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GETTING THE SKINNY: FAST FOOD FAT-BASED LITIGATION IS NOT A LEGAL THREAT TO BUSINESS, BUT IT SHOULD BE

J. Brad Reich[*]

INTRODUCTION

A wave of "fat-based" litigation paranoia recently swept the country.[1] It largely began with a 2003 lawsuit that grabbed the public's attention. It alleged a novel claim, namely that consuming McDonald's food made two minors fat, and McDonald's was liable for creating the minors' conditions.[2] The United States House of Representatives, responding swiftly, passing the "Personal Responsibility in Food Consumption Act,"[3] a federal law that would largely prohibit bringing a lawsuit against manufacturers, sellers, or distributors of food. This Act

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1. Not only is fat-based litigation a hot issue in the United States, it is part of a rapidly growing discussion of obesity worldwide. *See, e.g.*, Press Release, PR Web Newswire, Interest in Obesity Soars by 294% in Five Years; Education and Litigation Important Issues in Obesity Debate in U.S.; Leading Brands Top Global Attention (May 21, 2004) (on file with the HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL), *available at* http://pdfserver.prweb.com/pdfdownload/127780/pr.pdf (finding that a review of 9,000 pieces of worldwide media showed that "...the debate on obesity has soared 294% in five years.").

2. *See infra* text accompanying notes 40-41. There was an earlier suit filed by the same attorneys but it did not garner the same public attention. *See generally* Barber v. McDonald's Corp., No. 00-2152, 2000 U.S. App. LEXIS 26026 (4th Cir. Oct. 19, 2000), http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf.

3. H.R. 339, 108th Cong. (2004). The bill is now pending in the Senate as the "Commonsense Consumption Act." *See* S.1428, 108th Cong. (2004).

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was accompanied by more than 110 pieces of fat-based state legislation proposed in the first six months of 2004 alone.[4] The Act's rationale was straightforward; commentators contend that fast food, fat-based litigation would do to the food industry (primarily fast food companies) what big tobacco litigation did to tobacco companies. But is that really the case? This article contends that fast food fat-based litigation poses little or no legal threat to the fast food industry but, if being fat was properly analyzed and recognized as a protected disability under the Americans with Disabilities Act, fat-based discrimination actions by both employees and customers would.

This article has two sections. Section I looks at potential fat-based liability for fast food providers. The essence of such claims is that fast food consumption made certain consumers fat. It is increasingly popular for authors to contend that fast food fat-based litigation's evolution will mirror big tobacco litigation's evolution, culminating in eventual success for plaintiffs. Those authors have focused only on surface similarities between the two, proceeding as if such an evolution was a foregone conclusion. It is not. The similarities are obvious, but superficial. To date no author has examined the enormous differences between the two. I will. Tobacco producers were universally successful in defeating tobacco suits for decades and they only began to experience difficulties when certain key events occurred. Those events fundamentally altered tobacco litigation, but similar events have not occurred in fast food fat-based litigation and are unlikely to occur in the future. The end result, contrary to the unanimous speculation of other commentators, is that fast food fat-based litigation is not a significant legal threat to the fast food industry.

Section II examines legal liability for businesses and employers who discriminate based on "fat." The section is divided into four subsections. Subsection A focuses on what a goods or service providers must do to accommodate already fat patrons. Title III of the Americans with Disabilities Act makes it unlawful for a good or service provider to discriminate based on a disability. Arguably that means that such

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4. *See States Introduce Near Record Number of Obesity Reports*, 2 OBESITY POL'Y REP., JULY 1, 2004, http://www.obesitypolicy.com/ejournals/articles/demo_article.asp?id=82965:

> State legislators started off 2004 with a bang, and with the year half over, they're showing few signs of slowing down. More than 110 obesity-related bills have been introduced since January – just a few shy of the record 120-plus measures launched during all of 2003 – proving that obesity continues to be one of the hottest political issues in the country.

providers could not discriminate against fat customers because they are fat. We will see that is not the case because a customer's "fat" condition has never been recognized as a protected disability.

However, it is not impossible for being fat to constitute a protected disability. Subsection B discusses the Rehabilitation Act and the Americans with Disabilities Act, focusing on when being fat can be a protected disability. Subsection C reviews federal court decisions addressing fat-based employment discrimination cases, specifically discussing the two instances where Plaintiffs were successful, as well as common themes in the multitude of Plaintiffs' defeats. Despite the federal courts' reluctance to recognize being fat as a protected disability, subsection D argues that it should be a protected disability under the Americans with Disabilities Act when the claimant is able to satisfy the statutory criteria, regardless of whether the condition is mutable.

The term "fat" is both a noun[5] and an adjective.[6] Its adjective form is frequently unflattering.[7] While some members of society contend that "fat" does not have to be a derogatory term,[8] societal stereotypes and prejudices reveal otherwise.[9] For purposes of this article I will use the term "fat" as a general adjective, encompassing such other terms as

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5. *See* dictionary.com, http://www.dictionary.com (last visited February 17, 2006) (identifying "fat" as "[a]ny of various soft, solid, or semisolid organic compounds constituting the esters of glycerol and fatty acids and their associated organic groups.").

6. The adjective definition of "fat" is nebulous and demonstrates its common inter-relationship with "obese" and "overweight." *See id.* (defining "fat," in part, as "obesity, corpulence," "corpulence" as "...condition of being excessively fat; obesity," and "obesity" as "...extremely fat, grossly overweight.").

7. *See, e.g.*, Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COM. 203, 203 (1996) (citing Gordon B. Block, *So Long, Girth Control*, HEALTH, Feb. 1991, at 70).

8. *See* National Association to Advance Fat Acceptance (NAAFA) Information Index, at 5 of 6, http://www.naafa.org/documents/brochures/naafa-info.html#whatis (last visited Feb. 17, 2006):

> "Fat" is not a four-letter word. It is an adjective, like short, tall, thin, or blonde. While society has given it a derogatory meaning, we find that identifying ourselves as "fat" is an important step in casting off the shame we have been taught to feel about our bodies.

9. *See* Elizabeth E. Theran, *Free to be Arbitrary...and Capricious: Weight Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 152-53 (2001):

> One thing is absolutely clear: There are deeply entrenched cultural stereotypes, prejudices, and biases surrounding weight and fat in this country...[e]xtensive research in this area...has revealed consistent evidence of the stigmatization of the overweight at practically every stage in life, in every area of functioning. Common stereotypes of overweight people depict them as "lazy, gluttonous, and both mentally and physically slow."

"overweight[10]" and "obese[11]." I do so because, while the terms have different definitions, many people use them interchangeably and, frequently, the terms share part of the same definition(s). Many potential fat-based legal issues arise because of a subjective perception of a person as fat, as opposed to an objective determination that a person is overweight or obese.[12]

One of the primary reasons that businesses may be concerned about the risk of fat-based litigation is because so many employees, customers, and potential employees or customers are fat, and the rate is increasing dramatically.[13] Among all people, obesity has increased by 61% over the

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10. The term "overweight" is objective. Historically, a person was overweight if he or she weighed more than an "average" person of a particular height according to established insurance tables. *See* Donald L. Bierman, *Employment Discrimination Against Overweight Individuals: Should Obesity be a Protected Class?*, 30 SANTA CLARA L. REV. 951, 956 (1990). People are also defined as overweight if their weight exceeds 120 percent of the "desirable" weight for their height and severely overweight if their weight exceeds 140 percent of their desirable weight. "Overweight" may also be determined by using a measure called "Body Mass Index" ("BMI"), a relationship of height to weight. According to the United States Surgeon General, a person is overweight if their BMI exceeds the 85th percentile for young American adults of a specified height, and severely overweight if their BMI exceeds the 95th percentile. *See* U.S. Dep't of Health & Human Servs., *Extracts of the Surgeon General's Report on Nutrition and Health*, at 10 of 16, www.mcspotlight.org/media/reports/surgen_rep.html (last visited February 17, 2006).

11. The federal government defines obesity as having a Body Mass Index ("BMI") of 30% or more. *See* Nat'l Inst. of Health Clinical Guidelines on Identification, Evaluation, & Treatment of Overweight & Obesity in Adults: The Evidence Report, NIH Publication No. 98-4083, http://www.nhlbi.nih.gov/guidelines/obesity/ob<uscore>gdlns.htm (last visited Feb. 17, 2006). Obesity is broken down into "mildly obese," sometimes defined as 20-40% over "ideal" weight, "moderately obese," 41-99% above ideal weight, and "morbidly obese," those 100% or more above ideal weight. *See* Jane Byeff Kown, *Fat*, 77 B.U.L. REV. 25, 28-29 (1997). At the time that article was published, 25-30% of Americans were "obese." Within that group, 90% were mildly obese, 9% were moderately obese, and .5% were morbidly obese. *Id.*

12. As succinctly put by one author "[F]at is squarely in the eye of the beholder." *See* Theran, *supra* note 9, at 136.

