

September 21, 2012

Will the imposition of weight restrictions in the workplace present a hefty problem for employers under the ADA?

by Julie I. Ungerman and Jennifer N. Jones

We live in a society that is obsessed with appearance, and studies show that many people equate appearance to success. While employers may not be aware of these studies, some are trying to control appearance in the workplace by imposing weight restrictions on job applicants or employees as a condition of employment.

Whether these policies are permissible can only be answered with a “maybe.” There is no federal law that prohibits obesity discrimination, so plaintiffs have brought weight discrimination claims under the [Americans with Disabilities Act](#) (“ADA”) with varying degrees of success.¹ However, in light of recent amendments to the ADA, one wonders whether plaintiffs will be more or less successful in bringing weight discrimination claims.

In 2009 the [Americans with Disabilities Act Amendments Act](#) (“ADAAA”) made several significant changes to the ADA that broadened the protections of the ADA to a much larger group of people, which may include obese people.

Prior to the ADAAA, some courts used the qualification standard of the ADA to uphold weight restrictions imposed by employers. Because the ADAAA is recent legislation that does not apply to pre-amendment conduct, we are still waiting for cases decided under the ADAAA to funnel through the court system. However, what we do know about the recent amendments to the ADA is that case law seems to suggest that weight restrictions may pass muster if employers can show that the restrictions are an essential function of the position.

STATE AND LOCAL LAWS ON OBESITY

Weight is only a protected characteristic in one U.S. state — Michigan. Specifically, [§ 37.2202\(1\)\(a\) of Michigan’s Elliott-Larsen Civil Rights Act](#) prohibits an employer from “[f]ail[ing] or refus[ing] to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of...weight....”²

Likewise, employers in Michigan are prohibited from “[l]imit[ing], segregat[ing], or classif[ing] an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of...weight....”³

To prevail on a claim of weight discrimination in Michigan, “a plaintiff must show that weight was a determining — not necessarily the sole — factor in the adverse employment action, i.e., the unlawful adverse action would not have occurred without weight discrimination.”⁴

At first glance, this appears to be an easy standard to satisfy. However, a plaintiff fails to state a disparate treatment claim under Michigan law when he offers no proof that the employer intentionally discriminated against him on the basis of his weight.⁵

Moreover, a plaintiff fails to prove disparate impact under Michigan law when he does not show that the employer only hires applicants who are not overweight or rejects other applicants who are overweight.⁶

Only six U.S. cities, including Binghamton, N.Y.; Urbana, Ill.; Madison, Wisc.; Washington, D.C., Santa Cruz, Calif., and San Francisco have local laws prohibiting discrimination based on weight. Most state and local disability laws, however, are modified after the ADA. Therefore, disability discrimination claims that are successful under the ADA may also be successful under the states' counterpart to the ADA.

While arguably legal under most state and local anti-discrimination laws, one must determine whether weight restrictions as a condition of employment are legal in light of the recent amendments to the federal ADA. Individuals with mental and physical impairments that substantially limit major life activities are protected by the ADA. Individuals who have a record of such an impairment and those regarded as having an impairment are also protected under the ADA. This description of the ADA's protections sounds straightforward, but the recent amendments to it under the ADAAA blurs the protection line and poses the interesting question of whether obese workers can assert disability claims against employers for improper weight considerations as a condition of employment.

SOME CHANGES MADE BY THE ADAAA

The [ADAAA defines](#) a disability as:

1. A physical or mental impairment that substantially limits a major life activity; or
2. A record of a physical or mental impairment that substantially limited a major life activity; or
3. When an entity (e.g., an employer) takes an action prohibited by the ADA based on an actual or perceived impairment.⁷

While this is the same way the ADA defines disability, the ADAAA makes it clear that the definition must be interpreted in favor of broad coverage.

