Bloomberg BNA

Daily Labor Report®



**DISABILITIES**

When one thinks of disabilities under workplace anti-discrimination laws, obesity generally does not come to mind, yet recent changes in the Americans with Disabilities Act and similar state laws have expanded the scope of ''impairment'' to include the condition, Mintz Levin attorney David M. Katz says in this BNA Insights article. He provides an analysis of the federal, state, and local laws that address discrimination based on weight.

Katz says that because severe or morbid obesity—and perhaps even moderate obesity—may be considered a ''disability'' under the law, employers should tread lightly when making employment decisions that detrimentally impact overweight employees. The same goes for other ''nontraditional'' impairments, which may also be considered disabilities under the ADAAA's expanded reach, he says.

# Obesity as a Covered Disability Under the ADA

BY DAVID M. KATZ

When one thinks about disabilities under workplace anti-discrimination laws, the impairment of being fat generally does not come to mind. Yet, in the past couple of years, courts and the Equal Employment Opportunity Commission have expanded the scope of what it means to have an ''impairment,'' and therefore a ''disability,'' under the Americans with Disabilities Act and similar state laws to include obesity. With an easier threshold for obese employees to be considered ''disabled,'' combined with the fact that 35.7 percent of adults in the United States are obese, according to a 2011 study by the Centers for Disease Control and Prevention, disability discrimination lawsuits on the basis of obesity are sure to increase in the coming years. *See Behavioral Risk Factor Surveillance System Survey Data*, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Atlanta, Georgia, 2011.

*David Katz is an associate at Mintz Levin Cohn Ferris Glovsky and Popeo PC in the firm's New York office, practicing in the Employment, Labor and Benefits Section. David represents employers and executives in all aspects of labor and employment law and frequently counsels clients on issues related to discrimination, harassment, retaliation, whistleblowing, wage and hour, workforce reductions, leaves of absence, post-employment restrictive covenants, executive compensation, employee benefits and collective bargaining.*

## Few Laws Explicitly Prohibit Discrimination Based on Weight

Federal law does not prohibit discrimination based on weight. On the state level, Michigan's Elliott-Larson Civil Rights Act is the only law to explicitly prohibit employment discrimination on the basis of weight. *See* Mich. Comp. Laws § 37.2202(1)(a). Washington, D.C.'s Human Rights Law prohibits employment discrimination on the basis of ''personal appearance,'' which would include weight. *See* D.C. Code Ann. § 2-1401.01. Five cities—San Francisco, California, Santa Cruz, California, Binghamton, New York, Urbana, Illinois, and Madison, Wisconsin—have local ordinances including weight as a protected category. *See* San Francisco, Cal. Police Code art. 33; Santa Cruz, Cal. Mun. Code § 9.83.010; Binghamton, N.Y. Code § 45-3; Urbana, Ill.

 ISSN 0418-2693

Code of Ord. § 12-39; Madison, Wisc. Gen. Ord. § 39.03(2)(bb). Other than that, obese employees have had to finesse weight discrimination claims into disability discrimination claims under the ADA or similar state or local law, with varying degrees of success.

## Scope of 'Disability' and 'Impairment' Under the ADA and EEOC Regulations

Under the ADA, a disability is ''(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.'' 42 U.S.C. § 12102(1).

Under the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553, 110th Cong., 2d Sess. (Sept. 25, 2008), to be ''regarded as'' having an impairment, an employee no longer must establish that the employer perceived him or her to be substantially limited in a major life activity. The employee need only demonstrate that the employer took a prohibited adverse action based on the employee's actual or perceived physical or mental impairment, without regard to whether that condition limits or is perceived to limit a major life activity. *See* 42 U.S.C. § 12102(3). Neither the original ADA nor the ADAAA defines ''physical or mental impairment.'' The commission's implementing regulations define ''physical impairment'' as ''[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.'' 29 C.F.R. § 1630.2(h)(1).

EEOC's Interpretive Guidance, incorporated into the federal regulations, distinguishes between impairments and conditions that are simply physical characteristics: ''The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder.'' 29 C.F.R. pt. 1630 app. § 1630.2(h).

Accordingly, EEOC takes the position that an ''impairment'' requires a ''physiological disorder'' only if a person's weight is ''within 'normal' range.'' The Interpretive Guidance excludes weight from the definition of ''impairment'' only if it is *both* ''within 'normal' range'' and ''not the result of a physiological disorder.''

