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You Better Watch Your Weight Around Here: Weight Discrimination in the Workplace

By Warren E. Buliox

A good friend of mine -- not named Warren -- is around 5'9" with boots on and over the last few years or so has fluctuated between 185 lbs and 200 lbs. Both a certain "doctor" (not to be named) and the American Heart Association, among other organizations, tell him that given his weight and height he may be overweight, joining a group of approximately 149.3 million Americans who are considered overweight or obese. Other than some of the obvious health concerns with being significantly overweight, this would not be a problem but for the unsettling fact that approximately 12% of all U.S. adults report some type of discrimination based on their weight, size, or shape, whether it be at work or at public establishments like restaurants and clothing stores. According to at least one study by the *International Journal of Obesity*, weight discrimination or "anti-fat prejudice" is more prevalent than age or gender discrimination and may be on par in some instances with race discrimination.

I think we can all agree that this is a problem, but is it illegal in the workplace? There is no federal law that specifically affords legal protection to overweight people and/or prohibits discrimination in the workplace on the basis of weight. With the exception of Michigan and a very small handful of municipalities, there are no state or local laws that afford legal protections to overweight people either.

So are overweight people living outside of Michigan and the

few municipalities that prohibit weight discrimination out of options? Not necessarily.

Significantly overweight people who are considered obese may qualify for protection under the Americans with Disability Act (the "ADA"). The Equal Employment Opportunity Commission (the "EEOC"), for instance, has taken the position that morbid obesity (which is defined in part by WebMD as being 50% to 100% over normal weight) can qualify as a "disability" under the ADA. The EEOC has also taken the position that people who are simply obese (as opposed to morbidly obese) and whose obesity is the result of a physiological disorder/condition may be disabled for purposes of the ADA.

Some courts are somewhat in agreement with the EEOC. For example, the United States Court of Appeals for the Sixth Circuit (which covers Kentucky, Michigan, Ohio and Tennessee) has held that while morbid obesity by itself does not qualify as a disability under the ADA, obesity in general (morbid or otherwise) that is linked to a underlying physiological condition may qualify as a disability.

So, obesity (morbid or otherwise) can potentially qualify as a disability, which can operate to afford legal protections for those people who are obese. What about people who are simply overweight?

Being overweight, in and of itself, will not likely qualify for ADA protections. But a weight problem can sometimes be linked to an underlying medical condition, like hypertension, diabetes, heart disease, etc., that substantially limits a major life activity and therefore qualifies as a disability under the ADA. Arguably then, a person's weight combined with other tell-tale signs of a disability may be enough, at least for the EEOC, to put an employer on notice that a person may have a disability that may need accommodation, triggering the interactive process.

There is a balance to strike here though. Employers should be careful not to judge or be quick to assume a person is disabled or limited because of their weight, as doing so may lend to an employee to claim that he or she was perceived as disabled, which can expose the employer to liability under the ADA. Hence, attaching stereotypes to overweight people and assuming, without medically supported evidence, that they cannot perform essential functions of a job because they are overweight and "out of shape" can result in a court finding a "perceived" disability. If an adverse employment action follows this perceived disability, a lawsuit and liability possibly ensues. In one case out of New York, for example, a court denied an employer's motion to dismiss after the plaintiff, a teacher, presented evidence that his employer told him that his "size and weight were not conducive to learning" and "were preventing him from fulfilling the job functions of a teacher."

Surely, there are risks associated with making employment decisions based on a person being overweight. Note that these same risks apply with equal force to individuals considered "underweight" or "too skinny." Indeed, anorexia nervosa or other eating disorders often associated with extremely thin people can

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be considered a real or perceived disability under the ADA, especially in light of the new amendments to the same.

What about aside from the ADA? Are there any other potential claims tied to weight that employers should be aware of? As it turns out, one study suggests that women are 16% more likely to report discrimination in the workplace on the basis of their weight than are men. Another study suggests that women are twice as likely to face weight-based discrimination. These facts, as you can probably imagine, have led to some interesting sex-based discrimination cases. In one case out of California, for example, the United States Court of Appeals for the Ninth Circuit (which covers Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) held that weight-based negative evaluations given to an overweight female deputy sheriff and not overweight male deputies were enough, in part, to withstand a directed verdict in a Title VII sex discrimination case.

The point in all of this? Weight discrimination in the workplace is a real phenomenon and one that has found its way into courts and, in some cases, has exposed employers to significant liability. Yet, the recommended way to deal with this is simple. Treat employees with both real and perceived weight issues fairly and with dignity and respect. You may even be well served to include a mention of weight discrimination (and its potential for liability) in your next training session with managers and supervisors and to make sure you are always engaging in interactive processes for employees who may have disabilities, including those whose disabilities may be connected to their weight.

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