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CIVIL RIGHTS/EMPLOYMENT LAW—STATES CARRY WEIGHT OF EMPLOYMENT DISCRIMINATION PROTECTION: RESOLVING THE GROWING PROBLEM OF WEIGHT BIAS IN THE WORKPLACE

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NOTES

CIVIL RIGHTS/EMPLOYMENT LAW—STATES CARRY WEIGHT OF EMPLOYMENT DISCRIMINATION PROTECTION: RESOLVING THE GROWING PROBLEM OF WEIGHT BIAS IN THE WORKPLACE

INTRODUCTION

Should an employer be allowed to refuse to hire “fat girls?”¹ Should a supervisor be allowed to monitor what an employee eats or call him a “fat slob” in front of clients and colleagues?² Is it acceptable for a manager to refuse to promote a competent employee because he does not want a “stupid, fat broad” running his department?³ Should obese employees be forced to lose the weight or risk losing the job—even if their weight has nothing to do with their work?⁴ Not only are these scenarios representative of the kind of employment discrimination overweight workers face on a daily basis, they are situations from which employees have no legal protection under current federal and most state legislation.

Weight discrimination lawsuits have been brought under the theories that weight bias resulting in disparate treatment⁵ or dispa-

1. Mary Carmichael, *Do We Really Need a Law to Protect Fat Workers?*, BOSTON GLOBE MAG., Aug. 5, 2007, at 26, available at http://www.boston.com/news/globe/magazine/articles/2007/08/05/do_we_really_need_a_law_to_protect_fat_workers.

2. *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 269 (N.J. Super. Ct. App. Div. 1991).

3. *Freire v. First Nat'l*, No. 9644620, 1998 WL 1181751, at *3 (Mass. Super. Ct. July 22, 1998).

4. A twenty-year veteran flight attendant who weighed 154 pounds at five-foot-four was placed on a “formal weight program” for appearing overweight in her uniform and eventually suspended for not losing twelve pounds. *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 80-81 (S.D.N.Y. 1989). Continental Airlines enforced weight regulations on female flight attendants to gain a competitive edge by offering passengers service by “thin, attractive women.” *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 604 (9th Cir. 1982) (en banc).

5. “Disparate treatment [occurs when an] employer . . . treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); see *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding an employer wrongfully refused to hire the plaintiff because she had young children but did not apply the same standard to men).

rate impact⁶ of a protected group is a violation of civil rights law, or, alternatively, weight bias is a violation of disability law based on the premise that excess weight is a handicap.⁷ Neither theory has been sufficient to protect individuals against weight-based discrimination. Title VII of the Civil Rights Act of 1964 bans discrimination based on race, color, sex, national origin, or religion but does not protect weight as a stand-alone characteristic.⁸ The Rehabilitation Act of 1973⁹ (RHA) and The Americans with Disabilities Act of 1990¹⁰ (ADA) prohibit employers from discriminating against employees with disabilities, but courts have rarely interpreted obesity as a disability or handicap.¹¹ As a result, even if the court finds the

6. Disparate impact involves employment practices that are facially neutral but affect one group more harshly than another and cannot be justified by business necessity. *Int'l Bd. of Teamsters*, 431 U.S. at 335 n.15; see *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (holding standardized employment tests that favored white applicants over other applicants were impermissible under Title VII). See generally *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for correctional counselor position would exclude a disproportionate number of women compared to men).

7. See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 438 (6th Cir. 2006) (employee brought disability claim alleging his employer improperly discharged him because of his obesity); *Francis v. City of Meriden*, 129 F.3d 281, 282-83 (2d Cir. 1997) (a suspended firefighter sued his employer for intentionally discriminating against him based on his failure to meet weight regulation); *Andrews v. Ohio*, 104 F.3d 803, 805 (6th Cir. 1997) (police officers who were disciplined for failing to meet weight guidelines claimed they were regarded as disabled by the state); *Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 20-21 (1st Cir. 1993) (a morbidly obese applicant was rejected for a position she had successfully held twice previously based on the belief her weight would prevent her from performing the duties of the job).