Additionally, the ADAAA relaxes the definition of "substantial limitation" in a way that could be game changing to a court's analysis of whether obesity is a disability under the ADA. The ADAAA instructs that "substantially limits" is to be construed broadly and is not a demanding standard.⁸ Now, the impairment need not prevent or significantly restrict a major life activity to be considered substantially limiting, and the relevant comparison is to most people and not those similarly situated.⁹

Moreover, the ADAAA makes clear that "the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."¹⁰

Additionally, the ADAAA expands the scope of "major life activities" to include the operation of major bodily functions, and to include activities such as sitting, reaching, bending, and lifting.

The addition of these activities may be relevant to a claim that obesity is a covered impairment.¹¹

Furthermore, the ADAAA changed the analysis of the “regarded as” prong of the disability definition. Under the ADAAA, an employee is regarded as having an impairment if the employee is “subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.”¹²

It is not enough, however, for a plaintiff to merely show that the employer regarded him as obese; he must also show that the employer regarded him as having an impairment.¹³

ANALYSIS OF CASES INVOLVING OBESITY IN LIGHT OF THE ADAAA

On May 24, 2011, a federal court in Wisconsin decided an obesity-based disability case filed in 2008, before the ADAAA.¹⁴ In [*Revolinski v. Amtrak*](#), an employee’s application for continued employment as an assistant conductor was denied, due in part to his noncompliance with Amtrak’s uniform standards. Revolinski was unable to wear the uniform because of his weight, which was in the range of morbid obesity (defined as being 100 percent overweight).

Because Revolinski’s claim under the ADA was time-barred, the court considered only his disability discrimination claim under the Rehabilitation Act (the counterpart to the ADA that applies to federal employers). Using pre-ADAAA statutes and regulations, the court determined that Revolinski’s obesity was not a disability under the Rehabilitation Act and awarded summary judgment for Amtrak.

Specifically, the court stated that plaintiff “asserts some limitations on his major life activities of breathing, walking, climbing stairs and working [because of his weight, but does not] demonstrate through the record that he is significantly restricted as compared to an average person in the general population.”¹⁵

In a case decided after the ADAAA but before the EEOC regulations became effective, a Mississippi federal court relied on the ADAAA to deny an employer’s motion to dismiss an obesity-based disability claim by an employee.¹⁶

In [*Lowe v. American Eurocopter*](#), the court stated that prior to the ADAAA, the interpretive guidance created by the EEOC provided that except in rare circumstances, obesity is not considered a disabling impairment. Therefore, many courts presented with the issue of obesity as a disability have held that that such an impairment is not recognized under the ADA.¹⁷

However, based on the substantial expansion of the ADA by the ADAAA, the court in *Lowe* held that the employee pleaded sufficient facts to allege that she qualified for her job as a receptionist and was disabled under the ADA because her weight affected the major life activity of walking.¹⁸

Furthermore, the EEOC has asserted that obesity is a disability under the ADA and a [federal court in Louisiana agreed](#).¹⁹ In September 2010 the EEOC brought a claim alleging that an employer had engaged in discriminatory conduct in violation of the ADA. The complaint states that the employee, who is now deceased, suffered from severe obesity and as a result of her

obesity, the employer perceived her as being substantially limited in a number of major life activities, including walking.

The EEOC claimed that plaintiff was able to perform all of the essential functions of her position as a Prevention/Intervention Specialist working with children and mothers undergoing treatment for addiction. The court held that “[b]eing overweight, in and of itself, is not generally an impairment.”²⁰ However, “severe obesity, which has been defined as body weight more than 100 [percent] over the norm, is clearly an impairment” and there is no requirement that a severely obese person show that his obesity is based on a physiological impairment.²¹ Because plaintiff was severely obese at all relevant times during her employment, the court held that she was a qualified individual with a disability.²²

The language used by the Louisiana Eastern District Court stating, “severe obesity, which has been defined as body weight more than 100 [percent] over the norm, is clearly an impairment” presents several questions. What is meant by “100 [percent] over the norm”? Is the court referring to a person’s body mass index (“BMI”)?

