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# Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act

Karen M. Kramer

Arlene B. Mayerson

# OBESITY DISCRIMINATION IN THE WORKPLACE: PROTECTION THROUGH A PERCEIVED DISABILITY CLAIM UNDER THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

KAREN M. KRAMER* AND ARLENE B. MAYERSON**

While employment discrimination against fat[1] people is well documented by social science,[2] the question whether the Rehabilitation Act of 1973[3] and the Americans with Disabilities Act (ADA)[4] offer protection against this type of discrimination has rarely been addressed. The 1993 decision *Cook v. Rhode Island, Dept. of Mental Health, Retardation and Hospitals*[5] marked the first time that a federal appellate court squarely confronted the issue.[6] *Cook* involved a "perceived disability claim,"[7] which derives from the third prong of the definition of disability under the Rehabilitation Act and the Americans with Disabilities Act.[8] The First Circuit answered the question

* Stanford Law School, J.D. Candidate, 1995 and participant in clinical work at the Disability Rights, Education, and Defense Fund during 1994. Linda Krieger, Acting Professor at Stanford Law School and former attorney at the Employment Law Center in San Francisco, deserves thanks for her valuable comments and insight given to this article.

** Directing Attorney of Disability Rights Education and Defense Fund (DREDF). One of the nation's leading experts on disability rights laws, Ms. Mayerson has been a key advisor to both Congress and the disability community on the major disability rights legislation of the past decade, including the Americans With Disabilities Act. Ms. Mayerson has devoted her career exclusively to disability rights practice, and she has written numerous disability rights briefs to the United States Supreme Court, either as counsel or amicus. Ms. Mayerson teaches disability rights law at Boalt Hall and Stanford Law Schools.

1. The National Association to Aid Fat Americans (NAAFA) promotes the descriptive term "fat." This paper frequently uses the term obese, which is defined in note 9 *infra*. For better and for worse, "obesity" provides a less ambiguous reference, which proves useful in maintaining clarity for the purposes of legal discussion. One of the most famous advocates for fat people, Natalie Allon, herself used the term "obesity," along with "fatness," in her writings. *See, e.g.*, Natalie Allon, *The Stigma of Overweight in Everyday Life, in* PSYCHOLOGICAL ASPECTS OF OBESITY 130 (Benjamin B. Wolman ed., 1982).

2. *See infra* notes 171-82 & 195-202.

3. 29 U.S.C. § 701 et seq. (1985 & 1994 Supp.).

4. 42 U.S.C. § 12101 et seq. (1994 Supp.).

5. 10 F.3d 17 (1st Cir. 1993).

6. *See* Brief of the Equal Opportunity Commission As *Amicus Curiae* at 1, Cook v. Rhode Island, Dept. of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093) [hereinafter "EEOC br."] ("The issue in this case—whether, and under what conditions, obesity is covered by the Rehabilitation Act—has never, to our knowledge been addressed by a federal appellate court. Since the definition of 'disability' under the Rehabilitation Act is identical to that under the ADA, the decision in this case will affect the Commissions' enforcement of both the ADA and . . . the Rehabilitation Act.").

7. *Cook*, 10 F.3d at 22. *See also infra* text accompanying note 15.

8. *See infra* notes 17-20 and accompanying text.

affirmatively, finding that the plaintiff's condition of obesity[9] met this part of the definition of disability under the Rehabilitation Act.

Although some state courts have addressed whether state disability laws protect against obesity discrimination, the results have varied[10] and, in any event, are not binding on interpretations of federal law. Few of the state cases have directly addressed analogs to the perceived disability claim under federal law.[11] One state court case, *Cassista v. Community Foods*,

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9. As used by the medical and scientific community, and often referred to in law review articles and cases, "obesity" means weight 20% greater than the ideal as determined by actuarial tables; "serious" or "gross obesity" means 30-35% over this ideal. Weighing twice the ideal indicated in these tables classifies as "morbid obesity." *See, e.g.*, Jane Osborne Baker, *The Rehabilitation Act of 1973: Protection For Victims of Weight Discrimination?* 29 UCLA L. Rev. 947, 948-49 (1982) (citing *Diet Related to Killer Diseases II: Hearings Before the Senate Select Comm. on Nutrition and Human Needs*, 95th Cong., 1st Sess. 1 (1977)). Many commentators criticize the actuarial tables as a problematic manner for determining an "ideal" weight. *See, e.g.*, Esther D. Rothblum, *Women and Weight: Fad and Fiction*, 124 J. PSYCHOL. 5, 7-8 (1990).

10. In sum, New York and New Jersey Courts have ruled that obesity falls within the meaning of the term disability for the purposes of protection under state human rights laws, and Michigan's law explicitly prohibits discrimination on the basis of weight. *See* State Division of Human Rights *ex rel.* McDermott v. Xerox Corp., 478 N.Y.S.2d 982 (1984) *aff'd* 491 N.Y.S.2d 106 (N.Y. 1985) ("gross obesity" is in itself a physical and medical impairment within the meaning of New York's human rights law); Gimello v. Agency Rent-A-Car Systems, Inc., 594 A.2d 264 (N.J. Super. Ct. 1991) (plaintiff's obesity constituted a "real medical" condition qualifying for protection); MICH. COMP. LAWS § 37.2202(a) (1992).

Courts declining to extend coverage of obesity under state law include: Greene v. Union P. R. Co., 548 F. Supp. 3 (W.D. Wash. 1981) (morbid obesity not protected because it is not an immutable condition); Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co., 699 S.W. 2d 75 (Mo. Ct. App. 1985) (plaintiff's obesity plus high blood pressure not covered); Philadelphia Electric Co. v. Commonwealth, Pennsylvania Human Relations Com., 448 A.2d 701, 707 (Pa. 1982) (morbid obesity alone not a disability); Civil Service Comm'n v. Pennsylvania Human Relations Comm'n, 591 A.2d 281 (Pa. 1991) (plaintiff's evidence insufficient to establish obesity as a perceived disability).

11. For example, in two often cited state decisions declining to extend coverage of obesity, the perceived disability prong had not been adopted by the state legislature at the time the incident or legal proceedings began; consequently, the appellate courts declined to consider the viability of a perceived disability claim. Philadelphia Electric Co. v. Commonwealth, Pennsylvania Human Relations Com., 448 A.2d 701, 708 (Pa. 1982); Missouri Comm'n on Human Rights v. Southwester Bell Tel. Co., 699 S.W.2d 75, 77 (Mo. Ct. App. 1985). While finding obesity protectable, the New Jersey Court of Appeals determined that plaintiff's obesity qualified as "a real medical or pathological condition," so that the perceived disability claim was not "critical to our decision." Gimello v. Agency Rent-a-Car Systems, Inc., 594 A.2d 264, 278 (N.J. Super. Ct. 1991).

Apart from *Cassista II,* discussed *infra* text accompanying notes 1111-46, only one other state case has addressed the coverage of obesity under a state law version of the perceived disability claim. *See* Civil Service Commission v. Pennsylvania Human Relations Commission, 591 A.2d 281 (Pa. 1991) (holding that the plaintiff failed to establish that his obesity constituted a perceived disability claim under state law). Although the Pennsylvania court paid lipservice to the issue of the perceived disability claim in *Civil Service Commission*, the analysis failed to treat the requirements of a perceived disability claim as distinct from an actual disability claim. *See* 591 A.2d 281, 283-84 (dismissing the claim because of evidence that plaintiff's obesity is not, in fact, a disabling condition); *see generally* Robin Chodak, *Recent Decisions: Pennsylvania Excludes Obesity from Protection under the Pennsylvania Human Rights Act*-Civil Service Commission v. Pennsylvania Commission, *591 A.2d 81 (Pa. 1991)*, 65 TEMPLE L. REV. (1992) (criticizing the Pennsylvania Court for applying the perceived disability analysis more narrowly to an obesity case than in precedent applying the perceived disability claim to other conditions).

("*Cassista II*")[12] is notable both because it addressed a perceived disability claim, and it was decided just prior to the First Circuit's decision in *Cook;* the California Supreme Court based its opposite holding largely on its interpretation of the federal laws, which it treated as guiding.[13]

This article examines the recent holdings in *Cook* and *Cassista II* for discussion about the appropriateness of the coverage of obesity discrimination under federal disability legislation, focusing on the perceived disability claim. In both *Cassista II* and *Cook*, the plaintiffs did not consider themselves "disabled" or limited in their capacity to perform any of the job functions,[14] making the perceived disability claim under federal law especially relevant to their cases.[15] As the First Circuit in *Cook* noted, "few 'perceived disability' cases have been litigated and, consequently, decisional law involving the interplay of perceived disabilities and section 504 [of the Rehabilitation Act] is hen's-teeth rare."[16]

Part I of this article will outline in detail the provisions in the Rehabilitation Act and Americans with Disability Act establishing the parameters of a perceived disability claim. After providing this background, Part II will discuss the holdings in *Cook* and *Cassista II.* This section will highlight important aspects of the *Cook* precedent for claims of employment discrimination based on obesity and suggest that the court's treatment of the perceived disability claim was appropriate. In contrast, it will be argued, the holding in *Cassista II* added more stringent requirements to the perceived disability claim, to the extent that the opinion was based on interpretation of federal law. Finally, Part III will examine the body of literature and scientific data on the stigmatization of obesity in modern America, using this information to further show how prejudice toward obesity in many cases constitutes exactly the type of barrier to employment that the perceived disability claim was designed to combat.

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12. 856 P.2d 1143 (Cal. 1993).

13. *Id.* at 1149-50 (noting that the original California Code Provision on disability discrimination derives from the federal Rehabilitation Act of 1973, and the 1992 amendment to the state code is "modeled, in turn, on the ADA").

14. *See Cook*, 10 F.3d at 22 (plaintiff posited that she was "fully able" although the defendant regarded her as "physically impaired"); Cassista v. Community Foods, Inc., 10 Cal. Rptr. 2d 98, 105 (Ct. App. 1992) [hereinafter "*Cassista I*"] (plaintiff "vigorously denies being physically handicapped," and claims that defendant "*considered* her weight to be a handicap.") (emphasis added).

15. Under the perceived disability claim, plaintiffs need not insist that they are actually disabled, which is an important factor, given the reluctance of many people who are obese to define themselves as "physically disabled." *See* Allon, *supra* note 1, at 145.

16. *Cook*, 10 F.3d at 22.

