



# FAT-SHAMING IN THE WORKPLACE

**It's Not Nice, But is it Unlawful?**

**by Melanie D. Lipomanis**



MELANIE D. LIPOMANIS is an associate in the labor, employment, and education practice group of Porzio Bromberg & Newman, P.C. in its Morristown office.

# According to the Centers for Disease Control and Prevention (CDC), approximately 40 percent of American adults are obese, which is defined as having a body mass index (BMI) of 30 or higher.<sup>1</sup> Studies also show the prevalence of obesity is substantially higher among women and in minority populations.<sup>2</sup>

No federal legislation protects employees from discrimination due to their excess weight, and only the state of Michigan, along with a sprinkling of local governments, has enacted laws that explicitly prohibit employers from discriminating based on weight.<sup>3</sup> However, the Americans with Disabilities Act (ADA), as amended, and the New Jersey Law Against Discrimination (NJLAD) may protect overweight or obese employees from discrimination in the workplace, in certain circumstances. This article examines those circumstances and the applicable legal standards used in determining whether an overweight employee is a member of a protected class under federal or state law

and, thus, afforded protection from discriminatory employment practices.

## **The Americans with Disabilities Act as Amended**

With a rise in the prevalence of obesity over the past two decades, there has been a fair amount of litigation involving discrimination claims based on obesity as a disability. The success of those claims turns on whether the plaintiff can establish a *prima facie* case under the ADA. In order to establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must demonstrate by a preponderance of evidence that: “(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise

qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.”<sup>4</sup> As a threshold matter, the ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities,” having “a record of such an impairment,” or “being regarded as having such an impairment.”<sup>5</sup> Major life activities include walking and standing.<sup>6</sup> The disability must “limit[ ] the ability of an individual to perform a major life activity as compared to most people in the general population.”<sup>7</sup>

The Equal Employment Opportunity

Commission (EEOC) has issued interpretive guidance that provides that some physical characteristics, such as weight or obesity, can qualify as disabilities if they are outside of a 'normal' range and result from a physiological disorder. The *EEOC Compliance Manual* has indicated extreme obesity, alone, could meet the definition of a disability under the ADA. Notwithstanding the EEOC's expansive view, the majority of federal courts that have considered obesity discrimination claims have relied upon the statutory definition of disability and concluded that obesity that does not substantially limit a major life activity may not support a disability claim under the ADA.<sup>8</sup> At least one court, the Eighth Circuit Court of Appeals, however, included the EEOC's guidance in its consideration. In *Morriss v. BNSF Railway Company*, the Court specifically held that severe obesity will not qualify as a disability unless it results from an underlying physiological disorder.<sup>9</sup>

More commonly, the holdings are similar to those in *Lescoe v. Pa. Dep't of Corr.-SCI Frackville*,<sup>10</sup> in which the Third Circuit Court of Appeals considered whether a corrections officer who weighed approximately 300 pounds was disabled within the meaning of the ADA. The plaintiff's medical records indicated he was morbidly obese, and "his lower back and feet become painful after standing for long periods" as a result of his obesity. The plaintiff claimed he was entitled to sit in a chair while working as a reasonable accom-

modation. The court held the plaintiff "failed to establish by a preponderance of the evidence a *prima facie* case that he was a qualified individual with a disability under the ADA."<sup>11</sup> The court so found because the plaintiff "did not establish any major life activities that were adversely affected by his weight," or "that the limitation on the major life activity is substantial."<sup>12</sup> The District Court of New Jersey likewise has dismissed ADA claims based on obesity where the plaintiffs' weight was not shown to substantially limit a major life activity.<sup>13</sup>

### **The New Jersey Law Against Discrimination**

The NJLAD has been interpreted so broadly that a large segment of any workforce within the state will fall within one or more of its protected classes. As with the ADA, the protections of this legislation are not afforded to individuals based upon weight alone. However, a claim of obesity discrimination more likely will survive under the NJLAD than its federal counterpart, because the NJLAD definition of 'handicapped' does not require the disability to be 'severe' or 'immutable' and does not incorporate the requirement that the condition result in a substantial limitation on a major life activity.<sup>14</sup> Instead, a physical disability under the NJLAD must merely prevent the "normal exercise of any bodily or mental function."<sup>15</sup>

The NJLAD prohibits an employer from discriminating against an employ-

ee due to their disability or a perceived disability.<sup>16</sup> In *Clowes v. Terminix Int'l, Inc.*,<sup>17</sup> the New Jersey Supreme Court refined the federal elements required to state a claim of disability discrimination. To establish a *prima facie* case of disability discrimination under the NJLAD, a plaintiff must demonstrate "[1] that he was [handicapped], [2] that he was performing his job at a level that met his employer's legitimate expectations, [3] that he nevertheless was fired, and [4] that [the employer] sought someone to perform the same work after he left."<sup>18</sup> Thus, similar to ADA claims, the threshold inquiry in a disability discrimination case brought under the NJLAD remains whether the plaintiff can establish that he or she has a condition recognized in the statutory definition of disability.

