

Is Being Overweight an Impairment?

Prepared by:
Bennett L. Epstein
Foley & Lardner LLP

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Is Being Overweight an Impairment?

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According to the Centers for Disease Control and Prevention (CDC), approximately 40 percent of U.S. adults [are obese](#). The CDC uses the Body Mass Index (BMI) as the benchmark for obesity. BMI is a calculation based on height, weight and age. A BMI of 30 or more, applying the CDC standards, constitutes obesity. The question arises as to whether those 40 percent of us who have a BMI of 30 or more have a disability under the ADA and state law and, if so, how should employers treat employees who are obese.

The Ninth Circuit Court of Appeals (which covers a number of Western states) is reviewing [a case](#) that arose under the Washington State Law Against Discrimination (not the Federal ADA), which has recently provided guidance on this issue. A man who was 5 feet 6 inches tall and weighed 256 pounds applied for an electrician's job with the BNSF Railroad. His BMI was 41. BNSF maintained a policy that a BMI greater than 40 is considered "severely" or "morbidly" obese. BNSF referred the applicant to its chief medical examiner, who offered the applicant the option of taking supplemental (and costly) tests at his own expense to determine his fitness to perform the job. The

applicant could not afford the additional testing and was rejected for the electrician's job.

Because Washington's Supreme Court had not ruled on whether obesity constitutes an impairment under state law, a panel of the Ninth Circuit referred the case to the Washington Supreme Court for guidance. However, the Ninth Circuit provided an analysis of the standards applied to obesity by the federal courts under the ADA, as well as decisions from other state courts.

The court noted that the EEOC considers that obesity constitutes a disability under the ADA "under some but not all circumstances" (the equivalent of the lawyer adage when asked if conduct violates the law - "maybe"). The EEOC's Compliance Manual states "normal deviations in height, weight, or strength that are *not the result of a physiological disorder* are not impairments ... At extremes, however, such deviations may constitute impairments." EEOC Compliance Manual, § 902.2(c)(5) (2012). The EEOC did not define "normal" or "extreme." In an [amicus](#) brief in the recent Ninth Circuit case, however, the EEOC argued that a person has a disability when weight is *either* outside the "normal range" (again, undefined) *or* occurs as a result of a physiological disorder.

The EEOC's position is at odds with the holdings of most federal appellate courts, which have held that being "overweight" alone does not constitute a disability under the ADA. The claimant also must establish that the excessive weight is a result of a physiological disorder.

So, what should an employer do when an employee or applicant is “extremely overweight”? Until such time as the courts or the EEOC provide more objective guidance, the best practice is to do an individualized analysis of whether the employee is capable of performing the job. The Ninth Circuit, however, was unequivocal as to what an employer may not do: Do not require the employee or applicant to pay for any additional testing required by the employer.

In addition to the disability analysis, a small number of states and localities (for example, [Michigan](#)) designate weight as a protected class and explicitly prohibit employers from discriminating based on weight. Employers should therefore also be careful to review whether their location has any such prohibitions before making decisions based on employee or applicant weight.

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