

## Does Obesity Qualify as a Disability Under the ADA? - It Depends on Who You Ask (US)



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According to the most recent data from the [Center for Disease Control](#), more than one-third of American adults are obese. A person is considered obese when their weight is higher than what is considered as a healthy weight for a given height. With obesity impacting such a large portion of the American public, employers are left with many questions regarding their responsibilities to obese applicants and employees. The answers to these questions depend on a number of factors, including the reasons underlying the obesity and the jurisdiction in which the employer does business.

As we all know, the Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against “qualified individuals” with disabilities, and defines such individuals as applicants or employees who, with or without reasonable accommodation, can perform the essential functions of the job. In 2008, Congress amended the ADA, providing for a broader interpretation of the definition of disability under the statute. Further, the amendment added a “regarded as” disabled component of disability discrimination, meaning that applicants and employees who cannot prove that they have an actual disability within the meaning of the ADA may still be successful if they can show that their employer regarded them as having such a disability. This more expansive interpretation of disability provides obese plaintiffs a greater opportunity for success in disability

discrimination claims; however, jurisdictions differ on the extent to which obesity is considered a disability under the ADA, as amended.

## **EEOC Guidance**

The U.S. Equal Employment Opportunity Commission (“EEOC”) takes the position that obesity constitutes an impairment under the ADA under some, but not all, circumstances. According to the EEOC’s interpretative guidance:

*The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within “normal” range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments [ . . . ] The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.*

Obesity is typically assessed using Body Mass Index (“BMI”). A BMI of 18.5-25.0 is considered “normal,” and a BMI of 30.0 or higher is considered “obese.” Individuals with a BMI of 40.0 or higher are usually categorized as “extremely” or “severely” obese. The American Medical Association recognizes obesity as a disease. Unfortunately, the EEOC has not yet defined what it means to be in a “normal” weight range.

## **Courts Weigh In**

Many courts have confronted this issue, with most applying what they consider to be a “natural reading” of the EEOC’s interpretative guidance to conclude that physical characteristics, such as obesity, that are not the result of a physiological disorder are not considered disabilities under the ADA. Specifically, the Second, Sixth, and Eighth Circuits have held that even weight outside the normal range – no matter how far outside that range – must be the result of an underlying physiological disorder to qualify as a disability under the ADA. However, the First Circuit has reached the opposite conclusion, holding, based on expert testimony presented at trial, that morbid obesity, independent of an underlying physiological disease or disorder, can be a physical impairment under the ADA, and taking the position that a jury should decide the issue.

In the Ninth Circuit, the status of obesity as a disability under the ADA remains an open question of law, although the court did analyze the issue in a recent case arising under Washington’s state anti-discrimination law. However, in that case, the court ultimately remanded the matter back to the state court, holding that, given the lack of precedent in the Circuit, the Washington state courts should interpret the issue under the state statute. Although not arising under the ADA, the EEOC filed a brief in the case, arguing that morbid obesity clearly falls outside the “normal range” of weight, and that if the obesity substantially limits a major life activity, it should be considered a disability under the ADA, regardless of whether there is an underlying physiological condition. Notably, the EEOC’s stance here runs contrary to the Second, Sixth, and Eighth Circuits “natural reading” of the EEOC’s

interpretative guidance. The Fifth Circuit has not directly ruled on this issue, but the U.S. District Court for the Eastern District of Louisiana, a district within that Circuit, has held that severe obesity can be a disability under the ADA, even without evidence of an underlying condition.

The Seventh Circuit is currently considering this issue in a case involving a nearly 600-pound bus driver who claims his employer regarded him as disabled and terminated his employment because of his severe obesity. Oral argument in the case is scheduled for May 14, 2019. In a similar case before the Appellate Division of the Superior Court of New Jersey, a three-judge panel recently held that a bus driver who weighs more than 500 pounds could not bring an action claiming that he was subjected to a hostile work environment because of his obesity under the state's Law Against Discrimination ("LAD"). Notably, the LAD has a broader definition of "disability" than the ADA (although the laws have similar definitions of terms such as "regarded as" or "perceived" disability). Despite the New Jersey law's broader definition of disability, the court there held that obesity does not qualify as a disability under the LAD and found that the employer never treated the obese employee differently because of his weight.

As the discussion above reveals, whether obesity qualifies as a disability under the ADA is largely dependent on jurisdictional and situational factors, but most jurisdictions that have considered the issue have held that obesity alone, without an underlying physiological disorder, does not constitute a protected physical impairment. Even still, employers should tread carefully when making employment decisions that could implicate these issues, and should consult with counsel to ensure they are acting in accordance with the law in their jurisdiction.

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