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# **The Legal and Managerial Challenge of Obesity as a Disability: Evidence From the Federal Courts**

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## **ABSTRACT**

The Rehabilitation Act and the Americans with Disabilities Act prohibit discrimination against applicants and employees with disabilities. Following the elements of a prima facie claim of discrimination, this legal brief explores the conditions under which obesity has been deemed a disability. Although obesity is not generally considered a disabling impairment, plaintiffs have successfully brought obesity-related claims based on a rarely implicated definition of disability. The so-called regarded as definition protects those who are not substantially limited by any condition but are subjected to discrimination based on the perception that they are limited by a physical or mental impairment. Although employers have fared well in such obesity-related discrimination claims, a review of federal case law suggests that public human-resource managers are advised to adopt a strategy that reduces the likelihood of obesity-related discrimination, as it is more desirable to avoid potentially litigious behavior than to emerge victorious in court.

The obesity epidemic<sup>1</sup> is not only a public health or personal lifestyle problem but also an issue that has numerous effects on public agencies (Bradbury, 2005). The fiscal impact is felt through higher health care costs, as obesity can lead to chronic illnesses such as diabetes, heart disease, high blood pressure, and some cancers (Centers for Disease Control and Prevention [CDC], 2004). Indeed, states can attribute more than 10% of their Medicaid expenses, and 5% of their overall medical costs, to obesity (Lemov, 2004). In addition to fiscal concerns, obesity has personnel and management implications. One review found evidence of weight-related discrimination “at virtually every stage of the employment cycle, including selection, placement, compensation, promotion, discipline, and discharge” (Roehling, 1999, pp. 982-983). These findings underscore the relevance of weight-related discrimination to human resource managers, as incidents can rise to the level of illegal discrimination if a potential or current employee’s obesity constitutes a disability. This analysis of federal case law examines obesity-related disability claims under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA).

## **PRIMA FACIE DISCRIMINATION CLAIM**

The Rehabilitation Act and ADA generally prohibit discrimination against handicapped or disabled applicants and employees in personnel decisions. More precisely, the ADA provides that

no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. (§12112[a])

Although the ADA extended coverage from only those programs that receive federal funds to employers in all sectors, the two acts rely on similar language to define *disability* and the standards used to make and assess claims of discrimination. For this reason, both laws will be relied on interchangeably in the foregoing analysis.

Pursuant to the Supreme Court’s ruling in *McDonnell Douglas Corp. v. Green* (1973), the plaintiff bears the burden of presenting a prima facie case to establish a presumption that discrimination has occurred. As it pertains to the ADA, the plaintiff must show that he or she (a) suffers from a disability as defined by the ADA, (b) is otherwise qualified to perform the job, and (c) was subject to an adverse employment action because of the disability (*Clemons v. The Big Ten Conference*, 1997). If a prima facie case is made, the employer must offer a legitimate, nondiscriminatory reason for the action. Finally, the plaintiff must introduce sufficient evidence that the employer’s stated reason is merely a pretext for disability discrimination (*Ridge v. Cape Elizabeth School Dept.*, 1999). This analysis of obesity as a disability is structured according to these prima facie criteria.

## IS OBESITY A DISABILITY?

The first element of a prima facie case of discrimination is the establishment that the plaintiff is disabled. The ADA defines a *disability* as “a physical or mental impairment that substantially limits one or more major life activity, a record of such an impairment, or being regarded as having such an impairment” (§12102[2]). Obesity is obviously a physical characteristic; however, federal guidelines define a *physical impairment* as a physiological disorder that affects a major bodily system (29 C.F.R. § 1630.2[h]). Accordingly, the Equal Employment Opportunity Commission’s (EEOC) ADA regulations state that “except in rare circumstances, obesity is not considered a disabling impairment” (29 C.F.R. §1630.2[j]).

Numerous plaintiffs have lost their cases on the grounds that their obesity did not constitute a disability, and thus they are not afforded protection under the ADA. An illustrative example comes from *West v. Town of Jupiter Island* (2001). The plaintiff was acknowledged as overweight; however, the court upheld West’s termination as a police officer because he could not specify the life activities that were substantially limited by his alleged disability (p. 1301). Indeed, courts have repeatedly upheld the use of weight guidelines in personnel decisions as long as such restrictions are bona fide occupational requirements (see *Andrews v. Ohio*, 1997; *Francis v. Meriden*, 1997; *Tudyman v. United Airlines*, 1984).

