Employers, Check Your Weight-Bias: Obesity, Disability, and the Broadened Coverage of the ADAAA

By: Gillian Egan[1]

A study released by the Center for Disease Control in August 2012 estimates that 32 percent of adults in Alabama are obese. Alabama regularly appears in the Top Five of the list of "heaviest states," currently weighing in at fourth (behind Louisiana, Mississippi, and West Virginia).[2] Though several initiatives issued by the Alabama Department of Public Health and even private insurers are aimed at combating the epidemic of obesity, the number of overweight adults in the state has not fallen significantly. The consequences and costs of this health issue are well-known and often-studied, and they include increases in medical conditions like diabetes, heart disease, and stroke, which in turn lead to reduced productivity and elevating health care costs. On top of these known costs, an additional issue of potential risk arises when this growing public health epidemic is read in the context of the Americans with Disabilities Act ("ADA").

The ADA, passed in 1990, makes it illegal for an employer to discriminate against Americans suffering from a disability.[3] The ADA's protections were significantly narrowed by several U.S. Supreme Court cases, until Congress passed an amendment in 2008 that explicitly overturned the precedent and broadened the definition of what it is to be "disabled" under the statute. Because the amendments have only been applied to employment actions that occurred after January 1, 2009, case law discussing them is still scarce, and case law applying them specifically in the context of obesity is almost nonexistent. However, a couple of federal and state courts recently addressed the obesity issue, and the resulting opinions imply that a change is nigh. Under the *pre-amendments ADA*, the courts would generally not view an obese person as disabled unless he or she had some other underlying condition that caused the obesity. The amendments in effect lower the plaintiff's burden in ADA cases, and so now several jurisdictions are encountering – and sometimes embracing – the theory that the amended ADA now covers obesity as a disability on its own, without inquiry into any underlying conditions. This new look at obesity-as-disability is still developing, but it has the potential to ramp up employer exposure to a wide array of claims based solely on an employee's overweight.

The impact of this shift is especially significant in light of the fact that employees can recover under the ADA if they are "regarded as" being disabled and are discriminated against. In other words, if employers see that a person is obese and regard them as being limited thereby, then that person will be protected by the ADA whether or not he or she actually has a limitation. In support of weight bias, plaintiffs may reference the growing body of scientific literature confirming that overweight and obese people are frequently subjected to weight bias in all areas of life, including the terms and conditions of their employment. Taken together, the ADA's amendments, the increasing recognition of weight bias, and the large number of overweight and

obese adults in the workforce may lead to a new and popular source of ADA claims that prove difficult to refute.

Regardless of their legitimacy, such claims will prove more costly to employers than they have in the past: If obesity is a disability, then a plaintiff only has to provide some evidence of weight-bias to make a prima facie case of discrimination under the ADA and create an issue of fact, virtually eliminating summary judgment in these cases. Another area of cost may come as employers take second looks at their wellness incentive programs. Employers who promote certain types of wellness incentives may face additional risks and potential exposure for introducing measures designed to improve health and cut costs, as their existence or enforcement may be used as evidence of weight bias in the workplace. This article will briefly summarize the ADA Amendments, explore those cases decided since the ADA Amendments were enacted, outline some of the recent literature on weight-bias, and review employer actions that could constitute discrimination in light of these developments.

The ADA and the 2008 Amendments

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, et seq. (2012), had as its aim the elimination of discrimination against Americans suffering from a disability.[4] In the immediate aftermath of its passing, courts more often than not centered their focus on whether an employee was actually covered by the Act, exploring the definition of what it is to be "disabled" and therefore protected. A few United States Supreme Court cases interpreted the coverage very strictly – therefore, federal courts rarely found plaintiffs were disabled under the Act. For this reason, the case law did not often explore much beyond this threshold issue, and there is little precedent exploring and defining the contours of the other provisions of the statute.[5] In 2008, President George W. Bush signed into law an act that was designed to overrule this restrictive precedent and broaden the coverage of the Americans with Disabilities Act, and thereby make the law more closely comport with the protection Congress had originally intended.[6]

The ADA Amendments Act of 2008 ("ADAAA") made a number of changes to its coverage provisions. Under both the ADA and ADAAA, the term "disability" means:

> with respect to an individual--(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.[7]

Although the ADAAA does not change this original language, it did add provisions that extrapolate (and expand) the meaning of key phrases in the definition, including "substantially limits," "major life activity," and "regarded as."

