

Document: FEATURE: WEIGHING THE BALANCE: THE BONA FIDE O...

**FEATURE: WEIGHING THE BALANCE: THE BONA FIDE
OCCUPATIONAL QUATIFICATIO NEXCEPTION ALLOWS EMPLOYERS
TO HIRE ONLY THOSE WHO PASS SPECIFIC SIZE AND WEIGHT
REQUIREMENTS, 35 Los Angeles Lawyer 36**

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Reporter

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Text

[*36]

RECENTLY, CITIZENS MEDICAL CENTER in Victoria, Texas, came under fire for requiring that all potential employees have a body mass Index (BMI) of less than \$ 5. A BMI above 30 is considered obese. [1](#) ▼ Headlines captured the outrage over the so-called ban on fat people: "Texas Hospital Says Ear People Need Not Apply," said MSNBC; "Battling the Bulge? Don't Apply to This Hospital," proclaimed another article; and "Texas: Where Everything Must Be Bigger. scept Employees," observed a third. [2](#) ▼ News sources and opinion editorials often asked whether the medical center's decision was legal. The answer is that it depends.

In most states, including California, **employers** may impose height and **weight** restrictions if they bear a rational relation to an employee's ability to perform a particular job. [3](#) ▼ For example, an airline can require its male and female flight attendants to comport with the airline's **weight** guidelines, for safety reasons. By the same token, a public transit company may refuse to **hire** a driver whose Height keeps him or her from using a steering wheel.

An **employer** may also give preferential selection for employees based on **weight** if the **employer** makes a Strong showing that **hiring** overweight employees is not reasonable. This is known as the **bona fide occupational qualification exception**. It **allows** Hooters restaurant to **only hire** women who fit into small or extra-small uniforms. Hooters was able to make a strong showing that female sex appeal was an integral part of its commercial identity. [4]

Even in the absence of these **exceptions**, most States do not make it unlawful for an **employer** to factor a job applicant's **weight** into **hiring** decisions. Michigan is the **only** state in which **weight** discrimination is specified!) outlawed. [5] Some municipalities, including San Francisco and Santa Cruz, also forbid discrimination on the basis of **weight**. [6] Nevertheless, **employers** such as Citizens Medical Center may deny jobs to overweight applicants for a legitimate business reason.

This does not mean that job applicants or employees alleging **weight** discrimination in California are without recourse. Under the [*38] federal Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA), an individual may file a claim for discrimination based on a "physical disability." [7] The California Supreme Court has held that one's **weight** can be considered a qualifying "physical disability" under FEHA if it results from a "physiological condition affecting one or more of the basic bodily systems." [8] The disability must also limit an individual's ability to participate in "one or more major life activities." A physiological condition can be anything from hypertension or high blood pressure to a thyroid disorder. "Major life activities" include caring for oneself, performing manual tasks, walking, and working. [9]

Generally, those who are **only** slightly overweight will have difficulty proving their **weight** is a qualifying disability under FEHA. The few reported cases alleging **weight** discrimination involve individuals who are considered obese, which refers to the condition of a person who is 20 percent above the ideal **weight**. [10] Gross or serious obesity is considered 30 to 35 percent over ideal **weight**, while morbid obesity is either 100 pounds above or twice the ideal **weight**. [11]

Obesity with no underlying physiological cause, however, does not qualify as a disability. This means that in order to be part of a protected class, an employee must prove that a physical or mental impairment caused him or her to gain **weight**. There must be genetic factors or underlying physical disorders that predisposed a plaintiff to obesity. In defense of a discrimination claim, an **employer** can. 38 Los Angeles Lawyer October 2012 argue that the plaintiff's obesity was related entirely to dietary habits and a sedentary lifestyle, which do not constitute an "underlying physiological cause."

