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**WEIGHT DISCRIMINATION:  
SHOULD IT BE A BARRIER TO EMPLOYMENT?**

by

Diana D. Juetner\* and Anthony F. Libertella\*\*

Introduction

Obesity is the stigma of the nineties. Imagine the following situations! You receive your employment check and included amongst your usual deductions is a \$5 deduction because you are overweight. Or your spouse arrives at the house and says, "Honey, there's \$5 less in my pay envelope because you haven't stuck to your diet." Sounds incredible? Not to U-Haul International, Inc., employees who experienced this employment policy firsthand. U-Haul International requires employees and their spouses to acknowledge in writing that they fall within the company's acceptable weight guidelines. If employees lie about their weight, it becomes grounds for termination.<sup>1</sup>

For years, overweight and obese people have complained of unfair treatment by employers, and weight-based employment discrimination has been a frequent subject of newspaper and magazine articles. Yet, the employment problems of the overweight have been sorely neglected.

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This article will examine the definition and causes of obesity and the biases that exist toward overweight people in the workplace. It will show how these biases have led to negative social and economic consequences for these individuals. Next, it will explore the judicial developments as they relate to the increasing number of employees seeking redress for weight discrimination. Most notably, it will analyze the leading United States Circuit Court of Appeals weight-discrimination case *Bonnie Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals*<sup>2</sup>, a decision that may affect future weight-discrimination cases and potential "size" legislation. The article will also describe the responses of various state and local legislative bodies to the growth of employment-related obesity lawsuits. Finally, the recommendations from various experts in job-related weight-discrimination matters are discussed, with a brief commentary on possible solutions to this troubling issue in the workplace.

### Obesity And Its Stigma

Obesity is defined as an excessive storage of fat by the body. It may be mild (20% to 40% overweight), moderate (41%-100% overweight), or severe (>100% overweight), as classified in standard height-weight tables based on "ideal weight."<sup>3</sup> The "ideal weight" measurement is not always a good measurement of obesity, however. For example, athletes may exceed their "ideal weight" as determined by insurance company charts and still be lean because muscle weighs more than fat.

Although obesity is often considered to be a voluntary condition, there is ample evidence to the contrary. According to recent studies, as much as 50% to 75% of obesity is attributed to genetic influences.<sup>4</sup> Social factors are also believed to play an important role, especially among women.<sup>5</sup> Various endocrine, metabolic, developmental, and psychologic factors, as well as decreased physical activity, also are believed to contribute to obesity.<sup>6</sup> Frequently, however, the underlying cause of the obesity is not understood or explainable. Some medical experts believe that body weight is subject to physiologic regulation and that elevation of the regulatory level is responsible for obesity.<sup>7</sup>

At an International Conference on Obesity Management held in Antwerp in late 1993, Dr. Marian Apfelbaum, Professor of Nutrition at the University of Paris, revealed that his own protein-based diet, which he had been administering for the past twenty-five years, failed to produce long-term weight loss. Apfelbaum stated that genetic considerations determine one's weight, and oftentimes this creates an immutable condition. It is wrong, he said, to assume that individuals are obese due to overeating.<sup>8</sup>

Obesity is associated with various medical disorders such as diabetes, hypertension, and coronary artery disease.<sup>9</sup> However, a causal relationship between the obesity and the medical condition has not been established.

Even though about 25% of Americans are overweight,<sup>10</sup> obesity is an unacceptable condition in our thin-obsessed society. Overweight people are ridiculed without remorse or apology on television, in cartoons, by newspaper columnists, by employers, and employees. In a study of overweight people conducted at the University of Florida, researchers found that most of the overweight people surveyed felt that blindness, deafness, or leg amputation was a far better condition to have than being overweight.<sup>11</sup>

The obese also are often depicted as "lazy," "stupid," "ugly," and "cheats" by children at a very early age.<sup>12</sup> Obesity is not tolerated in our society. Unlike the blind or the deaf, overweight individuals are told that they could lose weight if they really made an effort. This creates a kind of double punishment in which individuals are discriminated against for being obese and criticized for lack of control over their situation.

The overweight also face discrimination in airline accommodations and educational opportunities as well as in their treatment by the medical profession, life insurance companies, and retailers. Sally Smith, Executive Director of the National Association to Advance Fat Acceptance (NAAFA)<sup>13</sup>, complained that because of her weight she is required to buy two seats when she flies and does not receive double frequent-flyer miles. She believes employers eventually may be required to obtain first-class accommodations or purchase two coach seats for their obese employees who travel, just as they make special provisions for the handicapped.<sup>14</sup> The medical profession also illustrates the prejudices that exist toward the overweight. An editorial in the *New England Journal of Medicine* criticized doctors and medical students for their insensitivity and prejudice toward overweight or obese patients. Medical education, according to the authors, has done nothing to alleviate this problem.<sup>15</sup>

### Obesity In The Workplace

Obesity has economic as well as social consequences. A study of 10,039 randomly selected adolescents and young adults in the United States, published recently in the *New England Journal of Medicine*, showed that overweight in adolescents, particularly women, may have significant social and economic consequences.<sup>16</sup> This seven-year prospective study conducted by the Harvard School of Public Health, New England Medical Center, and Harvard Medical School, found

that young, overweight women—those with weight above the 95th percentile for sex and age—had higher rates of household poverty, completed fewer years of school, had lower household incomes, and were less likely to be married than were women who were of normal weight.<sup>17</sup> Overweight men also were affected, but not as strongly.<sup>18</sup>

The study also compared the characteristics of overweight adolescents with those of adolescents who had chronic conditions such as asthma, diabetes, and arthritis. The study found that, unlike obesity, other chronic physical conditions had no significant effects on a person's later socioeconomic conditions, marital status, or self-esteem.<sup>19</sup> This supported the study's findings that discrimination, not health issues, causes overweight women and men to achieve less.

