The Appellate Division Gives Employers a "Fat" Chance

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The Appellate Division has drawn a line in the sand. Obesity, on its own, is not a disability protected under the New Jersey Law Against Discrimination ("LAD").

Background

Defendants, Community Bus Lines et al. ("Community"), hired Plaintiff in 2005. Plaintiff then worked for Defendants as a bus driver for the ensuing 10 years. During that time, Plaintiff weighed between 500 and 600 pounds. His position required him to maintain a valid Commercial Driver's License ("CDL"), which in turn required passage of a medical examination and attainment of a medical certification card every two years, in accordance with Department of Transportation ("DOT") mandates.

Since the start of his employment with Defendants, Plaintiff passed his medical exams routinely. Plaintiff also demonstrated solid work performance, even earning several accolades from his supervisors. Plaintiff's lateral colleagues appeared to regard him favorably as well. They did, however, make disparaging comments to Plaintiff about his weight. They referred to him as "fat," said he "must weigh a thousand pounds," and described him being "as big as a bus." For his part, Plaintiff teased his colleagues as well, and he referred to himself in a similar manner, calling himself "fat boy" when among his peers and "fat" on his Facebook page to which the colleagues he had "friended" had access. Plaintiff later claimed to have complained to his supervisors about his colleagues' remarks. However, he had no record of any such complaints and instead reported that he regarded his colleagues as friends.

In April 2015, a doctor and DOT medical examiner examined Plaintiff based on the DOT's standards and the criteria provided by the Motor Carrier Safety Administration. The examiner found, among other things, that Plaintiff was unable to bend over to take off his shoes and had "a massive pedal edema and venous stasis." The examiner disqualified Plaintiff temporarily from driving a bus pending further testing. The examiner, who was not Plaintiff's primary care physician, did not assess Plaintiff for a disability, determine whether Plaintiff was disabled, or write Plaintiff a prescription for the recommended testing. Plaintiff did not elect to pursue the testing, despite having health insurance. Consequently, his supervisors deemed him "out of service," pending his receipt of the requisite testing and a medical certification card.

Plaintiffs' supervisors then sent him for a second opinion with a board-certified physician in preventative medicine. This second physician affirmed the DOT examiner's findings and confirmed that further testing was needed. The second physician also noted swelling in Plaintiff's legs and advised that it could be an indicator of heart disease. The second physician further noted that Plaintiff's weight might aggravate health conditions, such as sleep apnea. This second

physician, who also was not Plaintiff's primary care physician, did not assess Plaintiff for a disability, determine whether Plaintiff was disabled, or write Plaintiff a prescription for the recommended testing.

Finally, Plaintiff saw his own physician who confirmed both the DOT examiner's and the second physician's recommendations for further testing. Still Plaintiff did not obtain the testing. Rather, he remained on leave from Community. Then he filed a complaint against it in February 2016. Among other things, Plaintiff's complaint alleged discrimination based upon weight, a failure to provide reasonable accommodations, retaliation, intentional infliction of emotional distress, hostile work environment, constructive discharge, and wrongful termination.

In connection with the litigation, Community noticed Plaintiff in July 2017 for an Independent Medical Examination. Plaintiff submitted to same and was diagnosed with obstructive sleep apnea. He suffered a stroke two days later. Then, in April 2018, Plaintiff's own cardiologist diagnosed him with obstructive sleep apnea, peripheral edema, morbid obesity, chronic congestive heart failure, and myocardial systolic dysfunction among other ailments.

Defendants filed a motion for summary decision, and Plaintiff opposed it by claiming that his obesity was a disability under the LAD, and he had been subjected to a hostile work environment due to his weight. As to Plaintiff's disability claim, the trial court considered, *Schiavo v. Marina District Developmental Co., LLC*, which found that obesity alone was not a protected class under the LAD. It also considered *Viscik v. Fowler Equipment Co.*, which held that that obesity could only constitute a disability under the LAD if Plaintiff could demonstrate, through expert medical evidence, that the condition was "caused by bodily injury, birth defect[,] or illness," such as a genetic metabolic condition. While Plaintiff had established his obesity, through expert testimony, he had presented no expert evidence establishing that his obesity was caused by an underlying medical condition. Plaintiff also failed to present evidence that Defendants had perceived him as "disabled." On the contrary, the evidence showed that Defendants had awarded Plaintiff for his work performance, maintained his regular driving route throughout his tenure, and supported him towards fulfilling his DOT requirements.

Plaintiff's hostile work environment claim was similarly undermined by the record evidence. This claim required Plaintiff to make *prima facie* showing that

> [he was] initially protected under [the LAD] and that the "complained - of conduct (1) would not have occurred but for the employee's [protected class]; and it was (2) severe or pervasive enough to make a (3) reasonable [person] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." *Cutler v. Dorn*, 196 N.J. 419, 430 (2008).

"Severity and workplace hostility are measured by surrounding circumstances." *Taylor v. Metzger*, 152 N.J. 490, 506 (1998).

Aside from being unable to establish his membership in a protected class, such as a disabled person, Plaintiff's colleagues' comments were not taken to support his claims. In reviewing the surrounding circumstances, the trial court noted that although Plaintiff's colleagues had made hurtful comments, Plaintiff made similar comments about himself to their awareness. Plaintiff's colleagues' comments thus did not alter the conditions of Plaintiff's employment. The trial court granted summary judgement to Defendants on Plaintiff's LAD and hostile work environment claims. Plaintiff appealed the latter.

The Decision

The Appellate Division reviewed Plaintiff's hostile work environment claim *de novo*. The Court noted that, on appeal, Plaintiff had shifted from arguing that he was protected under the LAD due to a disability to arguing that he was protected under the LAD because his excess weight had caused Defendants to perceive him as having a disability. The Court agreed fully with the trial Court's assessment. It found that Plaintiff could not show that he suffered from a disability, such as medically induced obesity, under the LAD or that Defendants perceived Plaintiff to have had a disability under the LAD.

Additionally, the Court found that Plaintiff's co-workers' comments did not subject him to a hostile work environment, since their comments were not severe or pervasive but instead were in line with Plaintiff's own self-deprecating remarks. The Court thus concluded that the trial court had properly dismissed Plaintiff's hostile work environment claim.

Take Away

Obesity alone is not a disability under the LAD. Employers should alert their human resources ("HR") staff to this outcome. HR staff also should be advised of the implications this decision has for reasonable accommodations under the LAD. While obese employees are not disabled under the LAD, obese employees whose obesity is the result of a medical condition are; so these employees may be entitled to reasonable accommodations. HR staff should be prepared to engage in more searching inquiries with such staff in order to ascertain whether they have a disability recognized under the law.