



## IS THERE A RIGHT TO BE FAT?

### *Recent Amendments to the Americans with Disabilities Act Expand the Legal Definition of “Disability”*

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Originally enacted in 1990 with the support of President George H.W. Bush and substantial majorities in Congress,<sup>1</sup> the Americans with Disabilities Act (“ADA”) was amended last year to expand the legal definition of “disability.” A generation later, and again with strong bipartisan support,<sup>2</sup> President George W. Bush signed the ADA Amendments Act of 2008 (“ADAAA”) into law on September 25, 2008. The new law, which became effective for employers with 15 or more employees on January 1, 2009, expressly overturns several U.S. Supreme Court decisions<sup>3</sup> that had construed the term “disability” narrowly under the employment provisions of the ADA.

This statutory expansion of the definition of “disability” means that more Americans will be protected from employment discrimination on the basis of conditions, like obesity, that may in some cases be controlled through behavioral changes or are preventable entirely. While employees have no obligation to “cure” a “disability,” once established, the employer must provide a “reasonable accommodation,” and further inquiries into the employee’s medical condition are prohibited. The employer must also keep an employee’s medical records in separate, confidential files. Thus the ADAAA creates a tension between the competing public policies of eliminating discrimination and protecting public health. Indeed, physicians who treat obesity-related conditions should be concerned about the amendments, both as medical professionals and as employers.

According to the U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency charged with implementing and enforcing the ADA, up to one million additional workers will “consistently meet the definition of disability” and will thus be protected from employment discrimination under the Act. In addition, the determination of who is disabled must be made without consideration of whether the disabling condition is asymptomatic or controlled through medication. Thus, according to regulations proposed by the EEOC, an individual diagnosed with diabetes will consistently meet the legal definition of disability because she is “substantially limited in functions of the endocrine system.” As explained below, individuals who are simply overweight and fall short of the medical definition of obesity may also be protected under the new law.

#### **ESTABLISHING A “DISABILITY” UNDER THE ADA**

An individual is “disabled” under the ADA if he or she is (1) “substantially limited” in performing (2) a “major life activity.” Under the original Act, major life activities included such essential life functions as walking, seeing, hearing and speaking. Under the new law, reaching, lifting, bending, and sleeping—activities that may be restricted in the obese—are expressly included as “major life activities.”

The EEOC has recently clarified that an individual will meet these requirements if she has a physical or mental impairment that limits her performance of a major life activity “as compared to most people in the general population.”<sup>4</sup> This comparison “often may be made using a common-sense standard, without resorting to scientific or medical evidence.”<sup>5</sup> The agency had already determined that obesity is an “impairment” under the original law.<sup>6</sup> Prior to the ADAAA, however, the EEOC generally did not pursue obesity discrimination cases unless the complainant (or “charging party” in EEOC practice) was “morbidly obese.”

Under the new law, someone who is “obese” or even overweight may be protected from employment discrimination if, for example, he or she has difficulty performing the “major life activities” of bending or reaching when compared with the general population. Once a disability is established, the employer must provide a “reasonable accommodation” to the employee to allow her to perform the “essential functions” of the position she holds or desires.

#### **THE “REASONABLE ACCOMMODATION” REQUIREMENT AND EMPLOYER DEFENSES**

The inquiry into what constitutes a “reasonable” accommodation is fact-driven and must be tailored both to the individual and the job. An employee substantially limited in the major life activity of bending, for example, may need to have modifications to his or her office or work space, or have non-essential functions (such as stocking shelves or filing documents) reassigned. Congress did not expand the legal definition of “reasonable accommodation” in the ADAAA, leaving current EEOC regulations and case law intact.

The employer, for example, may reject as unreasonable a requested accommodation that represents an “undue

hardship” for the employer. According to the EEOC, “undue hardship” means that the accommodation would require significant difficulty or expense, or would be unduly disruptive to the nature or operation of the business. Among the factors to be considered in determining whether an accommodation is an undue hardship are the cost of the accommodation, the employer’s size and financial resources, and the nature and structure of its operations. In short, the ADA does not require cost-prohibitive changes to the employer’s facilities.