The results of the *New England Journal of Medicine* study are consistent with those of prior studies, which also show evidence of weight-based employment-discrimination. In a 1987 survey conducted by Esther Rothblum, a psychologist at the University of Vermont, a close correlation was also found between overweight and employment discrimination. Dr. Rothblum surveyed 367 obese women and 78 obese men on job-related issues and found that more than 40% of the obese men surveyed and 60% of the obese women surveyed had been refused employment because of their weight.<sup>20</sup>

Respondents stated that many job interviews focused almost entirely on their weight. Moreover, if they were hired, they were subject to continued humiliation. For example, they were told not to sit on new office furniture for fear of breaking it or were intentionally excluded from company activities.<sup>21</sup> One woman surveyed was told that she would never be promoted until she lost weight; her humiliation was heightened when the union took management's side.<sup>22</sup> The survey also showed why obese women in particular so often are poor. The National Center for Health Statistics reports that 29.2% of women with incomes below \$10,000 per year are obese, while only 12.7% of those with incomes above \$50,000 per year are obese.<sup>23</sup> According to Dr. Rothblum's study, obese women are less likely than thinner women to be hired, and if they are hired, they are less likely to be promoted. Further, obese women are much more likely than thinner women to marry men lower on the social or economic ladder.<sup>24</sup>

Two other studies are consistent with the findings of the *New England Journal of Medicine's* study. In one study, more than 24% of executives said that employment opportunities for employees who are 15 pounds over their "ideal weight" would be somewhat negative. Approximately 70% of the executives interviewed indicated that

employment opportunities for employees who are 50 pounds over their "ideal weight" would be somewhat negative to very negative.<sup>25</sup>

The second study, conducted by the Maryland Commission on Human Relations, analyzed various employment practices by employment agencies in the State of Maryland. The study found that the employment agencies discriminated against overweight applicants by failing to recommend them or rarely recommending them for job opportunities because the applicants were perceived as lethargic, not motivated, and unenthusiastic.<sup>26</sup>

#### Judicial Developments

##### Pre-Cook v. Rhode Island

Employers and overweight prospective employees have been embroiled in a legal debate over discrimination due to obesity since the late seventies. This debate has raised such issues as: Is obesity a handicap? Should an obese person be classified as a "qualified individual with a disability?"<sup>27</sup> Does the employer's perception that an obese person is unable to perform the job qualify him or her as handicapped?

The following cases are illustrative of the treatment afforded the morbidly obese by the various state and federal courts that refused to consider obesity as a handicap from the late 1970s to the early 1990s.<sup>28</sup> In *Philadelphia Electric Company v. Pennsylvania*,<sup>29</sup> Joyce English pioneered the issue of weight-based employment discrimination in the state courts. In 1977 she was denied employment by the Philadelphia Electric Company (PECO) on the grounds that she was unsuitable for work because she weighed 341 pounds. Subsequently, she filed a complaint with the Pennsylvania Human Relations Commission claiming that PECO "refused to hire her because of her handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job."<sup>30</sup> The Commission ruled in favor of English, awarding her \$20,000 and an opportunity to apply for the next available position.<sup>31</sup> PECO appealed to the Commonwealth Court of Pennsylvania, which overruled the Commission, holding "a morbidly obese person is not handicapped or disabled within the meaning of the Pennsylvania Human Relations Act when there is no evidence that she had any of the diseases, physical restrictions, psychological characteristics or breathing difficulties to which she was potentially susceptible."<sup>32</sup> In addition, the Court held that PECO did not illegally discriminate against English. The court concluded that the "employer has an inherent right to discriminate among applicants for employment and to eliminate those who have a high potential for absenteeism and low productivity."<sup>33</sup>

In *Greene v. Union Pacific Railroad*,<sup>34</sup> the federal court for the first time heard a weight-based employment-discrimination case. In *Greene*, the United States District Court for the Western District of Washington held that morbid obesity is not a handicap. Richard Greene commenced a lawsuit against Union Pacific Railroad for denying his transfer to fireman job category because of his morbid obesity. The court, in dismissing Greene's complaint, explained that the railroad through its medical director exhibited reasonable behavior in promulgating systemwide medical standards for prospective or existing employees. The standards, the court reasoned, were determined to be bona fide occupational qualifications justified by business necessity and "did not have a disparate impact upon a protected class."<sup>35</sup> The court held that Greene was not handicapped within the meaning of the Washington statutes because Greene's weight fluctuated from being obese to morbidly obese. The court concluded that his morbid obesity was not an immutable condition such as blindness or lameness, but rather a condition that could be controlled.<sup>36</sup>

In 1993, the California Supreme Court in *Cassista v. Community Foods, Inc.*<sup>37</sup> reversed the California Court of Appeal when it held that the California antidiscrimination law protects obese people only if their weight stems from a medical disorder. In *Cassista*, the plaintiff applied for a job as a cashier and stock clerk with Community Foods. At the time she applied for the position, she was 5'4" tall and weighed 305 pounds. The position required her to move 35- to 50-pound sacks of grain, 50-pound boxes of produce, and 55-gallon drums of honey.<sup>38</sup> During her interview, she was asked if she had any physical limitations that would prevent her from doing the job. She assured the interviewer that she was capable of handling the position. Subsequently, she was not hired for the position.<sup>39</sup> Upon inquiring as to the reasons for not being hired, she was informed by the personnel manager that the company believed that she was incapable of handling the job because of her weight.

