

The obesity problem is growing

U.S. employers are bracing for claims under the ADA.

BY LEIGH JONES

Marta Fernandez got a call earlier this year from a client with a weight problem. Her client, a hotel and resort chain, was troubled about how to handle a request by an obese employee at one of its California properties. Required to walk the grounds as part of her job, the worker wanted to use one of the company's golf carts to get around.

The employee was asking for an accommodation for her disability—obesity. Fernandez, a partner at Jeffer, Mangels, Butler & Mitchell, was quick to offer advice: Do it.

It might have been a more difficult call just one year ago for Fernandez, who practices employment law in Jeffer Mangels' Los Angeles office. But with the outcomes fresh in her mind of three federal cases indicating growing acceptance of obesity as a condition covered by the Americans With Disabilities Act (ADA), it was a pretty easy decision.

Those cases, combined with obesity rates among the nation's work force at an all-time high, portend additional claims from plaintiffs demanding accommodations for their condition—and more lawsuits against employers that fail to provide them, according to Fernandez and other employment law practitioners.

"I can't imagine that there aren't going to be more suits across the country," she said.



The recognition of obesity as a condition under the ADA comes at a time when Americans are fatter than they've ever been. Adult obesity has more than doubled since 1970, according to the Centers for Disease Control and Prevention, which report that about two-thirds of the U.S. population is overweight and nearly 36 percent are obese. People in the South and Midwest weigh the most.

A report issued on September 18 by the Trust for America's Health advocacy group and the Robert Wood Johnson Foundation predicted that, by 2030, more than half of the people in 39 states will be obese.

The Equal Employment Opportunity Commission (EEOC) does not specifically track the number of ADA obesity cases, but of the 209 federal court decisions since September 2000 addressing ADA actions that included obesity claims, 23 percent were issued within the past 24 months, according to legal database Lexis.

Since 2010, obesity cases invoking the ADA have included actions against Wal-Mart Stores Inc., Follett Corp., Western Pennsylvania Health and Athletic Association, the Pennsylvania Department of Corrections and Continental Realty Corp.

In general, the ADA requires employers to accommodate disabled individuals as far as reasonably possible so that they can perform the core functions of their jobs.

OBESITY AS DISABILITY

The outcomes of three recent cases could drive the number of claims even higher, according to practitioners. The cases, although untested at the federal appellate level, were significant in that the EEOC did not allege that an underlying physiological condition—more easily protected by the ADA—was the basis for the employees' disability, said David Katz, an employment law attorney at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo. They represent a shift toward recognizing obesity as a disability by itself.

Indeed, the EEOC compliance manual for employers now states that although being overweight, "in and of itself, is not generally an impairment," severe obesity, in which someone's body weight is more than 100 percent over the norm, "is clearly an impairment."

"Employers need to pay attention," Katz said.

The first case concluded in July, when the EEOC settled an ADA obesity claim

PRECEDENTS: "I can't imagine that there aren't going to be more suits across the country," said Marta Fernandez of Jeffer Mangels. "Employers need to pay attention," added David Katz of Mintz Levin.



in U.S. District Court for the Southern District of Texas. In *EEOC v. BAE Systems*, the agency sued on behalf of Ronald Kratz, a 600-pound man who claimed he was fired from his job as a forklift operator because of his morbid obesity. BAE Systems PLC, which allegedly refused to accommodate Kratz with a seat belt extender, paid him \$55,000 and agreed to train managers and human resource employees in discrimination laws and compliance.

A spokeswoman for BAE said that the company had reached an "amicable resolution" with Kratz, but that it acknowledged no wrongdoing.

The second case closely watched by employment lawyers was *EEOC v. Resources for Human Development*, in the Eastern District of Louisiana. The commission filed the claim in 2010 against a treatment facility for chemically dependent women and their

children, on behalf of Lisa Harrison, who claimed that she was fired as manager of child-care services because of her severe obesity. Harrison, who died before the case was resolved, weighed more than 400 pounds.

In December, the district court held that her severe obesity was an impairment within the meaning of the ADA. In April, the facility agreed to pay \$125,000 to settle the matter. The defendant was represented by attorneys at Adams and Reese, who did not respond to a message seeking comment.

The third case was in federal court in Helena, Mont., which sent the disability question to Montana Supreme Court because the claim involved state law issues. In March, the state high court found that a physiological disorder underlying morbid obesity was not necessary for a disability claim. The Montana law at issue mirrored federal disability law.

The case, *Feit v. BNSF Railway*, involved a plaintiff who sued after the railroad company offered him a job as a conductor trainee, conditioned on his successful completion of a physical examination. The company allegedly refused to hire him because of his obesity.

Stephen Fink, an attorney at Thompson & Knight who represents BNSF in the Montana case, said that for employers, obesity is similar to the problems that smoking created during the 1970s and 1980s because of the associated health risks. "It's a social and political health issue of significant magnitude," he said.

In Fernandez's matter with the hotel chain, she said the client expressed concern that other employees might see the accommodation as unfair. Her advice didn't change. "Fairness is not an argument," she said.

The rising obesity rates, the recent cases and 2008 amendments to the ADA that made it easier for plaintiffs to prove disabilities portend more obesity claims, said plaintiffs lawyer David deRubertis, a solo practitioner in Los Angeles.

The U.S. Court of Appeals for the Sixth Circuit previously held that obesity was not a disability, but that was before the 2008 amendments. Still, claims are far from a shoo-in for plaintiffs, deRubertis said.

"If it's just a situation where they don't hit the gym enough, I don't think I want that case," said deRubertis, whose practice focuses on plaintiffs' disabilities claims. The stronger case remains the one in which obesity is the result of a physical or mental impairment, he said.

"I tend to be moderate in my view," he said. "If I take one of these cases, I don't want the client who's going to a fast-food restaurant."

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