13. *See* Obesity Trends, http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/index.htm (last visited Feb. 17, 2006):

> In 1991, four states were reporting obesity prevalence rates of 15-19 percent and no states reported rates at or above 20 percent. By 2002, 18 states had obesity prevalence rates of 15-19 percent; 29 states have rates of 20-24 percent; and 3 states have rates over 25 percent." The percentages of obese adults have skyrocketed. In 1991 11.7% of American men were obese, in 2001 that percentage was 21.0%.

Id. See also Michigan and National Obesity Trends, DETROIT NEWS, Dec. 14, 2003, http://www.detnews.com/2003/editorial/0312/14/a15-7090.htm (last visited Feb. 17, 2006) ("In 1991 12.2% or American females were obese, by 2001 that percentage had reached 20.8%."). Perhaps most alarming is obesity among non-adults. In 1971 4.3% of boys ages 6-11 and 3.6% of girls ages 6-11 were obese. By 2000 that percentage for boys was 16% and it was 14.5% for girls. *See* AOA Facts Sheet, Obesity in Youth, http://www.obesity.org/subs/fastfacts/obesity_youth.shtml (last visited Feb. 17, 2006).

past ten years.[14] An estimated 300,000 deaths per year are attributed to obesity and obesity-related conditions.[15] For some, it is difficult to separate the increase in fat citizenry from fast food sales.[16]

I. FAT LITIGATION AND GOODS AND SERVICE PROVIDERS: FAST FOOD MADE ME FAT

The possibility of a customer suing a fast food supplier for making them fat first captured the public's attention in 2003 in the case of *Pelman v. McDonald's Corp.*[17] In *Pelman*, two fat minor plaintiffs alleged that their fat conditions were caused by McDonald's business practices. Their original complaint was dismissed, but the court granted leave to file an amended complaint.[18] The amended complaint was also dismissed[19] but America was now on notice that such suits could be brought[20] and reaction was swift.[21]

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14. *See The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1161 (2003).

15. *See* David Satcher, Foreword to the Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity, http://www.surgeongeneral.gov/topics/obesity/calltoaction/foreword.htm (last visited Feb. 17, 2006).

16. In fact, sometimes the parallel growth of the two causes a second look. A striking example occurred in Sweden. *See* Deborah Ball, *Swedish Kids Show Difficulty of Fighting Fat*, WALL ST. J., Dec. 2, 2003, at B8 ("Vending machines in Swedish schools are practically unheard of. TV commercials aimed at kids under 12 are banned. School children as young as eight learn to cook healthy meals."). Yet, "the number of kids who are overweight has tripled in the last 15 years...McDonald's Corp.'s sales in Sweden have tripled since 1992." *Id.*

17. No. 02 Civ. 7821 (RWS), 2003 U.S. Dist. LEXIS 707 (S.D.N.Y. Jan. 22, 2003).

18. In fact the written ruling granting dismissal went so far as to identify for plaintiffs what might be included in a Complaint that would survive dismissal. Perhaps as a result of this guidance, the amended Complaint focused on alleged violations of statutory duties, as opposed to common law causes of action. *Id.* at *4-6.

19. The amended Complaint contained four causes of action, but plaintiffs only pursued three at oral argument. *See* Pelman v. McDonald's Corp., No. 02 Civ. 7821, 2003 U.S Dist. LEXIS 15202, *5-6 (S.D.N.Y. Sept. 3, 2003):

> The three remaining causes of action are based on deceptive acts in violation of the Consumer Protection Act, New York General Business Law §§ 349 and 250. Count I alleges that McDonald's misled plaintiffs, through advertising Campaign and other publicity, that its food products were nutritious, of a beneficial and nutritional nature or effect, and/or were easily part of a Healthy lifestyle consumed on a daily basis. Count II alleges that McDonald's failed adequately to disclose the fact that certain of its foods were substantially less healthier, as a result of processing and ingredient additives, than represented by McDonald's in its advertising campaigns and other publicity. Count III alleges that McDonald's engaged in unfair and deceptive acts and practices by representing to the New York Attorney General and to New York consumers that it provides nutritional brochures and information at all of its stores when in fact such

Almost immediately following what have become known as the "McSuits" the United States House of Representatives passed the "Personal Responsibility in Food Consumption Act," commonly known as the "Cheeseburger Bill."[22] The stated purpose of the Act was "[t]o prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements."[23] The real purpose of the Cheeseburger Bill, and similar state legislation, is to prevent fast food fat-based suits.[24] Many commentators have fueled this fear of

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information was and is not adequately available to the plaintiffs at a significant number of McDonald's outlets.

Id.

20. The opinion is carefully crafted, as if the court appreciated the potential ramifications of what was otherwise a relatively small case. That impact has already been recognized. *See* LSU Law Center's Medical and Public Health Law Site, *NY Dismisses First Fat Food Lawsuit*, http://biotech.law.lsu.edu/cases/food/Pelman_v_McDonalds_SDNY_brief.htm (last visited June 14, 2004) ("J. Sweet's opinions in McLawsuit I and II are likely to be cited for years to come as Americans cope with the obesity epidemic.").

21. The Plaintiffs appealed the second dismissal and it was overturned in part. *See* http://www.kir.com/documents/Super%20Size%20Me%20decision%20012605.pdf (last visited Sept. 20, 2005) (The district court's dismissal of the portions of Count I-III of the amended complaint as alleged violations of § 349 were vacated and remanded for further proceedings).

22. *See* H.R. 339, 108th Cong. (2004). The bill is now pending in the Senate as the "Commonsense Consumption Act." *See* S. 1428, 108th Cong. (2004).

23. H.R. 339, 108th Cong. The act went on to delineate the scope of protection:

> The manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption shall not be subject to civil liability, in Federal or State court, whether stated in terms of negligence, strict liability, absolute liability, breach of warranty, or State statutory cause of action, relating to consumption of food or non-alcoholic beverage products unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements.

Id. at 3 of 6.

24. Such legislation may have strong public support. *See, e.g.*, Shelly Branch, *Food Makers Get Defensive About Gains in U.S. Obesity*, WALL ST. J., JUNE 13, 2002, *available at* http://www.karlloren.com/diet/p110.htm at 4 ("The report, released earlier this year, included results from a survey asking about 1,000 consumers 'who is responsible' for obesity. It found that 57% of respondents blamed 'individuals themselves' rather than food manufacturers (5%), restaurants (2%) and other causes."); Restaurant.org, Public Policy Issue Briefs, http://www.restaurant.org/government/issues/lawsuits_food.cfm (last visited June 14, 2004) ("According to a recent Gallup poll, 89 percent of Americans believe that restaurants should not be held liable for an individual's obesity or weight gain.'); Jonathan S. Goldman, *Take that Tobacco Settlement and Supersize It!: The Deep Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 121 (2003) ("In general, the public is incredulous that anyone would have the gall to sue the fast food industry for making them fat.'"); and *supra* note 14, at 1174-75 ("most Americans continue to understand obesity as a case of individual failure rather than see it as the result of food environment or genetics."). At least one state, Louisiana, had adopted legislation that banned such suits. *See Wis. Bill to Curb Obesity Lawsuits Vetoed* ("Wis. Bill"), USA TODAY, March 18, 2004, at 3a. Similar legislation has been introduced in another bill. Ohio S.B. No. 161, *available at* http://www.legislature.state.oh.us/BillText125/125_SB_161_I_Y.html (last visited March 9,

litigation by opining that there will soon be a wave of litigation against food providers that will mirror big tobacco litigation.[25] At first glance, the projection of parallel evolutions seems logical, however further analysis reveals major flaws in this premise.

The evolution of tobacco litigation can be broken down into three distinct stages.[26] The first began with the first significant suit against the tobacco industry in 1957, a case entitled *Green v. American Tobacco Companies*.[27] Edwin Green filed suit, alleging that he contracted lung cancer from smoking Lucky Strike cigarettes. One of his causes of action was breach of implied warranty of merchantability.[28] The trial jury decided in favor of the defendants, determining that the defendants were not aware of the adverse health effects of smoking.[29]

The second stage of tobacco litigation was set when the Report to the Surgeon General on Smoking was published in 1964 ("1964 Report").[30] The 1964 Report was significant because it announced a

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2006) (stating that a bill was introduced in the Senate for the state of Ohio that "[p]rovides a qualified immunity from civil damages to a manufacturer or supplier of a food or nonalcoholic beverage for claim of weight gain, obesity, or a related health condition resulting from the consumption of food or nonalcoholic beverage unless certain circumstances are proven by a claimant.").

