Weight-Based Discrimination and the Americans With Disabilities Act: Is There an End In Sight?

Jeffrey Garcia

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss1/6

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
WEIGHT-BASED DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT: IS THERE AN END IN SIGHT?

I. INTRODUCTION

The existence of various forms of discrimination is far from a recent development in the United States. As society has become more developed, however, it has made efforts to combat discriminatory conduct, particularly that which occurs in the workplace. The most recent federal legislation enacted to confront discrimination in the workplace is the Americans with Disabilities Act of 1990 ("ADA"). Weight-based discrimination in particular, however, has proven to be elusive in terms of anti-discrimination legislation. This Note analyzes the treatment of weight-based discrimination under both federal and state legislation and court rulings, identifies the problem with using handicap discrimination legislation as the basis for a weight-based discrimination suit, and concludes by proposing a solution whereby overweight individuals can be legally protected.

2. Id. § 2000e-2.
4. See Cassista v. Community Foods, Inc., 856 P.2d 1143 (Cal. 1993) (holding that obesity, without more, is not a "disability" or "handicap"); Civil Serv. Comm'n v. Commonwealth, 591 A.2d 281 (Pa. 1991) (holding that in order for obesity to constitute a physical disability, plaintiffs must show that their obesity either caused, or was caused by, a type of disorder within the meaning of the state's handicap statute); Greene v. Union Pac. R.R., 548 F. Supp. 3 (W.D. Wash. 1981) (holding that obesity is not a physical handicap within the contemplation of Washington state law because it is considered to be alterable and not an immutable or unchangeable condition such as blindness or lameness).
II. BACKGROUND

Modern society tends to view the problem of obesity in both medical and psychological terms. But aside from the ridicule and health problems that overweight individuals may face, there is a prejudice against the obese in occupational settings. Such treatment restricts obese individuals from training and employment opportunities in favor of less qualified but slimmer individuals. In essence, obese individuals are being discriminated against merely because of their appearance, despite the fact that many of them can satisfactorily perform the duties of the position that they are seeking. The discriminatory treatment of obese individuals is often subtle, but the effects can be easily perceived.

5. JUDITH A. LEWIS ET AL., HEALTH COUNSELING 58 (1993). “Obesity is associated with higher morbidity as well as with increased mortality, including the greater incidence of diabetes, hypertension, gall bladder disease, orthopedic problems, and complications during surgery.” Id. (citations omitted). Obesity has also been associated with medical conditions such as depression, menstrual disorders, hernias, and several forms of cancer. William E. Straw, M.D., The Dilemma of Obesity, 72 POSTGRADUATE MED. No. 1, 121, 122 (1982). While the term “obese” generally indicates that an individual is extremely fat, it is defined as “a condition in which the energy stores of the body (mainly fat) are too large,” BLACK’S MED. DICTIONARY 417 (37th ed. 1992), or “an abnormal increase of fat in the subcutaneous connective tissues.” STEDMAN’S MED. DICTIONARY 1076 (25th ed. 1990). In any event, morbid obesity is “sufficient to prevent normal activity or physiologic function, or to cause the onset of a pathologic condition.” Id.

6. LEWIS, supra note 5. The obese often face a barrage of negative public attitudes and sentiments and suffer personal indignity. Patricia Hartnett, Note, Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers, 24 RUTGERS L.J. 807, 812 (1993). Obese individuals may be viewed as “wholly ‘responsible’ for [their] situation, unlike an individual with another disabling physical attribute.” Id. See infra part V.A. An individual’s desire to be thin can lead to severe eating disorders and illnesses such as anorexia nervosa or bulimia, psychological illnesses that can cause one to lose his or her appetite. Paula B. Stolker, Note, Weigh My Job Performance, Not My Body: Extending Title VII To Weight-Based Discrimination, 10 N.Y.L. SCH. J. HUM. RTS. 223, 227 (1992).

7. LEWIS, supra note 5. See generally Karol V. Mason, Note, Employment Discrimination Against the Overweight, 15 U. MICH. J.L. REFORM 337 (1982). For research indicating that “attractiveness relates to a more positive outcome in terms of employment opportunities, and that obese individuals experience discriminatory treatment based on their weight,” see Stolker, supra note 6, at 224. See also Esther D. Rothblum et al., The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization, 37 J. OF VOCATIONAL BEHAV. 251, 253-54 (1990).

8. See LEWIS, supra note 5, at 58.

9. See supra text accompanying notes 7-8. See generally Rothblum, supra note 7, at 251 for research illustrating the discriminatory treatment faced by the obese in the workplace. “A common symptom of the bias against overweight people is the use of weight standards to cover subjective bases for hiring and promoting decisions... [The use of] weight control program is one possible way to harass [employees].” Stolker, supra note 6, at 226. This is particularly common in the airline industry. See Stolker, supra note 6, at 226.
III. THE AMERICANS WITH DISABILITIES ACT OF 1990

Congress enacted the Rehabilitation Act of 1973 ("Rehabilitation Act")\(^\text{10}\) to equalize the employment opportunities for the handicapped\(^\text{11}\) by prohibiting discrimination in federally funded activities.\(^\text{12}\) Its major limitation, however, is that discriminatory employment decisions are not limited to federally funded activities.\(^\text{13}\) By limiting its application to federally funded programs, the Rehabilitation Act did nothing to protect disabled individuals who were already in, or trying to enter, the private sector.\(^\text{14}\) Therefore, since the Rehabilitation Act could only protect a small number of people against discrimination, it emphasized the need for a "comprehensive national mandate to eliminate discrimination against individuals with disabilities."\(^\text{15}\) The result, and the most recent federal attempt to combat discrimination in the work place, can be found in the Americans with Disabilities Act of 1990,\(^\text{16}\) which makes the provisions of the Rehabilitation Act generally applicable to employment agencies, labor organizations, joint labor-management committees, and employers.\(^\text{17}\)

---

11. Id. § 701.
12. Id. § 794. Section 794 provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." Id. In order to state a cause of action under the Act, it must be shown:
(1) that the plaintiff is a "handicapped individual" under the terms of the statute; (2) that the plaintiff is "otherwise qualified" to participate in the program or activity at issue; (3) that the plaintiff was excluded from the program or activity "solely by reason" of her or his handicap; and (4) that the program or activity receives federal financial assistance . . . .

14. Id. § 794.
15. Stolker, supra note 6, at 229.
17. Id. § 12111(2). The Act applies to all private employers in an industry affecting commerce, who employ 15 or more employees. Id. § 12111(5)(A). Congress adopted the definition of the term "disability" from the Rehabilitation Act definition of "individual with handicaps" so that the relevant case law developed under the Rehabilitation Act could be generally applicable to the term "disability" under the ADA. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 at 395 (1994); see Senate Comm. on Labor and Human Resources, Americans with Disabilities Act of 1989, S. Rep. No. 116,
According to the ADA, the term “disability” is defined as having a record of “a physical or mental impairment that substantially limits one or more . . . major life activities of [an] individual; a record of such impairment; or [a] being regarded as having such an impairment.” This definition is substantially similar to that of the definition of “individual with handicaps” in the Rehabilitation Act: “any person who (I) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”

Major life activities include functions such as caring for one’s self and working. In an attempt to give the Act the greatest applicability, the ADA has been drafted to cover both private and public employers. The Act provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, [or] the hiring, advancement, or discharge of employees . . . .” The Act further provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

