

Disability Discrimination and Obesity: The Big Questions?

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Abstract

Obesity discrimination in employment and recruitment has become a topic of focus for research examination with increasing reports of discrimination by colleagues and managers. Whilst a limited number of legal cases have emerged, disability law is consulted in line with the expectation of anti-discriminatory practices at work. In line with disability law, whether obesity is defined as a disability or not has an impact on the outcome of a court ruling. Ambiguity when defining obesity through either the medical or social model means there are many questions that remain unanswered which might lead to inconsistency in court rulings.

Introduction

Despite intervention efforts, obesity prevalence has increased over time and it remains a major health concern worldwide [1-2]. The health implications of obesity are well documented, with increasing evidence that obese people are stigmatised and discriminated in various spheres of life such as healthcare [3-4], exercise settings [5-6] and more recently in the workplace [7-8]. It has been suggested that obesity represents one of the last acceptable forms of discrimination [9] based on the openness in which obese people are stigmatised in today's society. Puhl and Colleagues [10] purport that obesity discrimination represents both

a social justice problem as well as a public health concern. Obesity and its relationship to disability discrimination is a societal and workplace concern. As citizens we are mindful of the importance of avoiding discriminatory behaviours and practices especially against those with disabling characteristics, for example mental impairments to the ability to reason, or physical impairments such as hearing, sight loss and limited mobility. Citizens are less likely to be aware of stereotyping fellow citizens based on their Body Mass Index (BMI) or obesity. Therefore citizens can be responsible for inspiring disabled people's career in modifying workplace practices and providing reasonable adjustments, yet other citizens might stereotype and stigmatise obese people as unfit to work or to undertake specific roles and activities [7].

In the light of these corresponding behaviours we might ask ourselves what are the implications for employers and employees if disability discrimination routinely includes obese people? What are the big questions for the law and society in a potentially new era of workplace disability discrimination claims? Thus, our focus is prompted by research evidence, news reports and recent law cases and in doing so, provides an update on evidence that demonstrates that obese people are discriminated in the workplace and in employment related decisions. This article offers an insight into current legal rulings of disability discrimination specifically in relation to cases of obesity amongst workers.

Obesity Discrimination in the Workplace

Over the past four decades, it has been reported that obese people are stereotyped as weak willed, lazy, unintelligent and gluttonous [11-12] and that obesity stigma has increased over time [13-14]. Stigmatising attitudes and discriminatory behaviour has been identified in a range of population groups including jurors [15●] and obesity researchers [16]. Instances of discrimination and physical abuse are evident [17-18], with consequences for the target of such behaviour including depression [19-20] and lowered self-esteem [19-21]. Various reasons for the widespread reporting obesity stigma and discrimination have been offered. However, a constantly cited vehicle is media portrayal with increasing evidence to demonstrate that obese people are the target of fat jokes and derogatory portrayals [22-28]. For example, it is reported that the media portrayals have increased, consistently present obesity in a negative tone and suggest that obese people need 'remedial action' [29-30].

The impact of obesity stigma and discrimination goes beyond psychological functioning, with research consistently evidencing that obese people are discriminated against in the workplace and in the hiring process. Discrimination has been reported across all levels

of employment, identified through the use of both implicit and explicit measures. Implicit measures referring to those that involve an unconscious, automatic response to a given stimuli, and explicit measures referring to those that involve a conscious thought process prior to a response. For example, it was reported that in reviewing applicants' suitability for employment, managers had negative obesity stereotypes and that obese applicants were less likely to be invited for an interview. Additionally, obese people are less likely to be employed, are perceived as less successful and are judged as possessing less leadership potential compared to normal weight colleagues [7, 31-32]. In comparison to normal weight employees, it has also been reported that obese people have lower starting salaries, are assessed as being less qualified, and work longer hours [32-35]. It should also be noted that discrimination towards obese women is greater than obese men, and this has also been identified in previous research examining workplace discrimination [31-32]. For example, obese women are more likely to be discriminated against than obese men when applying for a job, especially if the job requires high visibility and physical demands [32, 36●].

