

LABOR AND EMPLOYMENT LAW UPDATE



WHY ARE OBESE INDIVIDUALS FARING BETTER IN DISABILITY DISCRIMINATION LAWSUITS?

During the past 20 years, there has been a dramatic increase in obesity in the U.S. According to a January 2012 Data Brief published by the Center for Disease Control and Prevention, more than 35% of American adults are now obese.

Efforts to obtain express protection from discrimination in employment for obese individuals have been largely unsuccessful. Only one state – Michigan – makes it unlawful for employers to discriminate on the basis of “weight.” There is no federal law which prohibits obesity discrimination.

Historically, federal and state disability discrimination laws have proven to be an inadequate substitute for obese individuals claiming job bias. Most courts found that obesity, without an underlying or resultant physiological disorder, was not itself a disability entitled to legal protection.

In the past two years, however, disability discrimination claims by obese individuals have fared better in court. In July 2012, the EEOC obtained a settlement from BAE Systems in a Texas federal suit brought on behalf of a morbidly obese claimant. Court decisions in Louisiana, Mississippi Montana and New York have refused to dismiss discrimination suits brought by obese plaintiffs. There are several possible reasons for this significant trend.

ADA AMENDMENTS ACT OF 2008: Effective January 1, 2009, the ADA Amendments Act of 2008 (“ADAA”) amended the Americans with Disabilities Act (“ADA”), the primary federal law addressing disability discrimination in employment. Although the ADAA did not directly address obesity, the Act was critical of earlier court decisions which had narrowly construed the ADA’s definition of “disability.” The ADAA thus issued the following new mandate:

“The definition of disability ... shall be construed in favor of broad coverage of individuals ... to the maximum extent permitted ...” by the terms of the Act. 42 U.S.C. § 12102(4)(a).

This mandate was found to be persuasive in the December 16, 2010 decision in *Lowe v. American Eurocopter, LLC*, in which a Mississippi federal court refused to dismiss a claim brought under the ADA by a plaintiff who alleged that her weight affected her ability to walk.

PERCEPTION: Also affected by the ADAA was the treatment of persons who are protected from discrimination even if they are merely “regarded as having” a disability. Before the ADAA, only a person regarded as having a recognized disability could be protected. After the ADAA, a person can be protected if a condition is perceived to be a disability, even if it is not a disability. This distinction was found to be significant in *Lowe*, which noted that the plaintiff could be protected under the ADA “if her employer *perceived* her weight” as a disability.

EEOC REGULATIONS: On March 25, 2011, the EEOC issued regulations implementing the ADA Amendments Act of 2008. Previous regulations had declared that “except in rare circumstances, obesity is not considered a disabling impairment.” The new regulations provide:

“The definition of the term ‘impairment’ does not include physical characteristics such as ...weight ... that are within normal range *and* are not the result of a physiological disorder [emphasis added].” 29 C.F.R. § 1630.2(h).

The new regulations were quoted in the July 6, 2012 opinion in *BNSF Railway Company v. Feit*, in which the Montana Supreme Court found that the state's disability discrimination law protects a person whose weight is outside "normal range" and affects "one or more body systems."

EEOC COMPLIANCE MANUAL: Section 902.2(c) (5) of the November 21, 2009 version of the EEOC Compliance Manual states:

"[B]eing overweight, in and of itself, is not generally an impairment ... On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment."

This guidance was followed in the December 7, 2011 decision in *EEOC v. Resources for Human Development, Inc.*, in which a Louisiana federal court denied summary judgment as to an ADA plaintiff who weighed in excess of 500 pounds.

EXPERT TESTIMONY: Medical knowledge has advanced to the point where obesity is now understood to be more than just a mere physical characteristic; obesity is a discrete medical condition that independently affects health. Testimony by a medical expert or treating physician can thus be a powerful weapon supporting a bias claim by an obese individual. Such expert testimony was noted in the February 22, 2010 opinion in *Frank v. Lawrence Union Free School District*, in which a New York federal court denied summary judgment as to a claim brought under New York's Human Rights Law by a plaintiff with "clinically diagnosed obesity."

DOMINO EFFECT: To be sure, there have been court decisions in the past two years which have dismissed disability discrimination claims by obese plaintiffs. Nevertheless, the recent Montana Supreme Court opinion in *BNSF Railway Company v. Feit* was able to note that it wasn't the first opinion to find that obesity was a protected disability, citing the previous federal court decisions in Mississippi and Louisiana. Once a legal trail is blazed by other courts, it is easier for a court presented with a controversial claim to follow that trail.

WHAT DOES THE FUTURE HOLD FOR EMPLOYERS AS TO DISABILITY DISCRIMINATION CLAIMS BY OBESE INDIVIDUALS? Although the decisions regarding New York and Montana law are

likely final words, it remains to be seen how the ADA decisions will fare at the appellate level. In the meantime, this much is certain: obese claimants now have more ammunition for disability discrimination suits. It is thus predictable that, for the time being, (1) more suits will be brought, and (2) more claims will survive summary judgment. In short, the stakes have been raised significantly for adverse employment decisions which affect an obese applicant or employee.

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