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Weight-Based Discrimination in the Workplace: Is Legal Protection Necessary?

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Abstract Legal protection against weight-based discrimination in the workplace exists in the U.S. However, it is quite limited and its application across jurisdictions is inconsistent. The purpose of this paper is to examine whether such protection is needed—in other words, whether significant weight-based discrimination exists in the workplace, and, if it does, to what extent the legal system should intervene to prevent such discrimination.

Key words Weight-based discrimination · Protected class · Obese · Overweight

Overview of Current Law

Seven years ago, Annette McConnell was working in sales for a company in Arizona. At the time, she weighed about 300 lb. She was an award-winning salesperson, but her regional manager did not approve of her weight. At one point, he suggested that she stop eating dinner in the evenings and read books instead. He ultimately laid her off because "people don't like buying from fat people" (Tahmincioglu 2007).

Had her employer informed her that he was laying her off because "people don't like buying from black people," or "people don't like buying from Jews," or even "people don't like buying from disabled people," there is little question that the employer would have been violating federal, and possibly state, law. However, as U.S. law currently stands, her employer's comments and actions, while offensive, are not illegal and, generally speaking, neither U.S federal or state protects employees or applicants from discrimination based on weight or obesity.

While the purpose of this study is to examine the extent of legal protection available to mitigate weight-based discrimination in the United States, the potential for such discrimination is not limited to the U.S. As we shall demonstrate, there exists a substantial amount of research supporting similar economic hardships for overweight workers in other countries. The U.S. legal response to this problem could therefore inform, or perhaps be informed by, other nations' response to the problem.

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Title VII Law

Title VII of the Civil Rights Act protects employees, applicants, and union members from job discrimination based on race, color, national origin, religion, and gender, but does not recognize weight or obesity as a protected class (Clarkson *et al.* 2004). In fact, on at least one occasion, an employer successfully defended against a Title VII claim of sex discrimination by establishing that the female employee in question was not discriminated against because she was female, but because she was overweight (*Marks v. NCA, Inc*. 1999).

While the general rule is that Title VII does not offer protection against weight discrimination, there is one significant exception to this rule. Disparate treatment of overweight persons based on gender is considered a type of gender discrimination and is therefore prohibited. In disparate impact cases, courts look beyond the process of intentional discrimination on the part of an employer and, instead, look to whether a policy, facially neutral in intent, has the consequence of disparately impacting a protected class. For example, a differential application of weight standards, formal or informal, to members of a protected class (e.g., females, blacks or any protected class) may constitute a discriminatory practice under Title VII (Roehling 2002). The legal showing necessary to establish a disparate impact on a protected class because of their weight has been nicely summarized in the context of overweight women:

> "Although employers may have facially neutral policies for hiring or promoting, so long as an overweight or obese woman can show that there is a statistical impact on overweight and obese women as a class, such that this weight-based decision-making disparately impacts women, then a disparate impact framework should apply". (Griffin 2007, p. 640).

The problem, of course, is that it may be difficult to obtain statistical information as to the weight of people hired or promoted. Additionally, even if a plaintiff were able to statistically demonstrate that an employer's action has a disparate impact on overweight people, this showing would be necessary, but not always legally sufficient, under the disparate impact standard. The plaintiff would need to further demonstrate that the bias against overweight people, however unintended, disparately impacted a protected class. As such, a valid defense for an employer under the disparate impact theory would be: "I do not discriminate against women or blacks—I just don't hire any overweight people." Nonetheless, given that statistics reveal that some protected groups, such as Hispanics, tend to be more overweight than the general population (CDC 2010), it is possible that courts may find, in certain circumstances where an overweight person would be able to carry out the duties listed in the job description, that a weight-based policy disparately impacts a protected class.

A leading case in which a federal court found that a weight-based policy disparately impacted a protected class was *Frank v. United Airlines* (2000). United Airlines required female flight attendants to weigh 14 to 25 lb less than their male counterparts of the same height and age. The Ninth Circuit Court of Appeals found this practice to be impermissibly discriminatory. Specifically, the Court noted that "United made no showing that having a disproportionately thinner female than male flight attendants bears a relation to flight attendants' ability to greet passengers, push carts, move luggage, and, perhaps most important, provide physical assistance in emergencies." (p. 855). The United States Supreme Court declined to hear this case on appeal.

