

## **A PROPOSAL TO INCLUDE THE MORBIDLY OBESE AS A PROTECTED CLASS UNDER THE AMERICANS WITH DISABILITIES ACT**

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### **ABSTRACT**

For too many years the morbidly obese have been discriminated against in the work force. Many employers wrongfully make employment decisions based on weight and appearance, two meaningless factors, rather than on education, training, and ability. Federal laws, state laws, and court decisions have not afforded the morbidly obese adequate protection from such employment discrimination. Therefore, the Americans with Disabilities Act, which protects individuals with disabilities from employment discrimination, should include morbid obesity as a disability.

Historically, morbidly obese people have been discriminated against in the work force. As a result, there is an ongoing legal debate on whether morbid obesity should be considered a disability recognized under the Americans with Disabilities Act. "The ADA protects qualified individuals with disabilities from employment discrimination" [1]. Under other laws that ban employment discrimination, it typically is not difficult to know whether a person is protected because of his/her race, color, sex, national origin, or age [1, p. 299]. But to know whether a person is protected by the employment provisions of the Americans with Disabilities Act can be more complex [1, p. 299].

It is essential to grasp the act's very precise definitions of "disability" [1, p. 299]. "Under the ADA, an individual with a disability is a person who has: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) is regarded as having such an

impairment" [1, p. 299]. Morbid obesity is not explicitly listed in the Americans with Disabilities Act as a disability, and thus, people who suffer from it are not sufficiently protected.

"Discrimination against fat people is the 'last acceptable form of prejudice'" [2, p. 2]. There is a continual employment discrimination against the morbidly obese because of society's strong emphasis on appearance. "Many people are denied opportunities because they are judged on extraneous factors, such as weight or appearance, instead of their ability" [2, p. 223]. This article argues that in most cases, weight, like race and religion, should be an irrelevant factor in employment decisions.

Victims of employment discrimination should be able to seek relief through the Americans with Disabilities Act, because a huge gap in the law exists, leaving many morbidly obese individuals with no protection against such discrimination. This article suggests a solution for those individuals, through expansion of the Americans with Disabilities Act.

### EXISTENCE OF WEIGHT-BASED DISCRIMINATION

"Weight-based job discrimination is prevalent in today's fitness-obsessed society" [2, p. 224]. According to Dr. Albert Stunkard, an obesity expert at the University of Pennsylvania, "the extent to which overweight people have difficulty in obtaining work goes far beyond what can be justified by medical data and must be due to discrimination" [2, p. 224]. A psychology professor at the University of Vermont, Esther Rothblum, asserted that "if a fat person and a thin person with identical qualifications apply for the same job, the thin candidate will usually get the position" [2, p. 224].

Many studies show that attractive people are better liked than unattractive people and are regarded as having more favorable qualities, such as intellect and competence [2, p. 224]. "Studies indicate that body weight is one factor on which judgments of attractiveness are made, and that obesity is considered unattractive. Thus, society tends to favor non-overweight people over those who are overweight" [2, p. 224]. Rothblum's research also showed that attractiveness is linked to a more hopeful outcome in terms of employment chances, and that obese individuals encounter discriminatory treatment based on their weight [2, p. 224].

Surveys have shown that over 24 percent of middle and top managers expressed the idea that 15 pounds of excess weight would have a "somewhat negative" effect on employment opportunities [3]. At 50 pounds of added weight, 43 percent of the managers thought it would be "somewhat negative," and 27 percent concluded that it would be "very negative" [3, p. 959]. It has been estimated that each pound of fat could cost an employee \$1,000 in yearly salary at the executive level of employment [3, p. 959].

“Morbid obesity is weight that is either one hundred over the ideal, or twice the ideal” [3, p. 957]. According to these studies and surveys, a person suffering from morbid obesity would probably endure severe social and economic hardships in the work force, solely because s/he is extremely overweight.

## **EXISTING LEGAL APPROACHES TO WEIGHT-BASED DISCRIMINATION**

### **Federal Law**

The Rehabilitation Act of 1973 was established to equalize opportunities for the disabled [2, p. 228]. The act bans discrimination against disabled persons in federally-financed activities [2, p. 229]. “A ‘handicapped’ individual is defined as ‘any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. The law asserts that an ‘individual with handicaps’ means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . .” [4]. Thus, a federal remedy against employers who discriminate is given solely to those who can demonstrate their obese condition results in a significant handicap to employment, which can be corrected through vocational rehabilitation [2, p. 229]. Employers seem free to discriminate capriciously against many people varying from the “overweight” to “obese” persons [2, p. 229].

Another major drawback of the Rehabilitation Act is that it pertains only to federally-financed programs and does not extend to private organizations [2, p. 229]. Thus, the act covers only a small number of morbidly obese individuals who experience employment discrimination.

