COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER - EL PASO,	§	No. 08-19-00201-CV
Appellant,	§	Appeal from the 171st
v.	§	Judicial District Court
DR. LINDSEY NIEHAY	§	of El Paso County, Texas
Appellee.	§	(TC#2017DCV2558)

O P I N I O N

Texas Tech University Health Sciences Center-El Paso (Texas Tech) filed this interlocutory appeal challenging the trial court's denial of a combined Plea to the Jurisdiction and Motion for Summary Judgment, seeking dismissal of a lawsuit filed by Appellee Dr. Lindsey Niehay. Dr. Niehay's suit alleges that she was wrongfully terminated from an emergency medicine residency program because of a perceived impairment, which she identified as morbid obesity. We must decide whether morbid obesity can be considered a disability under the Texas Commission on Human Rights Act (TCHRA) in a "regarded as" claim, absent evidence that the employer believed the morbid obesity resulted from an underlying physiological cause. If so, we must then decide whether the appellate record contains some evidence that Texas Tech: (1) actually

viewed her as having an impairment under the TCHRA, and (2) terminated her because of that perceived impairment, rather than for other non-discriminatory reasons. To do so, we must address two subsidiary issues: (a) who was the actual decision-maker, and (b) whether the trial court erred in considering statements allegedly protected by the attorney-client privilege.

We hold that in a "regarded as" case asserting "perceived physical impairment" from morbid obesity, the claimant need not show that the employer believed the perceived impairment arose from a physiological cause. We find that there was some evidence that the Associate Program Director, Dr. Radosveta Wells was the actual decision-maker, or at least influenced the relevant decision-makers, and that the attorney-client privilege was waived as to the contested statements attributed to Texas Tech's in-house legal counsel. We ultimately conclude, under the favorable standard of review afforded the claimant's evidence, that Dr. Niehay offered some evidence for each challenged element of her cause of action. Accordingly, we affirm.

I. PROCEDURAL BACKGROUND

A. The Discrimination Charge and Lawsuit

Dr. Niehay filed a charge of discrimination with the Texas Workforce Commission and the EEOC alleging discrimination based on the disability of morbid obesity. She stated that Texas Tech suspended her on April 1, 2016 from clinical activities for unspecified complaints it had received the month before, and that she was terminated from her employment as a resident physician on April 21, 2016 due to her disability.

Upon receiving a right-to-sue letter, Dr. Niehay filed her lawsuit alleging that Texas Tech had violated the TCHRA by terminating her on the basis of her alleged disability, i.e., morbid obesity. The petition asserts that a disability includes either (a) having a mental or physical impairment that substantially limits at least one major life activity, or (b) being regarded as having

such an impairment. She sought back and front pay, actual and compensatory and punitive damages, as well as attorney fees and costs. Based on the timing of her EEOC complaint, the claim is limited to her termination from the program.

B. The Plea to the Jurisdiction/Motion for Summary Judgment

Following 19 months of discovery, Texas Tech filed a combined Plea to the Jurisdiction and Motion for Summary Judgment (with both traditional and no-evidence grounds), which we shorthand as the "Plea." The Plea asserts that Dr. Niehay failed to produce sufficient evidence of a valid claim of discrimination under the TCHRA--a necessary predicate to waive Texas Tech's sovereign immunity--on three grounds relevant here:

(1) Dr. Niehay lacks proof that she was actually disabled or was regarded as disabled, which are essential elements of her prima facie case;

(2) Dr. Niehay cannot establish that she was terminated because of any alleged disability; and

(3) Dr. Niehay cannot raise a genuine issue of fact to rebut Texas Tech's claim that it had legitimate, nondiscriminatory reasons for its employment action.

The Plea and Dr. Niehay's response address the threshold legal question of whether morbid obesity can be considered an impairment under the TCHRA without evidence of an underlying physiological cause. Beyond that, the parties disputed three factual issues: the identity of the decision-maker in Dr. Niehay's termination, whether Texas Tech viewed her as impaired, and whether Texas Tech had non-discriminatory reasons for the termination. Finally, Texas Tech objected to the inclusion of certain attorney-client communications in the summary judgment record. The trial court denied the Plea, and this appeal followed.

II. SOVEREIGN IMMUNITY AND OUR STANDARD OF REVIEW

Sovereign immunity protects the State and its political subdivisions from lawsuits for money damages unless the State waives that immunity. *Chambers-Liberty Ctys. Navigation Dist.*

v. State, 575 S.W.3d 339, 344 (Tex. 2019). State universities, such as Texas Tech, are considered state agencies for purposes of sovereign immunity. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976) (recognizing that a state agency, such as Texas Tech, has sovereign immunity from suit). Whether immunity has been waived, and whether the court has subject matter jurisdiction to hear a claim against the State, is a question of law. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

The State may waive its immunity by legislative enactment. *See Chambers-Liberty*, 575 S.W.3d at 344. And it has done so in the TCHRA. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012), *citing* TEX.LAB.CODE ANN. § 21.054. However, a plaintiff must allege a valid TCHRA claim, or if properly challenged, raise some jurisdictional evidence to support a valid claim; otherwise a court is obligated to dismiss the claim for want of subject matter jurisdiction. *Garcia*, 372 S.W.3d at 637. The burden to establish jurisdiction, including a waiver of immunity from suit, falls on the plaintiff. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

Whether immunity to suit is waived is properly asserted in a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (noting use of a plea to the jurisdiction and how it mirrors a summary judgment). The issue may also be raised in a motion for summary judgment. *See Town of Shady Shores*, 590 S.W.3d at 550 (permitting "no evidence" motion for summary judgment); *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009) (traditional motion for summary judgment). For each, we must determine whether more than a scintilla of evidence creates a genuine issue of material fact to support the disputed elements of the claim. To defeat a plea to the jurisdiction based on the lack of jurisdictional evidence, the non-movant need only present some evidence tending to establish each challenged jurisdictional fact. *Miranda*, 133

S.W.3d at 228 ("[W]e simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue."). To obtain a traditional summary judgment, the movant must produce evidence demonstrating the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). And if it does so, the non-movant is then entitled to rebut such a claim by advancing evidence establishing a genuine issue of material fact. *Id*. If presented as a Rule 166a(i) "no evidence" motion for summary judgment, the non-movant must produce evidence raising only a genuine issue of material fact on any challenged element. TEX.R.CIV.P. 166a(i).

Thus, for all three challenges raised by Texas Tech, we must determine whether Dr. Niehay raised "some evidence" establishing a genuine issue of material fact for each of the elements of her TCHRA claim that Texas Tech challenges. Some evidence means "more than a scintilla of evidence establishing the existence of the challenged element[.]" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). Dr. Niehay is not required at this stage to "marshal" all her evidence or to prove up her entire case. *Town of Shady Shores*, 590 S.W.3d at 550. We view the evidence in the light most favorable to Dr. Niehay. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) ("In determining whether a material fact issue exists, we must take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor. In doing so, however, we cannot disregard evidence necessary to show context, and we cannot disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not.").

III. FACTUAL BACKGROUND

With that standard in mind, we recite the evidence in the light most favorable to Dr. Niehay, acknowledging that none of these matters have been proven before a fact finder, and noting that for most of the critical assertions, Texas Tech advances conflicting evidence and testimony. We also recite some of Texas Tech's evidence relevant to its claimed reason for terminating Dr. Niehay from its program.

A. Dr. Niehay's Residency

In July 2015, Texas Tech accepted Dr. Niehay into the Department of Emergency Medicine (the EM Department) residency program; Dr. Niehay had just graduated from Texas Tech School of Medicine. She was one of twelve first-year residents selected and was ranked fourth among the 100 applicants who applied for the program. Dr. Niehay was recommended to the program by two EM Department faculty members who had supervised her during a medical school rotation in that department. In addition, an eight-member admissions committee, which included the eventual Interim Chair, Dr. John MacKay, and the Associate Program Director, Dr. Radosveta Wells, was responsible for interviewing Niehay and accepting her into the program.

At the time of her admission to the residency program and at all relevant times thereafter, Dr. Niehay was morbidly obese, meaning that she had a BMI measuring over 40.[1]

[1] A person in the normal weight range has a "Body Mass Index"(BMI) between 18.5 and 24.9. A BMI of 25.0 to 29.9 places one into the overweight category. A BMI of 30.0 to 39.9 classifies one as obese, and anything over 40.0 puts one in the severely or morbidly obese range. "Obesity" CDC - Morbidly Obese (BMI ≥ 40 kg/m²)§ - 2014 BRFSS, 25 States - NIOSH Workplace Safety and Health Topic (last visited January 26, 2022). "Obesity" https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742 (last visited February 19, 2020). We note these markers only to orient the reader. There is some controversy over the usefulness of the BMI measurements as applied to individual patients. *See Taylor v. Burlington N. R.R. Holdings, Inc.*, 444 P.3d 606, 618 (Wash. 2019) (Yu, J., dissenting) (collecting literature, and noting that BMI does not distinguish between weight from muscle or fat: a fit football player would also have abnormal BMI). And as amicus AARP points out, BMI is largely used as a screening tool. No one in this case, however, contests that Dr. Niehay is morbidly obese. In her deposition, Dr. Niehay testified that she weighed approximately 400 pounds during the residency program in 2015-2016, and that she had a BMI above 40. She also supplied medical records indicating that she had been diagnosed with morbid obesity.

Approximately one month after Dr. Niehay joined the residency program, Texas Tech appointed Dr. Radosveta Wells as the interim Program Director. In October 2015, however, the Accreditation Counsel for Graduate Medical Education notified Dr. Wells that she lacked sufficient supervisory experience to fulfill that role, and that her appointment was not confirmed. In response, Texas Tech gave Dr. Wells the title of Associate Program Director, and it named Dr. MacKay as the Interim Program Director. But Dr. Wells retained many of the functions of the Program Director during that period, often acted and made decisions without Dr. MacKay's supervision, and the Department generally viewed and treated her as the de facto Program Director.

Before December 2015, Dr. Niehay had one blemish on her record. In July or August of 2015, she apparently missed three shifts due to an illness and failed to timely report that to Dr. Wells. The matter was addressed at that time, and Dr. Niehay thereafter timely reported her future absences. And before December, Dr. Niehay passed all her rotations and scored in the middle-range on her midyear evaluations. These scores placed her within the range expected of a first-year resident.

