

# New Developments in the Law for Obesity Discrimination Protection

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**Background:** Obese individuals are frequent targets of weight-based discrimination, particularly in the employment setting. Victims of weight discrimination have sought legal restitution like others who have suffered from different forms of discrimination. However, in the vast majority of the United States, body weight is not a protected class and weight-based employment discrimination does not provide a basis for a legal claim. Some have attempted to seek legal recourse under the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990 (collectively, the ADA), which protect against discrimination based on mental or physical disabilities in a variety of settings. Until recently, claims of weight discrimination under the ADA have also been largely unsuccessful. However, Congress recently passed the ADA Amendments Act, expanding the definition of what constitutes a disability and incorporating a broad view of ADA's coverage.

**Objective:** This short communication provides an update of the law as it relates to employment based discrimination of obese people. The authors propose a legislative direction for future legal recourse.

**Design and Methods:** The authors conducted legal research into the ADA Amendments Act, and synthesized this work relating to discrimination against weight in the employment context.

**Results:** In light of the ADA Amendments Act, courts and the Equal Employment Opportunity Commission have provided protection for severely obese people from discrimination based on actual or perceived disability in the employment context.

**Conclusion:** The authors discuss this positive legal development and additionally propose a targeted solution to address weight discrimination in the employment setting. National polling suggests there is considerable public support for such a measure. The authors thus recommend the implementation of a "Weight Discrimination in Employment Act" modeled after the *Age Discrimination in Employment Act* to adequately address this pervasive and damaging injustice toward individuals who are affected by obesity.

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Obese individuals are frequent targets of weight-based discrimination. Recent national estimates show that the prevalence of reported weight discrimination among obese individuals has increased by 66% over the past decade (1) and is now comparable to rates of racial discrimination in the United States, especially among women (2). Obese individuals are vulnerable to weight discrimination in many domains of daily living, including educational institutions, health care facilities, public accommodations, and the workplace (3). The presence of weight discrimination in employment settings has been particularly well documented and shows that obese employees face unfair hiring practices, prejudice from employers, lower wages, harsher discipline, and wrongful termination compared with thinner employees (4). In addition to the financial consequences of these inequities and unfair treatment, being a target of weight discrimination increases risk for negative outcomes including depression, social rejection, anxiety, suicidality, avoidance of health care, and unhealthy behaviors that can reinforce weight gain and impair weight loss (3). With two-thirds of Americans now overweight or obese (5), millions are vulnerable to weight discrimination and its

numerous consequences for psychological, social, economic, and physical well-being.

Individuals who suffer from discriminatory practices may seek recourse from the US legal system. Victims of weight bias have sought restitution like others who have suffered from other forms of discrimination; however, most lawsuits based on weight have been unsuccessful. In the vast majority of the United States, weight is not a protected class (e.g., like race is) and weight-based employment discrimination does not provide a basis for a legal claim. There are few exceptions, including in the state of Michigan and several cities, including Madison, Wisconsin, Birmingham, New York, and Urbana, Illinois, where weight or appearance is included as a protected class in their civil and human rights statutes.

One avenue to address weight discrimination involves attempts to sue under the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990 (collectively, the ADA) (6). Together, these statutes protect against discrimination based on mental or physical

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disabilities in employment, public services, and privately owned accommodations by federal, state, and local governments and the private sector. Until recently, lawsuits based on obesity had been largely unsuccessful. However, a recent amendment to the ADA has changed this and will likely have a positive impact on weight-based discrimination claims in the future.

The ADA's definition of disability includes (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (6). To bring a lawsuit under the ADA, a person must first file a claim with the Equal Employment Opportunity Commission (EEOC), which conducts an investigation and then brings cases on behalf of aggrieved individuals or notifies the person of their right to sue. The EEOC issues guidance documents that courts consider in their interpretation of the ADA.

