

ARTICLE

**GUT CHECK: WHY OBESITY IS NOT A DISABILITY UNDER
TENNESSEE LAW AND HOW THE LEGISLATURE CAN
ADDRESS THE OBESITY EPIDEMIC**

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*“A lean compromise is better than a fat lawsuit.”
- English Proverb¹*

I. INTRODUCTION

“Bigger is better.” This old adage rings true for paychecks and televisions but not pant size. Now, some lawmakers and courts seek to protect obesity under disability law. Obesity currently plagues 35.7% of Americans² and 29.2% of Tennesseans,³ and it is growing at epidemic rates.⁴ However, the “bigger-is-better” argument rings false in this instance considering obesity’s severe complications and side effects. In the same vein, more people are also considering the consequences of obesity in the workforce, in health care, and in the medical profession. Indeed, tackling the issue of obesity demands sympathy because of the stigma and stereotypes associated with the condition, including the thoughts that obese people

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¹ KATHRYN ZULLO, *THE NEW LAWYER’S WIT AND WISDOM* 184 (Bruce Nash & Allan Zullo eds., Running Press 2d ed. 2001).

² *Adult Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/adult.html> (last reviewed Aug. 16, 2013). As of 2011, the CDC has made changes to its formula for calculating obesity. *Id.* The CDC has stated that because of these changes, estimates of obesity prevalence from 2011 forward cannot be compared to previous years. *Id.*

³ *Id.*

⁴ *The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cdctv/ObesityEpidemic/> (last reviewed Nov. 22, 2013).

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are lazy, unintelligent, or lacking in self-respect.⁵ In a society that is highly focused on appearance, the outlook for combating these stereotypes seems gloomy.⁶ However, while compassion is a must, legal protection under disability law is not.

More and more courts are having to decide complex legal issues regarding obesity as a disability. Consider the plaintiff Toni, a 5-foot, 4-inch woman who weighs 305 pounds, whom the defendant declined to hire chiefly based on a concern about her weight.⁷ Toni's scenario is one of

⁵ Michael L. Klassen et al., *The Role of Physical Appearance in Managerial Decisions*, 8 J. BUS. & PSYCHOL. 181 (1993); see also Michelle R. Hebl et al., *Perceptions of Obesity across the Lifespan*, 16 OBESITY 46, 46 (2008) (concluding that "this research shows prevalent and consistent patterns of obesity stereotyping across the lifespan"). Hebl's study viewed the extent to which individuals ages 18-77 stereotyped obese people in 20-, 40-, and 60-year olds. *Id.* Women weighing more were more negatively rated on all criteria examined in the study. *Id.* Interestingly enough, the CDC has found no significant relationship between obesity and education among men. *Adult Obesity Facts*, *supra* note 2. However, among women there is a correlation—those with college degrees are less likely to be obese than women with less education. *Id.*

⁶ See M. Neil Browne et al., *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 8 (2010).

⁷ *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143 (Cal. 1993). In *Cassista v. Community Foods, Inc.*, Toni Cassista sued an employer, a health food store, which denied her a job because of her weight. *Id.* at 1143. The job duties included many physical activities such as standing long hours to run the cash register, stocking thirty- to fifty-pound bags of grain, carrying fifty-pound boxes of produce, retrieving groceries from the warehouse, and carrying large crates of milk. *Id.* The Supreme Court of California ultimately found that medical evidence must be shown that excessive weight was the result of a physiological condition affecting one or more basic bodily systems and limiting a major life activity. *Id.* at 1149. Here, the plaintiff's weight discrimination claim was denied because she was unable to produce medical evidence. *Id.* at 1154.

the most common among “weight discrimination” claims in courts today,⁸ and about one-third of Tennesseans could theoretically share Toni’s plight.⁹ At first glance, one likely feels sympathetic for Toni, as is appropriate. However, whether the law should afford her a remedy under a disability statute requires a different analysis. In deciding weight discrimination cases, where clear statutory guidance is often lacking, the court must balance the state’s interests, the plaintiff’s interests, and the employer’s interests. In doing so, the court must look at other disabled plaintiffs and compare Toni—which is where the problem lies. Is Toni’s obesity a disability similar to other disabilities, like blindness or deafness? Is obesity preventable unlike other qualified disabilities? How do we determine who suffers from this nebulous condition? Different jurisdictions employ different methods when considering whether obesity should be a disability.¹⁰ Often, judicial instinct directs a court as to whether the obese merit protection under disability law.¹¹ However, in some instances, explicit statutory language guides the court.¹²

The State of Tennessee has yet to make a clear determination on whether Toni would prevail on a disability claim under the Tennessee Human Rights Act or the Tennessee Disability Act, which are very similar to the

⁸ Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & L. 209, 225–26 (2010).

⁹ *Adult Obesity Facts*, *supra* note 2. Nearly all lawsuits based on weight discrimination are filed in the context of employment discrimination. Browne, *supra* note 6, at 10–11; Perla Trevizo, *Tennessee Human Rights Commission Battling New Biases*, CHATTANOOGA TIMES FREE PRESS (Feb. 22, 2012), <http://www.timesfreepress.com/news/2012/feb/22/human-rights-commission-battling-new-biases/>.

¹⁰ Milena O’Hara, Note and Comment, “Please Weight to Be Seated”: *Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations*, 17 WHITTIER L. REV. 895, 926 (1996).

¹¹ *Id.*

¹² *Id.*

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Americans with Disabilities Act. However, with the alarming obesity statistics in Tennessee, the state's legislature and the courts will inevitably be compelled to answer this single question for the first time: should Tennessee consider obesity a disability? If Tennessee courts ultimately decide that obesity is a disability, Toni's claim prevails. Superficially, Toni's victory in court would appear to be promising for Toni and other plaintiffs similarly situated; however, this result leaves other aspects of the obesity epidemic legally unaddressed and quickly dismissed at an unfairly high cost to Toni's employer, health care provider, and other truly disabled plaintiffs.

Various state approaches to disability law focus on different elements, definitions, symptoms, and causes of obesity when considering whether obesity is a disability.¹³ Some states even focus on the same variables but reach different conclusions.¹⁴ For the most part, disability statutes seem to echo each other with one main purpose: to protect disabled persons from discrimination. While this is a noble goal indeed, it is one that requires courts to do more than simply study relevant statutory law. In each case, the court adopts an attitude of willingness or unwillingness to expand the protections offered by disability statutes.¹⁵ This is not unlike traditional areas of disability law and other protected areas such as race and gender.¹⁶ However, because most statutes do not explicitly mention obesity,

¹³ *Id.* at 926 (explaining how some courts rely on different methods of proof for weight discrimination claims, such as requiring proof of the diagnosis of an underlying condition, and some do not, possibly allowing recovery on the perceived disability theory or focusing on whether the plaintiff's obesity was voluntary or mutable).

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *Id.*

courts decide each case on a very fact-specific basis, leading to an uncertain future for this issue.¹⁷

A national debate has ensued as to whether courts and legislatures should consider obesity a disability. Currently, neither Tennessee statutory law nor case law has specified whether obesity is a disability under the Tennessee Human Rights Act or the Tennessee Disability Act. In this Note, I argue that obesity does not qualify as a disability in Tennessee. To show why, this Note will show how obesity is inherently different from other protected disabilities. The nature of obesity, however, requires the legislature to use its influence to combat obesity in areas where legislation can be effective. Part II provides background on federal and state law regarding disability law generally and how it currently affects weight discrimination law specifically. Part III explains the legal argument for excluding obesity as a disability under Tennessee state law. Part IV offers a proposal for the legislature to address obesity outside of disability statutes. Part IV also describes several of the benefits of adopting this proposal. Part V offers brief closing remarks.

II. BACKGROUND ON FEDERAL AND TENNESSEE DISABILITY LAW

Perhaps the most problematic shortcoming of this area of disability law is the amorphous definition of “disability.” Since the inception of the Americans with Disabilities Acts in 1990, courts have struggled to pinpoint what constitutes a protected “disability.” Further, the nebulous definition of “disability” adds confusion when determining whether the definition of “obesity” fits within that definition. Understanding the legal landscape upon which these definitions developed is important to

¹⁷ *Id.*

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understanding why obesity simply does not render an individual disabled, namely under the Tennessee Human Rights Act or the Tennessee Disability Act.

A. Defining “Disability”

i. Federal Disability Law

Before the landmark Americans with Disabilities Act (ADA) was passed, several laws existed—most importantly, the Rehabilitation Act of 1973.¹⁸ Section 504 of the Rehabilitation Act served as a “major conceptual foundation for the ADA.”¹⁹ Even with the Rehabilitation Act and other federal laws designed to protect disabled citizens, discrimination unfortunately continued.²⁰

In the decades between the civil rights era and the enactment of the Americans with Disabilities Act in 1990, complainants, legislators, and the public battled back and forth on whether the Civil Rights Act (CRA) should cover disabilities.²¹ Riding on the coattails of the civil rights era, the concept of protection for the disabled gained regard.²² The ongoing discrimination demanded protection for individuals with disabilities, and a Congress-appointed council drafted what would eventually become the ADA.²³

¹⁸ 29 U.S.C. § 701 (2006).

¹⁹ BUREAU OF NAT’L AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 9-11 (1990) [hereinafter PRACTICAL AND LEGAL GUIDE].

²⁰ U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983).

²¹ See O’Hara, *supra* note 10, at 926.

²² PRACTICAL AND LEGAL GUIDE, *supra* note 19, at 9-11 (explaining that the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, or national origin, “was a major inspiration for the concept of protection for people with disabilities”).

²³ *Id.* at 28-30.

Signed by President Bush in 1990, the ADA became the first major response to disability discrimination.²⁴ The ADA responded to decades of attempts to end discrimination against disabled individuals.²⁵

The ADA's passage was prompted by a statistic of forty-three million disabled Americans.²⁶ Ultimately, the ADA adopted most of the Rehabilitation Act's definitions, including "disability."²⁷ While the ADA covers millions and, thus, a variety of conditions, Congress never provided an exhaustive list of what it considered a "disability."²⁸ Congress did, however, provide the following language for what constituted a protected "disability": "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such an impairment."²⁹ The ambiguity in this definition is clear, and the task of interpreting it was left to courts.³⁰

Congress passed the ADA to provide a "comprehensive mandate for the elimination of discrimination against individuals with disabilities."³¹

²⁴ See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006); see also 1 BERNARD D. REAMS ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336, at vii (1992).

²⁵ 42 U.S.C. §§ 12101-12213 (2006); see also PRACTICAL AND LEGAL GUIDE, *supra* note 19, at 9-11.

²⁶ Browne, *supra* note 6, at 30.

²⁷ *Id.* at 63. Compare §§ 12101-12213 with 29 U.S.C. § 701 (2006). The ADA uses the term "disabled," as opposed to the Rehabilitation Act's "handicap," because the former is less stigmatizing. S. REP. NO. 101-116, at 35 (1989).

²⁸ See §§ 12101-12213.

²⁹ *Id.* § 12102(1).

³⁰ Browne, *supra* note 6, at 31.

³¹ 42 U.S.C. § 12101(b)(1). The ADA spans five titles, including employment, public entities, public accommodations, telecommunications, and miscellaneous. *Id.* §§ 12101-12213.

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During the ADA bill hearings, cancer patients, blind persons, and quadriplegics—persons traditionally considered disabled—gave personal testimony to exemplify the bill’s merit to Congress.³² Building upon these initial purposes, Congress enacted amendments to the ADA in 2009, the Americans with Disabilities Act As Amended (ADAAA), to offer courts more discretion when deciding disability claims.³³ Congress instructed courts to use the definition of “handicapped individual” under the broader definition that appears in the Rehabilitation Act of 1973³⁴ when deciding what constituted a disability under the ADA.³⁵ Congress further urged courts to broaden the scope of what was included under “substantially limits” and “major life activities,” effectively making it easier for plaintiffs to prove their disabilities.³⁶ Although Congress broadened the scope of these phrases, it never provided a definition for “substantially limits.”

In drafting the ADAAA, Congress replaced the Supreme Court’s narrow interpretation of the definition of “disability” and “substantially limits,” finding the Court’s

³² See, e.g., *Hearing on H.R. 2273 Before the H. Comm. on Educ. and Labor and the S. Comm. on Labor and Human Res.*, 100th Cong. 74–75 (1988) (statement of Judith Heumann, World Institute on Disability). Heumann explained how her handicap placed many obstacles in her life, including a denial of admission to a local public school because her wheelchair made her a “fire hazard” and an attempt by her high school principal to prevent her from going on stage to accept an award at graduation because she was in a wheelchair.