The “BMI, or Quetelet index, is a heuristic proxy for human body fat based on an individual’s weight and height.”²³ It is defined “as the individual’s body mass divided by the square of a person’s height”, but the “BMI does not actually measure the percentage of body fat.”²⁴

A person with a BMI within 18.5 to 25 may indicate optimal weight; a BMI lower than 18.5 suggests the person is underweight while a number above 25 may indicate the person is overweight.²⁵ A number between 35 and 40 suggests that the person is severely obese.²⁶ According to the Adult BMI Chart, a person who is 5’10” and weighs 243 pounds is severely obese. However, what if this person is a competitive body builder and his weight is made up of muscle mass? Would this person, who does not meet societal biases of an obese individual, be successful in bringing a disability claim against an employer?

Or what if we swing the pendulum in the opposite direction — would a person who is severely underweight have the same ADA protections as a person who is severely overweight?

The 3rd Circuit’s holding in [*Lescoe v. Pennsylvania Dep’t of Corrections-SCI Frackville*](#) answers some, but not all, of these questions.²⁷ In *Lescoe*, the plaintiff, who was 5’7” and 300 pounds (severely obese according to the BMI), alleged “that due to his obesity, his lower back and feet become painful after standing for long periods, his employer saw him as disabled, and he was discriminated against and faced great hostility from fellow co-workers.”²⁸

The court held that plaintiff’s obesity was not a disability within the meaning of the ADA, because he passed numerous physical and medical examinations to obtain employment; he underwent a five-week training program; his weight was not the result of a physiological disorder; and he failed to show that his weight placed a substantial limitation on a major life activity.²⁹

THE ADA DID NOT CHANGE THE ADA’S QUALIFICATION STANDARD³⁰

Among other things, the ADA DID NOT CHANGE the definition or the burden of proof associated with the term “qualified.” Therefore, an employee must still show that he or she is qualified for the position he or she seeks.

Under the ADAAA:

The term ‘qualified,’ with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.³¹

Therefore, employers can continue to use criteria that are job-related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.³²

To that end, if a weight requirement for employees is directly related to the essential requirements of a job, then an employer may impose that requirement.³³ For example, in [Hill v. Verizon Maryland, Inc.](#), the court upheld the employer’s policy that telephone pole service repair persons may not weigh more than 325 pounds to perform aerial work.

Additionally, in [Furst v. State of New York Unified Court Sys.](#), the court upheld the employer’s weight requirements because they were created to ensure that each candidate “is capable of performing the physical aspects of the Court Officer job in a safe and effective manner, so as not to endanger both himself and the public.”

Moreover, the [2nd Circuit has held](#) that “no cause of action lies against an employer who simply disciplines an employee for not meeting certain weight guidelines” when the employee’s weight renders him incapable of performing his job.³⁴

CONCLUSION

While it remains unclear whether the ADAAA includes obesity as a disabling impairment, an employer must use caution when imposing weight restrictions as a condition of employment. Weight requirements should be:

- Directly related to the essential functions of the job, and
- Required to ensure that the employees safely perform their jobs without endangering themselves or others.

Employers should consult with legal counsel before implementing any policy that makes weight restrictions a condition of employment.

Notes

- 1 [Cook v. State of Rhode Island, Dep’t of Mental Health, Retardation, and Hospitals](#), 10 F.3d 17 (1st Cir. 1993) (morbidly obese plaintiff can be considered disabled, and thus, entitled to protection from discrimination); [Francis v. City of Meriden](#), 129 F.3d 281, 286 (2nd Cir. 1997) (weight is not an impairment, but a “cause of action may lie against an employer who discriminates against an employee on the basis of the perception that the employee is morbidly obese”); See, e.g., [Greenberg v. BellSouth Telecommunications, Inc.](#), 498 F.3d 1258, 1264-65 (11th Cir. 2007) (plaintiff’s obesity was not an impairment that substantially limited a major life activity. Therefore, plaintiff was not disabled under the ADA).
- 2 [Mich. Comp. Laws § 37.2202\(1\)\(a\) \(2012\)](#).