The Act defines “qualified individual with a disability” as an individual with a disability who, with or without reasonable accommodation by a private entity “can perform the essential functions of the employment position that such individual holds or desires[,]” or who, with or without reasonable

---

18. 42 U.S.C. § 12102(2)(A)-(C). This definition is substantially similar to that of the definition of “individual with handicaps” in the Rehabilitation Act: “any person who (I) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. § 706(8)(B); see also supra note 17. The Rehabilitation Act is further limited in application, however, by providing a remedy only to those who can prove that their condition results in a substantial handicap to employment, which can be improved through vocational rehabilitation services provided pursuant to the Act. 29 U.S.C. § 706(8)(A).
20. “The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . .” 42 U.S.C. § 12111(5)(a) (1988 & Supp. V 1994).
21. “The term ‘public entity’ means— (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or . . . local government; and (C) the National Railroad Passenger Corporation, and any commuter authority . . . .” Id. § 12131(1)(A), (B).
22. Id. § 12112(a). It is this section that covers private entities.
23. Id. § 12132 (emphasis added).
24. Id. § 12111(8) (emphasis added).
Weight-Based Discrimination: Is There An End In Sight?

modifications of the rules, policies, or practices of a public entity “meets the essential eligibility requirements for the... participation in... programs or activities provided by a public entity.”

A. Congressional Findings and Purposes

Disabled individuals have historically been isolated and segregated by society by either “outright intentional exclusion” or more subtle practices, including “architectural, transportation, and communication barriers... exclusionary qualification standards and criteria, ... and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” Such individuals comprise a “discrete and insular minority” who are disadvantaged both socially and economically, who have faced limitations and restrictions, and have also been “subjected to a history of purposeful unequal treatment[] and relegated to a position of political powerlessness in our society...” As such, disabled individuals have often had no legal recourse to redress such discrimination, unlike those who have been discriminated against on the basis of race, color, sex, national origin, religion, or age. Given these findings, the Congressional mandate in passing the ADA is clear; to invoke a broad sweep of authority by creating enforceable standards and a central role for the federal government in the elimination of discrimination against the disabled.

B. Defenses Under the Americans with Disabilities Act

The Act does, however, provide defenses to a charge of discrimination on the basis of disability similar to that of the bona fide occupational qualification of Title VII of the Civil Rights Act of 1964. The

25. Id. § 12131(2) (emphasis added).
26. Id. § 12101(a)(2).
27. Id. § 12101(a)(2), (5).
28. Id. § 12101(a)(7).
29. Id. § 12101(a)(6), (7).
30. Id. § 12101(a)(4).
31. Id. § 12101(b)(1)-(4).
32. Id. § 12113(a).

[It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

Published by Scholarly Commons at Hofstra Law, 1995
ADA provides that:

[i]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . . 34

Also like the Civil Rights Act of 1964, which requires a valid bona fide occupational qualification in order for a court to sustain a discriminatory policy,35 the ADA requires discriminatory policies to be necessary to the job held or sought.36

C. An Expanded Meaning of “Disability”

What is perhaps the greatest effort to implement this national mandate is the inclusion of those who are regarded as having a disability in the definition of “disability.”37 To combat the effects of the erroneous perceptions about the handicapped, this definition of “disability”

such individual’s race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a)(1). The Civil Rights Act further provides:

[n]otwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id. § 2000e-2(e).

34. 42 U.S.C. § 12113(a) (emphasis added). But see infra part V.B.

35. E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that facially neutral height and weight standards that operated to exclude women from prison guard positions were valid BFOQs in that they were necessary to the maintenance of control in a maximum security penitentiary); Dripps v. UPS, 381 F. Supp. 421 (W.D. Pa. 1974) (holding that a company rule of forbidding welders from wearing beards was a valid BFOQ because it was based on a reasonable concern for safety), aff’d mem., 515 F.2d 506 (3rd Cir. 1975).

36. E.g., Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993) (distinguishing between the legitimate expectations an employer may have under the Rehabilitation Act for jobs requiring unique qualifications and the mere assumption that certain individuals cannot perform a large class of jobs); see infra text accompanying notes 125-43.

37. 42 U.S.C. § 12102(2)(C). The “regarded as having language” was also included in the Rehabilitation Act of 1973 “to protect people who are denied employment because of an employer’s perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer’s view of his or her condition is erroneous.” E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) (holding that the Rehabilitation Act protects those who do not in fact have the condition they are perceived as having, and whose physical condition does not substantially limit their major life activities). See also supra note 17.
is meant to "preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." It is here where many individuals who have been discriminated against because of their obesity should find protection, but "[n]either the ADA nor its implementing regulations specifically address the question of whether obesity is a disability.' The Act's implementing regulations, however, indicate that an impairment under the Act is a physiological or mental disorder. To date, there has been no definitive ruling as to the disabled status of obese individuals under the Americans with Disabilities Act of 1990.

IV. COURT DECISIONS ON WEIGHT-BASED DISCRIMINATION

The issue of whether obesity alone is a disability under federal and similar state legislation is far from settled. Most courts that have considered this question have held that obesity without more is not a physical disability.

According to one author, there are three predominant holdings on

38. School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (alteration in original) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 405-06 & n.6 (1979)).


40. Id.; 29 C.F.R. § 1630.2(h)(1)-(2) (1994).

41. This holds true as to obesity being a "disability" in the strictest sense of the term, or even as a "disability" under the "perceived as having a disability" language of the Act. See Hartnett, supra note 6, at 818, stating that:

[a]s a rule, ordinary obesity [(as opposed to excessive or morbid obesity)] is not considered a handicap within the meaning of the Rehabilitation Act. . . . An obese individual may, however, claim to have been "regarded as" having a handicap, and, if all other conditions for pursuing a successful claim are met, the claimant may qualify for protection under the statute.

Hartnett, supra note 6, at 818. But see infra part IV.A-B.

42. The appendix to the regulations accompanying the Act, however, indicate that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. . . . Similarly, except in rare and limiting circumstances, obesity is not considered a disabling impairment." 29 C.F.R. app. § 1630 at 396 (1994).

43. See infra part IV.A-C.

the weight-based discrimination issue: 45 (1) obesity is not a disability; (2) weight standards are legal if they are bona fide occupational qualifications; and (3) obesity is a disability. 46

A. Obesity is Not a Disability

In Krein v. Marian Manor Nursing Home, 47 the court held that a nurse’s aid, who had testified that she was not suffering from a medical condition in relation to her obesity and that her job performance was not impaired due to her obesity, was not protected by the state’s anti-discrimination statute. 48 Without analysis, the court held that obesity without more, is not a physical disability. 49

In Tudyman v. United Airlines, 50 an airline steward was terminated and his reinstatement was denied because his weight exceeded the defendant airline’s height and weight guidelines. 51 The steward brought suit, alleging violation of the Rehabilitation Act for discrimination based on his inability to meet the airline’s weight requirements, yet his condition was self-imposed as the result of bodybuilding. 52 Moreover, the steward’s bodybuilding did not cause a limitation in a major life activity. 53 Furthermore, because his weight was a self-imposed condition 54 it was, therefore, distinguishable from physiological conditions, disorders, disfigurement, and anatomical loss. 55 The court held that the steward was not impaired in any way, 56 and he was not considered to

46. Id.
47. 415 N.W.2d 793 (Sup. Ct. N.D. 1987).
48. Id. at 796.
49. Id. The court in Krein adopted the Webster’s Third New International Dictionary (1971) definition of “disability” as “a physical or mental illness, injury or condition that hinders, impedes or incapacitates.” Id.
51. Id. at 740-41.
52. Id. at 741.
53. Id. at 746.
54. The court noted that his weight was “self-imposed and voluntary,” and analogized his weight to the “voluntary” conditions of drug addiction and alcoholism, of which some individuals have been specifically excepted from inclusion as protected handicapped individuals under the Rehabilitation Act. Id. But see infra notes 150, 153, 155 and accompanying text.
56. The court noted that he was not in poor shape or overweight at all; in fact, it was his low percentage of body fat and high percentage of muscle (which weighs more than fat) that resulted in his weight exceeding the airline’s standards. Id. at 741.
be handicapped under the Rehabilitation Act. According to the Tudyman court, private employers are free to be arbitrary and capricious in their hiring decisions so long as they do not discriminate in any way that has been legislatively or judicially prohibited.

