



Montana Obesity Ruling May Be Cause For Concern

Insights

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The Americans with Disabilities Amendments Act (ADAAA) did not change the definition of impairment but it may have changed the EEOC's view on whether obesity is an impairment.

The EEOC definition of "impairment," is "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems, such as neurological, musculoskeletal, spatial sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hermetic, lymphatic, skin, and endocrine."

The EEOC Interpretative Guidance specifically excludes from the definition of impairment, physical characteristics. This includes things such as eye color, hair color, and left handedness, but also height, weight, or muscle tone that is within the "normal" range and is not the result of a physiological disorder from the definition of impairment. Before the ADAAA passed, the EEOC took the position that severe or morbid obesity was an impairment but that obesity rarely is. The EEOC subsequently removed the language that obesity is rarely an impairment from the 2011 version of its Compliance Manual.

While it is not a definitive ruling, a recent state court decision may shed some light on how courts will view the EEOC's position. *BNSF Railway Co. v. Feit*.

Too Big For A Train Engine

Eric Feit sued BNSF Railway after it revoked a conditional offer of employment to work as a conductor trainee on the grounds that Feit was not qualified because of the significant health and safety risks his extreme obesity presented in a safety sensitive position. BNSF offered to consider him for the job if he lost 10% of his body weight or successfully underwent additional physical examinations at his own expense.

Although Feit passed additional physical exams, he could not afford the \$1800 sleep test. Feit subsequently filed a complaint with the Montana Department of Labor (MDOL) alleging that BNSF discriminated against him based on a physical disability. The MDOL found in Feit's favor on the ground that BNSF had regarded him as disabled. The Montana Human Rights Commission affirmed the MDOL's decision. BNSF then appealed to the U.S. district court for Montana to review whether it

had violated Montana law. The district court asked the Montana Supreme Court whether obesity unrelated to a physical condition is an impairment under Montana law. The Montana court said "yes."

The Montana court noted that Montana's anti-discrimination law uses the *same terms* as the federal ADA and that Montana courts looked to federal law and the EEOC regulations and guidance in interpreting the law. In rejecting BSNF's argument that Feit's obesity was not an impairment because it did not result from a physiological condition, the court stated that the EEOC's Interpretative Guidance suggests that a physiological disorder is required only if an individual's weight is within the normal range.

The court further noted that 1) the EEOC's Compliance Manual indicated that extreme derivations in height, weight or strength can be impairments; 2) the Compliance Manual states that "severe obesity is an impairment"; 3) the federal appellate opinions holding that obesity is not an impairment absent a physiological condition all were decided before the ADAAA passed; 4) the 2011 Compliance Manual omitted the statement that simple obesity was rarely a disabling impairment; and 5) the ADAAA was intended to expand the definition of disability. The court then cited two district court decisions, one in Louisiana and one in Mississippi. Both held that under the ADAAA severe obesity need not be based on a physiological condition to be an impairment.

The net result of the Montana Supreme Court's opinion is that it opens the door for more courts to view severe obesity or even obesity standing alone as an impairment. Given the lack of definitive guidance be careful about rejecting requests for accommodation from morbidly obese and obese employees. Remember, to bring an action under the ADA, individuals need only show that they have an impairment or that the employer *thinks* they have an impairment.

And if obesity is viewed an impairment, it most likely will be immune to the affirmative defense that it is temporary (lasting less than six months) and minor. Consequently, employers who once felt secure in rejecting requests for accommodation from obese employees or denying obese applicants jobs should exercise caution when doing so.

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