

Employee Benefit ■ Plan Review

The Weighty Matter of Obesity in the Workplace

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Employers are well aware that discrimination based on such classifications as race, gender, and national origin is unlawful. Various studies over time have shown that obese employees earn less than their leaner colleagues and may be passed over for promotions. Is such treatment unlawful?

Whether weight discrimination is unlawful depends on whether weight is considered a physical characteristic or physical impairment that may rise to the level of a disability. Physical characteristics, including one's hair color, eye color, or left-handedness, are not impairments. According to the U.S. Equal Employment Opportunity Commission's (EEOC), weight can be considered a physical characteristic if it is "within 'normal' range" and "not the result of a physiological impairment." Under this analysis, treating employees differently based on their weight is permissible in most jurisdictions, except in a few such as Michigan and in some cities, including San Francisco, California, and Binghamton, New York, or if, for instance, women are treated differently than men with regard to weight issues. An individual's weight, however, can also be considered a physical impairment. According to a study by the Centers for Disease Control and Prevention, "the prevalence of obesity among U.S. adults was 39.8%."

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 (ADA) is the federal law that protects individuals

from discrimination based on a disability and covers employers with at least 15 workers. Disability is defined as: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) "a record of such impairment;" or (3) "being regarded as having such an impairment." Therefore, federal appeal courts have held that obesity may be considered a disability in limited circumstances if it is linked to an underlying physiological condition and/or employees are regarded as having a disability. Further, in its regulations interpreting the ADA, the EEOC defines physical impairment as

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

Obesity therefore may become a disability if it impacts a person's ability to work and perform major life activities.

In *Helmrich v. Mountain Creek Resort Inc.*, the District Court of New Jersey recently dismissed a morbidly obese employee's claim that he was passed over for a promotion based on his weight. The court reasoned that the employee had failed to establish that his obesity was a disability that substantially limited

one or more major life activities as required by the ADA. The court then analyzed the “regarded-as” prong of the ADA. While the court agreed that the employee was “regarded” by the employer as obese, that was not the test. The applicable test was whether the employer perceived the employee as having some sort of limiting physical impairment because of his weight, which he was unable to prove. As a result, the court dismissed the employee’s claims under the ADA. The court, however, left the door open for the employee to pursue his claim under state law, which often provides greater protections.

Under New Jersey law, disability is broadly defined to include “physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders ... or any mental, psychological, or developmental disability.” The definition is further broadened since there is no substantial limitation of a major activity requirement as under the ADA. With regard to obesity-related cases in particular, the New Jersey Supreme Court has found that an employee had proven that her morbid obesity was a disability because it was caused by her genetics and she exhibited physical infirmities such as arthritis, a heart condition, and obstructive lung disease. Further, the New Jersey Appellate Division has concluded that an employee was discharged because his obesity was regarded as a disability, even though it did not meaningfully impact his job duties.

As in New Jersey, anti-discrimination laws of other states include a broader definition of disability and may provide greater protections to employees who are obese. For instance:

- *New York* law defines disability as:

(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; (b) a record of such an impairment; or (c) a condition regarded by others as such an impairment.

At least one New York court has interpreted obesity as a disability under state law because it can lead to other future serious medical conditions.

- *Connecticut* law defines physical disability as:

any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or being hard of hearing or reliance on a wheelchair or other remedial appliance or device.

- *Massachusetts* law defines disability the same way the ADA does. However, some Massachusetts lawmakers have sought to prohibit discrimination on the basis of weight and height, but such bills have yet to gain any traction.

CONCLUSION

Given the above, employers should be mindful that an adverse employment action based on an employee’s weight may give rise to a discrimination claim if the employee claims obesity as a disability or that he/she was regarded by the employer as being disabled. Employers should also be aware of the potential for workplace harassment claims if employees are subjected to comments or negative treatment based on their weight. 🌐

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