In Civil Service Commission v. Commonwealth, a city laborer was suspended without pay for his failure to lose enough weight to meet the height and weight standards promulgated for city laborers. The Pennsylvania Supreme Court held that in order for obesity to constitute a physical disability within the meaning of the state's handicap statute, a plaintiff must show that his obesity caused, or was caused by, a type of disorder specified in the statute.

One of the most recent cases to rule that obesity alone is not a disability was Cassista v. Community Foods, Inc. In Cassista, a woman standing at five feet four inches tall and weighing 305 pounds applied for a job in a health food store. The position involved running the cash register, stocking produce and food items, and lifting and carrying groceries around the store. Cassista was not hired for the position, nor for other openings for which she subsequently reapplied. The defendant was concerned that she couldn't physically do the work required by the position because of her weight, despite the fact she stated that she had no physical limitations which would interfere with her ability to do the job. According to a defense expert, the worksite would be a hazard for an individual of her weight because of the narrow aisles in the store and the danger that the ladders and stepstools would not support her weight. All of the members of the hiring committee, however, testified that Cassista's weight played no part in the decision.

---

57. Id. at 746-47.
58. Id. at 747. Moreover, the inability to attain a single job because of a perceived impairment does not make that individual "handicapped." Id. at 745.
60. Id. at 282.
61. Id. at 283-84. See also Cassista v. Community Foods, Inc., 856 P.2d 1143 (Sup. Ct. Cal. 1993) (holding that weight, unrelated to physiological or systematic disorder as set forth in the disability statute, does not constitute a handicap or disability within the meaning of that statute); Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co., 699 S.W.2d 75 (Mo. Ct. App. 1985) (noting that obesity, without more, was probably not a handicap).
63. Id. at 1144.
64. Id.
65. Id. at 1145.
66. Id.
67. Id.
68. Id. at 1146.
not to hire her. The California Supreme Court favorably discussed the opinion of a federal district court that held that "to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap." And in a narrow reading of the relevant state disability statute, the court concluded that obesity, without more, was not a "disability" or "handicap" within the meaning of the statute. In essence, because the plaintiff failed to present evidence that her excess weight was caused by or, in turn, caused a physiological disorder within the meaning of the statute, she failed to establish a prima facie case of employment discrimination based on a disability.

Similarly, in Greene v. Union Pacific Railroad Co., a man was denied a transfer to a physically demanding job because he was overweight, had high blood pressure, and advanced osteoarthritis of the spine. The defendant railroad's justification was that these conditions made the plaintiff less apt to be an efficient and safe employee and more likely to claim more insurance benefits than an employee without similar physical conditions. The court held that the height and weight requirements of the railroad were valid bona fide occupational qualifications and that the railroad was under a duty to consider the impact of his condition on his ability to perform the job with sufficient safety towards himself, as well as to other employees and the public at large. Finally, in considering whether obesity was a handicap under the relevant state statute, the court ruled that no handicap was present because obesity is alterable, and not an "immutable or unchangeable condition such as

69. Id.
70. Id. at 1152 (citing Cook v. Rhode Island, 783 F. Supp. 1569, 1573 (D.R.I. 1992), aff'd, 10 F.3d 17 (1st Cir. 1993)).
71. Id. (quoting Cook, 783 F.Supp. at 1573; and citing Tudyman, 608 F. Supp. at 739). But see Cook, 10 F.3d 17 (1st Cir. 1993) (rejecting the lower Cook court's ruling on this point, noting that the Rehabilitation Act's protections are not necessarily tied to the manner in which an individual became disabled). See infra text accompanying notes 125-43.
72. Cassista, 856 P.2d at 1154.
73. Id.
75. Id. at 5.
76. Id.
77. For additional cases discussing bona fide occupational qualifications in the context of weight, see infra part IV.B.
78. Greene, 548 F. Supp. at 5. According to the court, however, whether a bona fide occupational qualification exists will generally depend on the specific facts and circumstances of each case. Id. at 4.
blindness or lameness."^{79}

In *Philadelphia Electric Co. v. Commonwealth*,^{80} a woman weighing 341 pounds and standing five feet eight inches tall underwent a physical examination after successfully passing preemployment testing.^{81} She was classified by the company's doctor as unsuitable for employment as a customer service person because her weight significantly exceeded the desirable weight of 140 pounds according to the height and weight charts used by the company.^{82} The commission held that her morbid obesity was a handicap within the meaning of the state act^{83} and that the condition did not interfere with the plaintiff's ability to perform the job she sought.^{84} The appellate court reversed the finding of unlawful discrimination and held that morbid obesity alone was not a handicap or disability within the meaning of the state statute.^{85} The court reasoned that since the doctor had found nothing physically wrong with the plaintiff, there was nothing to prevent her from performing her duties.^{86} Furthermore, since her obesity did not impair her job performance in any way, it was not a job related handicap.^{87} According to the court, obesity alone did not constitute a handicap within the meaning of the statute, nor was there "even a scintilla of evidence"^{88} that the plaintiff was in fact handicapped or disabled in any manner.^{89} The court further held that "an employer may be selective about the persons he employs as long as he does not unlawfully discriminate against the applicants."^{90} The court emphasized that:

\[\text{Not all discrimination is unlawful. An employer who refuses to hire}\]
someone solely because that person fails pre-employment tests is
discriminating against that person, but not unlawfully.... [A]n
employer has the inherent right to discriminate among applicants for
employment and to eliminate those who have a high potential for
absenteeism and low productivity.91

Thus, as one commentator has stated, "lawful discrimination can only
occur when the policy, procedure, or practice is applied uniformly and
reasonably."92

B. Weight Standards and Bona Fide Occupational Qualifications

In Lipton v. New York State Human Rights Appeal Board,93 a
woman who was five feet seven inches tall, weighed over 300 pounds,
and had high blood pressure was denied reemployment because her
obesity had previously hindered her job performance, and was likely to
do so in the future.94 Because her obese condition was directly related
to her ability to perform her job efficiently, the court held that her
employer had not discriminated against her on the basis of a disability.95

Similarly, in Velger v. Williams,96 an obese man alleging that he
was discharged from his probationary position as a hazardous waste
investigator because of his weight was unsuccessful in making a claim
under a state disability statute.97 According to that court, "an employer
is not guilty of unlawful discrimination against a person with a physical
impairment if that person’s condition is “in any way related to the duties
the person was required to perform in connection with [his] position”."98

