

WEIGHT DISCRIMINATION AT WORK: IS IT LEGAL?

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OVERVIEW OF TOPICS

- What is weight discrimination at work?
- How does weight discrimination negatively impact employers?
- Federal law: does it address it?
- State laws: which states address it
- City laws
- What if weight is a job requirement
- If no applicable law, can an employer safely discriminate based on weight?

WHAT IS WEIGHT DISCRIMINATION?

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A STUDY PUBLISHED IN 2016 ULTIMATELY CONCLUDED

- Obese candidates were rated as less suitable than candidates who were normal weight
- Both obese men and women were discriminated against based on their weight during the hiring process, although obese women were rated as less suitable over obese men
- The discrimination occurred irrespective of the physical demand of the job

Source: 2016 Study: Obesity Discrimination in the Recruitment Process: “You’re Not Hired!”
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4853419/>

HOW ARE OVERWEIGHT EMPLOYEES TREATED DIFFERENTLY AT WORK?

- In a study of over 2,000 obese women:
 - 25% reported that they experienced job discrimination because of their weight
 - 54% reported that they experienced weight stigma from co-workers and colleagues
 - 43% reported that they experienced weight stigma from their employers or supervisors

HOW ARE OVERWEIGHT EMPLOYEES TREATED DIFFERENTLY AT WORK?

- What types of weight stigma did participants in the study identify?
 - Targeted for derogatory humor and pejorative comments from co-workers and supervisors
 - Not being hired, denied promotions, or fired due to weight
 - Lower compensation

THE IMPACT OF WEIGHT ON AN EMPLOYEE'S COMPENSATION

- Studies conducted by the National Longitudinal Survey of Youth concluded that an employees weight had a direct impact on their compensation:
 - Obese men earned between .7- 3.4% less than non-obese men
 - Obese women earned 2.3-6.1% less than non-obese women
 - For a white female, a gain of 64 pounds above average weight was associated with a 9% decrease in wages (the equivalent of one and a half years of education or three years of work experience)

HOW DOES WEIGHT
DISCRIMINATION
NEGATIVELY IMPACT
EMPLOYERS?

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HOW CAN THIS PERCEIVED OR ACTUAL DISCRIMINATION NEGATIVELY IMPACT EMPLOYERS?

- Negatively impact employee morale
- Increase turnover
- Increase liability

HOW CAN THIS PERCEIVED OR ACTUAL DISCRIMINATION NEGATIVELY IMPACT EMPLOYERS?

- A study from the National Survey of Midlife Development found that in wrongful termination lawsuits filed by obese employees, a significant number of former employees reported that they believed their weight was **the deciding factor for job termination**

FEDERAL LAW: WEIGHT DISCRIMINATION

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AMERICANS WITH DISABILITIES ACT (ADA)

- A critical question in evaluating whether an individual's weight is protected under the ADA considers (1) how the individuals' weight compares to normal ranges and (2) whether the weight is due to physiological causes (such as cardiovascular or respiratory ailment)

AMERICANS WITH DISABILITIES ACT (ADA)

- There are no express federal statutes which address weight or obesity discrimination. Weight discrimination cases brought at the federal level are typically brought under the ADA
- There is a split between the courts where an obese plaintiff claims weight discrimination on whether an individual needs to show that the obesity is caused by a physiological disorder or that the obesity limits their major life activities

AMERICANS WITH DISABILITIES ACT (ADA)

- Under EEOC Guidelines to ADA, “severe obesity qualifies as a disability ... and ... there is no requirement to prove an underlying physiological basis”
- “Severe obesity” is defined as body weight more than 100% above the norm
- EEOC Compliance Manual § 902.2(c)(5)(ii); see [*EEOC v. Resources for Human Develop., Inc. \(ED LA 2011\) 827 F.Supp.2d 688, 695*](#)

AMERICANS WITH DISABILITIES ACT (ADA)