Cassista sued Community Foods in the California Superior Court for violating the California Fair Employment and Housing Act, claiming the defendant regarded her as having a physical handicap (i.e., too much weight). The jury found for the employer, Community Foods. Cassista appealed, and the California Court of Appeal overturned the verdict, stating evidence establishing that Community Foods had considered her weight to be a physical handicap as defined by state law.<sup>40</sup> Community Foods, therefore, should have been required to prove that Cassista's weight was not a determining factor in refusing to hire her.<sup>41</sup>

Subsequently, the California Supreme Court reversed the Court of Appeal ruling.<sup>42</sup> The court held that weight may qualify for protection as a "handicap" or "disability" under the California Fair Employment and Housing Act (FEHA) only if

the claimant can provide medical evidence to prove that the claimant's obesity is the result of a physiological condition that affects at least one basic bodily system and limits a major life activity, or that she was perceived as having such a condition.<sup>43</sup>

Cassista lost her case because she was unable to show that her obesity was caused by a medical condition. In its opinion, the California Supreme Court stressed that it was not at liberty to define "physical handicap" in its broadest terms to include what was morally just or socially desirable. The court continued that it was constrained to begin with the statute, apply ordinary meanings to the words, and then examine the legislative history.<sup>44</sup>

The California Supreme Court criticized the Court of Appeal for ignoring the statutory language and the relevant legislative history in analyzing the evolution of the term "physical handicap" since its initial adoption by the California legislature in the 1973-1974 session. The court stressed that even though the legislature made a sweeping change when it modeled its amendment to the FEHA in 1992 after the Federal ADA statute by replacing the term "physical handicap" with "physical disability," nevertheless the claimant "must have, or (be) perceived as having, a "physiological" disorder that affects one or more of the basic bodily "systems" and limits the claimant's ability to "participate in major life activities."<sup>45</sup> The Supreme Court stated that it was still the intention of the legislature that "physical disability" be interpreted in the same manner as "physical handicap."<sup>46</sup> The court again referred to the legislative history, emphasizing that it was the assembly bill, which defined handicap in a narrower way, that passed, not the senate bill, which did not limit the definition of the term "physical handicap."<sup>47</sup>

In considering the "perceived disability" theory the court concluded that the "perceived disability" must be in the nature of a physiological disorder as set forth in the FEHA, not just be a condition of overweight.<sup>48</sup> The court refused to accept the plaintiff's argument that her prospective employer's "perceived disability" of her overweight condition was enough to qualify as a disability under the state law.<sup>49</sup>

Therefore, the "perceived disability" conclusion has very limited use because the claimant still must show that the overweight condition, perceived by the employer as the reason for the employee's inability to perform the job, is medically related. In essence, the law does not protect an overweight prospective employee if the prospective employer makes a judgment that the applicant cannot do the job because of weight.

Did the court in the *Cassista* case fail to understand the causes of obesity? Laura Eljaieh criticized one of the California Supreme Court Judges because the judge's questions were based on the stereotype that overweight people overeat and if they diet they can lose the excess weight.<sup>50</sup> The *Cassista* decision left unresolved the debate regarding obesity as a behavioral versus a genetic or a physiological issue. Even though other advocates of "fat acceptance" believe that the California Supreme Court Judges did not fully understand the problems that overweight persons face, they still saw this decision as a partial victory in that overweight people now had the opportunity to show that their condition was medically related.

#### Cook v. Rhode Island

Immediately after the *Cassista* ruling, the tide shifted in favor of "fat pride" advocates when the first Federal Appeals decision of its kind ruled that job discrimination against severely obese people violated a federal disabilities law. On November 22, 1993, in the landmark case of *Cook v. Rhode Island*, the First Circuit Court of Appeals decided that morbid obesity is a handicap under Section 504 of the Rehabilitation Act of 1973<sup>51</sup>. Equally as significant, the court explored what it called "new frontiers" when it decided to apply the "perceived disability" theory to Section 504 of the Act.<sup>52</sup> The *Cook* holding permits all morbidly obese individuals to utilize the "perceived disability" theory without any requirements of a medical nexus.

In 1988, Bonnie Cook, a 5'2" woman weighing 320 pounds, reapplied for a position that she previously held from 1978 to 1980 and from 1981 to 1986 with the Rhode Island Department of Mental Health, Retardation, and Hospitals (MHRH) and which she voluntarily left with a "spotless work record." She was accepted for reemployment subject to completion of a physical examination. The agency's physician, Dr. O'Brien, denied her medical clearance because he believed that her morbid obesity could (1) place her own health at risk for serious diseases; (2) put the retarded residents at risk in emergency situations; (3) enhance absenteeism; and (4) increase the costs of Worker's Compensation injuries.<sup>53</sup>

The court set forth the following test to determine if morbid obesity was a handicap under the Rehabilitation Act. The four qualifications to invoke Section 504 of the Act for a failure to hire are (1) "that she applied for a post in a federally funded program or activity; (2) that, at the time, she suffered from a cognizable disability; (3) but was, nevertheless, qualified for the position; and (4) that she was not hired due solely to her disability."<sup>54</sup>

In applying the above criteria, the court found that the position for which Cook applied as an institutional attendant was federally funded. Additionally, the court testimony established her qualifications for the position because of her previous employment in the same position. The two remaining criteria that had to be discussed were whether she in fact had a disability that was covered by the Act and if so whether she was not hired solely because of her disability.

MHRH asserted that morbid obesity was not a handicap protected by Section 504 of the Rehabilitation Act, but a mutable condition that could be corrected by dieting.<sup>55</sup> The court rejected MHRH's arguments that all Cook had to do was diet and she would be able to simultaneously rid herself of the excess weight and her disability.