The restrictions of the Rehabilitation Act stressed the urgency for a comprehensive national mandate to abolish discrimination against persons with disabilities [2, p. 229]. “As a result, on July 26, 1990, Congress enacted the Americans with Disabilities Act (ADA). The ADA provides a remedy for discrimination against the disabled by making the provisions in the Rehabilitation Act ‘generally applicable to employment agencies, labor organizations, and employers’ ” [2, p. 229].

As a result of the extended coverage, nearly all disabled persons will be shielded from employment discrimination [2, p. 230]. However, since the ADA took effect, there have been no cases deciding whether the Americans with Disabilities Act’s liberal definition of “disability” includes morbid obesity [2, p. 230]. Therefore, it is still obscure whether the morbidly obese are covered by federal law against discrimination [2, p. 230].

## State Law

Not many legislatures have forcefully contemplated the issue of obesity in terms of either disabilities or discrimination [3, p. 960]. The only state to afford the overweight protection in its discrimination laws is Michigan [2, p. 230]. The Michigan civil rights codes have attached weight to the standard covered classes of religion, race, color, national origin, age, sex, and marital status [3, p. 960].

Iowa has passed a comparable law monitoring civil service entrance examinations for city government employees [2, p. 231]. The law states that “[a]n applicant shall not be discriminated against on the basis of . . . weight . . . in determining physical or mental ability of the applicant” [5]. While Iowa acknowledges the reality of weight-based discrimination in its civil service law, it has not consolidated a similar phrase in its employment discrimination laws [2, p. 231].

California codes monitoring discrimination in employment do not specifically outlaw discrimination based on obesity [3, p. 960]. The code section that relates to the California Civil Service system does allude to obesity, but specifically omits obesity, or health conditions caused by obesity, from the definition of physical handicap for civil service employment purposes [3, p. 960]. Proposals have been made, however, that the broadly written California Administration Code can be interpreted to cover obese individuals under the section discussing individuals perceived as having a handicap [3, p. 960].

## Court Decisions

Numerous courts have explored the issue of discrimination against the obese. Most courts have examined whether or not obesity is a disability and have held that it is not [3, p. 961]. A few courts have concluded that obesity is a disability, and several cases have not pondered the disability issue at all [3, p. 961].

### CASES HOLDING THAT OBESITY IS NOT A DISABILITY

Most of these cases have discussed whether or not the obesity in question was a qualified handicap [3, p. 961]. “Qualified handicap means that a handicap or disability exists, but does not interfere with job performance” [3, p. 361]. These cases usually interpret applicable laws narrowly in deciding whether or not there is a disability [3, p. 961]. Most of these cases find that obesity, without some other factor, is not a disability [3, p. 961]. Furthermore, if the disability interferes with acceptable job performance, it is not a qualified handicap [3, p. 961].

In *Greene v. Union Pacific Railroad Co.* [6], a resident of Washington State brought an action against an employer of a railroad, challenging denial of transfer to a fireman job category [6, p. 3]. The employer denied the transfer because the

employee was very overweight, had high blood pressure, and had advanced osteoarthritis of the spine [3, p. 962]. The railroad believed that this combination of conditions would create a less safe employee than an employee without similar physical conditions [6, p. 5].

The court held that the employee was not disabled within the contemplation of any statutes by his “morbid obesity” because obesity was not a permanent condition, and the railroad’s height and weight requirements were a bona fide occupational qualification [6, p. 5]. The court reasoned that the employer was under a business duty to consider the effect of the employee’s impairments on his competence to perform the job with sufficient safety toward himself, as well as to other employees and the general public [6, p. 5].

The next case to discuss the issue of obesity as a disability was *Philadelphia Electric Co. v. Commonwealth of Pennsylvania Human Relations Comm’n* [7]. Here, an employer refused to hire the plaintiff because its medical department determined that her obesity made her unfit for a customer service position [7, p. 703]. The plaintiff filed a claim under the Pennsylvania Human Relations Act [7, p. 703].

The Commonwealth held that 1) the fact that plaintiff’s weight was well beyond the “twice the desirable weight” medical definition of morbid obesity did not prove that she was disabled; 2) there was no evidence that the plaintiff was disabled in any manner, though she was morbidly obese; and 3) an employer who will not hire someone only because that person fails a preemployment test is lawfully discriminating against that person [7, pp. 707-709]. “The court’s rationale was that the examining physician had found nothing physically wrong with the plaintiff and that she was not prevented from performing her duties. Also, the plaintiff herself did not believe her weight would prevent her from completing a regular work day. Since the obesity did not impair job performance, it was not a job-related handicap” [3, p. 963].