An **employer** can also make the argument that an obese employee is unable to or cannot safely perform "essential duties even with reasonable accommodations." [12] Under FEHA, an **employer** has the right to discharge a disabled employee on this basis. **Employers**, however, must make sure that the employee is actually unable to perform his or her duties. Obesity may also be considered a handicap if the employee is "regarded as disabled," even if the obesity does not result from a medical condition or affect the employee's life. [13] If an **employer** views an employee's **weight** as making him or her incapable of performing the job, but the employee can prove he or she was able to perform the job's essential duties, the **employer** may be liable for disability discrimination based upon the perception of disability.

A nonprofit organization based in Philadelphia learned this lesson the hard way in 2007. Resources for Human Development (RHD) fired an employee because she was 5 feet 2 inches tall and **weighed** 527 pounds. [14] The employee, who worked with children dealing with parental drug addiction, filed a charge with the Equal Employment Opportunity Commission (EEOC) for disability discrimination. Two years after bringing the claim, she died of morbid obesity. Other significant conditions contributing to her death were hypertension, diabetes, and congestive heart failure.

The EEOC filed a suit against RHD for disability discrimination. The nonprofit attempted to have the case dismissed by filing a motion for summary judgment. In its motion, RHD argued that the employee's obesity severely limited her job performance. In response, the EEOC presented evidence that the plaintiff was able to perform her job, yet RHD continued to regard her as disabled and terminated her on that basis. The court denied RHD's motion, and the case was scheduled to go to trial. RHD then settled with the EEOC for \$ 125,000. [15]

The lessons from the RHD case are significant. In order to defend a disability discrimination claim based on **weight**, an **employer** must prove that it never considered the plaintiff to be disabled, or alternatively, that the employee's job performance was affected. This becomes difficult when an employee's job is purely sedentary, because it is hard to prove that an employee could not do his or her job due to obesity. As a result, **employers** in certain industries that require constant walking, lifting, and moving may find it easier to terminate employees on the basis of their physical limitations.

Employee Benefits Discrimination?

On the surface, it appears that **employers** like Citizens Medical Center and RHD are refusing to **hire** employees and terminating employees for aesthetic reasons. However, their rationale may be part of a larger scheme to reduce healthcare costs, which increase with instances of obesity, high blood pressure, and diabetes. [16] Premiums for **employer** health insurance plans have risen 153.5 percent since 2002. [17] The *American journal of Preventive Medicine* estimates that the cost of obesity-related medical expenditures may be as high as \$ 147 billion per year--roughly 9 percent of all annual medical expenditures. [18] On average, an obese person costs \$ 1,400 more per year because of related health issues such as type 2 diabetes, heart disease, and cancer. Accordingly, a California **hiring** manager who interviews a morbidly obese candidate may worry about health insurance Costs.

A decision not to **hire** a candidate due to concerns about health insurance costs may not be unlawful. The California Supreme Court has held that FEHA's prohibition against discrimination in employment extends to **hiring**, discharging, suspension, and demotion, but not to the furnishing of employee benefits. [19] Therefore, an individual may not bring a FEHA claim based solely on employee benefits discrimination; the discrimination must be linked to a disability or other enumerated factor. Moreover, the U.S. Supreme Court has made it clear that the Employee Retirement Income Security Act of 1974 (ERISA) [*39] preempts all state laws when it comes to **employer**-sponsored health group plans. [20] Under ERISA, an employee who utilizes his or her **employer's** health insurance plan and who is ultimately terminated may bring a discrimination claim on the theory that "the **employer** 'may' have been motivated by a desire to reduce its medical benefits costs." [21] However, under ERISA, the term "employee" means any individual employed by an **employer**. [22] It does not include candidates for employment who simply interview for a position.

Similarly, **employers** may discriminate against smokers in **hiring** due to the impact on healthcare premiums. In recent months, a number of healthcare agencies have begun implementing a nicotine test during the **hiring** stage in order to keep out employees who may have health problems affiliated with smoking. Because smoking is not a disability under the ADA or FEHA, [23] most challenges to nicotine testing policies are made on the basis of individual rights such as privacy and freedom of speech.

