

# Should Employers Consider Obesity a Disability?

By Keith A. Markel and Wendy M. Fiel

Reprinted with permission from *Corporate Counsel*

August 20, 2013



Keith A. Markel



Wendy M. Fiel

The Centers for Disease Control and Prevention report that more than one-third of adults in the United States are considered “obese.” Although courts have previously deemed “morbidly obese” individuals — those who are 50 percent to 100 percent (or more than 100 pounds) over their ideal body weight, or who have a body mass index (BMI) value greater than 39 — as “disabled” for purposes of protection under the Americans with Disabilities Act (ADA), “moderately obese” individuals with a BMI between 30 and 39 generally were not protected under the ADA absent another underlying disorder or impairment — until now.

## THE AMERICAN MEDICAL ASSOCIATION RECOGNIZES OBESITY AS A DISEASE

In June 2013, the American Medical Association (AMA) passed Resolution 420, entitled [“Recognition of Obesity as a Disease”](#), which officially recognizes obesity as a “disease state with multiple pathophysiological aspects.” With this Resolution, the AMA joins the World Health Organization, the Food and Drug Administration, the National Institutes of Health, the American Association of Clinical Endocrinologists, the Internal Revenue Service, and certain health insurance companies in recognizing obesity as a disease without distinction. Resolution 420 further states that there is an “overabundance of clinical evidence to identify obesity as a multi-metabolic and hormonal disease state.”

It is critical for employers, in-house counsel, and human resources representatives to be mindful that the AMA’s definition of obesity is not limited to morbidly obese individuals, but also includes those individuals who are “moderately obese” and who may be as little as 30 pounds overweight. Although Resolution 420 states that the AMA opposes any effort to make obesity a disability under the law, there is no doubt that the AMA’s recognition of obesity as a disease will have significant legal consequences.

## **THE MEANING OF “DISABILITY” IS CONSTRUED BROADLY UNDER THE ADA**

The ADA prohibits discrimination in the workplace on the basis of disability. The threshold issue in any ADA claim is whether or not the plaintiff has a “disability” within the meaning of the ADA. Prior to Congress’s passage of the [ADA Amendments Act of 2008](#) (ADAAA), which took effect on January 1, 2009, courts addressing the question of whether an obese individual is “disabled” generally held that obesity (even morbid obesity) was not a protected disability unless the individual also suffered from an underlying or resultant physiological disorder or impairment such as a thyroid disorder, which itself constituted a disability under the ADA. Courts were consistent with the EEOC’s pre-ADAAA position on obesity that “except in rare circumstances, obesity is not considered a disabling impairment,” and that an “impairment” with regard to Title I of the ADA “does not include physical characteristics such as . . . weight . . . that are within ‘normal’ range and are not the result of a physiological disorder.”

Under the ADA, as amended by the ADAAA, the definition of a disability now includes: “(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.” To satisfy the “regarded as disabled” prong, an individual need only establish that his or her employer took discriminatory action against him or her because the employer perceived the employee to be disabled. Under the “regarded as” prong, there is no need for the individual to establish that the impairment actually limits or is perceived to limit a major life activity. Although this prong of the disability definition is the least stringent, it should be noted, however, that this prong does not apply to transitory or minor impairments, nor does it require employers to provide reasonable accommodation to an employee who is not substantially limited with regard to one or more major life activities. Satisfying the “regarded as” prong of the ADA standard means only that a person is an individual with a disability entitled to the protections of the ADA. The issue of whether unlawful discrimination occurred is a separate determination.

## **WHAT’S HAPPENED SINCE THE PASSAGE OF THE ADAAA?**

Since the passage of the ADAAA, courts have not only continued to hold that morbid obesity is a recognized disability under the ADA when accompanied by an underlying or resultant physiological disorder or condition, but have also started to hold that morbid or severe obesity is a federally protected “disability” even when there was no underlying physiological disorder. Indeed, in April 2012, the EEOC announced that an employer who operated a residential treatment facility agreed to pay \$125,000 to settle a disability discrimination suit filed by the EEOC in which it was alleged that the employee was terminated because she was severely obese, even though she was able to perform the essential functions of her job. The settlement followed multiple decisions in which the court held that “severe obesity” qualifies as a disability under the ADA and may qualify as a disability even if it was not caused by a physiological disorder.

Only a few months later, the EEOC announced that another employer agreed to pay \$55,000 to settle a disability discrimination lawsuit in which it was alleged the employer violated the ADA after it discharged an employee because he was morbidly obese, even though he too was deemed qualified to perform the essential job functions of his position. Around that same time, the Montana Supreme Court interpreted Montana’s antidiscrimination statute (which is modeled after the ADA) and held that “[o]besity that is not the symptom of a physiological disorder or condition may constitute a ‘physical or mental impairment’ . . . if the individual’s weight is outside ‘normal range’ and affects ‘one or more body systems.’ ” These outcomes are supported by the expansive purpose of the ADAAA and the EEOC’s Compliance Guidelines, which recently deleted language stating that obesity “rarely” would be a disability.

## **RESOLUTION 420 MAY WEIGH HEAVILY ON WHETHER AN INDIVIDUAL IS CONSIDERED DISABLED UNDER THE ADA**

The AMA's recognition in Resolution 420 that any level of "obesity" is deemed to be a "multimetabolic and hormonal disease state" will require courts to further examine the issue of whether obesity constitutes a "disability" under the ADA. In a recent complaint filed with the United States District Court for the Eastern District of Missouri on July 19, 2013, in what appears to be the first federally filed obesity discrimination lawsuit since the passage of Resolution 420, a former employee alleges that he was unlawfully discharged from his management position because of his "severe obesity." *See Whittaker v. America's Car-Mart Inc.* (Case No. 1:13-cv-00109). Although this case is in its infancy, Resolution 420 will likely be considered by the court when it is asked to determine whether the plaintiff is disabled within the meaning of the ADA.

## **WHAT EMPLOYERS SHOULD KNOW GOING FORWARD**

Employers should be aware of the AMA's passage of Resolution 420 when making any employment-related decisions or addressing complaints of harassment relating to an employee's weight, or when responding to an employee's request for a weight-based accommodation. Although the AMA's classification of obesity as a disease was not intended to create law, it will undoubtedly have a legal impact on ADA lawsuits. When in doubt, we recommend that you speak to an experienced employment attorney who can assist you in understanding the impact Resolution 420 may have in the workplace.

*Keith A. Markel is a partner in the labor and employment group at Morrison Cohen in New York. He has extensive trial and arbitration experience in a variety of employment matters, including the defense of ADA discrimination cases. Wendy M. Fiel is an associate in the firm's litigation department with a focus that includes employment-related issues.*

Reprinted with permission from the August 20, 2013 edition of Corporate Counsel © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com