## I. STATUTORY PROVISIONS AND INTERPRETIVE GUIDELINES: THE PARAMETERS OF A PERCEIVED DISABILITY CLAIM UNDER THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

### *A. The Three-Prong Definition of Disability*

A perceived disability claim derives from the third of the three-prong definition of disability set forth in the Rehabilitation Act and the Americans with Disabilities Act. As codified 29 U.S.C. § 706(8)(B), the Rehabilitation Act defines the term "individual with a disability"[17] to mean any person who "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 impairment, or iii) is regarded as having such an impairment."[18] The ADA uses the same definition in 42 U.S.C. §12102(2).[19] In fact, because Congress modeled the ADA after the Rehabilitation Act of 1973, the ADA not uses only the same definition of disability, but also adopts the same definition of the "regarded as" prong provided by the Rehabilitation Act regulations.[20]

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17. The amendment to the Rehabilitation Act appearing in the 1993 Supplement changed the previously used word "handicap" to "disability," the term used in the ADA. The ADA adopted the term "disability" to bring the law "in line with the sensibilities of most Americans with Disabilities" and advocates of people with disabilities. *See, e.g.*, SENATE COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989). Accordingly, this note will use the term disability, except when quoting older statutes and case law.

18. 29 U.S.C. § 706(8)(B) (1994 Supp.). The same definition was used in the 29 U.S.C. § 706(8)(B) (1988), except the word "handicap" was used instead of disability, as explained *supra* note 17.

19. 42 U.S.C. § 12102(2) (1994 Supp.).

20. *See, e.g.*, SENATE COMM. ON LABOR AND HUMAN RESOURCES, S. REP. NO. 116, 101st Cong., 1st Sess. 21 (1989) (stating that the definition of the term "disability" included in the ADA bill is comparable to the definition of the term "individual with handicaps" in the Rehabilitation Act, and the same analysis should apply); HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 29 (1990) (noting that the ADA uses the same "regarded as test" as the Rehabilitation Act guidelines); Overview of the Regulations, 56 Fed. Reg. 35726 (1991) (explaining that the format of the ADA guidelines reflect "congressional intent, as expressed in legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing Section 504 of the Rehabilitation Act of 1973, as amended.").

Notwithstanding the identical definitions of disability, one of the main differences between the Rehabilitation Act and the ADA is that the latter extended coverage to private entities that do not receive federal funds. *See* 42 U.S.C. § 12111(2) (1994 Supp.); 29 U.S.C. § 793 et seq. (1985 & 1994 Supp.).

### B. *Prong-Three Analysis: The Perceived Disability Claim*

#### 1. Three Types of Perceived Disability Claims

The regulations implementing the Rehabilitation Act set forth three methods of meeting the "regarded as" prong,[21] which is known as the "perceived disability claim," and the same test has been incorporated into the regulations implementing the ADA.[22] The "perceived disability claim" can be satisfied three different ways, by showing that an individual:

> 1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a [covered entity] as constituting such limitation; [or]
> 2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment; or
> 3) Has none of the impairments defined in [the paragraphs defining "physical or mental impairment"] but is treated by a [covered entity] as having [such an/a substantially limiting] impairment.[23]

The wording, except where marked by brackets, is exactly the same in the regulations implementing the ADA and the Rehabilitation Act, aside from insignificant variations in punctuation.

The term "physical or mental impairment" used above is also defined by regulations implementing both statutes. Under the ADA and the Rehabilitation Act, "physical and mental impairment" means:

> 1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic, and lymphatic, skin, and endocrine; or

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21. 45 C.F.R. § 84.3(j)(2)(iv) (1993) (Department of Health and Human Services regulations implementing the Rehabilitation Act); 34 C.F.R. § 104.3(j)(2)(iv) (1994) (Department of Education regulations implementing the Rehabilitation Act).

22. 29 C.F.R. § 1630.2(l) (1994).

23. The regulations implementing the Rehabilitation Act say "such an impairment." The ADA regulations changed this to "a substantially limiting impairment" in order to clarify that the third part of the perceived disability test "refers to any substantially limiting impairment, rather than just to one of the impairments described in §§ 1630.2(l)(1) or (2)." *See* Section-by-Section Analysis of Comments and Revisions, 56 Fed. Reg. 35728 (1991).

2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional, or mental illness, and specific learning disabilities.[24]

The Rehabilitation Act regulations also clarify that these provisions "clearly comprehend" the inclusion of "any condition which is mental or physical but whose precise nature is not . . . known."[25] Under the third method of satisfying the perceived disability claim, an individual need not have an *actual* physical or mental impairment. Consequently, the issue whether a person's obesity qualifies as a cognizable impairment is not essential to one type of perceived disability claim, in contrast to prong-one analysis of disability, which in all cases requires that the plaintiff has *a physical or mental impairment* which substantially limits major life activities.

The interpretive guidelines to the Rehabilitation Act and the ADA make clear that the perceived disability claim was meant to open up an alternative to claims based on the first two prongs. The ADA regulations offer more elaborate commentary than the Rehabilitation Act regulations, but the latter will first be noted. While the ADA and Rehabilitation Act regulations are consistent, the ADA sought to be more comprehensive in order to be easily understood.[26]

The Rehabilitation Act guidelines comment that the perceived disability claim includes three types of claims beyond those that would satisfy the first two prongs of the definition of disability in § 706(8)(B). First, the perceived disability claim includes many persons who are ordinarily considered to be disabled, but who "do not technically fall within the first two parts of the statutory definition."[27] The example given for this is a person with a limp.[28] Second, the statute includes persons who might not ordinarily be considered disabled, such as a persons with disfiguring scars.[29] Third the perceived disability claim covers persons who "have *no* physical or mental

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24. *See* 29 C.F.R. § 1630.2(h)(1)-(h)(2) (1994) (ADA regulations); 34 C.F.R. § 104.3 (j)(2)(i)(A)-(j)(2)(i)(B) (1994) (Rehabilitation Act Regulations); 45 C.F.R. § 84.3(j)(2)(i)(A)-(j)(2)(i)(B) (1993) (Rehabilitation Act Regulations).

25. 34 C.F.R. pt. 104, app. A, at 373 (1994) (clarifying 34 C.F.R. § 104.3(j)); 45 C.F.R. pt. 84, app. A., at 370 (1993) (clarifying 45 C.F.R. § 84.3(j)). The guidelines note that a third clause once stated this explicitly, but it was removed because it was considered duplicative.

26. *See* Overview of the Regulations, 56 Fed. Reg. 35726 (1991). Consequently, while adopting the same definitions as the Rehabilitation Act, the ADA also defined some terms previously not defined, such as "substantially limits" and "reasonable accommodation." *Id.*

27. 45 C.F.R. pt. 84, app. A, at 371 (1993) (clarifying 45 C.F.R. § 84.3(j)); 34 C.F.R. pt. 104, app. A, at 373 (1994) (clarifying 34 C.F.R. § 104.3(j)).

28. 45 C.F.R. pt. 84, app. A, at 371 (1993) (clarifying 45 C.F.R. § 84.3(j)); 34 C.F.R. pt. 104, app. A, at 373 (1994) (clarifying 34 C.F.R. § 104.3(j)).

29. 45 C.F.R. pt. 84, app. A, at 371 (1993) (clarifying 45 C.F.R. § 84.3(j)); 34 C.F.R. pt. 104, app. A, at 373 (1994) (clarifying 34 C.F.R. § 104.3(j)).

impairment" but are "treated" by the employer "as if" they were disabled;[30] the Rehabilitation Act guidelines give no example for this point.

The EEOC's interpretative guidelines to the ADA provide these and additional examples that would qualify under the three types of perceived disability claims. Under the first type, the regulations give the example of an employee with controlled high blood pressure; if an employer reassigns the employee to less strenuous work out of unsubstantiated fears that the person will suffer a heart attack, the reassignment would meet the definition of the first type of perceived disability claim.[31] For the second type, an individual who has an impairment that is only substantially limiting because of the attitude of others toward it, the regulations give the examples of a facial scar, disfigurement, or involuntary jerk.[32] For the third definition of the perceived disability claim, the regulations give the example of an employer who erroneously believes that an employee is infected with the HIV virus.[33]

The legislative history of the ADA repeatedly provides two further examples of perceived impairments covered under the "regarded as" prong: burn victims[34] and people who, while lacking symptoms of impairment, show abnormal x-rays.[35] The ADA guidelines cite burn victims as an example of protected conditions under the "regarded as" prong in Title III of the ADA;[36] since the same definition of disability applies to Title III and Title I, no reason exists why burn victims would not also be recognized in the context of employment.

As these guidelines make evident, an individual need not possess an actual physical or mental impairment to seek coverage under the law. The "regarded as" prong turns significantly on the employer's perception.[37] Furthermore, the Rehabilitation Act, as interpreted by the regulations promulgated by the Departments of Health and Human Services and Education, specifically rejected a limitation of the law's application to " 'tradi-

30. 45 C.F.R. pt. 84, app. A, at 371 (1993) (clarifying 45 C.F.R. § 84.3(j)) (emphasis added); 34 C.F.R. pt. 104, app. A, at 373 (1994) (clarifying 34 C.F.R. § 104.3(j)) (emphasis added).

31. 29 C.F.R. pt. 1630, app. A, at 398 (1994) (clarifying 29 C.F.R.§ 1630.2(l)).

32. *Id.*

33. *Id.*

34. *See, e.g.*, S. REP. NO. 116, 101st. Cong., 1st Sess. 24 (1989); H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 53 (1990); H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 30 (1990).

35. *See, e.g.*, S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989) (citing Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989)); H.R. REP. NO. 485 (II), 101st Cong., 2d Sess. 54 (1990) (same).

36. 28 C.F.R. pt. 36.104 app. B, at 583 (1993) (clarifying 28 C.F.R. § 36.104) ("These persons would be covered under this test [the "regarded as" prong] based on attitudes of others towards the impairment, even if they did not view themselves as 'impaired'."). Title III addresses Public Accommodations and Services Operated by Private Entities, while Title I governs employment.

