

Is Obesity A Disability Under the ADA?

Labor & Employment Law Update

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As with so many ADA questions, “it depends.” However, a pair of cases pending before the 7th Circuit Federal Court of Appeals (covering Illinois, Indiana, and Wisconsin) could provide further guidance.

The 7th circuit has not definitively ruled on whether obesity alone is a “disability.” Federal appellate courts for the 2nd, 6th, and 8th circuits (covering NY, CT, and VT; KY, MI, OH, and TN; and AR, IA, MN, MO, ND, NE, and SD respectively) have all concluded obesity is not a disability unless it is linked to some other disabling condition. In the first of two pending appeals, the trial court reached the same conclusion, ruling that “severe obesity” alone is not a disability under the ADA. (Note, Michigan state law prohibits discrimination based on body weight and a handful of municipalities have passed similar measures.)

But, employers should proceed with caution. Obese employees have defeated motions for summary judgment by arguing their employers *regarded them* as disabled, and any adverse action taken on the basis of that *perception* violated the ADA. This is precisely what happened in the second case pending before the 7th circuit.

The plaintiff, who weighed 331 pounds and had a BMI of 47.5, was excluded from his position based on a policy forbidding anyone with a BMI over 40 from working in a safety sensitive role – a policy the employer argued was necessary because those with a BMI over 40 have a substantially higher risk of developing medical conditions which can cause sudden incapacitation or impairment.

The court denied summary judgment concluding it was unlawful to act on the belief that *potential future* disabilities pose a *present* safety risk.

Best practices:

- Remember the ADA’s statutory definition of “disability” includes those who have an impairment that substantially limits major life activities and those who are “regarded as having such an impairment.”
- Ensure that all job qualifications – including those designed to ensure safety – are necessary and narrowly tailored to the requirements of the particular job at issue.

- Focus on the duties of the position. Can the applicant or employee perform the essential functions of the job safely? If not, could he with a reasonable accommodation? If the accommodation at issue is not particularly onerous, it may make sense to provide it despite uncertainty about whether the individual truly has a disability. An individual who cannot perform the essential functions of a position with or without reasonable accommodation is not a “qualified individual” and cannot sustain an action under the ADA.
- When in doubt, treat the individual, at least preliminarily, as if he has a disability. Don’t assume there are no medical conditions beyond excess body weight. Engage in an interactive process to determine whether the individual has a disability, and don’t take a final adverse action until the individual has had an opportunity to provide relevant facts, including evidence of a disability.

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