B. The December Incident

Dr. Wells, however, became concerned about Dr. Niehay's performance because of an email that she received on December 7, 2015, from Dr. Sabrina Taylor. Dr. Taylor's email stated that she, along with Dr. Niehay, performed an arthrocentesis (the insertion of a needle into a joint to remove fluid). The email related that Dr. Niehay "really struggled and I blame it primarily on her habitus."[2] Dr. Taylor stated that during the procedure, Dr. Niehay "was sweating profusely, dyspneic and had to take multiple breaks because of her inability to stand and at times bend over

[2] Body habitus is defined as "Build, physique, and general shape of the human body." *See* https://medical-dictionary.thefreedictionary.com/body+habitus.

to gain the best access."[3] Dr. Taylor also believed that Dr. Niehay became distracted during the procedure because of the "issues she was having," and questioned Dr. Niehay's ability to "adequately perform . . . physically challenging procedures," adding that it would not instill "the greatest amount of confidence in the patients she treats, as they see her suffer through, sweating and panting along the way."

In her email, Dr. Taylor also noted that Dr. Niehay required a special size of sterile gown that was not readily available in the EM Department, and that Dr. Niehay might be relying on the unavailability of the proper sized gown to avoid doing procedures.[4] Finally, she stated that Dr. Niehay seemed to avoid being "physically active in the sim lab," and has to be encouraged to perform invasive procedures. In conclusion, she stated that Dr. Niehay's "fund of knowledge" was not an issue, and was instead her strength, which she used to "offset her physical impediments."

Dr. Wells responded by sending a series of emails that same morning to faculty members asking them to provide their experiences with Dr. Niehay. For instance, she sent an email to Dr. James Brown with the subject line "Problem with a resident," claiming that she had received more than one report of issues with Dr. Niehay's performance:

> I received *e-mails* from other faculty regarding issues with Dr. Lindsey Niehay. She has had difficulties with simple *procedures* largely due to her body habitus and health state. Apparently there have been some patient safety issues in relation to that. Please send me a description of your experience with the regards to those issues. (emphasis supplied)

[3] Dyspneic is defined as "out of breath." *See* https://medical-dictionary.thefreedictionary.com/dyspneic

[4] Although the exact timing is not entirely clear, Dr. Niehay had complained to various individuals in the EM Department about the lack of extra-large sized gowns. According to Dr. Niehay, larger-sized gowns were routinely stocked in other departments, but because they were not readily available in the EM Department, she often could not obtain a gown from another department in time to treat patients who were in immediate need of attention.

Dr. Brown responded stating that he had performed only one procedure with Dr. Niehay, and that she had performed satisfactorily, exhibiting a good understanding of the procedure, "perhaps exceeding her level of training." Dr. Brown stated that Dr. Niehay did not show fatigue during the long procedure, but that she was sweating, which he recognized as a potential patient safety issue. Dr. Brown stated that he addressed the issue by wiping the sweat from her forehead. He believed that Dr. Niehay has "good potential," and noted that he had "struggled with weight [his] entire life."

Dr. Niehay's mid-year review would have ordinarily been completed in either December 2015 or January 2016. But Dr. Wells concluded that Dr. Niehay's evaluations needed to be adjusted based on other information she had received.

On January 13, 2016, Dr. Adam Moore, a chief resident in the EM Department, emailed Dr. Wells, informing her that while recently working with Dr. Niehay in the EM Department she had "opted" not to perform a central line procedure on a patient with septic shock. According to Dr. Moore, Dr. Niehay claimed that she was unable to perform the procedure as there were no extra-large size gowns readily available to her. Dr. Moore faulted Dr. Niehay for not staying to watch the procedure, expressing concerns that she was "giving away valuable procedures" to an intern, and "not sticking around to take care of her patient."

C. The Disciplinary Process

The Program Director is accorded several disciplinary tools to deal with residents, to include probation, suspension, or dismissal. Those steps, however, require the approval of the seven-member Clinical Competency Committee (CCC). The CCC is composed of various EM Department faculty members. Although the Program Director is technically not a member of the CCC, and does not participate in its decision-making process, the Program Director has the

authority to call meetings, present findings, and to make disciplinary recommendations to the CCC.

On January 14, 2016, Dr. Wells sent an email to the members of the CCC recommending an "emergency" meeting to consider the "suspension or non-promotion/dismissal" of Dr. Niehay. Dr. Wells believed that it would be appropriate to immediately terminate or suspend Dr. Niehay due to patient safety concerns. Dr. MacKay, who was the interim program director, advocated for placing Dr. Niehay on probation. Although Dr. MacKay technically presided over the meeting, Dr. Wells presented the issue to the CCC, including the email correspondence she had with Dr. Taylor and Dr. Brown discussing Dr. Niehay's "habitus." The CCC agreed with Dr. MacKay's recommendation, and placed Dr. Niehay on probation for three months, extended her contract, but also decided to dismiss her from the program if she violated the terms of her probation as set forth in a remediation plan that Dr. Wells was tasked with drafting.

The next day, Dr. Wells sought input from Dr. Armando Meza on drafting the remediation plan. She noted, however, that "I feel that may be futile work because some of the immediate concerns are related to patient safety and it may be close to impossible to remediate that." Dr. Meza suggested she might want to get Texas Tech's legal counsel involved.

D. Dr. Wells Meets With Legal Counsel

On January 18, 2016, Dr. Wells met with Texas Tech's in-house assistant general counsel, Frank Gonzalez, to discuss her concerns. Yolanda Salas, who was the residency Program Coordinator at the time, attended to take notes.[5] Salas testified in her deposition that during the

[5] Texas Tech and Dr. Niehay both agree that the communications during that meeting were covered by the attorney-client privilege, but Dr. Niehay contends that the privilege was waived due to Texas Tech's failure to adequately assert the privilege during Salas's deposition when she revealed the contents of that conversation. We discuss that issue *infra*. In her affidavit, Dr. Wells states that she met with Gonzalez on January 18th. However, Salas testified at her deposition that she believed that the meeting with Gonzalez was in late December 2015 or early January 2016, before Dr. Niehay was placed on probation. The record does not contain any notes of the meeting.

meeting, Dr. Wells told Gonzales that she felt Dr. Niehay was not performing adequately because of her weight. Gonzalez then cautioned her that she could not terminate Dr. Niehay from the residency program for that reason. Instead, she would have to find other specific reasons to terminate Dr. Niehay to avoid creating the appearance that she was discriminating against her based on her weight. Salas also recalled that after the meeting that Dr. Wells repeated to her that she believed Dr. Niehay was not performing well because of her weight and that she needed to find other reasons to terminate her from the program.

E. Dr. Niehay is placed on probation

Before the probation documents were drafted, Dr. Wells received an email from Dr. Priscilla Reyes, another attending physician in the EM Department. Dr. Reyes reported that Dr. Niehay had delayed performing a central line procedure on a patient on January 19, 2016. Dr. Reyes reported that the delay was caused in part because it took "forever" to get an XL gown for Dr. Niehay. Dr. Reyes reported that after Dr. Niehay received the gown, she asked Dr. Niehay why she had not yet done the central line, and according to Dr. Reyes, Dr. Niehay "responded (while she ate Doritos) that she was waiting for the nurse to get the central line kit." Dr. Reyes complained that Dr. Niehay did not exhibit an appropriate sense of urgency in conducting the procedure and had become "overheated" while performing the procedure.[6]

On January 20, 2016, Dr. Wells forwarded this email chain to Dr. MacKay and members of the CCC, informing them of a new incident. The next day, Dr. MacKay responded to Dr.

[6] Two senior residents, Dr. Michael Tran and Dr. Brandon Charlton, also e-mailed Dr. Wells expressing concerns about the same incident. Dr. Tran stated that Dr. Niehay had become overheated, and he questioned her ability to work in a Level 1 trauma room, noting that they are often "heated" and chaotic. Dr. Charlton wrote that Dr. Niehay did not seem to have experience with this type of procedure, and stated that he heard "talk about her avoiding procedures," which led him to wonder if her "avoidance" was "health-related." He also contended that if "health issues are at the root of this problem," it would help to address them in a "professional way," before she entered her second year of residency.

Wells's email stating that the new incident was "concerning for a health reason," but that he did not see this as a reason to "gig" Dr. Niehay (meaning that he did not believe punishment was necessary). Dr. Wells then sent a second email to the CCC, indicating that she had spoken with legal counsel, and had been informed that the Department was not allowed to address Dr. Niehay's "health issues" or give her any accommodations unless she approached them first--which she had not done--or they could be guilty of discrimination. Dr. Wells did, however, indicate that she had taken steps to ensure that the extra-large sized gowns that Dr. Niehay needed to perform procedures would be made available to her in the EM Department in the future.

On January 29, 2016, Drs. Wells and MacKay met with Dr. Niehay to place her on probation for three months. She was provided a "Graduate Medical Education Performance Deficiency Alert and Review" (PDAR) that Dr. Wells drafted, along with a remediation plan. The PDAR identified deficiencies in "patient care" to include the ability to evaluate patients, develop patient treatment plans, and to competently perform procedures. She was also found deficient in the categories of "interpersonal and communication skills" and "professionalism" for not filling out paperwork in a timely manner, not working effectively as a team member, and not showing "respect" and "compassion" for the needs of patients, as well as generally failing to demonstrate a commitment to "excellence." The remediation plan identified specific goals she was expected to meet.

During the same meeting, Dr. Niehay asked for and was granted a one-month leave of absence until the end of February to address personal issues. Because Dr. Wells and Dr. MacKay both had concerns about her overheating and sweating while doing procedures, she agreed to their request to see her cardiologist during the leave. Dr. Wells directed Dr. Niehay to provide a letter from her physician stating that it was safe for her to return to work at the end of her leave.

Dr. Niehay agreed to provide the letter, and also agreed to allow Dr. MacKay to refer her to the residency assistance program to deal with any possible stress issues.

F. The SICU Rotation

Dr. Niehay rotated into the Surgical Intensive Care Unit (SICU) upon her return in March. All agreed that SICU was one of the more difficult rotations in the first-year residency program. The evidence conflicts on how Dr. Niehay performed during the month-long rotation, but it appears that she received at least three passing evaluations and received credit for the rotation. As well, Dr. Niehay acknowledged that although she did not complete any labs that month as required by her probation, she received permission from Dr. Wells to do the labs in April after her SICU rotation ended. And, according to Dr. Niehay she did attend the required number of conferences that month.

But during that rotation, Dr. Wells learned of another incident that occurred on March 30, 2016. On that morning, Dr. Niehay, arrived at work on time and began working on her patient notes, but left work within an hour with flu-like symptoms. Before leaving, she asked two other residents, including Dr. Erin De La Cruz, to see her patients, and then informed the senior resident in the General Surgery Department, Dr. Hashim Hanif, that she was going home. She further reported the absence later that same morning to Dr. Wells. After learning of the incident, Dr. Charlton emailed Dr. Niehay to inform her that both he and Dr. Hanif believed she had been unprofessional and disrespectful because she had not "asked" permission from Dr. Hanif to leave, but had instead simply informed him that she was leaving. Although Dr. Charlton expressed understanding for her condition, he cautioned her that her conduct in leaving so abruptly could have jeopardized patient safety. Dr. Cruz later forwarded this email to Dr. Wells.

