

# When Does Striving for a Healthy Workforce Violate the Law?

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Recently, it was reported that a Texas hospital had instituted a policy barring obese applicants from obtaining employment at the hospital. Specifically, the policy required that prospective employees' body mass index be less than 35 (i.e., less than 245 pounds for someone who is 5 feet 10 inches tall). In announcing the policy, the hospital stated that obese applicants did not "fit with a representational image...of the job of a health care professional," which included appearances "free from distraction" for the hospital's patients.

Although the policy was the first of its kind to gain widespread notoriety, the trend by employers to seek healthier workforces has been gaining momentum for several years. This is not surprising in light of recent studies regarding obesity. A Cornell University study released in January states that obesity accounts for almost 21 percent of United States health care costs (approximately \$190 billion per year), and a report from the Trust for America's Health and the Robert Wood Johnson Foundation found that 12 states have obesity rates above 30 percent. In fact, only one state (Colorado) has a rate lower than 20 percent (19.8 percent), and Pennsylvania, New Jersey and Delaware have rates of 28.5, 24.1 and 28.0 percent, respectively.

With the rising costs of providing health care to employees and a prediction (reported in the *American Journal of Preventive Medicine* in May) that 42 percent of the U.S. population will be obese by 2030, it is anticipated that the Texas hospital's policy will not be an isolated example of an employer attempting to achieve its goal of a healthy workforce by implementing a policy to prevent the hiring (or retention) of obese employees. However, employers considering such policies must be cognizant of the potential legal risks of doing so.

Last year, the Equal Employment Opportunity Commission (EEOC) unveiled its regulations for the Americans with Disabilities Act Amendments Act (ADAAA), which made it easier to establish a "disability" within the meaning of the ADA. While maintaining the basic definition of "disability," which remains defined as: "(a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment," the ADAAA permits the EEOC to broadly interpret the scope of the term "disability." In fact, the new regulations provide specific rules of construction "when determining whether an impairment substantially limits an individual in a major life activity" and expressly noted that "substantially limits" is not a "demanding

standard," as an impairment is a disability if it substantially limits an individual's ability to perform major life activities when compared to most people in the general population.

In light of the new regulations and the growing trend for healthier workplaces, employers must be mindful that courts and the EEOC will subject these types of policies to close scrutiny. In fact, the EEOC has already filed lawsuits on behalf of employees alleging that obesity is a "disability" under the ADA. Although there are few court decisions which have interpreted whether obesity is a disability under the ADA, employers should take note of these EEOC lawsuits in order to be aware of what approach the courts may take when determining these questions going forward.

Courts have traditionally rejected claims that "obesity" constitutes a disability under the ADA. For instance, in *Hill v. Verizon Maryland*, 2009 U.S. Dist. LEXIS 59786 (D. Md. 2009), it was noted that the U.S. Court of Appeals for the Fourth Circuit "specifically recognized 'the case law and the regulations both point unrelentingly to the conclusion that a claim based on obesity is not likely to succeed under the ADA.'" In fact, the court noted many circuit courts have required that "obesity be a symptom of an underlying physiological condition in order to constitute a disability."

Similarly, in *Middleton v. CSX Transportation*, 2008 U.S. Dist. LEXIS 24977, the court noted that "obesity, even morbid obesity...does not constitute a physical impairment unless it is the result of a physiological disorder or condition." In holding that the obese plaintiff was not disabled, the court reasoned that "the ADA was only intended to protect those who are truly disabled, not to serve as a

catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed."

Moreover, the Third Circuit recently upheld the dismissal of a plaintiff's disability discrimination claim in *Lescoe v. Pennsylvania Dep't of Corrections*, 2012 U.S. App. LEXIS 3022 (3d. Cir. Feb. 16, 2012). There, the plaintiff alleged that his obesity interfered with the activity of standing. In dismissing the claim, the court noted that while the Third Circuit "has not definitively reached a position regarding whether obesity is a disability under the ADA," the plaintiff "failed to allege that his weight is the result of a physiological disorder, which is imperative in some circuits." Nonetheless, the court found that the plaintiff failed to establish that any "major life activity" was adversely affected by his weight, reasoning that the plaintiff's passing of numerous medical and physical examinations precluded a finding that he was "disabled" under the ADA.