Morbid obesity, which is a body weight that is twice the norm, has been recognized as a disability in fact, thus constituting a “rare circumstance” as per EEOC guidelines (see *Nedder v. Rivier College*, 1996). The most notable case on this point is *Cook v. Rhode Island* (1993), where the court found that the plaintiff’s morbid obesity constituted a disability as she “presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems” (p. 23). A morbid obesity as disability in fact claim was rejected, however, in *Coleman v. Georgia Power Comp.* (2000) as the plaintiff did not demonstrate that his obesity was adversely affecting any major bodily systems, only that he had potential for physiological disorders. Other federal courts have tended to afford the plaintiff the benefit of the doubt on whether morbid obesity is an actual disability (see *Connor v. McDonald’s Restaurant*, 2003; *EEOC v. Texas Bus Lines*, 1996; *Fredregill v. Nationwide*, 1997; *Smaw v. Virginia*, 1994).

It is important to note that the *Cook* (1993) court rejected arguments made by the defendant-appellant that morbid obesity should not be considered a disability because of its mutable and voluntary nature. *Mutability* means that the condition could be reversed and could apply to obesity by losing weight and ridding oneself of any related disability. The court found that the physiological damage caused by morbid obesity is permanent, even if the degree of obesity is later reduced (p. 24). Likewise, the argument that morbid obesity is caused, or at least exacerbated, by voluntary conduct was rejected as being clearly inconsistent with the law. Relying on the Rehabilitation Act (1973), the court concluded that how an individual became impaired is not a relevant issue as “the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like” (p. 24).

## Regarded as Disabled

Much of the case law on the question of obesity as disability hinges on the third definition under the ADA: being regarded as having an impairing disability. The Implementing Guidelines of the ADA define *being regarded as* as follows:

1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; 2) has a(n) . . . impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or 3) has none of the impairments defined in . . . this section but is treated . . . as having a substantially limiting impairment. (29 C.F.R. § 1630.2[1])

The Supreme Court articulated the general rationale for *regarded as* in *School Board of Nassau County v. Arline* (1987). This notion of *disability* was designed to protect individuals who either are not substantially limited by their condition, or do not have any condition, but are subjected to discrimination based on the perception that they are limited by a physical or mental impairment (p. 279). This definition of *disability* turns on the perceptions and stereotypes of the employer. As such, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment” (p. 284). Thus, the perceived disability definition “can be satisfied whether or not a person actually has a physical or mental impairment” (Cook, 1993, p. 22).

Although constituting a markedly nonmedical definition of *disability*, the standards for presenting a prima facie case for “regarded as” discrimination under the Rehabilitation Act and ADA are unchanged. The burden falls on the plaintiff to “allege that the employer believed, however erroneously, that the plaintiff suffered from an ‘impairment’ that, if it truly existed, would be covered under the statutes and that the employer discriminated against the plaintiff on that basis” (Francis, 1997, p. 285). Thus, the plaintiff must show that the employer perceived that a disability existed that substantially limited a major life activity. The *Cook* (1993) court noted that “few ‘perceived disability’ cases have been litigated,” thus requiring the court to “explore new frontiers” (p. 22). The infrequency of such claims speaks to the difficulty of the plaintiff’s burden in demonstrating a prima facie “regarded as” case.

Turning to obesity-related claims, the EEOC directs that obesity should be considered a disability in fact only in “rare circumstances.” Numerous plaintiffs have shown, however, that their employer regarded their obesity as a disability and discriminated against them on that basis. In *Connor* (2003), the court allowed the claim to proceed based on the reasoning that “the issue is not whether Connor’s obesity is related to a physiological impairment; rather, the issue is whether McDonald’s perceived Connor’s obesity as relating to a physiological impairment” (p. 9). Similarly, Texas Bus Lines defended its refusal to hire Arazella Manuel, in part, because her obesity made her physically unqualified to perform the duties of a bus driver, even though there were no weight-related physical qualifications for the position (EEOC, 1996). A final example is *Warner v. Asplundh Tree Expert Co.* (2003), where the plaintiff’s supervisor told another worker that Warner was laid off because he was “overweight,” and that his obesity was going to lead him to “die on [his] job site” (p. 22329).

The analysis in *Nedder* (1996) presents a clear example of the complicated

applicability of obesity to the ADA. Mary Nedder claimed that Rivier College's termination of her contract as an assistant professor was a violation of the ADA because her obesity constituted a disability in fact and because the college regarded her as disabled. The court ruled that Nedder could not establish a prima facie case as to a disability in fact because she failed to show that she was actually substantially limited in a major life activity. In the context of repeated comments by supervisors that "obese teachers are perceived by students as less disciplined and less intelligent and as making unsuitable role models," the court ruled, however, that the college perceived Nedder's obesity as substantially limiting her ability to teach, and allowed her ADA claim to proceed (p. 119). Thus, Nedder's obesity led to a failed disability in fact claim and a successful "regarded as" disabled claim.