91. Id. (citing Metropolitan Dade County v. Wolf, 274 So.2d 584 (Fla. Dist. Ct. App. 1973)
(holding that “weight regulations [were] grounded on business necessity and compliance therewith
may be made a condition of employment due to the likelihood that an obese person will become
disabled during employment.” Id. n.10), cert. denied, 414 U.S. 1116 (1973).
92. Bierman, supra note 44, at 963.
94. Id. at 233-34.
95. Id. The court also stated that the appeals board should “restrict its intervention to cases in
which the alleged discrimination is unrelated to the nature of the employment.” Id. See also
(holding that a trucking company’s blanket policy of excluding all persons with back problems from
employment violated the relevant state employment discrimination statute). The Sterling court also
noted that the BFOQ defense only relates to whether a handicapped individual is unable to presently
perform the job duties safely and efficiently. Id. at 550.
97. Id. at 412.
98. Id. (alteration in original) (citing Miller v. Ravitch, 458 N.E.2d 1235, 1236 (N.Y. 1983)).
See also Parolisi v. Board of Examiners, 285 N.Y.S.2d 936 (Sup. Ct. 1967) (holding that the school
This case serves as an example of the "catch-22" situation in that unless the "weight condition has interfered with or precluded adequate job performance, it has not been considered to be a qualified handicap." 99

In *McMillen v. Civil Service Commission*, 101 when the Los Angeles City Fire Department disciplined an ambulance driver for failing to meet the body weight standards of the department, the driver charged the fire department with discrimination on the basis of a physical disability even though he did not feel that his weight hindered his job performance. 102 The court held that because of the strenuous activities that an ambulance driver may have to endure, the department's weight standards were reasonable "as a means of ensuring the safety of its employees and members of the public." 103 Furthermore, "[e]mployee board's speculation that a teacher could not perform her duties because she was obese was arbitrary and capricious); Independent Union of Flight Attendants v. Pan Am. World Airways, Inc., 50 Fair Empl. Prac. Cas. (BNA) 1698 (N.D. Cal. 1987) (holding that the defendant airline's weight policy, which applied different standards for men than for women, perpetuated sexual stereotypes and that the defendant failed to prove that the weight standard was a bona fide occupational qualification necessary to perform the job and ensure passenger safety within the meaning of the Civil Rights Act); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (holding that requiring flight attendants to be women was not a valid bona fide occupational qualification under the Civil Rights Act), cert. denied, 404 U.S. 950 (1971); Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971) (holding that an airline's "no-marriage" rule for stewardesses was an invalid bona fide occupational qualification under the Civil Rights Act), cert. denied, 404 U.S. 991 (1971). 99. This "damned if you do, damned if you don't" scenario can present itself in the following ways: a court can construe the term "handicap" so as to require an actual handicap, thus, barring relief for obese individuals who are not, in fact, physically impaired; or a court may consider a plaintiff unfit for a particular job if the plaintiff argues that she is impaired due to her obesity. Hartnett, supra note 6, at 842. As the *Tudyman* court described it, "the plaintiff must first show that he or she has some impairment which substantially limits a major life activity, but this same plaintiff must show that he or she is not so handicapped as to be unable to perform the job." *Tudyman* v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984). Hartnett suggests that it is for this reason that the "handicap" strategy is unreliable and inappropriate in obesity cases. Hartnett, supra note 6 at 842. This view, however, fails to take into account the very basis for the "regarded as having a disability" language of the ADA, to prevent those who do not in fact have a disability from being discriminated against because of the erroneous impression that they have an impairment. See infra notes 172-73 and accompanying text.

100. Bierman, supra note 44, at 963 & n.89.


102. See id. at 549-50.

103. Id. at 551. See also *Louisville Black Police Officers Org. v. Louisville*, 511 F. Supp. 825, 840-41 (W.D. Ky. 1979) (holding that potential police recruits were rejected for employment because they failed legitimate, non-discriminatory physical and stress tests rather than because of their obesity), aff'd, 700 F.2d 268 (6th Cir. 1993); *EEOC v. New Jersey*, 631 F. Supp. 1506 (D.N.J. 1986) (holding that a mandatory retirement age was a bona fide occupational qualification in light of the fact that the continued health and fitness of the state police was essential to the safe and efficient performance of law enforcement duties), aff'd, 815 F.2d 694 (3d Cir. 1987).
height and weight limitations may be prescribed by an employer where there is a rational basis for such limitations, as shown by supportive analytical factual data rather than stereotypical generalizations."

C. Obesity is a Disability

As stated above, few cases have held that obesity, without more, is a disability. In State Division of Human Rights v. Xerox Corp., the complainant, a five feet six inch tall woman of 249 pounds, received an offer of employment contingent upon her satisfactorily passing a preemployment medical examination. The complainant failed the medical exam and was refused employment because she was obese. The defendant company required all applicants to take a preemployment medical examination, and the complainant’s examination revealed no other medical conditions other than her obesity. The examining physician concluded that the complainant was not medically acceptable for employment as a systems consultant solely because she was obese. The defendant did not dispute in any way that she was qualified for the position and acknowledged that her condition was completely unrelated to her ability to perform her duties as a systems consultant. The defendant argued, however, that obese individuals

104. McMillen, 8 Cal. Rptr.2d at 550 (citing Hardy v. Stumpf, 112 Cal. Rptr. 739 (Cal. Ct. App. 1974)). See also Hegwer v. Board of Civil Serv. Comm’rs, 7 Cal. Rptr.2d 389 (Cal. Ct. App. 1992) (affirming the suspension of an obese paramedic who suffered from a thyroid condition which contributed to an obesity problem because the Fire Department’s weight standards were based upon a bona fide occupational qualification). In Hegwer, the fire department imposed weight limits on its firefighters and paramedics as a part of an overall physical fitness program. Hegwer, 7 Cal. Rptr. at 391. The defendant, however, consistently failed to achieve her weight goals as required by the program and was suspended numerous times. Id. at 392-93. Although the plaintiff’s level of fitness was classified as “very poor,” the Hegwer court held that the weight standard was not arbitrary due to the nature of a paramedic’s work. Id. at 396. According to the court, “[s]trength, endurance, agility and speed are essential to the safe and efficient performance of” a paramedic’s duties. Id. (emphasis added). See also Blodgett v. Board of Trustees, 97 Cal. Rptr. 406 (Cal. Ct. App. 1971) (noting that it was unnecessary for a probationary physical education teacher, an obese woman whose contract was not renewed due to her obesity, to excel during in-class demonstrations to be an effective, capable, and competent teacher).