In addition, at Dr. Charlton's suggestion, Dr. De La Cruz emailed Dr. Wells about the incident, complaining that Dr. Niehay had left unfinished notes for the patient charts, did not order labs for her patients, and failed to ensure that another resident was available to take over caring for her patients. Dr. De La Cruz also described two other past instances in which she believed Dr. Niehay had endangered her patients. First, she recalled an incident in which a nurse entered the residents' lounge and announced that a patient was tachycardic and complaining of abdominal pain. According to Dr. De La Cruz, without evaluating the patient, Dr. Niehay told the nurse to give the patient fentanyl. Dr. De La Cruz later evaluated the patient herself and noted that he was also hypoxic and likely would have continued to decompensate without her evaluation. Second, she reported another incident in which a nurse had informed them that a patient with a stab wound was vomiting, but when Dr. De La Cruz asked Dr. Niehay to evaluate him, Dr. Niehay responded, "Well, what am I supposed to do about it?" According to Dr. De La Cruz, after "further pressure" from her, Dr. Niehay did evaluate the patient. And finally Dr. De La Cruz also generally observed in her email that she had noticed "multiple times" when Dr. Niehay was attending to personal business on her phone rather than helping out with patients, and that she found it "very frustrating" as it was causing the other interns to shoulder a "lot of the burden she has left."

Upon receiving this information from Dr. Charlton and Dr. De La Cruz, but without further investigating the allegations, Dr. Wells sent an email on March 30, 2016 to the CCC, Dr. MacKay, and other EM Department faculty members with the subject line, "Lindsey Niehay- URGENT." The email reported on the March 30th incident and attached the two emails from Dr. Charlton and Dr. De La Cruz. The email expressed concern that Dr. Niehay had acted unprofessionally and had endangered her patients when she left her shift early. It also recounted Dr. Niehay's explanation for the sudden illness as "long hours of work" that were "affecting her immune system."

On March 31, 2016, Dr. Wells e-mailed the same recipients, explaining that she had received new information from Dr. Charlton, which in turn he had received from Dr. Hanif. That new information included the substance of a group text among the SICU interns, who reported that Dr. Niehay was a poor teammate, who often arrived late for work and left her unfinished work for others to complete, became defensive when given feedback and did not take ownership of her mistakes. Dr. Niehay was also continuing her "disturbing trend" of not examining patients. Based on this new information, Dr. Wells recommended that the CCC meet the next day.

G. Dr. Niehay is Terminated From the Program

At the specially called meeting, the CCC found that Dr. Niehay exhibited "persistent deficiency in patient care and abilities to perform expected job requirements," had performed at an unsatisfactory level under the remediation plan, had exhibited an "abrasive and unresponsive attitude toward patient care" and had a "defensive attitude to feedback." Based on its findings, the CCC voted to immediately suspend Dr. Niehay from her clinical duties until the completion of an investigation of her most recent performance in the SICU rotation, and that if the investigation was "found to represent an accurate evaluation of [her] performance the committee recommends dismissal." Dr. Wells then notified Dr. Niehay of the CCC's decision to immediately suspend her.

That same day, Dr. MacKay also contacted Dr. Niehay, and invited her to provide a written statement to the CCC about her performance during her SICU rotation. Dr. Niehay did so and addressed many of the issues raised during the SICU rotation. Although she acknowledged that there were a few occasions at the beginning of the rotation when she, and the other residents, including Dr. De La Cruz, were late in turning in their notes, she believed that any deficiencies were soon remedied as they adjusted to the rotation. She denied being rude to anyone during the rotation and believed that she had positive interactions with her peers and others on the team. In

particular, she defended her conduct on March 30, recalling that before leaving the SICU she spoke with the other residents about assisting with her patients, and that she had received permission to leave from the senior residents. She explained that after she received the email from Dr. Charlton accusing her of being rude, she apologized to both Dr. Charlton and Dr. Hanif for any misunderstanding. She stated that residents performed very few procedures during the SICU rotation, and that although she had offered to perform at least two, she was not permitted to do so. Dr. Niehay added that she had frequently checked in with Dr. Wells during the SICU rotation, and believed that Dr. Wells seemed pleased with her performance. She concluded that she wished to continue with the program, but in the alternative, requested that she be permitted to complete her first year of the residency so that she could then transition to another residency program.

In her response, Dr. Niehay claims she did not have a chance to address the accusations made by Dr. De La Cruz over patient care, because that issue was never raised with her. Dr. Wells also had not questioned Dr. De La Cruz about the incident and did nothing to corroborate its occurrence. Instead, she took it at face value, stating on deposition that "They were reported, so they occurred." Dr. MacKay acknowledged that he did not investigate the allegations, and did not know if Dr. Wells investigated them, even though she used it as a factor in presenting the suspension to the CCC. He testified that he would have investigated the allegation, and that it would have violated Texas Tech policy not to investigate a matter if the patient had suffered a negative outcome.

On April 19, 2016, the CCC members sent a formal letter to Dr. Wells stating that they had reviewed Dr. Niehay's case and had determined that her conduct during the probationary period was "persistently low," expressing concerns about her "initiative, procedural skills [and] medical

knowledge[.]" The members believed that Dr. Niehay still posed a "patient safety risk," and could not be allowed to continue in the program.

On April 25, 2016, Dr. MacKay sent Dr. Niehay a letter advising her that he intended to formally recommend her dismissal. Dr. Wells was involved in drafting that letter for Dr. MacKay's signature. The letter outlined specific issues under the headings, patient care, medical knowledge, interpersonal and communication skills, and professionalism. Dr. MacKay also stated in his letter that there was little evidence of progress and improvement in Dr. Niehay's performance during the probationary period.

In his deposition, however, Dr. MacKay was asked if he would have agreed to Dr. Niehay's immediate dismissal if he knew there was not an investigation of the complaints made against her. He responded:

> I do not believe that I would recommend immediate dismissal without confirmation or Dr. Wells indicating she had confirmation of the information that she was using to initiate this. I do not know if there was other data that she was considering at this time other than what's listed in the e-mail and Dr. De La Cruz's e-mail in its totality.

Dr. Niehay testified that she had a "vague" sense of unequal treatment during the course of the disciplinary proceedings but did not suspect discrimination until Salas told her in late April of 2016 that Niehay had been terminated for her weight issues. . In addition, Dr. Niehay testified that Yolanda Salas informed her that she believed that the department treated her negatively because of her weight and disability.

H. Additional Issues Raised by Texas Tech

In defending the termination, Texas Tech's sets out some additional facts in its Plea to the Jurisdiction. Texas Tech denies any discriminatory animus and notes that both Drs. Wells and MacKay knew Dr. Niehay when she was a medical student and accepted her into the residency

knowing of her body habitus. Texas Tech characterizes the complaints made by Drs. Taylor, Reyes, Charlton and De La Cruz as patient safety issues.

The CCC's decision also included some additional specific issues. First, in January of 2016, Dr. Wells learned that Dr. Niehay had written a prescription for a medication for herself without the supervision of a faculty member as required by Texas Tech's rules for first-year residents. Dr. MacKay spoke with Dr. Niehay about the issue. During their meeting, Dr. Niehay admitted that she had written herself a prescription for Metoprolol, a drug that her physician had prescribed for a heart issue.[7] Although she had logged the prescription into the system, she did not seek faculty supervision as she was unaware of that requirement.[8] Although Dr. MacKay communicated to Dr. Wells and other faculty members that he did not find it necessary to submit the matter to the Texas Medical Board, Dr. Wells reported the matter to the CCC, which directed her to file a complaint on the matter with the Board. Upon returning from her leave, Dr. Niehay sent Dr. Wells an email describing her meeting with the Texas Medical Board about the self-prescribing complaint, and her belief that the incident had been "resolved." But Dr. Wells learned that the complaint was still pending. Dr. Niehay responded that she had been told that the Board would recommend dismissal, not that the case had been closed, and that is all that she had reported to Drs. Wells and MacKay.

Additionally, Dr. Wells advised the CCC that she had never received a letter from Dr. Niehay's cardiologist clearing her for work. Dr. Niehay, however, testified that she had met with her cardiologist during her leave, who agreed to write a letter clearing her to return to work.

[7] Metoprolol is a beta-blocker used to treat angina, hypertension, and heart palpitations. https://www.drugs.com/metoprolol.html.

[8] Dr. MacKay acknowledged that the medical board's self-prescribing rules contained some "gray areas," and he later provided Dr. Niehay and other first-year residents with clarification of the rules; he determined that no other action was necessary at that time.

And while the cardiologist had not done so, Dr. Niehay was allowed to return to work without the letter. In March, Dr. Wells reminded Dr. Niehay to send the letter, and in turn, Dr. Niehay reminded her cardiologist of the need to send the letter. After receiving assurances that the letter would be sent, and when she heard nothing further from Dr. Wells, Dr. Niehay believed the issue was resolved.

Finally, while Texas Tech challenges some of the evidence attributing a perverse motive to Dr. Wells, it points to the decisional process that removed her from the final termination decision. If the CCC recommends a resident's termination, the Program Director could accept or reject the recommendation. Dr. MacKay was the Interim Program Director. And even if the Program Director recommends dismissal, the resident may appeal the recommendation to the five-member Appeals Review Committee composed of faculty members from different departments within the medical school. If the Appeals Committee upholds the recommendation, the matter is presented to the Dean and President of the School of Medicine, who at the time was Richard Lange.

Dr. Niehay engaged this process and appealed the termination decision. She appeared before the five-member appeals review committee on May 4, 2016 and provided a lengthy statement to them defending her conduct and performance during her residency. Dr. Wells also spoke at length to the Appeals Review Committee about the issues that she believed led to Dr. Niehay's termination. Dr. Wells and Dr. MacKay advised the Appeals Committee that although Dr. Niehay had passed all of her completed rotations, they did not believe that she had demonstrated sufficient competency to continue in the program, that she did not take criticism well, and was generally rude to them and others with whom she worked.

The Appeals Committee upheld the recommendation to dismiss Dr. Niehay. It stated that in making its decision, it reviewed the documentation provided, met with both Dr. MacKay and

Dr. Wells, as well as Dr. Niehay. Shortly thereafter, Dr. Lange sent Dr. Niehay a letter stating that he had reviewed the "recommendations and supporting data provided" by both Dr. MacKay and Dr. Wells, the CCC, and the Appeals Committee, and had determined to uphold their recommendation for her dismissal.