### **Substantially Limits One or More Major Life Activity**

Regardless of which of the three definitions of disability that is relied on in an ADA discrimination claim, a plaintiff must still show that his or her impairment substantially limits one or more major life activity. The implementing regulations for the ADA define substantially limits as

- (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner, or duration which an individual can perform a major life activity as compared with...the average person. (29 C.F.R. § 1630.2[j][1])

Thus, an impairment may negatively affect an individual's life without necessarily constituting a disability. Factors such as the nature and severity, duration, and longterm impact of the impairment must be considered (29 C.F.R. § 1630.2[j][2]). Such determinations are inherently made on a case-by-case basis. In *Andrews* (1997), a group of 76 law enforcement officers claimed that their failure to meet job-related weight restrictions constituted disability discrimination. The court found that although their weight was in excess of the mandated weight limit, such a condition was not regarded as an impairment "which is the result of a physiological condition or otherwise beyond the range of 'normal'" (p. 810). Similarly, the *Hazeldine v. Beverage Media* (1997) court found that the plaintiff's obesity affected her ability to engage in everyday activities, forcing her to pace herself when walking and to refrain from strenuous physical exercise. Such limitation, however, "is far from the 'substantial' or 'significant' restriction contemplated by the ADA as constituting the rare circumstances in which obesity should be considered a disabling impairment" (p. 704).

Significant limitations must affect major life activities, which include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," although this list is not considered exhaustive (29 C.F.R. § 1630.2[i]). Most obesity-related claims turn on whether the plaintiff was significantly limited in the major life activity of working. As such, ADA regulations require a plaintiff to show evidence of being "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities" (29 C.F.R. § 1630.2[j][3][i]). Thus, "the inability to perform a single, particular job does not constitute a substantial limitation in the major activity of working" (29 C.F.R. § 1630.2[j][3][i]).

Additional factors are the geographical area to which the individual has reasonable access and the range of similar and dissimilar jobs from which the individual has been disqualified due to the impairment (29 C.F.R. § 1630.2(j)(3)(ii)).

To be significantly limited in working, the plaintiff must be unable to perform a range of jobs, not merely in the one job of the plaintiff's choosing. This principle came to bear in *Smaw* (1994). Doretha Smaw consistently exceeded the weight limit for state troopers and ultimately was demoted to the position of dispatcher. The court reasoned that "even if the plaintiff is able to demonstrate that obesity qualifies as a 'mental or physical disability,' and that working qualifies as a 'major life activity,' she must also show that her disability 'substantially limits' her ability to work" (p. 1474). Her employment as a dispatcher effectively negated her claim of being substantially limited in her ability to work, as the court found that "the proper scope of Smaw's occupation is the field of law enforcement as a whole" (p. 1475). Absent this standard,

anyone who failed to obtain a job because of a single requirement which may not be essential to the job would become a handicapped individual because the employer would thus be viewing the applicant's failure as a handicap. This Court refuses to make the term handicapped a meaningless phrase. (*Tudyman*, 1984, p. 746)

The *Nedder* (1996) case demonstrates how an employer can regard an employee as being substantially limited in his or her ability to work on account of obesity. Here the court relied on the following reasoning from the *Cook* (1993) decision:

Denying an applicant even for a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited . . . working. (p. 26)

Because Rivier College considered the plaintiff to be "substantially limited in her ability to teach, either in the narrow class of jobs of a religious studies professor or in the broader range of any teaching position," Mary Nedder satisfied the prima facie burden of demonstrating that she suffers from a disability as defined by the ADA, and her claim was allowed to proceed (*Nedder*, 1996, p. 119).

## **REMAINING ELEMENTS OF THE PRIMA FACIE CASE**

Having satisfied any of the three definitions of *disability*, a plaintiff making an obesity-related ADA claim must still establish the remaining elements of a prima facie case. The plaintiff must demonstrate that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation for the disability. Although the determination of what functions are essential to a job is made largely by the employer, these functions must be job-related and not derived arbitrarily (Lee, 2005, p. 216). A similar balance holds for an employer's assessment of a person's qualifications for a job. Although an employer does not have to be "unfailingly correct," its assessment of a disabled individual must be "objectively reasonable" (*Cook*, 1993, pp. 26-27). As articulated by the *Cook* (1993) court, "an unfounded assumption that an applicant is unqualified for a particular job, even if arrived at in good faith, is not sufficient to forestall liability" (p. 27). Consequently,

the Supreme Court suggests that a fact-specific and individualized inquiry is essential to achieving the goal “of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear” (*School Board*, 1987, p. 287).