Harassment in the workplace is consistently reported in popular media, with research evidence emerging in the last five years that suggests work satisfaction and performance may be compromised as a result [37-38]. Workplace harassment may refer to assault, aggression, bullying, hostility, and intimidation all of which have been linked with health consequences such as anxiety, depression and lowered self-esteem. The harassment commonly includes belittling others, constant criticism, isolation, name calling, public ridicule and humiliation, and spreading rumours [37]. Whilst an association between workplace harassment and obesity are evident, future research that establishes whether workplace harassment can lead to obesity or whether obese people are more likely to be harassed as a consequence of the commonality of obesity stigma [38]. Currently, in relation to anti-discrimination law and claims, whether obesity is classed as a 'disability' appears to be of paramount importance.

Obesity as a 'Disability'

Defining compliance with anti-discriminatory practices at work with regard to disability demands that we understand the term 'disability', and then determine whether or not this includes obese people? If we demand compliance with anti-discriminatory practices at work with regard to disability, how do we then define the term 'disability', and can this include the obese person? Typically, two models are used to define a disability and should be considered in anti-discriminatory practice. The medical model identifies the claimant's weight as

signifying impairment, and then classifying its results on usual functions at work and beyond. The social model on the other hand identifies the claimant's obesity as limiting their working performance, leading to reasonable adjustments to the workplace and other environments to accommodate [39].

In considering recent decisions from UK and EU courts, we highlight the potential emergence of this new area of disability discrimination. UK and EU disability laws require employers and employees not to discriminate against or equally to harass their colleagues. The UK and EU laws cover a wide spectrum of behaviours, but not specifically on the basis of the claimant's obesity. Thus the possibility of claims focussed on obesity discrimination has not, as yet, led to a flood of claims in UK or EU courts. However, given that obesity is recognised a serious public health issue that threatens to overwhelm healthcare systems, it cannot be dismissed as of little consequence or concern to employers and employees in the western world.

UK anti-discrimination laws are now found in the Equality Act 2010 (EA) [38], and EU laws embodied in The Employment Equality Directive [40]. In conjunction, these legislative provisions demand equal treatment towards citizens in the workplace and beyond. Currently, there are medical definitions of obesity which specify physical impairments, and also social definitions requiring reasonable adjustments to workplaces to accommodate impairments. Thus, conflicting definitions of obesity persist, yet the condition is undoubtedly a controversial addition to the classifications of disability-related discrimination, and must factor as one issue that may lead to claims for anti-discriminatory behaviours in relation to selection, recruitment, reward, promotion, training and contract termination [7].

In UK law the EA [40] categorises discriminatory practices, for example, age, disability, gender re-assignment, marriage and civil partnership, pregnancy, maternity, race, ethnicity, religion, belief, sex and sexual orientation. There are four different types of discrimination: namely direct, indirect, harassment, dual and victimisation. EA [40] section 6 requires that disability must fall within the definition of discrimination as a 'physical or mental impairment which has a substantial and long-term adverse effect on people's ability to carry out normal day-to day activities'. For a claimant to be discriminated against on the grounds of disability then that claimant must provide evidence that any impairment (e.g. obesity), has had 'a substantial and long-term adverse effect on the sufferer's day-to-day activities'. Being overweight or obese may result in substantial and long term effects on people's ability to carry out normal day-to-day activities (washing, dressing and cooking).

In comparison, laws and protection against obesity discrimination in the USA and Asia are similar but appear to be similar to the UK and Europe. In a number of cases in the USA, dismissed claimants that were discriminated against due to their obesity have successfully received compensation for losing their job. Amendments to the Americans with Disabilities Act [41] have led to greater protection for obese people in the USA based on either actual or perceived disability. Pomeranz and Puhl [8] suggested that that a Weight Discrimination in Employment Act could be introduced.

Example UK Legal Ruling

In relation to the EA 2010 [40], obesity is not specifically identified as a disabling condition. Therefore although being the condition was not included, if obesity resulted from a disability, then less favourable treatment of claimants as a result of being obese might perhaps permit claims for disability discrimination by the obese claimant in Employment Tribunals as part of English domestic laws.