³³ 42 U.S.C. §§ 12101-12213 (2011) (amended 2008).

³⁴ 29 U.S.C. § 705(9)(A) (2006). Note that because the ADA’s definition of disability is identical to the Rehabilitation Act’s definition, cases arising under either statute generally follow the same precedent. See 29 U.S.C. § 701.

³⁵ 154 CONG. REC. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Reid).

³⁶ *Id.*

standard too high.³⁷ Accordingly, the ADA provides a non-exhaustive list of what constitutes a major life activity, including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³⁸

However, Congress did not provide a comprehensive list of “disabilities,” and federal courts take a variety of approaches when determining what constitutes a “disability.” Some courts require a medically diagnosable condition to be shown before calling a condition a “disability.”³⁹ Still, other courts have found that mutable characteristics cannot constitute a disability.⁴⁰ Further, courts have also found that when the plaintiff’s

³⁷ *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010).

³⁸ 42 U.S.C. § 12102(2)(A) (2006).

³⁹ *See, e.g., EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (holding that obesity, absent a physiological condition, was simply a physical characteristic and not a physiological disorder in itself).

⁴⁰ *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984) (finding that a bodybuilder’s condition was self-inflicted, which rendered his claim for weight discrimination unsuccessful); *Dale v. Wynne*, 497 F. Supp. 2d 1337, 1342 (M.D. Ala. 2007) (holding that obesity is a voluntary condition and thus not a disability under Alabama law); *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding that because obesity “was not an immutable condition such as blindness or lameness,” it is not a disability). Several state courts have also found that federal interpretation of the ADA precluded plaintiffs from recovering when the condition was mutable. *See, e.g., Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1152 (Cal. 1993) (finding that obesity was a voluntary condition and thus not a disability under California disability law); *Mo. Comm’n on Human Rights v. Sw. Bell Tel. Co.*, 699 S.W.2d 75, 79 (Mo. Ct. App. 1985) (holding that because plaintiff failed to take advantage of treatment for her known hypertension and obesity, she could not get the benefit of disability law).

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inability to work is of “limited duration,” she is not disabled under the ADA.⁴¹ In the same vein, “intermittent, episodic impairments” are not disabilities.⁴² Unique facts and circumstances in each case have led to a variety of court holdings without any cohesive jurisprudence.⁴³ Federal interpretation of disability law often guides state courts’ decisions. Therefore, this lack of cohesion in federal courts renders many difficulties for state courts and legislatures in determining what qualifies as a “disability” in their respective states.

ii. Tennessee Disability Law

In 1978,⁴⁴ the Tennessee General Assembly enacted the Tennessee Human Rights Act⁴⁵ (THRA) to provide protection for various forms of discrimination, including race, creed, color, religion, sex, age, or national origin. Shortly after the enactment of the THRA, the disabled became a protected category when the legislature enacted the Tennessee Disability Act⁴⁶ (TDA)

⁴¹ See, e.g., *McDonald v. Pennsylvania*, 62 F.3d 92, 96 (3d Cir. 1995).

⁴² *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

⁴³ O’Hara, *supra* note 10, at 929-30.

⁴⁴ TENN. CODE ANN. § 8-50-103 (2012); Trevizo, *supra* note 9.

⁴⁵ TENN. CODE ANN. §§ 4-21-101 to -1004 (2012).

⁴⁶ Formally known as the Tennessee Handicap Act. Effective April 7, 2008, the Tennessee Handicap Act was renamed the Tennessee Disability Act. See TENN. CODE ANN. § 8-50-103(a) (2012). Notably, this change was made after the Americans with Disabilities Act was amended in 2008. Unlike the changes made to the ADA that included amendments in the statute’s language, the Tennessee Disability Act was not substantively changed. This is evidence that shows the Tennessee General Assembly was updating the name of the statute but did not mean to change the language of the statute in accord with the meanings found in the ADA.

(collectively, “Acts”).⁴⁷ Although the THRA prohibits discrimination based on “race, color, creed, religion, sex, age, disability, familial status and national origin,” the TDA provides a mechanism for plaintiffs facing discrimination based on a disability.⁴⁸ That is, a plaintiff bringing a disability discrimination claim will sue under the TDA. However, the TDA relies on the principles and purposes set forth in the THRA.⁴⁹ The legislature listed its purposes for creating the Acts explicitly in the THRA itself: from the purpose of safeguarding individuals from discrimination based on race, creed, and sex to the purpose of making available to the state a citizen’s full productive capacity in employment.⁵⁰ More generally, the Acts seek to preserve the “public safety, health and general welfare” of the state.⁵¹

Generally, discrimination claims under the TDA are comparable to ADA claims, and courts *may* evaluate them using federal cases interpreting the ADA as guidance.⁵² However, the TDA is not identical to the ADA.⁵³ Although

⁴⁷ The TDA prohibits discrimination “against any applicant for employment based solely upon any physical, mental or visual handicap of the applicant, unless such handicap to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.” § 8-50-103.

⁴⁸ *Id.*; *Forbes v. Wilson Cnty. Emergency Dist.* 911 Bd., 966 S.W.2d 417, 420 (Tenn. 1998) (finding that the TDA embodies the principles and definitions of the THRA).

⁴⁹ *Forbes*, 966 S.W.2d at 420.

⁵⁰ TENN. CODE ANN. § 4-21-101(3), (5).

⁵¹ *Id.* § 4-21-101(a)(7).

⁵² *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000).

⁵³ *See* 42 U.S.C. § 12112(b)(5)(A) (2006); *Roberson v. Cendant Travel Servs., Inc.*, 252 F. Supp. 2d 573, 583 (M.D. Tenn. 2002) (noting that the TDA elements are very similar to the ADA’s but do not require employers to make “reasonable accommodations” for disabled employees).

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the TDA prohibits discrimination in the employment context based solely on any physical, mental, or visual disability (unless the condition prevents the applicant from performing the duties required by the position), the TDA does not require the employer to furnish a “reasonable accommodation” like the ADA does.⁵⁴ The Tennessee Court of Appeals has repeatedly noted—albeit in unpublished opinions⁵⁵—that the TDA lacks the “reasonable accommodation” element. However, the Tennessee General Assembly has yet to amend the statute and thus make Tennessee statutory law more similar to the ADA.⁵⁶

Identical to the ADA, the TDA defines “disability” as: “(i) a physical or mental impairment which substantially limits one (1) or more of such person’s major life activities; (ii) a record of having such impairment; or (iii) being regarded as having such impairment.”⁵⁷ The Tennessee Supreme Court has found that “an impairment that may disqualify one from working at a job of choice does not limit a major life activity.”⁵⁸ For example, the court found that the plaintiff in *Barnes v. Goodyear Tire & Rubber Co.* did not prove that his Bell’s Palsy “substantially limited a major life activity” even though it prevented him from

⁵⁴ 42 U.S.C. §§ 12101-12102.

⁵⁵ See, e.g., *Anderson v. Ajax Turner Co.*, No. 01A01-9807-CH-00396, 1999 WL 976517, at *3 (Tenn. Ct. App. Oct. 28, 1999) (finding that the TDA does not require an employer to provide disabled employees with a “reasonable accommodation”).

⁵⁶ TENN. CODE ANN. § 8-50-103 (2012).

⁵⁷ *Id.* § 4-21-102(3)(A)(i)-(iii) (2012); see also 42 U.S.C. § 12102 (2006).

⁵⁸ *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000).

working at Goodyear because he was still able to work at a broader class of jobs.⁵⁹

Even though the ADA and Tennessee disability statutes are not identical, courts have consistently found that the Acts require them to at least consider federal law when reaching a decision.⁶⁰ In doing so, these courts have relied solely on the first purpose listed in the THRA: to “[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Act[s] . . . , the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967.”⁶¹ Notably, none of the federal legislation mentioned in this purpose covers disabilities. Thus, the courts are using federal law to decide state disability issues without explicit—or even implicit—direction to do so. At least one court has declined to follow federal law when doing so would thwart the purposes of the THRA.⁶²

B. The Obesity Epidemic and Disability Law

Like the term “disability,” pinpointing a single definition, cause, or treatment for “obesity” proves difficult. This section discusses general medical definitions and then moves to federal law and state disability law regarding obesity. Offering little guidance, a dictionary defines “obesity” as “very fat.”⁶³ In trying to understand

⁵⁹ *Id.* at 704. However, the court still found defendant-employer liable based on other grounds unrelated to the scope of this Note.

⁶⁰ *Booker v. Boeing Co.*, 188 S.W.3d 639, 647 (Tenn. 2006); *Barnes*, 48 S.W.3d at 707; *Spicer v. Beaman Bottling Co.*, 937 S.W.2d 884, 888 (Tenn. 1996).

⁶¹ TENN. CODE ANN. § 4-21-101(a)(1).

⁶² *Booker*, 188 S.W.3d at 647.

⁶³ OXFORD AMERICAN DESK DICTIONARY AND THESAURUS 567 (2d ed. 2001).

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this amorphous condition, the medical community and courts have offered guidance as well.

i. Medical Definitions of Obesity and Its Causes

A more precise indication used by experts is the Body Mass Index (BMI), which indicates overweightness and obesity more precisely.⁶⁴ The BMI considers many facets of a person's body, including health, weight, and frame size, to produce a number. This number allows a person to see where he or she falls on a scale indicating if the person is overweight, normal, or underweight. A BMI ranging from 25–29.9 is considered overweight, and a BMI of 30 or greater is considered obese.⁶⁵

Still, other medical professionals use percentages of ideal body weight⁶⁶ to create three categories of obesity.⁶⁷ A person is “mildly obese” if he weighs twenty to forty percent over the ideal body weight.⁶⁸ A person is “moderately obese” if he weighs forty to one hundred percent over his ideal body weight. Finally, a person who weighs more than one hundred percent over his ideal body weight suffers from “morbid” or “severe obesity.”⁶⁹

⁶⁴ MERCK MANUAL OF DIAGNOSIS AND THERAPY 950 (Robert Berkow et al. eds., 15th ed. 1987) [hereinafter MERCK MANUAL 15TH ED.].

⁶⁵ U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERWEIGHT AND OBESITY STATISTICS 1 (2012), <http://win.niddk.nih.gov/publications/PDFs/stat904z.pd>.

⁶⁶ Ideal body weight is a BMI of 18-24.9. MERCK MANUAL HOME HEALTH HANDBOOK, OBESITY (2008), http://www.merckmanuals.com/home/disorders_of_nutrition/obesity_and_the_metabolic_syndrome/obesity.html.

⁶⁷ MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow et al. eds., 16th ed. 1992) [hereinafter MERCK MANUAL 16TH ED.].

⁶⁸ *Id.*

⁶⁹ *Id.*

On an individual level, obesity is directly and indirectly associated with a plethora of other health risks. Obesity-related conditions include heart disease, stroke, Type II diabetes, and certain types of cancer.⁷⁰ Of these conditions, Type II diabetes is most directly linked to obesity.⁷¹ Ninety to ninety-five percent of Type II diabetes cases result from the individual being overweight.⁷² Moreover, obesity is often associated with a variety of other health issues as well, including hypertension, osteoarthritis, sleep apnea, and respiratory problems.⁷³

Morbid obesity is outside of the realm of this Note; however, knowing what constitutes morbid obesity is helpful for understanding what normal obesity is. The Equal Employment Opportunity Commission (EEOC) defined severe, or “morbid,” obesity as 100% over the normal weight for that specific person.⁷⁴ The EEOC

⁷⁰ *Adult Obesity Facts*, *supra* note 2.

⁷¹ *The Coming Diabetic Epidemic*, FOOD MGMT., Dec. 2000, at 18.

⁷² Tara Parker-Pope, *Diabetes: Underrated, Insidious and Deadly*, N.Y. TIMES (July 1, 2008), http://www.nytimes.com/2008/07/01/health/01well.html?_r=0&pagewanted=print. Notably, the Tennessee Court of Appeals in *Davis v. Computer Maintenance Service, Inc.* decided that diabetes was not considered a disability when the plaintiff took insulin or other medication to regulate blood sugar levels. No. 01A01-9809-CV00459, 1999 WL 767597 (Tenn. Ct. App. Sept. 29, 1999). However, the court relied on the United States Supreme Court’s decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which has been preempted by the ADA. *Id.* at *1.

