



Obesity: A New Protected Class In Washington

Insights

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The Washington Supreme Court held for the first time today that obesity is a protected class under state anti-discrimination law (*Taylor v. Burlington Northern Railroad Holdings, Inc.*). This decision runs counter to recent federal court decisions in other parts of the country that have said obesity not caused by an underlying physiological disorder or condition does not qualify as an impairment under federal law. The main reason for this distinction is that Washington state disability discrimination law offers broader coverage than the federal Americans with Disabilities Act (ADA).

While Washington employers may have grown accustomed to expansive disability discrimination protections in our state, today's decision goes further than ever before and may require you to immediately adjust your personnel practices.

Applicant's Job Offer Rescinded Because Of Severe Weight Problem

Casey Taylor received a conditional offer of employment to work for BNSF Railway Company as an electronic technician, but the offer was contingent on him passing a physical examination and completing a medical history questionnaire to the company's satisfaction. The medical evaluation revealed that Taylor was 5 feet 6 inches tall and weighed 256 pounds, resulting in a Body Mass Index (BMI) of 41.3.

Because a BMI over 40 is considered "severely" or "morbidly" obese, BNSF informed Taylor that it was unable to determine whether he was medically qualified for the job due to the significant health and safety risks associated with his physical condition. It further informed him that it was company policy to not hire anyone who had a BMI over 35, and that if he did not agree to pay for expensive additional medical testing to further examine his condition, his only other option was to lose 10 percent of his weight and keep it off for six months.

Taylor was unemployed and without medical insurance or other benefits to assist him in paying for the proposed testing, and therefore declined the company's alternative proposals. Instead he sued the railway company, alleging discrimination under the Washington Law Against Discrimination (WLAD) for refusing to hire him due to a perceived disability – obesity.

A federal court initially dismissed his claim, relying on federal cases interpreting the law to indicate that obesity is not a disability unless caused by a separate, underlying physiological disorder (and Taylor had no such disorder). But the 9th Circuit Court of Appeals believed that Taylor may have had

a valid claim and was not ready to affirm the lower court's dismissal. Instead, it sent the matter to the Washington Supreme Court and asked it to resolve the issue by applying state law.

State Supreme Court: Obesity Is Covered Under State Disability Law

Today the Washington Supreme Court answered the question by issuing an unprecedented decision that "obesity is always an impairment under the plain language of [the WLAD] because the medical evidence shows that it is a 'physiological disorder, or condition' that affects many of the listed body systems." Putting it bluntly, the court said that "obesity does not have to be caused by a separate physiological disorder or condition because obesity itself is a physiological disorder or condition under the statute."

The court went through a detailed analysis of obesity in order to reach this conclusion. It noted that obesity is not merely the status of being overweight, but instead is recognized by the medical community as a "primary disease." It listed the many physiological reasons why an individual may suffer from obesity, ranging from genetic predisposition, endocrine disruption, an imbalance between energy intake and expenditure, to intrauterine growth restriction. And while certain disorders could contribute to obesity (such as tumors, eating disorders, various syndromes, or hypothyroidism), the court noted that obesity may occur in people without such disorders being present.

The court emphasized that the WLAD is broader than its federal counterpart, the ADA, and therefore coverage can be found under state law even when possibly absent under federal law. The court specifically declined "to use federal interpretations of the ADA to constrain the protections offered by the WLAD." For example, the regulations interpreting the statute make clear that "abnormal" physical conditions deserve protection under Washington law, while no such provision appears in the ADA.

BNSF argued that weight should not be considered an abnormality because it is not an immutable characteristic and could be altered by the individual. Moreover, the defense argued, a large percentage of the population is obese (some 29 percent of adult Washingtonians were obese in 2016 according to BMI statistics) and therefore it could not be an abnormal condition. But the court rejected these arguments, noting that "abnormality" refers to something other than statistical frequency and was not limited to immutable states of being.

The court concluded by ruling that workers and applicants can gain the protections of the WLAD even if they aren't obese, but that it is sufficient for actual or potential employers to perceive them as having the impairment of obesity. "Because obesity qualifies as an impairment under the plain language of our statute," the court concluded, "it is illegal for employers in Washington to refuse to hire qualified potential employees because the employer perceives them to be obese."

What Does This Mean For Employers?

Today's decision could have far-reaching effects for Washington employers. First and foremost, if you use physical examinations or medical questionnaires to assist you in your hiring process, you

you use physical examinations or medical questionnaires to assist you in your hiring process, you should immediately consult with your labor and employment counsel for how to proceed when it comes to inquiries and standards surrounding weight. Once you have determined the safest and most appropriate course of conduct, you should also provide written instructions to any third-party testing providers about your policies and hiring standards.

Next, you may want to consider reviewing and revising your anti-harassment, anti-discrimination, and anti-retaliation policies to reflect that obesity is now a protected class under Washington law. It may be sufficient for hiring personnel and other supervisors to know about this change in the law, but your particular circumstances may warrant a clear enunciation of this new standard.

You should also be prepared to adjust your reasonable accommodation practices to reflect this change. If an existing employee indicates they need to be accommodated because of their obesity, or an obese applicant articulates their need for reasonable accommodation in order to perform the essential functions of the job, you should be prepared to go through your typical interactive process as you would for any other disability.

Finally, you should incorporate this shift in the law into your training materials. Hiring managers need to know the new policies you have put into place, supervisors and managers need to understand the contours of the new law, and all personnel need to be aware that harassment based on someone's obesity is strictly prohibited under your company's policies.

If you have questions about compliance issues as a result of this decision, contact your Fisher Phillips attorney or any attorney in our [Seattle](#) office.

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