106. Id. at 696.

107. Id.

108. Id.

109. Id. She was characterized by the Director of Health Services as having the disease of “active gross obesity.” Id.

as a group would be more costly because "over the long term the obese group [would] have a higher absenteeism rate, higher utilization rate of long-term and disability benefits, medical care plans, [and] life insurance." According to the New York Court of Appeals, "the statute protects all persons with disabilities and not just those with hopeless [and immutable] conditions." The court held that her obesity fell into the statutory definition in that it was clinically diagnosed by the defendant's own physician, and rejected the argument that the statute should apply only to immutable disabilities. Thus, the court affirmed the findings of the court below, which held that the complainant's gross obesity in itself was a physical or medical impairment, that it prevented the exercise of normal bodily function or was "demonstrable by medically acceptable clinical or laboratory techniques," and that it was an accepted fact that obesity limits an individual's physical agility and endurance. What is perhaps most important about this particular case is that the court concluded that the obesity was a "medical" and "physical" impairment within the meaning of the New York State Human Rights Law, which the legislature had mandated to be liberally interpreted to accomplish its purpose. The New York Court of Appeals agreed with the finding that the complainant had been discriminated against, and added that "employment [could] not be denied because of any actual or perceived undesirable effect the person's employment [might] have on disability or life insurance programs." As was stated in Philadelphia Electric:

> every applicant for employment has some potential for handicap or

111. Xerox Corp., 478 N.Y.S.2d at 984.
112. Xerox, 480 N.E.2d at 698. New York State's Human Rights Law defines "disability" more broadly than statutes that track the federal Rehabilitation Act of 1973. Id. The court noted that disabilities "are not limited to physical or mental impairments but may also include 'medical' impairments... To qualify as a disability, the condition may manifest itself... by preventing the exercise of a normal bodily function or by being 'demonstrable by medically accepted clinical or laboratory diagnostic techniques'..." Id. The court read the statute as covering a variety of conditions, from the "loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future." Id.
113. Id.
115. Id. at 986. The court reasoned that since the statute would protect an obese person who also had high blood pressure, the statute should be construed to protect an obese person who had no other medical condition or impairments. Id.
116. Xerox, 480 N.E.2d at 697. Moreover, the court held that an employer could not deny employment simply because a condition has been detected that may potentially have undesirable effects. Id. at 698. But see Metropolitan Dade County v. Wolf, 274 So.2d 584 (Fla. Dist. Ct. App. 1972) (holding that there was a reasonable basis to conclude that an individual who is obese or overweight is more likely to become disabled during employment), cert. denied, 414 U.S. 1116 (1973).
disability and to use any criteria other than the applicant's present condition for a determination of whether or not that person is handicapped or disabled would be to transfer the language of [the disability statute] into a universal discrimination law.117

In Gimello v. Agency Rent-A-Car Systems,118 an office manager was allegedly fired due to his obesity.119 His employment records included several commendations for his job performance and his office's high performance, indications that his obesity did not affect his job.120 Therefore, the record supported the conclusion that he was "perceived as having" a disability in that his obesity was considered to be a defect, and that it did not disqualify him in any way from his particular position or his career path.121 The court concluded that he had shown that his obesity constituted a physical "handicap" within the meaning of the state disability statute122 because he had sought medical treatment for his obesity.123 The court, however, appears to have limited its holding to the facts of this particular case, noting that the lower court did not specifically address the issue of whether obesity was a disability in every case.124

Cook v. Rhode Island125 is particularly important, for it represents the first time that a federal court refused to dismiss a claim that obesity, without more, may be an actual or "perceived" handicap within the meaning of the Rehabilitation Act.126 In Cook, the plaintiff worked as an institutional attendant for the mentally retarded for eight years, during which she was overweight.127 She had two periods of employment as

117. 448 A.2d at 707-08.
119. Id. at 265.
120. Id. at 267.
121. Id. at 273.
123. Gimello, 594 A.2d at 273. The court held that the state's broad definition of handicap included a condition that was demonstrable by accepted diagnostic techniques, and that his obesity was undisputedly such a condition. Id. at 276.
124. Id. at 272-73. The court based its holding on the fact that the employer fired him because of a medically demonstrable condition covered by the broad language of the statute, a condition which did not prevent him from doing his job. Id. at 278. For this reason alone, the termination constituted employment discrimination based on a handicap and was actionable. Id. Thus, it did not matter whether the plaintiff's obesity was a real or perceived handicap because he had a recognized medical condition for which he sought legitimate treatment, and the defendants were liable. Id. at 273, 278.
125. 10 F.3d 17 (1st Cir. 1993).
126. See id.
127. Id. at 20-21 & n.1.
an attendant, during which she maintained an unblemished performance record.\textsuperscript{128} It is not clear why her employment was terminated in 1988, but when she sought reemployment she was refused partly because her employer claimed that her obesity impaired her ability to evacuate patients in an emergency.\textsuperscript{129} At the time she reapplied, she was five feet two inches tall and weighed over 320 pounds.\textsuperscript{130} She had been accepted for employment, on the condition that she satisfactorily complete a physical examination.\textsuperscript{131} Although she passed the physical, the examining physician refused to approve her hire unless she reduced her weight to something less than 300 pounds.\textsuperscript{132} When she failed to satisfy this requirement, she was denied employment, and she filed suit under the Rehabilitation Act.\textsuperscript{133}

Cook argued that she was discriminated against because her employer "perceived" her obesity to be a disability.\textsuperscript{134} In analyzing the interpretive regulations of the Rehabilitation Act, the First Circuit noted that the enumerated disorders in the Act "are open-ended . . . [and] do not purport to 'set forth [an exclusive] list of specific diseases and conditions . . . because of the difficulty of ensuring the comprehensiveness of any such list.'\textsuperscript{135} Therefore, the defendant essentially conceded that the plaintiff was not hired solely because of her weight.\textsuperscript{136}

On appeal, the defendant argued that a condition cannot be an impairment unless it is an immutable condition that is beyond a person's control, the lack of which would bring the condition outside the scope of the Rehabilitation Act.\textsuperscript{137} The court, however, concluded that "[s]o long as the prospective employer regards the condition as immutable, no

128. \textit{Id.} at 20.
129. \textit{Id.} at 21. The defendant employer also claimed that her obesity put her at risk of contracting more serious ailments, which would result in increased absenteeism and workers' compensation claims. \textit{Id.}
130. \textit{Id.} at 20.
132. \textit{Id.}
133. \textit{Id.} at 1570-71.
134. \textit{Cook,} 10 F.3d at 22.
135. \textit{Id.} at 22-23 (quoting 45 C.F.R. § 84.3(d)(2)(i)(A) app. at 377 (1992), amended by app. at 355 (1994)). The court noted that the employer's own expert physician held the opinion that "morbid obesity affects virtually every [body] system, including cardiovascular, immune, musculoskeletal, and sensory systems." \textit{Id.} at 23 n.6 (alteration in original).
136. \textit{See id.} at 21 n.3, 27.
137. \textit{Id.} at 24. The court's holding, however, was based on the fact that the employer perceived Cook to be disabled. \textit{Id.}
more is exigible. The court further held that the Rehabilitation Act's protections are not necessarily linked to how someone becomes disabled. Moreover, the employer relied on "generalizations regarding an obese person's capabilities," including a fear that the plaintiff would suffer a work-related injury. Thus, all of the evidence, including the medical examination which she would have passed but for her obesity, demonstrated that Cook was definitely qualified for the position and could perform the job satisfactorily. The potential force of this opinion for obese individuals can be seen from the following excerpt: "in a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences." Although the Cook decision appears to be limited to cases of morbid obesity, it is still a significant ruling and persuasive authority for "perceived disability" claims under the ADA.

These cases clearly show a lack of any definable standard in the obesity discrimination field, further stressing the importance for a uniform standard for determining when obesity will constitute a disability. As one commentator notes, even cases including "obesity within statutory protections . . . do not present a common pattern of reasoning. . . [Thus, o]besity discrimination remains a fluctuating and non-cohesive area of law." Such inconsistent reasoning clearly emphasizes the need for one definitive standard and an explicit prohibition against weight-based discrimination.