3 *Id.* at § 37.2202(1)(c).
4 [Rouse v. Michigan Dep't of State Police](#), No. 1:08-cv-982, 2010 WL 882821, at *3 (W.D. Mich. March 8, 2010) (holding that there are genuine issues of fact regarding weight discrimination because the defendant relied upon a doctor's report that included determinations concerning plaintiff's weight as the basis for relieving plaintiff from his duties).
5 *See*, [Howard v. City of Southfield](#), No. 95-1014, 1996 WL 518062, at *8 (6th Cir. Sept. 11, 1996).
6 *Id.*
7 *See* [29 C.F.R. §1630.2\(g\) \(2012\)](#).
8 *Id.* at §1630.2(j)(1)(i).
9 *Id.* at §1630.2(j)(1)(ii).
10 *Id.* at §1630.2(j)(1)(iv).
11 The ADAAA regulations state that the definition of impairment does not include physical characteristics such as height, muscle tone, and weight that are within a normal range. *See* Appendix to 29 C.F.R. §1630.2(h) (2012). However, the ADAAA regulations do not speak to the classification of these characteristics when they are outside of the normal range, leaving open the possibility that a court could find that obesity is a covered impairment.
12 *Id.* §1630.2(l)(1).
13 [Sibilla v. Follett Corp.](#), No. CV-10-1457 (AKT), 2012 WL 1077655, at *9 (E.D.N.Y. Mar. 30, 2012) (holding that even after the passage of the ADAAA, “[t]he fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment.”).
14 *See* [Revolinski v. Amtrak](#), No. 08-C-1098, 2011 WL 2037015, at *1 (E.D. Wis. May 24, 2011).
15 *Id.* at *12.
16 *See* [Lowe v. American Eurocopter, LLC](#), No. 1:10CV24-A-D, 2010 WL 5232523, at *1 (N.D. Miss. Dec. 16, 2010).
17 *See* [EEOC v. Watkins Motor Lines, Inc.](#), 463 F.3d 436, 440-443 (6th Cir. 2007) (holding that to “constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition.”).
18 [Lowe](#), 2010 WL 5232523, at *8.
19 *See* [EEOC v. Resources for Human Development](#), 827 F. Supp. 2d 688 (E.D. La. 2011).
20 *Id.* at 694.
21 *Id.*
22 *Id.* at 696.
23 Body Mass Index, *See* http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html.
24 *Id.*
25 *Id.*
26 *Id.*
27 [Lescoe v. Pennsylvania Dep't of Corrections-SCI Frackville](#), 464 Fed. App'x 50 (3rd Cir. 2012).
28 *Id.* at 52-53.
29 *Id.* at 53.
30 Because the ADAAA did not change the definition of “qualified,” pre-ADAAA cases remain applicable.
31 *See* [29 CFR §1630.2\(m\) \(2012\)](#).
32 *Id.* at §1630.10(a).

- 33 See, e.g., [Hill v. Verizon Maryland, Inc., No. RDB-07-3123, 2009 WL 2060088 at *2, 11 \(D. Md. July 13, 2009\)](#) (upholding employer’s policy that telephone pole service repair persons may not weigh more than 325 pounds to perform aerial work); [Furst v. State of New York Unified Court Sys., No. 97-CV-1502 \(ARR\), 1999 WL 1021817, at *6 \(E.D.N.Y. Oct. 18, 1999\)](#) (upholding employer’s weight requirements because they are created to ensure that each candidate “is capable of performing the physical aspects of the Court Officer job in a safe and effective manner, so as not to endanger both himself and the public”).
- 34 See [Francis, 129 F.3d at 286](#).

Julie Ungerman is a partner at Hunton & Williams LLP and Jennifer Jones is an associate at that firm. They represent management in labor and employment disputes, including claims arising under the Americans with Disabilities Act.