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# WEIGHT DISCRIMINATION: DISABILITY LITIGATION AND PUBLIC POLICY

*by* TESSA JANIA

According to the Centers for Disease Control and Prevention, the overall prevalence of obesity in the United States is 26.7 percent.<sup>1</sup> This is a staggering number that points to many issues concerning the country's health, but the effect that obesity has within the context of discrimination and disability is worth equal footing.

The recent case of *Spiegel v. Schulmann* in the Second Circuit brings this issue to the forefront. Elliot Spiegel was terminated from his position as a karate instructor at the Tiger Schulmann Karate School and filed a complaint alleging that the termination was made on the basis of his weight.<sup>2</sup> The United States

Court of Appeals for the Second Circuit vacated and remanded the District Court's grant of summary judgment for the defendant-appellee, Schulmann, concerning the issue as it pertained to the New York City Human Rights Law (NYCHRL).<sup>3</sup>

Spiegel's claim was denied under the New York State Human Rights Law because he could not connect his weight to a medical condition, but the NYCHRL is broader in that it makes it unlawful for an employer to discriminate based on an actual or perceived disability.<sup>4</sup> New York courts recently stated that analysis of these laws must be targeted at understanding and fulfilling the statute's "uniquely broad and remedial" purposes.<sup>5</sup> Therefore, the court remanded the issue to decide whether obesity alone is considered a disability under the NYCHRL.<sup>6</sup>

The Equal Employment Opportunity Commission (EEOC) filed another disability discrimination case pertaining to obesity in Louisiana where the claimant passed away, but her interests are being represented by her estate.<sup>7</sup> The claim alleged that Lisa Harrison was able to perform all of the essential functions of her position as a Prevention/Intervention Specialist at Resources for Human Development, Inc. (RHD), but RHD terminated her because, as a result of her severe obesity, RHD perceived her to be substantially limited in a number of major life activities.<sup>8</sup> Cases like these illuminate how weight stigma affects public policy and the debate over whether obesity should be treated as a disability within a labor and employment context.

#### OBESITY AND THE ADA

Karen Glickstein, a lawyer at Polsinelli Shughart PC, claims that "about the only protection obese people have found is through the Americans with Disabilities Act, which prohibits employers from not hiring people based on actual or perceived disability."<sup>9</sup> The ADA defines disability as: (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.<sup>10</sup> The 2009 amendments to the act emphasize that this definition should be construed in broad terms in order to cover individuals to the maximum extent available without extensive analysis.<sup>11</sup> Typically, under the ADA, it has been difficult for obese individuals to actually

recover because many courts find that obesity alone is not considered a disability and therefore not afforded protection.<sup>12</sup>

In *Spiegel v. Schulmann*, the court noted that the issue of whether or not obesity standing alone is considered a disability under the NYCHRL has never been analyzed.<sup>13</sup> The court also noted that the district court “may determine that this area of law would benefit from further development in the state courts and therefore dismiss the claim without prejudice to refiling in state court.”<sup>14</sup> It is interesting that the appellate court would point out the possible need for continued analysis of this issue because the debate over how obesity should be treated in terms of public policy is ongoing.

#### OBESITY ALONE AS A DISABILITY

Whether or not obesity should be viewed as a disability in and of itself seems to be one of the main areas for dispute. Policy as well as case law often discusses obesity in conjunction with other mitigating physiological conditions.<sup>15</sup> For instance, prior to 1999, the Social Security Act (SSA) listed obesity in its inventory of impairments, but subsequently deleted it.<sup>16</sup> Obesity alone can still be found to be a disability for the purposes of the SSA, but usually only when it is classified as “severe”.<sup>17</sup>

The EEOC promulgated ADA regulations that courts use in determining the validity of obesity discrimination cases.<sup>18</sup> These regulations give credence to the notion that obesity is a temporary condition that can be overcome by an individual and is therefore less deserving of protection. The regulations state that, “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints [and] concussions. . . . Similarly, except in rare circumstances, obesity is not considered a disabling impairment.”<sup>19</sup>

Rebecca Puhl, PhD, the director of research and weight stigma initiatives at the Yale Rudd Center for Food Policy & Obesity, suggests that obesity-induced disability should be covered in the same way as other disabilities, by redefining obesity based on scientific and medical consensus over evidence showing that obesity is really a chronic condition.<sup>20</sup>

