



ILLINOIS STATE BAR ASSOCIATION

LABOR & EMPLOYMENT LAW

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Is obesity a disability? An analysis of obesity under the ADAAA

By Susan A. Garver

It is no news to anyone that Americans are fat. According to the Centers for Disease Control ("CDC"), more than one-third (35.7%) of adults in the United States are obese. (<http://www.cdc.gov/obesity/data/adult.html#Common>) Obesity contributes to heart disease, stroke, type two diabetes and certain types of cancer all of which are some of the leading causes of death. In 2008, medical costs associated with obesity were estimated at \$147 billion; the medical costs expended by third-party payers for people who are obese were \$1,429 higher than those of normal weight. (<http://www.cdc.gov/obesity/data/adult.html#Common>)

In 2011 obesity prevalence ranged from 20.7% in Colorado to 34.9% in Mississippi. There was no state that had a prevalence of obesity less than 20%. Thirty-nine states had a prevalence of 25% or more; 12 of these states had a prevalence of 30% or more: Alabama, Arkansas, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Oklahoma, South Carolina, Texas, and West Virginia. The South had the highest prevalence of obesity (29.5%), followed by the Midwest (29.0%), the Northeast (25.3%) and the West (24.3%). (<http://www.cdc.gov/obesity/data/adult.html#Common>)

Obesity, generally, is defined in quantifiable terms by referring to a body mass index or BMI. BMI is based on a calculation that takes total weight and divides by height (30kg/m² (lb./ft² x 4.88)). Physicians have established that a person with a BMI greater than or equal to 30 is obese. Morbid or extreme obesity is generally defined as a BMI greater than or equal to 40. To put this into perspective, a five foot, ten inch male weighing 210 pounds would have a BMI of 30. The same man at 279 pounds would have a BMI

of 40.

Can an obese person sue his employer if he was or believes he was discriminated against on the basis of his weight? Prior to 2009, the answer was generally, 'no.' Recently, however, via amendments to the Americans With Disabilities Act, Congress made a claim of discrimination based on obesity much easier to prove. With over one-third of the population obese and rising, it stands to reason that claims based on obesity will also increase. The Courts docket could get as fat as Americans' waistlines.

ADA

The American's with Disabilities Act ("ADA") protects employees with disabilities against discrimination by any employer with fifteen or more employees. The ADA provides that no "covered entity shall discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12101 *et seq.* If an individual's condition does not rise to the level of a disability, the individual can not recover under the ADA even if the employer terminated the individual on account of the condition. See *Skorup v. Modern Door Corp.*, 153 F.3d 512, 514 (7th Cir. 1998).

The Interpretive Guidance issued by the Equal Employment Opportunity Commission ("EEOC") on Title I of the ADA provided that, "except in rare circumstances, obesity was not considered a disabling impairment." The EEOC regulations further explained that "the definition of impairment did 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." Under the ADA, most district courts found disability claims related to obesity

failed under the ADA, except in special circumstances where the obesity was related to a physiological disorder or where an individual's obesity caused the requisite substantial limitation of a major life activity.

In the Northern District of Illinois, the court has tackled the issue of obesity under the ADA. In *Cristia v. Red Door Spa Holdings*, 2008 U.S. Dist. LEXIS 22165 (N.D. Ill. 2008) the Plaintiff, Lisa M. Cristia, was a massage therapist and Body Department Manager for the Michigan Avenue location and was also Red Door's Midwest Regional Trainer. Cristia was diagnosed with throat and tongue cancer. At all times during Plaintiff's employment she weighed between 240 and 250 pounds. Cristia took FMLA and personal time off for cancer related treatments. When Cristia returned to work after her leave, she was reprimanded for performance related issues and ultimately was terminated for those issues. Cristia alleged disability discrimination based on her cancer and obesity. The court held that Cristia failed to support a claim that her physical impairment prevented her from performing a major life activity. Further, the court found Cristia was able to perform her work duties as a massage therapist before and after her cancer and surgery and during the time she was obese. The court also found Cristia failed to show that Red Door regarded her as having an impairment that substantially limited a major life activity. The court based this on the "undisputed facts" that demonstrated that Cristia was, "hired and promoted while she was at the same weight, or more, than when she was fired; she received leave for her cancer treatments and did not identify any undisputed fact demonstrating that Red Door found her cancer and its required treatment and surgeries as impairing her ability to

work." *Id.* at 15.