However, the UK legal ruling in the case of Walker v Sita Information Networking Computing Ltd [43] held that an obese employee who suffered from various physical and mental ailments was covered by the EA [40] under domestic law. In this case [43], the claimant suffered conditions including dyslexia, diabetes, knee problems, high blood pressure, bowel and stomach complaints, anxiety and depression, coughs, and other more minor difficulties such as joint pains. He was also diagnosed with functional overlay added to obesity. Functional overlay has traditionally been viewed in as a multiplicity of factors causing a number of symptoms to present in the patient. The original Employment Tribunal (ET) was asked to consider whether, in total Mr. Walker's multiple conditions constituted 'impairments' for the purposes of disability discrimination under the EA 2010 [40]. These medical conditions affected Mr Walker's normal activities, but significant issues arose with the definitions of functional overlay within the current legal definition of discrimination found in the EA [40].

The first hearing at ET held that Mr Walker was not disabled because there were no significant physical or mental impairments that caused his symptoms. However, on appeal, the Employment Appeals Tribunal (EAT) ruled differently. They determined that medical lexicons and labels cannot always be used to promote sustainable legal rulings. The EAT held that a claimant's disability sometimes resulted from both physical and mental impairments. Importantly, the EAT stressed that obesity does not render a claimant as disabled, but, however, it can make it more likely that the claimant is disabled for the purposes of disability

discrimination. The EAT ruled that in the future Employment Tribunals should first determine whether or not people have a disabling condition which impairs day to day activities, and only then decide whether or not the issue of obesity might cause that condition to persist as a result. Therefore, obese people cannot be regarded as disabled because of obesity, but that it is more likely that associated health problems of obesity will mean that people qualify as disabled. The ruling may be related to its particular facts, but it now seems that obesity may make it more likely that people is regarded as a having a disabling characteristic within meanings ascribed in the EA 2010 [40] and domestic laws.

Other points of interest within Walker [44] were comparisons of obesity and other conditions such as alcoholism, currently outside the definition of disability under the EA [40]. Where, for example, alcoholism is the causal factor for the claimant's liver failure then this would be an 'impairment' identifying the claimant as 'disabled' under the EA 2010 [40]. Correspondingly, if the claimant for a post is obese then that people could potentially claim for disability discrimination if subsequently denied employment because of their obesity. Moreover, obese people is able to claim for harassment or unfair dismissal if that treatment was directly associated with their disability. As a result of Walker [44], UK workplace managers should introduce and monitor behaviours and policies to reduce legal claims from obese people during recruitment, training and regular assessments such as appraisal and suitability for promotion.

Example EU Legal Ruling

The definitions of disability have been recently developed on a transnational EU stage by the recent European Court of Justice (CJEU) rulings in relation to the Employment Equality Directive (EED) [41]. First, the case of Chacon Navas v Eurest Colectividades SA Case C-13/05 [45] provided some guidance on disability for the purposes of the EED [18]. This definition included physical and mental impairments which hindered the participation of claimants in professional life. Chacon ruled that not all types of sickness result in disability, thus retaining differences between the two [45]. Second, in Karltoft v Municipality of Billund (Case C-354/13) [46●●], the applicant (K) was dismissed from his post as a child-minder in Denmark. The Danish Attorney General stressed that obesity was not used a principal ground for dismissal, but that K's dismissal resulted from a diminution in the need for the number of child-minders employed by the municipality who were K's employers.

One of the questions under consideration for the Danish courts and CJEU was whether or not obesity constitutes a disability under the EED and its general principle of

equal treatment. The preliminary ruling of the CJEU concluded that discriminatory behaviours towards claimants caused by obesity do not contravene the principle of equal treatment or the Directive. However, significantly, the CJEU also ruled that where obesity results in impairments producing long term limitations for the claimant, and consequently these impairments impede the claimant's equal participation in employment, then impairments may constitute disability under the EED. So, for example, disability discrimination may arise where claimants' obesity triggers impairments so causing reductions in mobility or, alternatively, claimants are distressed by undertaking tasks, or medical conditions are accelerated which prevent claimants working normally and stifles their equal participation in the employment market. Where, again, the claimant's obesity is the origin of back or knee pains this might also result in depression and / or other impairments limiting the complainant's equal participation in the employment market [39]. As yet the long term implication of *Karltoft* [46●●] remain uncertain since it confirms that obesity may be the underlying cause of disability, but still maintains that obesity itself is not within the EU definition of disability. Commentators suggest that the CJEU should not require a minimum level of seriousness before satisfying definitions of 'disability' [47]. As such this would entail the recognition that discriminatory behaviours include stigmatization or stereotypical views in addition to physical environments where this can be practiced including institutional discrimination and other areas such as access to transport systems [47].