The court found that "the jury had before it credible evidence that metabolic dysfunction ... lingers even after weight loss" in the morbidly obese and is a permanent physical impairment.<sup>56</sup>

In addition, the MHRH claimed that morbid obesity is caused by voluntary conduct, thereby not constituting an impairment as defined by Section 504 of the Rehabilitation Act. The court held that the Act does not contain language that links its protection with "how an individual became impaired or whether an individual contributed to his/her impairment...." It was further indicated "that the Act applies to many conditions that may have been caused or exacerbated by the individual such as AIDS, alcoholism, and diabetes.... Voluntariness is relevant only in deciding whether the condition has a substantially limiting effect."<sup>57</sup>

Next, the court considered whether a jury could properly have concluded that Cook regarded her condition as substantially limiting one of her "major life activities."

The regulations define "major life activities" as walking, breathing, working, and other manual tasks. The evidence showed that MHRH refused to hire the plaintiff because it was believed that her morbid obesity interfered with her ability to perform a "major life activity," the right to work.<sup>58</sup>

The court stated that its job was greatly simplified because the Equal Employment Opportunity Commission (EEOC) has promulgated regulations setting forth three ways an individual can qualify for protection on the basis of a "perceived disability" under section 504 of the Act. Cook had to establish that: (1) her morbid obesity did not "substantially limit her ability to perform major life activities;" or (2) "she did not suffer at all from a statutorily prescribed physical or mental impairment;" and (3) MHRH viewed her impairment "whether actual or perceived as substantially limiting one or more of her major life activities."<sup>59</sup>

Additionally, the court explained that the regulations define physical or mental impairment broadly and are open ended to encompass disorders not presently known. The regulations also cover a person who is "regarded as having an impairment" if that person: "has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in...this section but is treated by a recipient as having such an impairment."<sup>60</sup>

The court held that "MHRH treated the plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular system."<sup>61</sup> She was treated as if she had a physical impairment, and MHRH refused to hire her because her limited mobility could interfere with her ability to evacuate patients in case of an emergency. Therefore, the jury could find that she was refused employment solely because of her perceived handicap.<sup>62</sup>

The court held that the employer had to apply objective standards reasonably set to determine if the candidate could handle the job, rather than acting solely on the basis of a subjective belief that doing the job could potentially cause harm to other people. The court indicated that MHRH failed to inquire into the plaintiff's physical abilities and relied solely on generalizations about obese people. The court noted that the plaintiff had done the job before and at times weighed almost as much.<sup>63</sup> In addition, the "...Act requires employers to bear the cost of absenteeism and other burdens involving reasonable accommodations..." for disabled individuals to be able to work.<sup>64</sup>

The court concluded that MHRH rejected the plaintiff on the basis of weight-related reasons. Consequently, on the evidence presented, a jury could find that MHRH's refusal to hire the plaintiff was based solely on her perceived handicap.<sup>65</sup> Therefore, for the first time a Federal Appellate court extended coverage to include morbidly obese individuals under the federal Rehabilitation Act of 1973.

#### Legislative Responses

In addition to the coverage provided under the Rehabilitation Act, obese individuals have been provided some protection, although limited, at the state and local levels. The only state statute under which obese people have been able to seek redress is Michigan's Elliott-Larsen Civil Rights Act,<sup>66</sup> which prohibits employment discrimination on the basis of height and weight. The Act also prohibits employers

from discriminating against an individual with respect to employment because of religion, race, color, national origin, age, and sex, in addition to *height and weight*.<sup>67</sup> The Act specifies that an employer shall not discharge or refuse to hire an employee or "limit, segregate or classify an employee for employment in a way that deprives...the employee of an employment opportunity" because of *height and weight*.<sup>68</sup> In addition, under the Act, employment agencies and labor organizations are also prohibited from discriminating against an individual in any way because of height and weight.<sup>69</sup> Recently, Connie Soviak brought suit against First Federal Savings and Loan under Elliott-Larsen Act for weight harassment due to mistreatment she received while employed at the bank. Ms. Soviak alleges that management ignored her complaints about being humiliated, harassed, and punched by a coworker for being fat. Ms. Soviak argued that according to the Michigan Civil Rights Act an employer is required to investigate a charge of harassment by a member of a "protected class."<sup>70</sup>

The statute states further that any employer, labor organization, or employment agency found to be in violation of the terms of the Act must cease and desist the unlawful discriminatory practices.<sup>71</sup> The violating party is also subject to other penalties such as compensatory damages including reasonable attorney's fees<sup>72</sup> and payment for all or a portion of the cost of the action plus expert witness fees.<sup>73</sup>

Two local communities, the District of Columbia and the City of Santa Cruz, have addressed the issue of size-related employment discrimination. It is interesting to note that the District of Columbia's Human Rights Act<sup>74</sup> protects against employment discrimination based on personal appearance rather than specifically weight or height.<sup>75</sup> The Act also includes a special section to cover franchisees. Under the Code a franchisee is prohibited from discharging or refusing to hire or otherwise discriminate against a person for any reason provided in the Human Rights Act of 1977, the provisions of which would also apply to the franchisee.<sup>76</sup>

Santa Cruz became the first city in the State of California to prohibit employers and labor organizations from discriminating in all forms of employment-related activities on the basis of "age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, *height, weight or physical characteristics*."<sup>77</sup> Patterning their ordinance after the Michigan and District of Columbia statutes, the Santa Cruz ordinance added an innovative mediation clause, the intent of which was to provide an inexpensive and expedient method of resolving complaints of discrimination in the workplace.<sup>78</sup> The clause states that after exhausting the mediation remedy, the aggrieved party can commence a civil action "within one year of the alleged discriminatory act or within six months of the termination of mediation."<sup>79</sup>

