

OBESE EMPLOYEES SEE EXPANSION OF RIGHTS

More disability claims possible as protections are added



By JASON R. STANEVICH

Can employers discriminate against overweight employees? The answer has generally been yes, provided that the employee was not morbidly obese as a result of a physiological condition.

However, with the passage of the Americans with Disabilities Act Amendment and forthcoming Equal Employment Opportunity Commission regulations, obese and morbidly obese employees may become increasingly protected by disability discrimination laws and regulations.

Employers need to understand that obesity discrimination, considered the last frontier of discrimination, may no longer be legally acceptable.

The ADA emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the Americans with Disabilities Act.

The amendment act makes important changes to the definition of the term disability by rejecting the holdings in several Supreme Court decisions and sections of interpretive EEOC regulations.

The effect of these changes makes it easier for an individual seeking protection to establish that he or she has a qualifying disability.

The ADA retains the basic definition of disability as 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. The ADA, however, changes the way these terms should be interpreted in several meaningful ways. The legislation requires the EEOC to revise regulations defining the term substantially limits, so that it need not limit other life activities to be considered a disability.

In addition, the ADA expands the definition of major life activities by adding eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating to the list and specifying that any operation of a major bodily function, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions is a major life activity.

The ADA drastically expands the definition of regarded as disabled. An individual is now regarded as disabled if the employer believes the individual has any physical or mental impairment, despite whether the employer believes the impairment limits a major life activity.

Employers should review job descriptions to conform existing

weight requirements are reasonably related to the essential requirements of the position. Employers can also avoid being regarded as claims by avoiding assumptions about what job duties overweight employees can and cannot accomplish.

Lastly, employees should engage in the interactive process to determine whether a reasonable accommodation exists. By following these practices, employers can minimize exposure to disability discrimination claims related to a person's weight.

PRIOR CASES

Courts have been generally unresponsive to disability discrimination complaints filed by overweight plaintiffs. For example, in *EEOC v. Watkins Motor Lines, Inc.* the Sixth Circuit in 2006 held that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.

Other federal courts have reached the same conclusion.

EEOC regulations define physical impairment as a physiological disorder and does 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. Applying these definitions, courts have dismissed discrimination complaints where obese and morbidly obese plaintiffs were unable to establish that their weight was related to a physiological condition.

Morbidly obese plaintiffs have had some limited success with being regarded as claims against employers. In *Cook v. State of Rhode Island Department of Mental Health, Retardation, and Hospitals*, a plaintiff successfully established a being regarded as claim against her employer where she established that her morbid obesity was caused by a physiological condition. Also, in *Connor v. McDonald's Restaurant*, Connecticut's federal district court refused to grant an employer summary judgment where a morbidly obese applicant contended that the employer regarded him as disabled and refused to hire him based on that perception. The court stated that the plaintiff did not need to plead that his obesity was related to a physiological disorder in order to state a being regarded as claim.

MORE CLAIMS?

Under the ADA, courts are directed to broadly construe the definition of disability in favor of coverage of individuals under the ADA. The full extent of the ADA will not be known until the EEOC promulgates final regulations. New regulations, however, could re-define disability to include obesity-related health conditions and even obesity itself as a protected disability.

For example, an obese individual who is substantially limited

Jason R. Stanevich is a management-side labor and employment attorney with Berchem, Moses & Devlin P.C. in Milford, Conn.



THIS ARTICLE IS REPRINTED WITH PERMISSION FROM THE FIRST QUARTER 2010 ISSUE OF GC NEW ENGLAND. © COPYRIGHT 2010. ALM MEDIA PROPERTIES, LLC. ALL RIGHTS RESERVED. DUPLICATION WITHOUT PERMISSION IS PROHIBITED. ALL RIGHTS RESERVED.

compared to most people in the length of time he can stand or the distance he can walk could be considered an individual with a disability under the ADAAA.

Disability-rights advocates emphasize that the proper inquiry is the limitation experienced by the individual, and not the exact cause of the condition. If obesity becomes protected, employers will have to provide a reasonable accommodation to the employee to allow the employee to perform the essential functions of the position. The ADAAA did not change or expand the definition of reasonable accommodation.

Obesity-related conditions may also become increasingly protected by the ADA.

While an obese individual may or may not come within the ADAs coverage depending on changes to EEOC regulations, they may suffer from health conditions covered by the ADA. These underlying and/or resultant conditions, such as hypertension and heart disease, likely

meet the definition of impairment or fall within the ADAAA's list of major bodily functions.

The ADAAA also makes it easier to prove regarded as claims because an individual need not establish that the disability they are regarded as having is a qualified disability. Now, despite whether being obese or morbidly obese is considered a physical impairment under EEOC regulations, overweight plaintiffs may be more successful in establishing discrimination.

Plaintiffs no longer need to demonstrate that their perceived impairment limits or is perceived to limit a major life activity. If an employer perceives an obese applicant as having a physical impairment and refuses to hire the applicant based on that perception, the employer likely violates the ADA.

Claims of obesity discrimination that would have been considered frivolous before the ADAAA must now be provided greater weight. >