Implications

We posited what are the implications for employers and employees if disability discrimination routinely includes the obese? Put simply, we suggest the implications are profound. Obesity remains of great concern to society because it is one factor that contributes to heart, arthritic and diabetes conditions amongst many others. One view may be that obesity is just as much a disabling factor as others such as mobility or impaired audio or visual functions: claimants' life chances are limited by all these impairments and therefore all should be protected by lawmakers because it limits access to opportunity or the right to be judged equally in the workplace. The legal opinion is that obesity cannot be judged as disabling under any current statute, but that it may contribute to a limitation resulting from an impairment which hinders equality of participation in the workplace [39].

In the light of these corresponding behaviours we might ask ourselves what are the implications for employers and employees if disability discrimination routinely includes the obese? Intriguing questions remain after Walker [44]. For example, when, if at all, should

obese individuals claim protection from the law? One interpretation is that Walker [43] indicates that laws should protect those who consider themselves to be obese, and are therefore unable to carry out their day to day activities? The law as defined under the EA 2010 [40], if re-interpreted by law-makers may promote situations where disability and equality lead to ET's viewing obesity as not the only issue, but one that can be important when it acts to worsen people's symptoms. Cases where obesity can be defined as impairing day to day activities might then be a disabling condition.

Future Directions

Further questions about when individuals should claim protection under UK domestic laws might need consideration in the light of Walker [44]. For example, if obesity is a qualifying factor contributing towards prohibited categories of behaviour under the EA [40], then when might it become a case of disability discrimination on its own and specifically a characteristic? This possibility opens up a potential minefield for UK employers such as when should 'reasonable adjustments' be made for the medically obese by employers as required by the EA 2010 [40]? Should health checks become mandatory for continued employment of the medically obese, additionally with regular fitness tests becoming part of the employment contract as they are for the police service in the UK? Are sanctions to be imposed if medically obese people refuse to participate in working practices designed to support them and other employees reach levels of fitness deemed 'acceptable' to management and corporate rule makers? At the moment these questions remain mere conjecture, but they are possible scenarios that will become more prevalent if obesity is regarded as a form of disability and therefore likely to be deemed as discrimination in its own right under the EA 2010 [40] and domestic UK laws.

What, therefore, are the big questions for the law and society in a potentially new era of workplace disability discrimination claims? One of the bigger questions that may be asked in the light of Walker, Chacon and Karltoft are whether disability discrimination is now defined according to medical or social definitions [47]? There are, unfortunately, no clear answers as yet because legislation takes the perspective of a social model, yet the CJEU tends towards the medical model by suggesting that social barriers are part of the fabric reducing equal participation [40]. Without a definitive resolution of the medical vs social models we cannot be sure that the CJEU recognises that the participation of disabled in society is not just determined by medically defined and recognised conditions, but also includes those stigmatizing and stereotypical behaviours that limit disabled people's life chances.

Conclusions

Existing research evidence demonstrates that obesity discrimination is reported openly by employers and employees in the workplace and in recruitment [48-49]. Given the prevalence of obesity worldwide and the increasing reports of discrimination in the workplace, an increase in the number of claims might be expected. It has been suggested that the focus should be to reduce anti-obesity attitudes to eliminate employment-related discrimination and victimisation in the workplace [50]. Effective interventions to reduce anti-obesity attitudes continue to be needed [50-51] with previous reports of their robustness and the ineffectiveness of interventions to modify existing anti-obesity attitudes [51-52]. This article should serve as a reference point for understanding the potential ambiguity of obesity discrimination in relation to employment law and should stimulate further examination of an increasingly reported occurrence.

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Compliance with Ethics Guidelines

Conflict of Interest

Stuart W. Flint and Jeremé Snook declare that they have no conflict of interest.

Human and Animal Rights and Informed Consent

This article does not contain any studies with human or animal subjects performed by any of the authors.

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