### Proposed Legislation

Bills in New York and Texas could bring obese individuals under the protective umbrella of civil rights laws. New York is currently considering enacting Assembly Bill 3484, which would extend the New York State Civil Rights Statute to include height and weight as protected categories.<sup>80</sup> The proposed Act would make it an unlawful discriminatory practice for an employer or licensing agency "to refuse to hire, employ or discharge from employment ... or to discriminate against any individual because of age, race, creed, color, national origin, sex, *height and weight* considerations."<sup>81</sup> Similar to the Michigan statute, the proposed Act prohibits employment agencies and labor organizations from discriminating against individuals due to height and weight.<sup>82</sup> The sponsors of the proposed bill have indicated that there is a strong possibility of passage in 1994 because this legislation is consistent with the state's long-term commitment to condemn unreasonable exclusionary practices in employment.<sup>83</sup>

Two bills that were introduced in the Texas State Legislature in the 1990's also addressed the issue of weight discrimination. In 1991, Representative Debra Danburg introduced a bill that would have amended the Texas Human Rights Act by prohibiting weight discrimination based on gender.<sup>84</sup> The bill would allow an employee's weight to be classified as a bona fide occupational qualification if an employer could show that the employee's weight was reasonably likely to hinder the employee from carrying out the employee's duties in a safe and efficient manner.<sup>85</sup> This bill passed through committee but never made it to the floor for a vote for passage.

In 1993, Representative Sherri Greenberg introduced a similar bill, without the gender qualification, in the Texas State Legislature. This bill amends The Texas Human Rights Act to end weight discrimination in the workplace.<sup>86</sup> Furthermore, the proposed amended bill would make it an unlawful practice for an employer, an employment agency, or a labor organization to engage in any form of weight-based employment-discrimination because of "race, color, disability, religion, sex, national origin, *weight* or age."<sup>87</sup> The bill states that an employer cannot use an employee's weight as a "bona fide occupational qualification" without providing medical evidence "on the basis of a medical examination conducted by a physician approved by both the employer and the employee, that the employee's weight (was) reasonably likely to prevent the employee from performing the employee's duties safely and efficiently."<sup>88</sup> In addition to these legislative proposals, other segments of society have proposed solutions to weight-based employment discrimination.

### Obesity: Handicap Or Civil Rights Issue?

Legal and medical experts, as well as scholars and lobbyists, have examined the problem of employment discrimination of the obese and have offered recommendations in an effort toward solving it. The EEOC has been instrumental in calling attention to the problem by representing obese individuals in weight-discrimination lawsuits. The EEOC filed an *amicus brief* with the United States First Circuit Court of Appeals in the *Cook* case protecting the morbidly obese from employment discrimination by supporting the premise that "morbid obesity per se" is a handicap under the Rehabilitation Act of 1973.<sup>89</sup> The EEOC has also favored extending the Americans with Disabilities Act (ADA) to cover discrimination against morbidly obese individuals.<sup>90</sup> This is a departure from the traditional interpretation that to be considered a disability the obesity must be proved to have been caused by a physiological condition.

One legal scholar would extend the EEOC's recommendation by eliminating any form of weight discrimination in employment.<sup>91</sup> Extension of the Rehabilitation Act to protect obese and overweight individuals in the workplace was suggested to help change the negative image of overweight individuals and protect their employment rights.<sup>92</sup> Additionally, this classification would be consistent with the legal definition of physical or mental impairment and "with the treatment afforded alcoholics and drug addicts under the Act."<sup>93</sup>

The authors of the *New England Journal of Medicine* study would extend the above legal scholar's recommendation to apply to the recent Americans with Disabilities Act (ADA)<sup>94</sup>. They suggest that the ADA be broadened to include all overweight individuals, not just the morbidly obese, to protect them against weight discrimination in employment.

NAAFA has a somewhat different view of weight-based employment-discrimination issues. Sally Smith, Executive Director of NAAFA, said that while ADA protection would open up opportunities for public accommodations for "fat people," it could serve as a roadblock in seeking broader protection from employment discrimination.<sup>95</sup> Smith stated that defining morbid obesity as a disability does not fully address the issue of weight discrimination in employment and that the EEOC action still doesn't address those who are 50% overweight or 50 pounds overweight.<sup>96</sup> She said that denying employment to a 200-pound woman or firing a 140-pound flight attendant would not be illegal under the EEOC's interpretations.<sup>97</sup> Smith expressed concern that legislative efforts to make height and weight a protected category under state civil rights laws would be sidetracked and pointed out that the EEOC's argument



that some obese people are covered under disability rights laws would be used to oppose potential federal and state anti-size discrimination bills.<sup>98</sup>

For example, the New York Human Rights Commission has claimed that Assembly Bill 3484, which would add height and weight as a protected class under New York law, is unnecessary since weight discrimination is covered under disability rights laws.<sup>99</sup> And while it is true that morbidly obese individuals may be protected by these laws, protection is not so clear for slightly overweight or moderately obese individuals. Indeed, flight attendants are routinely suspended or fired for being over airlines' height/weight charts, yet they cannot use disability rights laws.<sup>100</sup>

A recent law review article concurs with the NAAFA's position<sup>101</sup> in suggesting that holding "obesity per se" as a handicap under the Rehabilitation Act of 1973 creates numerous implications. Employers who are subject to this Act would be required to use weight as a factor in their hiring decisions and in their affirmative-action programs.<sup>102</sup> Workplace adjustments and accommodations may also be required to assist in the hiring, promoting, or transferring of obese persons.<sup>103</sup> The ADA currently excludes obesity as a protected classification.<sup>104</sup> By extending "obesity per se" to the ADA, the private sector would face these problems as well.