However, the foregoing recent cases, while helpful for defending a claim that obesity is a disability, were decided under the ADA—not the ADA— and the EEOC's position on obesity appears to be shifting away from the "traditional interpretation" of whether obesity is a disability.

For example, the court in *EEOC v. Resources for Human Development*, 2011 U.S. Dist. LEXIS 140678 (E.D. La. 2011), denied an employer's motion for summary judgment with respect to the EEOC's claim that the employer discriminated against the employee because of her obesity. In denying the employer's motion for summary judgment and holding that "severe obesity is a disability under the ADA and does not

require proof of a physiological basis for it," the court relied primarily on the EEOC's Compliance Manual. While the court stated that the "definition of impairment does not include physical characteristics, including...weight that is within a 'normal range' and is not the result of a physiological disorder," the court took note of the EEOC's Compliance Manual which states that:

"Being overweight, in and of itself, is not generally an impairment...On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment. In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment."

From this, the court stated that "if a charging party's weight is outside the normal range...there is no explicit requirement that obesity be based on a physiological impairment." Following this opinion, the EEOC's website reported that the matter was resolved for \$125,000.

*Resources for Human Development* is not the only recent case filed by the EEOC on behalf of an obese employee. In a pending matter in Texas, *EEOC v. BAE Systems Tactical Vehicle Systems*, (No. 11-3497 S.D. Tex.), the EEOC has taken the position that "morbid obesity is a disability under the ADAAA." The complaint alleges that the employer "regarded" the plaintiff's "obesity as substantially limiting [the plaintiff] in the major life activities of...walking, standing, kneeling, stooping, lifting and breathing." Moreover, although the court in *Resources for Human Development* addressed a situation where the plaintiff was "severely obese," its interpretation that there is "no explicit

requirement that obesity be based on a physiological impairment" if the plaintiff's weight is "outside the normal range" appears to greatly expand the potential coverage of the ADAAA to obese employees and may subject employers to liability for the type of policies implemented by the Texas hospital referenced above.

Moreover, the court in *Lowe v. American Eurocopter*, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. 2010), provides further support for the EEOC's current position with respect to whether obesity is a disability. There, the court denied an employer's motion to dismiss the plaintiff's disability discrimination claim under the ADAAA, wherein the plaintiff alleged that she "is disabled due to her weight." In analyzing the plaintiff's claim, the court noted that prior to the ADAAA, the EEOC's interpretive guidance stated that, except in rare circumstances, obesity is not considered a disability and that most courts have held that obesity is not an impairment under the ADA unless it results from or relates to a physiological condition. However, the court noted that "these cases were all [decided] before the ADAAA took effect" and "this is especially important due to the expansion of what 'substantially limits' and 'major life activities' mean under the ADAAA." In applying the ADAAA to the plaintiff's claim, the court found that the plaintiff's assertion that "her weight affects the major life activity of walking" precluded dismissal of her case.

As can be seen from the foregoing, although courts have traditionally sided with employers on whether "obesity" is a disability under the ADA, the ADAAA will make the issue more difficult for employers in the future. This is especially true in light of the new regulations that expressly state that

determining whether an impairment "substantially limits" a "major life activity" in not a "demanding standard" under the ADA, and that any obese employee can say that their obesity substantially limits the major life activities of walking and standing.

Employers must realize that blanket policies precluding employment of someone with a weight "outside the normal range" will likely garner the EEOC's attention. Nonetheless, employers can and should continue to strive

for a healthier workforce through the use of company-backed health initiatives. While such programs may not completely satisfy an employer's desire to ban obese employees altogether, they will promote the employer's goal of motivating employees to lose weight, while significantly reducing the potential exposure the employer might face if it were using a blanket policy prohibiting the hiring or retention of employees with a certain waistline. •

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