138. Id.
139. Id.
140. Id. at 27. Equally important to the court, was the distinction between the legitimate expectations that an employer may have for jobs requiring unique qualifications (such as fire fighters, police officers, and airline stewards) and the mere assumption that an employee cannot perform a large class of jobs simply because of a generalized perception of a condition. Id. at 26. According to the court, one need not have been rejected from many jobs, but need only to show that an employer substantially limited a major life activity by foreclosing a "sufficiently wide range of jobs." Id. at 25-26. In essence:
[D]enying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation[sic] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, viz., working. Id. at 26.
141. Id. at 26-27.
142. Id. at 26.
143. Passaglia, supra note 39, at 842-43.
144. Dunworth, supra note 45, at 537.
V. OBESITY UNDER THE AMERICANS WITH DISABILITIES ACT

As stated above, neither the ADA, its implementing regulations, nor federal case law, specifically addresses the issue of whether obesity, without more, is a disability. Without such a definitive standard against weight-based discrimination, however, the ADA falls short of protecting overweight individuals.

A. A Condition Due to a Voluntary Act of the Individual Claiming to be Disabled

An argument against protecting obese individuals through disability statutes is that the obese are not entitled to protection because the term “disability” should not include physical conditions that result from the voluntary acts of an individual. According to this argument, a self-imposed condition that is the result of voluntary conduct (in this case, overeating) is neither a physiological disorder nor a handicap and, thus, should receive no protection.

In addressing this issue, there has been a tendency by courts to require an individual’s condition to be immutable in order for statutory protections against discrimination to apply. For instance, the Greene court held that a handicap was not present because obesity was considered to be alterable and not an immutable or unchangeable condition. The Tudyman court, on the other hand, discussed the issue further by analogizing the condition of being overweight to other

145. Passaglia, supra note 39, at 841. See supra part III.C.
146. See Cassista v. Community Foods, Inc., 856 P.2d at 1152 (Cal. 1993) (quoting Cook v. Rhode Island, 783 F. Supp. at 1573 (D.R.I. 1992) (“to the extent that obesity is a transitory or self-imposed condition resulting from an individual’s voluntary action or inaction, it would be neither a physiological disorder nor a handicap.”) aff’d, 10 F.3d 17 (1st Cir. 1993) (affirming the lower court’s ruling but rejecting the notion that immutability is required)). See also Greene v. Union Pac. R.R., 548 F. Supp. 3 (W.D. Wash. 1981) (holding that obesity is not a physical handicap within the contemplation of Washington state law because it is “not an immutable condition such as blindness or lameness”); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (holding that the plaintiff’s weight was “self-imposed and voluntary” and, as such, it was distinguishable from physiological disorders, disfigurement, and anatomical loss).
147. See supra note 146.
148. See supra note 146.
149. Greene, 548 F. Supp. 3 (W.D. Wash. 1981). But see Cook, 10 F.3d 17 (1st Cir. 1993) (rejecting the argument that immutability is required for the Rehabilitation Act to apply); Xerox, 480 N.E.2d 695 (N.Y. 1985) (rejecting the argument that the relevant state statute should apply only to immutable conditions).
voluntary conditions that are excepted from inclusion as “disabilities” by the Rehabilitation Act in certain circumstances. \textsuperscript{150} The major factor here was that the condition was self-imposed and voluntary. \textsuperscript{151} The New York Court of Appeals is the only state court to hold that such a statute protects all persons with disabilities, and not just those with hopeless or immutable conditions. \textsuperscript{152} In addition, the \textit{Cook} court is the only federal court to hold that protection under the Rehabilitation Act is not necessarily linked to how an individual became disabled or whether an individual contributed to an impairment. \textsuperscript{153} In most cases, however, excess weight, without a related medical condition or other impairment, has not been considered a handicap. \textsuperscript{154}

The immutability argument is short-sighted for a number of reasons. Obesity is often considered to be a voluntary indulgence, but being overweight is simply not the result of overeating and nothing more. \textsuperscript{155} Factors such as heredity, socioeconomic status, gender, and race can influence an individual’s body weight. \textsuperscript{156} In fact, researchers have consistently found that the obese cannot control their body weight. \textsuperscript{157} Thus, obesity may in fact be immutable for some overweight individuals.

\begin{itemize}
\item \textsuperscript{151} Tudyman, 608 F. Supp. at 746.
\item \textsuperscript{152} Xerox, 480 N.E.2d 695, 698 (N.Y. 1985).
\item \textsuperscript{153} \textit{Cook}, 10 F.3d 17, 24 (1st Cir. 1993). “On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, [and] cancer resulting from cigarette smoking . . . .” \textit{Id. But see} 42 U.S.C. §§ 12114(a), 12208, 12210(a), and 21211 of the ADA, which excludes, among other things, transvestites, people with sexual disorders such as pedophiles, gamblers, and illegal drug users from its protection.
\item \textsuperscript{154} E.g. Cassista, 856 P.2d at 1143, 1152.
\item \textsuperscript{155} Dunworth, \textit{supra} note 45, at 544-45. The obese may be viewed as being responsible for their situation, “unlike an individual with another disabling physical attribute.” Hartnett, \textit{supra} note 6, at 812. There is “no single explanation for its causes. [But t]o conclude that obesity is caused by overeating is no more meaningful than concluding that alcoholism is caused by too much drinking.” Hartnett, \textit{supra} note 6, at 810. See also Jane Osborne Baker, Comment, The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?, 29 UCLA L. REV. 947, 952 (1982).
\item \textsuperscript{156} Dunworth, \textit{supra} note 45, at 544-45; see Steven L. Gortmaker et al., \textit{Social and Economic Consequences of Overweight in Adolescence and Young Adulthood}, 329 NEW ENG. J. MED. 1008, 1008-12 (1993); see also Baker, \textit{supra} note 155, at 949, 952.
\item \textsuperscript{157} Dunworth, \textit{supra} note 45 at 545.
\end{itemize}
B. Meeting All Job Requirements But Failing a Physical Examination Because of Obesity

Employers often use the results of preemployment testing in hiring decisions, but such testing can create situations in which obese individuals who are capable of performing the duties required by the position being applied for are being denied employment because they are found to be medically unfit due to their obesity. In this respect, the business necessity exception to many disability statutes may serve as "a pretext for prejudice or to disguise unsubstantiated fear[s] that obese employees will be less likely to be 'illness-free' or 'claims-free.'" 

The ADA, however, provides protection for job applicants from employers who try to screen out individuals because of disabilities. Under the ADA the term "discriminate" with regard to a private employer includes:

using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity ... 

The ADA further provides that employers are prohibited from administering medical examinations to screen job applicants and to inquire as to the existence of a disability unless an applicant will be unable to perform the duties of the position sought because of a physical infirmity. An employer can, however, inquire as to an applicant's ability to perform

158. Xerox, 480 N.E.2d 695, 698 (N.Y. 1985) (holding that plaintiff was handicapped in that she was found to be medically unacceptable by a potential employer due solely to her obesity); see also Velger v. Williams, 500 N.Y.S.2d 411 (N.Y. App. Div. 1986) (holding that an employer is not guilty of unlawful discrimination against an obese person if the condition is in any way related to the duties required of the person in connection with the position); Gimello v. Agency Rent-A-Car Sys., Inc., 594 A.2d 264 (N.J. Super. App. Div. 1991) (holding that an employee was a victim of discrimination when he was fired because of his obesity, which his supervisors perceived as a defect but which did not disqualify him from his job).

159. See Hartnett, supra note 6, at 829.


161. "Qualification standard" can include a requirement that an "individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Id. § 12113(b).