37. *See* HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 485 (III), 101st Cong., 2 Sess. 30 (1990) ("The perception of the covered entity is a key element to this test").

tional' handicaps."[38] Suggestion by some commentators that the Rehabilitation Act does not protect obesity because it covers only those persons who are "severely handicapped" and in "need of rehabilitation," is plainly ill-founded.[39]

### 2. The Rationale: *Arline* and the Protection Against "Myths, Fears, and Stereotypes"

As the EEOC's interpretive guidelines to the ADA discuss,[40] the Supreme Court decision, *School Board of Nassau County v. Arline*,[41] articulates the rationale for the perceived disability claim. Initially, *Arline* raised the question whether a person with a contagious disease qualified as an individual with a disability under the Rehabilitation Act. The Court held that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as result of the negative reactions of others to the impairment."[42] The Court further ruled that by establishing the perceived disability claim, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[43]

The EEOC's interpretive guidance to the ADA recites these *Arline* holdings and restates that "an individual rejected from a job because of the 'myths, fears, and stereotypes' associated with disabilities would be covered" under the "regarded as" provision.[44] The interpretive guide makes explicit that such coverage exists "whether or not" an individual's "mental or physical impairment would be considered a disability under the first or second part of the definition of disability."[45]

The EEOC guidelines then note "common attitudinal barriers" identified by sociologists that frequently result in exclusion by employers of persons with disabilities; these include "concerns regarding productivity, safety,

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38. 45 C.F.R. pt. 84, app. A, at 370 (1993) (clarifying 45 C.F.R. § 84.3(j)) (the Department believes it has "no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps"); 34 C.F.R., pt. 104, app. A, at 372 (1994) (clarifying 34 C.F.R. § 104.3(j)) (same).

39. *See* Bruce I. Shapiro *The Heavy Burden of Establishing Weight as a Handicap Under Anti-Discrimination Statutes*, 18 W. ST. L. REV. 565, 569 (1991); Donald L. Bierman, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?* 30 SANTA CLARA L. REV. 951, 968 (1990).

40. *See* 29 C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. § 1630.2(l)).

41. 480 U.S. 273 (1987).

42. *Id.* at 283.

43. *Id.* at 284 (citation omitted).

44. 29 C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. § 1630.2(l)).

45. *Id.*

insurance, liability, attendance . . . [and] workers compensation costs."[46] The guidelines conclude:

> [I]f an individual can show that a [covered entity] made an employment decision because of a perception of disability based on "myth, fear, or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear, or stereotype" may arise.[47]

Through this decree, the guidelines explicitly command an examination of whether societal prejudices associated with disability has impermissibly played a role in an employer's decision.

### *C. The "Substantially Limited" in a "Major Life Activity" Provision*

The "substantially limits" provision, although it requires explanation here, would more likely pose difficulty for a claim of obesity discrimination under the prong-one definition of disability than under the "regarded as" prong. As the legislative history emphasizes, the perceived disability claim is "particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity."[48] It suffices to show that the employer has treated the plaintiff's obesity as if it were an impairment substantially limiting a major life activity.

The regulations for the Rehabilitation Act define "major life activity" to include walking, breathing, performing manual tasks, and working,[49] a definition that has been incorporated into the ADA regulations.[50] The ADA regulations for the first time defined "substantially limits,"[51] although the term is still not currently defined in the regulations implementing the Rehabilitation Act.[52]

The ADA regulations describe "substantially limiting" as an impairment that renders an individual "[u]nable to perform a major life activity . . ." or,

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46. The guidelines also specifically noted the cost of accommodation and accessibility as impermissible attitudinal barriers. Because this article focuses on perceived disability claims, where the plaintiff has indicated no need for accommodation or improved access, those factors are less relevant to the current discussion. However, those factors might be relevant to the situation where an obese plaintiff has proceeded under a prong one claim.

47. 29 C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. § 1630.2(l)).

48. S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989).

49. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1993); 34 C.F.R. § 104.3(j)(2)(ii) (1994).

50. 29 C.F.R. § 1630.2(i) (1994).

51. 29 C.F.R. § 1630.2(j) (1994).

52. *See* 45 C.F.R. pt. 84, app. A, at 370 (1993) (clarifying 45 C.F.R. § 84.3(j)) (Department does not believe that the definition of "substantially limits" is possible at this time); 34 C.F.R. pt. 104, app. A, at 372 (1994) (clarifying 34 C.F.R. § 104.3(j)) (same).

alternatively, that "[s]ignificantly restrict[s] . . . the condition, manner, or duration under which an individual can perform a particular major life activity as compared to . . . the average person in . . . general. . . ."[53] The regulations note that "temporary, non-chronic impairments of short duration, with little or no long-term impact" such as broken limbs, sprained joints, concussions, appendicitis, and influenza are usually not disabilities.[54] The guidelines then say, "Similarly, except in rare circumstances, obesity is not considered a disabling impairment."[55] The EEOC clarified in an amicus brief in *Cook v. Rhode Island* that this notation poses no absolute bar against coverage of obesity discrimination under the ADA, especially not for "morbid obesity," which is a '"rare, chronic condition."[56] Regardless of whether obesity is actually substantially limiting, the perceived disability claim mandates inquiry into whether the employer has treated a person as if his or her obesity is a substantially limiting impairment.

An employer who refuses to hire a person because of obesity may be deemed to have treated that individual as substantially limited in the major life activity of working because of a perceived impairment.[57] While the Rehabilitation Act guidelines remain silent on further explanation, the ADA guidelines comment that only when an individual is not substantially limited with respect to any other major life activity, should the individual's ability to perform the major life activity of "working" be considered.[58] Showing that an employer considered the individual substantially limited in the major life activity of working because of an actual or assumed impairment would appear to satisfy the first and third types of perceived disability claims. Additionally, as the *Arline* decision noted, an individual might be "sub-

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53. 29 C.F.R. § 1630.2(j)(1) (1994). According to the EEOC regulations, the factors that courts should consider are: 1) nature and severity of the impairment, 2) the duration or expected duration of the impairment, and 3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. 29 C.F.R. § 1630.2(j)(2) (1994).

54. 29 C.F.R. pt. 1630, app. A, at 396 (1994) (clarifying 29 C.F.R. § 1630.2(j)).

55. *Id.*

56. *See* EEOC br., *supra* note 6, at 13, 11 n.4.

57. The ADA regulations alone currently define factors that may be used in making the determination whether an individual is substantially limited in working. These factors include:

> 1) The geographical area to which the individual has reasonable access;
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> 2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> 3) The job for which the individual has been disqualified because of the impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(3) (1994).

58. 29 C.F.R. pt. 1630, app., at 397 (1994) (clarifying 29 C.F.R. § 1630.2(j)).

stantially limit[ed]" in his or her "ability to work as result of the negative reactions of others to the impairment,"[59] which seems to correlate with the second type of perceived disability claim.

The interpretive guidelines to the ADA demarcates two boundaries for determining when rejection or dismissal from a job in a particular instance satisfies showing substantial limitation in the major life activity of "working":

> [on the other hand] [A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or he is unable to perform a specialized job or profession requiring extraordinary skill, prowess, or talent. . . .
>
> On the other hand. . . . [a]n individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs.[60]

The ADA guidelines further clarify that § 1630.2(j) is "not intended to require an onerous evidentiary showing" by the plaintiff.[61]

### *D. Specifically Excluded Claims of a "Perceived Disability"*

While the "regarded as" prong affords coverage to a potentially broad scope of disability claims under the Rehabilitation Act and the ADA, the statutes and the interpretive guides do set forth some specific exclusions. The following characteristics cannot be treated as a "disability," and therefore cannot be covered under a perceived disability claim: transvestitism; transsexualism; pedophilia, exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling; kleptomania; pyromania; psychoactive substance use disorders resulting from current or illegal use of drugs; and homosexuality and bisexuality.[62]

The ADA guidelines add that environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments.[63] While obesity certainly has dimensions of a cultural impairment—as does societal prejudice against all disabilities—obesity is also a physical condition that may affect, or be presumed to affect, the bodily systems.

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59. *Arline,* 480 U.S. at 283.

60. 29 C.F.R. pt. 1630, app., at 397 (1994) (clarifying C.F.R. § 1630.2(j)).

61. *Id.*

62. 42 U.S.C. § 12211(a)-12211(b) (1990) (ADA statutory provision); 29 U.S.C. § 706(7)(E)-(7)(F)(1993 Supp.) (Rehabilitation Act statutory provision).

63. 29 C.F.R. pt. 1630, app., at 396 (1994) (clarifying 29 C.F.R. § 1630.2(j)).

Other than these enumerated exclusions and limitations, the ADA and the Rehabilitation Act leave open a variety of perceived disability claims. The interpretive guidelines to both acts make clear that the regulations avoided setting forth a specific list of diseases and conditions that could qualify as covered impairments, because of the "difficulty in ensuring comprehensiveness of any such list."[64] Consequently, it cannot be argued that the laws preclude coverage of obesity simply because the guidelines fail to enumerate it as a cognizable impairment. Moreover, in a number of respects the regulations explicitly invite a case by case determination;[65] therefore recognizing obesity as protectable under the federal disability laws cannot necessarily be characterized as unwarranted judicial activism.[66]

## II. RECENT DECISIONS ON THE COVERAGE OF OBESITY DISCRIMINATION UNDER FEDERAL LAW: THE *COOK* PRECEDENT AND THE MISGUIDED RATIONALE OF *CASSISTA II*

This section analyzes two recent holdings that address the issue of the coverage of obesity under federal law. Part A discusses *Cook v. Department of Mental Health, Retardation, and Hospitals,*[67] the first decision by a federal circuit court to address the coverage of obesity under the Rehabilitation Act and to do so specifically applying prong-three analysis. The discussion will highlight key aspects and implications of the *Cook* decision, a significant precedent which upheld the plaintiff's perceived disability claim. Part B discusses *Cassista v. Community Foods,* ("*Cassista II*")[68] a California Supreme Court decision which, while not binding on federal courts, based its decision largely on its interpretation of the federal law. The analysis discusses how the California Supreme Court decision actually misinterprets the requirements for protection under federal disability law and how the final ruling in *Cook* rejects linchpins of the analysis in *Cassista.*

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64. *See* 45 C.F.R. pt. 84, app. A, at 370 (1993) (clarifying 45 C.F.R. § 84.3(j)); 34 C.F.R. pt. 104, app. A, at 372 (1994) (clarifying 34 C.F.R. § 104.3(j)); *see also* 29 C.F.R. pt. 1630, app., at 395 (1994) (clarifying 29 C.F.R. § 1630.2(j)) (The ADA, like the Rehabilitation Act of 1973, does "not attempt a 'laundry list' of impairments that are 'disabilities'"). While this language refers to "prong-one" claims, if a claim in not barred under "prong-one," it is even less likely to be barred under a "prong-three" claim, as the requirements of "prong-three" are less exacting.