The Americans with Disabilities Act

Like Title VII, The Americans with Disabilities Act (ADA) does not generally protect against weight discrimination. The ADA defines "disability" as:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment (42 U.S.C. §12102(1)).

Application of this definition of disability has not been uniform among the courts. Additionally, even if a court finds that an overweight individual is disabled, the plaintiff must also show that he/she is otherwise qualified for the employment in question and that he/she was excluded from the employment solely because of the disability (*Smaw v. Comm. of Va. Dept. of State Police* 1994 and Clarkson *et al.* 2004). In this regard, the courts have concurred with the view expressed by EEOC regulators—that coverage of obesity will be a rare occurrence (Roehling 2002).

These rare occurrences will generally take place in circumstances where an employer "regards" obesity as a disability. As provided above, under the ADA, an individual may meet the definition of "disability" if he or she is "regarded as" disabled (42 U.S.C. §12102 (1)(C)). In order to qualify for this protection, the individual must establish that "he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity" (42 U.S.C. §12102(3)(A)).

A good example of the "regarded as" rule is found in *Kelly v Metallics West Inc*. Beverly Kelly worked for Metallics West inputting orders. After surgery for a pulmonary embolism, she required oxygen in order to avoid feeling dizzy and short of breath. When she tried to bring the oxygen bottle and associated equipment to work, her supervisor refused to allow it, saying he didn't want any oxygen on the premises. Subsequently he terminated her employment (*Kelly v Metallics West Inc.* 2005).

Kelly brought an action in district court, claiming her employer unlawfully discriminated against her, in violation of the ADA. During the course of the trial, the court ruled that the breathing impairment did not constitute a disability as defined by the ADA, since her condition was temporary and was mitigated through the use of oxygen. However, the district court found that Kelly could nevertheless pursue the case because the employer "regarded" her as disabled. Because Kelly's employer regarded her as disabled and had terminated her employment because of the perceived disability, her ADA claim was viable.

Despite the "regarded as" protection provided for in the ADA, there is a split among the federal circuits as to whether an employer is required to make "reasonable accommodations" to an employee who is merely "regarded as" disabled—as opposed to *actually* disabled. The ADA provides that one form of impermissible discrimination is the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" (42 U.S.C. §12112(b)(5)(A)). Some circuits hold that the "reasonable accommodation" provision only applies to employees who are *actually* disabled. Three circuits—the First, Third, and Tenth—hold that an employer must make "reasonable accommodations" to an employee who is merely "regarded as" disabled. (*Kelly v Metallics West Inc.* 2005). Unless and until the Supreme Court resolves this split, whether an employee is entitled to reasonable accommodations for a perceived weight-based disability will depend largely upon the location of the offense. (Danaher 2005).

If "reasonable accommodations" is not at issue, however, a plaintiff who can establish he or she was "regarded as" disabled due to his or her or weight should be permitted to move forward with an ADA claim. Recently, a federal court in New York, allowed an ADA case to go to trial on the theory that the plaintiff could show that he had the "perceived disability" of being overweight. In that case, Michael Frank taught math to 7th graders at Lawrence Union Free School District in Nassau County, N.Y. Michael had an impeccable attendance record, terrific performance evaluations and was the recipient of praise by his supervisors for his thoughtful lesson plans and his excellent relationship with his students. (*Frank v. Lawrence Union School District* 2010). Michael, who weighed 350 lb, had been recommended for permanent appointment by his direct supervisors. Nonetheless, a superintendent denied the permanent appointment, citing a belief that Michael was "so big and sloppy" that his weight would impact his ability to create an environment conducive to learning. Based upon this evidence, the court found that Michael was "regarded as" disabled by his employer and, as such, had a cognizable ADA claim.

An additional hurdle for a plaintiff alleging violation of the ADA because of obesity is that, in certain federal circuits, being overweight is not considered a disability unless such obesity is physiological in nature. For example, in *EEOC v. Watkins Motor Lines, Inc.* (2006), the Sixth Circuit held that the plaintiff, who was over 400 lb, was not obese because of physiology and, therefore, did not have a valid ADA claim. Interestingly, the Court did not address how it came to the conclusion that the 400 lb plaintiff was not obese due to physiology. Clearly, this opinion raises more questions than it provides answers.