162. Id. § 12112(b)(6).

163. Id. § 12112(d)(4)(A).
job-related functions." Preemployment examinations are also subject to several restrictions. An employer may administer such exams if they are job related, if all employees are required to take such an exam, and if the information that is obtained is kept confidential. There is still one problem, however, in that the subjective nature of such examinations enables employers to make evaluations as to an applicant's fitness for a particular job when such medical judgments are made without regard to any specific physical job requirement.

C. The Americans with Disabilities Act's Broad, Yet Limited, Definition of "Disability"

While the "perceived as having" terminology of the ADA may seem incredibly broad, its protections may still fall prey to the same fluctuation and non-cohesiveness with regard to what constitutes a "disability." The United States Supreme Court has held that an otherwise qualified individual "is one who is able to meet all of a program's requirements in spite of [the] handicap." It is language such as this which seems to protect obese individuals, but it is the issue of what constitutes a "disability" that works against them.

The ADA not only includes those "who are actually . . . impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity . . . [due to] society's . . . myths and fears about disabilities, . . . [which] are as handicapping as are the . . . limitations that flow from actual impair-

164. Id. § 12112(d)(4)(B).
165. Id. § 12112(d).
166. Id. § 12112(d)(2)(B).
167. Id. § 12112(d)(3)(A).
168. Id. § 12112(d)(3)(B). Provided that "(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations . . . " Id.
169. Hartnett, supra note 6, at 830. "In the Greene railroad case, for example, the court implied that a legitimate business concern existed regarding the 'overall fitness' of the obese employee and fear that the employee would not be 'illness-free, and claims-free.'" Hartnett, supra note 6, at 830; Greene v. Union Pac. R.R., 548 F. Supp. 3 (W.D. Wash. 1981). But see Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that a bona fide occupational qualification under the Civil Rights Act of 1964 is to be interpreted narrowly). This, however, does not seem to be the case concerning weight-based employment decisions.
170. See supra part IV.
ment."  

The effects of one's impairment "on others is as relevant to [the] determination of whether one is handicapped as is the" intrinsic or physical effect the condition has on the handicapped individual. Although not every applicant rejected because of a job requirement is handicapped within the meaning of the ADA, the substantial limitation in obtaining a career goal because of an impairment does make an applicant handicapped.

Although applicants may be excluded for failing to prove that they can engage in the activity despite their handicap, "[e]ven in applying permissible standards, officers of a [s]tate cannot exclude an applicant when there is no basis for their finding that he fails to meet [their] standards, or when their action is invidiously discriminatory."  While the "regarded as having" language seems to make the definition of "disability" broad, the Act leaves unanswered several questions that greatly restricts its application to weight-based discrimination. The Act fails to

172. Id. at 284. "Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the Act."  Id. at 282 n.9.

173. Id. at 283 n.10; Doe v. Centinela Hosp., No. CV. 87-2514 PAR, 1988 WL 81776, at *6 & n.6 (C.D. Cal. June 30, 1988). This is clearly supported by the legislative history of the ADA, which states that being regarded as having an impairment "also includes an individual who has a physical or mental impairment that substantially limits major activities only as a result of the attitudes of others toward such impairment[,] or [who] has no physical or mental impairment but is treated by a covered entity as having such an impairment."  SENATE COMM. ON LABOR AND HUMAN RESOURCES, AMERICANS WITH DISABILITIES ACT OF 1989, S. REP. NO. 116, 101st Cong., 1st Sess. 23 (1989). According to the Senate report, an individual would be covered under the "regarded as having" prong of the ADA if an employer refuses to hire an individual simply because of a fear of the negative reactions of others, or the employer's perception that the individual had a disability that prevented her from working.  Id. at 24 (citing Arline, 480 U.S. at 284; Centinela Hosp., No. CV. 87-2514 PAR, 1988 WL 81776 (C.D. Cal. June 30, 1988)).

174. See Taylor v. United States Postal Serv., 946 F.2d 1214, 1217-18 (6th Cir. 1991). See also Cook, 783 F. Supp. at 1575, (noting that the Rehabilitation Act does not require hiring an individual who cannot satisfactorily perform the job because such inability stems from a handicap), aff'd, 10 F.3d 17 (1st Cir. 1993). According to the lower Cook court, the individual's rejection must be solely, and by reason of, such handicap to establish a claim of handicap discrimination.  Id. at 1575-76 (citing 29 U.S.C. § 794(a) (1988); Bento v. I.T.O. Corp., 599 F. Supp. 731, 744 (D.R.I. 1984)). Likewise, the implementing regulations accompanying the ADA state that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

175. See Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (reversing the grant of a preliminary injunction where the plaintiff medical student failed to establish a substantial likelihood of success on the merits — that she was qualified for acceptance as a medical student or qualified to engage in the practice of medicine despite her handicap).

specifically include obesity as a "handicap," which, in turn, makes it difficult to determine whether obesity in itself is a "disability." Without such an inclusion, it is difficult to determine whether obesity can substantially limit a major life activity within the meaning of the Act. More importantly, the Act leaves unanswered the question of whether the perception of having such a limiting condition would entitle an obese individual to protection under the Act.

VI. HOW OBESITY SHOULD BE TREATED UNDER THE AMERICANS WITH DISABILITIES ACT

Without more aggressive action, discrimination against the obese will continue. States that have enacted disability discrimination statutes have not included obesity in the definition of "handicap." Michigan is the only state that has explicitly prohibited discrimination on the basis of weight. Moreover, most courts have been reluctant to hold that obesity, in itself, is a handicap. Only New York in Xerox has held that obesity alone was enough to consider an individual handicapped for anti-discrimination purposes. As one commentator has noted:

177. The result is the use of inconsistent standards to determine whether an obese individual is "handicapped." See supra parts III.C-IV.C.

178. This would clearly appear to be consistent with Arline, 480 U.S. 273, in that a person who is discriminated against because of negative attitudes is treated as being currently disabled and is also entitled to the protection of the Act, which makes such discrimination illegal. In essence, obesity alone should be enough to consider an individual disabled in those situations where an employer erroneously perceives an individual's capabilities to be limited merely because of his or her obesity.


183. Id. at 697. Other courts, however, have required obesity to be accompanied by other physiological conditions or impairments before it could be considered a handicap. Bierman, supra note 44, at 961. Without such other medical or physical conditions, these courts have defined "handicap" or "disability" narrowly, such that the overweight condition does not constitute a

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss1/6
It appears to stretch the definition of handicap to include someone who is in good health and able to perform job functions satisfactorily, but is overweight. The first two levels of obesity, overweight\(^{184}\) and significant obesity,\(^{185}\) do not appear to adversely affect performance. Even morbid obesity\(^{186}\) does not, by itself, necessarily have a negative impact on an individual’s job performance. Additionally, most overweight persons would not consider themselves to be handicapped under common notions, definitions and perceptions of the term handicapped. The self-perception of being handicapped, for many obese persons, probably occurs while searching for a remedy after discrimination has occurred.\(^{187}\)

But in order to combat this form of discrimination, we must change the definition of disability in the ADA to clearly include those who are obese either through federal legislation, or statutory interpretation by creating an exception (or addition) to the general definition. Such a change would make it unlawful for any employer to use weight as a factor in the hiring process, unless of course, an obese individual cannot adequately perform the duties of the position even after reasonable accommodation by the employer.\(^{188}\) What is most important, however, is that the federal government makes this change so that the “Congressional mandate”\(^{189}\) can be carried out through one uniform and enforceable standard. Current standards throughout the country for determining whether obese individuals are “handicapped” are simply insufficient to protect the overweight.\(^{190}\)

---

\(^{184}\) Defined as “any weight exceeding the ideal weight defined in tables published by insurance companies. ... Individuals in this category of obesity would probably not be considered fat or obese by the non-medical community.” Bierman, \textit{supra} note 44, at 956.