The now-familiar expectation of reasonable accommodations under the ADA applies to the determination of the qualifications of an applicant or employee. Implicit in this requirement is that some of the costs of working toward meaningful employment opportunities for disabled individuals must be borne by employers (*Cook*, 1993, p. 27). All possible accommodations, however, are not necessarily reasonable: “For an accommodation to be reasonable, it must be effective in permitting a disabled employee to perform the essential job functions” (*McDonald v. Kansas*, 1995, p. 1423). Thus, adjustments to the physical workspace, such as comfortable seating arrangements, electric carts, ramps, elevators, lifts, and convenient parking, or to the job itself, such as job restructuring and modified work schedules, may be reasonable (*Cook*, 1993, p. 27). Employers are not required to eliminate any of a job’s essential functions. In *McDonald* (1995), the plaintiff asked the state to accommodate his obesity by creating a new correctional officer position with duties that did not reflect the standard slate performed by other correctional officers. The court ruled that “the ADA does not require the employer to create a new position to accommodate the disabled worker” and ruled in favor of the defendant (p. 1423).

The final burden of the prima facie case for the plaintiff under the ADA is to show that he or she was the subject of an adverse employment action because of the disability. The ADA protects a wide range of employment decisions, such as “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment” (§12112[a]). The burden for the plaintiff is to show not merely that he or she suffered an adverse employment action but also that the reason for the action was the plaintiff’s factual or perceived disability.

In the cases where the plaintiff was able to demonstrate the necessary cause-and-effect relationship, the employer expressly cited the obesity of the applicant and/or employee as the reason for the adverse employment action. For example, Bonnie Cook was denied employment in any capacity at a state-operated medical facility on the explicit grounds that her morbid obesity compromised her ability to assist in emergency situations and put her at a greater risk for developing serious ailments that could lead to absenteeism and worker’s compensation claims (*Cook*, 1993). Similarly, Arazella Manuel was denied employment, in part, because she failed a required physical examination due to her morbid obesity. The doctor who conducted the examination for Texas Bus Lines concluded that Manuel would not be able to move swiftly in an emergency situation (*EEOC*, 1996). Finally, the plaintiff’s supervisor in *Warner* (2003) confided in another worker that David Warner’s morbid obesity was a “substantive factor” in the company’s decision to terminate him (p. 22329).

When an individual with a disability makes a prima facie case for discrimination, the employer must offer a legitimate, nondiscriminatory reason for the personnel action. The employer does not have to prove this reason but must produce evidence that would lead to a conclusion that there was a nondiscriminatory reason for the adverse action (*EEOC*, 1996, p. 970). Such nondiscriminatory reasons include job-related weight guidelines that are bona fide occupational requirements (see *Andrews*, 1997; *Francis*, 1997; *Tudymen*, 1984) and a record of unsatisfactory performance

evaluations and work-related deficiencies (see *Ridge*, 1999; *West*, 2001). In the *Cook* (1993) and *EEOC* (1996) cases, the defendants cited concerns about the ability of the plaintiffs to respond adequately in emergency situations.

The final aspect of the prima facie burden requires the plaintiff to introduce sufficient evidence that the employer's stated reason is merely a pretext for disability discrimination. In this way, the burden always remains on the plaintiff to make the prima facie case of discrimination. Despite the defendant's seemingly reasonable claim that Bonnie Cook's morbid obesity "compromised her ability to evacuate patients in case of an emergency," the court rejected this reason as a pretext for disability discrimination because "MHRH failed to make specific inquiries into plaintiff's physical abilities and instead relied on generalizations regarding an obese person's capabilities" (*Cook*, 1993, p. 27). More damning was the court's basis for denying the defendant's justification for rejecting the plaintiff's application for a bus driver position in *EEOC* (1996). Texas Bus Lines defended its refusal to hire Arazella Manuel, in part, because the company believed that she would not be able to "move around swiftly in case of accident" (p. 980). The court found that this argument was "without merit" for the simple reason that the controlling regulations "do not address the issue of a driver's ability to handle emergency situations" (p. 980).