8. 42 U.S.C. § 2000e-2(a)(1) (2006). Under Title VII, weight has been protected under “plus” claims where the basis for discrimination is a protected characteristic, such as sex or race. Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 Nw. U. L. REV. 209, 210 n.8 (2008) (citing *Phillips*, 400 U.S. at 542); see, e.g., *Gedom*, 692 F.2d at 602 (finding airline’s weight regulations were discriminatory because they were only enforced against female employees); *Hardy v. Stumpf*, 37 Cal. App.3d 958, 964 (Ct. App. 1974) (rejecting a height and weight requirement for a police officer position because the standards effectively excluded eighty percent of women and were not proven to be “reasonable” and “necessary” to job duties). But see *Marks v. Nat'l Commc'ns Ass'n*, 72 F. Supp. 2d 322, 335 (S.D.N.Y. 1999) (holding plaintiff’s discrimination claim based on weight alone was not illegal under Title VII because the employer discriminated equally against overweight men and women). To be unlawful, the basis of the discrimination must be a protected characteristic or the plus claim fails.

9. The Rehabilitation Act of 1973 (RHA), 29 U.S.C. § 701.

10. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101.

11. The courts have “consistently rejected obesity as a disability protected by the ADA.” *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 975 (S.D. Tex. 1996). Obesity that is not caused by a physiological condition is not considered a disability under federal law. *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1153 (Cal. 1993); see also *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987) (holding that the “mere assertion that one is overweight or obese is not” enough to qualify a claimant for

employee was discriminated against because of his or her weight, the discrimination is not considered unlawful because weight is not a protected characteristic under current federal disability law.¹²

This lack of legislative protection has allowed employees to be legally discriminated against in the workplace. Workers are stigmatized because of their weight—subjected to derogatory comments and jokes on a regular basis.¹³ In a study conducted by Yale University, forty-three percent of overweight workers reported experiencing weight bias from their supervisors,¹⁴ and more than half of the surveyed workers reported being harassed by colleagues.¹⁵

statutory protection, and that “[s]omething more must be shown”); *Phila. Elec. Co. v. Pa. Human Relations Comm’n*, 448 A.2d 701, 707 (Pa. Commw. Ct. 1982) (“The condition of morbid obesity, alone, is not such a handicap or disability.”).

12. For example, the California Supreme Court held that a grocery store discriminated against an applicant based on her obesity, but it was not unlawful because she did not prove her obesity was a handicap within the meaning of the statute. *Cassista*, 856 P.2d at 1148, 1154.

13. ROBERTA R. FRIEDMAN, RUDD CENTER FOR FOOD POLICY & OBESITY, *WEIGHT BIAS: THE NEED FOR PUBLIC POLICY 4* (2008) [hereinafter *RUDD REPORT*], available at <http://yaleruddcenter.org/resources/upload/docs/what/bias/weightbiaspolicyruddreport.pdf>. A National Association to Advance Fat Acceptance (NAAFA) survey found seventy-five percent of the respondents were subjected to criticism or teasing at work. A. Myers & J.C. Rosen, *Obesity Stigmatization and Coping: Relation to Mental Health Symptoms, Body Image, and Self-Esteem*, 23 *INT’L J. OBESITY* 221, 221 (1999). One of the “many discriminatory remarks” an employee was subjected to at work was a supervisor’s comment that he “shook like jello” when he walked. *Blanchard*, 23 *M.D.L.R.* 23, 24 (Mass. Comm’n Against Discrimination 2001), available at 2001 WL 1602836, at *1.

14. *RUDD REPORT*, *supra* note 13, at 4. Employees have reported weight-related discrimination in a number of different contexts. See, e.g., *Greene v. Seminole Elec. Coop., Inc.*, 701 So. 2d 646, 648 (Fla. Dist. Ct. App. 1997) (a morbidly obese grounds keeper was “the subject of jokes and derision” and pressured into buying “diet cookies” from his supervisor (internal quotation marks omitted)); *Lamoria v. Health Care & Ret. Corp.*, 584 N.W.2d 589, 590 (Mich. Ct. App. 1998) (per curiam), *adopted*, 593 N.W.2d 699 (Mich. Ct. App. 1999) (special panel) (retirement home supervisors allegedly had a “hit list” of employees they wanted to terminate, including those they perceived as overweight (internal quotation marks omitted)); Francine Thistle Tyler & Laura Fraser, *A Matter of Weight—Sizing Up Discrimination as Some Workers Find Laws, Attitudes Are Slow to Change*, *SEATTLE TIMES*, Aug. 21, 1994, at F1, available at <http://community.seattletimes.nwsourc.com/archive/?date=19940821&slug=1926319> (public relations director was told to wear only black or navy clothes to work based on the inference that the colors hid her size best).

