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## Employment & Disability Law—Americans with Disabilities Act of 1990—The Weight of Personal Responsibility: Obesity, Causation, and Protected Physical Impairments

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EMPLOYMENT & DISABILITY LAW—AMERICANS WITH DISABILITIES  
ACT OF 1990—THE WEIGHT OF PERSONAL RESPONSIBILITY: OBESITY,  
CAUSATION, AND PROTECTED PHYSICAL IMPAIRMENTS

I. INTRODUCTION

America and obesity have become almost synonymous. Now Americans, who pride themselves on a strong work ethic, must face an escalating and heavy challenge: the impact of obesity on the workforce. Obese persons are increasingly the object of prejudice and discrimination, and when such discrimination occurs in the workplace, litigation is bound to ensue. The problem is that until relatively recently, our understanding of obesity's causal factors was limited mostly to an individual's personal choices and responsibility. Because of an increase in both federal protections for the disabled and scientific understanding of obesity, courts, legislatures, and employers must adapt to the ever-expansive nature of obesity litigation and America's waistline.

On July 26, 1990, Congress enacted the Americans with Disabilities Act (ADA), which became effective two years later.<sup>1</sup> The stated goals of the ADA were (1) "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"<sup>2</sup> and (2) "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>3</sup> Because the ADA lacked a list of all the disabilities it covered, courts have considered obesity and morbid obesity to be disabilities in some cases but not in others, notwithstanding the legislation's desire for clarity and consistency in eliminating discrimination against the individuals with disabilities.<sup>4</sup>

Although the area of obesity discrimination is relatively new and still developing, there seems to be a trend towards presuming that obesity is a matter of personal responsibility rather than a protected disability. This trend was recently confirmed by the Sixth Circuit's decision in *EEOC v. Watkins Motor Lines, Inc.*,<sup>5</sup> in which the court determined that an employee's morbid obesity was not a "physical impairment" and not a disability under the ADA

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1. Americans with Disabilities Act of 1990, Pub. L. No.101-336, 104 Stat. 327 (1990).

2. 42 U.S.C. § 12101(b)(1) (2000).

3. 42 U.S.C. § 12101(b)(2) (2000).

4. See, e.g., *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997); and *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

5. 463 F.3d 436 (6th Cir. 2006).

because he failed to show that his morbid obesity was “the result of a physiological condition.”<sup>6</sup> This note will first consider the nature of obesity generally, the history of statutory protections for the disabled under the Rehabilitation Act of 1973 and the ADA, and the case law interpreting and applying those statutory protections to situations of weight discrimination.<sup>7</sup> The note will focus particularly on the facts and reasoning in *Watkins*, as it marks a significant shift in the trend towards personal responsibility.<sup>8</sup> Finally, this note will propose several potential responses to and impacts of recent trends in obesity jurisprudence, including: (1) other ADA disabilities potentially affected by the trend towards personal responsibility; (2) shared responsibility and wellness programs; and (3) the failure to consider whether physical complications resulting from non-physiologically caused morbid obesity may be ADA impairments.<sup>9</sup>

## II. BACKGROUND

In order to understand the background of recent trends in obesity jurisprudence, one must first consider the relatively short but complex history of obesity, weight discrimination, and other statutory protections for the disabled in the United States. In deciding claims of weight discrimination through a case-by-case approach, courts have taken into consideration the nature of and research regarding obesity; what place obesity might have as a protected disability under federal statutes; and how other courts have resolved issues of alleged weight discrimination based on the facts before them. The following sections of this note will examine obesity,<sup>10</sup> statutory protections for the disabled,<sup>11</sup> and the case law interpreting and applying those statutory protections in the context of claims of weight discrimination,<sup>12</sup> giving special attention to the *Watkins* decision.<sup>13</sup>

### A. Obesity

Obesity is an often misunderstood and easily misdiagnosed condition with which an increasing number of Americans struggle on a daily basis.<sup>14</sup>

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6. *Id.* at 443.

7. *See infra* Part II.

8. *See infra* Part II.D.

9. *See infra* Part III.

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See infra* Part II.C.

13. *See infra* Part II.D.

14. *See* Ctr. For Disease Control and Prevention, Overweight and Obesity: Introduction, <http://www.cdc.gov/nccdphp/dnpa/obesity/> (hereinafter Overweight and Obesity: Introduction) (last visited Feb. 21, 2007).

Because federal statutory protections for the disabled do not explicitly cover obesity, parties to a weight discrimination suit must be able to present evidence showing that a court should rightly consider a specific instance of obesity to be a disability.<sup>15</sup> The following sections will look at the nature of obesity as a disease,<sup>16</sup> America's increasing struggle with obesity,<sup>17</sup> and the particularly difficult problem of understanding and treating morbid obesity.<sup>18</sup>

### 1. *The Disease of Obesity*

Obesity is generally defined as "[t]he excessive accumulation of body fat."<sup>19</sup> According to the Centers for Disease Control and Prevention (CDC), the most common way of determining the categories of "overweight" and "obese" is by calculating an adult's Body Mass Index (BMI).<sup>20</sup> The BMI accurately places most adults into their proper weight category because it usually correlates with adults' actual body fat percentages.<sup>21</sup> There are three basic categories of obesity. First, a person is "mildly obese" if he or she weighs twenty to forty percent over the ideal body weight.<sup>22</sup> Second, if a person weighs forty-one to one hundred percent over the ideal body weight, he or she is "moderately obese."<sup>23</sup> Finally, someone more than one hundred percent over his or her ideal body weight suffers from "morbid" or "severe" obesity.<sup>24</sup> The side effects of obesity vary in degree depending on the level of obesity and may include: increased morbidity and mortality, cardiovascular disease, diabetes, osteoarthritis, gout, ovulatory and menstrual irregularities, and possibly certain types of cancer.<sup>25</sup>

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15. See, e.g., *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440–43 (6th Cir. 2006); *Cook v. R. I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 22–24 (1st Cir. 1993).

16. See *infra* Part II.A.1.

17. See *infra* Part II.A.2.

18. See *infra* Part II.A.3.

19. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (Robert Berkow et al. eds., 16th ed. 1992) [hereinafter MERCK MANUAL].

20. Ctr. For Disease Control and Prevention, Overweight and Obesity: Defining Overweight and Obesity, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Feb. 21, 2007).

21. *Id.* The BMI method of categorizing people into weight categories has come under much criticism as of late. See, e.g., Bethany Lye, *Not Measuring Up*, <http://health.msn.com/dietfitness/articlepage.aspx?cp-documentid=100155283> (last visited Feb. 15, 2007). Many doctors point out that athletes who are strong and fit may actually fall within the obese category, even though their body fat percentage is very low. *Id.*

22. MERCK MANUAL, *supra* note 19, at 981.

23. *Id.*

24. *Id.*

25. BLACK'S MEDICAL DICTIONARY 442 (Gordon Macpherson ed., 40th ed. 2004).

Although the mechanism by which someone becomes obese—consuming more calories than are expended—is relatively simple, the underlying causes of obesity are complex and not yet fully understood.<sup>26</sup> Studies of twins and adopted children “have firmly established that genetic factors are critical determinants of obesity.”<sup>27</sup> Dysfunctions of the endocrine and metabolic systems parallel an obese person’s weight gain, although whether the endocrine and metabolic dysfunctions directly cause obesity or whether obesity causes these dysfunctions remains unclear.<sup>28</sup> In some cases, brain damage may even be a factor in causing obesity.<sup>29</sup> In addition to genetic and physiological influences, environmental surroundings, physical inactivity, and psychological disturbances may promote an unhealthy lifestyle that leads to weight gain.<sup>30</sup> Although the precise interaction of these factors is unknown with respect to obesity, an imbalance of these factors at some point hinders the body’s ability to regulate its own physiology, thus resulting in weight gain and potential obesity.<sup>31</sup> Ultimately, true chronic obesity is the result of an imbalance of calorie consumption versus energy production caused by a combination of various factors: genetic, physiological, metabolic, cellular, molecular, behavioral, environmental, cultural, and socioeconomic.<sup>32</sup>

As a result of the increased understanding of obesity’s complex physiological nature, recent trends in obesity research have begun to focus less on obesity as a behavioral disorder and more on the physiological disorders leading to obesity.<sup>33</sup> Although the scientific research has not reached a defin-

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26. MERCK MANUAL, *supra* note 19, at 982.

27. *Id.*

28. *Id.*

29. *Id.* at 983. See also Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans With Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL’Y 563, 572–73 (1996).

30. MERCK MANUAL, *supra* note 19, at 982–83.

31. *Id.* at 982.

32. See United States Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity (2001), [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_glance.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_glance.htm) (last visited Feb. 21, 2007); National Institutes of Health, Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults, 27 (1998) available at [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.pdf](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf) (last visited Feb. 23, 2007) [hereinafter *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults*].