In other cases, however, workers have been permitted to proceed on a claim for disability discrimination based on obesity. For example, in *McDuffy v. Interstate Distributor Co.* (2005), an employee brought a claim under Oregon state law, claiming he was discriminated against on the basis of disability (morbid obesity) when his employer suspended him for three months. At trial, the employee received a $109,000 verdict, $100,000 of which was non-economic damages, plus an award of $109,000 in attorney fees and costs. The case was later settled out of court after the employer filed an appeal.

State and Local Law

State law varies greatly relative to protection offered for discrimination involving weight or obesity. However, most states offer no more protection than the Federal government. Michigan is a notable exception to this general rule. Michigan passed the Elliott-Larsen Civil Rights Act of 1976 and the act includes weight as a protected class. (Section 206, of Public Act 453 of 1976). This means that plaintiffs do not have to link their claim to any other protected class, such as sex or race. Instead, they may refer to the weight discrimination directly. However, no other state has such a provision in its Civil Rights Act and as a result, to paraphrase Roehling (2002): weight discrimination may be unethical but in most American jurisdictions it is not illegal.

Nonetheless, various localities are increasingly passing laws which prohibit employers from discriminating on the basis of weight. Unlawful discrimination is defined in Santa Cruz, California as the "differential treatment as a result of that person's race, color, creed, religion, national origin, ancestry, disability, marital status, sex gender, sexual orientation, height, weight, or physical characteristic".(Santa Cruz, Cal., Mun. Code § 9.83.010 (1995)). In the District of Columbia, discrimination in employment is prohibited if it is based upon "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation".

(D.C. Code Ann. § 2-1401.02 (2001). The college towns, Madison, Wisconsin and Urbana, Illinois have sweeping ordinances which prohibit workplace discrimination based upon "physical characteristics." (Madison General Ordinance § 39.03 (2010); *Urbana Code* of Ordinances, § *12–37 (2010))*. Additionally, San Francisco has a law specifically prohibiting weight-based discrimination. (*San Francisco, CA., Police Code Art. 33 (2000)*).

In addition to local law, several states, besides Michigan, provide some protection to overweight workers, even if the protection is not included in their Civil Rights Acts. In 1990, a California jury ruled in favor of Jesse Mercado, who had been terminated by the *Los Angeles Times* for being obese. (Johnson *et al.* 1995). Although the *Times* attempted to defend against the suit with the argument that Jesse was obese due to his voluntary choice, a jury found that the California Fair Employment and Housing Act protected him and rendered him a verdict in the amount of $430,000. (Johnson *et al.* 1995), (Carmichael 2007).

In 1988, a New Jersey Administrative Court held in favor of a plaintiff who was terminated by a rental car firm for being overweight, even though he had performed excellently in previous evaluations. The plaintiff sued under the New Jersey Law Against Discrimination and was awarded back pay, $10,000.00 for pain and suffering, and attorneys' fees. (Johnson *et al.* 1995) (*Gimello v. Agency Rent-a-Car Systems, Inc.*, 1991).

Notwithstanding the cases discussed herein, there is not much weight-based litigation. According a report produced by the Minnesota Department of Human Rights (MDHR), there may exist a number of reasons why the few jurisdictions which prohibit weight-based discrimination have yet to experience a large amount of weight-based discrimination litigation. (MDHR, Sept. 2010). In the view of one employee at the Madison Department of Civil Rights, most citizens of Madison are unaware that weight discrimination is illegal in the city. Officials in San Francisco hold similar beliefs. Other reasons offered, include the supposition that overweight people have come to accept discrimination as a necessary byproduct of being overweight, or a perceived lack of sympathy for claims of weight based discrimination because such a condition is viewed as being within the control of the overweight person. In the words of one Madison, Wisconsin official: "They look at it as something that you have caused, rather than something that you're born with, like your race or your sex." (p. 19).

Should Legal Protection Exist?