⁷³ NAT’L HEART, LUNG, & BLOOD INST., CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT (1998), http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf, <http://www.cdc.gov/Other/disclaimer.html> [hereinafter CLINICAL GUIDELINES]. Notably, the CDC mentioned that these obesity-related conditions were “some of the leading causes of preventable death.”

⁷⁴ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006).

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considers morbid obesity to be a physiological impairment, i.e. a “disability.” However, prior regulations state that “[b]eing overweight, in and of itself, generally is not an impairment.”⁷⁵ For this premise, the EEOC offered examples of bodybuilding and mild cases of being overweight.⁷⁶

Obesity is generally preventable and mutable, but once an individual becomes *morbidly* obese, complications and treatment are much more rigorous.⁷⁷ Researchers suspect that morbid obesity, unlike normal obesity, may be linked to a recessive gene.⁷⁸ Morbid obesity is very rare, affecting only 0.1% of the population.⁷⁹ Although morbid obesity shares some of the physiological characteristics of regular obesity, the consequences are much more severe.⁸⁰ Additionally, a change in diet and physical activity is usually ineffective at battling morbid obesity, forcing the individual to often resort to surgery.⁸¹

Some courts find that once an individual becomes morbidly obese, his metabolism is permanently dysfunctional, creating a physical impairment.⁸² Individuals who are morbidly obese are more susceptible to hypoventilation, carbon dioxide retention, blood circulatory dysfunctions, hypertension, and endocrine and metabolic complications.⁸³ Unfortunately, even morbidly obese

⁷⁵ See Equal Employment Opportunity Commission Compliance Manual, 2009 WL 4782107 (2009).

⁷⁶ *Id.*

⁷⁷ MERCK MANUAL 16TH ED., *supra* note 67, at 981.

⁷⁸ CLINICAL GUIDELINES, *supra* note 73, at 28.

⁷⁹ MERCK MANUAL 16TH ED., *supra* note 67, at 981.

⁸⁰ *Id.*

⁸¹ *Id.* at 984.

⁸² See, e.g., *Cook v. R.I., Dep’t of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 18 (1st Cir. 1993).

⁸³ TEXTBOOK OF MEDICINE 1378-79 (Paul B. Beeson & Walsh McDermott eds., 15th ed. 1979).

individuals who eventually do return to a normal weight still suffer from the increased risk of premature death and morbidity.⁸⁴ Therefore, regardless of morbid obesity's cause, an individual who is or was morbidly obese bears a permanent physiological impairment sufficient to render his condition a "disability."⁸⁵ Due to the nature of morbid obesity, it is outside the scope of this Note's argument, which only contemplates whether regular obesity is a disability under Tennessee law.

ii. Federal Law on Obesity as a Disability

Prior to the passage of the ADA, federal courts uniformly rejected the idea that obesity was a qualified disability under the ADA.⁸⁶ However, with the passage of the ADA, some federal courts have started to recognize obesity as a disability because the ADA generally includes a broader definition of "disability" than what the ADA originally included.⁸⁷ Absent any federal legislation or a Supreme Court case providing guidance on whether obesity is a disability under the ADA, this area of law is quite unsettled. Some of the more recent federal case law, however, tends to find that obesity is not a disability.⁸⁸

⁸⁴ Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 597-98 (1996).

⁸⁵ *Id.* at 595.

⁸⁶ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-43 (6th Cir. 2006); *Andrews v. Ohio*, 104 F.3d 803, 809-10 (6th Cir. 1997); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d. Cir. 1997).

⁸⁷ *See, e.g., EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011) (holding that the EEOC's interpretation of the new language in the ADA permitted plaintiff to claim obesity as a disability).

⁸⁸ *Watkins Motor Lines, Inc.*, 463 F.3d at 440-43.

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Additionally, a plaintiff may also sue under other statutes, such as the Rehabilitation Act of 1973,⁸⁹ which was used by the plaintiff in *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*.⁹⁰ *Cook* was the first case allowing a plaintiff to win an obesity discrimination claim.⁹¹ Although the court did not rule that obesity was an immutable condition, the court did find the plaintiff's claim valid based on her employer perceiving her as being disabled.⁹²

Regardless, the question still remains as to whether obesity is a disability under federal law. The EEOC has publicly stated that "the law protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity."⁹³ The EEOC,

⁸⁹ 29 U.S.C. § 701 (2006).

⁹⁰ 10 F.3d 17, 28 (1st Cir. 1993). The plaintiff applied for a position with the state's Department of Mental Health, Retardation, and Hospitals (MHRH) but was denied employment after a pre-employment physical found her to be morbidly obese. *Id.* at 20-21. The defendant, MHRH, argued that her obesity would prevent her from helping patients evacuate in an emergency situation and would cause her to miss work. *Id.* at 21. Further, MHRH feared the possibility of Cook filing a workers' compensation claim that would be higher than for employees of a normal weight. *Id.*

⁹¹ The plaintiff, Cook, brought the claim under the Rehabilitation Act because the claim arose from facts taking place before the enactment of the ADA. *Id.* at 20-21. However, because the Rehabilitation Act and the ADA definition for "disability" are identical, the two statutes follow the same precedent. *See* 29 U.S.C. § 701.

⁹² *Cook*, 10 F.3d at 23-24. *Contra Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). In *Tudyman*, a bodybuilder was denied employment as a flight attendant by defendant United Airlines and brought suit based on weight discrimination. *Id.* However, because the plaintiff's weight was found to be voluntary and self-inflicted, the court reasoned that his condition did not fit the definition of "disability" or the purposes of disability statutes. *Id.*

⁹³ Press Release, U.S. Equal Emp't. Opportunity Comm'n, BAE Systems Subsidiary to Pay \$55,000 to Settle EEOC Disability Discrimination Suit (July 24, 2012),

however, did not state whether this also applied to those who are simply obese or overweight as opposed to those who are morbidly obese. However, applying the concept of *expressio unius est exclusio alterius*—the specific inclusion of an item suggests the exclusion of the rest—dictates that the EEOC intentionally excluded obesity, especially considering the alarming statistics on obesity.⁹⁴

Moreover, a trend in federal disability law involving weight discrimination seems to be emerging—that of personal responsibility.⁹⁵ Proponents of greater legal protection for victims of weight discrimination celebrated the *Cook* decision.⁹⁶ However, the area of obesity discrimination is still fresh and undeveloped, leaving room for more interpretation by courts.⁹⁷ A recent case from the Sixth Circuit confirming this trend, *EEOC v. Watkins Motor Lines, Inc.*,⁹⁸ held that an employee's obesity was not a "physical impairment" and not a disability under the ADA because discrimination based on weight is only

<http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm>. Where the plaintiff is morbidly obese, he need not prove an underlying condition is the cause of his obesity to be considered "disabled." *EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011).

⁹⁴ See *Doukas v. Metro. Life Ins. Co.*, No. CIV-4-478-SD, 1997 WL 833134, at *3 (D.N.H. Oct. 21, 1997); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992).

⁹⁵ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-43 (6th Cir. 2006); *Andrews v. Ohio*, 104 F.3d 803, 809-10 (6th Cir. 1997); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997). See generally Matthew A. Glover, *Employment & Disability Law—Americans with Disabilities Act of 1990—The Weight of Personal Responsibility: Obesity, Causation, and Protected Physical Impairments*, 30 U. ARK. LITTLE ROCK L. REV. 381 (2008) (examining recent case law, including *Watkins Motor Lines, Inc.*, and finding that obesity stems from personal responsibility and, thus, is not a protected disability).

⁹⁶ Glover, *supra* note 95.

⁹⁷ *Id.*

⁹⁸ See *Watkins Motor Lines, Inc.*, 463 F.3d at 436.

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actionable if the plaintiff proves an underlying medical condition.⁹⁹

More law is emerging based on the premise that obesity is largely preventable.¹⁰⁰ Put very simply, obesity is caused by an excessive consumption of food, i.e. by taking in more calories than one burns during physical activity.¹⁰¹ Americans' "ever-increasing sedentary lifestyles [] make [] for an environment anathema to a healthy lifestyle."¹⁰² Congress has even gone so far as to introduce legislation like the Personal Responsibility in Food Consumption Act, better known as the "Cheeseburger Bill," that seeks to limit fast food restaurants' liability in response to the growing number of lawsuits concerning health issues arising from their products.¹⁰³ Although not the best way to address the problem of obesity, just the presence alone of the federal and state "Cheeseburger Bills" lends credence to the consensus that obesity, largely caused by overconsumption, is preventable.

⁹⁹ *Id.* at 443; see also *Andrews*, 104 F.3d at 810 (holding that the purpose of the ADA would be distorted if obesity was considered a disability); *Francis*, 129 F.3d at 286 (holding that the floodgates of litigation would open if obesity was considered a disability).

¹⁰⁰ Browne, *supra* note 6, at 1; Stephen A. McGuinness, *Time to Cut the Fat: The Case for Government Anti-Obesity Legislation*, 25 J.L. & HEALTH 41, 46 (2012).

¹⁰¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 65, at 1.

¹⁰² McGuinness, *supra* note 100, at 46; see also U.S. DEP'T OF AGRIC., PROFILING FOOD CONSUMPTION IN AMERICA 14 (2002), www.usda.gov/documents/usda-factbook-2001-2002.pdf.

¹⁰³ H.R. 339, 108th Cong. (2004) <http://www.gpo.gov/fdsys/pkg/BILLS-108hr3390pcs/pdf/BILLS-108hr339pcs.pdf>. Ultimately, this bill did not pass, but many state legislatures enacted their own versions of the Cheeseburger Bill, including Tennessee's Commonsense Consumption Act. TENN. CODE ANN. § 29-34-205 (2012). The Commonsense Consumption Act limits liability for restaurants based on claims of weight gain or obesity brought by individuals. *Id.*

A federal circuit split currently exists as to whether obesity is a disability absent a cognizant physiological condition, such as a glandular issue. Courts' main fear in permitting obese plaintiffs to sue for discrimination is that it will open the floodgates of litigation, distorting the purpose of the ADA to protect those with a genuine handicap.¹⁰⁴ However, when an underlying physiological condition is present, most courts will permit the plaintiff to claim he is disabled.¹⁰⁵ Still, some courts have held that obesity alone is a disability and should be protected.¹⁰⁶

¹⁰⁴ See, e.g., *Andrews*, 104 F.3d 803 (finding that to consider obesity a disability would distort the purpose of the ADA and allow a very large group of people to pursue litigation); *Francis*, 129 F.3d 281 (finding that considering obesity as a disability would open the floodgates of litigation and distort the purpose of the ADA to protect those with a legitimate handicap); *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (fear-of-heights case where the court refers to several obesity cases, holding that protecting acrophobia would debase the high purpose of the statute in allowing minor or widely shared impairments to qualify as disabilities). An interesting case of how weight discrimination may be reversed is *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984). In *Tudyman*, the court reasoned that because the bodybuilder-plaintiff's weight and low-fat content were self-imposed, he could not claim he was disabled. *Id.* at 746. The court opined that it "refused to make the term handicapped a meaningless phrase." *Id.*

¹⁰⁵ "[S]uch an impairment" within the meaning of subsection (C) plainly refers to a "physical or mental impairment" within the meaning of subsection (A). *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 172 (4th Cir. 1997) ("The 'such an impairment' language incorporates by reference subsection (A)'s description of the sort of impairment that qualifies as a disability."); *Francis*, 129 F.3d at 286 (finding that obesity must be a symptom of an underlying physiological condition to constitute a disability); *Andrews*, 104 F.3d 803 (holding that a disability must be accompanied by a physiological impairment); *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993) (holding that a plaintiff who was obese because of an underlying physiological condition was disabled). *Contra EEOC v. Res. for Human Dev.*, 827 F. Supp. 2d 688 (E.D. La. 2011) (holding

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iii. Other States' Laws on Obesity as a
Disability

At the state level, the law is beginning to mirror the unsettled federal law with conflicting state court decisions. Only Michigan's Civil Rights Act¹⁰⁷ explicitly prohibits employment discrimination on the basis of weight. In the same vein, Washington D.C.'s Human Rights Law¹⁰⁸ prohibits discrimination on the basis of "personal appearance," which arguably includes weight. In states lacking an explicit statute, most courts' interpretations attempt to resemble federal law because most state disability statutes are strikingly similar to the ADA.¹⁰⁹

that morbid obesity was a disability regardless of the existence of an underlying physiological condition).