Substantially Limits: The ADAAA did not define "substantially limits," but it did explicitly reject precedent that only recognized a limitation when a plaintiff suffered a "severe

restriction" in major life activities. On March 25, 2011, the EEOC published guidelines in the Federal Register to give employers further guidance in how to interpret the new ADA, which included nine rules of construction for courts to apply when determining whether a disability substantially limits a major life activity. The upshot of the guidelines is that "substantially limits" should not be a high hurdle for claimants, and should be construed favorably towards coverage.

Major Life Activity: Next, the ADAAA tackled the category of "major life activity." Precedent required that a "major life activity" had to be of central importance in daily life, and courts were conservative in determining what activities qualified. In an effort to broaden coverage, the ADAAA appended a non-exhaustive list of "major life activities" which includes a number of activities not recognized under precedent prior to the Amendments. The full list is:

> [C]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.[8]

Regarded As: The ADAAA also broadened the "regarded as" prong of disability coverage, drawing into its protection employees that were discriminated against "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." This language abrogated precedent that required that employer who perceives a disability also perceive it to substantially limit an employee's major life activity, such that the employee cannot perform a "broad class of jobs."

In sum, when involved in litigation under the ADAAA, the amendments shifted an employer's focus from proving that the employee was not disabled under the statute to proving that the employer had done all that was required under the law to accommodate a disabled person's impairment. This shift in focus means that more disabled employees will receive the important protections that the statute was designed to provide. It also means that employers who have followed the law will have a more difficult time dispensing with fraudulent claims, as it is now easier for potential plaintiffs to create an issue of fact and bring a claim to trial.

Obesity in America

This lower hurdle for a plaintiff to make a prima facie case may be cause for concern when considered in light of the obesity rate in the United States. According to the Center for Disease Control and Prevention, more than 1/3 of U.S. adults are now obese.[9] In equally alarming news, 17% of U.S. children are obese, a number that has tripled over the last generation, and a statistic that portends an even greater obese adult population in the next generation.[10] The medical costs of obesity are staggering - one study reports that in 1998, $78.5

billion was spent on obesity-related issues, with roughly half financed by Medicare and Medicaid. By 2008, that number reached $147 billion.[11] Obesity and its attendant complications also result in lost productivity, with one study calculating its cost at $4.3 billion in 2004 dollars.[12]

The highest prevalence of obesity in regional terms is, unsurprisingly, the South, at 29.5% according to the CDC. Alabama in particular is one of the most obese states, at a prevalence rate of 32%. Although the Alabama Public Health Department created an Obesity Task Force in 2004, obesity rates have steadily risen since that time, along with their costs and complications.

Obesity doesn't just cause health problems for the people who experience it. Obese adults are also more poorly treated by coworkers, employers, doctors, family members, and teachers; are denied jobs and promotions because of weight bias; are considered to be more stupid, lazy, ugly, unhappy, sloppy, lacking in personal control, and less motivated than adults who are not overweight.[13] One study showed that male jurors were more likely to find obese female criminal defendants to be guilty, revealing an even harsher weight-bias for female subjects.[14]

These trends are cause for concern on a number of levels, including these citizens' quality of life, the country's healthcare cost burden, and even the problems that will accrue and aggregate as an increasingly overweight population of children grows into adulthood with bodies weakened by a lifetime of overweight. In addition to these issues, employers need to be concerned: In the context of the recent changes to the ADA, the obesity epidemic, and growing scientific knowledge of weight-bias, employers' exposure to potential ADA claims has sky-rocketed. Managers will have to consider all of the potential problems that could arise from a population of employees who increasingly tip the scales into overweight and obesity – from managing their health, to managing their healthcare and lost-productivity costs, to further managing their liability for supervisors discriminating against or punishing obese workers. Understanding the ways in which the courts have addressed these issues can help defense attorneys provide good counseling to employers, allowing them both to incentivize healthy weight in their employees, and also protect overweight and obese employees from discrimination and unfair treatment.

Obesity under the ADAAA

As obesity becomes a more widespread and serious public health problem, the courts are increasingly being asked to address it in the context of the ADAAA. Prior to the 2008 Amendments, courts usually followed the EEOC guidelines, which at the time stated that obesity was not a disability except in "rare circumstances." Pre-amendment, obesity had to be caused by some underlying physiological condition in order to be protected by the statute. However, it appears that the EEOC's guidelines may have relaxed.