Of course, if a job applicant shows up at a job interview using a cane to walk, the **hiring** manager's actions will be more closely scrutinized, regardless of the concern for healthcare premiums. "At minimum, evidence that an individual requires a cane in order to walk is clearly sufficient to establish that a person is physically disabled under California law." [24]

Employer Wellness Programs

A number of **employers** throughout the state have started proactive campaigns aimed at giving employees incentives to exercise, lose **weight**, and eat a more **balanced** diet. While these "wellness programs" may be well intended, **employers** must be careful not to penalize nonparticipation.

For example, in 2009, government officials in Broward County, Florida, began asking employees to get a finger-stick blood test for cholesterol and diabetes. Those who participated were given the opportunity to participate in a disease management coaching program if they had asthma, hypertension, diabetes, congestive heart failure, or kidney disease. [25] Workers who declined were docked \$ 20 each pay period. In August 2010, an employee who was docked \$ 20 from his paycheck filed a federal discrimination claim on the grounds that the county's program violated the ADA.

The trial court ruled in favor of the county, finding that its wellness program fell under the insurance safe-harbor rule of the ADA. This provision **allows** an **employer** to institute a wellness program as long as it is considered a benefits plan. [26] Because the \$ 20 payroll deduction could be seen as a penalty rather [*40] than a benefit, Broward County stopped docking employees after the ruling came out. Despite this, the employee appealed the trial court's ruling, arguing that using medical tests to give financial incentives could discriminate against workers with health problems. The appeal has yet to be decided.

The Future of Obesity Discrimination

According to the Centers for Disease Control and Prevention, about 36 percent of all Americans are considered obese. [27] The *American Journal of Preventive Medicine* estimates that about 42 percent of the U.S. population will be obese by 2030. [28] It was perhaps with this forecast in mind that California's Commission on Fair Employment and Housing recently proposed exempting "obesity" from the definition of "disability." After receiving comments and suggestions from the legal and health community, however, the commission decided to omit the proposed obesity **exception**. The current revised proposal aims to conform with federal law, which does not exclude obesity as a disability yet includes severe obesity as a disability. [29]

The commission's uncertainty with how to treat obesity reflects the continuing uncertainty over whether to deem it a disability, a concern that extends beyond the employment context to all realms of public accommodation. If one out of three Americans is considered obese, and that obesity may be due to a disability, the number of potential disability claims arising simply due to the inclusion of obesity as a protected characteristic could be monumental. For example, if obesity is a disability, will common carriers need to provide bigger seats or larger lavatories to **allow** ease of access? Would airlines be able to charge a higher rate for clinically obese passengers or would this constitute disparate treatment under the law? In Canada, it is unlawful to discriminate against clinically obese customers by charging them more to travel by air, rail or ferry. **30** Will the United States follow suit?

As the girth of Americans continues to expand, **employers** should keep a watchful eye on this area of the law when trying to cut healthcare costs and manage the effectiveness of their workforce. While **weight** is not currently a protected characteristic under FEHA, California **employers** should always keep in mind whether there are legitimate business reasons for their decisions in light of the risks of a disability or perceived disability discrimination claim.

Graphic

PHOTO 1, no caption; PHOTO 2, no caption

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Footnotes

1

BMI is calculated from a person's **weight** and height. A BMI from 18.5 to 25 is considered normal, while a BMI of 30 or more is obese. Individuals whose BMI is 40 or more are considered extremely obese.

2

Eve Tahmincioglu, *Texas Hospital Says Fat People Need Not Apply*, LIFEINC (Apr. 5, 2012), http://lifeinc.today.msnbc.msn.com/_news/2012/04/05/11036667-texas-hospital-says-fat-people-need-not-apply?lite; Daniel Cook, *Battling the Bulge? Don't Apply to This Hospital*, OUTPATIENT SURGERY MAGAZINE (Mar. 30, 2012), <http://www.outpatientsurgery.net.ezproxy1.lib.asu.edu/news/2012/03/33-Battling-the-Bulge-Don-t-Apply-to-This-Hospital>; Richard B. Cohen, *Texas: Where Everything Must Be Bigger, Except Employees*. EMPLOYMENT DISCRIMINATION RETORT (Mar. 27, 2012), <http://employmentdiscrimination.foxrothschild.com/2012/03/articles/another-category/texas-where-everything-must-be-bigger-except-employees>.