There are two distinct categories of disability: physical and non-physical.<sup>19</sup> When addressing obesity as a possible handicap under the NJLAD, New Jersey courts have applied the physical disability standard.<sup>20</sup> To meet the physical standard, "a plaintiff must prove that he or she is (1) suffering from physical disability, infirmity, malformation or disfigurement (2) which is caused by bodily injury, birth defect or illness including epilepsy."<sup>21</sup> Where the existence of a handicap is not apparent, a plaintiff is required to support his or her claim with expert medical evidence.<sup>22</sup>

The first element, whether the plaintiff has a recognized disability, is the dispositive factor of the majority of obesity discrimination cases. As previously

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noted, obesity alone is not a handicap. The condition must be coupled with some underlying medical causation, such as birth defect or illness, or other recognized disability that prevents a normal bodily or mental function. The following cases are illustrative of how the foregoing framework and tests are applied.

The New Jersey Supreme Court first recognized morbid obesity as a handicap under the NJLAD in *Viscik v. Fowler Equipment Company*.<sup>23</sup> Viscik weighed approximately 400 pounds. She was terminated from her position as a billing clerk after only four days on the job, allegedly due to her inability to move around the office well. There, the Court found the plaintiff's "obesity-based arthritis, heart condition and obstructive lung disease [were] clearly 'physical infirmities' under the first prong of the physical handicap test."<sup>24</sup> With respect to the second prong—that the infirmity be caused by "bodily injury, birth defect or illness"—the plaintiff's expert testified the plaintiff's "metabolic condition is genetic, that she suffered from it since birth, and that it is a direct cause of the obesity-based infirmities." While the Supreme Court remanded the case due to the lower court's erroneous jury instructions, it agreed with the lower court's finding the plaintiff had established that her morbid obesity met the definition of a disability under the NJLAD, noting "the term 'morbid' means 'diseased or pathologic.'"<sup>25</sup> And that "'Morbid obesity' means 'obesity sufficient to prevent normal activity.'"<sup>26</sup>

Recently, in *Dickson v. Cmty. Bus Lines, Inc.*,<sup>27</sup> the Appellate Division examined whether a claim of hostile work environment could arise from obesity discrimination based upon a perceived disability. There, the plaintiff worked as a bus driver for 10 years. He was well liked by his coworkers, and he was a good employee who earned recognition awards from his employer. Despite weighing between 500–600 pounds, Dickson passed a medical examination every two years, as was required by the Department of Transportation to maintain his commercial driver's license (CDL). In April 2015, the physician performing Dickson's mandated medical examination concluded additional testing was required before he could recertify Dickson to maintain his CDL. The physician referred Dickson to his personal doctor for this additional medical testing. The employer sent the plaintiff for a second opinion with another physician, who reached the same conclusion. Importantly, neither of the certifying physicians diagnosed Dickson with any disability or condition related to his obesity.

Dickson did not seek additional medical testing and, instead, filed a complaint alleging, among other counts, hostile work environment based upon a perceived disability due to his obesity. Although the plaintiff was undoubtedly morbidly obese, he proffered no expert medical report or testimony to survive the threshold inquiry of whether he could meet the statutory definition of

disability. The Appellate Division found the plaintiff had failed to establish his obesity was caused by "bodily injury, birth defect, or illness, such as a genetic metabolic condition that caused" his obesity. The plaintiff admitted he had never been diagnosed with a medical condition that caused his obesity or taken any medication that could have contributed to the condition. Nor could the plaintiff establish that his coworkers' jokes and comments regarding his size and weight could be the basis of a hostile work environment claim. While the comments and jokes may have been unkind, they were not severe or pervasive, and Dickson conceded he himself joked about being overweight with his coworkers.

### **Disparate Impact**

Employers who refuse to hire or promote overweight individuals may be exposed to race or gender discrimination claims based on a disparate impact theory. As previously noted, the prevalence of obesity is higher among women and minority groups. A disparate impact claim could be made against an employer who, as a matter of practice, does not hire or promote people because they are overweight. This practice may have the unintentional effect of excluding women and minorities from consideration in employment opportunities.

