



How To Weigh Obesity In Employment Decisions

Insights

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Imagine you are the Hiring Manager for a distribution warehouse and have just begun interviewing applicants for a materials handler position. The first candidate enters the room, standing at a height of 5'4", weighing more than 500 pounds. You continue the interview and learn that his qualifications are quite notable, but you can't help but consider how his weight may possibly affect his work performance.

You anticipate that his obesity might put him at a greater risk of developing serious illnesses that may lead to absenteeism. You also fear that accommodations may be required for him to use the fork lift and other machinery, and you worry he may pose a safety threat if he were unable to move quickly enough to evacuate in the event of an emergency.

Based on these considerations, you decide not to hire this candidate. Was this proper or did you put too much emphasis on his obesity and risk liability? This is the question many business employers have had to face in light of the Americans with Disabilities Act (ADA). Recent cases brought by the EEOC may shed light on whether severe obesity is a protectable disability, but the question still remains: when is obesity "severe" enough to constitute an ADA-protected disability?

What's The Legal Basis?

There is no federal law explicitly prohibiting obesity discrimination, and the ADA doesn't specifically address it, so the employees that have brought claims under the ADA for obesity discrimination have had mixed results. Whether obesity is a disability under the ADA and what proof is required for an obese employee to win the case are issues that have generated controversy over the years.

The ADA's basic definition of "disability" is an impairment, that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. In 2008 the ADA was amended (the ADA Amendment Act or ADAAA). The ADAAA did not change the wording of this definition; however, Congress indicated that the definitions of "substantially limits" and "major life activities" should be interpreted broadly. Thus, the ADAAA increased the probability that morbid obesity will be deemed to constitute a federally protected "disability."

With the passage of the ADAAA, the EEOC changed its view on whether obesity is an impairment. Prior to passage of the ADAAA, the EEOC Interpretative Guidance said that *severe* or *morbid* obesity was an impairment, but that obesity alone rarely is. After the ADAAA passed, when the EEOC

revised the Interpretive Guidance, it deleted the language indicating that obesity “rarely” would be a disability.

Must There Be An Underlying Disorder?

The EEOC Interpretative Guidance specifically excludes from the definition of impairment physical characteristics such as weight that 1) is within the normal range and 2) is not the result of a physiological disorder. Nonetheless, courts have disagreed about when an employee must establish that obesity is the result of an underlying physiological disorder.

A federal court in Louisiana discussed the requirement of proof of an underlying physiological disorder in a case filed by the EEOC on behalf of Lisa Harrison. She was 5’2” and weighed more than 400 pounds when she was hired to oversee a daycare program, but weighed more than 500 pounds when she was fired. The EEOC alleged that Harrison had severe obesity, that severe obesity is a physical impairment under the ADA, and that the employer regarded her as disabled because of her obesity. Thus, EEOC alleged that Harrison’s former employer discriminated against her because of a disability protected by the ADA.

The court observed that the EEOC’s ADA Compliance Manual stated that being overweight, in and of itself, generally was not an impairment, but that severe obesity, which may be defined as body weight more than twice the norm, was clearly an impairment. Under that standard, the court easily concluded that severe obesity is a disability under the ADA. The court went on to say that proof of a physiological cause is required only when an employee’s weight is within normal limits, and accordingly such proof is not required where the employee is severely obese.

This case was governed by the ADA (Harrison was discharged before the ADAAA took effect), under which the definition of “disability” was interpreted more narrowly than it is under the current version of the law, the ADAAA. Nevertheless, the ruling adopts an interpretation that makes it easier for an obese employee to pursue an ADA claim under either standard.

In more recent cases under the current law, some courts have used the ADAAA to expand the definition to conclude that weight outside the normal range may be an impairment even when no physiological disorder exists. For example, in 2010 the U.S. District Court in north Mississippi noted that the ADAAA substantially expanded the definition of disability and that cases requiring obesity to be based on physiological condition to be an impairment were all decided before the ADAAA. However, there is still a difference of opinion, as other courts have continued to require a physiological disorder.

How Much Is Too Much?

In July of this year, the EEOC announced that it had reached a settlement in a disability-discrimination lawsuit against BAE Systems, which allegedly had discriminated against an employee on the basis of his actual or perceived disability of morbid obesity by terminating him. The employee, Ronald Kratz, II, was morbidly obese, as he weighed well in excess of 600 pounds. He worked as a material handler in BAE’s manufacturing location in Texas. His job duties mostly

worked as a material handler in BAE's manufacturing location in Texas. His job duties mostly included desk work, but occasionally required him to drive a forklift. Company policy required him to wear a seatbelt while driving the forklift. Unable to wear the provided seatbelt, he asked for a seatbelt extender. Instead of providing the extender, BAE terminated him on the basis that he could no longer perform his job due to his weight.

From this case, it is clear that the EEOC has taken the position that there may be extreme cases where the physical characteristic is far outside the normal range and constitutes an ADA-protected impairment even absent a physiological disorder. From the EEOC's viewpoint, a person who is morbidly obese has an ADA-protected disability, period.

Because the ADAAA broadly interprets the ADA's definition that a disability is an impairment that substantially limits one or more major life activities, the ADAAA increases the likelihood that morbid obesity will constitute a federally protected disability; and where obesity need only substantially limit a major life activity to be a disability, would moderate or mild obesity qualify? It's easy to imagine how some future jury might think so.

Avoiding A Lawsuit

Considering that the EEOC apparently believes that obesity can be an impairment, absent any physiological disorder, and that the difference of opinion among courts as to whether the term "impairment" now must be broadly construed to encompass obesity that is not the result of a physiological disorder, employers should avoid making assumptions about how obesity may affect an individual's ability to perform job functions. Managers and supervisors should avoid conveying any belief that applicants' or employees' obesity is an impairment or may hinder performance of the essential functions of the job held or sought or that the individual presents a safety risk. And don't automatically reject accommodation requests from morbidly obese or obese employees.

When an employee seeks an accommodation necessary to perform the job, you are entitled to seek documentation sufficient to substantiate that the employee has an ADA-protected disability. Applying this rule to when an obese employee seeks an accommodation you may have a right to seek confirmation as to whether the employee's obesity is caused by an underlying disorder.

But in light of the conflicting court opinions relating to the requirement of an underlying disorder, seeking and using this information as a basis for determining whether to accommodate an employee is chancy. If no disorder exists and you refuse to offer an accommodation necessary for job performance, you may be risking litigation.

So how should one view obesity in employment decisions? Given the ambiguity and uncertainty that currently exist with regard to whether obesity can be an impairment without an underlying physiological disorder – because morbidly obese and mayhaps even less-obese employees may be considered disabled under the law – employers should tread lightly when making employment decisions based on an individual being overweight and should avoid making weight too big of an issue.

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