\(^{185}\) “When a person is 20% [to 30%] above the ideal weight [it] ... is referred to as medically significant obesity. ... [This] person would be considered fat by a non-medical person.” Bierman, \textit{supra} note 44, at 956.

\(^{186}\) “Morbid obesity is weight that is either one hundred pounds over the ideal, or twice the ideal.” Bierman, \textit{supra} note 44, at 957.

\(^{187}\) See \textit{infra} notes 192-95 and accompanying text.

\(^{188}\) See \textit{infra} part III.A.

\(^{189}\) See \textit{Cassista}, 856 P.2d 1143 (Cal. 1993) (holding that obesity, without being the result of an underlying physiological disorder enumerated in the relevant state statute, is merely self-imposed and is insufficient to constitute a disability). \textit{Accord Civil Serv. Comm’n}, 591 A.2d 281 (P.A. 1991); \textit{Tudyman}, 608 F. Supp. 739 (C.D. Cal. 1984). These cases represent the narrowest definition of “disability” or “handicap,” which requires some sort of demonstrable medical impairment. However,
to the holding in Cassista:

The result of the holding in Cassista is unreasonable. An employer who discriminates against an obese employee will have broken the law if it turns out that the employee also suffers from a disorder listed in the statute, such as a thyroid problem, even though the employer was unaware of that condition. However, if it turns out that the employee does not have one of the listed disorders, the employer may legally discriminate against the employee on that same basis: obesity. Such a holding, which distinguishes between actual and perceived disabilities, "makes no sense . . . since that interpretation would only protect against discrimination in cases where the wrongdoer accurately perceived the discriminatee's 'classification'."191

Another commentator has recommended that it makes more sense to include the obese as a class to be protected under civil rights legislation, rather than to prove that a handicap exists each time an obese person suffers from employment-related discrimination.192 One reason given for this approach as opposed to changing the definition of "disability" so as to include obesity is that discrimination based on obesity will be very fact specific, necessitating "litigation in order to determine if the obesity was the reason for the employment-related decision."193 This position, however, fails to take into account that a claimant will not have to prove that a handicap exists if obesity is included in the definition of "disability" or "handicap." Moreover, while an employment-related decision based on weight may be a very fact specific determination, it is difficult to comprehend how it will be any more fact specific than determining whether an individual's race, sex, or national origin played a part in an employment-related decision.

Yet another commentator has proposed that the obese should be


192. Bierman, supra note 44, at 975.

193. Bierman, supra note 44, at 970-71. The author also suggests that weight-based discrimination may have a disparate impact on some minorities and on women for equal protection purposes. Bierman, supra note 44 at 971. For an in depth discussion about the Civil Rights Act of 1964 and weight-based discrimination, see Stolker, supra note 6. The Equal Employment Opportunity Commission has endorsed the view that congress should extend the Americans with Disabilities Act to weight-based discrimination. Passaglia, supra note 39, at 841. But because there is no federal law that explicitly prohibits weight-based discrimination, the Commission has argued that weight programs used by airlines reflect both sex and age bias. Stolker, supra note 6, at 245.
protected by legislation prohibiting “lifestyle” and “appearance” discrimination.194 The problem with this approach is that weight-based employment decisions can go beyond appearance discrimination in that an employer may be under the erroneous belief that an overweight individual will be incapable of performing a job simply because of that individual’s weight, not because of her appearance, or even race. And if an employer believes that an individual is physically incapable of performing the job, that individual is being treated as if she was handicapped, thus, necessitating protection under a disability statute.195

VII. CONCLUSION

The ADA was enacted to equalize the employment opportunities for the handicapped by invoking a broad sweep of authority and creating enforceable standards to eliminate discrimination against the disabled.196 Unlike the Rehabilitation Act, however, the ADA was meant to protect a larger group of disabled individuals by being made applicable to the private sector.197 Moreover, by including those that are regarded as having a disability in the definition of “disability,”198 the ADA can potentially protect any impaired individual, or anyone perceived to be impaired, who is subject to discrimination in the workplace on the basis of that impairment.

While the ADA is perhaps the greatest effort to combat discrimination in recent years, it may still be inadequate to eliminate discrimination against the obese. Unfortunately, the ADA suffers from the same inadequacies as other previous and current statutory attempts to prohibit discrimination when dealing with weight-based discrimination. Although the language is there, neither the ADA nor its accompanying regulations specifically address the issue of whether obesity is a “handicap” or “dis-

194. Hartnett, supra note 6, at 843.
195. This is not to say that obese individuals do not face appearance discrimination, and protection for the obese as a class under civil rights or appearance discrimination legislation would certainly provide extra protection through a second or third cause of action. But see Hartnett, supra note 6, at 841. The author suggests that it would be a difficult and unfair burden on overweight individuals to argue that they are handicapped when they do not consider themselves to be. Hartnett, supra note 6, at 841. Moreover, Hartnett states that an employer’s discrimination may be more a matter of finding an obese individual undesirable as opposed to perceiving her as being disabled or unfit. Hartnett, supra note 6, at 841.
197. Id. § 12111(5)(a). See supra text accompanying notes 12-17.
ability" within the meaning of the Act.\textsuperscript{199} The definition of "disability" must be changed to specifically include the obese so that the Act clearly protects overweight individuals, and to eliminate the fluctuating reasoning of our country's courts through a uniform standard.\textsuperscript{200} Without such a change, the most important issue in weight-based discrimination will be left unanswered: whether the perception of having a limiting condition because of obesity would entitle the obese to protection under the Act.\textsuperscript{201} Although obesity may not be a "disability" in the ordinary sense of the word, the legislative history of the Act supports its inclusion:

[The "regarded as having a disability"] prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination. . . . A person who is excluded from any activity covered under [the] Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. . . . Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered . . . .\textsuperscript{202}

The regulations accompanying the Act similarly support its inclusion by defining "regarded as having such an impairment" as: (1) having a physical impairment that does not substantially limit a major life activity but is treated by an employer as having such a limitation;\textsuperscript{203} (2) having a physical impairment that substantially limits a major life activity "only as a result of the attitudes of others towards such impairment;"\textsuperscript{204} or (3) not having one of the enumerated impairments but being treated by a covered entity as having a "substantially limiting impairment."\textsuperscript{205} Only an express prohibition against using weight as a factor in the hiring process can eliminate the current inadequate standards for determining whether obese individuals are "handicapped" for anti-discrimination

\begin{footnotes}
\item[199] Passaglia, supra note 39, at 841.
\item[200] See supra part IV.
\item[201] See supra note 178 and accompanying text.
\item[203] 29 C.F.R. § 1630.2(1)(1).
\item[204] Id. § 1630.2(1)(2).
\item[205] Id. § 1630.2(1)(3).
\end{footnotes}
purposes. Without the specific inclusion of obesity in the definition of “disability,” however, weight-based discrimination is sure to continue.

Jeffrey Garcia

---

206. See supra note 190 and accompanying text.