The foregoing demonstrates the relative paucity of law protecting the obese from discrimination which is available to other classes of employees. This begs the question: should such legal protection exist? This question may be considered from two perspectives. First, should the law intervene at all or should it simply let the market solve the problem? Second, if the law should intervene, is the problem sufficiently serious as to justify creating a new protected class under Title VII or the ADA?

There are respected and influential jurists and economists who maintain that discrimination in employment in general requires no corporate or governmental intervention. These individuals argue that, if left alone, the market will solve the problem and discrimination in general will fall by the wayside. These adherents of what is often referred to as the market approach advance the following basic argument:

If a firm hires its employees on the basis of prejudices and discriminatory views (e.g., women can't do this type of job, blacks don't work hard, our customers don't like to look at fat employees), then the firm is limiting its pool of possible employees. Firms that do not discriminate will be drawing their employees from a larger pool of candidates and are therefore more likely to obtain employees most qualified to do the job. In other words, as

an economist would put it, there is an opportunity cost associated with discrimination. Labor is a factor of production. When productive resources are left unused the entire economy is disadvantaged. The human capital of women and minorities is lost when they are denied opportunities in the economy (Hartman and Desjardins 2008). Using the example of discrimination against blacks Judge Richard A. Posner phrases the market approach this way:

> In a market of many sellers, the intensity of the prejudice against blacks will vary considerably. Some sellers will have only a mild prejudice against them. These sellers will not forgo as many advantageous transactions with blacks as their more prejudiced competitors (unless the law interferes). Their costs will therefore be lower, and this will enable them to increase their share of the market. The least prejudiced sellers will come to dominate the market in much the same way as people who are least afraid of heights come to dominate occupations that require working at heights: they demand a smaller premium. (Posner 2002, p.352)

Notwithstanding the market approach advocates, federal law has, since 1964, "interfered" with the markets relative to discrimination based on race, color, religion, national origin, age and disability (Jentz *et al.* 2010). The reasons cited for this legal intervention generally revolve around the violation of the civil rights of minorities or their access to equal opportunity under the law. In other words, the legal intervention was deemed necessary because a problem existed—i.e., people within certain classes were actually being disadvantaged.

Where obese workers are concerned, this brings us to the second part of the question: is the problem sufficiently serious as to justify creating a new protected class under Title VII or the ADA?

Evidence of Weight-Based Discrimination in the Workplace

There are several economic studies that estimate the impact of obesity on worker compensation, with most suggesting that overweight workers are indeed penalized with lower pay. These studies generally adopt the definitions of "overweight" or "obese" used by organizations such as the World Health Organization or the Centers for Disease Control. These organizations use the Body Mass Index (BMI) to categorize levels of excessive body weight. The BMI is a simple index of weight to height. It is defined as a person's weight in kilograms divided by the square of his/her height in meters. A BMI equal to or greater than 25 (but less than 30) is considered overweight. A person with a BMI equal to or greater than 30 is considered obese (WHO Fact Sheet 2011).

Baum and Ford (2004) find that obese males and females are paid less than their thinner co-workers, with the wage penalty more pronounced for females. Cawley (2004) and Register and Williams (1990) confirm this finding for women, but suggest that no statistical wage difference exists between normal weight and obese men. There also appears to be some uncertainty associated with racial differences, with some studies suggesting that obese African-Americans are either not penalized, or are penalized at a lower rate than their white counterparts (Averett and Korenman (1996) and Cawley (2004)). The economic studies all control for other characteristics that are known to affect compensation, such as education and experience.

In addition to the studies of wage differentials referenced above, there is also a body of literature outside of economics that supports non-wage discrimination against overweight workers. Sartore and Cunningham (2007) find that overweight, but nonetheless qualified,

applicants are less likely to receive a hiring recommendation in the fitness industry. This type of hiring discrimination is supported by experimental evidence found in Pingitore *et al.* (1994). Roehling *et al.* (2007) report that obese individuals are 37 times more likely to report discrimination than normal weight individuals. Furthermore, Rothblum *et al.* (1988) document negative attitudes associated with the attractiveness of obese women.