*Tudyman v. United Airlines* [8] provided a different approach to the issue of obesity as a disability. Here, a flight attendant who was a “body builder” filed a claim under the Rehabilitation Act alleging that the airline failed to hire him because they perceived him to be overweight [8, pp. 740-741]. The airline had weight requirements, which were motivated by a desire to project a positive image to customers [8, pp. 740-741]. The primary factor in *Tudyman* was that the applicant’s weight was self-imposed and totally deliberate [3, p. 964]. He was not found to be impaired or disabled in any way under the Rehabilitation Act of 1973 [3, p. 964].

As in *Philadelphia Electric Co.*, the *Tudyman* court said that employers are free to be subjective and can usually hire as they desire as long as they do not discriminate on any basis that has been legislatively or judicially forbidden [3, p. 964].

Another case holding that the employee failed to establish that his obesity constituted a “disability” was *Civil Service Comm’n of Pittsburgh v. Pennsylvania*

*Human Relations Comm'n* [9]. Here, an employee lost wages during a period when the employee was suspended for noncompliance with the city's weight requirement for his job [9, pp. 281-282].

The court stated that for the employee to show that he was "regarded as having a physical or mental impairment, he must prove he was regarded as having a physiological disorder, cosmetic disfigurement, or anatomical loss which affects the body system" [9, p. 283]. The court found the employee did not meet this burden and thus, he was not regarded as having a disability under the terms of the Rehabilitation Act [9, p. 284]. The court deduced there was "nothing in the record to indicate that the employee's obesity, or any obesity, fits into a physiological disorder, cosmetic disfigurement, or anatomical loss which affects the body system" [9, p. 283].

The effect of most of these cases is that obese persons will receive protection only if they have a medically-related or disabling impairment and are fully able to perform the job [3, p. 963].

### CASES HOLDING THAT OBESITY IS A DISABILITY

Some states have found that "obesity" is included in their statutes' broad definition of "disability" or "handicap." Therefore, in these states, the "obese" are entitled to protection against employers who discriminate.

One case which explored obesity, without other medical or disabling impairments, was *State Division of Human Rights v. Xerox Corp.* [10]. In *Xerox*, the employer refused to hire the plaintiff as a systems consultant because she was obese [10, pp. 695-696]. The company did not deny the fact that she was eligible for the job and that her obesity was unrelated to her ability to perform the job [10, pp. 695-696]. However, Xerox's director of health services had tested the plaintiff and advised that the company hold off from hiring her because of the effect her obesity would likely have on the company's insurance program [10, p. 696]. The plaintiff sued, asserting that Xerox illegally discriminated against her on the basis of her disability [10, p. 696].

The Court of Appeals of New York found that the obesity is a "disability" as statutorily defined, and therefore, the employer could not deny the applicant employment on that basis, even though her impairment may have been treatable [10, pp. 698-699]. The court further found "nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possible treatable condition or excessive weight" [10, p. 699].

New Jersey was the second state to find that obesity is a disability covered under its discrimination laws [2, p. 235]. New Jersey's discrimination law states that it is illegal for an employer to discriminate against an employee because the employee is or has at any time been disabled, "unless the nature and extent of the disability reasonably precludes the performance of the particular

employment” [11]. For example, an individual restricted to a wheelchair would not be able to succeed in a discrimination suit, if an employer refused to hire him/her as a firefighter.

The court construed New Jersey’s handicap discrimination law in *Gimello v. Agency Rent-A-Car Systems, Inc.* [12]. The plaintiff, an office manager, claimed he was terminated because he suffered from a condition of obesity [12, p. 265]. His employment records, which contained much praise, implied his obesity did not impair his job performance and he did his job very well [12, p. 266].

The court held the employer could not deny the plaintiff employment on the basis of obesity because obesity is a “disability” as statutorily defined [12, p. 278]. Also, the court found the plaintiff’s obesity existed physiologically and was demonstrable by accepted diagnostic techniques [12, p. 276]. The court stressed that the employer terminated the plaintiff because of a condition covered by the broad language of New Jersey Statute Annotated 10:5-5q, a condition which did not prevent him from doing his job [12, p. 278]. Therefore, the court determined the plaintiff’s firing was an actionable employment discrimination [2, p. 236].

*Cook v. Rhode Island, Dept. of Mental Health, Retardation, and Hospitals* [13] illustrated that morbid obesity, when regarded as an impairment by an employer, constituted a disability. In *Cook*, an applicant for a position of institutional attendant for the mentally retarded brought an action against an employer, alleging handicap discrimination, due to the employer’s determination that she was “morbidly obese,” in violation of the Rehabilitation Act [13, pp. 20-21].