25. *See, e.g., Personal Responsibility in Food Consumption Act: Hearing on H.R. 339 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. (2003), *available at* http://www.house.gov/judiciary/schwartz061903.htm (last visited August 9, 2006) (testimony of Victor E. Schwartz, member, American Law Institute); John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110-11 (2003). *See generally* Goldman, *supra* note 24, at 133; Franklin E. Crawford, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J 1165 (2002).

26. *See generally* Goldman, *supra* note 24; Crawford, *supra* note 25.

27. 304 F.2d 70, 71 (5th Cir. 1962). Although the first reported claim by a smoker against a tobacco manufacturer appears to be *Cooper v. R.J. Reynolds Tobacco Co.* 234 F.2d 170 (1st Cir. 1956).

28. *See generally* Crawford, *supra* note 25 for a current and comprehensive discussion of the warranty of merchantability and its potential application to fast food.

29. As at least one author has pointed out, what *Green* really demonstrated was that tobacco companies had the resources to simply outlast most plaintiffs' claims and that they would use that strategy until it was no longer successful. *See id.* at 1180 ("[A]s hinted by the conclusion in *Green*, the sheer burden of litigation often battered plaintiffs into submission. A common tactic that survives today is the strategy of litigating every case to the end in an attempt to exhaust the plaintiff's resources."). While it seems difficult to prove or disprove, especially in light of the commonness of confidential settlement agreements, one author contends that as of 2003, "...tobacco companies have never settled a single legal case against a smoker." *See* Goldman, *supra* note 24, at 133.

30. SMOKING AND HEALTH REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964), http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.html (last visited July 18, 2004).

causal relationship between cigarette smoking and lung cancer.[31] In 2000, the United States Surgeon General issued the Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity ("2000 Call").[32] The 2000 Call detailed the problems posed by obesity.

Some may view the 2000 Call as analogous to the 1964 Report, but it is not. There is no doubt that being fat can cause serious health concerns but, unlike the causal link between smoking and lung cancer established in the 1964 Report, there is widespread uncertainty about what specifically causes a person to become fat.[33] Those who contend that tobacco litigation is the template for fast food fat-based litigation are ignoring the significance of stage two. Unlike smoking and cancer, there is currently no way to determine that one specific fast food provider, or even a group of such providers, was or were the proximate cause of an individual becoming fat.[34] To draw such a correlation, a claimant would need to be able to remove all other variables that may be linked to being fat, such as exercise level, other dietary intake, genetics, or other physiological conditions.[35] To date, no evidence exists that demonstrates

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31. *Id.* As a result of the 1964 Report, tobacco manufacturers could not avoid liability by arguing that they were unaware of tobacco's adverse health effects. Following the 1964 Report, Congress passed the Federal Cigarette Labeling and Advertising Act. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965). That Act required each package of cigarettes to contain the warning, "Caution: Cigarette Smoking May be Hazardous to Your Health." *Id.* at §4. Ironically, this warning became big tobacco's new defense. *See* Goldman, *supra* note 24, at 122 ("The tobacco companies used these warnings to wield affirmative defenses of assumption of the risk and contributory or comparative negligence which preempted or limited plaintiffs' claims.").

32. REPORT ON OVERWEIGHT AND OBESITY (2000), http://www.surgeongeneral.gov/topics/obesity/calltoaction/toc.htm (last visited Sept. 20, 2005).

33. "Obesity is a complex, multi-factorial disease that develops from an interaction of genotype and the environment, our understanding of how and why obesity develops is incomplete, but involves integration of social, behavioral, cultural, physiological, metabolic, and genetic factors." The National Institutes of Health: National Heart, Lung, and Blood Institute, *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults, available at* http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.htm (last visited Sept. 20, 2005).

34. The first court to address a fast food fat litigation claim recognized, at most, only a tentative correlation between consuming fast food and becoming obese. *See* Liberty v. D.C Police and Firemen's Retirement and Relief Bd., 452 A.2d 1187 (D.C. 1982).

35. *See* Karen McNulty Walsh, *More Clues About Obesity Revealed by Brain-Imaging Study* (July 1, 2002), *available at* http://www.eurekalert.org/features/doe/2002-07/dnl-mcao071902.php ("Obesity is a complex disease with many contributing factors, including genetics, abnormal eating behavior, lack of exercise, and cultural influences, as well as cerebral mechanisms, which are not yet fully understood."). *See also* Milena D. O'Hara, *Please Weight to be Seated: Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations*, 17 WHITTIER L. REV. 895, 897 (1996) ("The causes of obesity are complex, thus not fully understood. Medical experts believe that it is a multi-factoral disease that involves 'genetics, physiology, biochemistry, and the neurosciences, as well as environmental, psychosocial, and cultural factors."). "Professionals have

a direct and singular correlation between fast food consumption and an individual becoming fat. Thus, the key component in moving big tobacco litigation forward does not exist in fast food fat-based litigation.

The third stage of tobacco litigation is really a result of the cumulative discovery of multiple lawsuits. Past tobacco litigation revealed information that showed a much darker side of the tobacco manufacturers. Over time incriminating tobacco industry documents surfaced which proved tobacco companies' had deceived the public. These documents showed that tobacco companies knew nicotine was addictive, they failed to disclose this information to the public, and the companies manipulated nicotine levels in cigarettes in order to control and increase smokers' addiction.[36]

Big tobacco's shield during the 1950's and 60's, namely their professed ignorance of the adverse health effects of cigarettes, was now exposed as a concerted effort to deceive and addict. In light of this information the individual states that were paying for these adverse health effects through state Medicaid expenditures brought suit against several big tobacco companies. They were successful in reaching the 1996 "Master Settlement Agreement."[37] Additionally, plaintiffs began to combine the public knowledge of tobacco companies' actions with greater resources of their own (primarily through class actions), and they began to win suits as well.[38]

It appears that tobacco litigation would still be in the status quo of the 1950s if the "smoking gun" of intentional nicotine manipulation by tobacco companies was still unknown and no direct correlation between smoking and lung cancer had been established. However, it has now been proven that tobacco companies knew about the addictive nature of tobacco. Furthermore, they intended tobacco to be addictive and failed to reveal its potential addiction to consumers and prospective consumers. As a result, many consumers developed lung cancer from using the tobacco products. This is another fundamental way that fast food fat-based litigation differs from tobacco litigation. Consumers may like fast

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long suspected that genetics make up between one-third to three-fourths of the causes of obesity." *Id.* at 898-99.

36. Goldman, *supra* note 24, at 123.

37. The Master Settlement Agreement was an agreement between four major cigarette manufacturers and 46 states. Pursuant to the agreement, the manufacturers would pay in excess of $200 billion over a 25 year period. For specific terms of the agreement see http://caag.state.ca.us/tobacco/pdf/1msa.pdf (last visited July 19, 2004).

38. *See generally* Bryce A. Jensen, *Comment: From Tobacco to Health Care and Beyond- a Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334 (2001).

food, some may even crave fast food, but there is no credible evidence that fast food is actually addictive[39] and, even if there was, there is no evidence that fast food providers have attempted to addict consumers.

Fast food fat-based litigation is not supported by science or sentiment. Addiction to fast food has not been proven, no direct correlation has been demonstrated between fast food and becoming fat, and it is extremely difficult, if not impossible, to link a fast food provider to a consumer becoming fat. Furthermore, there is a strong sentiment that being fat is self-inflicted. Although fast food litigation

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39. Whether or not fast food is addictive has become a very contentious issue, to the point where some are willing to stretch arguments. *See, e.g.*, Goldman, *supra* note 24, at 1219 ("Thus it is clearly conceivable that certain fast foods can be widely held to be addictive in the future..."). The author was then forced to a tenuous rationalization to support that position. *Id.* at 242 ("Although fast food lacks an addictive element, eating habits learned during youth and resulting eating disorders from unhealthy diets, can potentially be analogized to the addictive nature of nicotine, and thus the comparison between tobacco and fast foods would be complete."). *See also* Jeremy H. Rogers, *Living on the Fat of the Land: How to have Your Burger and Sue it Too*, 81 WASH. U.L.Q 859, 877 (2003):

> In a recent study scientists argue...[that b]inging on foods that are high in fat and sugar may cause changes in the brain that make it hard to say no. By stimulating the brain's natural opiods, large doses of the foods can produce a high that is similar, though less intense, to that produced by heroin or cocaine.

Id. Of course, a relaxed definition may define addiction in terms of use of a substance, as opposed to physical or physiological need for that substance. *See, e.g.*, Cohan, *supra* note 25, at 117:

> One current definition of addiction is the repeated use of a substance and/or compelling involvement in a behavior that directly or indirectly modifies the internal milieu (as indicated by changes in neurochemical or neuronal activity) in such a way as to produce immediate reinforcement, but whose long-term effects are personally or medically harmful or highly disadvantageous to society.