For example, a doctor’s office need not provide machinery for reaching charts on high shelves, but may be required to reassign the filing responsibility to another, non-disabled employee to accommodate an obese employee who may be substantially limited in the major life activities of bending or reaching.” The employer also need not reassign the “essential” functions of the job, or create a new job in order to comply with the accommodation requirement. The EEOC does, however, view transfer to a vacant position as an accommodation that the employer should consider.

Another defense available to employers in this area is the so-called “direct threat” defense. This defense applies where the employee’s disability, with or without an accommodation, presents a direct threat to himself or others. The defense is usually available only in disputes involving “safety sensitive” positions, such as vehicle operators. This reflects Congress’s recognition that public safety concerns should, in some cases, trump claims of discrimination. For example, an individual who uses insulin to control her diabetes does not meet the physical requirements established by U.S. Department of Transportation (“DOT”) regulations for commercial truck drivers.<sup>7</sup> The defense may also be available to employers who establish voluntary safety standards for ambulance drivers and other employees who operate vehicles outside of DOT’s jurisdiction. It is important to remember, however, that the employer has the burden to show that either the employee

would pose a direct threat to the safety of himself or others, or that the employee is unqualified under other federal regulations that supersede the ADA’s requirements.

On the other hand, employers violate the ADA if they “regard” an individual as disabled even if he or she does not have an actual physical impairment. This prong of the ADA’s definition of disability was also broadened under the recent amendments. Thus, if an employer denies an individual a job based only on a “perceived” physical impairment, the employer may be in violation of the ADA even if the impairment does not substantially limit a major life activity. Employers who, for example, perceive an obese or overweight individual as having a physical impairment and refuse to hire the individual based on that perception, may have liability under the ADA.

### CONCLUSION

The ADAAA will undoubtedly expand the number of Americans who are legally “disabled.” Those who are obese or merely overweight may, for the first time, be protected from employment discrimination—even on the basis of a “perceived” impairment. Given widespread concerns about the prevalence of obesity in this country, this is strange public policy indeed. It is, in fact, a deviation from the idea that civil rights protections should be available to those who have immutable physical characteristics—such as sex, race, age, and national origin. Thus, the ADAAA may—albeit unintentionally—contribute to the obesity crisis by allowing individuals to justify what may be life-threatening behaviors under the mantra of a new “right” in the workplace. Physicians who are concerned about the expanding waistlines of their patients should also be concerned about this unprecedented expansion of a major civil rights law. Given the ADAAA’s expansion of the definition of “disability,” I would expect that the new battleground will involve disputes between employers and employees on the scope of the “reasonable accommodation” requirement and “direct threat” defense.

### REFERENCES

1. The U.S. Senate passed the ADA, 76-8, in September 1989; it passed in the U.S. House of Representatives, 403-20, in May 1990.
2. On June 25, 2008, the House passed the ADAAA by a vote of 402-1; it passed the Senate unanimously on September 11, 2008.
3. The decisions include *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Toyota Mfg., Ky v. Williams*, 534 U.S. 134 (2002).
4. 74 Federal Register at 48446 (Sept. 23, 2009).74 Fed. Reg. at 48440 citing 2008 Senate Managers’ Statement at 7.

5. The EEOC Office of Legal Counsel has issued an informal opinion in response to at least one employer inquiry that “normal deviations in height, weight or strength are not impairments.” The EEOC may provide further guidance on this issue when the final rules implementing the ADAAA are issued in 2010. See also note 6 and accompanying text.
6. The Federal Motor Carrier Safety Administration, an agency within DOT, enforces the regulations governing minimum physical requirements for commercial truck drivers and driver trainers. These regulations apply only to operators of vehicles weighing more than 10,000 pounds. See 29 C.F.R. §391.41 (2009).
7. The EEOC’s proposed regulations would deny coverage to individuals under this prong “where the impairment that is the basis for the covered entity’s action is both transitory (lasting or expected to last for six months or less) and minor.” 74 Fed. Reg. at 48443. The term “minor” is not defined.