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The Scales of Injustice

*Weight based discrimination is becoming
an issue in the workplace*

By David S. Katz, Esq.

HOT TOPIC

- **Overweight Employees may suffer from discrimination in the workplace.**

There is a bill pending in the Massachusetts Legislature introduced by Representative Byron Rushing to amend the Commonwealth's antidiscrimination statute to add protection against height and size bias.

Over and over again we are reminded that Americans are getting heavier. The Center for Disease Control and Prevention reports that sixty percent of the American population is now classified as overweight or obese. The medical definition of obesity is body weight that is twenty percent more than the standard height/weight table. Severe or morbid obesity means that a person has a body weight more than 100 percent above the standard height/weight table or more than 100 pounds over their optimal weight. The medical issues of overweight and obesity have found their way into the American workplace.

In the wake of this increasing health problem, employers may be asking themselves about their legal obligations to people of size and any concomitant potential liability for claims of weight discrimination. For example, it is permissible to refuse to hire someone solely on the basis that the individual is overweight? Can a company reject an applicant because it considers a person's large size offensive and the job requires the employee to interact with the public? What should the employer do if an obese worker is being subjected to harassment by co-workers because of his or her excessive weight? Is it safe to assume that a person's size hinders their physical ability to do the job?

Most of the weight based discrimination cases are presented based on disability discrimination or perceived disability discrimination. In certain limited jurisdictions, for example, weight based discrimination is strictly prohibited either by a state civil rights act or by local ordinance. In all other instances, the EEOC regulations that were promulgated as guidance pursuant to the American with Disabilities Act state that, "except in rare instances, obesity is not considered a disability impairment." Courts, thus far, have also ruled that obesity alone is not a physical impairment under the Rehabilitation Act of 1973. Where, however, a person is morbidly obese and where that condition has created a resultant physiological disorder that affects the body's system,

“According to both the MCAD and the EEOC, ‘size’ lawsuits are on the rise.

Companies would do well to establish guidelines or policies banning such discriminatory treatment in the workplace.”

David S. Katz, Esq.

Lawsuits have emerged across the nation attempting to carve out new legal ground by arguing that obesity and overweight be defined as an impairment under the ADA.

then the disorder is an impairment under the federal disability discrimination statutes.

The mere presence of a physical impairment, however, does not automatically mean that an employee is legally disabled. The person claiming such an impairment must prove that such a disability must be substantially limited or so limited that it affects one or more major life activities. The fact that an overweight person may need more rest or cannot perform certain basic physical tasks associated with his job may be insufficient to be considered as a substantial limitation of a major life activity and thus no violation of federal statute is established. At present, cases involving morbid obesity that present infirmities or disorders such as arthritis, heart condition or obstructive lung disease, whether the morbid obesity was involuntary or voluntary, will qualify as an impairment. On the other hand, several federal courts have said it is at present unclear as to whether simple obesity falls within the broad sweep of the definition of physical impairment under the ADA. Insofar as employees who are overweight and not obese or morbidly obese, it has been held that such a condition is not considered a physical impairment under federal law.

Under federal and state law, an obese person with a disability may not be subjected to discrimination in their employment and with respect to the various terms, conditions and privileges of the workplace. These include, of course, hiring and termination decisions and freedom from harassment or a hostile work environment. Furthermore, disability discrimination can arise where an individual without disability impairment simply stated as being disabled under the law because of his or her obesity. There are three different ways that such discrimination can occur:

1. The person may have an impairment that is not substantially limiting, but is perceived by the employer to be limiting.
2. The individual may have an impairment that is only substantially limiting because of the attitudes of others toward the impairment and,
3. The employee may have no impairment at all, but the company regards him or her as having a substantially limiting impairment.

Under these circumstances and in dealing with obesity, prospective employers need to be especially cognizant of their actions during the interviewing and hiring process. Negative assessments about an applicant’s qualifications or general suitability for a position that are generated because of a dislike or distaste for a person’s large size may turn into a claim and legal judgment of disability discrimination.