33. See William C. Taussig, Note, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, & Hosps. and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act*, 35 B.C. L. REV. 927, 930 (1994).

itive conclusion as to the factors that contribute to obesity, America's struggle with obesity is a definitive problem for present and future generations.<sup>34</sup>

## 2. *America's Struggle with Obesity*

America's population is becoming increasingly obese.<sup>35</sup> Among adults in the United States aged twenty to seventy-four years old, the prevalence of obesity increased from 15% to 32.9% between 1980 and 2004.<sup>36</sup> A recent study by the National Center for Health Statistics—a branch of the Centers for Disease Control and Prevention (CDC)—determined that nearly two-thirds of all American adults are either overweight or obese.<sup>37</sup> The same study concluded that the percentage of American adults falling into the “obese” category has risen by 61% since 1991, meaning that 14% of American adults are now obese.<sup>38</sup> Annual costs of healthcare associated with obese Americans has now reached roughly \$100 billion,<sup>39</sup> which surpasses the \$75.5 billion in annual healthcare costs associated with smokers.<sup>40</sup> These statistics are indicative of a serious problem that is impacting the financial stability of American employers.<sup>41</sup>

Unfortunately, obesity and its ramifications affect not only adults, but children as well.<sup>42</sup> Pediatric clinics are treating an increasing number of children for obesity every year, in large part because the lifestyles and eating habits that children have learned are a recipe for weight disaster, leading some popular publications such as *People Magazine* to label the upcoming generation as “Generation Overweight.”<sup>43</sup> Studies have shown that 80% of

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34. See Overweight and Obesity: Introduction, *supra* note 14.

35. *Id.*

36. *Id.*

37. Robert J. Grossman, *Countering a Weight Crisis: America's Growing Weight Problem Raises Serious HR Issues Relating to Health Care Costs, Wellness, Recruiting, and Employee Relations*, HR MAGAZINE, Mar. 1, 2004, available at <http://www.shrm.org/hrmagazine/articles/0304/0304covstory.asp>. Other sources and studies have put the number of obese or overweight Americans at slightly over one-third. See Kuss, *supra* note 29, at 563–64 & n.5. The discrepancy in numbers is a result of different ways of calculating obesity and overweight. *Id.* (citing studies from two individuals and one task force regarding the percentages of obese and overweight American adults).

38. Grossman, *supra* note 37.

39. American Obesity Association, AOA Fact Sheets, available at [http://www.obesity.org/subs/fastfacts/obesity\\_what2.shtml](http://www.obesity.org/subs/fastfacts/obesity_what2.shtml) (last visited Mar. 3, 2007).

40. American Lung Association, Smoking 101 Fact Sheet, available at <http://www.lungusa.org/site/apps/s/content.asp?c=dvLUK9O0E&b=34706&ct=66713> (last visited Mar. 3, 2007).

41. See *id.*

42. See Richard Jerome & Steve Barnes, *Childhood Obesity: The Fight Against Fat*, PEOPLE, Feb. 12, 2007, at 82–88.

43. See *id.*

children whose parents were both obese were obese themselves.<sup>44</sup> Fifty percent of children who had only one obese parent were themselves obese, and only 10% of children without an obese parent were obese.<sup>45</sup> Therefore, whether because of genetic or environmental predisposition, children of obese parents appear much more likely to be or at some point become obese.<sup>46</sup>

Children may actually be more discriminatory than adults against their obese peers.<sup>47</sup> One study of grade school children found that most consider obesity to be more of a disability than even dismemberment or disfigurement, leading researchers to conclude that children thought obesity had a serious influence on social relationships.<sup>48</sup>

The growing epidemic of childhood obesity has led state governments to join in the fight at a local level. For example, Arkansas was the first state to require schools to send BMI "report cards" of children to parents, informing them of their child's health.<sup>49</sup> The BMI report cards are a way in which federal, state, and local officials are trying to increase awareness regarding the problem, prevention, and treatment of childhood obesity.<sup>50</sup>

Although children have misconceived notions regarding their obese peers, many adults also have misconceptions surrounding obesity, and most American adults believe that an obese person's major problem is a lack of self-control.<sup>51</sup> Many see obesity as a voluntary condition resulting from laziness or a shortage of discipline, intelligence, and energy.<sup>52</sup> America is practically obsessed with weight control, perceiving those who are extremely thin as the most attractive, even though being overweight was once considered a sign of wealth and opulence.<sup>53</sup> Whether the cause of obesity is genet-

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44. Kuss, *supra* note 29, at 571.

45. *Id.*

46. *Id.*

47. See Taussig, *supra* note 33, at 933.

48. *Id.*

49. The instigator of the BMI "report cards" was the former Governor of Arkansas, Mike Huckabee, who has received national recognition for his efforts to increase awareness of and treatment programs for obesity. Laura Kellams, *House, Senate Settle on BMI Bill*, ARK. DEMOCRAT-GAZETTE, Feb. 22, 2007, at B1. The Arkansas state legislature is presently negotiating with Governor Mike Beebe a new bill that would continue the BMI measurements of public school children, although potentially reducing their frequency. *Id.* Many have praised the program as a positive step in preventing or treating childhood obesity, but some argue that the mandatory BMI report cards are an unnecessary usurpation by the government of the parents' role. *Id.*

50. *Id.*

51. Taussig, *supra* note 33, at 932.

52. *Id.*

53. See Kuss, *supra* note 29, at 564; CareerBuilder.com, *Is Your Weight Hurting Your Career?*, <http://www.careerbuilder.com/jobseeker/careerbytes/cbarticle.aspx?articleid=658> (last visited Feb. 15, 2007) [hereinafter *Is your Weight Hurting Your Career?*].

ics, physiological disorders, or lack of personal discipline, obese Americans still suffer from discrimination.<sup>54</sup> In fact, America's preconceived notions regarding obesity have resulted in an increasing trend in unintentional—and sometimes intentional—"appearance" discrimination against the obese in the workplace.<sup>55</sup>

Although some may criticize employers for discriminating against overweight and obese employees, employers have every reason to be concerned about the financial impact that an overly obese workforce may have on their businesses.<sup>56</sup> Although overweight employees do not necessarily cost an employer much more than those of a normal weight, the costs of employees in the obese category are still significant.<sup>57</sup> According to some studies, obesity may be costing American businesses around \$12.7 billion *each year*.<sup>58</sup> Healthcare expenses cost businesses 36% more for obese workers than for normal weight workers.<sup>59</sup> Medications cost 77% more for obese employees than those of normal weight.<sup>60</sup> Employers may be able to measure these direct costs, but they also must account for the indirect costs associated with obese workers, such as decreased productivity and increased absenteeism.<sup>61</sup> Obesity financially impacts not only employers but also the obese employees, who on average earn a lower percentage annually and receive fewer promotions than their counterparts of normal weight.<sup>62</sup> As American employees continue to struggle with their weight, employers must also deal with an increasing number of employees suffering from morbid obesity, which involves more complex causations and more severe complications than mere obesity.

### 3. *Morbid Obesity: Its Physiology and Disabling Consequences*

Although fairly uncommon,<sup>63</sup> morbid obesity's physiological characteristics are similar to those of mere obesity, but the complications arising

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54. See LAURA ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* § 4.9 (3d ed. 2006).

55. See Jennifer Shoup, Note, *Title I: Protecting the Obese Worker?*, 29 IND. L. REV. 207, 213–14 (1995).

56. Grossman, *supra* note 37.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. See Shoup, *supra* note 55, at 213–14; *Is Your Weight Hurting Your Career?*, *supra* note 53.

63. Morbid obesity only affects about 0.1% of the population. MERCK MANUAL, *supra* note 19, at 984.



from morbid obesity are usually much more severe.<sup>64</sup> Some researchers suspect that a major recessive gene, as yet undiscovered, may be involved in morbid obesity, and many studies have shown that some persons are more susceptible to morbid obesity than others.<sup>65</sup> A person is morbidly obese when he or she weighs 100% more than his or her ideal weight,<sup>66</sup> and the morbidly obese usually are ten to twelve BMI units heavier than their parents or siblings.<sup>67</sup> Because a normal routine of diet and exercise is usually insufficient to combat morbid obesity, the most common treatment is surgery.<sup>68</sup>

Even if a morbidly obese individual is initially able to lose weight, a great majority of the morbidly obese eventually regain that weight.<sup>69</sup> A continual pattern of losing and regaining weight over time will usually result in a lowered resting metabolic rate, which permanently impairs an obese person's ability ever to keep the weight off.<sup>70</sup> Some courts have recognized that once a person reaches the level of morbid obesity, his or her metabolism becomes permanently dysfunctional, which in itself is a physical impairment separate from the state of morbid obesity.<sup>71</sup> Those who are morbidly obese are particularly prone to hypoventilation, carbon dioxide retention, blood circulatory dysfunctions, hypertension, and endocrine and metabolic complications.<sup>72</sup> Even the morbidly obese who are asymptomatic have quantifiable and increased risks of certain health defects, morbidity, and mortality;<sup>73</sup> and those who return to normal weight may still be at an increased risk for premature death and morbidity.<sup>74</sup> Thus, regardless of morbid obesity's cause, the permanent physiological impact that it has may be sufficient to consider morbid obesity as a disabling physiological disorder.<sup>75</sup>

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64. *Id.* at 984.

65. Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults, *supra* note 32, at 28.

66. MERCK MANUAL, *supra* note 19, at 981.

67. Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults, *supra* note 32, at 28.

68. MERCK MANUAL, *supra* note 19, at 984.

69. Kuss, *supra* note 29, at 595-96.

70. *Id.* at 596.

71. See, e.g., *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 14 (1st Cir. 1993).

72. TEXTBOOK OF MEDICINE 1378-79 (Paul B. Beeson & Walsh McDermott eds., 14th ed. 1975).

73. Kuss, *supra* note 29, at 597-98.

74. *Id.* at 598.

75. *Id.* at 595.

## B. Statutory Protections for the Disabled: The History and Meaning of the Americans With Disabilities Act

Federal statutory protections for the disabled are relatively new in the United States.<sup>76</sup> The Americans with Disabilities Act of 1990 was landmark legislation aimed at preventing and remedying discrimination against the disabled in the workplace, but Congress did not create its provisions and definitions in a vacuum.<sup>77</sup> In order to provide a context for the ADA and its protections for the disabled, the following sections will consider the Rehabilitation Act of 1973 (a precursor to the ADA),<sup>78</sup> the legislative history and enactment of the ADA itself,<sup>79</sup> and the meaning of “disability” under the ADA.<sup>80</sup>

### 1. *The ADA’s Beginnings: The Rehabilitation Act of 1973*

The Rehabilitation Act of 1973<sup>81</sup> (the “Rehabilitation Act”) was the first instance of federal statutory protection of the rights of disabled Americans. Congress limited the scope of the Rehabilitation Act to federal agencies and entities receiving federal funding.<sup>82</sup> The Rehabilitation Act’s protections did not extend to disability discrimination by private employers.<sup>83</sup> Section 504 of the Rehabilitation Act, which provided a definition of “disability” that would serve as a foundation for the ADA’s definition, prohibited any federal agency or entity receiving federal assistance from discriminating on the basis of disability.<sup>84</sup>

The Rehabilitation Act created a broad prohibition against discrimination: “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”<sup>85</sup> An individual is disabled under this act if he or she “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities; (ii) has a record of such an impairment; or (iii) is re-

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76. Prior to the Rehabilitation Act of 1973, there was no federal statutory law protecting the disabled.

77. See *infra* Part II.B.1–2.

78. See *infra* Part II.B.1.

79. See *infra* Part II.B.2.

80. See *infra* Part II.B.3.

81. 29 U.S.C. § 701 *et seq.* (2000).

82. See MICHAEL FAILLACE, DISABILITY LAW DESKBOOK: THE AMERICANS WITH DISABILITIES ACT IN THE WORKPLACE § 1:2 (Incorporating Release No. 8 2005).

83. *Id.*

84. 29 U.S.C. § 794(a) (2000).

85. *Id.*

garded as having such an impairment.”<sup>86</sup> The Rehabilitation Act required the Department of Health and Human Services (DHHS) to promulgate regulations implementing the provisions of the act. The DHHS regulations defined “physical impairment” as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.”<sup>87</sup>

The Rehabilitation Act has undergone a number of amendments since its original enactment. In 1993, Congress amended the language of the Rehabilitation Act to replace “handicapped” with “disabled.”<sup>88</sup> In 1987, an amendment clarified that the Rehabilitation Act’s protections may not cover some contagious diseases or infections.<sup>89</sup> In the 1990s Congress amended the Rehabilitation Act to state that it may cover those suffering from alcoholism or drug addiction under certain circumstances,<sup>90</sup> but that it specifically precluded certain behavioral “disorders” from coverage.<sup>91</sup> Although most disability law began to center primarily on the ADA after its enactment in 1990, the Rehabilitation Act’s definitions of “disabled” and “physical impairment”—and the regulations and court opinions corresponding to those definitions—are benchmarks for understanding and applying the ADA’s definitions and accompanying regulations.

## 2. *Enactment of the ADA*

In 1990, Congress enacted the Americans with Disabilities Act (ADA).<sup>92</sup> Title I of the ADA is the employment section, which Congress intended to close the gaps between the Rehabilitation Act and the various state statutes on employment discrimination.<sup>93</sup> The ADA did not preempt the Rehabilitation Act, therefore an employer covered by the Rehabilitation Act

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86. 29 U.S.C. § 705(20)(B)(i)–(iii) (2000).

87. 45 C.F.R. § 84.3(j)(2)(i)(A) (2005).

88. See 29 C.F.R. § 1630.1 (1993).

89. See 29 U.S.C. § 705(20)(D) (2000).

90. See *id.* § 705(20)(C)(v) (2000).

91. See *id.* § 705(20)(E)–(F) (2000). Such precluded behavioral “disorders” that do not constitute a “disability” include: homosexuality; bisexuality; transvestism; transsexualism; pedophilia; exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments; compulsive gambling; kleptomania; pyromania; and psychoactive substance use disorders. *Id.*

92. 42 U.S.C. § 12101 *et seq.* (2000).

93. See ROTHSTEIN & ROTHSTEIN, *supra* note 54, at § 4:6; RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 22 (2005) (“The ADA is truly landmark legislation for individuals with disabilities because it reflects the first time that the federal government has imposed rules on the private sector that it has generally applied to the publicly financed sector for nearly thirty years.”).

is likely covered by the ADA as well.<sup>94</sup> Although the ADA adopted much of the same language as the Rehabilitation Act, the ADA was unique because its protections applied to private entities in addition to those receiving federal funds.<sup>95</sup>

One motivating factor for passage of the ADA was to continue the work of the Civil Rights Movement, which had culminated in the Civil Rights Act of 1964.<sup>96</sup> Another impetus was the need to protect an increasing number of disabled Americans, particularly those suffering from discrimination because of an HIV infection.<sup>97</sup> In the 1980s, Congress began to recognize that many disabled Americans were willing to work yet were unable to do so because of the pervasive problem of disability discrimination in the workplace.<sup>98</sup> One report from the House of Representatives concluded that 66% of all disabled Americans—more than 8.2 million people—had a desire to work and yet remained unemployed.<sup>99</sup> Both houses of Congress engaged in considerable debate regarding new legislation that would guarantee the rights of disabled individuals in the private sector.<sup>100</sup> Relying on its powers under the Commerce Clause<sup>101</sup> and the Fourteenth Amendment,<sup>102</sup> Congress ultimately passed the ADA in July of 1990, and its provisions took effect two years later, on July 26, 1992.<sup>103</sup>

### 3. *Disability under the ADA*

At the time Congress passed the ADA, about 20% of Americans—over forty-nine million people—were considered obese.<sup>104</sup> Congress stated that the ADA would provide protection for forty-three million disabled Americans.<sup>105</sup> The text of the ADA did not explicitly name obesity as a disability,

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94. ROTHSTEIN & ROTHSTEIN, *supra* note 54, at § 4:6.

95. 42 U.S.C. § 12111(5)(A) (2000).

96. *See* 42 U.S.C. § 1981 *et seq.* (2000).

97. *See* COLKER, *supra* note 93, at 22.

98. FAILLACE, *supra* note 82, at § 1:2.

99. H.R. REP. NO. 101-485, pt. 2, at 32 (1990).

100. For an extensive overview of the legislative history of the ADA, *see* COLKER, *supra* note 93, at 22-68; *see also* Carol R. Buxton, Comment, *Obesity and the Americans With Disabilities Act*, 4 BARRY L. REV. 109, 111-12 (Fall 2003); Claudia Center & Andrew J. Imperato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 321-22 (2003); Jeffrey Garcia, *Weight-Based Discrimination and the Americans With Disabilities Act: Is There an End in Sight?*, 13 HOFSTRA LAB. L.J. 209, 211-15 (Fall 1995).

