

OBESITY AS A DISABILITY UNDER THE ADA: IS IT MORE LIKELY NOW THAN BEFORE?

In July, the American Medical Association (AMA) adopted a new policy that officially labels obesity as a disease, “requiring a range of medical interventions to advance obesity treatment and prevention.” According to the AMA’s Council on Science and Public Health, a “disease” is defined as having the following criteria: 1) an impairment of the normal functioning of some aspect of the body; 2) characteristic signs or symptoms; and 3) harm or morbidity.

The AMA’s focus on obesity as a disease has centered on the question of whether obesity may be a disability under the Americans with Disability Act (ADA). The definition of disability under the ADA is:

- A physical or mental impairment that substantially limits one or more major life activities;
- A record of such an impairment; or
- Being regarded as having such an impairment

While the ADA does not identify obesity as a disability, several events in recent years – including the AMA’s July policy declaration – make it more likely that obesity, and certainly morbid obesity, will be treated as a disability under the ADA.

2008: Congress Broadens Definition Of “Disability”

In 2008, Congress enacted the American with Disabilities Act Amendments Act (ADAAA). In doing so, it declared its intent that the definition of “disability” be construed broadly to afford greater protection to employees. Although the ADAAA does not change the definition of disability, it broadens the term by modifying key language within that definition. Following enactment of the ADAAA, it is more likely that an individual’s physical or mental impairment will be considered a “disability” under the ADA.

Prior to enactment of the ADAAA, the Equal Employment Opportunity Commission (EEOC) took the position that severe or morbid obesity – though not necessarily obesity itself – was an impairment. The EEOC’s Interpretive Guidance, which is incorporated into the federal regulations on the ADA, concluded, prior to the ADAAA, that “except in rare circumstances, obesity is not considered a disabling impairment.” However, when the 2011 Interpretive Guidance was published in the Code of Federal Regulations, this language was omitted, suggesting that the EEOC no longer considers obesity to be a disability only “in rare circumstances.”

2012: EEOC Settles Two Cases That Focused On Obesity As A Disability

In 2012, the EEOC settled two cases in which it alleged discrimination based on an employee's obesity.

In the first, *EEOC v. Resources for Human Development, Inc.*, the commission brought suit on behalf of the estate of Lisa Harrison, a former employee of the company, alleging that RHD violated the ADA in terminating her because she was obese and was regarded as disabled. Harrison weighed more than 400 pounds when she was hired and weighed 527 pounds when she was terminated eight years later. According to the EEOC, she received "excellent" ratings in her performance evaluations. Harrison died two years after her termination as a result of "morbid obesity."

The District Court for the Eastern District of Louisiana ruled that severe obesity – defined as a body weight of more than 100 percent over the norm – is an impairment. Relying on the EEOC's Interpretive Guidance, the court found that if an individual is severely obese, there is no requirement that the obesity be based on a physiological impairment. Thus, Harrison qualified as disabled under the ADA. The parties settled the case for \$125,000 following the district court's ruling.

In the second case, *EEOC v. BAE Systems Tactical Vehicle Systems, LP*, the EEOC filed suit in a Texas district court alleging that BAE fired its employee, Ronald Kratz, because of his disability, morbid obesity, and because it regarded him as disabled. Kratz was hired by BAE in 1994. In 2009, he was informed that BAE felt he could no longer perform his job duties because of his weight. According to Kratz, he asked whether he could be transferred to a different position or be provided with other reasonable accommodations, and BAE refused. At the time he was terminated, Kratz weighed 680 pounds. In July 2012, BAE entered into a settlement with the EEOC that required the company to pay \$55,000 to Kratz and to provide disability discrimination training to its employees.

In a press release detailing the *BAE* settlement, senior EEOC trial attorney Kathy Boutchee stated that the ADA "protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity." Boutchee explained:

So long as an employee can perform the essential job duties of a position, with or without reasonable accommodation, the employee should be allowed to work on the same basis as any non-obese employee. Employers cannot fire disabled employees based on perceptions and prejudice.

Boutchee's statement clarified the EEOC's position that morbid obesity, by itself and without some additional underlying physiological disorder, may constitute a disability under the ADA.

Will Courts Routinely Consider Obesity A Disability Under ADA?

With the AMA's designation of disability as a disease, employers should understand that it may be only a matter of time before the courts routinely consider obesity as a disability under the ADA. Obesity for adults is defined by looking at a person's BMI, which is a measure of body fat based on weight and height. An individual with a BMI of 30 or higher is considered obese.

According to the Centers for Disease Control and Prevention (CDC), the U.S. obesity rate increased almost 50 percent between 1997 and 2012. Today, more than one-third of adults in the United States – 35.7 percent – are considered obese. Based on the statistical information the CDC maintains, every state in the nation had a prevalence of obesity at 20 percent or more in 2012, and 13 of these states – including South Carolina and several others in the South – had a prevalence of 30 percent or more.

Considerations For Employers

Before making employment decisions that adversely affect employees who may be obese or morbidly obese, employers should consider whether the decision would be different if the employee were considered disabled under the ADA. For example, is there an accommodation that would allow the employee to perform the essential functions of his or her job and eliminate the need for the adverse action?

In addition, employers need to caution their supervisory and management-level employees not to regard an individual as disabled simply because he or she is overweight. Taking adverse action against the employee *because* the employee is overweight may violate the ADA's prohibition against discriminating against an individual because he or she is regarded as disabled, even if the person is not disabled. Notably, the ADAAA eliminated the requirement that an employee establish that the employer perceived him or her to be substantially limited in a major life activity. Now, the employee need only demonstrate that the employer took an adverse action based on the employee's actual or perceived physical or mental impairment.

It remains to be seen whether the AMA's recent designation of obesity as a disease will have an effect on court decisions addressing obesity and the ADA. It does appear, however, particularly given the EEOC's position on this issue, that courts will look at the issue more closely and may not readily rule out obesity as a disability.

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