15. *RUDD REPORT*, *supra* note 13, at 4; see, e.g., *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 485 (6th Cir. 2000) (truck driver’s co-workers called him names and poked fun at his weight); *Butterfield v. State*, No. 96 Civ. 5144, 1998 U.S. Dist. Lexis 18676, at *15-16 (S.D.N.Y. July 15, 1998) (state corrections officer had his locker sprayed with cheese and an unknown substance slipped into his drink, the latter causing nausea and burning in his stomach).

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Heavier workers earn less than their average-sized counterparts,¹⁶ receive fewer raises,¹⁷ and are viewed as having low supervisory potential.¹⁸ Employees have been denied health-insurance benefits, and seventeen percent of those surveyed reported being fired or pressured to resign because of their excess weight.¹⁹ Employees who fail to lose weight *can be fired or suspended* even if they perform their jobs well and their weight is unrelated to their job requirements.²⁰

The resulting shame and stigma from this kind of treatment results in social rejection, lower socio-economic status, and poor body image, which can lead to decreased physical activity, binge eating, and ultimately the onset of a vicious cycle of weight gain.²¹ Considering that two out of three American adults are now overweight or obese, weight bias has affected, and will continue to affect, millions.²² This dilemma may explain why weight discrimination in the workplace is gaining momentum as the focal

16. RUDD REPORT, *supra* note 13, at 4. Obese women have been found to earn twelve percent less than nonobese women. Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 790 (2001). R

17. THE COUNCIL ON SIZE & WEIGHT DISCRIMINATION, STATISTICS ON WEIGHT DISCRIMINATION: A WASTE OF TALENT, <http://www.cswd.org/docs/stats.html> [hereinafter COUNCIL] (last visited Mar. 27, 2010).

18. RUDD REPORT, *supra* note 13, at 4; *see, e.g.*, *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 289 (E.D. Mich. 1993) (route salesman testified he was told he would have to lose weight “if he wanted to go anywhere with the company”); *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 268 (N.J. Super. Ct. App. Div. 1991) (record-setting sales manager was not considered “promotable” by his supervisor because of his “size and weight”). R

19. Puhl & Brownell, *supra* note 16, at 790. R

20. RUDD REPORT, *supra* note 13, at 4; Svetlana Shkolnikova, *Weight Discrimination Could Be as Common as Racial Bias*, USA TODAY, May 21, 2008, at 7D, available at http://usatoday.com/news/health/weightloss/2008-05-20-overweight-bias_N.htm. For example, a public relations director raised large sums of money for a major medical center, established award-winning programs, and garnered national publicity in her first year on the job. Tyler & Fraser, *supra* note 14. Nevertheless, she was fired because “[t]hings that should have changed didn’t change,” alluding to the fact that the employee had not lost weight. *Id.* R

21. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 8 (2001) [hereinafter CALL TO ACTION], available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>; *see also* RUDD REPORT, *supra* note 13, at 3; RM Puhl, T Andreyeva, & Kelly D. Brownell, *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, 32 INT’L J. OBESITY 1, 7 (2008). R

22. RUDD REPORT, *supra* note 13, at 2; *see also* Elizabeth E. Theran, “Free to Be Arbitrary and . . . Capricious”: Weight-Based Discrimination and the Logic of American AntiDiscrimination Law,” 11 CORNELL J.L. & PUB. POL’Y 113, 136 (2001) (holding weight bias has the ability to affect everyone). R

point of a new civil rights movement.²³ But what is the role of the legal system in that movement?