101. U.S. CONST. art. I, § 8, cl. 3.

102. U.S. CONST. amend. XIV.

103. Pub. L. No. 101-336, 104 Stat. 327 (1990).

104. Buxton, *supra* note 100, at 112.

105. 42 U.S.C. § 12101(a)(1) (2000).

meaning that Congress did not at that time consider obesity to be an explicitly protected disability under the ADA.<sup>106</sup>

The ADA's definition of disability is identical to that of the Rehabilitation Act: "a physical or mental impairment that substantially limits one or more major life activities."<sup>107</sup> The Equal Employment Opportunity Commission (EEOC) regulations to the ADA provide a definition of "physical impairment," but that definition differs slightly from the definition in the Department of Health and Human Services (DHHS) regulations to the Rehabilitation Act.<sup>108</sup> Unlike the DHHS regulations, the EEOC regulations define physical impairment as "a physiological disorder, or condition."<sup>109</sup> Because the ADA explicitly intended to adopt the Rehabilitation Act's definitions of disability and physical impairment, courts generally consider the language of the Rehabilitation Act and case law surrounding it as controlling.<sup>110</sup>

### C. The Development of Case Law Regarding Obesity Under Federal Statutory Law

Beginning with the Rehabilitation Act, courts had to determine on a case-by-case basis whether an individual's particular case of obesity constituted a disability protected by federal statutory law. Because the statutory law protecting the disabled did not explicitly cover the condition of obesity, courts recognized obesity as a protected disability in some instances but not in others. The following sections consider how courts have interpreted and applied the protections of the Rehabilitation Act<sup>111</sup> and the ADA<sup>112</sup> where an employee has claimed weight discrimination resulting from his or her obesity.

#### 1. *Case Law Under the Rehabilitation Act of 1973*

Because the Rehabilitation Act was the first attempt by the federal government to protect the disabled from discrimination, courts had little prior precedent to assist them in interpreting the applicability of the Rehabilitation Act's provisions. The Rehabilitation Act's definitions of "disability" and "physical impairment" were broad enough potentially to cover a wide range of conditions, including obesity. The following are the two primary cases in which courts applied the Rehabilitation Act to claims of weight

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106. *See id.* § 12101.

107. 42 U.S.C. § 12102(2)(A) (2000).

108. *See supra* Part II.B.1.

109. 29 C.F.R. § 1630.2(h) (1993).

110. *See infra* Part II.C.

111. *See infra* Part II.C.1.

112. *See infra* Part II.C.2.

discrimination due to an employee's obesity,<sup>113</sup> *Tudyman v. United Airlines*<sup>114</sup> and *Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals*.<sup>115</sup>

a. *Tudyman v. United Airlines*

The first major case interpreting weight discrimination under federal statutory law prior to the ADA was *Tudyman v. United Airlines*.<sup>116</sup> That case involved a suit brought under section 504 of the Rehabilitation Act of 1973.<sup>117</sup> United Airlines ("United") maintained a strict policy that established the maximum weight for applicants of a particular height to become flight attendants.<sup>118</sup> The plaintiff in *Tudyman* was fifteen pounds over the maximum limit for his height when he reapplied for a flight attendant position in 1983.<sup>119</sup> United's weight policy apparently had no relation to any practical limitations concerning an aircraft's flight load or a flight attendant's ability to perform his or her duties.<sup>120</sup> Instead, the purpose of the policy was primarily to ensure that flight attendants, who worked closely with customers, were presentable in appearance.<sup>121</sup> The plaintiff's weight problems, however, stemmed not from excessive fat but from excessive body building.<sup>122</sup> The plaintiff claimed that United discriminated against him as a "handicapped individual" under the Rehabilitation Act.<sup>123</sup>

In the relevant portion of the decision, the court for the Central District of California began its analysis by considering the definition of "handicapped individual" under the Rehabilitation Act.<sup>124</sup> The court noted that few prior cases had discussed at length the definition of "handicapped individual" in the context of particular facts, but clearly an employer's policies must discriminate against the actually handicapped for those policies to be illegal under section 504 of the Rehabilitation Act.<sup>125</sup> The court concluded that the plaintiff was not "handicapped" because he did not have a physical impair-

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113. See *infra* Part II.C.1.a-b.

114. 608 F. Supp. 739 (C.D. Cal. 1984).

115. 10 F.3d 17 (1st Cir. 1993).

116. 608 F. Supp. 739 (C.D. Cal. 1984).

117. *Id.* at 740.

118. *Id.*

119. *Id.* at 740-41. The plaintiff had previously worked for United, which terminated him in 1980 and denied him reinstatement in 1982 because of his weight problems. *Id.*

120. *Id.* at 741.

121. *Id.*

122. *Tudyman*, 608 F. Supp. at 741.

123. See *id.* at 743.

124. *Id.* at 743-44.

125. *Id.* at 745.

ment or a substantial limitation of a major life activity and because United merely perceived the plaintiff to be over a particular weight limit.<sup>126</sup>

A unique strain in the court's rationale was its discussion of the "voluntariness" of the plaintiff's condition and whether it constituted a "physiological disorder."<sup>127</sup> The court distinguished the plaintiff's situation—his physical condition being "self-imposed and voluntary"—from a situation in which an individual's weight problem might be involuntary—for example, resulting from a glandular dysfunction.<sup>128</sup> The court stated that the voluntariness of a person's physical condition could be one factor in deciding whether that condition falls under the protections of section 504.<sup>129</sup> In part because the plaintiff assumed his physical condition voluntarily, the court held that his weight condition could not be a physical impairment—and thus a handicap—under the Rehabilitation Act.<sup>130</sup>

b. *Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals*

Although the First Circuit decided *Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals*<sup>131</sup> after the passage of the ADA, the claim arose from facts taking place before the ADA's enactment and, therefore, the plaintiff, Bonnie Cook ("Cook"), asserted a violation of the Rehabilitation Act rather than the ADA.<sup>132</sup> The defendant, the Department of Mental Health, Retardation, and Hospitals (MHRH), denied Cook's application because her morbid obesity would make it difficult for her to evacuate patients in emergency situations and made her susceptible to serious ailments.<sup>133</sup> Cook sued under section 504 of the Rehabilitation Act, and MHRH appealed the jury's verdict in her favor.<sup>134</sup>

On appeal, the First Circuit stated that two of MHRH's arguments were futile.<sup>135</sup> MHRH's first argument was that morbid obesity could not be an impairment under the Rehabilitation Act because it is a "mutable condition," which section 504 does not cover.<sup>136</sup> The fundamental premise of this argument was that Cook could choose to lose some weight and thus lose her

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126. *Id.* at 746.

127. *Id.*

128. *Tudyman*, 608 F. Supp. at 746.

129. *Id.*

130. *See id.*

131. 10 F.3d 17 (1st Cir. 1993).

132. *Id.* at 20–21.

133. *Id.* at 21 n.7. Cook weighed more than 320 pounds and was only 5 feet 2 inches in height. *Id.* at 20.

134. *Id.* at 21.

135. *See id.* at 23–24.

136. *Id.* at 23.

disability.<sup>137</sup> The court, however, reasoned that mutability was not “an automatic disqualifier under section 504” and was only one factor in considering the substantial limitation of a major life activity.<sup>138</sup> Cook had presented evidence that metabolic dysfunction persisted even after a morbidly obese individual lost weight, thus constituting metabolic dysfunction as a permanent physical impairment once an individual had reached the point of morbid obesity.<sup>139</sup> In addition, even if Cook had presented no evidence regarding a dysfunctional metabolism, the court stated in dicta that Cook’s morbid obesity could still be an impairment under the “regarded as” prong if MHRH had considered her morbid obesity to be an immutable characteristic.<sup>140</sup>

MHRH’s second argument was that Cook’s voluntary conduct caused or contributed to causing her morbid obesity.<sup>141</sup> The court observed that the Rehabilitation Act “contain[ed] no language suggesting that its protection [was] linked to how an individual became impaired, or whether an individual contributed to his or her impairment.”<sup>142</sup> In fact, the court listed a number of conditions that voluntary conduct may cause or exacerbate and that the Rehabilitation Act indisputably covers, such as heart disease, lung cancer from cigarettes, AIDS, alcoholism, and diabetes.<sup>143</sup> Because Cook introduced evidence regarding the physiological causes of morbid obesity, the court concluded that a reasonable jury could have determined that her physical condition was beyond her control.<sup>144</sup>

## 2. *Case Law Under the ADA*

After the enactment of the ADA, courts had new federal regulations to interpret and apply with respect to weight discrimination and obesity. Although many courts looked for precedent in prior case law under the Rehabilitation Act because of its similarity to the ADA,<sup>145</sup> not many previous

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137. *Cook*, 10 F.3d at 23.

138. *Id.* at 24 n.7.

139. *Id.* at 24.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Cook*, 10 F.3d at 24.