¹⁰⁶ *Res. for Human Dev.*, 827 F. Supp. 2d 688 (denying defendant's motion to dismiss because the EEOC's current guidelines permitted severely obese plaintiffs to state a claim, even without an underlying physiological condition); *Frank v. Lawrence Union Free Sch. Dist.*, 688 F. Supp. 2d 160 (E.D.N.Y. 2010) (finding that an obese teacher who was fired by the superintendent because his "size and weight were not conducive to learning" suffered from discrimination based on a disability under the New York Human Rights Law); *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010); *Rouse v. Mich. Dep't of State Police*, No. 1:08-CV-982, 2010 WL 882821 (W.D. Mich. March 8, 2010) (holding that obese plaintiff suffered a disability upon finding that the police department had fired him, stating that if he "had lost a significant amount of weight he could have the potential ability to perform those essential functions").

¹⁰⁷ MICH. COMP. LAWS § 37.2202(1)(a) (2012).

¹⁰⁸ D.C. CODE ANN. § 2-1401.01 (2012).

¹⁰⁹ O'Hara, *supra* note 10, at 930-33. See, e.g., *BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012) (interpreting the Montana Human Rights statute in accordance with the ADA and various EEOC interpretations to find that obesity absent an underlying physiological disorder could constitute a disability as long as the individual's weight was outside the "normal range" and affected one or more "body

Disability decisions under state law regarding obesity differ as well. In 1981, the United States District Court for the Western District of Washington first examined obesity discrimination in employment under Washington state law in *Greene v. Union Pacific Railroad*.¹¹⁰ Ultimately, the court held that obesity was not a disability because it was “not an immutable condition such as blindness or lameness.”¹¹¹ The court found that the employer’s decision to deny Greene a transfer to a fireman position was justified because a morbidly obese person “would be less apt to be an efficient, safe, illness-free, and claims-free employee than one not having those conditions.”¹¹² Thus, the plaintiff was not discriminated against because of his weight but due to the “bona fide occupational requirements of being a fireman,” just as any other job has requirements.¹¹³

After the *Greene* decision, state-law discrimination cases based on obesity have contained different lines of analysis leading to different outcomes. In Pennsylvania, an obese woman brought suit¹¹⁴ against her employer under the Pennsylvania Human Rights Act,¹¹⁵ which defines

systems” as explained in 29 C.F.R. § 1630.2(h)(1)); *Res. for Human Dev.*, 827 F. Supp. 2d 688; *Lowe*, 2010 WL 5232523.

¹¹⁰ 548 F. Supp. 3, 3 (W.D. Wash. 1981).

¹¹¹ *Id.* at 5.

¹¹² *Id.* Similar to the Washington state statute at issue here, the Tennessee Disability Act disallows discrimination “unless such disability to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.” TENN. CODE ANN. § 8-50-103.

¹¹³ *Greene*, 548 F. Supp. at 5.

¹¹⁴ *Phila. Elec. Co. v. Pennsylvania*, 448 A.2d 701 (Pa. Commw. Ct. 1982).

¹¹⁵ See Pennsylvania Human Relations Act of 1955, Pub. L. No. 744, as amended by 43 PA. CONS. STAT. §§ 951-963 (1994); see also *Phila. Elec. Co.*, 448 A.2d at 702-03.

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disability virtually the same as the ADA.¹¹⁶ The employer-defendant, Philadelphia Electric, found that the plaintiff was “unsuitable for work . . . because of her abnormal weight.”¹¹⁷ Despite this finding, the court concluded that the plaintiff had no job-related or non-job-related disability because she was “perfectly able to . . . work at all times.”¹¹⁸ The majority of courts finding obesity to not be a disability focus on the lack of plaintiffs’ medical proof that their condition is “disabling” and not merely inconvenient.¹¹⁹ Absent such proof, courts are reluctant to accept obesity as a disability rather than a result of mere overeating.¹²⁰

Conversely, some states have found that obesity is a disability, beginning with *McDermott v. Xerox* in 1985.¹²¹ The defendant-employer denied McDermott a job because of her obesity.¹²² Because, under New York law, McDermott was clinically diagnosed as obese and considered unsuitable for the position (which is a lawful reason for an employer to not hire her), her obesity constituted an actual disability according to the court.¹²³ Additionally, the court rejected the defendant’s argument that the New York statute only applied to involuntary or immutable conditions, stating that the “statute protects all persons with disabilities and not just those with hopeless conditions”¹²⁴—a drastic departure from previous state case law.

¹¹⁶ *Phila. Elec. Co.*, 448 A.2d at 703-04; see also 16 PA. CODE § 44.4 (2012).

¹¹⁷ *Phila. Elec. Co.*, 448 A.2d at 703.

¹¹⁸ *Id.* at 707.

¹¹⁹ See O’Hara, *supra* note 10, at 896.

¹²⁰ *Id.*

¹²¹ 480 N.E.2d 695 (N.Y. 1985).

¹²² *Id.* at 695-96.

¹²³ *Id.* at 698.

¹²⁴ *Id.*

In the same vein, New Jersey has also permitted obese plaintiffs to recover where the plaintiff can demonstrate that his obesity is caused by or causes a physical impairment proven through “accepted clinical or laboratory diagnostic techniques.”¹²⁵ Under this statute, the plaintiff in *Gimello v. Agency Rent-a-Car*¹²⁶ sued his former employer for terminating his job because of his obesity.¹²⁷ The court found that because Gimello faced discrimination under this broadly worded statute based on his obese condition, proven through medical evidence, he suffered from an actual disability.¹²⁸ It is important to note, however, that the court never specified what would qualify as sufficient medical evidence.

iv. Tennessee Law on Obesity as a Disability

Tennessee courts have not yet considered whether obesity is a disability under state law. Speaking about disability law generally, Tennessee courts have often stated that “it is clear that the Tennessee General Assembly envisioned the Tennessee Disability Act would be coextensive with federal law,” which is a hefty assumption.¹²⁹ These courts, however, also noted that the

¹²⁵ N.J. STAT. ANN. § 10-5-5(q) (West 2011).

¹²⁶ 594 A.2d 264 (N.J. 1991).

¹²⁷ *Id.* at 265, 273.

¹²⁸ *Id.* at 268, 278. Specifically, Gimello’s weight-loss specialist testified that Gimello had been obese for most of his life. *Id.* at 268.

¹²⁹ *Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170, 172 (Tenn. 1999) (finding that the policy of “interpreting the THRA coextensively with Title VII is predicated upon a desire to maintain continuity between state and federal law”); *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 834 (Tenn. 1997), *overruled on different grounds by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Bennett v. Steiner-Liff Iron & Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). The Tennessee Supreme Court has found that federal law may guide interpretation in the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire &*

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federal precedents do not bind or limit Tennessee's courts in giving the "fullest possible effect to Tennessee's own human rights legislation"—that is, the courts are not limited to interpreting the state disability statutes identically to their federal counterparts.¹³⁰ Without further legislative direction, a court analyzing an obesity discrimination claim under Tennessee law may find that obesity constitutes a disability by following recent federal case law development. Because federal law is unsettled on this point, there is no absolute guidance available to Tennessee courts for deciding that obesity is not a disability, which is another reason for the legislature to make a decision. It is only a matter of time before a plaintiff brings this claim, and Tennessee is not prepared to decide this issue based on the legislature's lack of thought given to the issue.

III. TENNESSEE SHOULD NOT INCLUDE OBESITY
AS A DISABILITY PROTECTED BY THE
TENNESSEE HUMAN RIGHTS ACT

Barbeque, sweet tea, and a laid-back lifestyle are hallmarks in Tennessee. However, what seem like innocent pleasures contribute to some alarming statistics: 67.8% of adult Tennesseans are overweight¹³¹ and 31.7% are

Rubber Co., 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court "may look to federal law for guidance") (emphasis added).

¹³⁰ Carr v. United Parcel Serv., 955 S.W.2d 832, 835 (Tenn. 1997); Weber v. Moses, 938 S.W.2d 387, 390 (Tenn. 1996); Bennett v. Steiner-Liff Iron & Metal Co., 826 S.W.2d 119, 121 (Tenn. 1992).

¹³¹ "Overweight" includes individuals with a BMI of twenty-five or greater. CDC, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM: PREVALENCE AND TREND DATA—OVERWEIGHT AND OBESITY, U.S. OBESITY TRENDS, TRENDS BY STATE, 2010, available at <http://www.cdc.gov/brfss/> [hereinafter PREVALENCE AND TREND DATA].

obese.¹³² While these statistics certainly indicate a public health crisis and an obesity epidemic, no court or legislative action can combat obesity merely by affording the obese protection under disability statutes.

In light of the 2008 amendments to the ADA and the increasing number of obese persons in Tennessee, this Note argues that Tennessee should not consider obesity a disability, regardless of how the federal courts hold in the future. More specifically, Tennessee should not classify obesity as a disability absent an underlying condition. To support this point, this Note first shows how obesity is inherently different from other protected disabilities. Second, this Note asserts that there is no need to expand the definition of “disability” to include obesity because the medically diagnosable conditions associated with obesity are already generally protected by disability statutes. Lastly, the purposes of the THRA show that the legislative intent of the Tennessee General Assembly when enacting the THRA and TDA was not to follow the ADA or create such an expansive definition of disability but rather to provide a comprehensive list of ideals that should guide the courts when applying disability statutes.

A. Inherent Differences Exist Between Obesity and Other Disabilities

Obesity is generally mutable.¹³³ This lends credence to the argument that obesity is often only temporary.¹³⁴ The characteristics of “mutable” and

¹³² *Id.* “Obese” includes individuals with a BMI of thirty or greater.

¹³³ See generally Browne, *supra* note 6 (arguing that obesity is largely caused and fixed by habits of overconsumption and physical activity).

¹³⁴ Although most instances of obesity are from high caloric intake and lack of exercise, this Note leaves room for protecting obese persons whose condition is the result or cause of an underlying condition.

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“temporary,” the courts argue, lead to the conclusion that Congress and the EEOC never intended obesity to be protected as a disability in the first place.¹³⁵ Building on this distinction, even after the ADAAA was enacted, the EEOC has not deviated from its declaration that physical personal characteristics are not covered by the ADA, including “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.”¹³⁶

Medical studies have found that behavioral techniques derived largely from experiments in psychology provide the means to show that many obese people are able to learn new behavior patterns, including how to control certain eating habits that have contributed to their conditions.¹³⁷ Further, at reasonable prices¹³⁸ and perhaps even covered by insurance plans, medication (such as appetite suppressants) or counseling can treat obesity.¹³⁹ Once weaned off of the medication, individuals show high success rates for weight loss and increased health after seeing how a person with a healthy, balanced diet eats.¹⁴⁰

The theory behind that medication is that obesity can be changed through a personal habit (here, eating properly). This fact alone could constitute a showing that

¹³⁵ Browne, *supra* note 6, at 23; see *Cook v. Rhode Island*, 783 F. Supp. 1569 (D.R.I. 1992).

¹³⁶ ADA Guidelines § 1630.2(h) (1995) (emphasis added).

¹³⁷ Kyoung Kon Kim et. al, *Effects on Weight Reduction and Safety of Short-Term Phentermine Administration in Korean Obese People*, 47 YONSEI MED. J. 614 (2006).

¹³⁸ In Shelby County, Tennessee, a month’s supply of Phentermine, a well-known appetite suppressant, costs approximately \$50-\$75 (around \$25 for the office visit and \$40 for the prescription). *E.g.*, CORDOVA MEDICAL CLINIC, <http://www.cordovamedical.com/> (last visited Dec. 22, 2012). This price includes nutrition and physical exercise counseling by either a medical doctor or a nurse practitioner.

¹³⁹ 23 AM. JUR. 2D *Proof of Facts* § 6 (2012).

¹⁴⁰ *Id.*

obesity is self-imposed, unlike the disabilities listed by the EEOC Guidelines, which are as follows:

These impairments and activities limited include: [D]eafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and

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major depressive disorder,
bipolar disorder, post-
traumatic stress disorder,
obsessive compulsive
disorder, and schizophrenia
substantially limit brain
function.¹⁴¹

Of course, many of the items on this list are preventable—for example, when a conscious decision is made by a drug user to share an HIV-infected needle—but for the most part, they are not mutable, unlike obesity.