After leaving the program, Dr. Niehay applied at other programs, and her applications explained that emergency medicine was likely a poor fit for her.

IV. ISSUES ON APPEAL

In its first issue, Texas Tech argues that Dr. Niehay did not set forth a valid discrimination claim under the TCHRA because Dr. Niehay presented no evidence that (1) she was "actually disabled," (2) Texas Tech regarded her as being impaired or disabled under the TCHRA, and (3) she was terminated "because of" any alleged actual or perceived disability. Embedded in this third sub-issue are questions of who was the actual decision-maker, and whether there was evidence that the decision-maker viewed Dr. Niehay as being impaired. In its second issue, Texas Tech argues that even if Dr. Niehay established a prima facie case of discrimination, she failed to meet her burden of establishing that Texas Tech's stated reasons for terminating her were pretext, asserting that Dr. Niehay was required to come forward with evidence to rebut each reason it gave for the termination. And finally, in its third issue, Texas Tech complains that the trial court erred in considering attorney-client privileged communications as part of the summary judgment record.

In response, Dr. Niehay concedes Texas Tech's arguments on her claim for actual discrimination, and instead limits her claim to a "regarded as" TCHRA theory. We re-order these issues somewhat and resolve them as follows.

V. DOES DR. NIEHAY ASSERT A VALID TCHRA CLAIM?

We first address whether Dr. Niehay has asserted a valid TCHRA claim.

A. TCHRA Claims

Under the TCHRA, "[a]n employer commits an unlawful employment practice if because of race, color, *disability*, religion, sex, national origin, or age the employer . . . discharges an individual or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment." TEX.LAB.CODE ANN. § 21.051 (emphasis supplied). In most respects, the TCHRA mirrors the federal Americans with Disabilities Act (ADA) and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). TEX.LAB.CODE ANN. § 21.001(3) (providing "for the execution of the policies" of the ADA and its amendments). The elements of a disability claim in the employment context under both the TCHRA and the ADA are: (1) the plaintiff has a "disability" (2) she is qualified for the job, and (3) she suffered an adverse employment decision because of her disability. *See El Paso County v. Vasquez*, 508 S.W.3d 626, 639 (Tex.App.--El Paso 2016, pet. denied), *citing Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1092 (5th Cir. 1996) (per curiam).[9]

The term "disability" is defined in the TCHRA as "a mental or physical impairment that substantially limits at least one major life activity of that individual, a record of such an impairment, or being regarded as having such an impairment." TEX.LAB.CODE ANN. § 21.002(6);

[9] In its Reply Brief, Texas Tech asserts that a fourth element requires the plaintiff to come forward with evidence to establish that she was treated differently than similarly situated employees. A plaintiff, however, need only come forward with such evidence as part of a prima facie case when the claim rests on a "disparate treatment" theory. *See, e.g., Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam) (to prove discrimination based on disparate discipline, i.e. claiming that he or she was treated differently than another employee who committed similar misconduct, the plaintiff has the burden of demonstrating that the circumstances are comparable in all material respects, including similar standards, supervisors, and conduct). Dr. Niehay did not base her claim on disparate treatment, and instead, only relied on situations in which Texas Tech allegedly treated other residents differently to show that Texas Tech relied on pretextual reasons for terminating her.

see also Vazquez, 508 S.W.3d at 639. Dr. Niehay proceeds only under the third prong of this definition.[10]

The "regarded as" prong encompasses persons who have physical and mental impairments, and those who do not but are treated by the employer as if they do. *See E.E.O.C. v. Texas Bus Lines*, 923 F.Supp. 965, 975 (S.D. Tex. 1996); 29 C.F.R. § 1630.2.[11]

B. The Disputed Elements of the TCHRA "Regarded As" Claim

Texas Tech does not dispute that Dr. Niehay was morbidly obese, nor assert that her condition was "transitory" or "minor." Instead, what is at issue is whether Dr. Niehay was required to show that Texas Tech believed her morbid obesity resulted from a physiological cause. According to Texas Tech, morbid obesity, standing alone, without any showing that the employer believed she suffered from an underlying physiological disorder, cannot be physical impairment within the meaning of the TCHRA or the ADAAA. Dr. Niehay responds in two ways: (1) she may have such evidence, but the trial court erroneously sustained an objection to her physician's opinion linking her obesity to a physiological cause; and (2) in any event, a physiological cause is not required under the law. Because we find the second issue dispositive, we do not address the first issue.

[10] Although Dr. Niehay initially pled that she had an "actual" disability under the TCHRA, she limits her analysis on appeal to being "regarded as" having an impairment. Because Texas Tech briefed this part of the claim, and Dr. Niehay concedes the issue, we therefore reverse the trial court's order to the extent it would permit an actual discrimination claim to proceed forward.

[11] Under a claim of actual disability under the TCHRA, a plaintiff must present evidence that an impairment substantially limited a "major life activity." TEX.LAB.CODE ANN. 21.0021(a)(2). No such requirement applies in "regarded as" cases filed since 2009 under the ADA and TCHRA. *See City of Houston v. Proler*, 437 S.W.3d 529, 533, n.17 (Tex. 2014) (recognizing the 2009 changes to the ADA and TCHRA in "regarded as" cases); *see also E.E.O.C. v. Gulf Logistics Operating Co., Inc.*, 371 F.Supp.3d 300 (E.D. La. 2019) (discussing the elimination of the substantially limiting provision in "regarded as" cases under the ADAAA); TEX.LAB.CODE ANN.§ 21.002(12-a); 42 U.S.C.A. § 12102(3)(A).

C. Morbid Obesity Qualifies as an "Impairment" in a "Regarded As" Claim, Without Evidence of an Underlying Physiological Cause

TCHRA defines "disability" as a "mental or physical *impairment*" that substantially limits at least one major life function. TEX.LAB.CODE ANN. § 21.002(6) (emphasis supplied). The TCHRA does not define "impairment." Texas courts have held that the federal statutes and regulations, as well as federal cases interpreting the ADA and the ADAAA, should guide out interpretation of the TCHRA. *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) ("[A]nalogous federal statutes and the cases interpreting them guide our reading of the TCHRA."); *see also* TEX.LAB.CODE ANN. § 21.002(3). This includes the Code of Federal Regulations, as promulgated by the EEOC to define that term. *See, e.g.*, *Morrison v. Pinkerton, Inc.*, 7 S.W.3d 851, 855 (Tex.App.--Houston [1st Dist.] 1999, no pet.) (relying on language from 29 C.F.R. § 1630.2(h) to define the term "impairment"). They provide "significant guidance" to our interpretation of the TCHRA, whether or not they are entitled to complete "*Chevron*"-like deference. *See Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 381-82 (Tex. 2004) *quoting Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 655 n.1 (5th Cir. 2003) (*referring to Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The relevant provision in the Code of Federal Regulations defines a physical or mental impairment as follows:

> Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine[.]

29 C.F.R. § 1630.2(h)(1). The EEOC later issued an "interpretive guidance" on what constitutes an impairment:

> It is important to distinguish between conditions that are impairments and physical, psychological, environmental, 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. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.

Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108 (8th Cir. 2016), *citing* Appendix to Part 1630—Interpretive Guidance on Title I of the ADA (interpretive guidance), 29 C.F.R. Pt. 1630, App'x § 1630.2(h) (emphasis supplied). This interpretative guidance has become the focal point of dispute in several state and federal courts.

A line of cases advanced by Texas Tech concludes that the EEOC interpretive guidance means that weight may not be considered an impairment unless it is *both* outside the normal range *and* results from a physiological disorder. *See, e.g.*, *Richardson v. Chicago Transit Authority*, 926 881, 888 (7th Cir. 2019); *Morriss v. BNSF Railway Corp.*, 817 F.3d 1104, 1108 (8th Cir. 2016), *E.E.O.C. v. Watkins Motor Lines, Inc*., 463 F.3d 436, 442-43 (6th Cir. 2006); and *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997).

On the other hand, another line of authority advanced by Dr. Niehay interprets the EEOC's guidelines to mean that weight may be considered an impairment if it is *either* outside the normal range *or* if it results from a physiological disorder. *See, e.g.*, *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F.Supp.2d 688, 694 (E.D. La. 2011); *McCollum v. Livingston*, No. 4:14-CV-3253, 2017 WL 608665, at *35 (S.D. Tex. Feb. 3, 2017); *see also BNSF Ry. Co. v. Feit*, 281 P.3d 225, 231 (Mont. 2012). And Dr. Niehay argues that although the Fifth Circuit has not yet decided the issue, several district courts within the Circuit have agreed that morbid obesity may be considered a

physiological impairment under the ADAAA, without the need to establish the cause of the obesity.[12]

And the EEOC in an amicus brief filed in other litigation advocated for the interpretation that "weight (1) is not an impairment when it is within the 'normal' range and lacks a physiological cause but (2) may be an impairment when it is either outside the 'normal' range or occurs as the result of a physiological disorder." *See Taylor v. Burlington N. Railroad Holdings Inc.*, 904 F.3d 846, 851 (9th Cir. 2018) (summarizing EEOC amicus brief before it).[13]

To resolve this dispute, we return to the text of the Texas statute. "Disability" is defined in TCHRA, as "a mental or physical impairment . . . or being regarded as having such an impairment." TEX.LAB.CODE ANN. § 21.002(6). The relevant provision in the Code of Federal Regulations defines a physical or mental impairment as "*any physiological disorder or condition*" that affects one or more body systems. Those body systems might include the neurological, musculoskeletal, respiratory, cardiovascular, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, or endocrine systems. 29 C.F.R. § 1630.2(h)(1). "Physiological disorder" and "physiological condition" are not defined by the C.F.R. Generally, when a statute uses an undefined word, a court should apply the word's common, ordinary meaning. *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). To determine its *common, ordinary* meaning,

[12] *See, e.g.*, *McCollum*, 2017 WL 608665, at *35; *E.E.O.C. v. Res. For Human Dev., Inc.*, 827 F.Supp.2d 688, 696 (E.D. La. 2011); *Melson v. Chetofield*, No. 08-3683, 2009 WL 537457, at *3 (E.D. La. Mar. 4, 2009); *Lowe v. Am. Eurocopter, LLC*, No. 1:10-CV-24-A-D, 2010 WL 5232523, at *7-8 (N.D. Miss. Dec. 16, 2010); *E.E.O.C. v. Texas Bus Lines*, 923 F.Supp. 965, 979 (S.D. Tex. 1996).