In Massachusetts, a “slim” state with a 20.9% obesity rate,²⁴ House Representative Byron Rushing has proposed a bill that would add height and weight to current antidiscrimination laws, offering legal protection from employment discrimination based on height and weight.²⁵ *House Bill 1850: An Act Making it Unlawful to Discriminate on the Basis of Weight and Height* (hereinafter H.R. 1850) would make it illegal for employers to consider an individual’s weight with respect to hiring decisions, compensation, job placement, and termination.²⁶ In this respect, the legislation would place weight under the same legal protection as race, color, sex, religion, national origin, and disability. Previous attempts went unnoticed, but the bill, introduced in 2008²⁷ and resubmitted in 2009, has fifteen cosponsors and has received significant press coverage.²⁸ “What was clear,” Representative Rushing said, “is there is a growing number of people who think this should happen and an even larger number of people who think we should at least be talking about it.”²⁹

Currently, Michigan is the only state that offers legal protection against employment discrimination based on weight.³⁰ Under

23. SONDRÁ SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 29 (2000).

24. The Centers for Disease Control and Prevention (CDC), U.S. Obesity Trends: Trends by State 1985-2008, <http://www.cdc.gov/obesity/data/trends.html#/State> (last visited Apr. 8, 2010) [hereinafter Trends by State]. Fifty-six percent of Massachusetts residents qualified as overweight in 2005. Courtney N. Kubilis, Note, “Weighting” for Protection in Massachusetts: The Myth of Equal Opportunity in Employment, 42 *SUFFOLK U. L. REV.* 211, 211 (2008).

25. H.R. 1850, 2009 Leg., 186th Sess. (Mass. 2009); see also Kubilis, *supra* note 24, at 211.

26. H.R. 1850, 2009 Leg., 186th Sess.

27. *Id.*

28. The cosponsors include fellow House Representatives Christine E. Canavan, Pam Richardson, Timothy J. Toomey, Jr., Matthew C. Patrick, Martha M. Walz, Benjamin Swan, Stephen J. D’Amico, Willie Mae Allen, John W. Scibak, Kathi-Anne Reinsteiner, Ellen Story, Karen E. Spilka, Gloria L. Fox, Kay Khan, Carl M. Sciortino, Jr., and State Senator Susan C. Fargo. *Id.*; see also Carmichael, *supra* note 1.

29. Lisa Anderson, *Lending Heft to an Anti-Bias Campaign: Massachusetts Bill Aims to Stem Discrimination Against the Overweight, but Some Don’t Want a ‘Green Light’ to Be Fat*, *CHI. TRIB.*, Apr. 28, 2008, available at 2008 WLNR 7852996 (Westlaw). But see Gary Feldman & Judith Ashton, Op-Ed., *Jumping the Gun on Weight Discrimination*, *BOSTON GLOBE*, June 2, 2007, at A11 (disagreeing with the bill), available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/06/02/jumping_the_gun_on_weight_discrimination.

30. The Elliott-Larsen Civil Rights Act (“the Elliott-Larsen Act”), modeled after Title VII, prohibits “discriminatory practices, policies, and customs . . . based upon re-

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the Elliott-Larsen Act, a claimant only needs to prove a prima facie case of weight discrimination or provide direct evidence of discrimination³¹ to fall under the umbrella of statutory protection.³² Other states have applied broader interpretations of their civil rights and disability laws to afford obese employees legal protection.³³ Some cities have enacted local ordinances that have successfully shielded employees from workplace weight discrimination,³⁴ but the limited

ligion, race, color, national origin, age, sex, height, weight, familial status, or marital status.” MICH. COMP. LAWS ANN. § 37.2101 (West 2001); *see also* Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 102 (2002); Kenneth P. Thom, *Employment Discrimination Under the Elliott-Larsen Civil Rights Act: The State of the Statute*, 1989 DET. C. L. REV. 1235, 1236 n.2 (1989) (stating that the Elliott-Larsen Act is “unique,” in part because it includes weight discrimination, unlike federal statutes). The District of Columbia Human Rights Act prohibits discrimination on the basis of “personal appearance,” which includes weight. D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2001).

31. *See infra* notes 187-190 and accompanying text for discussion of the elements of a prima facie case and direct evidence of weight discrimination.