144. *Id.*

145. *See, e.g.,* *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 n.2 (9th Cir. 1999) (“interpretations of the ADA are guided by Rehabilitation Act precedent”); *Menkowitz v. Pottstown Mem’l Med. Ctr.*, 154 F.3d 113, 120 (3d Cir. 1998) (“Courts, including our own, have accordingly examined Rehabilitation Act precedent in examining the scope of coverage under the ADA.”); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996) (“Analysis of claims under the Americans with Disabilities Act roughly parallels those brought under the Rehabilitation Act of 1973.”).



cases had discussed whether an individual's obesity constituted a disability. The following three sections consider cases that serve as guideposts in the development of court interpretation of "disability" under the ADA in the context of obesity.<sup>146</sup>

a. *Morrow v. City of Jacksonville*

In *Morrow v. City of Jacksonville*,<sup>147</sup> the court for the Eastern District of Arkansas took up an issue on which neither party's brief had focused: whether the obese plaintiff was "disabled" within the meaning of the ADA.<sup>148</sup> The plaintiff, Ms. Morrow, had begun working for the Jacksonville police department in 1978.<sup>149</sup> In 1993, less than one year after the effective date of the ADA, the department instituted a new obstacle course test, which Ms. Morrow failed three times.<sup>150</sup> As a result, the department suspended her and threatened to fire her if she was unable to pass the test at a later date.<sup>151</sup> After she filed EEOC charges, the department allowed her to return to a different assignment, but both the department doctor and her personal physician recommended that she not take the test because she was "markedly obese" and suffered from hypertension.<sup>152</sup> Finally, the department placed her on indefinite sick leave, and she filed a second EEOC complaint.<sup>153</sup>

Although neither party addressed whether Ms. Morrow was "disabled" under the ADA, the court stated that a claimant must be able to meet the "threshold burden" of demonstrating that he or she has a disability under the ADA.<sup>154</sup> After stating the ADA definition of "disability," the court noted that there was "scant authority anywhere, and none from the Eighth Circuit, for the proposition that obesity is a disability [per se]."<sup>155</sup> The district court effectively conceded that Ms. Morrow suffered from a physical impairment, stating that her obesity and hypertension were "impairments."<sup>156</sup> Because the court assumed that Ms. Morrow's obesity was a physical impairment, it instead focused on the second part of the ADA test: whether that physical impairment substantially limited one or more major life activities.<sup>157</sup> The court concluded that the question of substantial limitation was a question of fact

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146. See *infra* Part II.C.2.a.-c.

147. 941 F. Supp. 816 (E.D. Ark. 1996).

148. *Id.* at 821.

149. *Id.* at 818.

150. *Id.* at 818-19.

151. *Id.* at 819.

152. *Id.*

153. *Morrow*, 941 F. Supp. at 819.

154. *Id.* at 821.

155. *Id.*

156. *Id.* at 822-23.

157. See *id.* at 821-23.

for the jury and, therefore, denied the defense's summary judgment motion as to that issue.<sup>158</sup>

b. *Andrews v. Ohio*

In *Andrews v. Ohio*,<sup>159</sup> a group of seventy-six police officers failed a mandatory fitness program because they were either too heavy or could not meet other fitness standards.<sup>160</sup> The officers filed suit under both the Rehabilitation Act and the ADA, claiming that the tests were not consistent with their job requirements and that Ohio perceived them to be disabled.<sup>161</sup> After the district court dismissed for failure to state a claim, the Sixth Circuit considered whether the officers' weight and fitness problems constituted a disability under the ADA or Rehabilitation Act.<sup>162</sup>

After discussing the statutory and regulatory definitions of disability and physical impairment, the Sixth Circuit extensively examined the *Tudyman*<sup>163</sup> and *Cook*<sup>164</sup> decisions.<sup>165</sup> Recognizing that the claimant in *Cook* suffered from morbid obesity that necessarily involved "a metabolic disorder that was permanent,"<sup>166</sup> the court concluded that the officers' situation was much more similar to *Tudyman* than to *Cook*.<sup>167</sup> The officers only demonstrated the existence of a physical characteristic that was "marginally above a weight limit or marginally below a fitness standard."<sup>168</sup> Because the officers did not allege that their status was a physiological disorder or an impairment—meaning that their condition was essentially a mere physical characteristic—the court found that they failed to meet their prima facie burden and, therefore, failed to state a claim upon which relief could be granted.<sup>169</sup>

c. *Francis v. City of Meriden*

In *Francis v. City of Meriden*,<sup>170</sup> the Second Circuit explicitly adopted the reasoning of the Sixth Circuit's decision in *Andrews*.<sup>171</sup> In *Francis*, a

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158. *Id.* at 823.

159. 104 F.3d 803 (6th Cir. 1997).

160. *Id.* at 805.

161. *Id.* at 805–06.

162. *See id.* at 806–08.

163. *See supra* Part II.C.1.a.

164. *See supra* Part II.C.1.b.

165. *See Andrews*, 104 F.3d at 809–10.

166. *Id.* at 809.

167. *See id.* at 810.

168. *Id.*

169. *Id.*

170. 129 F.3d 281 (2d Cir. 1997).

171. *Id.* at 285.

firefighter had repeatedly failed to meet the weight standards of the firefighter union's collective bargaining agreement.<sup>172</sup> The fire department eventually suspended him one day without pay; that same year the department also suspended a captain, two lieutenants, and a fire inspector for the same reasons.<sup>173</sup> Francis brought suit under the Rehabilitation Act and the ADA, claiming that the department discriminated against him by perceiving him to have a protected disability.<sup>174</sup>

The Second Circuit first covered the Rehabilitation Act and ADA definitions of disability and physical impairment.<sup>175</sup> The court explained that, to state a claim under the "regarded as" prong of the ADA, a claimant must allege that the employer perceived the claimant as suffering an impairment "that, if it truly existed, would be covered under the statutes and that the employer discriminated against the plaintiff on that basis."<sup>176</sup> In fact, one of the purposes of the "regarded as" prong was to protect those whose impairments had a history of stigmatization.<sup>177</sup> The court held that Francis's claim was insufficient because obesity was not an ADA impairment, "except in special cases where the obesity relates to a physiological disorder."<sup>178</sup> The court acknowledged that previous decisions had recognized such a cause of action to lie when the claimant was morbidly obese or suffered from a physiologically caused weight disorder, but the court pointed out that Francis had merely failed to meet a weight standard.<sup>179</sup> Thus, because Francis had not alleged that he suffered from an impairment under the ADA, the court ruled that the protections that the ADA did not apply to him.<sup>180</sup>

Standing in the background of the previously discussed cases is the continually developing scientific research regarding the nature and causes of obesity.<sup>181</sup> The development of statutory protections for the disabled—such as the Rehabilitation Act of 1973 and the ADA—has provided courts with new opportunities and new challenges in deciding claims of disability discrimination.<sup>182</sup> More specifically, how various courts have resolved issues of alleged weight discrimination provides important context for understanding

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172. *Id.* at 282.

173. *Id.*

174. *Id.* at 282–83.

175. *Id.* at 283–84.

176. *Francis*, 129 F.3d at 285.

177. *Id.* at 287.

178. *Id.* at 286.

179. *Id.*

180. *Id.* at 287.

181. *See supra* Part II.A.

182. *See supra* Part II.B.

the Sixth Circuit's reasoning in *EEOC v. Watkins*, which has solidified the shift towards personal responsibility.<sup>183</sup>

#### D. *Watkins* and the Solidified Shift Towards Personal Responsibility

The Sixth Circuit's recent decision in *Watkins* helped to solidify a shift towards a presumption of personal responsibility as the primary causal factor of obesity, rather than any other number of elements that are outside of one's control. Because *Watkins* is important for understanding the extent of recent developments in obesity discrimination, this note considers the *Watkins* decision more in depth than those that preceded it. The following sections will consider the facts underlying the case<sup>184</sup> and the Sixth Circuit's reasoning in analyzing and resolving the dispute.<sup>185</sup>

##### 1. *The Facts*

Watkins Motor Lines ("Watkins") hired Stephen Grindle ("Grindle") in August of 1990 to work as a driver and dock worker, which required him to be able to load, unload, and arrange heavy freight on Watkins' docks.<sup>186</sup> When Watkins hired Grindle, he weighed approximately 345 pounds; over the next five years of his employment with Watkins, his weight fluctuated from 340 to 450 pounds.<sup>187</sup>

In November of 1995, Grindle injured his knee while at work.<sup>188</sup> Despite the knee injury, Grindle returned to work the following day and continued working.<sup>189</sup> Finally, on January 22, 1996, the injury from his November accident forced Grindle to take a leave of absence.<sup>190</sup>

Watkins's policy was to terminate any employee whose leave of absence continued for longer than 180 days.<sup>191</sup> To return to work, an employee had to procure a release stating that he or she was fit to return to work.<sup>192</sup> The policy also placed the employee on notice that Watkins could ask him or her to take a physical exam as a prerequisite for returning to work.<sup>193</sup>

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183. See *infra* Part II.D; *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441–43 (6th Cir. 2006).

184. See *infra* Part II.D.1.

185. See *infra* Part II.D.2.

186. *Watkins*, 463 F.3d at 438.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Watkins*, 463 F.3d at 438.