[13] Under *Auer v. Robbins*, 519 U.S. 452, 461-62, (1997), federal courts defer to an agency's interpretation of its own ambiguous regulations, unless that interpretation is plainly erroneous or inconsistent with the regulation, or where there is reason to believe the interpretation does not constitute the agency's fair and considered judgment. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2408, 2412 (2019) (declining to overrule *Auer*, and explaining the doctrine this way: "Want to know what a rule means? Ask its author."); *see also Velez v. Cloghan Concepts, LLC*, 387 F.Supp.3d 1072, 1076 (S.D. Cal. 2019) ("In the absence of clear, binding authority, the Court adopts the definition the EEOC set forth in its amicus brief and compliance manual: weight may be an impairment when it falls outside the normal range *or* occurs as the result of a physiological disorder.") (emphasis original).

courts may look to a wide variety of sources, including dictionary definitions, treatises and commentaries, prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances. *Id.*

Webster's defines "physiology" as "the organic processes and phenomena of an organism or any of its parts or of a particular bodily process[.]" *Physiology*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). Webster's also defines "disorder" as "a derangement of function" and "an abnormal physical or mental condition[.]" *Disorder*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). The word "condition" can be used in several contexts, but when referring to a physical state, Webster's defines it to include: "a mode or state of being . . . proper or good condition (as for work or sports competition) . . . the physical status of the body as a whole . . . [usually] used to indicate abnormality[.]" *Condition*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

Morbid obesity, at least as evidenced in our record, meets those common dictionary definitions. First, it "involves both the organic process and phenomena of an organism—the excessive accumulation of fat cells." *Taylor v. Burlington N. R.R. Holdings, Inc.*, 444 P.3d 606, 612 (Wa. 2019) (similarly holding under Washington law that obesity is a physiological condition or disorder). Dr. Niehay, a medical doctor, testified at her deposition that morbid obesity is a contributing factor to cardiac issues, such as tachycardia and arrhythmia, and is associated with metabolic syndrome, which includes hormonal imbalances, insulin resistance, and the potential to develop type 2 diabetes. She testified that it can affect activities such as walking, running, climbing, breathing and muscle function. Both Dr. Niehay and amicus direct us to secondary medical authorities that view morbid obesity as a physiological disorder or disease, without regard

to its cause.[14] *See also Taylor*, 444 P.3d at 615 (citing additional authorities). Thus, under just a plain word reading of the TCHRA's use of the word disability, and the Code of Federal Regulations definition of impairment, Dr. Niehay's morbid obesity could be regarded as an impairment.

Our sister court in *Morrison v. Pinkerton Inc.*, 7 S.W.3d 851, 855-56 (Tex.App.--Houston [1st Dist.] 1999, no pet.), reached a similar conclusion on the definition of "impairment" under the TCHRA. In that case, the court noted that in order "for a physical disorder to carry the status of a disability, it must impact one of the many body systems" set forth in the regulations. *Morrison*, 7 S.W.3d at 855, *citing* 29 C.F.R. § 1630.2(h)(1). The court then stated that "[o]besity may be properly classified as a disability when it substantially affects a body system, whether the neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic, lymphatic, skin, or endocrine system." *Morrison*, 7 S.W.3d at 855, *citing* 29 C.F.R. § 1630.2(h)(1).[15]

A few other thoughts inform our decision. Texas Tech's interpretation yields an absurd result. As Texas Tech points out, in a "regarded as" case, the plaintiff must establish that the employer views the employee as having an "impairment" under the TCHRA--whether mistakenly or not. *See Francis*, 129 F.3d at 285 (stating employer would have to regard plaintiff as having a physiological weight-related disorder); *Columbia Plaza Med. Ctr. of Fort Worth Subsidiary, L.P. v. Szurek*, 101 S.W.3d 161, 167 (Tex.App.--Fort Worth 2003, pet. denied) (recognizing that to be

[14]The American Association of Retired People (AARP) filed an amicus in this case. The AARP asserts that it is interested in this case because many of its members, who must be 50 years or older, are still employed, and that older adults experience disproportionate rates of obesity. Among other authorities, it points us to the American Medical Association's recognition of obesity as a disease. Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. Times (June 18, 2013), https://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html.

[15]In that case, the court held that the plaintiff had not presented evidence that his obesity substantially limited him in a major life activity--a requirement that no longer applies. *Morrison*, 7 S.W.3d at 856.

considered "disabled" under the "regarded as" prong, a plaintiff must show that the employer regarded the employee to be suffering from an impairment under the TCHRA, not just that the employer believed the employee to be somehow disabled). Crucially, in a "regarded as" claim, the claimant need not actually have the perceived impairment--only be regarded (correctly or incorrectly) as having it by the employer.[16] We find it illogical to suggest a claimant must establish that the imagined impairment they are "regarded as" having by their employer--but don't actually have--is also regarded by the employer as being caused by an imagined underlying physiological cause that they likewise don't have. And we see no basis or authority for imposing that requirement on a portion of "regarded as" cases (where the claimant is shown to actually have the perceived impairment) but not others (where she isn't).

Furthermore, were Texas Tech's interpretation to prevail, even if the employer did fabricate an imagined cause for the impairment that the person did not have, the specific cause they imagined would determine whether liability attached or not. For example, an employer who decided the employee was morbidly obese for psychological reasons could never be held liable for terminating an employee on that basis. Yet an employer who viewed the employee as being morbidly obese through no fault of their own--for physiological reasons--would be subject to potential TCHRA liability.

We conclude that in a "regarded as" claim, morbid obesity can be considered an impairment under the TCHRA without evidence of an underlying physiological cause. Dr. Niehay was therefor only required to establish that Texas Tech viewed her as being impaired from her morbid obesity--regardless of the cause--and that Texas Tech terminated her as a result.

[16] An employer could believe a person is morbidly obese when they do not meet that medical definition, or vice versa, be unaware that the person meets the definition of morbidly obese and thus not regard them as having that condition.

We reject Texas Tech's argument (lifting from *Richardson v. Chicago Transit Authority*, *Morriss v. BNSF Ry. Corp.*, and *EEOC v. Watkins Motor Lines, Inc.*) that our narrow holding today would expand the TCHRA's scope to an entire new class of claimants. Our conclusion that morbid obesity can be considered an impairment in a "regarded as" claim under the TCHRA without evidence of an underlying physiological cause is not properly interpreted as suggesting that obesity or morbid obesity is a categorical disability under other sections of the TCHRA. We do not so hold. Further, we do not mean to indicate that Dr. Niehay has established her ultimate right to recover on the merits. A "regarded as" claimant must be qualified to perform the job in the first place. *City of Houston v. Proler*, 437 S.W.3d 529, 532 (Tex. 2014) ("At the outset, we note that the law prohibiting disability discrimination does not protect every person who desires employment but lacks the skills required to adequately perform the particular job. Lacking the required mental, physical, or experiential skill set is not necessarily a disability."). And in a "regarded as" claim, that issue is particularly significant because under the ADAAA, a claimant is not entitled to reasonable accommodations. 29 C.F.R. §1630.2(o)(4); *Robinson v. First State Community Action Agency*, 920 F.3d 182, 186 (3d Cir. 2019), *cert. denied*, 140 S.Ct. 464 (2019) ("In other words, after the 2008 Amendments went into effect, an individual who demonstrates that she is 'regarded as' disabled, but who fails to demonstrate that she is actually disabled, is not entitled to a reasonable accommodation."); *Powers v. USF Holland, Inc.*, 667 F.3d 815, 823 n.7 (7th Cir. 2011) ("[T]he ADAAA clarified that an individual 'regarded as' disabled (as opposed to actually disabled) is not entitled to a 'reasonable accommodation.'"). This simple limitation in a "regarded as" claim narrowly cabins the implications of our decision today to morbidly obese workers who can perform their normal job duties without accommodation, but who are wrongly

perceived as being impaired. That issue is not part of the dispositive motions below and is not before us.

We now address whether Dr. Niehay presented sufficient evidence to raise a prima facie case on those two elements.

D. Did Texas Tech View Dr. Niehay as Having an Impairment?

Texas Tech also argues that Dr. Niehay presented no evidence that Texas Tech's decision-makers viewed her as being impaired. Its argument consists of multiple parts. First, Texas Tech points out that Dr. Niehay only accuses Dr. Wells of having a discriminatory motive. Second, it argues that Dr. Wells was not the final decision-maker in Dr. Niehay's case, and therefore her alleged animus toward Dr. Niehay was irrelevant. Third, it claims that Dr. Wells's alleged discriminatory motive could not be imputed to the final decision-makers--which it identifies as Dr. MacKay, the CCC, the Appeals Committee, and Dean Lange.

1. The evidence that Texas Tech perceived Dr. Niehay as being disabled

Dr. Niehay's timeline begins with an email from Dr. Sabrina Taylor to Dr. Wells, that states Dr. Niehay was not performing well because of her body habitus. The email concluded:

> I am concerned for her and her ability to adequately perform these physically challenging procedures. Imagine her trying to reduce a hip, shoulder, intubate, etc.! I fear it could be problematic and quite dangerous. It certainly doesn't instill the greatest amount of confidence in the patients she treats, as they see her suffer through, sweating and panting along the way.

After receiving this email and forwarding it to others, Dr. Wells met with Texas Tech's in-house counsel, informing him that Dr. Niehay was not performing due to her weight, asked how to word things to avoid it looking like discrimination, and she later said she would need to find reasons other than Dr. Niehay's weight. Although Texas Tech challenges the admissibility of these later statements--an issue we address below--it also contends that Dr. Wells was not the relevant decision-maker, and Dr. Niehay has no similar evidence for the seven members of the

CCC, Dr. MacKay, the five members of the appeals panel, or Dr. Lange, who it contends were the ultimate decision-makers.

2. Applicable law

Remarks made by someone not directly connected with a termination decision generally do not raise a fact issue about the reason for termination. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592-93 (Tex. 2008) (per curiam). But otherwise relevant remarks might suffice for that purpose when the person making the remark had "authority over the employment decision" or "possessed leverage or exerted influence over the decision-maker." *Id. citing Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 607-08 (5th Cir. 2007) and *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000); *see also Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 480 (Tex.App.--El Paso 2013, pet. denied) (upholding jury verdict when production manager who influenced termination decision evidence ageism bias). The case authority that *AutoZone* cites, refers to the concept as a "cat's paw" theory. *See, e.g., Russell*, 235 F.3d at 226-27. Under that theory, a plaintiff need not show that the final, official decision-maker harbored a discriminatory animus toward her. Instead, the plaintiff may present evidence that a subordinate employee harbored such an animus, and that the subordinate employee's efforts led to a recommendation for termination, which the final decision-maker effectively rubber stamped. *Russell*, 235 F.3d at 227 (collecting cases). The court in *Russell* noted that many federal courts "will not blindly accept the titular decisionmaker as the true decisionmaker." *Id.* at 227. Rather, it is "appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker." *Id*.