32. MICH. COMP. LAWS ANN. § 37.2101; *see, e.g.*, *Knowlton v. Levi’s of Kochville, Inc.*, No. 190677, 1997 WL 33345022, at *1 (Mich. Ct. App. June 3, 1997). In Michigan, the courts use the *McDonnell Douglas* test or the *Gallaway* test to establish burden of proof. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 805 (1973); *Gallaway v. Chrysler Corp.*, 306 N.W.2d 368, 371 (Mich. Ct. App. 1981); *see also* *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 293 (E.D. Mich. 1993) (holding an isolated comment about an employee’s weight was not enough to establish discrimination); *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115, 1124 (E.D. Mich. 1988) (finding a requirement that an employee seek treatment for obesity could be evidence that weight played a part in the employer’s decision to fire her).

33. *See, e.g.*, *Clowes v. Terminix Int’l Inc.*, 538 A.2d 794, 802 (N.J. 1988) (holding that the general purpose of New Jersey’s Law Against Discrimination, as “remedial social legislation,” is to “guarantee civil rights”); State Div. of Human Rights *ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 699 (N.Y. 1985) (finding “nothing in [New York Executive Law section 292] or its legislative history” that would allow an employer to refuse to hire a qualified applicant simply because of “excessive weight”).

34. For example, in Santa Cruz, California, when Toni Cassista lost her discrimination claim, *see SOLOVAY, supra* note 23, at 233-34, the Santa Cruz City Council passed an ordinance “to protect and safeguard the right and opportunity of all persons to be free from . . . discrimination based on . . . weight or physical characteristic.” SANTA CRUZ, CAL., MUN. CODE, ch. 9.83.010 (1992), *available at* <http://www.codepublishing.com/CA/SantaCruz/>. In New York in December of 2008, the Common Council of the City of Binghamton passed civil rights legislation that included weight as a protected characteristic “to protect and safeguard the right and opportunity of all persons to be free from discrimination.” BINGHAMTON, N.Y., BINGHAMTON HUMAN RIGHTS LAW, CODE ch. 45, § 45-2 (2008), *available at* <http://www.yaleruddcenter.org/resources/upload/docs/what/bias/Binghamton%20Human%20Rights%20Law%20-%20Final%20Version.pdf>. San Francisco also prohibits weight from being used as a “measure of health [or] fitness” in employment decisions. CITY & COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, COMPLIANCE GUIDELINES TO PROHIBIT WEIGHT AND HEIGHT DISCRIMINATION, § 5(C) (2001), *available at* www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=159. Its ordinance gave legal leverage to Jennifer Portnick, a certified aerobics instructor, who was denied a Jazzercise franchise for not

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range of legal protection creates inconsistency within the state and leaves employees outside city limits vulnerable.³⁵ In this respect, state-wide legislation such as H.R. 1850 is a more logical, effective solution.

After examining the merits of, and issues with, including weight as a protected characteristic under antidiscrimination law, this Note concludes that Massachusetts should add weight to its civil rights laws because federal civil rights and disability laws are inadequate in terms of legal protection.

Section I will discuss the pervasive evidence of weight discrimination found at all levels of employment: the hiring process that disqualifies obese candidates on sight,³⁶ the lack of promotion based on stereotypical beliefs that overweight workers lack supervisory characteristics,³⁷ the inequity in pay,³⁸ and the harassment employees suffer at the hands of their coworkers and supervisors.³⁹ This Note will consider how the bias and stigma associated with being overweight negatively impacts workers professionally, financially, and socially, and concludes there is an immediate need for legislation to ensure equal employment opportunities for all.

Section II will examine current federal legislation and discuss the role of weight in federally-protected antidiscrimination categories. It will consider how the courts have treated obesity in a civil rights context: courts have offered protection against weight discrimination if discrimination based on a protected characteristic such as sex or race is also found but have held that discrimination based on weight alone is not unlawful.⁴⁰ Section II will also demonstrate that under disability law, courts have rarely found that obes-

having a “fit appearance.” See Dan Ackman, *The Case of the Fat Aerobics Instructor*, FORBES.COM, May 9, 2002, <http://www.forbes.com/2002/05/09/0509portnick.html>. Jazzercise is “a fusion of jazz dance, resistance training, Pilates, yoga, and kickboxing movements.” Jazzercise Business Information, http://www.jazzercise.com/pdfs/jazzercise_bus_info08.pdf (last visited Mar. 27, 2010).