In fact, many courts have agreed with this idea, finding that obesity is a voluntary and mutable condition.¹⁴² For example, the court in *Andrews v. Ohio*¹⁴³ repeatedly

¹⁴¹ See 29 C.F.R. § 1630.2(j)(3)(iii) (2011).

¹⁴² See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 443 (6th Cir. 2006) (holding that obesity, absent a physiological condition, was simply a physical characteristic and not a physiological disorder in itself); *Dale v. Wynne*, 497 F. Supp. 2d 1337, 1342 (M.D. Ala. 2007) (holding that obesity is a voluntary condition and thus not a disability under Alabama law); *Greene v. Union Pac. R.R.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding that because obesity “was not an immutable condition such as blindness or lameness,” it is not a disability); *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1152 (Cal. 1993) (finding that obesity was a voluntary condition and thus not a disability under California disability law); *Mo. Comm’n on Human Rights v. Sw. Bell Tel. Co.*, 699 S.W.2d 75, 79 (Mo. Ct. App. 1985) (holding that because plaintiff failed to take advantage of treatment for her known hypertension and obesity, she could not get the benefit of disability law).

¹⁴³ *Andrews v. Ohio*, 104 F.3d 803, 808-09 (6th Cir. 1997). In *Andrews*, seventy-six law enforcement officers sued the State of Ohio, the Department of Highway Safety, and the state highway patrol under the ADA claiming weight discrimination. *Id.* at 805. The court found that the officers were not disabled because “they have not alleged a weight or fitness status other than a mere, indeed possibility transitory, physical characteristic.” *Id.* at 810.

stated that a physical characteristic must relate to a physiological disorder in order to qualify as an ADA impairment.¹⁴⁴ This reasoning arose from the Code of Federal Regulations' definition of an impairment: any "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of [various] body systems."¹⁴⁵ Consequently, the *Andrews* court found that "physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for purposes of determining either actual or perceived disability."¹⁴⁶ In deciding *Andrews*, the court reasoned that a disability is one that is physiologically caused and immutable.¹⁴⁷

Tennessee, too, has recognized that obesity is mutable in its other legislation, such as the Commonsense Consumption Act,¹⁴⁸ which supports the argument that obesity is not a disability. Obesity is inherently different from other already-recognized disabilities in that it is largely controllable.¹⁴⁹ When there is no underlying physical condition, obesity is comparable to a person's conscious decision to gain muscle by weightlifting because "mere physical characteristics [do] not, without more, equal a physiological disorder."¹⁵⁰ The Tennessee Commonsense Consumption Act, modeled after the federal Cheeseburger

¹⁴⁴ *Id.*

¹⁴⁵ 29 C.F.R. § 1630.2(h)(1).

¹⁴⁶ *Andrews*, 104 F.3d at 808 (emphasis added).

¹⁴⁷ *Id.* at 809. See, e.g., *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993) (holding that where a physiological condition caused the plaintiff's obesity, the court would find an impairment).

¹⁴⁸ TENN. CODE ANN. § 29-34-205 (2012).

¹⁴⁹ See generally *Browne*, *supra* note 6 (explaining how the condition of obesity may be controlled by developing healthy habits).

¹⁵⁰ *Andrews*, 104 F.3d at 810.

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Bill,¹⁵¹ denies plaintiffs the ability to sue restaurants merely because the plaintiff, in eating the restaurant's food, became overweight or obese.¹⁵² The statute is not without support either. Groups including the American Bakers Association, the National Association of Wheat Growers, and the American Frozen Food Institute urged Senate Majority Leader Bill Frist of Tennessee to cosponsor the bill at the federal level.¹⁵³ Further, a 2003 Gallup Poll revealed that 89% of Americans agreed that restaurants should not be responsible for their customers' eating habits and weight gains.¹⁵⁴ The purpose of disability statutes is to protect a vulnerable group—here, the disabled. Arguably, with legislation such as the Cheeseburger Bill and the results of the Gallup Poll, obesity is a condition that people agree does not need to be protected like true disabilities, such as cancer, cerebral palsy, or depression.

Obesity is also inherently different from other disabilities because it affects a huge amount of the population. Expanding the definition of obesity in Tennessee creates room for more plaintiffs to be able to sue. The possibility of the “floodgate” effect is arguably the most looming concern in the debate.¹⁵⁵ If Tennessee finds that obesity is a disability, nearly one-third of the state's population qualifies as “disabled” and, if obesity is further declared a protected condition, could potentially be protected under disability statutes.¹⁵⁶ If an obese plaintiff

¹⁵¹ See *supra* p. 286.

¹⁵² TENN. CODE ANN. § 29-34-205.

¹⁵³ *Congressional 'Cheeseburger Bill' Gains Support*, HEARTLANDER MAG. (Nov. 1, 2005), <http://news.heartland.org/newspaper-article/2005/11/01/congressional-cheeseburger-bill-gains-support>.

¹⁵⁴ *Id.*

¹⁵⁵ *Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹⁵⁶ *Adult Obesity Facts*, *supra* note 2.

can sue without proving an underlying physiological condition, more plaintiffs would be able bring other claims based solely on physical characteristics that pose some limitation on their daily lives. As one author noted, “if anyone can bring a suit alleging discrimination based on a physical characteristic, then virtually every employment dispute . . . can turn into a vehicle for a discrimination suit.”¹⁵⁷ When rejecting the claim that mere overweightness was a disability, the First Circuit warned that allowing claims based on physical characteristics would encourage a “catch-all cause of action for discrimination . . . far removed from the reasons the [ADA] was passed”—to protect true disabilities.¹⁵⁸

In May 2011, the EEOC amended its regulations to reflect the new ADAAA, stating that an impairment is a “disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population.”¹⁵⁹ At the time of

¹⁵⁷ Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 713 (1999).

¹⁵⁸ *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997).

¹⁵⁹ 29 C.F.R. § 1630(j)(1)(ii) (2011). Further, the EEOC Manual and Code of Federal Regulations provide a list of physical impairments. Obesity is not included. See 29 C.F.R. § 1630.2(j)(3)(iii). These impairments and activities include: “deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function” *Id.* Because this Note argues

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enactment of the ADA, obesity was a severe epidemic in the United States.¹⁶⁰ With that in mind and the increasing number of obese persons in the United States, Congress could have easily included obesity in the ADA but chose not to.¹⁶¹ The EEOC estimated that out of a total workforce of approximately 142 million,

that obesity absent an accompanying physiological condition is not a disability, obesity will be considered a disability when paired with a condition from this list. Thus, an individual who is obese and must result to using a wheelchair is disabled because she has a physiological impairment that substantially limits her ability to walk. In the same vein, if she becomes obese because she is confined to a wheelchair, this also qualifies as a disability for the same reason.

In the list provided by the EEOC, all of the conditions listed are virtually non-controllable or occur because of an accident of sorts. Further, these conditions also all stem from an underlying physiological condition or result in one. On the other hand, obesity, which is not listed, often results from an individual's conscious decisions to engage in behavior that leads to obesity.

¹⁶⁰ In 2008, the Centers for Disease Control and Prevention estimated that 25.6% of the population was obese, an increase of 1.7% from the previous two years. Press Release, Centers for Disease Control and Prevention, Latest CDC Data Show More Americans Report Being Obese (July 17, 2008), <http://www.cdc.gov/media/pressrel/2008/r080717.htm>. In this press release, Dr. William Dietz, the Director of the Division of Nutrition, Physical Activity, and Obesity, stated that to curb the problem of obesity, people need to be encouraged to eat better and exercise. *Id.* In his analysis of the problem, Dr. Dietz never mentioned that obesity was a condition that could not be controlled. *See id.*

¹⁶¹ *See* 154 CONG. REC. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Reid). Senator Reid stated that the Americans with Disabilities Act needed an amendment due to the strict application of what constituted a disability by the Supreme Court. He states as follows: "As a result, the lower courts have now gone so far as to rule that people with amputation, muscular dystrophy, epilepsy, diabetes, multiple sclerosis, cancer, and even intellectual disabilities are not disabled." However, several weight discrimination cases under the ADA had already occurred when Mr. Reid spoke, but Mr. Reid did not mention obesity or weight discrimination in his proposal.

8,229,000 workers were *disabled*¹⁶² when the ADAAA was enacted.¹⁶³ However, with the EEOC's estimation that 25.6% of adults are obese, the EEOC's number for *disabled* workers would have been much higher had the EEOC chosen to consider obese persons as disabled as well. Turning to the general population for guidance would show that obese people share this condition with many others.

B. Obesity Need Not Be Protected Absent an Underlying Condition

Because Tennessee law protects many of the underlying physiological causes and effects of obesity, there is no need to expand disability protection to obese plaintiffs. Statutory protections do not extend to all abnormal physical characteristics of a person.¹⁶⁴ To the extent a person is obese without a medically diagnosable cause or side effect, obesity is merely a physical trait of that person—not a disability. Obesity either causes or is correlated with the following conditions, complications, and diseases:

¹⁶² The indicator of “disability” depended on six categories: a severe vision or hearing impairment; a condition that “substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying; a physical, mental, or emotional condition lasting 6 months or more that results in difficulty learning, remembering, or concentrating; or a severe disability that results in difficulty dressing, bathing, getting around inside the home, going outside the home alone to shop or visit a doctor’s office, or working at a job or business.”

¹⁶³ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended; Final Rule, 76 Fed. Reg. 16,977 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/html/2011-6056.htm>.

¹⁶⁴ *E.g.*, *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997).

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Multiple cancers (kidney, breast, colon, endometrial, gallbladder), diabetes and related complications (blindness, kidney failure, amputation), impaired glucose tolerance, cardiovascular disease, hypertension, stroke, birth defects (spina bifida, anencephaly), premature death, asthma and impaired air flow, decreased lung capacity, sleep apnea, degenerative osteoarthritis and joint stress (spine, hip, knee, etc.), increased surgical risk and complications, fertility problems (decreased sperm count and abnormal menstruation), sexual dysfunction (linked to diabetes), adverse perinatal outcomes, increased likelihood of depression, suicidal thoughts, and suicide attempts, psychological difficulties due to social stigmatization, acanthosis nigricans (dark skin disorder linked to obesity), hirsutism (excess body and facial hair), stress incontinence (urine

leakage caused by weak pelvic floor muscles).¹⁶⁵

Tennessee recognizes most of the conditions on the list above as “disabilities.”¹⁶⁶ According to the Tennessee Employment Law Letter, conditions such as diabetes and depression (two that are often associated with obesity) certainly qualify as “disabilities” under Tennessee law.¹⁶⁷ The problem facing some plaintiffs, however, is that they cannot demonstrate that the condition substantially limits a life activity.¹⁶⁸ The Tennessee Supreme Court has already held that the inability to “work[] at a job of choice” does not constitute a major life activity.¹⁶⁹ Thus, Tennessee law provides relief for obese plaintiffs but only when they can show a physiological cause of the condition. Until then, the condition is merely a physical characteristic.

Because Tennessee could choose to follow federal law, data from ADA claims is helpful in proving that obese plaintiffs still have a cause of action if they can prove an underlying physiological condition that is diagnosable either caused the obesity or resulted from the obesity. Under the ADA, the ten most common disabilities to which the ADA is applied include: back/spinal injuries, psychiatric/mental impairments, neurological impairments, extremity impairments, heart impairments, former

¹⁶⁵ OFFICE OF RESEARCH & EDUC. ACCOUNTABILITY, WEIGHING THE COSTS OF OBESITY IN TENNESSEE 15 (2006), *available at* http://hit.state.tn.us/Reports/Final_Obesity_Report.pdf.

¹⁶⁶ Martin Miller, *What’s an ADA Disability?*, 18 No. 8 TENN. EMP. L. LETTER 5 (2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing *Gourgy v. Metro Nashville Airport Auth.*, 61 Fed. Appx. 958 (6th Cir. 2003)).

¹⁶⁹ *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 706 (Tenn. 2000).

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substance abuse,¹⁷⁰ diabetes, hearing impairments, vision impairments, and blood disorders.¹⁷¹ From this sampling of ten ADA disabilities, one notices that at least four of those listed are side effects of obesity and overweightness. Thus, a merely obese plaintiff suffers only from stigma discrimination or discrimination based on a mutable physical attribute. Once the plaintiff's condition develops into a diagnosable physical impairment, however, the plaintiff can be considered disabled but not until then.¹⁷²

¹⁷⁰ U.S. COMM'N ON CIVIL RIGHTS, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), available at <http://permanent.access.gpo.gov/LPS13245/mail.htm>. The ADA provides that an individual "currently engaging" in the illegal use of drugs is not a "qualified individual" with a disability. 42 U.S.C. § 12114(a) (2011); 29 C.F.R. § 1630.3(a) (2011); see also Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (holding that current substance abuse is not covered by the ADA). A former drug addict (not a casual user) may be protected under the ADA as having an impairment. But see EEOC, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITY ACTS § 8.5 (1992).