- In a federal court case out of Louisiana, the plaintiff was hired to work at a long-term residential drug treatment facility. At the time she was hired, she weighed over 400 pounds. At the time of her termination, she weighed 527 pounds. The plaintiff filed charges with the EEOC and the EEOC filed a lawsuit on her behalf. The plaintiff died two years after filing her EEOC charge. Her death certificate listed hypertension, diabetes, and congestive heart failure as “significant conditions contributing to death.”
- [*EEOC v. Resources for Human Develop., Inc. \(ED LA 2011\) 827 F.Supp.2d 688, 695*](#)

AMERICANS WITH DISABILITIES ACT (ADA)

- The Court held that because the plaintiff was severely obese, her weight constituted a disability. Because the employer in this case failed to present evidence of her job duties and her inability to do those jobs, the court denied the employer's motion summary judgment (a motion to dismiss the case).
- [*EEOC v. Resources for Human Develop., Inc. \(ED LA 2011\) 827 F.Supp.2d 688, 695*](#)

STATE LAW WEIGHT
DISCRIMINATION:
WHICH STATES ADDRESS IT
AND HOW

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MICHIGAN'S STATE LAW

- Currently, Michigan is the only state which explicitly prohibits employment discrimination based on weight
- The Michigan Civil Rights Commission (MCRC) prohibits discrimination based on religion, race, color, national origin, arrest record, genetic information, sex, age, height, weight, marital status and disability

RECENT COURT RULING IN WASHINGTON STATE

- *Taylor v. Burlington Northern Railroad Holdings, Inc.* 193 Wash.2d 611 (2019)
- Taylor received a conditional offer of employment in 2007 to work as an electrical technician. During his physical exam he was found to meet the minimum physical requirements of the essential functions of the position. He was 5'7" and weighed 250 pounds with a BMI of 41.3. The medical officer at the facility informed Taylor that he was unable to determine if he was qualified to do the job due to "significant health and safety risks associated with extreme obesity."

RECENT COURT RULING IN WASHINGTON STATE

- The employer informed Taylor “it was company policy to not hire anyone who had a BMI of over 35 and that if he could not afford [testing to prove his qualification] his only option was to lose 10% of his weight and keep it off for six months.”



RECENT COURT RULING IN WASHINGTON STATE

- Taylor sued the employer. In July 2019, the Washington Supreme Court issued an opinion on whether “obesity” fell under a covered disability in the state of Washington.



RECENT COURT RULING IN WASHINGTON STATE

- “The evidence presented to us shows that obesity is always an impairment under the WLAD because it is a ‘physiological disorder, or condition ... affecting one or more of the [listed] body systems.’ See RCW 49.60.040(7)(c)(i). BNSF argues that we should follow the rulings of some federal courts interpreting the ADA and hold that obesity can be a disability only if it is caused by a separate, underlying physiological disorder. We decline to do so. The WLAD is broader than the ADA and offers its own independent protections to Washingtonians.”

RECENT COURT RULING IN WASHINGTON STATE

- “Because obesity qualifies as an impairment under the plain language of our statute, it is illegal for employers in Washington to refuse to hire qualified potential employees because the employer perceives them to be obese”



CALIFORNIA LAW

- Obesity alone is not a protected category under California law. Like federal law, obesity is protected if the employee has a physiological cause.

CITY LAW: WEIGHT DISCRIMINATION

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CITY LAW

- In addition to evaluating weight discrimination claims under federal laws and state laws, employers must also evaluate whether any local city laws or ordinances apply
- Several cities in the country have passed weight discrimination laws

SAN FRANCISCO POLICE CODE

SEC. 3303. EMPLOYMENT.

(a) **Prohibited Activity.** It shall be unlawful for any person to do any of the following acts wholly or partially because of an employee's, independent contractor's or an applicant for employment's actual or perceived race, color, ancestry, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, weight or height:

(1) By an employer: To fail or refuse to hire, or to discharge any individual; to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his/her status as an employee;

SAN FRANCISCO POLICE CODE

- The San Francisco Code applies to:
 - Employers
 - Employment Agencies
 - Labor Organizations
 - Independent Contractors

SAN FRANCISCO POLICE CODE

- It also restricts the following:

(ii) To print, publish, advertise or disseminate in any way, or cause to be printed, published, advertised or disseminated in any way, any notice or advertisement with respect to employment, membership in, or any classification or referral for employment or training by any such organization, which indicates an unlawful discriminatory preference.