35. San Francisco has an ordinance prohibiting weight discrimination, but its neighboring city, Oakland, does not. Sally E. Smith, *And Justice for All?*, BBW MAG., http://www.bbwmagazine.com/work_3_0018.htm (last visited Mar. 27, 2010). Author and attorney Sondra Solovay noted, “You land on one side of the Bay Bridge and it’s illegal for you to be discriminated against because of your weight. You land on the other side of the bridge, and it’s a tough fight.” *Id.*

36. See *infra* notes 52-58 and accompanying text.

37. See *supra* note 18 and accompanying text.

38. See *infra* note 73 and accompanying text.

39. See *infra* note 74 and accompanying text.

40. See *infra* note 127.

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ity is a handicap within the meaning of the federal statutes.⁴¹ Section II will conclude that federal law, as it currently exists, inadequately protects weight from employment discrimination.

Finally, Section III will examine how some states and cities have protected their citizens from weight bias in the workplace despite the legal limitations at the federal level.⁴² It will conclude that creating state legislation such as H.R. 1850 would allow the states to directly protect weight from being considered in employment decisions to the detriment of workers. H.R. 1850, if passed by Massachusetts legislators, would be most effective as a legal basis for weight-discrimination claims. Comparing the proposed Massachusetts bill to Michigan’s Elliott-Larsen Act, this Note will discuss how Michigan courts have interpreted the statute when considering a weight-discrimination case.⁴³ It will conclude that the Elliott-Larsen Act, which is based on existing federal legal frameworks, provides a sufficient model for Massachusetts to emulate and improve upon when deciding claims of weight bias.

I. WEIGHT-BASED DISCRIMINATION IN THE WORKPLACE

Weight discrimination is prevalent in our society, affecting every facet of an individual’s professional life.⁴⁴ A Yale study conducted in 2007 found that overweight adults were twelve times more likely than adults who were not overweight to report weight-based discrimination.⁴⁵ Obese adults were thirty-seven times more likely to report discrimination,⁴⁶ and severely (morbidly) obese

41. See *infra* notes 165-170 and accompanying text.

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42. See *infra* notes 212-224 and accompanying text.

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43. See *infra* notes 184-204 and accompanying text.

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44. Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 969, 969 (1999); Lucy Wang, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1910 (2008).

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45. RUDD REPORT, *supra* note 13, at 4. The CDC defines the term “overweight” as a body mass index of 25-29.9. CDC, *Obesity and Overweight for Professionals: Defining Overweight and Obesity*, <http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm> (last visited Apr. 9, 2010). Body mass index (BMI), for most people, is a reliable measurement of body fat. A person’s BMI is based on height and weight. CDC, *Healthy Weight: Adult BMI Calculator*, http://www.cdc.gov/nccdphp/dnpa/healthyweight/assessing/bmi/adult_BMI/english_bmi_calculator/bmi_calculator.htm (last visited Apr. 9, 2010).

46. RUDD REPORT, *supra* note 13, at 4. “Obese” is defined as a BMI of 30 or higher. CDC, *Obesity and Overweight for Professionals: Defining Overweight and Obesity*, *supra* note 45. It has also been defined as twenty percent above a person’s ideal weight. *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1151 n.12 (Cal. 1993); Roehling, *supra* note 44, at 971.

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adults were one hundred times more likely.⁴⁷ Evidence of discrimination has been found at virtually every level in the cycle of employment, including the hiring process, placement, pay, promotions, disciplinary actions, and termination.⁴⁸ Overweight applicants are less likely to be initially hired, regardless of their qualifications, especially for jobs that require personal interaction with clients or customers.⁴⁹ This impediment to securing work increases the risk of poverty, preventing a person from having the means to afford healthier food.⁵⁰ Weight bias also takes a psychological toll, destroying the person’s confidence.⁵¹

A. *Ripping Away the Welcome Mat*

It began like an ordinary job search. A job seeker applied for positions and conducted preliminary job interviews over the phone.⁵² The candidate was highly qualified with an impressive re-

47. RUDD REPORT, *supra* note 13, at 4. Severely obese (Grade III obesity) is defined as having a BMI of 40 or higher. BLACK’S MEDICAL DICTIONARY 417 (37th ed. 1992). It has also been defined as being one hundred pounds overweight or twice the normal, or desired, body weight for the person’s height. See *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 20 n.1 (1st Cir. 1993). R