The court of appeals held that 1) Under the Rehabilitation Act, voluntariness of behavior leading to the applicant’s condition, as well as the permanence of the condition, is applicable only in determining whether the condition has a substantially limiting effect; 2) the jury could have found that the plaintiff, although not handicapped, was treated by the employer as if she had a physical impairment; 3) the plaintiff was not required to prove she unsuccessfully sought an abundance of jobs in order to prove a “perceived disability” claim; and 4) the question of whether the plaintiff was “otherwise qualified” to work in the position applied for was for the jury [13, pp. 22-26]. This court affirmed the decision of the lower court when it stated, “in this case, the evidence adduced at trial amply supports the jury’s determination that the employer violated section 504 of the Rehabilitation Act. And because the employer refused to hire plaintiff due solely to her morbid obesity, there is no cause to disturb either the damage award or the equitable relief granted by the district court” [13, p. 28].

## PROPOSAL

As the preceding analysis has explained, morbidly obese persons have had serious difficulties with employment-related discrimination [3, p. 975]. It is unsatisfactory to try to establish in each case that the morbidly obese are disabled

so that certain protective laws will apply [3, p. 975]. Furthermore, courts have been inharmonious in deciding which laws relate to morbidly obese individuals [3, p. 975].

As is so frequently said, “beauty is in the eye of the beholder” [2, p. 249]. The way the law is today, employers can arbitrarily discriminate against the morbidly obese by having their own ideals of attractiveness or acceptability, and most employees have no relief [2, p. 249]. A more objective standard must be established for fairness to be accomplished [2, p. 249]. “Certain state legislation, court decisions, and the opinions of many members of Congress indicate a less subjective approach, which focuses on ability and competency, would eliminate unnecessary and arbitrary discrimination” [2, p. 249].

The purpose of establishing the Americans with Disabilities Act was to encourage employment decisions based solely on job qualifications. Standards based on weight, when immaterial to job qualifications, defeat this purpose [2, p. 249]. Therefore, morbid obesity should be incorporated in the Americans with Disabilities Act, as a disability upon which employment decisions cannot be made. If the law is not expanded, numerous skilled, trained, and educated people will continue to be unprotected.

The bona fide occupational qualification was devised to give employers flexibility in employment decisions; “it enables employers to judge employees on the basis of otherwise forbidden considerations” [2, p. 250]. Thus, if the Americans with Disabilities Act were to expand its definition of disability to cover the morbidly obese, the bona fide occupational defense would protect an employer in cases where weight or a certain fitness level is essential for job performance [2, p. 250].

When passing the Americans with Disabilities Act, Congress aimed to create equal opportunity for all [2, p. 250]. Thus the individuals diagnosed as morbidly obese should be embraced as a protected class. Employment determinations should be grounded on a person’s merits, ability, and skills, rather than his/her appearance or weight.

## CONCLUSION

Morbid obesity can be closely identified with other protected classes such as race, sex, color, age, or religion. Consequently, morbid obesity should be granted the same legislative protection that goes along with being a member of a protected class [3, p. 975].

In a society that all too often confuses “slim” with “beautiful” or “good,” morbid obesity can present awesome barriers to employment [13, p. 28]. Unless these barriers are destroyed by the Americans with Disabilities Act, many morbidly obese people who are competent and ambitious will suffer the consequences.



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### ENDNOTES

1. *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act*, Equal Employment Opportunity Commission, Washington, D.C., Jan. 1992.
2. P. S. Stolker, Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination, *Journal of Human Rights*, 10, p. 223, 1992.
3. D. L. Bierman, Jr., Employment Discrimination Against Overweight Individuals: Should Obesity be a Protected Classification?, *Santa Clara Law Review*, 30, pp. 951-976, 1990.
4. 29 U.S.C. § 701 (1988).
5. Iowa Code § 400.8(1) (1992).
6. *Greene v. Union Pacific Railroad Company*, 548 F. Supp. 3 (W.D. Washing. 1981).
7. *Philadelphia Electric Co. v. Commonwealth of Pennsylvania Human Relations Comm.*, 448 A.2d 701 (Pa. Commw. Ct. 1982).
8. *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984).
9. *Civil Service Commission of Pittsburgh v. Pennsylvania Human Relations Commission*, 591 A.2d 281 (Pa. 1991).
10. *State Division of Human Rights v. Xerox Corporation*, 480 N.E.2d 695 (N.Y. 1985).
11. N.J. Stat. Ann. § 10:5-4.1 (West 1991).
12. *Gimello v. Agency Rent-A-Car Systems, Inc.*, 594 A.2d 264 (N.J. Super Ct. App. Div. 1991).
13. *Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17 (1st Cir. 1993).

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