The commission's Compliance Manual, which has been afforded considerable deference by the courts over the years, provides that ''normal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments. At extremes, however, such deviations may constitute impairments.'' EEOC Compliance Manual § 902.2(c)(5). While the Compliance Manual notes that ''being overweight, in and of itself, generally is not an impairment, . . . severe obesity, which has been defined as body weight more than 100% over the norm is clearly an impairment.'' Notably, as of July 25, 2012, EEOC has removed from its website the Compliance Manual section on the definition of the term ''disability,'' including the above-quoted language, because ''the analysis in it has been superseded by the [ADAAA]. The ADAAA makes it easier for individuals challenging employment actions under Title I of the ADA to establish that they meet the definition of 'disability' and are thus protected by the law.'' *See*http://www.eeoc.gov/policy/docs/902cm.html#902.2c5. It remains to be seen whether the EEOC will publish a revised version of this section of the Compliance Manual on its website, and if so, what that section will look like.

## Obesity Generally Not Considered Covered 'Disability' Prior to the ADAAA

Before the ADAAA took effect on Jan. 1, 2009, some courts held that obesity could qualify as a physical impairment under the ADA, but only if the obesity was caused by a physiological disorder. *See, e.g.*, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 18 AD Cases 641 (6th Cir. 2006); (177 DLR AA-1, 9/13/06) (''to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition''); *Andrews v. Ohio*, 104 F.3d 803, 6 AD Cases 322 (6th Cir. 1997) (plaintiffs had not demonstrated that their weight resulted from a physiological condition under the ADA); *Francis v. Meriden*, 129 F.3d 281, 7 AD Cases 955 (2d Cir. 1997) (physical characteristics, such as weight, that do not result from a physiological disorder are not considered ''impairments'' under the ADA).

In the years prior to the ADAAA, EEOC's Interpretive Guidance included the statement that, ''except in rare circumstances, obesity is not considered a disabling impairment.'' 29 C.F.R. pt. 1630 app. § 1630.2(j) (2008). Notably, that language has been omitted since the 2011 version of the Interpretive Guidance was published in the Code of Federal Regulations. So while prior to the ADAAA the commission took the position that *severe or morbid obesity* was an ''impairment'' but that *obesity* rarely was, the removal of the ''except in rare circumstances'' language from the implementing regulations signals that EEOC may view ''regular'' obesity as an ''impairment.''

## The ADAAA Paves the Way for Federal Courts to Consider Obesity a Covered 'Disability'

In the ADAAA, Congress made clear that courts were interpreting the ADA too restrictively and that its intent is that the definition of ''disability'' be construed broadly to afford greater employee protection. *See* 122 Stat. at 3553-54. Though the ADAAA did not substantively alter the ADA's statutory definition of the term ''disability,'' the ADAAA sparked somewhat of a sea change for courts considering whether obesity may be a ''disability'' in the absence of a physiological disorder.

Congress's mandate that the term ''disability'' be more inclusive in scope has led federal courts in Mississippi and Louisiana to eliminate the requirement that a physiological disorder cause the obesity in order for it to be considered an ADA-covered ''disability.'' *See Lowe v. Am. Eurocopter, LLC*, 24 AD Cases 40 (N.D. Miss. 2010) (denying motion to dismiss plaintiff's ADA claim, noting the ''substantial expansion of the ADA by the ADAAA'' and that cases requiring that obesity be a product of a physiological condition ''were all before the ADAAA took effect''); *EEOC v. Resources for Human Dev., Inc.*, 827 F. Supp. 2d 688, 25 AD Cases 964 (E.D. La. 2011) (concluding, in reliance on the EEOC Compliance Manual, that ''if a charging party's weight is outside the normal range—that is, if the charging party is severely obese—there is no explicit require-

  DLR ISSN 0418-2693

ment that obesity be based on a physiological impairment''). *But see Lescoe v. Pa. Dep't of Corrections*, 464 F. App'x 50 (2012) (failing to reach issue of whether a cause of action lies under the ADA based on employer perceiving employee as disabled by obesity because evidence demonstrated that employer did not perceive employee's obesity as limiting any major life activities); *Frank v. Lawrence Union Free Sch. Dist.*, 688 F. Supp. 2d 160 (E.D.N.Y. 2010) (without addressing the ADAAA or providing any analysis and citing pre-ADAAA case law, finding that obesity is not a ''disability'' under the ADA, though ''clinically diagnosed'' obesity is a ''disability'' under the New York State Human Rights Law). Interestingly, according to the CDC, Mississippi and Louisiana rank one and two, respectively, for states with the highest prevalence of obesity.

