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Obesity Alone as a Disability? Slim Chance, Says Eighth Circuit

BY PETER J. PETESCH

A memorable scene from the dark comedy “In Bruges” features a clash between a disgraced Irish assassin, played by Colin Farrell, and three portly American tourists after Farrell’s character warns them not to climb the narrow stairway to the belfry of Bruges’ iconic medieval tower. As the Americans nonetheless proceed toward the tower, he dismissively shrugs, uttering “it’s Americans, isn’t it?”

The Journal of the American Medical Association and the United States Centers for Disease Control and Prevention (CDC) report that nearly 35% of adults in the United States—or 78.6 million individuals—are obese.¹ Childhood obesity, affecting the incoming workforce, is also high—at 17%. The CDC further explains that obesity rates are, predictably, highest among middle-aged adults (a protected age group). Obesity also disproportionately affects non-Hispanic blacks and Hispanics.

Arguing for ADA Protection

Against this backdrop, advocates—including the Equal Employment Opportunity Commission (EEOC)—have argued that obesity should be considered a disability under the Americans with Disabilities Act (ADA). A thoughtful article from the ABA Journal of Labor & Employment Law raises the point that size discrimination is prevalent. It argues that obese individuals are often unfairly stereotyped as having personality traits closely associated with poor work performance.² The article takes the position that the underlying cause for obesity need not be considered in determining whether the condition is an impairment and a disability under the ADA, as amended under the 2009 Americans with Disabilities

1 See www.jamanetwork.com and www.cdc.gov/obesity/data. The definition of obesity for purposes of these statistics is a body mass index (BMI) of 30 or greater. The American Medical Association study further differentiates grade 1 obesity (BMI 30-34), grade 2 (BMI 35-39), and grade 3 (BMI 40 and up).

2 Monahan, C., Goldman, T., and Oswald, D., “Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System,” ABA Journal of Labor & Employment Law, Spring 2014.

Amendments Act (ADAAA). It posits “that severe obesity, or weight beyond a ‘normal range,’ is a physical impairment and does not require proof of a physiological cause.”

As the article acknowledges, courts have not been consistently sympathetic to this viewpoint. As such, the ADA has not been a reliable vehicle for combatting this bias.

The 8th Circuit Decision in *Morriss v. BNSF*

Recently, the U.S. Court of Appeals for the Eighth Circuit upheld judgment against an individual seeking ADA protection on the basis of obesity.³ The plaintiff received a conditional offer of employment for a safety-sensitive position with a railroad employer, contingent on passing the medical review. This medical review placed him at a BMI of just over 40, which disqualified him from the job. The employer observed that the plaintiff’s obesity level created an unacceptable risk that he would develop certain medical conditions in the future, such as diabetes. The job applicant sued under the ADA, seeking protection on the basis of having an actual disability, or on the basis of his obesity being regarded as a disability. He failed on both theories, because he could not show that his obesity was a threshold “physical impairment,” or that the employer regarded the plaintiff as having a physical impairment.

In this instance, the plaintiff did not and could not claim that another medical impairment caused the obesity, or a presently existing medical condition commonly associated with obesity—such as diabetes, hypertension, cardiac disease, or sleep apnea. Looking to the EEOC’s own regulations,⁴ the court observed that “obesity is not a physical impairment unless it is a physiological disorder or condition and it affects a major body system.” Moreover, the court noted that the EEOC’s interpretive guidance on the ADA says that impairments do not include physical characteristics, including weight, that are both within the normal range and that are not the result of a physiological disorder.⁵ Although the plaintiff and the EEOC (as amicus curiae supporting the individual) argued that abnormal weight is an impairment under the EEOC guidance, the court disagreed, and held:

[A]n individual’s weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder. In other words, even weight outside the normal range – no matter how far outside that range – must be the result of an underlying physiological disorder to qualify as a physical impairment under the ADA.

The court looked to ample pre-ADAAA precedent to bolster its conclusion, and explained that pre-ADAAA precedent was perfectly valid because the ADAAA did not alter the interpretation of “impairment” in this context. Rather, the ADAAA focused on the term “substantial limitation” of a major life activity (the next part of the ADA disability definition). Congress did not change the interpretation of the threshold term “physical impairment,” nor did it empower the EEOC to make such a change.⁶

The court rejected the plaintiff’s argument that the ADAAA called for an overall less-restrictive analysis of whether an impairment constitutes a disability—and that this leads to a looser analysis of whether a condition or characteristic equates to an impairment. It also rebuffed the EEOC’s amicus argument that its new position on physical or mental impairments (as expressed in its brief and in its compliance manual) is entitled to deference, even in the absence of regulations.

³ *Morriss v. BNSF Railway Co.*, No. 14-3858 (8th Cir. Apr. 5, 2016).

⁴ 29 C.F.R. § 1630.2(h)(1).

⁵ See 29 C.F.R. Pt. 1630, App’x § 1630.2(h).

⁶ As the court noted, the EEOC only added the immune and circulatory body systems to the list of major body systems. See *BNSF*, footnote 3.

Finally, the court held that the ADA did not cover predispositions to an illness or disease in the future, and that acting on an assessment of the plaintiff's predisposition to develop a condition such as diabetes did not equate to regarding the plaintiff as having an existing disability or impairment. Simply regarding an individual as obese does not confer protection under the ADA, because obesity by itself is not an impairment.

Never Say Never

What do *BNSF* and similarly-reasoned cases mean for accommodations for individuals claiming needs relating to obesity? Must an employer always buy two airplane seats for the sales representative who claims such a need, or assume the daunting burden of proving "undue hardship" in denying the accommodation? Not necessarily. Conversely, the *BNSF* case does not mean that obesity is never a disability. There may be instances when an obese employee may be found to have a "disability" (i.e., in instances when the obesity stems from a recognized physiological impairment) and this and other accommodations (e.g., special equipment) need to be considered. Moreover, personal appearance and size may be protected classes under state and local laws, though these anti-bias laws do not include accommodation duties.

The *BNSF* case delivers a powerful message that there should be a deeper analysis of the underlying cause of an individual's obesity in the accommodation process and in cases alleging either straight discrimination or failure to accommodate obese individuals. It further underscores the principle that, even after the ADA, not every ADA plaintiff will be found to have a "disability" or even a threshold impairment under the law.

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