65. *See, e.g.,* 29 C.F.R. pt. 1630, app., at 396 (1994) (clarifying 29 C.F.R. § 1630.2(j)) (holding that the determination of whether an individual is "substantially limited in a major life activity," pursuant to prong-one analysis, must be made on a "case-by-case basis"); *id.* (holding that the determination of whether an individual has a disability under prong-one analysis is "not necessary based on the name or diagnosis of the impairment," but rather on the "effect" it has on a person); *cf.* School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1982) (holding that the "individualized assessment" is required in determining whether a person is otherwise qualified under a perceived disability claim). Indeed, individualized, case-specific analysis is a touchstone for all disability cases.

66. *Contra* Shapiro, *supra* note 39, at 577.

67. 10 F.3d 17 (1st Cir. 1993).

68. 856 P.2d 1143 (Cal. 1993).

### *A. The Holding in* Cook

*Cook* involved a plaintiff who was denied the position of institutional attendant at defendant's facility for people with mental retardation in 1988. When plaintiff Bonnie Cook applied for the position, she stood 5'2" and weighed over 320 pounds; her weight classified her as "morbidly obese."[69] Previously she had worked at the facility as an attendant from 1978 to 1980, and again from 1981 to 1986, both times departing voluntarily and leaving behind a "spotless work record."[70] In fact, the defendant conceded that Cook's previous performance met its legitimate expectations.[71] When she worked at the facility previously, at times she weighed almost as much as she weighed when she reapplied in 1988.[72] During the routine pre-hire physical in 1988, the nurse employed by the defendant determined that the plaintiff met the classification of morbid obesity, but found "no limitations that impinged on her ability to do the job."[73]

Nevertheless, the defendant refused to hire Cook, offering two reasons: First, defendant claimed that Cook's morbid obesity compromised her ability to evacuate patients in case of an emergency; and second, defendant concluded that morbid obesity put her at greater risk of developing serious ailments, which would promote absenteeism and increase the likelihood of workers' compensation claims.[74]

After trial, a jury found, *inter alia,* that Cook, apart from her disability or perceived disability, was "qualified to perform the duties" of the position and that "the defendant did not reasonably believe plaintiff lacked such qualifications."[75] The jury awarded her $100,000 in compensatory damages[76] for a "failure to hire"[77] claim under the Rehabilitation Act.

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69. *Cook*, 10 F.3d at 20.

70. *Id.*

71. *Id.*

72. *Id.* at 27 n.12.

73. *Id.* at 20-21.

74. *Id.* at 21; *see also id.* at 28 n.13 (Doctor testified that he declined to give medical clearance to hire the plaintiff for three reasons: First, he believed that she herself was at risk because of her obesity; second, he believed that she could put the retarded residents at risk in emergency situations; and third, he was concerned about the overall costs of Worker's Compensation injuries).

75. *Id.* at 21 n.3. The jury indicated these findings through interrogatories answered favorably for the plaintiff. *Id.* at 21.

76. *Id.* at 21.

77. To invoke the Rehabilitation Act in a failure-to-hire claim, plaintiff must prove four things: 1) that she applied for a post in a federally funded program or activity; 2) that, at the time, she suffered from a cognizable disability; 3) but was, nonetheless, qualified for the position, and 4) that she was not hired due solely to her disability. *Id.* at 22.

Although not summarized in the opinion, inquiry into whether the plaintiff is "qualified" means determining whether she is able to perform "essential functions" of the position with "reasonable accommodation." *See, e.g.*, 34 C.F.R. § 104.3(k) (1994); *see also* Pub. L. 101-336 Tit. I § 101(8) (using the same standard in the ADA).

The defendant's promptly appealed[78] for review of plaintiff's "perceived disability"[79] claim. As a result of uncontested trial instructions, the appellate court considered only whether plaintiff met the first and third types of perceived disability claims. The court noted that the second type—showing that a plaintiff has an impairment that substantially limits major life activities only as the result of others' attitudes—arguably fell within the scope of plaintiff's claim, but the court did not examine the matter further, as plaintiff had not cross-appealed that issue.[80]

The court explained that to satisfy the first type of perceived disability claim, Cook needed to show that, while she had a physical or mental impairment, it did not substantially limit her ability to perform major life activities.[81] Providing the third type of perceived disability claim required showing that, though "she did not suffer at all from a statutorily prescribed physical or mental impairment," the defendant "treated her impairment (whether actual or perceived) as substantially limiting" one or more major life activities.[82] Because the jury had returned no special finding as to whether plaintiff "actually had a cognizable impairment or was merely regarded" by the defendant as having one, and the jury had received instructions in the alternative, Cook was entitled to prevail on either of those theories.[83]

While ruling that the record "comfortably justifie[d]" either of those theories,[84] the court rejected two main arguments asserted by the defendant: First, that "mutable" conditions are not impairments covered under the Rehabilitation Act;[85] and second, because plaintiff's conduct is "caused or at least exacerbated by voluntary conduct," it cannot qualify as an impairment covered under the Rehabilitation Act.[86] Because of the significance of those holdings, the court's discussion will now be highlighted in some depth.

Explicitly, the First Circuit rejected the defendant's suggestion that immutability constitutes a requirement for protection of a condition, whether actual or perceived. The court noted that "Mutability is nowhere mentioned in the statute or regulations, and we see little reason to postulate it is an automatic disqualifier under [the Rehabilitation Act]."[87] Accepting the

78. *Cook,* 10 F.3d at 21.
79. *Id.*
80. *Id.* at 22.
81. *Id.* at 23 (interpreting 45 C.F.R. § 84.3(j)(2)(iv)(A)).
82. *Id.* (interpreting 45 C.F.R. § 84.3(j)(2)(iv)(C)).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 24. The opinion stated that such assertion "rests on a legally faulty premise." *Id.*
87. *Id.* at 24 n.7.

position of the EEOC in an amicus brief,[88] the First Circuit ruled that the only relevance mutability bears on a claim is in determining the substantiality of the limitation flowing from a given impairment: "[s]o viewed, mutability only precludes [from coverage] those conditions that an individual can easily and quickly reverse by behavioral alteration."[89] The court strongly suggested that it considered the lower court's instruction to the jury that a "'condition or impairment is not an impairment unless it . . . constitutes an immutable condition that the person affected is powerless to control'" to be erroneous.[90] However, those district court's jury instruction became "the law of this case" and was harmless in that it worked to *this* plaintiff's advantage, since Cook was able to satisfy the charge as a matter of fact.[91]

The court further stated that "[e]ven if immutability were normally a prerequisite to finding a covered impairment," the "logic of a perceived disability claim . . . would nonetheless defeat" the application of such requirement.[92] So long as an employer regards the condition as immutable, no more is needed.[93] The court determined that the facts satisfied such a jury finding, because the testimony showed that the defendant regarded plaintiff's obesity as "'an impairment of a continuing nature.'"[94]

With equal force, the court rejected defendant-appellant's assertion that a condition caused or exacerbated by voluntary conduct cannot qualify as an impairment covered under the Rehabilitation Act.[95] The court explained:

> The Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting

88. EEOC br., *supra* note 6, at 17.

89. *Cook,* 10 F.3d at 24 n.7.

90. *Id.* at 24.

91. *Id.* at 24 n.7. In this case the plaintiff presented "credible evidence" that metabolic dysfunction lingers even after weight loss in a person who is morbidly obese; a jury could have reasonably found that while "people afflicted with morbid obesity can treat manifestations of metabolic dysfunction by fasting or perennial undereating, the physical impairment itself—a dysfunctional metabolism—is permanent." *Id.* at 24.

92. *Id.* at 24 (interpreting 45 C.F.R. § 84.3(j)(2)(iv)(C)).

93. *Id.*

94. *Id.* (citing Evans v. Dallas, 861 F.2d 846, 853 (5th Cir. 1988)). The defendant-appellant's own expert witness testified that it is dangerous for a dieter to lose more than 20% of her total body weight each year, and the defendant's doctor who denied medical clearance of plaintiff acknowledged that he would have rehired Cook only when she reduced her weight to 190 pounds. *Id.* at n.8. Taking these testimonies together, the jury could reasonably have concluded that, "appellant treated plaintiff as if her obesity would have disqualified her from working for over two years." *Id.* The court considered two years a period sufficient to establish a perception of an impairment of a continuing nature, hence satisfying whatever import immutability could be said to bear on the "regarded as" prong. *Id.* at 24.

95. *Id.* (stating that appellant's assertion rests on a "legally faulty premise").

> from cigarette smoking, heart disease resulting from excesses of various types, and the like.[96]

The court added that while the defendant's proposition was faulty as a matter of law, the plaintiff was able, in this case, to satisfy it as a matter of fact.[97]

In firmly rejecting mutability and voluntariness as the touchstones of protection for disability claims under federal law, the First Circuit established an important precedent,[98] one consistent with modern sensitivities toward the issue of disability. This ruling comports with the understanding that the way an individual has become a "person with a disability" is considered a private and otherwise irrelevant matter.[99] Legislative history to the ADA further evidences Congress' intent that the genesis of a disability be considered irrelevant.[100]

In addition to addressing the issues of mutability and voluntariness, the First Circuit set forth a number of other principles important to obesity discrimination claims by other plaintiffs. These included: 1) how obesity may easily satisfy the meaning of the term "physical or mental impairment;"[101] 2) how the requirement that the employer treat the plaintiff as substantially limited in "major life activities," can be satisfied, including; 3) how an employer's rejection for a single position entailing skills that apply to a broad class of jobs may show that the employer regarded the plaintiff as "substantially limited" in the major life activity of "working." Each of these rulings will be highlighted in turn.

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96. *Id.* (citing as examples, Severino v. North Ft. Myers Fire Control Dist., 935 F.2d 1179, 1182 (11th Cir. 1991) (AIDS); Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 517 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 54 (1992) (drug abuse); Gallagher v. Catto, 778 F.Supp 570, 577 (D.D.C. 1991), *aff'd*, 988 F.2d 1280 (D.C. Cir. 1993) (alcoholism); 45 C.F.R. § 84, app. A, at 377 (1993) (clarifying 45 C.F.R. § 84.3(j))(cancer; heart disease)).

97. *Id.* The court described how, "[g]iven the plethoric evidence introduced concerning the physiological roots of morbid obesity, the jury certainly could have concluded that the metabolic dysfunction and failed appetite-suppressing neural signals were beyond plaintiff's control and rendered her effectively powerless to manage her weight." *Id.*

98. Notably, the decision can be understood as rejecting the holding Greene v. Union Pac. R.R. Co., 548 F. Supp. 3 (W.D. Wash. 1981) in the context of federal disability law. *See also* Terry S. Hyman, *Voluntary Handicaps–Should Drug Abuse, Alcoholism, and Obesity be Protected by Pennsylvania's Anti-Discrimination Laws?* 85 DICK. L. REV. 475 (1981) (arguing that the treatment of obesity, alcoholism, and drug abuse as disabilities in related areas of the law shows that the issue of voluntariness is insufficient to justify exclusion under the Pennsylvania Human Rights Act).