BINGHAMTON, NY: HUMAN RIGHTS LAW

- The local law defines discrimination as follows:
 - “[A]ny act, policy, advertisement or practice which, regardless of intent, has the effect of subjecting any person to differential treatment in and as a result of that person's actual or perceived age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, sexual orientation, gender identity or expression, **weight** or height. Discrimination also includes any differential treatment because of one's association with a person or group of people identified herein.

WHAT IF THE JOB REQUIRES
SOMEONE SMALLER OR
THINNER?

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JOB REQUIREMENTS

- What if an employer is subject to weight discrimination laws but the job requirements prevent someone from being hired due to their weight?
 - Can Hooters operate in San Francisco? In Michigan?



JOB REQUIREMENTS

- Hooters Website (updated in the last several years)
 - “The element of female sex appeal is prevalent in the restaurants... The Hooters system employs over 25,000 people – over 17,000 of which are Hooters Girls. The "nearly world famous" Hooters Girls are the cornerstone of the Hooters concept... Hooters hires **women who best fit the image of a Hooters Girl**... The chain hires both males and females to work in management and host, staff, service bar, and kitchen positions. The Hooters Girl uniform consists of orange shorts and a white tank top. Pantyhose and bras are required.”

JOB REQUIREMENTS

- How does Hooters get away with discriminating based on weight?
 - Hooters takes the position that they can discriminate based on weight as the employee's appearance is a Bona Fide Occupational Qualification (BFOQ)

MICHIGAN STATE LAW: EXCEPTION

- 37.2208 Application for exemption; bona fide occupational qualification
- A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is **a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise**. Upon sufficient showing, the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

SAN FRANCISCO POLICE CODE: WHEN WEIGHT IS A BFOQ

- The City law specifically states that it does not prohibit the rejection of an employee based on a bona fide occupational qualification
- **However, when that defense is pled, the employer must show (1) the discrimination was due to a BFOQ and (2) there exists no less discriminatory means of satisfying the occupational qualification**

BINGHAMTON, NY: WHEN WEIGHT IS A BFOQ

- “Nothing contained in this Local Law shall be deemed to prohibit selection or rejection based solely upon a bona fide occupational qualification, or a bona fide physical requirement”

CLAIMING WEIGHT IS A BFOQ CAN STILL EXPOSE YOU TO LAWSUITS

- In Michigan, a Hooters waitress was put on probation after she was told that her 5'8", 132 pound figure no longer met the appearance standards for the restaurant. Hooters relied on the BFOQ defenses. The uniforms made available to her were xx-small, x-small, and small, none of which fit her. Her supervisors told her they understood if she wanted to quit.
- Hooters eventually settled the case in a confidential settlement

NO WEIGHT DISCRIMINATION
LAWS APPLY:
CLEAR TO DISCRIMINATE?

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WHEN NO WEIGHT DISCRIMINATION LAWS APPLY

- Even when no weight discrimination laws apply to your jurisdiction, an employer should use caution before discriminating based on weight

WHEN NO WEIGHT DISCRIMINATION LAWS APPLY

- Courts have found that even where no “weight discrimination” law applied, having weight restrictions could be evidence of gender discrimination
- *Watson v. Fort Worth Bank and Trust (1988) 487 U.S. 977*

WHEN NO WEIGHT DISCRIMINATION LAWS APPLY

- Maximum weight and physical fitness requirements upheld as BFOQs for paramedics because statistical studies showed obesity decreased a paramedics strength and agility
- *Hegwer v. Board of Civil Services Comm'rs of City of Los Angeles* (1992) 5 Cal.App.4th 1011, 1025

WHEN NO WEIGHT DISCRIMINATION LAWS APPLY

- Airline policy imposing stricter weight limits on women flight attendants than male attendants was not a BFOQ because their duties were the same
- *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 853-854

QUESTIONS?



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THANK YOU

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