¹⁷¹ Norman H. Kirshman & Roger L. Grandgenett II, ADA: The 10 Most Common Disabilities and How to Accommodate, 2 LEGALBRIEF L. J. 3 (1997), available at <http://legalbrief.com/kirshman.html>.

¹⁷² See TENN. CODE ANN. § 4-21-102(3)(A) (2012). But see Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993). The defendant, Community Foods, refused to hire Cassista, a 5-foot, 4-inch, 305-pound woman (BMI of approximately 52) based mainly on her weight. The California Fair Employment and Housing Act (under which the plaintiff brought suit) contained a definition of disability modeled after the ADA definition. Although California modeled the statute after the ADA, the court found that obesity was not a disability absent medical proof of an underlying physiological cause.

C. Labeling Obesity as a Disability Does Not Further the Purposes Set Forth in the Human Rights Act

Considering obesity as a disability does not serve the purposes laid forth in the Tennessee Human Rights Act (THRA) and Tennessee Disability Act (TDA). In the THRA, the Tennessee legislature stated that its goals were as follows:

(1) Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968, and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967 [...]

(2) Assure that Tennessee has appropriate legislation prohibiting discrimination in employment . . . sufficient to justify the deferral of cases by the federal [EEOC] . . .;

(3) Safeguard all individuals within the state from discrimination because of race, creed, color, religion, sex, age or national origin in connection with employment . . .;

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- (4) Protect their interest in personal dignity and freedom from humiliation;
- (5) Make available to the state their full productive capacity in employment;
- (6) Secure the state against domestic strife and unrest that would menace its democratic institutions;
- (7) Preserve the public safety, health and general welfare; and
- (8) Further the interest, rights, opportunities and privileges of individuals within the state.¹⁷³

Although the Tennessee General Assembly explicitly listed these eight purposes for the creation and carrying out of the THRA (and thus the TDA as well), courts analyzing these claims tend to focus only on the first purpose: “to provide for execution within Tennessee of the policies embodied in the [federal acts].”¹⁷⁴ Although consistency between state and federal law is an understandable concern,¹⁷⁵ courts ignore the purpose of

¹⁷³ TENN. CODE ANN. § 4-21-101(a)(1)-(8) (2012).

¹⁷⁴ *Id.*; see, e.g., *Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170, 172 (Tenn. 1999) (finding that the policies of the THRA were to be interpreted in light of federal interpretation). The Tennessee Supreme Court has found that federal law may guide interpretation of the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court “*may* look to federal law for guidance”) (emphasis added).

¹⁷⁵ See, e.g., *Parker*, 2 S.W.3d at 172 (finding that the policy of “interpreting the THRA coextensively with Title VII is predicated upon

“preserv[ing] the public safety, health and general welfare.”¹⁷⁶ A court should look at all the purposes for guidance but also weigh other concerns, such as whether a potential rule would “preserve the public safety, health and general welfare”¹⁷⁷ of the state’s citizens.

Indeed, the Tennessee Supreme Court has previously exercised its authority to make decisions free of the confines of relevant federal interpretation.¹⁷⁸ In *Booker v. Boeing Co.*, the court noted that one of the purposes of the THRA was to “[p]rovide for execution within Tennessee of the policies embodied” in federal law.¹⁷⁹ Courts faced with the question of whether to follow federal law typically quote a popular phrase in Tennessee disability jurisprudence: that the court is “neither bound by nor restricted by the federal law when interpreting our own anti-discrimination laws.”¹⁸⁰ The court in *Booker* further opined that it would decline to apply the reasoning and

a desire to maintain continuity between state and federal law”); see also *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 834 (Tenn. 1997), *overruled on different grounds by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Bennett v. Steiner-Liff Iron & Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). At least one Tennessee Supreme Court opinion has found that federal law may guide interpretation of the state’s “own anti-discrimination laws.” *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that that court “may look to federal law for guidance”) (emphasis added).

¹⁷⁶ (Currently, Tennessee has the twelfth highest percentage of obese adults when compared to other states at 29.2%. *Adult Obesity Facts*, *supra* note 2. The lowest percentage of obese persons by state is Colorado with 20.7%. *Id.* The highest percentage belongs to Mississippi at 34.9%. *Id.* However, the South has the highest prevalence of obesity at 29.5%. *Id.*)

¹⁷⁷ TENN. CODE ANN. § 4-21-101(a)(7) (2012).

¹⁷⁸ *Booker v. Boeing Co.*, 188 S.W.3d 639, 647 (Tenn. 2006).

¹⁷⁹ *Id.*

¹⁸⁰ *Barnes*, 48 S.W.3d at 705; *Phillips v. Interstate Hotels Corp.* No L07, 974 S.W.2d 680, 683-84 (Tenn. 1998).

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conclusions found in federal law because doing so conflicted with the THRA's purposes.¹⁸¹

Some states have relied on federal law for guidance in disability cases, but the statutes do not include a lengthy list of purposes like Tennessee's. Other states have considered obesity a disability, but those states' statutes are different than Tennessee's. In *Feit v. BNSF Railway*, the Montana Supreme Court, in a 4-3 decision, held that obesity was a disability and covered by the Montana Human Rights Act (MHRA).¹⁸² BNSF Railway gave the plaintiff, Feit, a conditional offer of employment to work as a conductor trainee.¹⁸³ Feit's "employment was conditioned upon successful completion of a physical examination" and other customary items.¹⁸⁴ BNSF informed Feit that he was not qualified for the "safety sensitive position" due to the "significant health and safety risks associated with extreme obesity."¹⁸⁵ BNSF further informed Feit that he would not be considered for the position unless he "lost 10% of his body weight, or successfully completed other physical examinations at his own expense."¹⁸⁶ However, after passing several of the physical examinations, Feit could not afford the final sleep study test at a cost of \$1,800.¹⁸⁷ Accordingly, Feit attempted to lose 10% of his body weight.¹⁸⁸ Shortly

¹⁸¹ *Booker*, 188 S.W.3d at 647.

¹⁸² *BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012); *see also* MONT. CODE ANN. § 49-2-202 (2012).

¹⁸³ *Feit*, 281 P.3d at 227.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (However, BNSF informed Feit that regardless of the outcome of the results, it could still not guarantee him a job.)

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (A genuine dispute of whether BNSF ever received documentation of the weight loss existed at trial.)

thereafter, Feit filed a complaint against BNSF, charging it with discrimination based on a disability.¹⁸⁹

The Montana Supreme Court found that if a person is obese, even absent another condition, and the obesity affects at least one body system, the condition may constitute a disability per the MHRA.¹⁹⁰ The court based its decision on the fact that the Montana legislature had indicated clear intent that the MHRA be interpreted with federal discrimination law, statutory and case law, and the Montana Supreme Court's interpretation of federal law was that federal law does protect obesity.¹⁹¹ The court relied on the legislature's actions in making the MHRA more like the ADA.¹⁹²

However, the MHRA differs from the THRA in that the MHRA never spells out its purpose like the THRA does.¹⁹³ The Montana Supreme Court relied on the legislature's actions in following federal law and legislative history.¹⁹⁴ The similarity in the language of the statutes left the Montana Supreme Court with only two ways to shape its ruling: either analogous to federal law or not. Unlike the Montana legislature, the Tennessee legislature has provided eight reasons for courts interpreting the THRA

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 231.

¹⁹¹ *Id.* at 228. The Montana Supreme Court relied on EEOC definitions. The court ignored federal case law finding obesity not to be a disability.

¹⁹² At least one state representative commented in her opening statement regarding the MHRA that "[t]he purpose of [the law] is to update terminology used in the Americans with Disabilities Act (ADA)." *Id.* at 234 (Rice, J., dissenting) (citing *Hearing on H.B. 496 Before the Mont. S. Comm. on the Judiciary*, 53rd Leg., Reg. Sess. 2 (1993)).

¹⁹³ Compare TENN. CODE ANN. § 4-21-101(a) (2012), with MONT. CODE ANN. § 49-2-501 (2011), and MONT. CODE ANN. § 49-1-102 (2011).

¹⁹⁴ *Feit*, 281 P.3d at 227.

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and TDA to shape a rule that serves Tennesseans.¹⁹⁵ The statute has multiple purposes, and when a court decides to value only one, there is a conflict with the others (here, the “health and safety” purpose), which is especially true if the court decides to consider obesity a disability. At no place in the THRA or TDA does the legislature indicate that any purpose listed in § 4-21-101(a) weighs more than the others listed.¹⁹⁶

Further, none of the purposes listed in the THRA appear anywhere in the ADA,¹⁹⁷ indicating the Tennessee legislature’s willingness to guide courts’ interpretation down a different path. There are several methods of statutory construction in which the courts may give effect to the purposes listed in the THRA. Although courts typically rely on the purpose of remaining consistent with federal law, the court would be ignoring other purposes explicit in the statute. First (and simplest), using the plain meaning of the THRA, courts should apply the statute as it appears including the purposes listed. To this end, another basic principle of statutory interpretation given effect to the oft-neglected other purposes in the THRA is that courts should presume the legislature intended each word to be given full effect.¹⁹⁸ In doing so, the court would find that several of the purposes in the THRA require that obesity not be protected as a disability.¹⁹⁹

¹⁹⁵ TENN. CODE ANN. § 4-21-101(a)(1)-(8) (2012).

¹⁹⁶ See TENN. CODE ANN. § 4-21-101(a) (2012).

¹⁹⁷ Compare *id.* with Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2011).

¹⁹⁸ *In re Hogue*, 286 S.W.3d 890 (Tenn. 2009) (citing *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007)).

¹⁹⁹ For a discussion of how the interests of employers would be compromised, see *infra* page 323. This directly conflicts with the THRA purpose of furthering the interests, rights, and privileges of individuals in TENN. CODE ANN. § 4-21-101(a)(8) because it places an undue burden on employers taking on costs by hiring obese employees.

The modern implementation of this principle renders life to all clauses in a statute “so as to avoid rendering superfluous” any language within the statute.²⁰⁰ In interpreting the THRA’s list of purposes, courts have only been relying upon the first purpose listed: to interpret the THRA along with federal law. Notably, however, the ADA is not included in the list of federal laws that the Tennessee legislature intended to imitate.²⁰¹ A negative inference may be drawn here—*expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others).²⁰² The list given by the legislature, including “the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978, and the Discrimination in Employment Act of 1967, as amended,”²⁰³ are arguably the

²⁰⁰ See generally *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991). Another view of this principle offered by the Supreme Court states that two overlapping statutes may be given effect so long as there is no “positive repugnance” between them. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (finding that overlapping statutes still addressed matters that the other did not address). This may be helpful here to view the ADA and THRA/TDA as “overlapping statutes.” While the ADA and THRA/TDA represent two distinct areas of the law, the current trend to interpret them as one practically creates liability under both for a defendant facing an alleged violation. Further, although the two statutes are nearly identical, the purposes listed in the THRA should not be rendered superfluous merely because they do not appear in the ADA. Thus, the purposes should be given effect.

²⁰¹ See TENN. CODE ANN. § 4-21-101(a)(1) (2012). *But see, e.g., Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 705 (Tenn. 2000) (finding that courts may look to federal law when interpreting Tennessee disability statutes). The TDA was amended slightly in 2008; however, the Tennessee legislature did not add the Americans with Disabilities Act to the list of federal laws to be used as guidance. However, whether this was oversight or blatant is unknown.

²⁰² See YULE KIM, CRS REPORT FOR CONGRESS, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 16-17 (2008), <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

²⁰³ TENN. CODE ANN. § 4-21-101.

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only pieces of federal legislation that the courts may use for guidance in disability claims. The Tennessee Supreme Court opined that the primary rule of statutory construction is to give effect to the legislative intent.²⁰⁴ Although the THRA and TDA were created before the enactment of the ADA, the Tennessee legislature amended the statutes after the passage of the ADA—and still did not add the ADA to its list of model purposes.²⁰⁵ Although obesity is not a “disability,” it is a public health crisis.