Lorenzo Clemons was a Big Ten football official and alleged he was terminated due to his weight. Clemons sued The Big Ten Conference alleging he was discharged due to his *perceived* disability of obesity in violation of the ADA. *Clemons v. The Big Ten Conference*, 1997 U.S. Dist. LEXIS 1939; (1997). In order to prevail on a perceived disability claim, Clemons had to show that the Big Ten believed he had an impairment that substantially limited one or more of his major life activities. The court noted the regulations interpreting the ADA defined the term, "substantially limits," as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j) (3)(i). The record contained the assessment criteria for evaluating officials. The first area of assessment was appearance and physical condition. This referred to being trim, looking sharp and having the ability to cover, move and be in position to make calls. Clemons' weight during his employment with the Big Ten varied from 235 pounds when he was initially hired to around 285 when he was terminated in 1994. Clemons later maintained a regular position as a Salesperson at Kimberly-Clark and then as a Liaison for the Cook County Sheriff's office. Both parties agreed that Clemons' weight had no effect on his ability to perform his other jobs.

The court rejected Clemons' argument that he met the definition of disabled because the Big Ten regarded him as incapable of performing an entire class of jobs, football officiating, as a result of his obesity and instead found that officiating was a single position and not a "class of jobs." The court noted that, "it is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap; the impairment must substantially limit employment generally." The court found that although the Big Ten may have found Plaintiff's weight made him an ineffective football official, there was no support for the contention that he was perceived as being disabled from working generally. Clemons was at all times able to work at his other employment and there was no evidence presented that the Big Ten perceived Clemons as unable to work generally.

ADAAA

The Americans with Disabilities Act Amendments Act ("ADAAA") became effective on January 1, 2009. The ADAAA overturns the Supreme Court's definition of "substantially limits;" because Congress believed that the court's standard was "too high" and that "substantially limits" should be viewed more broadly. Further, the ADAAA expanded the definition of "major life activity."

A "major life activity" under the ADAAA now means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. It also now includes major bodily functions including, but not limited to, functions of the immune system, normal cell growth, digestion, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

The ADAAA no longer requires a plaintiff bringing a claim under the "regarded as" category to show that the impairment limited her life activity, including working in a broad class of jobs.

The ADAAA and the subsequent EEOC regulations do not mention obesity at all and thus have not defined it. The current EEOC regulations no longer mention "rare circumstances" related to obesity application in the statute. The EEOC has also recently taken the position that morbid obesity is a disability under the ADAAA.

As a result of a suit filed in U.S. District Court for the Southern District of Texas, *EEOC v. BAE Systems* (Civil Action No.: 11-cv-3497 (2012)). BAE Systems agreed to pay \$55,000.00 to settle a disability discrimination lawsuit based on morbid obesity. According to the EEOC's press release dated July 24, 2012, Ronald Kratz II was fired due to his disability, morbid obesity, and because his employer, BAE Systems regarded him as obese. At the time of his discharge, Kratz was able to perform the essential job functions without reasonable accommodation and had a good performance rating. The EEOC's Houston trial attorney, Kathy Boutchee stated, "The law protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity. So long as an employee can perform the essential job duties of a position, with our without reasonable accommodation, the employee should be allowed to work on the same basis as any non-obese employee. Employers can not fire disabled employees based on perceptions and prejudice." The EEOC considers morbid obesity a disability under the ADAAA

even without a physiological disorder causing the obesity.

A federal district court in Louisiana seems to consider obesity a disabling condition in and of itself. In *Lowe v. American Eurocopter, LLC.*, 2010 U.S. Dist. LEXIS 133343; (N.D. La. 2010), a former employee was terminated due to her weight. Plaintiff alleged that her obesity affected the major life activity of walking as she was unable to park and walk from the regular parking lot and had to park in a handicapped parking space. In response, the defendants alleged that obesity was not a disabling impairment. The court stated that it was unable to say that obesity can never be a disability under the ADA, especially given that the ADA was amended by the Americans with Disabilities Act Amendment Act of 2008. "Lowe at 22. The court held that, "under the ADAAA an individual is not required to demonstrate that the disability she is regarded as having is an actual qualified disability under the ADA or that it substantially limits a major life activity. The ADAAA only requires that a Plaintiff show that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id.* at 24-25. "Thus, a plaintiff now might be considered disabled due to obesity under the ADA is her employer *perceived* her weight as an impairment." *Id.* at 25.