99. For example, an etiquette guide for positive interactions with people with disabilities states, "Do not ask a person when or how they [sic] became disabled. You do not ask people of other minorities when they became Jewish, Black, or Hispanic. When and how a person became disabled is irrelevant." CHARLES D. GOLDMAN, DISABILITY RIGHTS GUIDE 17-18 (2d ed. 1991). Based on this principle, in filing complaints on behalf of persons with disabilities, the Disabilities, Rights, Education, and Defense Fund (DREDF) never describes how it is that the person became, for example, a paraplegic who uses a wheelchair or a person who has an amputated leg and uses a prosthetic.

100. *See* H.R. REP. NO. 485, 101st Cong., 2d Sess. 29 (1990) ("The cause of a disability is always irrelevant to the determination of a disability.").

101. *See supra* text accompanying notes 24-25.

First, the court found that plaintiff satisfied with ease the requirement that her obesity constitutes an actual or perceived "physical impairment" as contemplated by the Rehabilitation Act. Preliminarily, the First Circuit noted that the regulations "broadly"[102] define the term "physical or mental impairment." The court then explained how the record amply satisfies a finding of an actual or perceived physical impairment, pursuant to the first and third types of perceived disability claims. On the one hand, the jury could have found that the plaintiff did have a statutorily recognized physical impairment, in light of the expert testimony that "morbid obesity is a physiological disorder involving a dysfunction of a both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems."[103] On the other hand, the court noted, evidence also "conclusively" showed that the defendant treated Cook's obesity "as if actually affected her musculoskeletal and cardiovascular systems": the evidence included the defendant's proffered concern that Cook's limited mobility impeded her ability to evacuate patients, and the defendant expressed fear about her increased risk of heart disease and the concomitant rise of worker's compensation costs.[104]

Notably, this interpretation of the term "physical or mental impairment" in the context of a perceived disability claim could apply to many plaintiffs who are obese, even if their weight falls short of "morbid obesity." This flexible ruling comports with the directives to avoid easy labels[105] and to engage in fact-specific, "individualized inquiry."[106] This ruling reaches potentially a large number of cases, including the facts of *Cassista*, which will be discussed next.

Second, the court ruled that the plaintiff satisfied the required showing that the defendant treated her as "substantially limited" in major life activities. Showing that the employer's perception that obesity interferes with the applicant's ability to undertake "physical activities" such as "walking, lifting, bending, stooping, and kneeling" can, alone, satisfy this requirement.[107] Third, and relatedly, the court added that the "substantially limited in working" provision in a perceived disability claim can be satisfied

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102. *Cook*, 10 F.3d at 22.

103. *Id.* at 23.

104. *Id.*

105. As the ADA guidelines note:

> The determination of whether an individual has a disability is *not necessarily based on the name or diagnosis* of the impairment the person has, but rather, the effect of the impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others . . . . Other impairments, however, such as HIV infection, are inherently substantially limiting.

29 C.F.R. pt. 1630, app., at 396 (1994) (emphasis added) (clarifying 29 C.F.R. § 1630.2(j)).

106. *See, e.g.*, School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

107. *Cook*, 10 F.3d at 25.

where the employer "den[ies] an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying for a broad spectrum of jobs."[108]

The First Circuit's interpretation of the "substantially limited in working" provision fits within the boundaries established by the interpretive guidelines of the ADA. These guidelines say, on the one hand, that rejection from a single job does not constitute a substantial limitation in the ability to work; on the other hand, it is not meant for the plaintiff to make onerous evidentiary showings, and a job rejection that would apply to a broad "class of jobs" would be sufficient to meet the substantially limited in working requirement.[109]

In summary, the *Cook* decision issued a number of rulings favorable to a plaintiff who proceeds with a perceived disability claim for discrimination on the basis of his or her obesity. Because this is the first case by a federal circuit court to address the issue squarely, *Cook* represents the leading case to date. Some of the court's rulings may also benefit plaintiff's proceeding with a disability claim not only under a perceived disability claim, but also under prong-one analysis.[110] These beneficial rulings include the court's finding that plaintiff presented sufficient evidence to establish that she had an actual physical or mental impairment as defined by the statute, and that rejection from a single job involving no special skills may show that a person is substantially limited in the major life activity of working.

### *B. The Holding in* Cassista II

*Cassista II* involved a plaintiff who applied twice for a position at the defendant's health food store. In 1987 the store had three vacant positions, which required the employee to perform duties such as running the register, stocking 50-pound bags of grain, carrying 50-pound boxes, retrieving groceries from the warehouse, changing 55-gallon jugs, and carrying large creates of milk.[111] After her application passed screening, Toni Linda Cassista was interviewed by a hiring committee, which lasted approximately thirty minutes and covered topics such as her employment history and the job

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108. *Id.* at 26.

109. *See supra* text accompanying notes 60-61.

110. Under prong-one analysis it would be theoretically possible for an obese plaintiff to request "reasonable accommodations" such as larger furniture. So far no cases at the state or federal level have involved requests for any accommodation from employers, indicating that the specter of requests for reasonable accommodation claims by obese people may be unlikely. In many cases besides *Cook* and *Cassista II*, the plaintiffs who are obese do not consider themselves in need of any policy modifications. *See, e.g.*, Philadelphia Electric Co. v. Commonwealth, Pennsylvania Human Relations Com., 448 A.2d 701, 707 (1982); Krein v. Marian Manor Nursing Home, 415 N.W. 2d 793, 796 (N.D. 1987).

111. *Cassista II*, 856 P.2d at 1144.

requirements.[112] Previously, Cassista had been employed in several restaurants, managed a sandwich shop, and worked as an aid in a nursing home.[113]

At the time she applied for a position with defendant's health food store, she stood 5'4" tall and weighed 305 pounds.[114] When asked during the interview whether "she had any physical limitations that would interfere with her ability to do the job," she said that she "did not."[115] Customarily, Community Foods used a 200-hour probationary period to determine whether a new employee could perform the duties required.[116]

Despite being told that the hiring committee would notify her, she was never contacted, and subsequently learned that three others had been chosen.[117] Shortly after, when she learned of another opening at the store, she contacted the defendant's personnel coordinator, Will Hildeburn, who agreed to resubmit her application.[118] When she later contacted the personnel coordinator to learn that she had not been selected once again, she asked him what she could do "to prepare for future openings."[119] Hildeburn admitted telling her that "there was some concern about your weight."[120] Plaintiff testified that the coordinator actually responded to the effect that, "'members were concerned that you couldn't physically do the work due to your weight.'"[121] The personnel coordinator testified, and plaintiff contested, that he also said that the others had more experience.[122]

Dissatisfied with the response she got, the plaintiff wrote the defendants, who agreed to meet with her as part of a "'consciousness raising'" session to discuss her concerns.[123] At the meeting, Hildeburn apologized to Cassista for hurting her feelings, and the members of the health food store discussed their views about weight and job performance.[124] One woman, whose own weight fluctuated, stated that when she was heavier at the end of the day, "'my feet hurt and my lower back usually hurts, because my stomach is, you know, pulling my back.'"[125] Another member said that "when she was pregnant it became more difficult to climb ladders and stock aisles, and . . . that 'physical attributes have to a part of the decision-making

112. *Id.* at 1145; *Cassista I,* 10 Cal. Rptr. 2d at 101.
113. *Cassista II,* 856 P.2d at 1144.
114. *Id.*
115. *Id.* at 1145.
116. *Cassista I,* 10 Cal. Rptr. 2d at 103 (testimony of personnel coordinator).
117. *Cassista II,* 856 P.2d at 1145.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Cassista I,* 10 Cal. Rptr. 2d at 102; *Cassista II,* 856 P.2d at 1145.
124. *Cassista II,* 856 P.2d at 1145.
125. *Id.* at 1145.

process.'"[126] Both of these members, nonetheless, testified that the plaintiff's weight had no effect on the hiring decision.[127] Hildeburn admitted to asking a friend shortly before meeting with Cassista, "'If she had a 300-pound worker and a 150 pound worker, how would she decide who to pick?'"[128]

After trial, the jury returned a unanimous verdict in favor of the defendants.[129] The Court of Appeal reversed, holding, *inter alia*, that evidence established that the defendant considered plaintiff's weight to be a physical disability, as defined by California's Fair Employment and Housing Act (FEHA).[130] The California Supreme Court then granted review to determine whether the plaintiff had established "a prima facie case" of disability discrimination under FEHA.[131]

The FEHA regulations defining the term disability since 1980 (but initially using the term "physical handicap") set forth a definition that almost exactly tracks the three-prong definition under the Rehabilitation Act and the ADA.[132] The California Supreme Court also looked at the state

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126. *Id.*

127. *Id.*

128. *Id.* at 1146.

129. *Id.*

130. *Id.* The Court of Appeal also ruled that trial court had issued erroneous and prejudicial jury instructions. *Id.* The Fair Employment and Housing Act is codified at CAL. GOV'T CODE § 12900 et seq.

131. *Cassista II,* at 1146.

132. A "handicapped individual" is one who:

> 1) Has a physical handicap which substantially limits one or more major life time activities.
> 2) Has a record of such a physical handicap; or
> 3) Is regarded as having such a physical handicap.

CAL. CODE REGS. tit. 2, § 7293.6, subd. (i) *cited in Cassista II,* 856 P.2d, at 1149.