Id. An individual who is addicted to something has three characteristics pertaining to an increased preoccupation and commitment to the addiction: "an affective attachment to the object...a behavioral intention to consume or approach the object, and a cognitive commitment to the object and its approach or consumption." *Id.* at 118 (quoting JIM OXFORD, EXCESSIVE APPETITES: A PSYCHOLOGICAL VIEW OF ADDICTIONS 207 (1985)). Arguably, under this looser definition, a person who desires, targets, and consumes fast food may be doing so out of addiction, but juries might not accept this argument. *See* Felix R. Livingston, *The Heavy Weight of Helpless Obesity*, at 3, *available at* http://www.freemarketplace.org/about/advisors/thoughts/2004/thoughts20040513.asp (last visited June 15, 2005):

> The [Food and Drug Administration] has delineated four attributes that together define a condition of addiction; first, compulsive use of something despite the knowledge that its harmful; second, a "psychoactive" or direct chemical effect produced in the brain; third, reinforcing behavior that promotes additional use; and fourth, withdrawal symptoms when deprived of the substance. While trial lawyers were able to convince juries that cigarettes meet the threshold of addiction, most people are skeptical that fast food should be considered in the same category.

Id.

may be a public relations nightmare[40] for fast food providers, it is not a substantive legal threat.[41] Based on the information currently available, fast food fat-based litigation will not mirror big tobacco litigation.

II: DISABILITY IS FREQUENTLY IN THE EYE OF THE JUDICIARY

A. What about Customers who are Already Fat?

Fast food fat-based litigation does not pose a threat to fast food service providers when the cause of action hinges on causation, but what if the issue does not involve causation? Can goods and service providers be liable when they discriminate against already fat customers? This sub-section examines that question.

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40. *See* Bruce Horovitz, *Under Fire, Food Giants Switch to Healthier Fare*, *available at* http://www.usatoday.com/money/industries/food/2003-07-01-junkfood_x.htm (last visited March 1, 2005) (citing Marion Nestle, "Every major foodmaker is terrified about lawsuits"). This fear may have been behind the recent advertisement from McDonald's France urging customers not to visit McDonald's more than once per week. *See* Marian Burros, *McDonald's France Says Slow Down on the Fast Food*, *available at* http://query.nytimes.com/gst/abstract.html?res=F00710F9395B0C738FDDA90994DA404482 (last visited March 1, 2005) ("A spokesman for McDonald's in US says company does not agree with views expressed in advertorial").

41. Of course, a food seller could attempt to limit liability by using a waiver similar to the one utilized by a restaurant called "The 5 Spot" when serving its 4,000 (yes, four *thousand*) calorie dessert, the "Bulge." *See Fat Chance II*, 7 GREEN BAG 2d 5, 5-6 (Autumn 2003), *available at* http://80web.lexisnexis.com.ezproxy.stthomas.edu/universe/document?_m=bd77ac76f477dd92f08a15f8d12a1723&_docnum=800&wchp=dGLbVtz-zS (last visited June 19, 2004).

> I, _____ release _____ from all liability of any weight gain that may result from ordering and devouring this sinfully fattening treat. I will not impose any sort of "Obesity-Related" lawsuit against _____ or consider any similar type of frivolous legislation created by a hungry trial lawyer.
>
> _____ will not be liable in any way if the result of my eating this dessert leads to a "Spare Tire," "Love Handles," "Saddle Bags," or "Junk in my Trunk." If I have to go to "Fat Camp" at some point in my life, I will not mail my bill to _____.
>
> I knowingly and willfully accept full responsibility for my choices and actions.
>
> Signed
>
> Dated

For those curious to know what it takes to create a 4,000 calorie desert, it is a banana that is "...battered, rolled in sugar, deep-fried, and then covered with Madagascar vanilla ice cream, whipped cream, caramel sauce, hot fudge, macadamia nuts, and a little sugar on top." *Clogging the Legal Arteries with Obesity Suits*, *available at* www.cfif.org/htdocs/legislative_issues/hot_issues_in_congress/legal_reform/obesity_lawsuits.html (last visited March 1, 2005). One can only assume the "little sugar on top" is to add a subtle pique of sweetness.

The Americans with Disabilities Act ("ADA") is broken down into four titles.[42] The pertinent provision for this sub-section is Title III. Title III governs private entities that own, lease, lease to, or operate places of public accommodation[43] and it requires that those entities not discriminate against disabled patrons.[44] The language and interpretations of Title III are very broad.[45] The Title requires that operators of public accommodations make reasonable modifications in their policies, practices, or procedures when necessary to make their goods, services, facilities, privileges, advantages, or accommodations available to individuals with disabilities, unless such modifications would "fundamentally alter" the nature of such goods, services, facilities, privileges, advantages, or accommodations.[46]

The language is sufficiently broad that one might suspect that providers of goods and services, who have failed to accommodate fat patrons, would be highly susceptible to fat-based litigation and would have a difficult time defending themselves in such actions. That has not been true. Litigation has been minimal[47] and plaintiffs' successes have been rare.[48] Part of the reason for plaintiffs' difficulties may be simply

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42. Title I prohibits discrimination in employment. *See* 42 U.S.C. §§ 12111-12117 (2004). Title II prohibits discrimination in public entities and services. *See* 42 U.S.C. §§ 12131-12165 (2004). Title III prohibits discrimination in public accommodation and services. *See* 42 U.S.C. §§ 12181-12189 (2004). Title IV addresses miscellaneous matters. *See* 42 U.S.C. 12201-12213 (2004).

43. 42 U.S.C. § 12182(a) (2004).

44. *Id.*

45. *See* Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title II and Applicable Case Law*, 29 SUFFOLK U.L. REV. 1117, 1125 (1995):

> Because "private entities" within the definition of "public accommodation" refers to anything other than public entities, the purview of Title III is extremely broad. In addition, because courts have liberally construed "affecting commerce," the determinative question in deciding who Title III covers often comes down to the "own, lease, leas to, or to operate places of accommodation language.

Id. The application of Title III is not limited to employers employing a certain number of employees. *See* 42 U.S.C. § 12181(7) (2000) (giving no threshold number of employees).

46. 42 U.S.C. 12182(b)(2)(A)(ii) (2004).

47. *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELY J. EMP. & LAB. L. 377, 400 (2000):

> [T]he courts of appeals had issued decisions in 475 cases under ADA Title I (the employment title) from June 1992 to July 1998. By contrast, I have only been able to locate 25 ADA Title III appellate decisions for the same time period. Twenty five appellate decisions are too few to provide a clear sense of how effective ADA Title III has been in remedying discrimination problems.

Id. See also Sullivan, *supra* note 45, at 1141 ("Commentators reason that initial litigation has been sparse because the government has placed a greater emphasis on education.").

48. *See* Colker, *supra* note 47, at 400 ("Of those 25 [appellate] decisions, defendants prevailed below through dismissal or summary judgment in 18 of 25 cases (72%)."). *See also* Lisa

that, in order to establish that a person is protected under Title III, the fat claimant must establish not only that he or she is fat, but that being fat causes him or her to be "disabled."[49] As demonstrated in the next subsection, it is very difficult to establish that being fat is a protected disability.

B. The ADA and Being Fat as a Disability

Employers run the risk of violating federal and state laws when they discriminate against fat employees or prospective employees. One might assume that statutes like the Rehabilitation Act of 1973[50] ("RA") or the ADA would protect employees from fat-based discrimination but, as this section discusses, that is rarely the case.

The RA originally protected federal employees from discrimination in the workplace.[51] Seventeen years after its enactment the ADA extended the same type of protection to employees in the private sector.[52] In order to reduce any textual ambiguities between the two Congress mandated that the substantive analysis be the same under both Acts.[53] For purposes of this article I will use the ADA as the primary

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A. Sciallo, *The ADA Through the Looking Glass*, 68 BROOK. L. REV. 589, 622 (2002) ("[P]laintiff success stories seem to be the exception rather than the rule.").

49. It is certainly possible that a claimant could bring a tort cause of action based on a theory other than discrimination. *See, e.g.*, O'Hara, *supra* note 35, at 903-06. The article discusses three cases where obese people filed suit against accommodation providers under a variety of non-discriminatory causes of action. *Id.* The captions of the suits were *Birdwell v. Carmike Cinemas*, No. 2940014 (M.D. Tenn. 1994), *Hollowich v. Southwest Airlines*, No. BC035389 (Cal. 1991), and *Green v. Greyhound*, No. 92VS55226H (N.D. Ga. 1992). *Id.* While the author provided Complaint numbers, I was unable to verify any further disposition other than that Birdwell settled the case "for a very satisfactory sum." *Id.* at 904.

50. *See generally* The Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 500-04, 87 Stat. 390, 390-94 (codified as amended at 29 U.S.C. §§ 701-97 (1985 & Supp. 1995)).

51. *See* Amy M. Frisk & Charles B. Hernicz, *Obesity as a Disability: An Actual or Perceived Problem*, 1996 ARMY LAW 3, 5 (1996) ("The RA provides the sole remedy for federal employees alleging employment discrimination based on disability.").