Medical professionals have also found that declaring a condition a “disability” sets up a “resentful atmosphere” against the condition.²⁰⁶ Legally labeling obesity a “disability” heightens the stigma already associated with obesity.²⁰⁷ The THRA’s goal of “protecting [one’s] interest in personal dignity and freedom from humiliation” is rendered meaningless if obesity is considered a disability because it affixes a label with a negative connotation on the individual—“disabled.” Stigmatization alone is insufficient to prove an actual disability exists.²⁰⁸

IV. THE PROPOSAL AND ITS BENEFITS

The essence of this section is to offer an alternative way of thinking about obesity from a legal standpoint. In this section, this Note shows how the legislature can act to create a holistic statutory scheme that combats obesity but does so in a way that complements purposes set forth in other legislation, such as the THRA and TDA. In doing so, this Note proposes that the legislature has several options in

²⁰⁴ *In re Hogue*, 286 S.W.3d 890 (Tenn. 2009).

²⁰⁵ See TENN. CODE ANN. § 4-21-101 (2012).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *EEOC v. Gen. Elec. Co.*, 17 F. Supp. 2d 824 (N.D. Ind. 1998).

combating obesity. These options can be seen as a compromise.

A. Proposal: The Legislature Should Exclude Obesity from Protection under the THRA and TDA

Certainly, obesity is a growing epidemic in Tennessee, and its victims require sympathy and action from the legislature. Cancer, contagious diseases, war, and terrorism are crises in which the government has responded in full force; however, the government has done relatively little to battle obesity, “the silent killer.”²⁰⁹

Rather than weakening the disability statutes by including the large number of obese persons, the Tennessee legislature should enact other mechanisms to help combat obesity. In doing so, the Tennessee legislature should first act to exclude obesity from protection under the Tennessee Human Rights Act. On a national level, this has already been done for several conditions such as for addiction to controlled substances or vision impairments that are fixable with prescription lenses.²¹⁰ Likewise, the Tennessee legislature can either exclude obesity wholly or draft a list of protected disabilities and exclude obesity.

Building on the exclusion of obesity from disability statutes, the Tennessee legislature should then create laws that encourage a healthier citizenry. Using policy initiatives from other state legislatures as guidance, the Tennessee

²⁰⁹ McGuinness, *supra* note 100, at 49.

²¹⁰ James E. Kellett, *An Employee with a Drug Addiction Who Is Not Currently Using the Drug Is Protected by the ADA as Disabled If the Drug Addiction Constitutes an Actual or Perceived Disability That Motivated an Adverse Employment Action*, PRAC. INSIGHTS EMP. 0159 (2013) (explaining how current substance abuse is not a disability); Charles S. Plumb, *Individuals with Correctable Vision Problems Are Not Disabled*, 6 No. 2 OKLA. EMP. L. LETTER 1 (1998).

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legislature has eight broad areas in which to create legislation to assist the obese in a legal sense.²¹¹ These eight areas include: (1) commemorative or advisory regulations; (2) advisory commissions and studies; (3) insurance regulation; (4) school food programs; (5) nutrition education; (6) physical education and physical activity of children; (7) adult physical activity; and (8) other policies.²¹² For example, one author has suggested imposing a “sin tax” on unhealthy foods and beverages—a tax modeled on those already placed on alcohol and cigarettes.²¹³ Another author suggests five legal mechanisms that could be effective, including “full disclosure laws” requiring increased dissemination of nutritional value; restrictions on the advertising of certain low-nutritional value foods; requiring warnings on unhealthy products; providing subsidies to growers and manufacturers of healthy foods; imposing a tax on especially unhealthy foods; banning certain ingredients; and enacting special foods policies to help particular sub-groups, such as children and those living in economically disadvantaged areas.²¹⁴

Although precise statutory models for each relevant area are outside the scope of this Note, it is important for lawmakers to respect individual freedom of choice—a hallmark of American society.²¹⁵ However, a counterbalancing policy arises when considering the

²¹¹ KAN. HEALTH INST., OBESITY AND PUBLIC POLICY: LEGISLATION PASSED BY STATES, 1999 TO 2003, 5 (2004), <http://media.khi.org/resources/Other/50-0402ObesityLegislation.pdf>.

²¹² *Id.*

²¹³ Alexander Copp, *The Ethics and Efficacy of a “Fat Tax” in the Form of an Insurance Surcharge on Obese State Employees*, 15 QUINNIPIAC HEALTH L.J. 1, 1 (2011).

²¹⁴ McGuinness, *supra* note 100, at 49.

²¹⁵ *Id.* at 5; see KAN. HEALTH INST., *supra* note 211 (discussing other states’ initiatives and responses to the obesity epidemic).

expense that employers and insurance companies incur regarding obesity.

B. Benefits of this Proposal

After the Tennessee General Assembly enacts this proposal, the state will reap several major benefits from its enactment. First, Tennessee litigants will be able to avoid relying on a conflicting body of law that often occurs when the court of appeals releases incompatible opinions. Second, the obesity epidemic will be more effectively combated in the state because the legislature is taking a proactive role to do so. Finally, the proposal gives the state's employers freedom in their businesses.

i. Prevents the Tennessee Court System from Being Muddled with Varying Decisions Regarding Whether Obesity is a Disability

The Tennessee Court of Appeals is divided among three sections: the Western Section, the Middle Section, and the Eastern Section.²¹⁶ Tennessee Code Annotated section 16-4-101 states that “[t]here shall be an appellate court of twelve (12) judges, styled ‘the court of appeals.’” Although the court of appeals is regarded as one court, the ruling of one section of the court of appeals is merely persuasive, not binding, authority for the other two sections.²¹⁷ Thus, while a decision rendered by one section of the court is considered a decision of the court of appeals

²¹⁶ *Court of Appeals Judges*, TENN. ST. CTS., <http://www.tncourts.gov/courts/court-appeals/judges> (last visited Nov. 26, 2013).

²¹⁷ *Court of Appeals Precedent*, Tenn. Op. Att’y Gen. 07-98 (July 3, 2007).

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as a whole, the precedential value of the decision is binding only upon the section it was made in.²¹⁸

The different sections of the Tennessee Court of Appeals have often rendered contradictory decisions, leaving litigants unable to decipher what the law in the state is.²¹⁹ By excluding obesity from THRA coverage, the legislature can circumvent needless and conflicting case law in the court of appeals. In the absence of any direction by the Tennessee legislature or the Tennessee Supreme Court, any split of opinion between the courts of appeal in Tennessee “results in a lack of clear authority to assist the trial courts, with the ostensibly finality of Courts of Appeals decisions undermined and confused by contradictory appellate holdings.”²²⁰ In 1998, the Tennessee Court of Appeals affirmed the trial court in only 59% of the cases for which it wrote opinions.²²¹ This left 41% of appealed cases for the Tennessee Court of Appeals’

²¹⁸ *Id.*

²¹⁹ *E.g., compare* *Hermosa Holdings, Inc. v. Mid-Tenn. Bone & Joint Clinic, PC*, No. M2008-00597-COA-R3-CV, 2009 WL 711125 (Tenn. Ct. App. Mar. 16, 2009) (finding that Tennessee jurisprudence required the plausibility standard in court pleadings), *with* *Ind. State Dist. Council of Laborers v. Brukardt*, No. M2007-02271-COA-R3-CV, 2009 WL 426237 (Tenn. Ct. App. Feb. 19, 2009) (finding that Tennessee jurisprudence did *not* require the plausibility standard in court pleadings). Two years after *Hermosa* and *Brukardt*, the Tennessee Supreme Court held that Tennessee would not adopt the plausibility standard for court pleadings. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011) (en banc).

²²⁰ Meehan Rasch, *California’s Dueling Harmless Error Standards: Approaches to Federal Constitutional Error in Civil Proceedings and Establishing the Proper Test for Dependency*, 35 W. ST. U. L. REV. 433, 435 n.7 (2008).

²²¹ Daniel J. Foley, *The Tennessee Court of Appeals: How Often It Corrects the Trial Courts—And Why*, 68 TENN. L. REV. 557, 562 (2001).

sections to come up with varying holdings for.²²² Because it is not uncommon for the life of one case to span months or years, it is important that the Tennessee legislature act soon, before plaintiffs bringing weight discrimination suits under the THRA are left to an unpredictable precedent in the court system.

ii. Combats the Obesity Epidemic in Tennessee

Many Tennesseans struggle with obesity, and the Tennessee legislature can address this concern outside of disability statutes. In Tennessee, 67.2% of the adult population is overweight, and 30.8% of the population is obese.²²³ Among Tennessee's adolescents in grades 9-12, 15.8% are obese and 16.1% are overweight.²²⁴ The CDC estimates that the national obesity rate sits at around 17%.²²⁵ The number of obese residents in Shelby County, Tennessee, where the city of Memphis is located, nearly doubles the national average at more than 30%.²²⁶

The Tennessee State Nutrition, Physical Activity, and Obesity Profile provided by the CDC indicates that

²²² *Id.*

²²³ CDC, TENNESSEE STATE NUTRITION, PHYSICAL ACTIVITY, AND OBESITY PROFILE 2 (2012), <http://www.cdc.gov/obesity/stateprograms/fundedstates/pdf/Tennessee-State-Profile.pdf> [hereinafter TENNESSEE STATE NUTRITION].

²²⁴ DIV. OF ADOLESCENT & SCH. HEALTH, CDC, THE 2009 YOUTH RISK BEHAVIOR SURVEY, <http://www.cdc.gov/HealthyYouth/yrbs/index.htm>. The number of obese and overweight Tennessee youth is provided because it evidences the importance of the necessity to begin combating obesity at a young age. *See id.* Children who are obese have an 80% chance of becoming obese adults. *Id.*

²²⁵ *Adult Obesity Facts*, *supra* note 2.

²²⁶ Ed Arnold, *Nation's Growing Girth Costs Business, Government, Insurers*, MEMPHIS BUS. J. (Aug. 10, 2012), <http://www.bizjournals.com/memphis/print-edition/2012/8/10/nations-growing-girth-costs.html>.

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Tennesseans' dietary and exercise habits leave much to be desired.²²⁷ To illustrate, less than one-third of Tennessee adults achieved at least 300 minutes of physical activity per week.²²⁸ Even more alarming is that 31% of Tennessee adults reported that in the last month, they had not participated in any physical activity.²²⁹ In addition to the scarce number of Tennesseans participating in physical activity, only about one in every four adults reported consuming the recommended level of fruits per day.²³⁰ In like manner, only one-third of adults reported consuming the recommended level of vegetables per day.²³¹

Because overweight and obese children are more likely to become obese in adulthood,²³² statistics concerning their age groups are increasingly important in establishing legislation and preventative measures to combat obesity. Currently 16.1% of Tennessee *adolescents*

²²⁷ See TENNESSEE STATE NUTRITION, *supra* note 223, at 2.

²²⁸ *Id.*

²²⁹ *Id.* In comparison, Colorado obtained the lowest obesity percentage out of all the states: 7.1%. CDC, COLORADO STATE NUTRITION, PHYSICAL ACTIVITY, AND OBESITY PROFILE (2012), <http://www.cdc.gov/obesity/stateprograms/fundedstates/pdf/Colorado-State-Profile.pdf>. (Accordingly, over one-half of adults achieved at least 300 minutes of physical activity per week. Further, only 17% of Colorado adults reported no physical activity for the last month.)

²³⁰ TENNESSEE STATE NUTRITION, *supra* note 223, at 2.

²³¹ *Id.*

²³² Kuss, *supra* note 84, at 572-73. See generally Laura Blue, *Do Obese Kids Become Obese Adults?*, TIME (Apr. 28, 2008), <http://www.time.com/time/health/article/0,8599,1735638,00.html>. Although it depends slightly on the definitions of "overweight" and "obese" used and the age of the child, overweight and obese children are more likely to be obese—and sick—as adults. *Id.* Although an overweight infant has a lesser risk than an overweight adolescent, Dr. David Freeman from the CDC stated that "even down to the youngest ages that I've worked with, age five, overweight five-year-olds maybe have a tenfold risk of becoming obese adults compared to relatively thin five-year-olds." *Id.*

are overweight,²³³ and 15.8% are obese.²³⁴ The unhealthy dietary behaviors contributing to adolescent obesity are alarming. Around 88% reported that they had not eaten vegetables at least three times a day in the week before the survey.²³⁵ In addition, 41.3% drank at least one soda or pop in each of the seven days before being surveyed.²³⁶ Of equal importance, only 24.2% reported being physically active for at least an hour per day the seven days before being surveyed.²³⁷ Well over one-third of adolescents reported watching three or more hours of television per day on an average school day.²³⁸

Perhaps the most logical place to begin combating obesity is where it can have the biggest effect on its often-young victims—in schools. Fortunately, well over half of Tennessee high schools did not sell less nutritious foods and beverages anywhere outside the school food service program.²³⁹ However, only 22.9% of adolescents in Tennessee report attending daily physical education classes in an average week.²⁴⁰ The 2010 Tennessee School Health Profiles assessed the school environment, indicating that among high schools only 9.9% always offered fruits or non-fried vegetables on school grounds.²⁴¹

²³³ TENNESSEE STATE NUTRITION, *supra* note 223, at 3. “Overweight” is considered to be between the eighty-fifth and ninety-fifth percentiles for BMI by age and sex.