In September 2011, the EEOC brought an action on behalf of Robert Kratz II, who it alleged had been fired "because of his disability, morbid obesity, and because it regarded him as disabled," according to an EEOC press release.[15] Notably, then, the plaintiff's morbid obesity *was* his disability, *in toto*. A July press release by the EEOC indicates that the case settled for $55,000 plus injunctive relief. The EEOC trial attorney was quoted as saying "The law protects morbidly obese employees and applicants from being subjected to discrimination because of their obesity," a statement which further buttresses the new view of obesity post ADAAA.[16] It appears, then, that the EEOC may have changed its guidelines from only recognizing obesity in "rare circumstances," to instead arguing that the law protects the obese because of their obesity.

Along with the change in EEOC standards comes a more plaintiff-friendly trend in the federal courts. In *E.E.O.C. v. Resources for Human Development, Inc.*, 827 F. Supp. 2d 688 (E.D. La. 2011), the Eastern District of Louisiana considered a defense motion for summary judgment which argued that the plaintiff had not reached the "disability" threshold by virtue of her weight. The morbidly obese plaintiff alleged that she was terminated for being regarded as having a disability, in violation of Title I of the ADA. The employee passed away from morbid obesity (and several other related conditions) in November 2009, and the EEOC brought the complaint on behalf of her estate. In ruling against the defendant's motion for summary judgment, the Eastern District of Louisiana reviewed the disagreement among the circuits as to whether an underlying physiological condition was required for obesity to be a disability. The court then ruled that the plaintiff's extreme weight - in excess of 500 pounds - qualified her for disabled status. Notably, her termination occurred in September 2007, before the ADA was amended, and her case proceeded under the ADA and *not* the ADAAA. Even so, the court relied on the new EEOC guidelines from 2011 to support its ruling.

In a neighboring southern state, a district court allowed a pro se plaintiff's claim of discrimination based on her obesity to survive a motion to dismiss. In *Lowe v. American Eurocopter, LLC*, 2010 WL 5232523 (N.D. Miss. Dec. 16, 2010), a court denied a defense motion to dismiss in a disability claim involving obesity. The plaintiff in this case, proceeding pro se, alleged that she was discriminated against and harassed because of her disability, which was solely based on her overweight. The court reviewed precedent that did not consider overweight or obesity to be a disability without an underlying physiological condition, but then noted that the ADAAA required a broader interpretation. Because the Plaintiff had alleged that her obesity affected the major life activity of walking, she alleged enough to survive a motion to dismiss, ruled the court, and it allowed her case to continue.

A state court has also held that its own disability statute, modeled after and consistent with the federal statute, recognizes obesity as a disability. In *BNSF Railway Co. v. Feit*, 365 Mont. 359 (Mont. 2012), the Montana Supreme Court based its analysis of a state human rights law on its interpretation of the ADAAA. The Supreme Court of Montana cited the congressional purpose of "broadening the scope of protection to be available under the ADA." *Id.* at 363. The court further noted that the EEOC's updated guidelines dropped the phrase "except in rare

circumstances, obesity is not considered a disabling impairment." Ultimately, the court held that "[o]besity that is not the symptom of a physiological disorder or condition may constitute a 'physical or mental impairment' within the meaning of Montana Code Annotated § 49–2–101(19)(a) if the individual's weight is outside 'normal range' and affects 'one or more body systems' as defined in 29 C.F.R. § 1630.2(h)(1) (2011). *Id.* at 367.