The United States Supreme Court accepted this theory in *Staub v. Proctor Hospital*, 562 U.S. 411, 420-21 (2011) under a statute that prevents discrimination against employees engaged in National Guard service. That statute, like the TCHRA, makes actionable a discriminatory motive that is a "motivating factor" in the employment decision. *Cf.* 38 U.S.C.A. § 4311(c)(1) with TEX.LAB.CODE ANN. § 21.125(a) ("[A]n unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice[.]").

And under that standard, Justice Scalia writing for the Court declined to adopt a per se rule that an independent investigation by the actual decision-maker would negate the effect of the discriminatory animus by the influencer. *Staub*, 562 U.S. at 421. Rather, the Court held that "if a supervisor performs an act motivated by [unlawful] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable[.]" *Id.* at 422. (footnote omitted). [17]

3. Application

Texas Tech is correct in pointing out that the CCC made the initial recommendation to terminate Dr. Niehay, which Dr. MacKay, as the Interim Program Director, adopted, and which

[17] We recognize that a similar question has arisen in whistleblower employment discrimination cases. In both *Office of the Att'y Gen. of Texas v. Rodriguez*, 605 S.W.3d 173 (Tex. 2020) and *City of Ft. Worth v. Zimlich*, 29 S.W.3d 62, 70 (Tex. 2000), the courts hold that evidence of one decision-maker's improper motive "cannot be imputed to all of the decisionmakers—or to the final decision—without evidence that the improper motive influenced the final decision." *Rodriguez*, 605 S.W.3d at 193. The whistleblower theory, however, employs a more onerous "but for" causation standard. *See Texas Dep't of Human Services of State of Texas v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995) (adopting "but for" causation standard for whistleblower cases); *Univ. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 349 (2013) (explaining that motivating factor test is a lessened causation standard than "but for" causation). Accordingly, the whistleblower cases are helpful, but not controlling in a disability discrimination case.

the Appeals Committee and Dr. Lange approved. And Texas Tech is correct that Dr. Wells did not technically have any authority to recommend or approve of Dr. Niehay's termination.). Therefore, we must determine whether there is *some evidence* to raise a question of fact regarding whether Dr. Wells nevertheless possessed leverage or influence over these official decision-makers such that she could substantially affect their ultimate decision to terminate Dr. Niehay.

Although Dr. MacKay was the named Interim Program Director at the time of Dr. Niehay's disciplinary proceedings, there was some evidence that Dr. Wells was fulfilling that role instead. At the start of Dr. Niehay's residency program, Dr. Wells was appointed as the Interim Program Director, but was notified in October of 2015 that she was not confirmed due to her lack of experience. Dr. Wells was then given the title of Associate Program Director, and Dr. MacKay was named as the Interim Program Director (and was ostensibly tasked with the duty of supervising Dr. Wells's actions). However, there is some evidence that Dr. Wells continued to serve as the de facto Program Director throughout the disciplinary proceedings in Dr. Niehay's case. First, in her deposition testimony, Dr. Wells testified that despite not being confirmed, she "retained the function of the program director." And when pressed to describe the functions she retained, Dr. Wells responded: "The short of it is the operations of the program director of the residency," or in other words "supervision of the program."[18] Moreover, in her CV attached to her deposition,

[18] Dr. Wells later made a correction to her deposition testimony, averring that her original statements were inaccurate, and that she did not in fact retain the functions of the program director, and that she instead had the "responsibilities for the day-to-day operations of the residency [program], as delegated by the program director." We believe that the trial court was entitled to consider both the corrected and uncorrected versions of Dr. Wells's testimony on this issue, and that the conflict in her statements, if nothing else, created a question of fact regarding what role she actually performed at the time of Dr. Niehay's termination. *See Wheeler v. Yettie Kersting Mem'l Hosp.*, 866 S.W.2d 32, 50 (Tex.App.--Houston [1st Dist.] 1993, no writ) (recognizing that internal contradictions in the deposition testimony of witnesses on a material issue created a question of fact, thereby precluding summary judgment); *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 242 (Tex.App.--Eastland 1975, writ ref'd n.r.e.) (noting that witness was entitled to make changes to deposition but that "[i]t was the jury's responsibility to pass on the credibility of Pursley's deposition testimony."); *but see Ramsey v. Cravey*, No. 04-03-00342-CV, 2004 WL 1453455, at *2 (Tex.App.--San Antonio June 30, 2004, pet. denied) (mem. op.) (noting trial court's discretion under Rule 403 to exclude original answer in deposition).

Dr. Wells stated that she was the "Co-Director" of the residency program in the EM Department from July 2014 to the present, stating that her duties included discipline of the residents. And finally, Dr. Edward Michelson, who became a faculty member at the tail-end of Dr. Niehay's disciplinary proceedings in April of 2016, testified at his deposition that it was his understanding that Dr. Wells had been performing most of the duties of a program director while Dr. MacKay served as the "named" director before his arrival.

Some evidence also demonstrated that Dr. Wells used her position, whether as the associate Program Director, or as the de facto Program Director, to initiate and pursue disciplinary proceedings against Dr. Niehay, with little supervision or input from Dr. MacKay. Beginning in December of 2015 after Dr. Wells received Dr. Taylor's email raising concerns about Dr. Niehay's "habitus," Dr. Wells, without first consulting with Dr. MacKay, (1) initiated an investigation into Dr. Wells's performance, (2) met with legal counsel, (3) sought advice on what disciplinary steps she should take, (4) called "emergency" meetings of the CCC to discuss Dr. Niehay's performance, and (5) took the lead role in gathering and presenting information to the CCC regarding Dr. Niehay's performance. And in the last two emails that she sent to the CCC in March of 2016, Dr. Wells outlined several new complaints about Dr. Niehay and advocated for "urgent" action. In their responses, several of the CCC members--including Dr. Taylor--advocated for Dr. Niehay's immediate suspension or termination, based in part on the information Dr. Wells provided.

Dr. MacKay testified that he conducted no independent investigation to verify the information that Dr. Wells presented to him and to the CCC before recommending Dr. Niehay's termination. But had he been in charge of the disciplinary proceedings, he would have conducted an independent investigation into the claims lodged against Dr. Niehay before reporting the matter to the CCC.

We find this to be some evidence that Dr. Wells influenced the disciplinary proceedings, and that both the CCC and Dr. McKay took the negative information that Dr. Wells presented to them at face value, without conducting any independent investigation, before recommending Dr. Niehay's termination. We conclude that the summary judgment record includes some evidence that Dr. Wells's animus could be imputed to both the CCC and Dr. MacKay.

Texas Tech, however, contends that any "causal chain" between Dr. Wells's animus toward Dr. Niehay and her ultimate termination was broken when the five-member Appeals Review Committee met and conducted its own independent investigation into the reasons underlying Dr. Niehay's termination. This investigation consisted of meeting separately, first with Dr. Niehay, and later with both Dr. Wells and Dr. MacKay. And the transcript of the latter meeting indicated that although Dr. MacKay (who was identified as "man two" on the transcript), spoke on occasion, it was Dr. Wells who took the lead role in summarizing the evidence that led to the recommendation to terminate Dr. Niehay, and in defending the recommendation. As a result, given that Dr. Wells took an active role at this meeting, we cannot conclude that the Appeals Committee's actions in upholding the termination recommendation broke the "causal chain" between Dr. Wells's animus and Dr. Niehay's termination.

And finally, there is no evidence that Dr. Lange conducted any independent investigation before upholding the termination recommendation, and instead simply reviewed the record of the proceedings and documents in the file--most of which were supplied by Dr. Wells--prior to upholding the termination.

Accordingly, we find sufficient evidence to raise a genuine issue of material fact on whether Dr. Wells's alleged animus could be imputed to Texas Tech and its final decision-makers.

We next turn to whether Dr. Niehay has raised any evidence that such animus led to her termination.

VI. WAS DISCRIMINATORY ANIMUS THE CAUSE FOR THE TERMINATION

Texas Tech's final grouping of arguments contends that Dr. Niehay failed to produce any evidence that a discriminatory animus had anything to do with her termination from the program. The argument has different threads, including: (1) whether the trial should have considered Dr. Wells's statements made to Texas Tech's attorney, or statements she made as a result of the meeting; and (2) whether Dr. Niehay's case is based only on circumstantial evidence, and as such, she has not made out a prima facia case, or negated all the possible rationales for her termination. We start with the evidentiary framework and then address what evidence the trial court could have considered.

Texas courts recognize two alternative methods to prove discrimination under the TCHRA. *Williams-Pyro, Inc.*, 408 S.W.3d at 477-79, *citing Mission Consol.*, 372 S.W.3d at 634. Under the first method, a plaintiff proves discriminatory intent with direct evidence of that intent. *Williams-Pyro, Inc.*, 408 S.W.3d at 477-79. "Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *Id., quoting Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002).

However, as courts have recognized, it is often difficult to prove "forbidden animus" through direct evidence. *See Williams-Pyro, Inc.*, 408 S.W.3d at 477-79, *citing Mission Consol.*, 372 S.W.3d at 634 (recognizing that "motives are often more covert than overt, making direct evidence of forbidden animus hard to come by"). Courts have thus devised a second method: the burden-shifting mechanism described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under this method, the plaintiff creates a presumption of discrimination if she meets

the "minimal" initial burden of establishing a prima facie case of discrimination. *Mission Consol.*, 372 S.W.3d at 634. To establish a prima facie case of disability discrimination, a plaintiff must show that (1) she has a "disability" (2) she is "qualified" for the job, and (3) she suffered an adverse employment decision because of that disability. *Id.* If the plaintiff makes that prima facie case, discrimination is presumed, and the burden shifts to the employer-defendant to articulate a legitimate non-discriminatory reason for its differential treatment of the employee. *Id*., *citing McDonnell Douglas*, 411 U.S. at 802; *see also Madden v. El Paso Indep. Sch. Dist.*, 473 S.W.3d 355, 360 (Tex.App.--El Paso 2015, no pet.). Once an employer offers an ostensibly legitimate reason for their actions, the presumption disappears, and "[t]he burden then shifts back to the complainant to show that the employer's stated reason was a pretext for discrimination." *Madden*, 473 S.W.3d at 360. This is often referred to as a "pretext case." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001). In a pretext case, the plaintiff-employee must also show that discrimination was a motivating factor for the employment action, though not necessarily the sole factor. *Id.* at 480.[19]

A. The Nature of Dr. Niehay's Evidence

Dr. Niehay relied primarily on two categories of what she claims is "direct" evidence of Texas Tech's discriminatory motive. The first is the chain of events that transpired after Dr. Wells received Dr. Taylor's email expressing concern over Dr. Niehay's "habitus." Wells reacted to this single incident by asking at least one other faculty member if he shared the same concern, stating

[19] And some of this evidence will overlap. The trier of fact may consider the evidence establishing the plaintiff's prima facie case, and inferences properly drawn from that evidence, on the issue of whether the defendant's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); s*ee also Valentino v. Village of S. Chicago Heights*, 575 F.3d 664, 673 (7th Cir. 2009) ("[T]he district court suffered the misapprehension that a plaintiff necessarily must proffer different or additional evidence to rebut pretext from that she used to establish her prima facie case. This is not so. Often, the same evidence used to establish the prima facie case is sufficient to allow a jury to determine that a defendant's stated reason for terminating a plaintiff was a mere front for an ulterior, unlawful motive.").

that she had received more than one report from faculty members expressing concern about this issue. Dr. Niehay argues this evidence supports a finding that Dr. Wells engaged in a concerted campaign to gather and present negative information to the CCC about Dr. Niehay's performance.