52. 42 U.S.C. §§ 12101(b), (2004).

53. In order to align the RA with the later enacted ADA, Congress mandated that:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§12201-12204 and 12210) as such sections relate to employment.

29 U.S.C. § 791(g) (2004). However, there is some confusion as to whether or not the ADA and RA will be construed in the same manner. *See, e.g.*, McDonald v. Pennsylvania, 62 F.3d 92, 95 (3d Cir. 1995) (holding that the substantive standards for determining liability under the ADA and RA are the same). *But see* Wolf v. Frank, No. 92-76270, 1994 U.S. Dist. LEXIS

model because it uses the same analysis as the RA and the majority of cases refer to the ADA. The ADA does not specifically identify being fat as a disability. It does, however, establish a framework that may allow being fat to be a protected disability under some circumstances.

A claimant may establish that he or she is "disabled," and protected from discrimination based on that disability under the ADA, by following a series of interlocking steps. To begin with, the ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, firing, advancement, or discharge of employees, employment compensation, job training, and other terms, conditions, and privileges of employment.[54]

A "disability" may be created by any of three ways:

> (i) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (ii) a record of such impairment; or
>
> (iii) being regarded as having such impairment.[55]

A disability is created by an impairment. The EEOC defines "physical impairment," for ADA purposes, as:

> any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory,. . . cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.[56]

Therefore, an impairment becomes a disability when it substantially limits the person in one or more major life activities. A person is "substantially limited" when he or she is

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10356, at 9 (E.D. Mich. Apr. 28, 1994) ("[claimant's] reliance on the ...(ADA) in interpreting the Rehabilitation Act is misplaced.").

54. 42 U.S.C. § 12112(a) (2004).

55. 42 U.S.C. § 12102(2).

56. Butterfield v. New York, No. 96-51441998 U.S. Dist. LEXIS 18676, at 25 (S.D.N.Y. 1998) (citing 29 C.F.R. § 1630.2(h)(1)).

> Unable to perform a major life activity that the average person in the general population can perform; or
>
> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition manner, or duration under which the average person in the general population can perform that same major life activity.[57]

"Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[58]

As being fat is not a statutorily protected class, the cases must proceed through the above steps to determine if a claimant's fat constitutes a protected disability. Historically, claimants have not faired well. While claimants are not usually successful, the courts are split and a brief review of federal case law, and general trends in the courts' rationales, are necessary as we consider whether or not being fat should be protected as a disability under the ADA.

C. Federal Case Law: Plaintiffs Almost Never Win

Plaintiffs have brought ADA claims seeking relief for fat-based discrimination in the First,[59] Second,[60] Third,[61] Fourth,[62] Fifth,[63] Sixth,[64] Seventh,[65] Eight,[66] Ninth,[67] and Eleventh circuits.[68] Plaintiffs have won

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57. 29 C.F.R. § 1630.2(j)(1) (2002).

58. 29 C.F.R. § 1630.2(h)(2)(i) (2002).

59. *See* Cook v. Rhode Island, 10 F.3d 17 (1st Cir. 1993), Nedder v. Rivier Coll., 944 F. Supp. 111 (D.N.H. 1996), and Ridge v. Cape Elizabeth Sch. Dep't, 77 F. Supp. 2d. 149 (D. Me. 1999).

60. *See* Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697 (S.D.N.Y. 1997); Frances v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Butterfield v. New York, 1998 U.S. Dist. LEXIS 18676 (S.D.N.Y 1998); Furst v. New York Unified Court System, 1999 U.S. Dist. LEXIS 22588 (E.D.N.Y. 1999).

61. *See* Motto v. City of Union City, 1997 U.S. Dist. LEXIS 23401 (D. N.J. 1997).

62. *See* SMAW v. Virginia Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994).

63. *See* EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996).

64. *See* Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997).

65. *See* Clemons v. The Big Ten Conference, No. 96-c0124, 1997 U.S. Dist. LEXIS 1939 (N.D. Ill. Feb. 19, 1997) and Zarek v. Argonne Nat'l Lab, No. 97-C6964, 1998 U.S. Dist. LEXIS 13444 (N.D. Ill. Aug. 26, 1998).

66. *See* Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082 (S.D. Iowa. 1997); King v. Hawkeye Cmty. Coll., No. C98-2004, 2000 U.S. Dist. LEXIS 1695 (N.D. Iowa Jan. 3, 2000).

only twice. Those decisions show us when, and under what circumstances, being fat is a protected disability under the ADA.

It is unlikely that there is a federal fat-based disability case of record that does not cite *Cook v. Rhode Island*.[69] Cook had worked for the defendant on two prior occasions and re-applied in 1988.[70] A pre-employment physical showed her to be 5'2" tall and weigh 320 pounds. The reviewing nurse classified Cook as "morbidly obese."[71] The defendant refused to hire Cook because "[i]t claimed that Cook's morbid obesity compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments."[72]

Cook is unique in four respects. First, the cause of action was brought under the RA, as opposed to the ADA, although the court looked to the ADA for guidance.[73] Second, Cook was morbidly obese, so the court was not confronted with a situation where a person was subjectively fat, or even objectively over mandated weights. Third, the court did not reach the conclusion that Cook's condition was immutable, or involuntary. Fourth, this was a claimant's dream case. Cook proceeded on a theory of "perceived disability,"[74] or the idea that while she was not actually disabled, the defendant treated her as if she was. The court was clear that there was sufficient evidence to support recovery under this theory and that the most critical evidence came from the defendant, not the claimant.[75]

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67. *See* Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000).

68. *See* Coleman v. Georgia Power Co., 81 F. Supp. 2d 1365 (N.D. Ga. 2000)

69. 10 F.3d 17 (1st Cir. 1993).

70. *Id.* at 20.

71. *See supra* note 11.

72. *Cook*, 10 F.3d. at 21.

73. *Id.* at 25.

74. *See supra* text accompanying note 55 ("[A] disability" may be created by any of three ways including "...being regarded as having such impairment.").

75. *Cook*, 10 F.3d at 23.

> [T]he jury could have found that plaintiff, although not handicapped, was treated by MHRH as if she had a physical impairment. Indeed, MHRH's stated reasons for its refusal to hire—its concern that Cook's limited mobility impeded her ability to evacuate patients in case of an emergency, and its fear that her condition augured a heightened risk of heart disease...shows conclusively that MHRH treated plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular systems.

Id.

> MHRH has not offered a hint of non-weight-related reason for rejecting plaintiff's application. Rather it has consistently conceded that it gave plaintiff the cold shoulder because Dr. O'Brien denied her medical clearance. The record is pellucid that Dr. O'Brien's refusal had three foci, each of which related directly to plaintiff's obesity. On this record, there was considerable room for a jury to find that appellant declined to hire Cook "due solely to" her perceived handicap.

The only other plaintiff victory came in 1996 when the United States District Court for the Southern District of Texas, Houston Division, issued *EEOC v. Texas Bus Lines*.[76] Much like Cook, the defendant's evidence made the plaintiff's case. The EEOC represented Arazella Manuel ("Manuel"). Manuel applied for a job as a passenger van driver for the defendant. The defendant sent Manuel for a pre-employment physical examination. The reviewing physician found her to be morbidly obese and disqualified her from holding the position because "she would not be able to move swiftly in the event of an accident."[77] The defendant was clear that the sole reason for its decision not to hire Manuel was this disqualification.[78] The court found that as a result of this disqualification, the defendant perceived Manuel as disabled.[79] As in Cook, the fat plaintiff was protected under the ADA because she was perceived as disabled, as opposed to actually being disabled. Neither of the two victories for plaintiffs concluded that being fat was an actual disability.

All other cases on point have concluded that being fat was not an actual disability. Obviously, the facts in each differed, but some common themes are clear. First, courts have frequently found being fat to be an impairment.[80] However, pursuant to the ADA, an impairment becomes a disability only when it substantially limits the person in one or more major life activities.[81] The courts have repeatedly held that there is a substantive difference between an impairment, and an impairment that is perceived as,[82] or actually does,[83] substantially limit one or more

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Id. at 28. Further, the court implied that had claimant proceeded under a theory of actual disability, she would have recovered there as well:

> [T]he jury could plausibly have found that plaintiff had a physical impairment; after all, she admittedly suffered from morbid obesity, and she presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.

Id. at 23.

76. 923 F. Supp. 965 (S.D. Tex. 1996).

77. *Id.* at 967.

78. *Id.* at 977. Unfortunately for the Defendant, the Doctor had not performed any medical tests to determine if Manuel would be able to perform duties in an accident and his opinion was not based on objective medical findings. *Id.* at 978.

79. *Id.* at 981.

80. *See, e.g., Hazeldine*, 944 F. Supp. at 703; *Butterfield*, 1998 U.S. Dist. LEXIS 18676, at 29-31.