If overweight workers are penalized, is this because employers have a personal distaste for this type of worker that persists regardless of productivity? Or perhaps employers perceive, correctly or not, that customers will be less enthusiastic about purchasing goods and services from overweight individuals. If the latter is the case, then we would expect the effect to be stronger in occupations that involve significant customer contact. DeBeaumont (2009) finds evidence supporting occupational differences in the wage penalty for overweight women. In particular, the wage penalty appears primarily to be found in sales and service occupations. The wage penalty in these customer-oriented occupations even persists amongst self-employed individuals, which tends to support the theory that businesses are responding to customer preferences. Furthermore, customer-based discrimination may also explain why overweight African-Americans do not appear to receive the same wage penalty as similar overweight whites. Abrams *et al.* (1993) suggest that black communities may be more accepting of large women. If blacks, on average, are more likely to have a black customer base, then perhaps overweight blacks would not be penalized even in jobs that involve significant customer contact. Further evidence supporting racial differences in the perception of weight can be found in Ge *et al.* (2001).

Customer discrimination has been demonstrated to affect economic outcomes for other potentially disadvantaged groups. For instance, Holzer and Ihlanfeldt (1998) find that hiring decisions for jobs involving direct customer contact are affected by the racial composition of the customer base. Furthermore, Neumark *et al.* (1996) suggest that female waitresses may be penalized at high-priced restaurants because of the preferences of their customers.

If customer discrimination partly explains the inferior employment and pay outcomes of overweight individuals, then the free market cannot be counted on to eliminate these differences because they are economically-driven decisions. Unlike discrimination based on the personal distaste of the employer, customer-based discrimination is profit-maximizing. As such, the wage differential would be expected to persist over time. The economic literature offers several theoretical discussions of the ability for customer based discrimination to exist regardless of market pressures (i.e., Kahn (1991), Nardinelli and Simon (1990)). Furthermore, several empirical studies identify wage-based differentials that are best explained by customer discrimination (i.e., Ihlanfeldt and Young (1994)). With respect to sales occupations, DeBeaumont *et al.* (2009) find that overweight men and women in sales occupations not only start at lower pay, but experience slower wage growth over time even as they gain experience.

Union activity could potentially limit the wage penalty, as unions typically compress wage differentials and thus benefit disadvantaged groups. For instance, Peoples (1994) finds that unions tend to reduce the wage gap between blacks and whites. Boris (2010) discusses the United Auto Workers fight to extend benefits to gay, lesbian, and bisexual members, even though the union generally represents male blue-collar workers. However, only about 12 % of the U.S. workforce is unionized, with the rate even lower for women. Thus, while unions may offer some protection for obese workers, most wage contracts are negotiated without union influence.

The above analysis focuses on potential wage discrimination in the U.S. However, there exists a substantial amount of research supporting similar economic hardships for overweight workers in other countries. For example, Morris (2006) finds that a higher Body

Mass Index results in lower occupational attainment in England. Furthermore, Greve (2008) documents a wage penalty for obese workers in Denmark. In fact, higher body weight appears to reduce wages throughout Europe (Brunello and D'Hombres 2007). The negative association between weight and wages is even found in lower-income countries. For instance, Shimokawa (2008) concludes that obesity has been rising in China, and that a wage penalty exists for obese Chinese workers. As such, the debate about how to address potential weight-based discrimination may be of international interest.

Conclusion

In summary, equally qualified obese workers appear to be paid less, especially amongst white women, and the economic literature provides reasons why markets cannot be counted on to eliminate this pay disparity. One could argue that if such pay differentials are profit maximizing, employers should not face legal action for engaging in this type of discrimination. However, even though the same argument can be made concerning wage differentials for African Americans, current law does not permit employers to discriminate against blacks because of the potential prejudice of their customers. While skin color is not generally discretionary and weight (at least to some extent) may be, should the law allow employers to discriminate against the obese for the same reason?

While more research is needed, preliminary research suggests that overweight, but nonetheless qualified, workers are being disadvantaged relative to both compensation and hiring opportunities. While some courts have recognized legal protection for such individuals, it appears to be a highly fact-intensive inquiry, and the degree of protection varies among circuits. Similarly, some states and localities offer protection, but this protection varies and is not uniform. As a result, geographical, and occupational, inequities exist. Perhaps it is time that Title VII and the ADA were amended in order to correct these inequities.

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