193. *Id.*

After six months of physical therapy and nearly 180 days after his initial leave of absence, Grindle's doctor, Dr. Zancan, authorized him to return to work and granted the required release.<sup>194</sup> Because Dr. Zancan had issued the release without reviewing the nature of Grindle's job duties, however, Watkins refused to accept that release.<sup>195</sup> Instead, Watkins sent Dr. Zancan a copy of Grindle's job duties and a copy of the company's own release form for his signature.<sup>196</sup> Watkins never received a response from Dr. Zancan and refused to accept the original release.<sup>197</sup>

In June of 1996, Watkins directed Grindle to see the industrial clinic doctor, Dr. Walter Lawrence.<sup>198</sup> Dr. Lawrence found that Grindle had a limited range of motion and that "he could duck and squat but he was short of breath after a few steps."<sup>199</sup> Dr. Lawrence stated that "the most notable item" of Grindle's physical examination was his weight at 405 pounds.<sup>200</sup> Dr. Lawrence concluded that Grindle "could not safely perform the requirements of his job."<sup>201</sup> In light of Dr. Lawrence's conclusions and because Watkins had not received the required signed release from Dr. Zancan, Watkins placed Grindle on "safety hold."<sup>202</sup> Grindle remained on "safety hold" until the expiration of the 180-day leave period for returning to work, and Watkins subsequently terminated Grindle.<sup>203</sup>

Believing that Watkins had discharged him because of his morbid obesity, Grindle filed a complaint with the Equal Employment Opportunity Commission (EEOC) on September 30, 1998.<sup>204</sup> Four years and one month later, the EEOC filed suit in federal district court contending that Watkins had violated the ADA by firing Grindle.<sup>205</sup> On February 9, 2004, Watkins filed a motion for summary judgment claiming that obesity without a physiological causation was not an "impairment" under the ADA.<sup>206</sup> The district court granted Watkins's motion for summary judgment because "non-physiologically caused obesity is not an 'impairment' under ADA."<sup>207</sup> The EEOC appealed.<sup>208</sup> In granting review, the Sixth Circuit weighed in on

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194. *Id.*

195. *Id.*

196. *Id.* at 438-39.

197. *Id.* at 439.

198. *Watkins*, 463 F.3d at 439.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Watkins*, 463 F.3d at 439.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 438.

whether non-physiologically caused morbid obesity is an impairment under the ADA.<sup>209</sup>

## 2. *The Sixth Circuit's Reasoning*

After briefly considering and then rejecting Watkins's affirmative defense of laches,<sup>210</sup> the majority opinion held that morbid obesity, without any evidence of physiological causation, was not an impairment for purposes of the ADA.<sup>211</sup> Judge Julia Smith Gibbons concurred with the majority but wrote separately to underscore the possibility that morbid obesity, by its very nature, may have a physiological cause even if no evidence points to the nature of that cause.<sup>212</sup>

### a. The majority opinion

The court's primary consideration was whether and under what circumstances morbid obesity could be considered a physical impairment—and thus potentially a protected disability—under the ADA.<sup>213</sup> First, the majority summarized the definitions of both “disability” and “impairment” as those terms apply in the ADA.<sup>214</sup> Next, the majority analyzed its decision in *Andrews v. Ohio*<sup>215</sup> and the EEOC's subsequent reliance on that particular case.<sup>216</sup> Finally, the majority applied its analysis of *Andrews* to the ADA definitions of “disability” and “impairment”<sup>217</sup> and ultimately determined that Grindle's obesity did not fall under those definitions because he did not provide evidence of any physiological causation.<sup>218</sup>

#### i. *Morbid obesity as an ADA impairment*

The Sixth Circuit began its analysis of whether Grindle's morbid obesity constituted a disability under the ADA by considering the definitions of both “disability” and “impairment” under the ADA.<sup>219</sup> The ADA prohibits discrimination by an employer against any qualified individual with a disa-

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209. *Id.* at 440–43.

210. *Watkins*, 463 F.3d at 439, 440.

211. *Id.* at 441.

212. *Id.* at 443 (Gibbons, J., concurring).

213. *Id.* at 440–43.

214. *See infra* Part II.D.2.a.i.

215. 104 F.3d 803 (6th Cir. 1997).

216. *See infra* Part II.D.2.a.ii.

217. *See infra* Part II.D.2.a.iii.

218. *Watkins*, 463 F.3d at 443.

219. *Id.* at 440.

bility.<sup>220</sup> A “disability” for purposes of the ADA is a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>221</sup> Even if the impairment is not substantially limiting, however, an individual may also suffer from a disability protected by the ADA if he or she has “a record of such an impairment,”<sup>222</sup> or if he or she is “regarded as having such an impairment.”<sup>223</sup> These possibilities constitute the “three prongs” under which an individual may successfully claim an ADA disability.<sup>224</sup>

On appeal, the EEOC argued that the alleged discrimination against Grindle fell under the “regarded as” prong, which required the EEOC to show that Watkins perceived Grindle to have an impairment protected by the ADA.<sup>225</sup> The district court had held that Grindle’s obesity could not be a disability because “*non-physiological* morbid obesity is not an ‘impairment’ under the ADA,” and that such obesity could only be an ADA impairment if it had a physiological cause.<sup>226</sup> Therefore, before the appellate court could consider whether morbid obesity was a disability under the ADA, the majority first had to resolve “whether non-physiologically caused morbid obesity [was] an ADA impairment.”<sup>227</sup>

The majority set out the definitions of “impairment” and “physical impairment” as found in the EEOC’s regulations and in the Rehabilitation Act of 1973, respectively.<sup>228</sup> The EEOC’s “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act” defined impairment as:

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220. 42 U.S.C. § 12102(2)(A) (2000).

221. *Id.*

222. *Id.* § 12102(2)(B).

223. *Id.* § 12102(2)(C).

224. *See id.* § 12102(2)(A)–(C). The majority did not mention the “record of such impairment” prong. Instead, it labeled the “regarded as” prong as the “second prong,” even though it was actually the “third” of the ADA prongs regarding disability. *Watkins*, 463 F.3d at 440. The majority’s misnomer resulted from its reliance on the language of a United States Supreme Court decision, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999), (“There are two [types of ADA disabilities] . . . : (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.”). *See id.*

225. *Watkins*, 463 F.3d at 440. In a footnote, the majority noted that the EEOC took exception to the district court’s application of the *Sutton* standard. However, the majority clarified and affirmed the district court’s holding that “to succeed on a ‘regarded as’ claim, the perceived condition must be an ‘impairment’ under the ADA.” *See Watkins*, 463 F.3d at 440 n.2.

226. *Id.* at 441 (citing District Court Opinion, R. 80).

227. *Id.* at 440–41.

228. *Id.* at 441.

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>229</sup>

The foundation for that definition was the Rehabilitation Act of 1973, which defined “physical impairment” in nearly the same language, except that the Rehabilitation Act did not place a comma separating “physiological disorder” from “or condition.”<sup>230</sup> The court reasoned that an individual may have a particular characteristic that an employer regards unfavorably, but that characteristic must rise to the level of an impairment under the ADA in order for the ADA’s protections to apply.<sup>231</sup> The majority explained that, if an individual’s obesity is a mere physical characteristic rather than an ADA impairment, an employer is legally entitled to choose one particular physical characteristic and reject another.<sup>232</sup> Although the EEOC conceded that non-physiological *moderate* obesity was generally more similar to a physical characteristic than an impairment, it argued that *morbid* obesity—more than 100% over the normal body weight—was an ADA impairment regardless of physiological causation.<sup>233</sup> The EEOC had based its argument on a particular sentence from *Andrews v. Ohio*,<sup>234</sup> however, and the majority was quick to manifest the importance of context in interpreting the meaning of that sentence.<sup>235</sup>

ii. *Analysis of the EEOC’s reliance upon the Sixth Circuit’s decision in Andrews v. Ohio*

The EEOC based its argument—that non-physiological morbid obesity was an ADA impairment—“almost entirely on [ ] one of the last sentences of [the Sixth Circuit’s] decision in *Andrews v. State of Ohio*.”<sup>236</sup> In that case, police officers had exceeded the official weight standard, and the court held:

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229. 29 C.F.R. § 1630.2(h)(1) (2006).

230. 45 C.F.R. § 84.3 (2006). The majority made no mention of the difference in punctuation, but the concurring opinion later used the difference to buttress its interpretation of the definition of impairment. See *infra* Part II.D.2.b.

231. See *Watkins*, 463 F.3d at 441.

232. *Id.* (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 473 (1999)).

233. *Id.* at 441.

234. 104 F.3d 803 (6th Cir. 1997).

235. *Watkins*, 463 F.3d at 441–42; see also *infra* Part II.D.2.a.ii.

236. *Id.* at 441–42.