Although glossed over by the court, these regulations also provided definitions of the same three types of perceived disability claims described in the ADA and the Rehabilitation Act, but added an expansive fourth category. The regulations define "Regarded as Having a Physical Handicap" to mean:

> 1) Has a physical handicap that does not in fact substantially limit one or more major life activities but is treated by an employer or other covered entity as having a physical handicap which does substantially limit major life activities; or
>
> 2) Has a physical handicap that substantially limits one or more major life activities only as a result of the attitude of an employer or other covered entity toward such a physical handicap; or
>
> 3) Does not have a physical handicap that substantially limits one or more major life activities but is treated by an employer or other covered entity as having or having had a physical handicap that presently substantially limits major life activities; or
>
> 4) Does not have a physical handicap that substantially limits one or more major life activities but is treated by an employer or other covered entity as having an increased likelihood of developing a physical handicap that substantially limits major life activities.

legislature's 1992 Amendment to FEHA for guidance, because the amendment derived from the Rehabilitation Act and ADA, and was therefore consistent with the 1980 regulations.[133] While unnoted by the court, the 1992 Amendment also declares that any definition of disability in the ADA that "would result in broader protection" of individuals with a mental or physical disability or would include any additional medical condition not included in FEHA's provisions shall be "deemed incorporated" into FEHA and "shall prevail over conflicting provisions."[134]

In relevant part, the 1992 Amendment considered by the Court defines "physical disability" as including, "but not limited to":

> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
>
> A) Affects one or more of the following bodily systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin, and endocrine.
>
> B) Limits an individual's ability to participate in major life activities
>
> (2) Any other impairment described in paragraph (1) that requires special education or related services.
>
> (3) Being regarded as having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or heath impairment as described in paragraph (1) or (2).
>
> (4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).[135]

Section (1)(A) appropriates much of the definition of "physical and mental impairment" set forth in the ADA and the Rehabilitation Act and restates prong-one analysis.[136] Section (3) essentially restates the traditional "regarded as" prong, and Section (4) adds an expansive point to the definition.

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CAL. CODE REGS. tit. 2, § 7293.6, subd. (h) (1988).

133. *See Cassista II,* 856 P.2d at 1149-50 ("The obvious similarity between the 1980 regulation and the 1992 statutory amendment is not coincidental. Both derive from the same source, the federal Rehabilitation Act. . . . [and are] modeled, in turn, on the ADA.").

134. CAL. GOV'T CODE § 12926, subd. (l) (West Supp. 1994).

135. CAL. GOV'T CODE § 12926, subd. (k), enacted by Stats. 1992, ch. 913, § 21.3 No. 6 Deering's Adv. Legis. Service, at 3860, *cited in Cassista II,* 856 P.2d at 1148. Mental disabilities are also protected but defined separately under CAL. GOV'T CODE § 12926, subd. (i).

136. *Cf. supra* notes 18 & 24 and accompanying texts.

The Supreme Court of California reversed the Court of Appeal, rejecting both an actual and perceived disability claim. Because the opinion declared its finding consistent with "both judicial and administrative interpretations of federal statutes,"[137] the court's finding bears on this article's discussion of the coverage of obesity under the perceived disability claim of the Rehabilitation Act and the ADA.

To succeed with a perceived disability claim, the California Supreme Court required the plaintiff to show that the defendant perceived her to have a condition which would satisfy prong one of the definition:

> [I]t is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight. The applicant must also be "regarded as having or having had" a condition "*described in paragraph (1) or (2),*" to wit, a *physiological* disease or disorder affecting one or more of the bodily systems . . . . In other words, the condition, as perceived by the employer, must still be in the nature of a *physiological disorder* within the meaning of FEHA, even if it is not in fact disabling.[138]

However, the court made clear that it understood "physiological disorder" in the context of obesity to mean that the plaintiff must show evidence that she has a related physiological disorder (such as heart disease or diabetes) or that the obesity itself is "caused by systemic or metabolic factors."[139]

It is problematic to require a plaintiff claiming prong-three coverage in an obesity case to prove that the employer perceived her obesity to have a physiological cause. First, since most people discount a physiological basis for obesity and instead view it as lazy and compulsive behavior, it will be virtually impossible to prove that the employer viewed the plaintiff's obesity as having a physiological cause.[140] Second, science itself has not been able to explain the causes of obesity definitely in many cases.[141] The Rehabilitation Act guidelines make clear that the term physical and mental impairment encompasses disorders and conditions "whose precise nature is not at present known."[142] Consequently, it should not be an absolute requirement

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137. *Cassista II,* 856 P.2d. at 1153.

138. *Id.* (first emphasis in the original, the rest added).

139. *Id.* at 1152 (citing the district court's opinion in *Cook).*

140. *See infra* text accompanying notes 162-63 (describing the data on this point from sociological studies).

141. *See infra* text accompanying notes 164-68 (describing the incomplete scientific data on the physiological causes of obesity).

142. *See supra* text accompanying note 25. In asserting that obesity may not be covered "absent proof of physiological causation under federal law," the court further offered incorrect "proof" that the EEOC supported this view. The court cited to a provision in the ADA regulations, but truncated it and interpreted it in a manner inconsistent with the EEOC's own position in *Cook.* The full provision at issue states, "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." 29 C.F.R. pt. 1630, app., at 395 (1994) (clarifying 29 C.F.R. § 1630.2(h)) (emphasis added). Ignoring the conjunction "and," the court cited that the regulations exclude, "such physical

of a perceived disability claim that an employer regarded the plaintiff as having an impairment explainable by a precise physiological cause.

A more justifiable limitation to a perceived disability claim involving obesity would be requiring the plaintiff to show that the employer perceived her to have a physical condition "affecting" one of the "bodily systems."[143] Under the facts of *Cassista*, this requirement could have been satisfied if the rationale in *Cook* were applied. The California Supreme Court could have found that the defendant, by doubting that Cassista could perform the lifting tasks required by the job, regarded her condition as affecting her musculoskeletal system.[144] This analysis could explain why the law protects people with abnormal x-rays but no symptoms of impairment[145] under the perceived disability claim.

The court also incorrectly suggested that voluntariness and immutability constitute requirements of a disability claim under federal analogs.[146] In drawing this conclusion, the court relied heavily on the federal district court's jury instructions in *Cook*.[147] These were the same instructions that the federal appellate court later attacked as flawed. The final ruling in *Cook*

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characteristics as 'height, weight, or muscle tone' that 'are not the result of a physiological disorder.'" *Cassista II*, 856 P.2d at 1153. In its brief to the First Circuit in *Cook*, the EEOC clarified in a footnote that this provision cannot properly be understood as barring coverage of obesity: while obesity in some cases may not be "'the result of a physiological disorder,'" it is "also not weight within 'normal' range. The Commission's Guidance requires that weight conditions be the result of a 'physiological disorder' only in situations where the weight falls within normal range." EEOC br., *supra* note 6, at 12 n.6. While the California Supreme Court stated that the EEOC adopted the view that obesity requires proof of physiological causation to qualify as an impairment, the administration subsequently denounced this interpretation in the *Cook* brief.

143. *Cf. supra* note 24 and accompanying text. The proposed analysis reflects a strict reading of the third and easiest method of satisfying a perceived disability claim, which requires showing that the employer has treated the plaintiff as having an impairment, even though the employee has no such impairment. *See supra* text accompanying note 23.

By using burn victims as the classic example of the need for third-prong coverage, Congress made clear that it intended to protect people whose abnormal physical conditions result in discrimination because of the attitudes of others. *See supra* notes 29, 32, 34 & 36 and accompanying text. Because the regulations explicitly include cosmetic disfigurement as an example of an impairment, *see supra* text accompanying note 24, the burn victim falls under the first and second types of perceived disability claims, which address an individual having an impairment which is substantially limiting only as a result of the attitudes of others.

The concern with the third type of perceived disability claim, which covers people with no impairment, is that the claim could be too far-reaching. Even if a plaintiff's obesity fails to qualify as an actual impairment, the plaintiff may still be covered by the third type of perceived disability claim. In order to address the concern that this claim not be too far-reaching, requiring a showing that the defendant perceived the condition to have a substantial physical consequence, i.e., bending walking, etc., or increased health insurance, etc., will limit the scope of coverage and, at the same time, address Congress' concern that prejudice against abnormal physical conditions be curtailed.

144. *Cf. supra* text accompanying note 104.

145. *See* Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989) (Rehabilitation Act protects person excluded from job based on abnormal x-ray which employer treated as a limitation on lifting capabilities required by the job) and *supra* text accompanying note 35.

146. *See Cassista II*, 856 P.2d at 1152-53.

147. *Id.* at 1152.

firmly rejected the same suggestion that voluntariness and immutability form the touchstones of a disability claim.[148] This aspect of the *Cassista* decision should now be understood as overruled, rather than supported, by the final ruling in *Cook*.

Hence to the extent that *Cassista* relied on the district court's decision in *Cook* for a requirement that the employer perceived the plaintiff's obesity to have a precise physiological cause or that plaintiff's obesity be proven involuntary or immutable, the First Circuit's final opinion in *Cook* flatly rejects such contentions. The California Supreme Court appeared to import these additional requirement to the perceived disability claim which federal disability does not, in fact, exact.

## III. THE STIGMATIZATION OF OBESITY: ATTITUDINAL BARRIERS TO THE EMPLOYMENT OF OBESE PERSONS ADDRESSED BY THE PERCEIVED DISABILITY CLAIM

This section examines the literature and data from social science studies to identify more clearly the nature of stereotypes against people who are obese, and the interplay of these stereotypes with actual discrimination in employment. The discussion will cover first the general stigmatization of obesity, then specific work-related stereotypes, and, finally, the documented existence of employment discrimination against individuals who are fat. Throughout the discussion, it will be noted how a number of the stereotypes faced by obese persons constitute precisely the "attitudinal barriers"[149] to employment that the guidelines interpreting the perceived disability claim proscribe.

As the EEOC regulations clarify, "If an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on 'myth, fear, or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability."[150] A claimant need not show that all employers would apply the same exclusionary standard,[151] toward the condition of obesity, or even that the assumptions

148. *See supra* text accompanying notes 87, 92 & 95-97.

149. 29 C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. § 1630.2(h)).

150. *Id.*

151. *See* 29 C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. § 1630.2l)) ("An individual rejected from a job because of the 'myths, fears, and stereotypes' associated with disabilities would be covered under [the regarded as prong] *whether or not* the employer's or other covered entity's perception were shared by others in the field . . . .") (emphasis added); *see also* H.R. REP. NO. 485 (III), 101st. Cong., 2d Sess. 30 (1990) ("[w]hether or not the employer's perception was shared with others in the field," a person rejected from a job because of myths fears and stereotypes associated with disabilities would be covered under the perceived disability claim).

are necessarily false.[152] By highlighting the often widespread assumptions about obese persons, this discussion hopes to clarify the type of discrimination that an individual plaintiff may have faced from a particular employer, as well as the different angles of a perceived disability claim that an individual could pursue.

