

## Fat bias can grow into a big legal problem

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*A recent study by researchers at Duke University concluded that implicit weight bias begins in childhood and is as common as implicit race bias. Indeed, prejudice against people who are obese has been documented in all aspects of our society, including employment, education, and health care. And that bias can have damaging effects on people who struggle with their weight.*

*Weight bias can mean legal trouble for employers. Recently, Northern Virginia-based Capital One found itself on the wrong end of a lawsuit filed under the Americans with Disabilities Act (ADA). In *Kaptur v. Capital One, N.A.*, a former employee claimed he was harassed and later fired because of his obesity. The employee had undergone four kidney surgeries, which led to his significant weight gain. According to the lawsuit, the employee's supervisors made demeaning comments about his weight (e.g., telling him to join a "fat farm") and then manufactured an excuse to get him fired.*

*In an effort to provide guidance for readers about this emerging area of the law, DiMuroGinsberg partner Jonathan R. Mook, a nationally recognized authority on disability law, offers some answers on how to deal with potential ADA claims alleging obesity discrimination.*

**Q** When is obesity arguably a disability under the ADA?

**A** The analysis of whether obesity is a disability follows the same analysis as any other medical condition. To have an actual disability, the individual must have a physical or mental impairment that substantially limits a major life activity.

Courts considering the status of obese individuals under the ADA primarily have focused on whether their obesity, in and of itself, satisfies the "impairment" component of the Act's definition of disability. Clearly, if the obesity is caused by an underlying physiological disorder, such as a metabolic imbalance, then the person, especially someone who is morbidly obese (which is defined as body weight more than 100 percent over the norm), will be deemed to have an ADA "impairment." Next, the question is whether the individual's obesity or its underlying cause substantially limits a major life activity. Given the broad interpretation of "substantially limits" and "major life activities" under the ADA Amendments Act of 2008 (ADAAA), the answer usually will be yes.

Importantly, even if obesity that results from an underlying physiological disorder doesn't substantially limit a major life activity, the individual may still be covered by the ADA. For example, if an employer takes an employment action against an individual because of his obesity, the employer will be deemed to have regarded him as disabled.

**Q** Where do the courts stand on the question of whether obesity is a covered ADA disability?

**A** The appeals courts generally are on the same page in terms of analyzing whether obesity constitutes an ADA disability. The U.S. Courts of Appeals for the 2nd, 6th, and 8th Circuits have made it clear that simply being obese is not sufficient to constitute an impairment that rises to the level of an ADA disability. Their decisions include *Frances v. City of Meriden*, 129 F.3d 281 (2d Cir., 1997); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir., 2006); and *Morris v. BNSF Railway Co.*, 817 F.3d 1104 (8th Cir., 2016).

A federal court in Chicago recently reached the same conclusion in *Richardson v. Chicago Transit Authority*, dismissing the ADA claims of a former bus driver who is morbidly obese but failed to present any medical evidence of an underlying disorder that causes his obesity. In *Cook v. Rhode Island Dep't of Mental Health*, the 1st Circuit found a job applicant's obesity was a physical impairment based on expert testimony that her extreme weight is the result of a physiological disorder involving her metabolic and neurological systems. The 4th Circuit (whose decisions apply to Virginia employers) hasn't spoken on the issue, but it probably would follow the analysis of the courts in the decisions cited above.

Morbid obesity can be the result of a genetic disorder that causes severe weight gain, or it may be associated with other health problems, such as hypertension, type 2 diabetes, and coronary heart disease, all of which would constitute physical impairments in their own right. Thus, in most cases, an employee or a job applicant claiming she suffered an adverse employment action because she is morbidly obese should be able to present medical evidence that the obesity is caused by an underlying physiological disorder or that she has other physical or mental impairments related to the obesity that would substantially limit a major life activity.

**Q** *When demeaning comments are made about an employee's weight, what should HR do?*

**A** Disability harassment is unlawful under the ADA, and HR needs to make that perfectly clear to the supervisors and coworkers of a disabled employee. When training isn't sufficient, you should consider taking some type of employment action against coworkers or supervisors who allow what could be deemed a hostile work environment to occur.

**Q** *What's the bottom line on the ADA's coverage of obesity?*

**A** I would recommend that you assume an individual who is morbidly obese will be deemed disabled under the ADA and therefore covered by the law's protections. If an employee requests an

accommodation because of his obesity (e.g., a special chair), you should honor the request if you can. If the requested accommodation might be more difficult to provide (e.g., exempting the employee from walking significant distances when walking is a necessary part of the job), you may want to request medical information about the employee's physical condition and the nature of his limitations so you can analyze your potential obligations under the ADA. When undertaking such an analysis, you should consult with experienced legal counsel to ensure that you cover all the bases and are aware of the most current developments in this rapidly changing area of the law.

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