81. *See supra* text accompanying notes 55-58.

82. *See, e.g., Ridge*, 77 F. Supp. 2d at 156; *Butterfield*, 1998 U.S. Dist. LEXIS 18676, at 24.

83. *See, e.g., Nedder*, 944 F. Supp. at 118. The *Nedder* court concluded that the claimant had not presented sufficient evidence of an actual disability but, perhaps more importantly, gave a sense

major life activities.[84] Second, courts have not considered anything less than morbid obesity as potentially disabling.[85] Third, courts have not considered being fat as a potentially protected disability if the condition was arguably mutable, or voluntary.[86] Fourth, an employer's perception that an employee was too fat to perform a particular job has not meant that the employer viewed the employee as substantially limited in one or more major life activities.[87] While the courts have been more than reluctant to find that being fat can be a protected disability, there are clearly situations where being fat would meet the standard for a

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of how compelling such evidence would need to be by referencing another decision:

> [I]n *Stone v. Entergy Services*...a plaintiff with partial paralysis, muscle weakness, and uneven legs as residual effects of polio testified that he had limited endurance, experienced difficulty climbing stairs, and walked significantly slower then the average person. Despite this and other evidence, the court concluded that plaintiff's ability to walk was not substantially limited.

Id.

84. *See, e.g.*, *Hazeldine*, 944 F. Supp. at 697. Hazeldine pursued relief based on actual disability. At the time of the alleged fat discrimination she weighed approximately 290 pounds and was morbidly obese. *Id.* at 698. The court looked at a) whether claimant had an impairment and b) whether such impairment created a disability under the ADA. Claimant presented evidence that she was morbidly obese, that her weight caused her to often twist her ankles which resulted in swelling and bruising, and that she was diagnosed with hypertension and coronary insufficiency. *Id.* at 703 The court concluded that the claimant was impaired, but reasoned that "an impairment may affect an individual's life without becoming disabling." *Id.*

85. *See, e.g.*, *Furst*, 1999 U.S. Dist. LEXIS 22588, at *14 ("In this case Furst does not allege that he suffers from morbid obesity."); *Motto*, 1997 U.S. Dist. LEXIS 23401, at *10 (holding that plaintiff's morbid obesity could generate a genuine issue of material fact as to whether or not he was disabled); *Zarek*, 1998 U.S. Dist. LEXIS 1344, at *11 ("...plaintiff admits [that he is not] morbidly obese...."). While the opinion is vague and incomplete, at least one court may recognize morbid obesity as a per se protected disability. *See* Gaddis v. Oregon, 21 Fed. Appx. 642, 643 (9th Cir. 2001) ("Appellant...suffers from morbid obesity, a disability under the...ADA.").

86. *See Frances*,129 F.3d at 286 ("...except in special cases where the obesity relates to a psychological disorder, [obesity] is not a 'physical impairment' within the meaning of the statutes."); *Andrews*, 104 F.3d at 808 ("...physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either actual or perceived disability."); *Zarek*, 1998 U.S. Dist. LEXIS 1344, at *10-11 ("...except in rare cases where obesity is caused by a physiological disorder, [obesity] is not a 'physical impairment' within the meaning of [the ADA], but instead is considered a 'normal' characteristic."). It is only fair to briefly acknowledge the case of *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984) at this point because the cases identified above either implicitly or explicitly reflect *Tudyman's* holding and rationale, even though it was decided under the Rehabilitation Act, and not the ADA. Tudyman was unique because he was a bodybuilder who exceeded airline steward weight restrictions. *Id.* The *Tudyman* court drew a clear distinction between mutable and immutable weight conditions and was clear that mutable weight conditions would not merit statutory protection. *Id.* at 746. No published federal opinion has held otherwise. *Id.*

87. *See, e.g.*, Walton v. Mental Health Ass'n of S.E. Pennsylvania, 168 F.3d 661, 666 (3d Cir. 1999); *SMAW*, 862 F. Supp. at 147; *Clemons*, 1997 U.S. Dist. LEXIS 1939, at *18-19.

disability under the ADA. When that happens, being fat should be a protected disability.

D. When Should Being Fat be a Protected Disability Under the ADA?

As previously discussed, a person is disabled, within the meaning and protection of the ADA, if a) he or she has a physical or mental impairment that substantially limits one or more major life activities; b) has a record of such impairment, or; c) is regarded as having such an impairment. This subsection will only address fat as an actual disability. A person is "substantially limited" when he or she: a) is unable to perform a major life activity that the average person in the general population can perform or; b) is significantly restricted as to the condition, manner, or duration under which an individual can perform a particular life activity as compared with the condition, manner, or duration under which the average person can perform the same activity.[88] Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[89]

At least one past case demonstrates that being fat can satisfy these requirements and can constitute an actual disability under the ADA, although the case was decided for the Defendant on other grounds. In 2000, the United States District Court for the Northern District of Iowa issued *King v. Hawkeye Community College*.[90] The claimant weighed 597 pounds before bypass gastric surgery and 385 pounds following the procedure.[91] Evidence showed that he had difficulty walking and breathing, that his face turned ashen and he began sweating profusely when engaging in any activity, and that the college staff was concerned that he could fall, have a heart attack, or stop breathing.[92] The court ultimately concluded that the claimant could not prevail because his termination was a result of taking extended medical leave, as opposed to an actual or perceived disability under the ADA.[93] While it involves some conjecture, it does not appear that this court would have found the claimant to be perceived as disabled. However the question remains,

88. *See supra* text accompanying note 57.
89. *See supra* text accompanying note 58.
90. 2000 U.S. Dist LEXIS 1695 (N.D. Iowa 2000).
91. *Id.* at 2-3.
92. *Id.* at 3-4.
93. *Id.* at 19.

"was he actually disabled due to being fat?" This inquiry requires application of the ADA's test:

1. Did the Plaintiff suffer from an impairment? Repeated cases have held that being fat is an impairment.[94] There is no dispute that at either 385 or 597 pounds the Plaintiff was fat and his fat condition was an impairment. The first requirement is satisfied.

2. Did the Plaintiff's impairment substantially limit one or more major life activities? A person is substantially limited in a major life activity when he or she is significantly restricted in performing that activity as compared to an average person. Major life activities include walking and breathing. The evidence was uncontroverted that "[a]s a result of substantial weight gain, the Plaintiff had difficulty walking and breathing. Staff at the community college observed him having great difficulty even walking from the parking lot to his classroom. He would have to stop and sit down to catch his breath even on this short walk."[95] "Other staff were genuinely concerned that he could fall, have a heart attack, or stop breathing."[96] Assuming the average person could walk from the parking lot to the classroom, the plaintiff satisfied the remaining two prongs for ADA protection; he was significantly restricted in the major life activities of walking and breathing as compared to a normal person. The end result is that Mr. King's fat condition was an actual disability under the ADA.

If being fat can be an actual disability, why have the courts not recognized it as such? The courts' holdings may reflect the strong societal bias against fat people.[97] There is also the common perception

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94. *See, e.g., Hazeldine*, 944 F. Supp. at 703; *Butterfield*, 1998 U.S. Dist. LEXIS 18676, at *28-30.

95. *King*, 2000 U.S. Dist LEXIS 1695, at *3-4.

96. *Id.* at 4.

97. This bias may start early in life. Research has shown that when 10 and 11 year olds were shown pictures of people with extreme physical deformities and asked to rank which they liked most, the obese depictions finished last. *See* Stephen A. Richardson et al., *Cultural Uniformity in Reaction to Physical Disabilities*, 26 AM. SOC. REV. 241, 241-47 (1961). A separate study revealed that, by age 5, children would rather lose an arm than be fat. *See* Theran, *supra* note 9, at 153. While we might write off such statements to the impetuousness of youth, apparently the preference of serious injury over being fat continues later in life. *See Media Bombards Women with Mixed Weight Messages*, CONSUMER HEALTH JOURNAL, October 2003, http://www.consumerhealthjournal.com/articles/women-and-weight.html [hereinafter *Media Bombards*](last visited July 16, 2004) ("More than half of the women between 18 and 25 would prefer to be run over by a truck than to be fat..."). This bias may exist in the workplace as well (*see* Judith Candib Larkin & Harvey A. Pines, *No Fat Person Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preference*, 6 SOC. OF WORK AND OCCUPATIONS 312, 319-21 (1979) (explaining that subjects who were shown videotapes of one fat person and one thin person performing tasks almost identically rated the fat person as a less desirable employee)) and it appears

that being fat is voluntary.[98] This bias is reflected in court decisions holding that being fat cannot be a protected disability under the ADA if it is not caused by a physiological condition.[99] In lay terms, courts have refused to find that being fat is a protected disability if it appears that it is, or may be, the claimant's own fault that he or she is fat.