Note that not all precedent is unanimously favorable to obese plaintiffs. The Eastern District of New York recently held that, even under the ADAAA, two obese women could not survive a motion for summary judgment on their claim for discrimination based on being regarded as disabled. In *Sibilla v. Follett Corp*., 2012 WL 1077655 (E.D.N.Y. Mar. 30, 2012) , the two obese sisters' claims arose when their employer was purchased and the new company offered them inferior positions at much lower pay. The court ruled in favor of the defendant's motion for summary judgment, holding that the plaintiffs did not provide any evidence to show that the new employer believed them to be disabled or otherwise unable to perform. The plaintiffs only provided evidence of their own perception of bias based on their weight, including their interpretation of remarks about the small size of their workspace. This was not enough to survive a summary judgment, the court ruled. In making its ruling, the court carefully distinguished between an employer's regarding an employee as overweight, and an employer's regarding an employee as suffering a physical impairment on the basis of his or her weight, saying: "It would be inconsistent with the purposes of the ADA to construe the statute to reach alleged discrimination by an employer on the basis of a simple physical characteristic, such as weight. To do so would render the disability discrimination laws a catch-all cause of action for discrimination based on appearance, size, and any number of things far removed from the reasons the statutes were passed." *Id.* at * 9 (internal citations and quotations omitted).

In sum, then, the few precedents that exist establish that the EEOC regards obesity as a disability in and of itself, and at least one court has used the EEOC's stance to justify its own similar holding (Eastern District of Louisiana). Further, a plaintiff's proffer of evidence of obesity and its deleterious effect on walking (Northern District of Mississippi) or any of the major body systems listed in the Code of Federal Regulations (Montana Supreme Court) is also enough to survive a dispositive motion. However, one court (Eastern District of New York) was reluctant to provide protection for discrimination against the appearance of obesity alone, but rather required an allegation involving physical impairment related to the obesity. This is significant – it implies that weight-bias alone might not be actionable if the plaintiff fails to allege a concomitant perception of a weight-related disability. However, given obesity's well-known deleterious effects on bodily systems and functions, this clarification presents a minimal hurdle.

Wellness Programs - A Rock and a Hard Place

An additional area that may be cause for concern at the intersection of obesity and liability is an employer wellness program. An argument has already been brought under the

ADAAA alleging that an employer's wellness incentives were penalizing employees who declined to participate. In *Seff v. Broward County, Fla.*, 691 F.3d 1221 (11th Cir. 2012), the Eleventh Circuit considered the validity of such wellness incentive programs, and whether they could be illegal under the ADAAA. In *Seff*, a Florida county employer imposed a wellness program with medical testing designed to pinpoint employees with certain chronic diseases and provide them with targeted disease control services and incentives to follow them. As further incentive to encourage employees to undergo the testing, the employer imposed a $20 per biweekly paycheck penalty for those who refused. The plaintiff, who had refused and paid the penalty for about 6 months, filed a class action suit alleging that the employee wellness program's medical testing violated the ADA's prohibition on non-voluntary medical examinations and disability-related inquiries.[17] The Eleventh Circuit did not agree, and ruled that the wellness program fell under the ADA's Safe Harbor provision, which allows certain entities to make such inquiries for the purpose of "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks." 42 U.S.C.A. § 12201(c)(2).

In *Seff*, the Eleventh Circuit is the first appeals court to examine the issue of the ADA and wellness programs under employer-sponsored health plans. Because the Court's ruling hinged on the connection between the biometric screening and the underlying health plan, the wellness program was protected by the safe harbor provision. Remember, however, that the *Seff* plaintiff was challenging the program as a violation of § 12112, the medical exams provision. The plaintiff did *not* bring the claim under the section of the statute that prohibits discrimination against the disabled (42 U.S.C. § 12112(a)); nor did he characterize the claim as a failure to make reasonable accommodations of a qualified disabled individual. (42 U.S.C. § 12112(b)(5)(A)). With obesity now a disability under the ADAAA, it is not a far stretch to imagine creative plaintiffs bringing "unfair wellness programs" claims under one or both of these sections of the statute, using the program's rewards and penalties to buttress a claim of discriminatory or disparate treatment.

Conclusion

Literally, the jury is still out on how claims of obesity as a disability will fare under the ADAAA. In the *Resources for Human Development* case out of the Eastern District of Louisiana, the court ruled in February of 2012 to deny the plaintiff's motion for summary judgment on the issue of whether she had been discriminated against *because of* her obesity disability, as that question represented an issue of fact for trial. *U.S. Equal Opportunity Comm'n v. Res. for Human Dev.*, 2012 WL 669435 (E.D. La. Feb. 29, 2012). As for the Mississippi case, that plaintiff filed for bankruptcy and failed to disclose her ongoing ADA litigation, and therefore was estopped from pursuing her ADA claims any further. *Lowe v. Am. Eurocopter, LLC*, 2011 WL 2491576 (N.D. Miss. June 22, 2011) aff'd sub nom. *Lowe v. Am. Eurocopter, L.L.C.*, 471 F. App'x 257 (5th Cir. 2012).