Texas Tech argues, however, that at best, this only presents us with a circumstantial case, as Dr. Wells did not directly state in any of these communications that she intended to seek Dr. Niehay's termination as the result of her weight or health concerns. We agree that, viewing those comments alone, this case would be properly categorized as a circumstantial case, requiring the trier of fact to make inferences that Dr. Wells's animus motivated her efforts to terminate Dr. Niehay. *See, e.g.*, *Montalvo v. Aerotek, Inc.*, No. 5:13-CV-997-DAE, 2014 WL 6680421, at *6 (W.D. Tex. Nov. 25, 2014) (employer's comment in age-discrimination case that he intended to "get rid of the dinosaurs in the company" required the jury to make inferences that the employer terminated employee because of his age).

However, Dr. Niehay offers more compelling evidence of Dr. Wells's alleged bias. Salas related statements from Dr. Wells that Dr. Niehay could not perform her job due to her weight, and that Dr. Wells intended to find other pretextual reasons to terminate Dr. Niehay to avoid appearing to discriminate against her. This evidence, if admissible, would raise a direct inference that not only did Dr. Wells view Dr. Niehay as having an impairment, but that her view of Dr. Niehay was a motivating factor in her efforts to terminate Dr. Niehay. We therefore consider Texas Tech's next argument that the trial court erred in denying its motion to strike Salas's deposition testimony from the record based on the attorney-client privilege.

B. The Trial Court Did Not Err in Considering the Salas Testimony

1. The deposition testimony

All of the testimony at issue comes from a pre-suit Rule 202 deposition of Yolanda Salas. TEX.R.CIV.P. 202.1 (allowing for pre-suit deposition to investigate claim or perpetuate testimony for use in anticipated suit). At the time of the deposition, Salas was still employed by Texas Tech, but was represented by a personal attorney, as she was pursuing her own employment action against Texas Tech. That attorney declined to let Salas meet with Texas Tech's counsel before the deposition.

Salas had apparently met with Dr. Niehay shortly after Dr. Niehay was dismissed from the program. At that meeting, Salas informed Dr. Niehay of several statements that were made by Dr. Wells. And at Salas's deposition, Dr. Niehay's counsel sought to elicit those statements. In response, Salas first testified that Dr. Wells "was picking on [Dr. Niehay] because of her weight," and that Dr. Wells had mentioned "on occasions that [Dr. Niehay] couldn't perform due to her weight."

Dr. Wells attorney then asked Salas whether Dr. Wells had communicated her concerns to anyone else. In response to that question, Salas testified that she was present when Dr. Wells met with Texas Tech attorney Frank Gonzalez to talk to him about her concerns, and that Gonzalez "advise[d] her that she couldn't use that as a reason, you know, for dismissing her." As Salas started to elaborate, Texas Tech's attorney objected that "[t]his is getting into attorney/client privileged information." After Salas's and Texas Tech's attorney disagreed on whether Salas was the "client," Salas's attorney instructed her to finish the answer. She did so and was asked nine additional questions soliciting the substance of the communications between Dr. Wells and

attorney Gonzalez, either without objection, or where the only objection was "leading." The questions included:

- Did attorney Gonzalez suggest any lesser alternatives to termination?[20]
- What was Wells's response to that suggestion?
- Was attorney Gonzalez uncomfortable with Dr. Wells's position at the meeting?
- What phrasing was suggested to Dr. Wells to avoid the appearance of discrimination?
- Did Dr. Wells request the meeting?
- Did attorney Gonzalez say be careful because it sounds like discrimination?
- At the meeting with attorney Gonzalez, did Dr. Wells say she wanted to get rid of Dr. Niehay because of her weight?
- At the meeting, did attorney Gonzalez make clear that she should not terminate Dr. Niehay because her weight?

In response to these questions, Salas testified that attorney Gonzalez advised Dr. Wells that "she had to find specific reasons why she wasn't performing well to dismiss her," and that Gonzalez advised Dr. Wells that she could not "use her weight as a reason to dismiss her." He also reportedly advised Dr. Wells that there had to be other reasons to dismiss Dr. Niehay. Salas also testified that during the meeting, Gonzalez repeatedly cautioned Dr. Wells to be "careful how she handled this [and] that she couldn't mention anything about her weight." Dr. Wells agreed with Gonzalez that she could not mention Dr. Niehay's weight, and then asked him how she could "word it," apparently referring to her initiation of disciplinary proceedings, to instead "show" that Dr. Niehay was not performing well. And, Salas testified that Dr. Wells informed her after the meeting that she believed Dr. Niehay "wasn't performing well because of her weight and that--but that she had to find a way to--find other reasons other than that" to terminate her. Salas expressed her belief that Dr. Wells was determined to find other reasons to dismiss Dr. Niehay, in order "to

[20] As a predicate to this question, Dr. Niehay's counsel first asked what Salas had told Dr. Niehay about what attorney Gonzalez had said. Texas Tech's counsel then stated, "Objection, privileged." The witness then asked that the question be repeated, and the counsel then asked a somewhat different question--whether a specific statement was made by attorney Gonzalez, to which no objection was made.

go around the weight issue" and that she later contacted various other faculty members, "just looking for a reason to dismiss her."

2. The attorney-client privilege

Confidential communications made for the purpose of facilitating the rendition of professional legal services between the client, lawyer, and their representatives are privileged--assuming the privilege has not been waived. *See, e.g.*, TEX.R.EVID. 503(b); *Huie v. DeShazo*, 922 S.W.2d 920, 925 n.4 (Tex. 1996) (orig. proceeding) (discussing the elements of the privilege). Accordingly, when an employee acting within the scope of their employment meets with the employer's counsel and seeks legal advice on behalf of the employer, those communications are protected by the attorney-client privilege. *See generally Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197-98 (Tex. 1993); *see also In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 225 n.3 (Tex. 2004) (per curiam); TEX.R.EVID. 503(b)(1)(A) (a client may be an organization or entity, whether public or private, and the privilege attaches when the entity's representative seeks the advice on the entity's behalf). The parties agree that the communications between Dr. Wells and Texas Tech's attorney Gonzalez, were covered by the attorney-client privilege. Thus, both the comments that Dr. Wells made to attorney Gonzales, as well as the advice she received from him, would be covered by the privilege. *See, e.g., Paxton v. City of Dallas*, 509 S.W.3d 247, 260 (Tex. 2017) ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."). In addition, subsequent communications that Dr. Wells may have had with other Texas Tech employees, including Salas, discussing that legal advice would be covered by the privilege as well. *See In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49-50 (Tex. 2012) (orig.

proceeding) (recognizing that "Rule 503(b) protects not only confidential communications between the lawyer and client, but also the discourse among their representatives.").

3. *Waiver of the privilege*

The only question here is waiver. The attorney-client privilege is waived when the holder of the privilege voluntarily discloses the privileged material to a third party. *See* TEX.R.EVID. 511(a)(1) (a person waives his privilege if he voluntarily discloses any significant part of the privileged matter unless the disclosure itself is privileged). Waiver in this context generally describes the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *City of Dallas*, 509 S.W.3d at 261.

Texas Tech carries the burden to demonstrate both the privilege and absence of a waiver. *See, e.g. Riverside Hosp., Inc. v. Garza*, 894 S.W.2d 850, 853 (Tex.App.--Corpus Christi 1995, orig. proceeding); *see also Stroud Oil Properties, Inc. v. Henderson*, No. 02-03-003-CV, 2003 WL 21404820, at *3 (Tex.App.--Fort Worth June 19, 2003, pet. denied) (mem. op.) (recognizing that party asserting a privilege has the burden to come forward with evidence showing that the privilege was not waived through voluntary disclosure); *see generally Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (orig. proceeding) (per curiam) (recognizing that "[t]he burden is on the party asserting a privilege from discovery to produce evidence concerning the applicability of the particular privilege to the communication in question."). When disputed, the trial court must resolve evidentiary conflicts over the existence or waiver of the privilege. *See Osborne v. Johnson*, 954 S.W.2d 180, 183 (Tex.App.--Waco 1997, no pet.), *citing Cameron County v. Hinojosa*, 760 S.W.2d 742, 745 (Tex.App.--Corpus Christi 1988, orig. proceeding).

4. *Application*

Salas, who was not a management level employee within the agency, lacked the independent authority to waive the privilege on Texas Tech's behalf. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985) (recognizing that "[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."). Thus, Salas's disclosure of the communications to Dr. Niehay before suit was filed would not waive the privilege.

But the attorney-client privilege can also be lost during discovery proceedings when the party holding the privilege fails to adequately assert it, and instead allows the privileged information to be disclosed on the record. *See generally Granada Corp. v. Hon. First Ct. of Appeals*, 844 S.W.2d 223, 226 (Tex. 1992) (failure to take reasonable precautions in production of documents waived privilege); *Delaporte v. Preston Square, Inc.*, 680 S.W.2d 561, 564 (Tex.App.--Dallas 1984, writ ref'd n.r.e.) (recognizing that a party's "failure to assert the attorney-client privilege at the time of his deposition resulted in a waiver of the matter being protected by the attorney-client privilege"), *citing Eloise Bauer and Associates v. Electronic Realty Associates, Inc.*, 621 S.W.2d 200, 204 (Tex.App.--Texarkana 1981, writ ref'd n.r.e.) (recognizing that failure to assert the privilege when a question is asked about a written communication waives the privilege); *see also Rowe Int'l Corp. v. Ecast, Inc.*, 241 F.R.D. 296, 301 (N.D. Ill. 2007) (finding waiver where attorney, who was representing holder's interest at deposition, failed to object to witnesses' disclosure of privileged information).