The officers have not alleged that Ohio perceives them to have any *impairment*. That is, they have not alleged a weight or fitness status which is other than a mere, indeed possibly transitory, physical characteristic; they have not alleged a status which is the result of a physiological condition or otherwise beyond the range of "normal."<sup>237</sup>

The majority stated that the *Andrews* decision did not stand for the proposition that "*any* abnormal physical characteristic [was] a potential ADA impairment."<sup>238</sup> Rather, the context of the entire decision was imperative for a proper interpretation of its language regarding abnormal physical characteristics.<sup>239</sup>

The majority reiterated that only physical characteristics with some underlying physiological disorder could constitute ADA impairments.<sup>240</sup> Like the EEOC in *Watkins*, the police officers in *Andrews* attempted to advance their case under the "regarded as" prong of the ADA.<sup>241</sup> That court could not consider the police officers' obesity to be an impairment because their obesity lacked a proven physiological disorder, and "a mere physical characteristic *does not, without more, equal a physiological disorder*."<sup>242</sup>

The *Andrews* court relied on two other decisions—the First Circuit case of *Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals*<sup>243</sup> and a California District Court case styled *Tudyman v. United Airlines*<sup>244</sup>—both of which ruled that a physiological cause was necessary for a physical characteristic to be an impairment.<sup>245</sup> In addition, the *Watkins* majority noted that a Second Circuit case had interpreted *Andrews* as holding that physical characteristics—even those outside of a normal range—must have some physiological causation in order to be impairments under the ADA.<sup>246</sup> Therefore, the majority reaffirmed that the *Andrews* language was only meant to emphasize that the plaintiffs' obesity, being neither physiologically caused nor abnormal, was "far from constituting an ADA impairment."<sup>247</sup>

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237. *Id.* at 442 (quoting *Andrews*, 104 F.3d at 810).

238. *See id.* at 442.

239. *Id.* at 442.

240. *Id.* (citing *Andrews*, 104 F.3d at 808 ("[P]hysical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either actual or perceived disability.")).

241. *Watkins*, 463 F.3d at 442.

242. *Id.* (quoting *Andrews*, 104 F.3d at 810).

243. 10 F.3d 17 (1st Cir. 1993).

244. 608 F. Supp. 739 (C.D. Cal. 1984).

245. *Watkins*, 463 F.3d at 442 (citing *Cook*, 10 F.3d 17; *Tudyman*, 608 F. Supp. 739).

246. *Id.* (citing *Francis v. City of Meridian*, 129 F.3d 281, 286 (2d Cir. 1997)).

247. *Id.*

iii. *Application of the Andrews analysis to the ADA understanding of “disability” and “impairment”*

Finally, the majority applied the *Andrews* analysis to the previously discussed definitions of impairment and physical impairment.<sup>248</sup> The court held that the ADA’s protections did not extend to all physical characteristics that happened to be abnormal.<sup>249</sup> If all abnormal physical characteristics were impairments under the ADA,

the central purpose of the statutes, to protect the disabled, [would be] incidental to the operation of the ‘regarded as’ prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed.<sup>250</sup>

Therefore, the court ruled that obesity, “even morbid obesity,” must result from *some* physiological condition in order to constitute an impairment under the ADA.<sup>251</sup> The EEOC was unable to offer any proof that Grindle’s morbid obesity had a physiological causation.<sup>252</sup> Therefore, because Grindle’s obesity had no proven physiological causation—a necessary element of an ADA impairment—the court found that Grindle’s morbid obesity was not an impairment under the ADA.<sup>253</sup> As a result, the court felt no need to consider the remaining elements of the “regarded as” prong of the ADA definition of “disability.”<sup>254</sup>

b. Judge Gibbons’s Concurring Opinion

In her concurring opinion, Judge Gibbons was willing to consider the argument that “morbid obesity, because of the nature of the disorder, always has a physiological cause.”<sup>255</sup> Unlike the majority opinion, the concurrence explored the legislative history of the ADA definition of physical impairment.<sup>256</sup> Noting that no comma separated “physiological disorder” from “or condition” in the definition explicitly adopted by the ADA and the EEOC, Judge Gibbons concluded that “physiological” was meant to modify both “disorder” *and* “condition.”<sup>257</sup> Therefore, the EEOC’s argument that morbid

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248. *See id.* at 443.

249. *Id.*

250. *Id.* (quoting *Francis*, 129 F.3d at 287).

251. *Watkins*, 463 F.3d at 443.

252. *Id.* at 439.

253. *Id.* at 443.

254. *Id.*

255. *Id.* at 443 (Gibbons, J., concurring).

256. *Id.* at 444.

257. *Watkins*, 463 F.3d at 444. (Gibbons, J., concurring).

obesity as a "condition" needed no physiological cause to be an ADA impairment was unfounded.<sup>258</sup>

In reaching her conclusion, Judge Gibbons discussed the few cases that had ruled on obesity under the ADA.<sup>259</sup> All of those cases maintained that an individual's morbid obesity may be an ADA impairment if that individual presented evidence of some underlying physiological cause.<sup>260</sup> However, in an important footnote to her review of those cases, Judge Gibbons recognized the possibility "that morbid obesity is a disorder that by its very nature has a physiological cause."<sup>261</sup> If this possibility were true, then Grindle would have had no need to prove a physiological cause for his morbid obesity.<sup>262</sup> Nonetheless, the fact that "[n]o court or agency ha[d] ever adopted this position" and "the EEOC ha[d] put forth no evidence, medical or otherwise, to support such a sweeping conclusion" compelled Judge Gibbons to concur that the EEOC failed to prove that Grindle's morbid obesity was an impairment—and thus potentially a disability—under the ADA.<sup>263</sup>

Both the majority and concurring opinions held that obesity and morbid obesity must have some underlying physiological causation in order to be considered a physical impairment under the ADA.<sup>264</sup> The EEOC failed to offer any evidence that either Grindle's specific case of morbid obesity or morbid obesity in general had a proven physiological causation.<sup>265</sup> As a result, the majority and concurring opinions both concluded that—based on the evidence presented, the language of the ADA, and prior judicial application of the ADA to weight discrimination claims—Grindle's morbid obesity could not be considered an ADA disability.<sup>266</sup>

### III. PROPOSAL

America's struggle with obesity has continued to worsen, but research has shown that obesity's causation is a complex mix of multiple factors, including environment, lifestyle, geography, genetics, and personal responsibility. Given the relatively recent developments in the adjudication of disability claims involving obesity, courts, employers, and legislatures must consider the impact of these developments and respond in a proactive and

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258. *Id.*

259. *See id.* at 444–45. (Gibbons, J., concurring).

260. *Id.* Judge Gibbons discussed the cases of *Cook v. R.I., Dep't of Mental Health, Retardation, & Hospitals*, 10 F.3d 17 (1st Cir. 1993); *Francis v. City of Meridian*, 129 F.3d 281 (2d Cir. 1997); and *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997). *Id.*

261. *Id.* at 445 n.1 (Gibbons, J., concurring).

262. *See id.*

263. *Watkins*, 463 F.3d at 445 n.1 (Gibbons, J., concurring).

264. *Id.* at 443–44.

265. *Id.* at 439.

266. *Id.* at 443–44.

preventative manner. This proposal outlines some consequences of and potential responses to these recent developments. First, these recent developments affirm a trend to consider the weight of personal responsibility in determining whether a morbidly obese individual has a physical impairment under the ADA.<sup>267</sup> Second, courts have so far failed to consider whether physical complications resulting from non-physiologically caused morbid obesity are precluded from ADA protection, even if those complications would normally be physical impairments that the ADA protects.<sup>268</sup>

#### A. The Weight of Personal Responsibility

The relatively recent decisions in obesity litigation mark a disturbing jurisprudential trend of weighing a claimant's personal responsibility against the causes for the condition that were beyond the claimant's control. This trend could negatively impact the protection of other disabilities covered by the ADA.<sup>269</sup> This trend towards personal responsibility also fails to account for the modern attitude of shared responsibility, exhibited in various community efforts to curb obesity.<sup>270</sup>

##### 1. *Personal Responsibility, Morbid Obesity, and Other Potentially Affected ADA Disabilities*

Although the *Watkins* court had to confine its analysis on appeal to the evidence on record, which did not include any evidence regarding the physiological causes of morbid obesity, the implied conclusion of the court's reasoning is that an individual who becomes morbidly obese simply by a combination of laziness and overeating cannot claim to have an ADA-protected disability. Placing the burden of morbid obesity's causation entirely on the individual flatly ignores and does an enormous disservice to modern research regarding the multifaceted causes of obesity, especially morbid obesity. Although research has shown that personal decisions regarding eating habits and lifestyle do play a role in causing obesity, most research shows that a complicated combination of environmental, genetic, societal, and other external factors are involved in causing obesity.<sup>271</sup> Moreover, once an individual has developed obesity or morbid obesity, that condition is treatable but potentially non-curable. This lends credence to the position that

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267. See *infra* Part III.A.