The Montana Supreme Court recently grappled with the issue of whether obesity is a disability for the purposes of the Montana Human Rights Act. In *BNSF Railway Company v. Eric Feit*, 2012 Mt 147; 2012 LEXIS 192 (2012), the Montana Supreme Court was asked to answer the certified question, "Is obesity that is not the symptom of a physiological condition a "physical or mental impairment" as it is used in Montana Code Annotated § 49-2-101(19)(a)." The Montana Supreme Court answered the question with a qualified yes. The Court noted that the Montana Human Rights Act (MHRA) was intended by the Montana state legislature to be interpreted consistently with federal discrimination statutes and case law. It was noted that in particular, the definition of physical or mental disability was substantially identical to that in the ADA. *BNSF* at p.8. The court noted that the purpose of the ADAAA was to reinstate "a broad scope of protection to be available under the ADA," and clarified that "the definition of disability... shall be construed in favor of broad coverage... to the maximum extent permitted"

by the terms of the Act." *BNSF* at p.10 citing 29 C.F.R § 1630.1(c)(4)(2011). The court went on to note that "Congress did express its specific intent that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* at p.10. The court also made reference to the fact that, "prior to the ADAAA, the EEOC's Interpretive Guidance included the statement that, "except in rare circumstances, obesity is not considered a disabling impairment." Notably, this language has been omitted from the 2011 version." *BNSF* at p.14.

The Montana Supreme Court reviewed the relevant recent case law pre-ADAAA. It noted that in *EEOC v. Resources for Human Development, Inc.*, 827 F. Supp. 2d 668, 694 (E.D. La.2011) the court found weight outside the normal range may constitute a physiological condition within the definition of impairment if it "affects one or more body systems;" noting that in *Lowe* the court denied a motion for summary judgment noting the "substantial expansion of the ADA by the ADAAA and finding cases requiring that obesity be a product of a physiological condition 'were all before the ADAAA took effect,' and noting that in *Lescoe v. Pa. Dept. of Corrects.*, 2011 U.S. Dist. LEXIS 34325, 10-13 (M.D. Pa. March 30, 2011) the court upheld summary judgment in favor of the defendant on a ADA claim because plaintiff had not demonstrated his obesity claim because plaintiff had not demonstrated his obesity was physical or mental impairment but not addressing the ADAAA.

Ultimately, the Montana Supreme Court answered the certified question in the affirmative holding, "Obesity that is not the

symptom of a physiological disorder or condition may constitute a "physical or mental impairment" within the meaning of the Montana Code Annotated § 49-2-101(19)(a) if the individual's weight is outside the "normal range" and affects "one or more body systems" as defined in 29 C.F.R. § 1630.2(h)(1) (2011)." *BNSF* at p.16.

The Montana Supreme Court gives some guidance as to how court's may interpret obesity as a disability under the ADAAA in the future. A person can qualify himself as disabled under the ADAAA if he is obese or morbidly obese (outside the normal range) and his obesity affects one or more body systems. Diabetes and high blood pressure (both fairly common side effects of obesity) may be enough to qualify as affecting one or more body systems under the ADAAA.

Further, the ADAAA makes the "regarded as" prong much easier for plaintiffs to prove. Now, under the ADAAA plaintiffs need only show that the employer *perceived* obesity to limit a major life activity instead of having to prove that the employer regarded the employee as having the impairment.

If *Clemens v. Big Ten*, were heard today under the ADAAA, the courts would likely have found The Big Ten *perceived* Clemons as having a disability which substantially limited his ability to perform his job as a football referee.

Looking Ahead

In American today, there is a stigma against the obese. The non-fat tend to stereotype the obese as lazy, stupid and weak. There is even a new term for the stigma known as "weightism." Wikipedia defines

weightism as, "discrimination or stereotyping based on one's weight, especially very large or thin people." Some argue that prejudice against the obese is one of the last "socially acceptable" prejudices. Smith, S., *The California Now Activist*, *Sizism: One of the Last "Safe" Prejudices*, Vol 5, 2-3 (1990). Some overweight individuals also hold prejudices against other overweight people and themselves. Crocker, J. et. al., *Journal of Personality and Social Psychology*, The stigma of overweight: Affective Consequences of Attributional Ambiguity, 64, 60-70 (1993). Additionally, obesity is generally viewed as a condition that is directly in the control of the obese person, i.e. the obese person has failed at his responsibility to stay thin and maintain a healthy weight. Obesity is also a condition that is immediately apparent to the viewer, unlike a drug addiction or alcoholism, which can lend itself to greater discrimination. Finkelstein, L., *Human Resource Management*, Bias Against Overweight Job Applicants: Further Explorations of When and Why, Vol 46, No.2, 203-222 (Summer 2007).

With increasing discrimination against the obese, it stands to reason that discrimination suits based on obesity will be on the rise in the future. Employers can no longer discriminate based on obesity and employees will now have an easier time avoiding summary judgment on their ADAAA disability discrimination claims. ■

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ILLINOIS STATE BAR ASSOCIATION'S
LABOR & EMPLOYMENT LAW NEWSLETTER,
VOL. 50 #3, DECEMBER 2012.
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