As more of these cases present fact issues required to go to the jury, recall that the jury pool will be drawn from an increasingly obese population. Overweight and obese jurors, having faced the types of weight-bias described in the scientific studies cited above, may be more inclined to sympathize with obese ADAAA plaintiffs. Although it is too early to say how these cases will come out, employers should be wary of increasing exposure to claims of obesity discrimination under the ADA. Wellness incentives need to be structured so as to fully comply with the ADAAA's safe harbor provisions, done so with an eye trained on the statute's requirements with regard to discrimination and reasonable accommodation. Further, supervisors and decision-makers should be trained on weight-bias and weight discrimination, and need to be on the lookout for potential reasonable accommodations that obese employees may require. And most of all, employers need to keep their eyes on the cases that are beginning to make their way into the appellate courts, to stay on top of this changing area of the law.

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[1] **Gillian Egan** is an associate at the Mobile office of Burr and Forman, LLP. She received her undergraduate degree from Hanover College, her Master's degree in Shakespeare from the University of Birmingham in the United Kingdom, and her Juris Doctor degree from Tulane University Law School. She practices in the firm's Labor and Employment Group, and is admitted to the Bar in Alabama and Florida.

[2] See data from the CDC's Behavioral Risk Factor Surveillance System compiled into a summary report at the website of the National Conference of State Legislatures, under Issues and Research/Health/Obesity Statistics in the United States (available at http://www.ncsl.org/issues-research/health/obesity-statistics-in-the-united-states.aspx).

[3] 42 U.S.C. §§ 12101, et seq. (2012). Although the ADA also protects the disabled in a number of other contexts, this article will only discuss the ADA as applicable to employment.

[4] *See* the Act's Purpose at 42 U.S.C.A. § 12101(b)(1).

[5] *See, e.g.*, Jana K. Terry, "The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last," Fed. Law., November/December 2011, at 49, 55; H. William Wasden and Kristin Taylor Ashworth, "The Americans with Disabilities Act Amendments of 2008: The ADA's Bite Finally Matches its Bark," Alabama Defense Lawyer's Association Journal, Vol 25 No. 1, April 2009, at 13, 13.

[6] ADA AMENDMENTS ACT OF 2008, PL 110–325, September 25, 2008, 122 Stat 3553, Sec. 2 (a)(1) - (a)(8).

[7] 42 U.S.C.A. § 12102(1) (West).

[8] 42 U.S.C.A. § 12102(1) - (2) (West).

[9] "Adult Obesity Facts," Center for Disease Control, available at http://www.cdc.gov/obesity/data/adult.html (last checked April 14, 2013).

[10] "Childhood Obesity Facts," Center for Disease Control, available at http://www.cdc.gov/obesity/data/childhood.html (last checked April 14, 2013).

[11] Eric A. Finkelstein, Justin G. Trogdon, Joel W. Cohen and William Dietz, "Annual Medical Spending Attributable To Obesity: Payer-And Service-Specific Estimates," Health Affairs, 28, no.5 (2009).

[12] John Cawley, John A. Rizzon, and Kara Haas, "Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity," Journal of Occupational and Environmental Medicine, Vol 48 No. 12, December 2007, 1317-1324.

[13] Rebecca M. Puhl and Kelly D. Brownell, "Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults" Obesity, Vol 14 No. 10, October 2006, Rudd Center for Food Policy and Obesity, Yale University, page 1802-1815.

[14] NA Schvey, RM Puhl, KA Levandoski, and KD Brownell, "The Influence of a Defendant's Body Weight on Perceptions of Guilt," International Journal of Obesity, (2013) 1-7, p. 5.

[15] "EEOC Sues BAE Systems for Disability Discrimination," E.E.O.C. Press Release, September 27, 2011, available at http://www.eeoc.gov/eeoc/newsroom/release/9-27-11a.cfm.

[16] "BAE Systems Subsidiary to Pay $55,000 to Settle EEOC Disability Discrimination Suit," E.E.O.C. Press Release, July 24, 2012, available at http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm.

[17] "A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. . . . A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." 42 U.S.C.A. § 12112(4)(A) - (B) (West).