268. See *infra* Part III.B.

269. See *infra* Part III.A.1.

270. See *infra* Part III.A.2.

271. See Robert J. Grossman, *Countering a Weight Crisis: Predestination vs. Choice*, HR MAGAZINE (Mar. 2004), available at <http://www.shrm.org/hrmagazine/articles/0304/0304covstory.asp> (last visited Jan. 31, 2007).

obesity, especially morbid obesity, is not a mutable condition.<sup>272</sup> Therefore, even absent evidence of some physiological causation, courts have basically relied on a default presumption of *individual* or *personal* causation with respect to obesity.

This presumption of personal responsibility as a default causation for morbid obesity stands in conflict with modern research showing that obesity is as much a product of an individual's environment and genetics as it is a product of an individual's personal choices.<sup>273</sup> Still, some lawmakers would place the burden of obesity entirely on the individual, rather than recognizing the need for community involvement and shared accountability.<sup>274</sup> Nevertheless, until scientists can prove a direct link between genetics, environment, and morbid obesity—or until Congress includes obesity or morbid obesity as an explicitly protected physical impairment under the ADA—courts will have the burden of determining how much weight to give to an individual's personal responsibility as a factor in examining the causes of that individual's morbid obesity.

A legitimate concern with negating the importance of personal responsibility is the potential flood of claims of “voluntary” condition discrimination.<sup>275</sup> However, the ADA already protects disabilities such as alcoholism and drug addiction that are subject to a similar flood of claims. To hold that a “voluntary” condition—with no proven physiological causation and brought about solely by personal choices—cannot be an impairment under the ADA ignores the impact that such reasoning would necessarily have if applied to other recognized ADA disabilities, such as alcoholism, drug addiction, and HIV infection.<sup>276</sup> Although scientists have proven that alcoholism and drug addiction have elements of physical addiction,<sup>277</sup> the risk of developing either of these protected conditions is greatly increased based on lifestyle and voluntary decisions founded on personal responsibility. In addi-

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272. See Kuss, *supra* note 29, at 595–97.

273. See generally Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity*, 28 U. ARK. LITTLE ROCK L. REV. 443–55 (2006). This article was a result of a symposium entitled “America’s Epidemic: The Uses of Law to Address Obesity,” co-hosted by the University of Arkansas at Little Rock, William H. Bowen School of Law and the University of Arkansas for Medical Sciences, College of Public Health. *Id.* Symposia such as this are evidence that obesity is a societal problem with continually developing legal ramifications.

274. See, e.g., Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Congress (2005); Commonsense Consumption Act, 85th Gen. Assem., Reg. Sess. (Ark. 2005). See also Michael R. Wickline & Jake Bleed, Bill Filed to Shield Food Sellers from Suits,” ARK. DEMOCRAT-GAZETTE, Feb. 19, 2005.

275. See Shoup, *supra* note 55, at 226–27.

276. *Id.*

277. See Buxton, *supra* note 100, at 126–27.

tion, many who have contracted HIV have done so at least in part because of individual decisions regarding sexual activity and personal protection.

If courts were to adopt the reasoning of these recent adjudicative developments, and in particular the *Watkins* reasoning—that a condition that is voluntary in nature and results partially from personal decisions is not an ADA impairment—and give similar weight to the role of personal responsibility, then courts potentially must examine the weight of personal responsibility with respect to other disability claims under the ADA. This would require evidence regarding the personal decisions that an individual made leading up to his or her alcoholism, drug addiction, or infection with HIV—or theoretically any number of disabling conditions—thus forcing courts to consider an individual's personal lifestyle choices as a factor in determining whether his or her condition is a physical impairment under the ADA. It is striking that courts may be quick to weigh personal responsibility as a factor with respect to morbid obesity but are slow to consider that same factor with respect to other ADA disabilities that clearly have a voluntary component. Such inconsistencies in application of reasoning can only lead to inconsistent protections for the truly disabled.

## 2. *Shared Responsibility and Wellness Programs*

Based on research showing the impact of environmental factors on obesity and the financial burden resulting from obesity in the workplace, many employers have recognized their shared responsibility for employees' health by instituting wellness programs.<sup>278</sup> Studies have shown that, due to the detrimental impact that obesity has in the workplace, employers save more financially in the long run by instituting wellness programs for their employees.<sup>279</sup> Many programs include incentives for employee participants to reach certain goals or participate in the program.<sup>280</sup> Although they are one step in providing employees with the encouragement and opportunity necessary for a healthy lifestyle, the programs must still comply with the ADA.<sup>281</sup>

Participation in a wellness program must be voluntary, the employer must keep confidential all information that it obtains, and the employer cannot use any obtained information to discriminate against an employee.<sup>282</sup>

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278. See Christine Williams, *Wellness Programs: Useful Tools but Questions Abound*, 35 A.B.A. SEC. LAB. & EMP. L. 5, 9 (Winter 2007).

279. See Joseph J. Lazzarotti, *An Introduction to Wellness Programs: The Legal Implications of "Bona Fide Wellness Programs,"* 6 BENDER'S LABOR AND EMPLOYMENT BULLETIN 270 (June 2006), available at [http://www.jacksonlewis.com/articles/0606\\_Bender.pdf](http://www.jacksonlewis.com/articles/0606_Bender.pdf) (last visited Apr. 21, 2007).

280. Grossman, *supra* note 37.

281. See Williams, *supra* note 278, at 5.

282. *Id.*

The EEOC has encouraged wellness programs in the workplace as long as they are in compliance with the ADA.<sup>283</sup> Because the future of obesity litigation is unclear, especially with respect to the degree to which courts may consider personal responsibility as a factor in the causation of morbid obesity, employers who institute some form of wellness program will likely be reducing both the financial impact of obesity and their exposure to liability in the still-developing area of obesity and disability discrimination.

#### B. Physical Conditions Arising from Non-Physiological Morbid Obesity

Recent court decisions have also failed to consider whether the physical conditions resulting from morbid obesity might constitute a disability under the ADA. For example, in *Watkins*, the employee's range of motion and respiratory problems were physiological in nature and could well have affected various other bodily functions or systems.<sup>284</sup> Because the industrial clinic doctor reported that the employee had physical limitations other than his morbid obesity, the court should have been on constructive notice regarding other physiological impairments from which the employee could have been suffering as a result of his morbid obesity.

Most courts have failed to address the issue of other manifestations of physical impairment. The result is a very problematic issue regarding the logical consequences of such decisions: whether physical impairments resulting from non-physiological morbid obesity can be physical impairments under the ADA. In other words, if an individual's morbid obesity has no proven physiological causation, does that preclude any resulting physical conditions from being physical impairments under the ADA? According to the reasoning in *Watkins*, the ADA would not protect individuals suffering from physical side effects that stem from non-physiological obesity because the foundational root cause of those side effects would not be physiological. Such ambiguity in reasoning could prove problematic for future claimants who suffer from disability discrimination based on physical impairments that result from obesity or morbid obesity. Future claimants may first have to demonstrate that their obesity had a physiological cause, regardless of the fact that their obesity was a physiological cause for the physical impairment that allegedly resulted in discrimination.

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283. *Id.*

284. *See* 29 C.F.R. § 1630.2(h).

## IV. CONCLUSION

The enactment of the ADA in 1990 was meant to provide a “comprehensive national mandate” for eliminating disability discrimination<sup>285</sup> and to establish “clear, strong, consistent, enforceable standards” by which courts could address claims of discrimination against those with disabilities.<sup>286</sup> The scientific research on the causes of obesity and morbid obesity, however, has yet to establish a clear, strong, or consistent reason why some individuals become obese while others do not.<sup>287</sup> Meanwhile, continuing growth in the number of obese Americans is most certainly having measurable effects in the workplace and in American society as a whole.<sup>288</sup> Because the ADA did not specifically name obesity as a protected disability, courts deciding allegations of weight discrimination have had to apply the protections defined in the ADA and the Rehabilitation Act—the ADA’s precursor—in different ways based on the different facts involved in each case.<sup>289</sup>

The most recent developments in obesity jurisprudence have held that morbid obesity—absent evidence of physiological causation—was not an ADA physical impairment, impliedly concluding that a claimant whose disability is the result of personal choices rather than a physiological disorder is not “disabled” for purposes of the ADA.<sup>290</sup> The direction of these developments (1) presents the possibility that personal responsibility may be a factor in considering the validity of ADA claims involving disabilities other than obesity;<sup>291</sup> (2) should encourage employers to develop and implement wellness programs in the spirit of shared responsibility;<sup>292</sup> and (3) fails to resolve whether physical conditions arising from non-physiological obesity may be protected disabilities under the ADA.<sup>293</sup>

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285. 42 U.S.C. § 12101(b)(1) (2000).

286. *Id.* § 12101(b)(2).

287. *See supra* Part II.A.1.

288. *See supra* Part II.A.2.

289. *See supra* Part II.C.

290. *See supra* Part II.D.

291. *See supra* Part III.A.1.

292. *See supra* Part III.A.2.

293. *See supra* Part III.B.

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