Although the finding that obesity is a handicap has resulted in some positive implications, this is not a fail-safe solution. If "obesity per se" is protected by the Act, employers would not be able to use weight as a factor in the decision to hire as long as the obese person could adequately perform the job after reasonable accommodations had been made by the employer.<sup>105</sup>

Even though employers would be prohibited from discriminating on the basis of obesity, prospective employees would have to litigate to determine if obesity was the reason for their not being hired. Each case would also require proof of whether or not reasonable accommodations had been made for the job applicant.<sup>106</sup> These requirements place a heavy burden on prospective employees to prove that they were not hired because the employer perceived that their obesity would impair their job performance. Employees would also have to show that the employer could have made reasonable accommodations for them.<sup>107</sup>

The law review commentator recommends that all victims of weight-based employment discrimination be afforded protection under federal and state civil rights laws, that the statutes exclude non-work-related factors as criteria for employment-related decisions, and that employees and employment applicants be considered on merit rather than on any irrelevant criterion such as weight.<sup>108</sup> The commentator

further urged that obese persons be protected in the same manner as other protected classes.<sup>109</sup>

### Conclusion

An estimated 25% of Americans are obese. Many in our society regard them as "lazy," "stupid," "ugly," and lacking in discipline despite the consistent findings by medical experts that most individuals have little control over their body weight. Obese individuals have a condition that is not tolerated in our society. As a result, they are discriminated against socially and in the job market. Frequently, these individuals are denied employment, promotions, and raises unrelated to factors of competence.

With the knowledge that physiological factors may account for obesity and dispelling typical stereotypes that all obese individuals lack discipline, obese workers are fighting back on the federal and state levels. Until recently, federal prohibition of employment discrimination has been concentrated in areas unrelated to the obese. Although an important segment of the workforce, the obese have been virtually ignored. The recent burgeoning of interest in weight-based employment discrimination, albeit in a limited way, is significant in light of the intense concern over employment discrimination that has occurred within the past 15 years.

It is possible that we are on the threshold of significant changes as a result of the *Cook* decision and its application to the Rehabilitation Act of 1973. With the *Cook* decision, no longer is the employer able to hide behind the stereotypes and generalizations directed at the morbidly obese. Instead, the *Cook* case imposes an obligation on certain employers not to discriminate against the morbidly obese in an actual or a "perceived" manner. As new lawsuits challenging weight-based employment discrimination emerge, the legislatures and the courts will be pressured to correct this injustice just as they did the prejudices against racial minorities, women, and the underprivileged.

Two legal concepts are emerging to support this discrimination challenge. One argument is that obesity is a handicap protected by state and federal laws that prohibit discrimination against the handicapped. The other argument relies on a civil rights theory that makes weight a protected class under state and federal civil rights laws. While it is true that the morbidly obese individual may be protected by handicap laws, protection is not so clear for overweight or mildly or moderately obese individuals. Indeed, flight attendants are routinely suspended or fined for being over height/weight charts, yet they cannot use handicap statutes for protection. Most recently, USAir, in a civil rights action based on sex discrimination, became the latest airline to drop its

weight standards for flight attendants, requiring a performance test to establish flight attendants' agility and maneuverability.<sup>110</sup> Workplace discrimination against the obese has been well documented; yet in the current wave in political correctness, the 1990's could be the decade that exhibits extreme sensitivity to discrimination faced by the obese.

This article argues that weight, like race and gender, is almost always an illegitimate employment criterion and that it is frequently used to make decisions based on personal dislike or prejudicial assumptions rather than merit. Two proposed actions could possibly protect victims of weight-based employment discrimination: First, victims might try framing a civil rights action based on the premise that victims of weight discrimination are also members of other protected classes and may find protection under race-, sex-, or age-discrimination statutes. Civil rights laws reject any point of view that encourages innate inferiority and reflect a commitment to the principle that competition for jobs or opportunities should be based on individual merit. Second, in initiating weight-based employment-discrimination suits, the morbidly obese could try to gain general protection under handicap discrimination laws.

The closing paragraph of the *Cook* decision signals a warning to all employers that weight-based employment discrimination will not be tolerated. The court concluded:

In a society that all too often confuses "slim" with "beautiful" or "good," morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences.<sup>111</sup>

#### ENDNOTES

<sup>1</sup> "U-Haul Penalizing Fat Employees," NAAFA NEWSLETTER, Vol.XIX, July 1990, p.1.

<sup>2</sup> *Bonnie Cook v. State of Rhode Island Department of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir.1993).

<sup>3</sup> THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, 15th edition, 1987, p.950.

<sup>4</sup> Tierney, McPhee, Papadakis, CURRENT MEDICAL DIAGNOSIS & TREATMENT, (1994),p.1036.

<sup>5</sup> See MERCK MANUAL, *supra* at note 3,951.

<sup>6</sup> *Id.* at 951-952.

<sup>7</sup> *Id.* at 951.

<sup>8</sup> "Experts say dieting may cause obesity," CHICAGO TRIBUNE, September 21, 1993, p.11.

<sup>9</sup> See Current MEDICAL DIAGNOSIS AND TREATMENT *supra* at note 4, p.1036.

<sup>10</sup> Charles B. Claman, ed., THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE (1989).

<sup>11</sup> G. Kolata, "The Burdens of Being Overweight: Mistreatment and Misconceptions," THE NEW YORK TIMES, November 22, 1992, p.38.

<sup>12</sup> Donna Ciliska, BEYOND DIETING, 1990, p.16.

<sup>13</sup> The National Association to Advance Fat Acceptance, Inc. (NAAFA) is an advocacy group formed in Sacramento, California with over 4,000 members nationwide.

<sup>14</sup> "Fat is a Big Issue," THE GUARDIAN, December 10, 1993, p.15.