In 2009, the American Medical Association (AMA) officially stated that it does not support the effort to make obesity a disability.<sup>21</sup> In explaining this position the resolution stated, “If obesity is designated a disability, physicians could be sued or reprimanded for discrimination under the ADA if a patient takes offense at the physician discussing obesity.”<sup>22</sup>

Walter Lindstrom, a lawyer and founder of the Obesity Law and Advocacy Center, disagrees with this resolution and indicates that “the problem that the AMA resolution has in all honesty is that they fundamentally don’t understand disability law.” Lindstrom further added, “Very few medical conditions are a disability by (traditional) definition.”<sup>23</sup> The AMA resolution looks misguided to others as well, including Dr. Puhl, who stated that “deciding whether or not obesity is a disability should be based on scientific and medical evidence, not on fear of legal liability.”<sup>24</sup>

The societal view that obesity is an issue of personal responsibility creates a stigma that influences public policy and litigation. Despite studies showing that weight discrimination is practically equal to that of racial discrimination and even more prevalent than racial discrimination among women, Dr. Puhl believes that policymakers have not allocated enough funding to do sufficient research to address the issue.<sup>25</sup> Without enough actual knowledge about the causes and implications of obesity, public policy will continue to be influenced by a societal stigma against obesity.

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#### NOTES

1 Centers for Disease Control and Prevention, *Vital Signs: State-Specific Obesity Prevalence Among Adults—United States, 2009*, MORBIDITY AND MORTALITY WEEKLY REPORT, Aug. 3, 2010, available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm59e0803a1.htm?s\\_cid=mm59e0803a1\\_e%0D%0A](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm59e0803a1.htm?s_cid=mm59e0803a1_e%0D%0A).

2 *Spiegel v. Schulmann*, 604 F.3d 72, 76 (2nd Cir. 2010).

3 *Id.* at 75-76.

4 *Id.* at 82.

5 *Id.* at 83.

6 *Id.*

7 Press Release, U.S. Equal Employment Opportunity Commission, EEOC Sues Resources for Human Development, Inc. for Disability Discrimination, Sept. 30, 2010, available at <http://www.eeoc.gov/eeoc/newsroom/release/9-30-10u.cfm>.

8 *Id.*

9 Aly Van Dyke, *A Weighty Issue*, PORTFOLIO.COM, Sept. 10, 2010, *available at* <http://www.portfolio.com/industry-news/health-care/2010/09/10/issue-of-obesity-could-lead-to-discriminatory-hiring-practices#ixzz10fEKusdD>.

10 42 U.S.C. § 12102(1) (2009).

11 U.S. Equal Employment Opportunity Commission, Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008, [http://www.eeoc.gov/laws/statutes/adaaa\\_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm).

12 Email interview with Rebecca M. Puhl, PhD, Dir. of Research and Weight Stigma Initiatives, Yale Rudd Center for Food Policy & Obesity in New Haven, Conn. (Oct. 14, 2010).

13 Schulmann, *supra* note 2.

14 *Id.*

15 Jennifer Staman, CONG. RESEARCH SERV., RS 22609, OBESITY DISCRIMINATION AND THE AMERICANS WITH DISABILITIES ACT, July 16, 2007, *available at* [http://assets.opencrs.com/rpts/RS22609\\_20070716.pdf](http://assets.opencrs.com/rpts/RS22609_20070716.pdf); SSR 02-1p: 67 Fed. Reg. 177 Sept. 12, 2002, *available at* [http://www.ssa.gov/OP\\_Home/rulings/di/01/SSR2002-01-di-01.html](http://www.ssa.gov/OP_Home/rulings/di/01/SSR2002-01-di-01.html).

16 SSR 02-1p, *supra* note 15.

17 *Id.*

18 Staman, *supra* note 15 at 2.

19 *Id.*

20 Puhl, *supra* note 12.

21 Lauren Cox, *Doctors Fight Labeling Obesity a Disability*, ABCNEWS.COM, Jun. 18, 2009, *available at* <http://abcnews.go.com/Health/WellnessNews/story?id=7865711&page=1>.

22 Cox, *supra* note 21.

23 *Id.*

24 Puhl, *supra* note 12.

25 *Id.*