### **Take Away**

In the employment context, discrimination against overweight applicants or

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employees may not be fair, but it does not necessarily violate state or federal law. As it now stands, employees may not bring weight discrimination claims under NJLAD, unless the obesity is associated in some way with an underlying physical or mental condition that contributes to the obesity, or prevents the normal exercise of any bodily or mental functions. Nonetheless, an employer should not make employment decisions based solely on an employee's excess weight unless it is clear the employee cannot perform the essential functions of the job, with or without a reasonable accommodation that would not pose an undue burden on the employer. Employers also should not make assumptions concerning an overweight employee's performance or abilities based upon weight alone. The best practice is to do an individualized analysis of whether the employee is capable of performing the essential job duties.

According to the studies, the prevalence of obesity among American adults is not a fleeting problem. Many obese individuals do not have any limiting conditions and, in fact, prove themselves to be highly productive, successful employees when given the opportunity. Employers seeking to obtain diversity in their workforce need to be mindful of their own hidden bias against overweight individuals in their hiring and promotion practices. Employers can discourage so-called 'fat-shaming' and other discriminatory behavior in their workforce through education, by including the topic in their anti-discrimination and diversity and inclusion training programs. ♪

## Endnotes

1. Available at: <https://www.cdc.gov/obesity/data/adult.html>.
2. Available at: <https://www.ncbi.nlm.nih.gov/pubmed/8363191>.

3. Santa Cruz, CA, Washington, DC, Binghamton, NY, Urbana, IL, Madison, WI and San Francisco, CA.
4. *Lescoe v. Pa. Dep't of Corr.-SCI Frackville*, 464 F. App'x 50, 52 (3d Cir. 2012).
5. 42 U.S.C. § 12102(1).
6. *Id.* § 12102(2)(A).
7. *Id.* § 1630.2(j)(1)(ii).
8. *Valtierra v. Medtronic Inc.*, 232 F. Supp. 3d 1117, 1123 (D. Ariz. 2017) (citing *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1108 (8th Cir. 2016) (finding that weight outside the normal range must be the result of an underlying physiological disorder in order to qualify as a physical impairment under the ADA); *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 442-43 (6th Cir. 2006) (concluding that a person's obesity, even morbid obesity, must be the result of a physiological condition); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (finding that obesity, by itself, does not qualify as a physical impairment because physical characteristics that are not the result of a physiological disorder are not considered impairments for purposes of determining either actual or perceived disability); *Ni v. Rite Aid of N.J.*, 2010 WL 2557523, at \*3 (D.N.J. June 22, 2010) ("Except for rare circumstances, obesity is not considered a disability [under the ADA].").
9. *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016).
10. *Lescoe v. Pa. Dep't of Corr.-SCI Frackville*, 464 F. App'x 50, 53 (3d Cir. 2012).
11. 464 F. App'x 50, at 52-53.
12. *Id.* at 53.
13. See *Ni v. Rite Aid of N.J.*, No. 10-1522, 2010 WL 2557523, at \*3 (D.N.J. June 22, 2010) ("Except for rare circumstances, obesity is not considered a disability [under the ADA].") *Helmrich v. Mountain Creek Resort Inc.*, 2018 WL 4961464, at \*5 (D.N.J. Oct. 15, 2018) ("Plaintiff does not claim that his obesity "substantially limits one or more...major life activities.").
14. *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 16 (2002).
15. N.J.S.A. 10:5-5(q).
16. *Rodgers v. Campbell Foundry, Co.*, 185 N.J. Super. 109, 112-13 (App. Div. 1982).
17. 109 N.J. 575, 596-97 (1988).
18. *Ibid.*
19. *Viscik, supra*, 173 N.J. at 15.
20. *Id.* at 17 (Finding that obese plaintiff had established physical handicap within the meaning of the NJLAD); *Citta v. Borough of Seaside Park*, 2010 WL 3862561, at \*20 (D.N.J. Sept. 27, 2010); *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 338, 355 (App. Div. 1991) (characterizing obesity as a physical condition).
21. N.J.S.A. 10:5-5(q).
22. *Viscik, supra*, 173 N.J. at 16.
23. *Id.* at 16-17.
24. *Id.* at 17.
25. *Id.* at 10, FN 1 (quoting *Stedman's Medical Dictionary*, 4th L.Ed. unabridged, 885 (1976).
26. *Ibid.* (quoting *Stedman's*, at 970).
27. 2019 WL 1474060 (N.J. Super. Ct. App. Div. April 4, 2019).