<sup>15</sup> Albert J. Stunkard and Thorkild Sorensen, "Obesity and Socioeconomic Status - A Complex Relation," 329 THE NEW ENGLAND JOURNAL OF MEDICINE, 1036, 1037, September 30, 1993.

<sup>16</sup> *Id.* at 1036.

<sup>17</sup> Steven Gortmaker et al., "Social and Economic Consequences of Overweight in Adolescence and Young Adulthood," 329 THE NEW ENGLAND JOURNAL OF MEDICINE, 1008,1012, September 30, 1993.

<sup>18</sup> *Id.* at 1010.

<sup>19</sup> *Id.* at 1011.

<sup>20</sup> Rothblum, Brand, Miller, Oeijen, "Summary of the Results of the NAAFA Survey on Employment Discrimination", NAAFA (Unpublished summary) Fall 1987, p.6-11.

<sup>21</sup> *Id.* at 6-13.

<sup>22</sup> *Id.* at 6-11.

<sup>23</sup> Kolata, Gina, "The Burdens of Being Overweight: Mistreatment and Misconceptions," THE NEW YORK TIMES, November 22, 1992, p.38.

<sup>24</sup> *Id.*

<sup>25</sup> Comments, "Employment Discrimination Overweight Individuals: Should Obesity be a Protected Classification?" 30 SANTA CLARA L. REV. 951,959 (1990).

<sup>26</sup> Comments, "Employment Discrimination Against the Overweight," 15 U. MICH.J.L.R.337,340-341, Winter 1982.

<sup>27</sup> "Fair Employment Practices," BUREAU OF NATIONAL AFFAIRS, 1992, p.421:852.

<sup>28</sup> The New York State Court of Appeals in *State Division of Human Rights v. Xerox Corporation*, 65 N.Y.2d213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985), virtually stands alone in holding that obesity is a handicap. The plaintiff, Catherine McDermott, applied for a position as a systems consultant with the Xerox Corporation. She was accepted for employment subject to a physical examination. Because Ms. McDermott was 5'6" and weighed 249 pounds, the examining physician found that she had the "disease" of "active gross obesity." On this finding alone, the examining physician concluded that Ms. McDermott was medically unacceptable for employment. The company's physician concurred. When Ms. McDermott inquired about the reason for not being hired, she was informed that she was rejected solely because of her obesity.

At the Human Rights Appeal Board Hearing, Xerox officials said that they did not refuse Ms. McDermott's employment because of a present disability, but because of a "statistical likelihood" that her obese condition would produce future impairments. The company argued that people "with such conditions are not disabled within the meaning of the statute". Ms. McDermott testified that she had always been overweight and that it had never prevented her from performing her job. She stated further that she fully performed other jobs similar to the one originally offered by Xerox. The Commissioner upheld Ms. McDermott's position and concluded that Xerox had discriminated against Ms. McDermott on the basis of a disability unrelated to her employment, in violation of the

Human Rights Law. However, the Human Rights Appeals Board reversed and dismissed the complaint. The Board held that "being overweight without proof of any impairment (was) not a disability covered by the statute." The Board noted further that Ms. McDermott's condition was a mutable and voluntarily induced condition unrelated to a medical or physiological disorder.

On appeal, the Appellate Division reversed the holding of the Board, whereupon Xerox appealed to the New York Court of Appeals. The Court of Appeals affirmed the Appellate Division's ruling, holding that obesity is a disability as statutorily defined; therefore, Xerox could not refuse Ms. McDermott's employment application on that basis regardless of her mutable and voluntary condition. The New York Court of Appeals held that an employer cannot deny employment to persons with disabilities because of any actual or perceived "undesirable effect the person's employment may have on disability or life insurance programs." It should be noted that the Court took a very liberal interpretation of the statute, claiming that legislative history indicated a legislative intent to restrict employers from refusing to hire individuals who are capable of performing a job mainly because they have a voluntary condition.

<sup>29</sup> *Philadelphia Electric Company, Petitioner v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission and Joyce English Respondents*, 68 Commonwealth Ct. 212, 1982.

<sup>30</sup> *Id.* at 215.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 225.

<sup>33</sup> *Id.* at 228.

<sup>34</sup> *Greene v. Union Pacific Railroad Co.*, 548 F. Supp.3 (1981).

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Cassista v. Community Foods, Inc.*, 5 Cal.4th 1050, 856 P.2d 1143, 22 Cal. Rptr.2d 287 (1993).

<sup>38</sup> *Id.* at 1053, 856 P.2d 1144, 22 Cal. Rptr.2d 288.

<sup>39</sup> *Id.*, 856 P.2d 1145, 22 Cal. Rptr.2d 289.

<sup>40</sup> *Cassista v. Community Foods, Inc.*, 10 Cal.Rptr.2d 98,106,(Cal. App.6 Dist., 1992).

<sup>41</sup> *Id.* at 104.

<sup>42</sup> *See Cassista supra* note 46 at 1056, 856 P.2d 1146, 22 Cal. Rptr.2d 290.

<sup>43</sup> *Id.* at 1059, 856 P.2d 1153, 22 Cal. Rptr.2d 297.

<sup>44</sup> *Id.* at 1056, 856 P.2d 1146, 22 Cal. Rptr.2d 290.

<sup>45</sup> *Id.* at 1057, 856 P.2d 1147- 1149, 22 Cal. Rptr.2d 292-293.

<sup>46</sup> *Id.* at 1058, 856 P.2d 1150, 22 Cal. Rptr.2d 294.

<sup>47</sup> *Id.* at 1057, 856 P.2d 1148, 22 Cal. Rptr.2d 292.

<sup>48</sup> *Id.* at 1059, 856 P.2d 1153, 22 Cal. Rptr.2d 297.