## Supreme Court of Montana Holds Obesity May Be Covered 'Disability'

Federal courts are not the only courts to hold that obesity may be a ''disability'' absent a physiological disorder or condition. On July 6, 2012, the Supreme Court of Montana held in *BNSF Railway Co. v. Feit*, 365 Mont. 359 (2012) (131 DLR AA-1, 7/9/12), that: ''[o]besity that is not the symptom of a physiological disorder or condition may constitute a 'physical or mental impairment' within the meaning of [the Montana Human Rights Act] if the individual's weight is outside 'normal range' and affects 'one or more body systems' as defined in 29 C.F.R. § 1630.2(h)(1).'' The Montana Human Rights Act, Mont. Code Ann. § 49-2-101 *et seq.*, is patterned after the ADA.

In *Feit*, the plaintiff sued BNSF Railway Co. after the employer revoked a conditional offer of employment to work as a conductor trainee on the grounds that the plaintiff was not qualified for the position due to risks his extreme obesity posed in a safety sensitive position. BNSF informed the plaintiff that he would not be further considered for employment unless he lost 10 percent of his body weight or successfully underwent additional physical examinations at his own expense. The plaintiff completed all but one of the additional physical examinations, an $1,800 sleep test that he could not afford. Because he did not complete the sleep test, BNSF refused to reconsider its hiring decision.

In affirming the state agency decisions that BNSF regarded the plaintiff as disabled, the Supreme Court of Montana, looking to the ADAAA and the EEOC's guidance, found persuasive that the ADAAA was intended to broaden the definition of ''disability''; that the cases finding that obesity is not an ''impairment'' in the absence of a physiological disorder or condition were all decided before the ADAAA; that the EEOC's Compliance Manual states that extreme derivations in weight can be impairments and that ''severe obesity . . . is clearly an impairment''; that two post-ADAAA federal court decisions held that obesity need not be based on a physiological disorder or condition to be an ''impairment''; and, perhaps most importantly, that the EEOC's Interpretive Guidance, updated in 2011, omitted the statement that obesity was rarely a disabling impairment.

## EEOC Makes Clear Its Stance That Obesity May Be Covered 'Disability'

Less than three weeks after *Feit* was decided, on July 24, 2012, the EEOC announced that it settled a disability discrimination lawsuit, *EEOC v. BAE Systems, Inc.*, Civil Action No. 4:11-cv-3497 (S.D. Tex.), filed in Texas federal court in 2011, involving BAE Systems Inc.'s alleged discrimination against an employee based on his actual or perceived disability, morbid obesity, by terminating his employment and denying him a reasonable accommodation. *See* http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm.

The plaintiff in *BAE* weighed well in excess of 600 pounds, meaning that he was morbidly obese (generally characterized by being at least twice the ideal body weight). The plaintiff worked as a material handler in BAE's manufacturing location outside Houston, Texas, where 90 percent of his job consisted of desk work and the remaining 10 percent was performed standing up or driving a forklift. After being instructed to wear a seatbelt while driving the forklift, he asked for a seatbelt extender. The plaintiff did not receive the extender; instead, he was terminated two weeks later because, according to BAE, he could no longer perform his job due to his weight.

As part of the settlement, the plaintiff received $55,000. In addition, BAE agreed to provide the plaintiff with six months of outplacement services and must conduct training for, and issue written guidance to, its managers and human resources professionals on equal employment opportunity compliance, disability discrimination law, and responsibilities regarding reasonable accommodations to employees and job applicants. BAE must also post an anti-discrimination notice in multiple locations in the workplace.

## Where We Go From Here

Although the recent decisions in Montana, Mississippi, and Louisiana and the EEOC settlement in Texas are by no means binding nationwide, taken together, they may well serve as an indicator of a developing trend on how federal and state courts and administrative agencies will view obesity in disability discrimination claims. These decisions may well have a domino effect, opening the door for more courts and administrative agencies to follow suit in finding that severe obesity, or even moderate obesity for that matter, may be an ''impairment.'' Whether or not other courts jump on this bandwagon led by the EEOC, there is little doubt that obese employees now have more ammunition in bringing disability discrimination lawsuits. As such, there is a significant likelihood that disability discrimination suits will be on the rise and a greater percentage of claims will survive summary judgment.

Employers should therefore be cognizant that because obesity may be considered a ''disability'' under the law, they should tread lightly when making employment decisions (including requests for accommodations) based on an employee's weight or when making decisions that detrimentally impact overweight employees. The same goes for any other ''non-traditional'' impairments, such as:

- height abnormalities (e.g., extreme tallness or shortness);
- addictions (e.g., alcoholism);
- mental illness (e.g., narcissism); or
- conduct disorders (e.g., sexual compulsion).

Much to employers' surprise, these conditions may also be considered disabilities under the ADAAA's expanded reach.