Being fat may not be the result of personal choice. While there is certainly a debate within the field as to specifically what causes a person to become fat, "[p]rofessionals have long suspected that genetics make up between one-third and three-fourths of obesity."[100] There is strong agreement that being fat can be a result of a combination of several

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to negatively impact fat female workers. At least one study has shown that obese women earn less than non-obese women. *See Study Says Obese Teen-Age Girls Earn Less After they Enter the Job Market*, DAILY LAB. REP. (BNA) No. 133, at D-16 (July 14, 1994). Another found that highly obese women earned less than moderately obese women. *See* Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 64 (2002) (discussing the results of a study showing that "'highly obese' women earn 24% less than thin women while the so-called moderately obese earn 6% less."). A separate study revealed that "...people of average weight prefer women who are 'somewhat smaller than normal with no extra fat and little muscular development." *See* Korn, *supra* note 11, at 30 (quoting Jayne Stake & Monica L. Lauer, *The Consequences of Being Overweight: A Controlled Study of Gender Differences*, 17 SEX ROLES 31, 43 (1987)). The same group preferred men who were "slightly overweight." *Id.* Such attitudes may affect hiring or promoting females as well. *See id.* at 66-67:

> [I]t may be acceptable for a man to be obese, but not a woman. For example, due to increased emphasis on slimness for women and its connection to attractiveness, a woman who is twenty-five percent over her "ideal" weight might be denied a job while a man who is also twenty-five percent over his "ideal" weight [would not be].

Id. Finally, at least one study has shown that 16 percent of prospective employers would not hire obese women, period. *See* Kristen, *supra* at 97 (citing Daphne A. Roe & Kathleen R. Eickwort, *Relationships Between Obesity and associated Health Factors with Unemployment Among Low Income Women*, 31 J. AM. MED. WOMEN'S ASS'N 193, 199 (1976)).

98. *See, e.g.*, *The Elephant in the Room*, *supra* note 14, at 1174-1175 ("As one recent survey discovered 'most Americans continue to understand obesity as a case of individual moral failure rather than see it as the result of the food environment or genetics.").

99. *See, e.g.*, *Frances*, 129 F.3d at 286 ("[E]xcept in special cases where the obesity relates to a physiological disorder, [it] is not a 'physical impairment' within the meaning of the statutes."); *Andrews*, 104 F.3d at 808 ("[P]hysical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining actual or perceived liability."); *Zarek*, 1998 U.S. Dist. LEXIS 13444, at *3 ("[E]xcept in rare cases where the obesity is caused by a physiological disorder, [it] is not a 'physical impairment within the meaning of [the ADA]..."); *Coleman*, 81 F. Supp. 2d at 1369:

> In light of the above, it appears to this court that while obesity generally is not considered an impairment, it can be found to be an impairment in limited circumstances where it is shown both to affect one of the bodily systems outlined in the guideline for physical impairment and where such obesity is related to a physiological disorder.

Id.

100. *See* Albert J. Stunkard et al., *An Adoption Study of Human Obesity*, 314 N. ENGL. J. MED. 193, 195 (1986). A study showed "a strong relation between adoptee weight class and biological parents and no relation between adoptee weight class and adoptive parents." *Id.*

factors, many of which are not voluntary.[101] The EEOC has recognized that being fat can be a disability, regardless of whether or not it is mutable.[102] Still, courts have not held that fat is a protected disability, frequently because the fat condition was not shown to be immutable. However, why is being fat treated differently than being an alcoholic, a recognized disability under the ADA,[103] when both becoming fat and becoming an alcoholic begin with a voluntary action (consuming food and alcohol, respectively)? As one author put it "[t]he reasoning may be here: at this time, scientists have matter-of factly stated that alcoholism is a disease. . . ."[104] If the answer is that simple, the only remaining question is whether or not being fat is a "disease." If it is, than it, like alcoholism, should be protected as an actual disability under the ADA.

A disease is defined as "[a] pathological condition of a part, organ, or system of an organism resulting from various causes, such as infection, genetic defect, or environmental stress, and characterized by an identifiable group of signs or symptoms."[105] While no expert has defined a sole cause for an individual becoming fat, there is agreement in the field that the condition can result from one or more of the following: genetics, biochemistry, neurosciences, environmental factors, psychosocial factors, and cultural factors.[106] The physical symptoms of being fat are readily apparent (although subjective), the fat person is fat. There is no requirement under the ADA that the disease be contagious or transmittable. Being "fat" qualifies as a disease under this definition.

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101. *See supra* note 33.

102. In a brief filed in support of the Plaintiff in *Cook v. Rhode Island*, the EEOC stated that "morbid obesity of sufficient duration and with a significant impact on major life activities" can be a disability. *See* Nancy Roman, *EEOC Pushes to Label Obesity as a Disability*, WASH. TIMES, Mar. 1, 1994, at A7.

103. There is a split among courts as to whether alcoholism is a disability per se under the ADA. *See, e.g.*, Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054 (7th Cir. 1998). There is also a split as to whether it is an impairment that must be proven to substantially limit one or more major life activities. *See, e.g.*, Burch v. Coca Cola, Co., 119 F.3d 305 (5th Cir. 1997); Nelson v. Williams Field Serv., 216 F.3d 1088 (10th Cir. 2000). At least one author has submitted the negative social stigma that goes along with alcohol abuse is a basis for making alcohol a disability per se. *See*, Beth Hensley Orwick, *"Bartender, I'll have a Beer and a Disability"; Alcoholism and the Americans with Disabilities Act: Affirming the Importance of the Individualized Inquiry in Determining the Definition of Disability*, 20 ST. LOUIS U. PUB. L. REV. 195, 215 (2001). If that social stigma is sufficient to make alcoholism a disability per se, than the tremendously negative social stigma of being fat should be sufficient to make being fat a disability per se.

104. *See* Carol R. Buxton, *Civil Rights – Looking Forward: Obesity and the Americans with Disabilities Act*, 4 BARRY L. REV. 109, 126 (2003).

105. *See* dictionary.com, http://www.dictionary.com (last visited Aug. 30, 2005).

106. *See supra* note 33; O'Hara, *supra* note 35, at 897.

"Disease" is also defined as:

> [a]n impairment of the normal state of the living animal or plant body or one of its parts that interrupts or modifies the performance of the vital functions and is a response to environmental factors. . .to specific infective agents. . .to inherent defects of the organism (as genetic anomalies), or to a combination of these factors.[107]

So, can being fat be an impairment that interrupts or modifies the performance of vital functions as required by this definition? Yes. In *Butterfield v. New York*,[108] the court found that the claimant was impaired. It also reviewed expert testimony that the claimant had arthritis of the left knee that was related to his weight, a peptic esophagus caused by a continuous reflux of acid, and the possibility of Dicwickian syndrome (where obese sufferers cannot get sufficient air when they breathe and thus fall asleep). Additionally, the court had the claimant's own testimony that he had different level and frequencies of trouble in activities such as running, walking, bending, and lifting weights.[109] The evidence was clear that Plaintiff's fat condition caused multiple direct and indirect interruptions or modifications of the performance of vital functions.[110] Finally, experts in the field agree that the fat condition is caused by some combination of certain factors, including environmental and genetic factors.[111] By either definition, being fat is a disease. If the disease of alcoholism is an ADA protected disability, then being fat should be as well.

Perhaps it is not enough that being fat fits one or more definitions of "disease." There are certainly diseases that are not (or have not yet been recognized as) protected disabilities under the ADA. Perhaps being fat needs to be more directly analogous to alcoholism before it is a protected disability. Alcoholism is a disease that has four symptoms:

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107. *Id.*

108. 1998 U.S. Dist. LEXIS 18676. *See Hazeldine*, 954 F. Supp. at 697; *Frances*, 129 F.3d at 281; *Furst*, 1999 U.S. Dist. LEXIS 22588.

109. *Butterfield*, 1998 U.S. Dist. LEXIS 18676, at * 29-33.

110. Will being fat always fulfill these requirements? No, because there are times when being fat will cause risks, but not interruptions or modifications. *See, e.g., Coleman*, 81 F. Supp. 2d at 1367-69 The claimant was employed by Defendant as a fleet mechanic. *Id.* The Defendant set weight restrictions of 280 pounds because fleet mechanics sometimes used aerial lift devices with a 300 capacity. *Id.* Claimant weighed approximately 340 pounds. *Id.* A physical examination found that claimant was morbidly obese, that he suffered from diabetes mellitus and high cholesterol, and that he was at high risk of heart attack. *Id.* It also found that he was capable of fulfilling the duties of a fleet mechanic and placed no physical restrictions upon him. *Id.*

111. *See generally supra* notes 33 & 35.

craving, loss of control, physical dependence, and tolerance.[112] Alcoholism is also chronic, meaning that it lasts the person's lifetime.[113] Research shows that alcoholism is at least partly genetically predisposed, but that an individual's environment or lifestyle may also be a factor.[114] Let us compare those criteria to being fat.