### *A. General Stigmatization of Obesity*

A number of studies have demonstrated the general stigmatization of obesity, a stigmatization similar to and even stronger than that toward other disabilities covered under the federal law. One seminal study asked children and adults to rank, in their order of preference, six drawings depicting children with a range of disabilities. Subjects consistently ranked them in this order: 1) a child with no visible disability; 2) a child with crutches and a leg brace; 3) child sitting in a wheelchair with blanket covering one leg; 4) a child with a missing hand; 5) a child with a facial disfigurement; and 6) an obese child.[153] With little exception,[154] people responded even more negatively toward the feature of obesity than toward a facial disfigurement, a condition that the administrative regulations explicitly cover.[155]

The basic finding that adults and children responded more negatively toward obesity than toward any of the other disabilities shown has been corroborated by subsequent studies. One later study[156] found nearly identical results using a "social distance scale."[157] In that study a number of

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152. As noted by a House Judiciary Report, "A person who is covered because of being regarded as having an impairment is not required to show that the employer's perception is inaccurate, *e.g.,* that he will be accepted by others, or that insurance rates will not increase in order to be qualified for the job." H.R. REP. NO. 485 (III), 101st Cong., 2d Sess. 31 (1990). Rather, showing that the plaintiff is qualified entails showing that he or she is able to perform "essential job functions" with reasonable accommodation. *See supra* note 77.

153. Norman Goodman, et al., *Variant Reactions to Physical Disabilities*, 28 AM. SOC. REV. 429, 431-33 (1963).

154. The researchers hypothesized that Jews and Italians of lower socio-economic class, because of "different cultural practices and values associated with eating," and their often distinct facial characteristics, would differ in their rankings. *Id.* at 430-431. Results of the study found that the Jewish population from low socio-economic status did show greater preference for the obese child than the dominant group, but the Italian group still ranked the obese child "conspicuously last." *Id.* at 432. Both the Italian and Jewish groups showed a decisive preference for the facially disfigured child over all the other visible disabilities. *Id.* at 433.

155. *See supra* text accompanying notes 29 & 32.

156. Victor Matthews & Charles West, *A Preferred Method for Obtaining Rankings: Reactions to Physical Handicaps,* 31 AM. SOC. REV. 851 (1966).

157. The "social distance" scale used in this scale measured responses to the following seven points:

1) Would exclude this person form my school.
2) Would be willing to have this type of person in my school.
3) Would be willing to have this type of person in the same club as me.
4) Would be willing to have this type of person as a friend.
5) Would be willing to date or double date with this type of person.

of the high school students reacted negatively toward the pictorial ranking method and refused to order the pictures.[158] Another group of researchers found that subjects from a public medical clinic, known to include persons from primarily lower-socioeconomic status, almost consistently ranked the picture of obesity last.[159] This study, by the Maddox team, additionally showed that subjects imputed the fat persons to be responsible for their condition, which intensified the negative reactions.[160]

Seizing on the implication in the Maddox study that notions of responsibility affected the negative ratings of people who are obese, William DeJong conducted experiments showing how subjects evaluated an obese girl less negatively if they were specifically told that she had a thyroid problem accounting for the condition.[161] DeJong emphasized that his findings implied, "Quite simply, the fact obesity is a complicated disorder must be better communicated."[162] In the absence of a countervailing explanation, people assume the "naive theory" that the sole causes of obesity are "overeating and lack of exercise," and that understanding does not recognize the "complex etiology" of the condition.[163]

While the scientific understanding of obesity is not complete, medical evidence suggests that a range of factors determine obesity, tending to show that obesity is not a voluntary condition. "Most health professionals agree that obesity has multiple causes."[164] Studies indicate that the condition of obesity is linked to genetics, an enzyme in the blood, and in some cases psychological disorders.[165] One of the most widely accepted theories on obesity today is the "set point theory," which holds that individuals have a natural set point for their weight, which the metabolism changes to maintain

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6) Would be willing to have this person as my sister or brother.
7) Would be willing to marry or have my sister or brother marry this type of person.

*Id.* at 852 n.5.

158. *Id.* at 852 n.6. The results of the students who did rank order the preferences showed obesity ranked third, although the entire sample ranked obesity last when using the social distance scale. *See id.* at 852.

159. *See* George L. Maddox, Kurt W. Back, & Veronica R. Liederman, *Overweight as Social Deviance and Disability*, 9 J. HEALTH & SOC. BEHAV. 287, 290, 292 (1968).

160. *Id.* at 295-96; *see also id.* at 297 (abstract summary).

161. William DeJong, *The Stigma of Obesity: The Consequences of Naive Assumptions Concerning the Causes of Physical Deviance*, 21 J. HEALTH & SOC. BEHAV. 75 (1980).

162. *Id.* at 85.

163. *Id.*

164. Baker, *supra* note 9, at 949.

165. *See id.* at 949-50 for a review of some these studies as of the early 1980s. For recent findings on the link between genetics and obesity, *see, e.g., Pig Research Shows Genetic Link to Obesity*, CHI. TRIB., News Sec., Mar. 28, 1994, at 7; Linda Wasowicz, *Scientists Find Possible Genetic Link to Some Obesity*, UPI, Mar. 14, 1994, *available in* LEXIS, News Library, UPI file (A study of people found connection between obesity that begins after puberty and the D2 dopamine receptor gene, which has been previously linked to alcohol and cocaine abuse.).

regardless of the amount eaten.[166] While the medical community has not conclusively determined the causes of obesity, scientific evidence strongly supports the view that obesity is caused by factors beyond mere overeating. In fact, a series of studies demonstrated that most people who are obese do not, in fact, consume more calories than average-weight counterparts.[167] Furthermore the well-documented inefficacy of dieting for many obese people tends to "rebut the view that all people are fat by choice."[168]

It should be emphasized that reaching a definitive understanding of obesity and conclusive link to uncontrollable causes is *not* a prerequisite to qualifying for coverage as an actual or perceived disability under federal law. The regulatory guidelines explicitly cover impairments whose nature is not presently known.[169] And, as the *Cook* decision made clear, voluntariness *cannot* logically be the touchstone for coverage consistently with other protected conditions.[170] However, studies showing naive assumptions of the causes of obesity help explain why people who are obese face discrimination in the first place.

### *B. Work-Related Stereotypes about Obese Individuals*

A number of studies have demonstrated work-related stereotypes about obese individuals, which have been associated with discriminatory hiring decisions. This discussion will identify the stereotypes in some depth, in order to show how their consideration in hiring decisions may match with clear prohibitions in federal guidelines to disability anti-discrimination laws.

Larkin and Pines conducted one of the leading studies that identified a "*work-related* overweight stereotype."[171] They ran a two-part experiment. In the first, subjects were asked to give their impressions of three persons about whom they only knew weight and sex, with regard to twenty-two characteristics.[172] The results showed that:

> [O]verweight people are seen as significantly ($p < .05$) less desirable employees, who compared with others, are less competent, less productive, not industrious, disorganized, indecisive, inactive, and less successful. . . . In addition, on scales measuring the degree to which certain terms and phrases characterize the target, the descriptive labels conscientious, takes initiative, aggressive, perseveres at work, and ambitious were seen as *less*

166. Rothblum, *supra* note 9, at 11 (citing the theory first posited by R.E. Nisbett, *Hunger, Obesity, and the Ventromedial Hypothalamus,* 79 PSYCHOL. REV. 433 (1972)).

167. For a review of these empirical studies, see Rothblum, *supra* note 9, at 10.

168. Allon, *supra* note 1, at 161; *see also* Rothblum, *supra* note 9, at 12-17 (studies documenting the inefficacy of dieting).

169. *See supra* note 25 and accompanying text.

170. *See supra* notes 95-97 and accompanying texts.

171. Judith Candib Larkin & Harvey A. Pines, *No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preferences,* 6 SOCIOLOGY OF WORK & OCCUPATIONS 312, 313 (1979).

172. *Id.* at 314-15.

> characteristic of the overweight than the average weight, while mentally lazy and lacks self-discipline were rated as *more* characteristic of the overweight. All in all, this picture hardly describes the type of person one would choose as an employee.[173]

These findings establish, without a doubt, the existence of a "negative stereotype" toward individuals who are obese.[174] The authors defined a "stereotype" as "a pattern of traits we assign to other people, often on the basis of highly visible and distinctive characteristics, such as race or sex. Stereotypes are usually simple overgeneralizations that are widely accepted, but often inaccurate."[175]

The second part of the Larkin and Pines study showed how in a simulated personnel selection environment, overweight persons would be likely to encounter discrimination because of their weight,[176] impliedly because of those negative stereotypes. Subjects were shown a videotape of overweight and "normal" persons performing *identically* on employee selection tests.[177] To control for other variables, the facial gestures and voices of the employees taking the test were not shown and the obese applicants were identically dressed; in one of the two tests only the applicant's hand taking the test was shown. Before showing the tests, the camera focused only briefly on the applicant, just long enough for the subjects to observe the applicant's body size.[178] Subjects were told that the experiment was "'part of a larger research program whose purpose is to devise different tests that are useful for judging the qualifications of a person who is applying for a job opening.'"[179] After viewing an applicant's performance on the employment tests, subjects were asked whether they would recommend or oppose hiring the applicant for the job requiring skills measured by those tests, and subjects used a seven-point rating scale to respond.[180] Results of the study showed that the overweight applicants "were significantly less highly recommended" for hiring than the other average weight applicants.[181] Irrespective of *equal performance* on qualifying tests, overweight individuals were evaluated more negatively and less likely to be hired than average weight people. Concern about employers making such blanket assumptions based on stereotypes rather than individual-

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173. *Id.* at 315-16.
174. *Id.* at 317.
175. *Id.* at 312.
176. *Id.* at 317.
177. *Id.*
178. *Id.* at 317-18.
179. *Id.* at 319.
180. *Id.* at 320.
181. *Id.* at 321. Further suggesting a lower evaluation of the overweight applicant, thinner subjects, when asked about their chances of being hired compared with the applicant's, showed a significantly greater expectation of being hired after observing the overweight applicant. *Id.*

ized assessments of a person's capabilities gave rise to the federal disability laws.

The application of disability law is underscored by the fact that obese people are assumed to be in poor health and have a high mortality rate. "The association between excess mortality and overweight is a particularly pronounced with regard to cardio-vascular-renal diseases, diabetes mellitus, and diseases of the digestive system. These findings have been popularized by the mass media and disseminated by way of mouth in such a pervasive way."[182]

The poor health stereotype bears significance on employment decisions because it often translates into assumptions of higher absenteeism, increased insurance rates, and greater workers' compensation costs. Misguidedly, some commentators have argued that those factors justify an employer in discriminating against people who are obese.[183] To the contrary, employers are *specifically prohibited* from taking those concerns into account under the EEOC guidelines to the ADA.[184] The stereotype of health risks also distinguishes obesity discrimination from mere "appearance-based" discrimination, placing obesity discrimination directly within the scope of protection of disability law.[185] Plaintiffs may also be able to use specific evidence that these health-related stereotypes influence their employer's decision in

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182. Werner J. Cahnman, *The Stigma of Obesity*, 9 SOC. Q. 283, 284-85 (1968).