²³⁴ *Id.* “Obese” means in or above the ninety-fifth percentile for BMI by age and sex.

²³⁵ *Id.* at 2.

²³⁶ *Id.*

²³⁷ *Id.* at 3.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ DIV. OF ADOLESCENT & SCH. HEALTH, CDC, PROFILES 2010-CHRONIC DISEASE PREVENTION, TENNESSEE SECONDARY SCHOOLS I (2010),

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The lack of effective preventative measures contributes to the alarming number of obese adults and children today. Superficially, it appears that an obese person chooses to either disregard healthy food choices or exercise. But in low-income areas, especially in Memphis, Tennessee's most populous city, that might not be true. One argument proving an obese person's lack of control of his condition is that many Americans live in communities with limited access to supermarkets and grocery stores that sell healthy foods.²⁴² These "food deserts," which tend to sell cheaper, processed goods, play a significant role in poor dietary decisions.²⁴³ A 2010 Gallup Poll ranked Memphis first for hunger in the country with 26% of Memphians reporting they could not afford enough food for their families.²⁴⁴ Another survey done by the Mid-South Food Bank found that 83% of those it served had to choose between buying food and paying utilities.²⁴⁵

Other legislatures have also taken matters into their own hands by regulating government nutrition programs, such as the food stamp program. In 2010, New York City and State asked the USDA to prohibit recipients of food stamps from buying food with no nutritional value.²⁴⁶

http://www.cdc.gov/healthyyouth/profiles/pdf/facts/tn_chronic_profiles.pdf.

²⁴² WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY REPORT TO THE PRESIDENT, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION (2010).

²⁴³ *Id.*

²⁴⁴ *America's Worst 9 Urban Food Deserts*, NEWSONE (Sept. 22, 2011), <http://newsone.com/1540235/americas-worst-9-urban-food-deserts/>.

²⁴⁵ *Id.*

²⁴⁶ Anemona Hartocollis, *New York Asks to Bar Use of Food Stamps to Buy Sodas*, N.Y. TIMES (Oct. 6, 2010), http://www.nytimes.com/2010/10/07/nyregion/07stamps.html?_r=2&hp&.

While some argue that this type of legislation unfairly targets the poor,²⁴⁷ the food stamp program is a nutritional program, not a food program.²⁴⁸ Providing a solid nutritional diet to these vulnerable groups would combat their higher levels of obesity.²⁴⁹ While strict prohibitions on junk food might not be the answer, even in this circumstance, government is attempting to make strides toward more education for those on these types of assistance programs.²⁵⁰

Preventative measures geared toward children seem to be more effective²⁵¹ in combating a growing obesity rate but are still ineffective as they stand today. Students who have disabilities or other chronic health problems are often discouraged from participating in their physical education classes and other physical activities taking place in public schools.²⁵² For example, 59% of schools with disabled students permit these students to be exempt from enrolling

²⁴⁷ *Id.*

²⁴⁸ *See id.*

²⁴⁹ ROBERT WOOD JOHNSON FOUND., ISSUE REPORT: F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE (2011).

²⁵⁰ "Food vouchers and stamps are not accepted by some merchants who sell fresh fruits and vegetables," reports the *Commercial Appeal*, Memphis's main newspaper. *Health Memphis: 'Food Deserts' Tied to Obesity, Unhealthy Community*, COM. APPEAL (May 14, 2012), <http://www.commercialappeal.com/news/2012/may/14/food-deserts-tied-to-obesity-unhealthy-community/>.

²⁵¹ INST. OF MED., EARLY CHILDHOOD OBESITY PREVENTION POLICIES 3 (2011), <http://www.iom.edu/~media/Files/Report%20Files/2011/Early-Childhood-Obesity-Prevention-Policies/Young%20Child%20Obesity%202011%20Report%20Brief.pdf>.

²⁵² S.M. Lee et al., CDC, *Physical Education and Physical Activity: Results from the School Health Policies and Programs Study 2006*, 77 J. SCH. HEALTH 435, 435-463 (2007), <http://www.ncbi.nlm.nih.gov/pubmed/17908102>.

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in physical education.²⁵³ This does little for the stigma of obesity²⁵⁴ and even less for the well-being of these children.

Tennessee's attempt to battle obesity has led to the implementation of several programs geared toward encouraging citizens to become more active and more educated on nutrition. Obesity Mini-Grants, given by the Tennessee Department of Health in cooperation with the Tennessee Obesity Task Force, help to support local communities to implement the objectives of the state nutrition, physical activity, and obesity plan—the “Eat Well, Play More Tennessee” plan.²⁵⁵ Acting as a “statewide call to action,” the plan gathers assistance from “scientists, clinicians, city planners, school officials, state agencies, policymakers, transportation experts, nutritionists, and parents” to better address more susceptible populations in the state.²⁵⁶

Various entities in Tennessee have also taken the initiative to combat the obesity epidemic in Tennessee. In 2010, then-Governor Phil Bredesen signed Executive Order No. 69,²⁵⁷ endorsing healthier foods and beverages to be sold at vending facilities on properties within Tennessee's executive branch.²⁵⁸ Another program, the Gold Sneaker Initiative, designates child care centers as “Gold Sneaker”

²⁵³ *Id.* at 442.

²⁵⁴ Sharon McDonald of the National Association to Advance Fat Acceptance stated that the obese would rather not be classified as disabled. O'Hara, *supra* note 10, at 896 (citing Telephone Interview with Sharon McDonald, Program Dir., Nat'l Ass'n to Advance Fat Acceptance (Mar. 2, 1995)).

²⁵⁵ TENNESSEE STATE NUTRITION, *supra* note 223, at 3.

²⁵⁶ *Id.*

²⁵⁷ Tenn. Exec. Order No. 69 (Aug. 6, 2010),

<https://news.tn.gov/system/files/Executive%20Order%20%252369.pdf>.

²⁵⁸ Press Release, Bredesen Signs Executive Order Promoting Healthy Options for State Vending Machines (Aug. 6, 2010), <http://news.tn.gov/node/5694>.

facilities upon the facilities successfully implementing nutritional and physical activity-related objectives.²⁵⁹ The YMCA of Middle Tennessee has also joined the fight against obesity, hosting Nashville on the Move, a free lunchtime walking event, on the first Friday of every month.²⁶⁰ Utilizing Tennessee's landscape, the state's "Connect with Tennessee" campaign encourages individuals and families to utilize the abundance of trails and greenways throughout the state, including by activities such as walking, running, biking, hiking, and horseback riding.²⁶¹

iii. Reduces Burdens on Employers

Employers are beginning to consider obesity as a disability and a potential threat to business. Absenteeism, lowered productivity, and higher health care costs are several items that employers struggle with due to heightened numbers of obese workers.²⁶² Health care costs to individuals and employers are at risk of increase with the

²⁵⁹ TENNESSEE STATE NUTRITION, *supra* note 223, at 4. Currently, 240 child care centers in the state have received the designation. *Id.*

²⁶⁰ NASHVILLE ON THE MOVE, <http://www.nashvillemoves.org/> (last visited Dec. 19, 2012).

²⁶¹ CONNECT WITH TENNESSEE, www.connectwithtn.com (last visited Dec. 19, 2012). Interestingly, one author has noted that the "suburban sprawl" contributes to obesity because it encourages suburbanites to drive into the city often. Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35, 80 (2012). In the same vein, Connect with Tennessee recognizes this problem and attempts to provide people outside bigger Tennessee cities with opportunities for physical activity.

²⁶² *Id.* "It impacts cost, it impacts productivity, it impacts absenteeism and disability," says Russell Robbins, principal and senior consultant for Mercer Consulting, a global HR adviser. *Id.* Robbins also suggests that "[d]epending on the job type, obesity could definitely impact worker's comp claims." *Id.*

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rising rates of obesity. Obesity has contributed to health care spending that has tripled in the last twelve years, rocketing past inflation rates.²⁶³ One human resources adviser suggests that obesity attributes for approximately 20%-25% of health care costs either directly or indirectly.²⁶⁴ The CDC estimated that the direct cost of treating obesity and its related illnesses was \$147 billion in 2011.²⁶⁵ Moreover, obesity forces businesses to bear another \$75 million in costs from absenteeism and lost productivity.²⁶⁶ To put this in perspective with other governmental expenditures, the total spent on obesity adds up to more than the budgets of the federal government's Departments of Transportation, Education, and Homeland Security combined.²⁶⁷

Because of the mutable and voluntary nature of obesity, protecting the obese under Tennessee law puts unfair burdens on employers based on lessened productivity and increased cost.²⁶⁸ Some studies indicate that obesity costs American businesses around \$12.7 billion annually.²⁶⁹ Health care costs businesses 36% more for obese workers than normal weight workers, and medications cost 77% more.²⁷⁰ Perhaps even more

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Robert J. Grossman, *Countering a Weight Crisis: America's Growing Weight Problem Raises Serious HR Issues Relating to Health Care Costs, Wellness, Recruiting, and Employee Relations*, HR MAG., Mar. 1, 2004, available at <http://www.shrm.org/Publications/hrmagazine/EditorialContent/Pages/0304covstory.aspx>.

²⁷⁰ *Id.*

alarming is the indirect costs to businesses, such as decreased productivity or absenteeism at work.²⁷¹

Employers' reluctance to invest in curbing this epidemic thwarts the purposes of the THRA even further. In Tennessee, particularly among state employees, the top two health risks in 2003 and 2004 were a high BMI and a low level of physical activity.²⁷² These statistics evidence the need for legislative action. However, while some employers seek to improve their employees' health through increasing health and wellness programs, many employers are "reluctant to commit to these programs for fear that they will fail to recoup their investment from short-term employees."²⁷³ A study done at Vanderbilt University found that employers remained hesitant to provide health and wellness programming to employees based on a lack of awareness, lack of awareness of intervention options, an assumption that the issue is one of personal choice, and a reluctance to invest in programs without clear evidence that the programs provide a worthwhile return.²⁷⁴

V. CLOSING REMARKS

Currently, the muddled jurisprudence stemming from whether obesity is a disability does little for public health, employers, and hope for a healthier future. Though there are substantial policy concerns in battling discrimination based on appearance, using disability law to do so is inappropriate in this context. Disability statutes need to remain limited in scope and to serve those who are

²⁷¹ *Id.*

²⁷² OFFICE OF RESEARCH & EDUC. ACCOUNTABILITY, WEIGHING THE COSTS OF OBESITY IN TENNESSEE ii (2006), http://hit.state.tn.us/Reports/Final_Obesity_Report.pdf.

²⁷³ *Id.* at 13.

²⁷⁴ *Id.*

truly disabled and those who have no control over the harsh treatment they receive every day at their jobs and in their communities.

The Tennessee General Assembly retains the power to use other avenues, such as legislation geared toward preventative programs and helping those in “food deserts,” before the courts should take action in this context. While obesity does not qualify under the THRA and TDA as a disability, Tennessee needs to take greater legal initiatives to prevent obesity at a young age, starting in the school system and educational programs. With respect to the THRA and the TDA, the Tennessee legislature needs to set forth clearer guidelines so that courts are not left to blindly follow the interpretations of the federal disability statutes. Rather than hastily deeming obesity a disability, the legislature needs to enact various laws to further the policies of the disability statutes first, such as requiring an increase in nutritional information provided to consumers or imposing a tax on foods especially low in nutrition.²⁷⁵ In doing so, Tennessee can promote the health and welfare of its citizens while following the original purpose of the THRA and TDA—to protect the truly disabled.

²⁷⁵ McGuinness, *supra* note 100, at 48-49.