Prior to 2009, the EEOC and courts interpreted "impairment," for purposes of the ADA, as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss. The onus was thus put on obese individuals to prove that their weight was because of a physiological cause, which most could not. Courts therefore rejected ADA coverage for disability discrimination claims by obese individuals, finding that obesity was a physical characteristic and not an impairment. In addition, courts determined that to be "regarded as" disabled under the third prong of the definition, one's perceived disability must be a covered impairment. Therefore, the ADA has not been a viable solution for legal resource for obese persons who were disabled or those who were regarded as disabled because of their obesity.

In 2008, Congress passed the ADA Amendments Act, which went into effect in January of 2009 (7). The purpose of the Act was to make it easier for an individual seeking protection under the ADA to establish a claim of disability. Congress sought to undo the years of narrow interpretation by the EEOC and courts. The Act reinstates an expanded view of what constitutes a disability and also institutes a broad view of the third prong of the definition. In addition, Congress directed the EEOC to make a common sense assessment of whether an impairment substantially limits daily activities, instead of undertaking extensive analysis. The EEOC revised its regulations accordingly and the final version was published in the federal register in March 2011. One notable change in the EEOC's interpretation is that it used to consider obesity a disabling impairment only in "rare circumstances," but this language has been removed. (8) The current guidance document states that, "severe obesity, which has been defined as body weight more than 100% over the norm ... is clearly an impairment." (9)

Court cases are emerging to reflect the expanded understanding of the ADA's coverage for obesity-related claims. In a groundbreaking shift, several persons have successfully alleged that they suffered discrimination because of their obesity. The EEOC and courts now agree that severe obesity can be considered an impairment for purposes of the ADA's definition of disability, as well as under the "regarded as" prong (8,10). In 2012, the EEOC obtained positive settlements for employees who were allegedly terminated based on their severe obesity as a covered disability and because the employers additionally regarded them as disabled because of their obesity (11-12).

The ADA Amendments Act did not alter coverage for overweight or moderate obesity, but comorbidities of obesity, such as diabetes, are

covered by the ADA because diabetes "substantially limits" the endocrine system (10). Further, even though the EEOC explained that severe obesity "is clearly an impairment," the mere presence of an impairment does not automatically indicate that an individual is disabled under the ADA (9). However, the revised understanding of ADA coverage is an important step forward toward equal treatment for severely obese people who are disabled because of their obesity or who have suffered from weight bias because of a perceived inability to undertake a major life activity. Obesity that substantially limits a major life activity constitutes an impairment like any other disability, and obese people should be protected like other similarly situated persons.

It is important to note that there has never been a prerequisite under the ADA that a disability must have been caused by events or circumstances out of one's personal control. Courts have noted that the Act applies to conditions that are "caused or exacerbated by voluntary conduct" (10). For example, cancer caused by cigarette smoking and disabilities arising from automobile accidents caused by reckless driving are covered by the ADA. Further, individuals who suffer from weight-based discrimination because of the misperception that their severe obesity limits their ability to perform tasks of a job or other covered life activities are entitled to compensation just as other people who have similarly suffered.

Of course, not all discrimination occurs in the face of disability or perceived disability. One method to rectify employment-based weight discrimination is to directly address it as a legitimate social injustice in this setting (13). Congress has legislated in the context of employment discrimination in the past. The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination based on a person's age of more than 40 years (14). A similar measure may be warranted for weight discrimination. Polling results show that Americans support protective measures for obesity-related discrimination in the employment context more than the other areas surveyed (15). In particular, this poll found substantial public support for a hypothetical law proposed by these authors called the Weight Discrimination in Employment Act (WDEA) (13), which was viewed favorably by 81% of women and 65% of men in a national US sample (15). Higher support for this legislation among women could reflect their heightened vulnerability to weight discrimination, as evidenced by some research documenting that women report more weight discrimination than men, even at lower levels of overweight (1,2). If Congress enacted the WDEA to mirror the ADEA, it would be similarly interpreted and provide obese individuals the coverage they need (12). In light of the evolution of law, the revised understanding of the ADA, and a shift in public opinion, the time may be ripe for consideration of a WDEA. Meaningful legal remedies like this are necessary in efforts to reduce weight discrimination. Without improved legislation, weight discrimination will continue to prevent equal opportunities, reinforce disparities, and reduce quality of life for millions of individuals affected by obesity.

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