183. *See* Shapiro, *supra* note 39, at 576 (arguing that "Employer's have a right to consider higher medical insurance rates, life insurance rates, workers' compensation, death benefits, sick leave, turnover, higher absenteeism rates, and higher mortality rates in considering which employees to hire."); *cf.* Bierman, *supra* note 39, at 969 (arguing that while obesity should be protected through new legislation paralleling equal protection law, it should not be covered under federal disability law because, "More likely, an employer would view an obese person as an above-average user of various insurance programs, rather than as a handicapped employee.").

184. *See supra* text accompanying notes 46-47. As further illustration, a House Judiciary Report explained the reasons that people with abnormal x-rays but no symptoms would be protected under the "regarded as" prong:

> [M]any people are rejected from jobs because a back x-ray reveals some anomaly even though the person has no symptoms of a back impairment. The reasons for the rejection are often fear of injury, as well as increased insurance or worker's compensation costs. These reasons for rejection rely on common barriers to employment for persons with disabilities and therefore, the person is perceived to be disabled under the third test.

H.R. 485, 101st Cong., 1st Sess. 31 (1990). To the extent that one court sanctions discrimination against people whom employers assume have a potential for high absenteeism and low productivity because of their obesity, the holding plainly violates the ADA. *Cf.* Philadelphia Electric Co. v. Commonwealth, Pennsylvania Human Relations Com., 448 A.2d 701, 708 (Pa. 1982).

185. *Cf.* Shapiro, *supra* note 39, at 576 (noting that discrimination against the obese is based on appearance, which is permitted by federal law and most state law); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035 (1987) (arguing the Rehabilitation Act should be used to protect against discrimination based on appearance, including obesity, shortness, and unattractive facial characteristics).

order to support a claim that the employer regarded obesity as a physical impairment affecting their bodily systems.[186]

The current association of obesity with poor health and mortality has an interesting historical origin. The negative stereotype began as a result of "the persistent claim advanced by insurance companies that obesity is a morbid condition, which a responsible person concerned about his health should avoid."[187] An influential statistician and employee of the Metropolitan Life Insurance Company, Louis Dublin, wrote in popular and medical journals during the first half of the 20th century about the risk of obesity, naming it "'America's No. One Health Problem.'"[188] At the same time that life insurance companies proliferated these health concerns, slimness became associated with standards of beauty in the United States, as reflected in cultural icons like the flat, adolescent bodies of flappers in the 1910s and 1920s to the 97-pound model Twiggy in the 1960s.[189]

Challenging the accuracy of the assumption that obesity causes health problems, modern research shows that is actually the effect of the diet cycle on the body, not extra pounds, that leads to health problems like increased heart disease and hyper-tension.[190] Studies conclusively demonstrated that repeated dieting causes hypertension, heart disease, and shortened lives in mice, swine, and rats.[191] Studies of obese dieters versus nondieters showed abnormal levels of free fatty acids only among the dieters.[192] Weight loss diets, independent of weight regain and subsequent diets, have also been linked to a variety of physical problems, such as gallstones, anemia, and cardiac disorders.[193] These findings seriously defeat the paternalistic assumption that people who are obese should be encouraged to lose weight for their own good and therefore should not be protected under disability law.[194]

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186. In *Cook*, the court reached this conclusion in determining that the defendant's admitted fear of plaintiff's increased risk of heart attack and worker's compensation claims amounted to treating her as if her condition affected her cardiovascular system. Cook v. Rhode Island, Dept of Mental Health, Retardation and Hospitals, 10 F.3d 17, 27 (1st Cir. 1993). *See supra* note 104 and accompanying text.

187. Maddox, *supra* note 159, at 288.

188. Rothblum, *supra* note 9, at 6 (citing W. BENNETT & J. GURIN, THE DIETER'S DILEMMA 133 (1982)).

189. *Id.* (citing R. FREEDMAN, BEAUTY BOUND 149 (1986)).

190. *Id.* at 18-19 (survey of supporting studies); Allon, *supra* note 1, at 162 (discussion of additional studies).

191. *Id.* (citing, *e.g.*, P. Ernsberger, *The Death of Dieting*, AM. HEALTH 4, 29-33 (1985)).

192. *Id.* at 18 (citing J.A. Hibescher & C.P. Herman, *Obesity, Dieting, and the Expression of 'Obese' Characteristics*, 2 J. COMP. PSYCHOL. PSYCHOL. 374 (1970)).

193. *Id.* (citing J. POLIVY & C.P. HERMAN, BREAKING THE DIET HABIT (1983) for a review of those studies).

194. This paternalistic assumption underlies the decisions in Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co., 699 S.W.2d 75, 79 (Mp. App. 1985) (plaintiff should not receive "benefit" of protection under disability law for her obesity and high blood pressure because she took "no steps to treat and control" her condition) and Greene v. Union Pac R.R. Co., 548 F. Supp. 3, 5 (W.D. Wash. 1981) (morbid obesity not protected because it is not an

### C. Documented Evidence of Employment Discrimination

In addition to the findings by Larkin and Pines of discrimination against obese persons in a simulated hiring environment, strong documentation exists showing that actual discrimination in employment occurs.[195] The Maryland Commission on Human Relations conducted one of the most extensive studies, finding "the obese are penalized by lower pay, inequitable hiring standards, relegation to noncontact public positions, and other distinctive treatment, based on non-job related criteria."[196] In fact, the study concluded that the population of fat people may well face greater discrimination than an African American.[197] Similarly, a widely reported study by an employment agency, the Robert Half Association, found that overweight workers made significantly less money and were less likely to get higher positions when promotions came around.[198] Recent studies focusing on women show a significant adverse impact of obesity on their earning power.[199]

Studies also show a correlation between obesity and high unemployment rates.[200] The unemployment resulting from discrimination against fat people indicates a high cost to society as a whole, because of lost productivi-

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immutable condition).

195. For a more detailed discussion, see Baker, *supra* note 9, at 952-54 (1982); Allon, *supra* note 1, at 137-40.

Discrimination against obese persons existing in areas other than employment has been documented as well. *See, e.g.,* Lambros Karris, *Prejudice Against Obese Rentors,* 101 J. SOC. PSYCHOL. 101, 159-60 (1977) (landlords less likely to rent to obese people); H. Canning & J. Mayer, *Obesity— Its Possible Effect on College Acceptance,* 275 NEW ENG. J. MED. 1172 (1966) *cited in* Allon, *supra* note 1, at 36-137 (bias in college admissions).

196. STATE OF MD COMM'N ON HUMAN RELATIONS, REP. ON THE STUDY OF WEIGHT AND SIZE DISCRIMINATION, Executive Summary, (1979) [hereinafter MD COMM'N STUDY].

197. *Id.* at 49 (citing an employment agent manger who commented that, "'It is much easier to place a Black person on the job than someone who is fat,'" and concluding that much of the research in this study "indicate[s] that there is a great deal of substance in that statement").

198. *Fatter Executives Get Slimmer Pay Checks,* INDUSTRY WK., Jan. 14, 1974, at 21, *cited in* Allon, *supra* note 1, at 39 & MD COMM'N STUDY, *supra* note 196, at 39.

199. One study, which followed 10,039 young adults for seven years, found that overweight women earned $6,710 a year less and were 10% more likely to have income below the poverty level; while overweight men also earned less than their average weight counterparts, the earning difference proved far less dramatic than for women. Conducted by researchers from the Harvard School of Public and Health and the New England Medical Center, the study's results became published in the New England Journal of Medicine. *See* Gina Kolata, *Women Pay Price for Being Obese,* N.Y. TIMES, Sept. 30, 1993, at A18.

Another study, conducted exclusively on women, used data from a large aerospace organization and found that "weight is a predictor of occupation and income," but that the effect on income was "significant only for women in professional, technical, and management positions." *See* Katherine M. Haskins, *The Relationship Between Weight and Career Payoffs Among Women* (1989) *in* 50 DISSERTATION ABSTRACTS INTERNATIONAL 3743-A. (May 1990).

200. *See, e.g.,* Daphne A. Roe & Kathleen Eickwort, *Relationships Between Obesity and Associated Health Factors with Unemployment Among Low Income Women,* 31 J. AM. MED. WOMEN'S ASSOC. 193 (1976); MD COMM'N STUDY, *supra* note 196, at 41-49 (interviews with employment agencies).

ty and the increased need for welfare services.[201] In a New York-based study, researchers found through questionnaires to employers that 15.9% said that they would not hire obese women; and 43.9% considered obesity to be conditional medical grounds for refusal to hire.[202] Altogether, these findings reveal that employment discrimination against the obese poses more than a theoretical matter. It is a very real, and, evidence suggests, widespread phenomenon.

## CONCLUSION

Obesity discrimination, which is based on stereotypes associated with a physical condition, subverts the principle behind federal disability law and anti-discrimination doctrine as a whole.[203] Specific features of obesity and common reactions to the condition make it especially suited for protection under a perceived disability theory. Unfortunately, much of society harbors negative stereotypes toward obesity, which directly affects the employment prospects of fat people. Employment discrimination against obese people based on stereotypes—including the beliefs that they are automatically less productive, prone to health problems, inclined to higher absenteeism, and likely to raise insurance and workers compensation costs—amounts to the very type of attitudinal barrier toward disabilities that the perceived disability claim reaches. While obesity in some cases may constitute a cognizable "physical or mental impairment," the third type of the perceived disability claim does not hinge on such determination. The *Cook* decision sets forth a valuable precedent for using the perceived disability claim to combat obesity discrimination, and the decision proves overall consistent with the purposes and parameters of the federal disability laws.

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201. For example, a particular supervisor's attitude toward the obesity of a highly rated office manager, Joseph Gimello, caused him to be passed over for promotion and then discharged; consequently he had to sell an antique car in his family's possession and ended up on welfare for a period. *See* Gimello v. Agency Rent-A-Car Systems, Inc., 594 A.2d 264, 267-68, 271 (N.J. Super. 1991).

202. Roe & Eickwort, *supra* note 200, at 199 *cited in* Allon, *supra* note 1, at 137-38 & Baker, *supra* note 9, at 954.

203. *Cf.* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies* 141 U. PA. L. REV. 149, 218 (1992) ("Discrimination may be intrinsically wrong because it is based upon biases, the incorrect judgments of lesser moral worth, or upon the shallow aversions or inaccurate negative stereotypes that are produced by such judgments.").