Following this reasoning, Dr. Niehay contends that Texas Tech waived the privilege by failing to object to each question seeking disclosure of the privileged conversation. Deposition testimony is generally treated like trial testimony. TEX.R.CIV.P. 199.5(d) ("The oral deposition

must be conducted in the same manner as if the testimony were being obtained in court during trial."). And for trial purposes, a legion of cases hold that a party forfeits the right to object to testimony if an objection is not raised each time the offending question is asked. *See Bay Area Healthcare Group, Ltd. v. McShane,* 239 S.W.3d 231, 235 (Tex. 2007) (per curiam) (although party objected to the first question asked by opposing counsel regarding a prior patient, his failure to object to subsequent questions waived the issue for appellate review); *In re Commitment of Massingill*, No. 09-15-00365-CV, 2016 WL 2594720, at *4 (Tex.App.--Beaumont May 5, 2016, pet. denied) (mem. op.) (failure to object to each objectionable opinion of expert, or to obtain a running objection, waived complaint on appeal).

Conversely, Texas Tech urges that waiver consists of the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. And a waiver of the privilege should not be lightly found. *See In re Southpak Container Corp.*, 418 S.W.3d 360, 364 (Tex.App.--Dallas 2013, orig. proceeding). Texas Tech believes that it was sufficient for its attorney to lodge an objection on the record to some of the questions asked.

Two rules of civil procedure, each with two relevant sub-parts, guide our resolution of the waiver issue. First, Rule 199.5(e) addresses objections at depositions, and only allows for objections as to "form" and "leading"; "[a]ll other objections need not be made or recorded during the oral deposition to be later raised with the court." *Id*. In isolation, that rule might suggest that Texas Tech need not have objected at all, or at least its objection to one of several questions might suffice.[21] But the very next section of the rule allows an attorney to instruct a witness not to answer

[21] We interpret the rules of civil procedure as we would construe a statute. *In re City of Dickinson*, 568 S.W.3d 642, 645-46 (Tex. 2019) (orig. proceeding). In doing so, "our primary objective is to give effect to the drafter's intent as expressed in the rule's language." *Id*., *citing Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). And we look to the discovery rules as "part of a cohesive whole," considering them "in context rather than as isolated provisions." *In re City of Dickinson*, 568 S.W.3d at 645-46 *citing TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

a question during an oral deposition if it is necessary to preserve a privilege. *Id.* at 199.5(f). Second, we look to Rule of Evidence Rule 511 which governs waiver of evidentiary privileges by voluntary disclosure. Rule 511(a)(1) sets forth the general rule that evidentiary privileges are waived if the privilege holder voluntarily discloses the privileged matter or consents to disclosure. Subsection (b) of the rule applies specifically to the attorney-client privilege and limits the general waiver rule when there has been actual disclosure. It provides a mechanism to claw back inadvertently disclosed attorney client communications by incorporating the provisions of TEX.R.CIV.P 193.3(d).

From these rules we perceive two threads of authority--one that looks to waiver when the holder of the privilege has refused to disclose the substance of the privileged communication, and the other where the substance of the communication has been revealed. *See City of Dallas*, 509 S.W.3d at 260 (finding no waiver by city missing ten-day deadline for requesting attorney general opinion when city refused to turn over material); *Granada Corp*., 844 S.W.2d at 226 (distinguishing inadvertent from involuntary production, and finding waiver when reasonable precautions were not taken to safeguard actual divulging of privileged documents). This case falls into the second category because Texas Tech allowed the substance of the privileged communication to be elicited at deposition and later transcribed. And that is a problem because "[o]nce information has been disclosed, loss of confidentiality is irreversible. The bell cannot be unrung, and neither dissemination nor use can be effectively restrained." *City of Dallas*, 509 S.W.3d at 261. Or as the Texas Supreme Court has also said, once a "matter has been disclosed, it cannot be retracted or otherwise protected." *West v. Solito*, 563 S.W.2d at 245 (Tex. 1978) (orig. proceeding), *citing Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962); *see also Jordan v. Court of*

Appeals for Fourth Supreme Judicial Dist., 701 S.W.2d 644, 649 (Tex. 1985) (orig. proceeding) (holding that once privileged matters are voluntarily disclosed, the privilege is waived).

Although we agree that Texas Tech was placed in a difficult situation, its conduct equates to an intentional relinquishment of the privilege. The preferred course of action would have been for Texas Tech's counsel to instruct Salas (who was a current employee) not to reveal attorney client communications. *See* TEX.R.CIV.P. 199.5(f) (expressly permitting an attorney to instruct a witness not to answer a question during a deposition if, among other things, it is "necessary to preserve a privilege."); TEX.R.EVID. 503 (a)(1) ("A client has a privilege to refuse to disclose *and to prevent any other person* from disclosing confidential communications made to facilitate the rendition of professional legal services to the client") (emphasis supplied); *see also Solito*, 563 S.W.2d at 246 (in deposition, a deponent--or his attorney--may assert the privilege and refuse to answer any questions violating the attorney-client privilege); *In re Mason & Co. Prop. Mgmt*., 172 S.W.3d 308, 314 (Tex.App.--Corpus Christi 2005, orig. proceeding) (explaining that attorneys who are deposed may follow the procedures set forth in *West* when asked questions seeking privileged information, by asserting privilege and refusing to answer any such questions, and allowing the matter to be resolved at a subsequent court hearing); *In re Lowe's Companies, Inc.*, 134 S.W.3d 876, 878 (Tex.App.--Houston [14th Dist.] 2004, orig. proceeding) (recognizing that an attorney seeking to assert a privilege may instruct a witness not to answer questions seeking privileged information). And even if Salas, as a hostile witness, declined to follow that instruction, Texas Tech had the additional option to recess the deposition and seek court intervention. TEX.R.CIV.P. 199.5(g) (permitting a party or a witness to suspend the oral deposition for the time necessary to obtain a ruling, when he or she believes is being conducted in violation of the rules); TEX.R.CIV.P. 199.6 (allowing sensitive information to be submitted in camera).

But having allowed the witness to answer the questions, Texas Tech took no action to protect the privileged communication until almost two years later when it objected to Dr. Niehay's use of the deposition in response to the Plea. The deposition was taken in April of 2017 and Texas Tech did not raise the issue until it filed a motion to strike the transcript on May 14, 2019. Yet, Evidence Rule 511(b)(2) gave Texas Tech another option: "[w]hen made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d)." TEX.R.EVID. 511(b)(2). And while Rule 193.3 was intended to apply to written discovery, Rule 511(b)(2)'s incorporation of Rule 193.3 does not limit its application to only written discovery. *See In re FEDD Wireless LLC.*, 567 S.W.3d 470, 477 (Tex.App.--Houston [14th Dist.] 2019, orig. proceeding) (stating Rule 193.3 would have applied to privileged exhibit inadvertently attached to dispositive motion under clear wording of Rule 511(b)(2)). But Rule 193.3(d) requires a party to *promptly* seek a "snap back" of inadvertently privileged material--something Texas Tech did not do here. Under these circumstances, we agree with the trial court that the privilege has been waived. *See City of Dallas*, 509 S.W.3d at 264 ("But when inadvertence is coupled with failure to take prompt remedial action after discovering actual disclosure of privileged information, the privilege is waived because inaction under such circumstances is inconsistent with claiming the privilege."); s*ee also Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981) (recognizing that when a party inadvertently discloses privileged information during discovery proceedings, the privilege will be lost unless the party takes immediate steps to rectify the situation); *Rowe Int'l Corp.*, 241 F.R.D. at 301 (by knowingly allowing deposition testimony containing privileged information to become part of a public record, party waived his right to later assert any privilege); *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 510-11 (2009) (where privileged

information was disclosed at deposition, party's failure to attempt to rectify the disclosure by taking some form of "curative action" waived the privilege).

We overrule Texas Tech's third issue.

C. Dr. Niehay Presented Direct Evidence of Her Claim

As discussed above, if Dr. Niehay presented direct evidence that Dr. Wells had a discriminatory animus toward her based on her perceived impairment, we do not apply the *McDonnell* burden shifting procedure described above, and therefore, Dr. Niehay would not be required to present evidence rebutting the stated, non-discriminatory reasons that Texas Tech gave for her termination.

"[F]or workplace comments to provide sufficient evidence of discrimination, the remarks must be (1) related to the protected class, (2) proximate in time to the adverse employment decision, (3) made by an individual with authority over the employment decision at issue, and (4) related to the employment decision at issue." *Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 821 (Tex.App.–Houston [1st Dist.] 2012, pet. denied); *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016). We believe that Salas's deposition testimony, which we have concluded was properly considered by the trial court, supplied direct evidence meeting that standard. It not only contained comments that Dr. Wells made indicating that she viewed Dr. Niehay's weight to be an impairment, but also expressed an intent to terminate Dr. Niehay and find other pretextual reasons to cover-up her true motive. The statements' timing was just before the imposition of the probationary period that preceded Dr. Niehay's termination.

Given this direct evidence of Texas Tech's discriminatory intent, we conclude that Dr. Niehay has met her burden of raising a question of fact on the issue of whether Texas Tech violated the TCHRA in its termination decision. Accordingly, as we do not treat this as a pretext

case, we do not address Texas Tech's argument that Dr. Niehay failed to present sufficient evidence to rebut the stated reasons it gave for her termination.

For the reasons set forth above, we find that Dr. Niehay has come forward with sufficient evidence at this stage in the proceedings to support her claim of disability discrimination, and to warrant a conclusion that the trial court has subject matter jurisdiction to hear her claim. We therefore overrule Texas Tech's Second Issue.

VII. CONCLUSION

We overrule Issue One with regard to the "regarded as" claim, but sustain the issue as to the actual disability claim (which Dr. Niehay concedes). We overrule Issue Two (Texas Tech's other reasons for terminating Dr. Niehay) because Dr. Niehay has presented direct evidence of discrimination and removed the case from the McDonnell Douglas framework. We also overrule Issue Three which argues the trial court erred in considering the attorney client communications. We therefore affirm the trial court's judgment denying Texas Tech's Plea on the "regarded as" claim of discrimination. All pending motions regarding the briefing in this case are denied.

PER CURIAM

January 31, 2022

Before Rodriguez, Alley, and Ferguson, JJ.
Ferguson, Judge (sitting by assignment)
Alley, J., concurring