<sup>49</sup> *Id.*

<sup>50</sup> "Standard Set in Fat Bias Suits: Scales of Justice Tipped to Business," WASHINGTON TIMES, September 4, 1993, p.A1.

<sup>51</sup> Rehabilitation Act of 1973, Sect.504, Pub. L. No.93-112, 87 Stat.355, 29 U.S.C. Sec.701-796 (Supp. 1993).

<sup>52</sup> *See Cook supra* at note 2, 22.

<sup>53</sup> *Id.* at 20,21.

<sup>54</sup> *Id.* at 22.

<sup>55</sup> *Id.* at 23.

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 25.

<sup>59</sup> *Id.* at 23.

<sup>60</sup> *Id.* at 22 fn.4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 27.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 28.

<sup>66</sup> Michigan Compiled Laws, Chapter 37, Civil Rights, Elliott-Larsen Civil Rights Act (1992).

<sup>67</sup> *Id.* at M.C.L. 37.2202. Section 202.(1)(a).

<sup>68</sup> *Id.* at M.C.L. 37.2202. Section 202.(1)(b).

<sup>69</sup> *Id.* at M.C.L. 37.2203, Section 203 and MCL 37.2204, Section 204.

<sup>70</sup> "Michigan's Civil Rights Act to Be Tested," NAAFA NEWSLETTER, October/November 1993, vol. XXIV, p.6.

<sup>71</sup> *Id.* at M.C.L. 37.2206, Section 605.(1).

<sup>72</sup> *Id.* at M.C.L. 37.2206, Section 605.(2)(i)

<sup>73</sup> *Id.* at M.C.L. 37.2206. Section 605.(2)(j)

<sup>74</sup> District of Columbia, Human Rights Act, Section 1-2501 et seq. (1993).

<sup>75</sup> District of Columbia Human Rights Act, Section 1-2512 (1993).

<sup>76</sup> District of Columbia Code, Section 43-1840 (1993).

<sup>77</sup> Santa Cruz Municipal Code, Prohibition Against Discrimination, Sections 9.83.01, 9.83.03(1), (1992).

<sup>78</sup> *Id.*

<sup>79</sup> Santa Cruz Municipal Code, Section 9.83.12(2)(b)(1992).

<sup>80</sup> 1993-1994 Regular Sessions New York State Assembly A.3484 and S.6382.

<sup>81</sup> *Id.* A.3484, Section 296(a).

<sup>82</sup> *Id.* A.3484, Section 296(b)(c)

<sup>83</sup> 1993-1994 Regular Sessions New York State Senate Memorandum to S.6382.

<sup>84</sup> 72nd Regular Session Texas House of Representatives, H.B.#1445, Section 1.04(d).

<sup>85</sup> *Id.* H.B.#1445, Section 1.04(e).

<sup>86</sup> 73rd Regular Session Texas House of Representatives, H.B. #1560. Telephone interview with Linda Hymans, Administrative Assistant to Representative Greenberg, indicated that this bill died in Committee and Representative Greenberg is not currently planning to reintroduce it.

<sup>87</sup> *Id.* H.B.#1560, Section 5.01(1),5.02,5.03.

<sup>88</sup> *Id.* H.B.#1560, Section 1 (d) lines 8-14.

<sup>89</sup> "ADA May Cover Very Fat People EEOC Files Brief in Cook Case," NAAFA NEWSLETTER, Vol.XXIV, December 1993/January 1994, p.1.

<sup>90</sup> *Id.*

<sup>91</sup> Comment, "The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination," 29 U.C.L.A. L. REV. 947 (1982).

<sup>92</sup> *Id.* at 970.

<sup>93</sup> *Id.* at 967.

<sup>94</sup> Americans with Disabilities Act of 1990, Pub. L. No.101-336, 104 Stat.327,330 (Codified as 42 U.S.C.12101 (1990).

<sup>95</sup> See NAAFA NEWSLETTER *supra* note 97 at 1.

<sup>96</sup> Bill McAllister, "Obesity Can Be a Disability,EEOC Says," WASHINGTON POST, November 13, 1993, p.A5.

<sup>97</sup> See NAAFA NEWSLETTER *supra* note 97 at 1.

<sup>98</sup> *Id.*

<sup>99</sup> See New York State Assembly *supra* note 88.

<sup>100</sup> See Johnson, "Flight Attendants at Pan Am Settle a Weighty Matter," WALL STREET JOURNAL, 1987 and McEvoy, Sharlene A., "Fat Chance: Employment Discrimination Against the Overweight," 43 LAB.L.J.3,8-9,(1992).

<sup>101</sup> See Comments, SANTA CLARA L. REV., *supra* note 25 at 951.

<sup>102</sup> *Id.* at 970.

<sup>103</sup> *Id.*

<sup>104</sup> 42 USC Section 12101(1990).

<sup>105</sup> See Comments, SANTA CLARA L.REV., *supra* note 25 at 970.

<sup>106</sup> *Id.* at 971.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 976.

<sup>110</sup> Tamar Lewin, "USAir Agrees to Lift Rules On the Weight of Attendants," THE NEW YORK TIMES, April 8, 1994, A12. USAir indicated it would place a moratorium on its weight chart for three years and substitute a performance test requiring flight attendants that they could move comfortably down the aisle and fit quickly through the cabin emergency windows on USAir's smallest jets. Under prior standards a 5'3" female flight attendant in her twenties could weigh no more than 130 pounds. In ten year increments, a small addition of weight could be added. If attendants failed to meet these requirements, they were either not hired or suspended. Flight attendants asserted that it was a form of sex discrimination to require them to meet weight requirements as a condition for holding their jobs.

<sup>111</sup> See Cook *supra* at note 2, 28.