3

McMillen v. Civil Serv. Comm'n, 6 Cal. App. 4th 125 (1992).

4

See, e.g., *Frank v. United Airlines, Inc.*, 216 F. 3d 845, 855 (2000).

5

Elliott Larsen Civil Rights Act, [MICH. COMP. LAWS 37.2101](#) *et seq.*

6

S.F. ADMIN. CODE ch. 12 (2000); SANTA CRUZ MUNICIPAL CODE ch. 9.83 (1995).

7

[GOV. CODE §§ 12900](#) *et seq.*

8

Cassista v. Community Foods, Inc., 5 Cal. 4th 1050, 1065 (1993); [GOV. CODE § 12940\(a\)](#).

9

[CAL. CODE REGS. tit. 2, § 7293.6\(e\)](#) < l)(A)(2)(a).

10

Cassista, 5 Cal. 4th at 1062.

11

Id.

12

[Gov. CODE § 12940\(a\)\(1\)](#).

13

Cassista, 5 Cal. 4th at 1060-61; *cf.* *Frank v. Lawrence Union Free Sch. Dist.*, 688 F. Supp. 2d 160, 171 (E.D. N.Y. 2010).

14

EEOC v. Resources for Human Dev., Slip Copy, 2012 WL 669435 (E.D. La. 2012).

15

Press Release, EEOC, Resources for Human Development Settles EEOC Disability Suit for \$ 125,000 (Apr. 10, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/4-10-12a.cfm>.

16

Ronald L Fong & Peter Franks, Body Mass Index and Employment-Based Health Insurance (May 9 2008), <http://www.biomedcentral.com.ezproxy1.lib.asu.edu/1472-6963/8/101>.

17

California HealthCare Foundation, California **Employer** Health Benefits Survey (2012), <http://www.chcf.org/publications/2011/12/employer-health-benefits>.

18

Eric A. Finkelstein et al., *Obesity and Severe Obesity Forecasts through 2030*, A.M. J. OF PREVENTIVE MED. 563-70 (June 2012).

19

Esberg v. Union Oil Co., 28 Cal. 4th 262, 47 P. 3d 1069(2002).

20

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-45 (1987).

21

Wills v. Honda of America Mfg., Inc., No. 2:11-cv-717,2011 WL 6934502, at *2 (S.D. Ohio Dec. 30,2011).

22

42 U.S.C. § 2000e(f).

23

Brashear v. Simms, 138 F. Supp. 2d 693 (D. Md. 2001).

24

Sandell v. Taylor-Listug, Inc., 188 Cal. App. 4th 297, 311 (2010).

25

Seff v. Broward County, No. 10-61437-CIV-MOORE/SIMONTON (S.D. Fla. Apr. 11, 2011).

26 ¶

42 US.C. § 12201(c).

27 ¶

Centers for Disease Control and Prevention, Adult Obesity Facts,
<http://www.cdc.gov.ezproxy1.lib.asu.edu/obesity/data/adult.html>.

28 ¶

Eric A. Finkelstein et al., *Obesity and Severe Obesity Forecasts through 2030*, AM. J. OF PREVENTIVE MED. 563-70 (June 2012); *see also* David Brown, *Study Predicts 42 Percent of Americans Will Be Obese in 2030*, WASHINGTON POST (May 7, 2012),
http://www.washingtonpost.com/national/health-science/study-predicts-42-percent-of-americans-will-be-obese-in-2030/2012/05/07/gIQAeaDL9T_story.html.

29 ¶

FFHA, Title 2, Sections 7293.5-7294.4 Disability Discrimination, Notice of Proposed Rulemaking at 5 (Mar. 2, 2012), *citing AD AAA interpretative regulations* at 29 C.F.R. pt. 1630.3.

30 ¶

Canada Transportation Act S.C. 1996, c. 10.

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