## STATE LAW

The preceding legal analysis relied exclusively on federal statutes and federal case law. Although few of the cited cases have national enforceability, they will certainly be influential as precedent in cases dealing with obesity as a disability. Furthermore, plaintiffs' suits also may contain counts under state disability law, and the federal ruling can thereby be considered controlling law in the state where the suit originated. Indeed, the following state laws were successfully applied in conjunction with the Rehabilitation Act or ADA in the respective cases: the Rhode Island Fair Employment Practices Act and Rhode Island Civil Rights of Individual with Handicaps Act in *Cook* (1993); the Pennsylvania Human Relations Act in *Polesnak v. R.H. Management Systems, Inc.* (1997); the Arkansas Civil Rights Act of 1993 in *Morrow v. City of Jacksonville* (1996); and the Connecticut Fair Employment Practices Act in *Connor* (2003) and *Warner* (2003). The court's ruling in *Hazeldine* (1997) is particularly noteworthy as the plaintiff's disability claim did not meet the ADA's prima facie criteria but did satisfy the broader definition of *disability* found in the New York State Human Rights Law.

In addition to implications for state law springing from federal court rulings, a number of state and local governments offer their own protections from obesity-related discrimination. Michigan is the only state with a law that explicitly prohibits employment discrimination on the basis of weight (Michigan Civil Rights Act, 1977). The cities of San Francisco, California, Washington, D.C., and Santa Cruz, California, are among the few local jurisdictions to afford such protections (Carr-Ruffino, 2003; Garcia, 2004). In addition, state courts have established legal protections for obesity under such general state statutes as the Florida Civil Rights Act, the New Jersey Law Against Discrimination, the New York Human Rights Law, and the Pennsylvania Human Relations Act.<sup>2</sup>



## MANAGERIAL STRATEGIES

Of course, claims of discrimination are not always successful. Indeed, Roehling (1999) suggested that most of the weight-based discrimination that is likely to be occurring would not be considered illegal (p. 1001). If, however, it is more desirable to avoid litigious behavior than to emerge victorious in court, public human resource managers are well advised to adopt a strategy that reduces the likelihood of obesity-related discrimination.

Garcia (2004) suggested that managers must understand how the ADA and relevant state and local laws apply to obesity-related issues. Employers also should review all job descriptions to make sure that weight requirements are job-related, be respectful toward requests for accommodation from overweight individuals, establish expectations of courteous treatment of all employees regardless of personal appearance, and educate all employees on what is appropriate conduct toward overweight employees. As Roehling (1999) asserted, "managers and supervisors who show insensitivity to overweight employees are employers' worst nightmares" (p. 1010). Furthermore, managers should not make generalized assumptions about what job functions overweight employees can and cannot accomplish. Numerous resources are available to assist managers in their dealings with obesity issues. Health departments in 28 states receive federal funding for obesity prevention programs (CDC, 2004). Consistent with New York's *Focus On: Overcoming Obesity* guidebook (Siegel, 2004), employers should help employees fully understand the range of obesity-related treatments covered by health care plans and Medicare ("Medicare to Cover Some," 2004). A number of national and international advocacy groups have valuable information on their Web sites, notably the International Size Acceptance Association, the American Obesity Association, and the National Association to Advance Fat Acceptance.

Because overweight employees are more likely to have low morale, which can negatively influence the efficiency and effectiveness of the agency, managers should reconsider the scope of wellness programs (ComPsych, 2005). Such wellness programs typically address eating habits and lifestyles (Berman, Bowman, West, & Van Wart, 2001). With regard to habits, employers should ensure that nutritional choices are available during office parties and in cafeterias and vending machines. Employers can also make formal and informal opportunities to encourage health lifestyles. Work sites and work schedules can be designed to provide opportunities for regular physical activity. Programs that encourage communal exercise, such as walking during lunch hours, can help build camaraderie while reinforcing the importance of healthy living. Larger agencies could install exercise facilities at the work site or provide incentives for employees to join local fitness centers. Such investments can pay substantial future dividends in terms of reduced health care costs.

The costs and dangers associated with obesity are very real and can profoundly affect the workplace. Proactive efforts by public managers to prevent discriminatory behaviors and promote wellness may serve to protect the agency from costly litigation while simultaneously addressing morale and motivation issues among all affected workers.

## NOTES

1. Although there is some debate as to the full extent of the problem, it is clear that obesity is a major and increasingly common public health problem (see Centers for Disease Control and Prevention, 2004; Stein, 2004). The body mass index (BMI), which is calculated by dividing weight by height, is the most commonly accepted measure of obesity, though this, too, is controversial (see Campos, 2004; Sturm, Ringel, & Andreyeva, 2004). The three categories of BMI results are normal, overweight, and obese.

2. State court decisions are *English v. Philadelphia Electric Company* (1982); *Gimello v. Agency Rent-A-Car Systems, Inc.* (1991); *Greene v. Seminole Electric Cooperative* (1997); and *McDermott v. Xerox Corp.* (1985).

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