As previously discussed, being fat fits multiple definitions of "disease." Fat people can crave food the same as alcoholics crave alcohol and can lose control over the amount of food they ingest.[115] All people are physically dependant on food as an energy source, but fat people may become dependent on more food than non-fat people, precisely because they are fat[116] creating both an "addiction"[117] to food and a tolerance for excessive portions of food.

One of the important differentiations between being a disease and being a protected disability is permanence. According to one of the foremost obesity experts, Dr. Albert J. Stunkard, being fat is a permanent condition for most because, "most obese persons will not stay in treatment. . .most will not lose weight, and of those who lose weight, most will regain it."[118] It is the last piece of this quote that most closely mirrors alcoholism. An alcoholic is always an alcoholic, even if not currently using alcohol.[119] A fat person, even one who has managed to

112. *See* National Institute on Alcohol Abuse and Alcoholism, *Frequently Asked Questions*, http://www.niaa.nih.gov/faq/q-a.htm#question2 (last visited March 1, 2005).

113. *Id.*

114. *Id.*

115. *See supra* note 100 (discussing how obesity, like alcohol, can be a genetic disease).

116. At least one researcher has propounded a particularly insidious theory regarding obesity. Professor Nisbitt argues that the body's hypothalamus is set to protect a particular body weight and that body weight is directly related to the number of fat cells in the body. When a person moves below that weight, the body responds with defensive mechanisms that promote weight gain, including the inhibition of saiety mechanisms, heightened preference for high caloric foods, or slowed metabolic activity. *See supra* note 124, at 210 (citing D. Roncari & R.L.R. Van, Adipose *Tissue Cellularity and Obesity: New Perspectives*, CLIN. INVEST. MED. 71-79 (1978)).

117. There is no universal definition of "addiction" but "addiction generally requires substance dependence with tolerance and withdrawal effects." *See* Marvin F. Hill, Jr. & Tammy Westhoff, *"No Song Unsung, No Wine Untasted"- Employee Addictions, Dependencies, and Post-Discharge Rehabilitation: Another Look at the Victim Defense in Labor Arbitration*, 47 DRAKE L. REV. 399, 405 (1999). There is certainly room for debate about whether or not food dependency constitutes an addiction because there is room for debate about what constitutes an addiction. *See* Rogers, *supra*, note 39, at 877 (discussing how binging on high fat foods could create changes in the brain that can produce a high that is similar to, though less intense than, the high produced by heroin or cocaine).

118. THOMAS A. WADDEN & SUSAN J. BARTLETT, VERY LOW CALORIE DIETS: AN OVERVIEW AND APPRAISAL, IN TREATMENT OF THE SERIOUSLY OBESE PATIENT 44 (1992) (emphasis added).

119. *See supra* note 113 ("[A]lcoholism cannot be cured at this time. Even if an alcoholic has not been drinking for a long time, he or she can still suffer a relapse.").

shed fat, is very likely to regain the fat.[120] Being fat is frequently permanent.

Finally, there is a strong correlation between having alcoholic parents and becoming an alcoholic, indicating that alcoholism is at least partly genetic.[121] As previously discussed, there is common agreement within the field that becoming fat is, at least partly, caused by genetic pre-disposition.[122]

Alcoholism can be a protected disability under the ADA. Its protected status may be a result of being a disease or it may be a result of unique aspects of that disease. In either case it is highly analogous to being fat. Accordingly, being fat should be a protected disability under the ADA, but it should be protected in a manner that carries out the intended purpose of the law.[123] In order to do that, being fat should not be a protected disability per se, rather it should be evaluated on a case by case basis.[124] Interestingly, past common court themes, finding that

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120. *See Fat People who Lose Weight Put it all Back on Because their Metabolism Adapts*, http://www.medicalnewstoday.com/medicalnews.php?newsid=10097 (last visited Sept. 22, 2005) (finding that rat weight loss caused by caloric restriction caused changes in metabolic activity that made the rats predisposed to regain the weight).

121. *See* AVRAM GOLDSTEIN, ADDICTION: FROM BIOLOGY TO DRUG POLICY 94 (1994):

> Sons of alcoholics, adopted at birth and raised in a nonalcoholic family, were found to have a four-fold greater probability of becoming alcoholic than did their stepbrothers. Conversely, sons of nonalcoholic parents, adopted and raised by alcoholic families did not tend to become alcoholic, even when their stepbrothers did.

Id.

122. *See* text accompanying note 100.

123. The ADA is meant to broadly protect disabled persons from workplace discrimination. That is one of the reasons the law does not provide an exhaustive list of disabilities, but rather provides the "substantial limitation" test, allowing disability to be determined on a case by case basis. The EEOC lists several factors that should be evaluated in order to determine if an impairment is substantially limiting. *See* EEOC, *EEOC Interpretative Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. pt. 1630.2(j):

> Part 1630 notes several factors that should be considered in making the determination of whether the impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact of, or resulting from, the impairment.

Id. Another EEOC directive states, "these factors must be considered because, generally, it is not the name of an impairment or condition that determines whether a person is protected under the ADA, but rather the effect of an impairment or condition on the life of a particular person." *See* EEOC, *A Technical Assistance Manual of the Employment Provisions (Title I) of the Americans with Disabilities Act*, II-3 (1992).

124. Adopting a case by case analysis would also mirror the recent trend of case by case disability analysis by the United States Supreme Court. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624 (1998) (addressing a-symptomatic HIV infection as a disability); Sutton v. United Air Lines, 527 U.S. 471 (1999) (addressing severe myopia as a potential disability).

being fat was not a protected disability, should help guide analysis in determining when being fat should be a protected disability in the future.

Court decisions have not favored protecting fat claimants from discrimination when 1) the fat condition was only an impairment and not a legal "disability"; 2) they were anything less than morbidly obese; 3) the fat condition was not immutable; and 4) an employer perceived an employee as too fat to do a particular job, but not too fat to engage in the major life activity of working.

Being fat is not a statutorily identified disability so, in order to be protected, the fat claimant must establish both that he or she is impaired by being fat and that the impairment substantially limits one or more major life activities. If he or she cannot establish the second requirement, the condition is only an impairment. The ADA was not designed or intended to protect the impaired from discrimination. The theme of separating impairment from disability carries out the purpose of the ADA and should continue.

While some of the past themes carry out the intent of the ADA, the requirement that the condition be immutable does not. There is no requirement, under the ADA, that a condition must be immutable to be a protected disability. The condition of immutability is simply an incorrect common law invention. It is unclear if being fat is mutable or immutable in the aggregate population, and it may be unclear on an individual basis, but mutability does not matter. As a result, this standard must be abandoned.

It may well be the case that a person is fat, but that condition does not substantially limit one or more major life activities. The same may be true of the morbid obesity requirement. It is unclear why courts have utilized this standard, but it exists in multiple opinions.[125] If courts are using this obesity requirement as one of several criteria to determine the extent of impairment it may add value. However, if it is used as the sole or primary determination of the impairment's extent it is misused because a person may be morbidly obese, but that obesity may not substantially limit one or more major life activities.[126] When that is the case, morbid obesity does not constitute a legal disability.[127]

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125. *See supra* note 85.

126. Other criteria should include those identified by the EEOC: nature and severity of the impairment, duration or expected duration, and long-term or permanent results of the impairment. *See supra* note 123.

127. At least one medical professional argues that morbid obesity is a per se disability. *See* Christine L. Kuss, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L & POL'Y 563

Finally, the ADA protects actual and perceived disabilities from discrimination. The focus of this section's discussion has been on fat as an actual disability, but the potential for being a protected perceived disability exists as well. The ADA's purpose is to protect those individuals who are substantially limited in one or more major life activities from discrimination. There is a significant legal distinction between being perceived as unable to perform a particular job and being perceived as unable to engage in the major life activity of working. The recurrent theme in determining whether or not an employer took fat-based discriminatory action because it perceived an employee as unable to engage in work is well designed to carry out the protection limitations of the ADA.

CONCLUSION

Despite the groundswell of paranoia regarding fast food fat-based litigation, its evolution will not mirror big tobacco's. Further, general fat-based litigation poses no legal threat to businesses if courts continue to define "disability" using past common themes. However, the courts' current analysis is incorrect. Much like alcoholism, being fat is a disease, and when that disease results in a physical or mental impairment that substantially limits one or more major life activities, it is a protected disability under the ADA. Children frequently pick on the fat kid, and no one protects the victim. It is not right for businesses and the courts to do the same.

(1996). Dr. Wadden asserts that when a person is 100% over his ideal weight, the result, regardless of the cause will be a physiological disorder....[a]ccordingly morbid obesity can meet the definitional requirements of a physical impairment as an 'actual impairment'. *Id.*