48. Roehling, *supra* note 44, at 982-83 (1999); see, e.g., *Marks v. Nat’l Commc’ns Ass’n*, 72 F. Supp. 2d 322, 326 (S.D.N.Y. 1999) (“Telemarketer of the Year” told, “Lose the weight and you will get promoted”); State Div. of Human Rights *ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 696 (N.Y. 1985) (potential employer deemed computer programmer “medically not acceptable” because she was obese); *Metro. Dade County v. Wolf*, 274 So. 2d 584, 585 (Fla. Dist. Ct. App. 1973) (upholding the termination of an overweight employee based on the belief he was “more likely to become disabled”). R

49. Puhl & Brownell, *supra* note 16, at 789-90; see, e.g., *Marks*, 72 F. Supp. 2d at 326 (overweight employee at a telephone services company not promoted to a face-to-face sales representative position because “presentation [was] extremely important”); Roehling, *supra* note 44, at 976 (finding that obese sales people were less likely to be assigned to challenging sales territories when the job was conducted face-to-face). R

50. In 2008, Mississippi, the poorest U.S. state, had the highest obesity rate at thirty-three percent. See *Trends by State*, *supra* note 24; see also *CALL TO ACTION*, *supra* note 21, at 13-14 (“[W]omen of lower socioeconomic status . . . are approximately [fifty] percent more likely to be obese”); Wang, *supra* note 44, at 1915 (“Discrimination within . . . employment naturally reduces chances of economic success in life.”). R

51. *CALL TO ACTION*, *supra* note 21, at 8; RUDD REPORT, *supra* note 13, at 3; see also *Tyler & Fraser*, *supra* note 14 (employee who was fired for not losing weight opted not to bring a lawsuit because the experience “[took] a toll on her confidence and made it hard to fight back”); *Smith*, *supra* note 35 (rejected job applicant was deterred from seeking other positions because she was “afraid of being discriminated against”). R

52. SOLOVAY, *supra* note 23, at 99; *Teaching Tolerance, Sizing Up Weight-Based Discrimination* (May 3, 2002) [hereinafter *Sizing Up Weight-Based Discrimination*] (on file with author). R

sume, and the prospective employer was eager to meet in person.⁵³ When she arrived for the interview, however, everything changed.⁵⁴

“[T]here was a look that would cross their faces when I came in,” the candidate observed about her potential employers, a sentiment echoed by her fellow overweight job seekers.⁵⁵ “You can just see this wall come down,” another interviewee noted.⁵⁶ Despite a professional wardrobe, a neat appearance, and a poised and confident demeanor, once the employer met the potential employee and “looked [her] up and down,”⁵⁷ the interview became short and to the point; the suddenly unqualified candidate was “out the door.”⁵⁸

Weight discrimination often occurs in the hiring process, where the employers pass over qualified applicants in favor of lesser candidates simply based on appearance—and specifically based on weight.⁵⁹ Some applicants even refuse to apply for jobs that require a “professional appearance,” believing their weight automatically excludes them in the mindset of the hiring employer.⁶⁰ Their beliefs may be justified. One study reports that sixteen percent of employers would not hire an obese person for any reason.⁶¹ The same study reports that another forty-four percent of employers would hire an obese person only under certain circumstances.⁶² Weight is

53. Sizing Up Weight-Based Discrimination, *supra* note 52.

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54. *Id.*

55. SOLOVAY, *supra* note 23, at 99; *see also* Gauthier, 20 M.D.L.R. 41, 42 (Mass. Comm’n Against Discrimination 1998) (complainant testifying that her interviewer had “a look of repulsion on his face that I wasn’t worth his time”).

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56. Mickey Meece, *Mind-Set: Only the Svelte Need Apply*, N.Y. TIMES, Mar. 22, 2000, at G1 (internal quotation marks omitted).

57. Smith, *supra* note 35.

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58. Meece, *supra* note 56; *see* Sizing Up Weight-Based Discrimination, *supra* note 52.

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59. COUNCIL, *supra* note 17. For example, fifty-three-year-old Gail Gauthier, weighing 250 pounds, alleged she was discriminated against when a car company hired a 103-pound, twenty-two-year-old instead of her. *Gauthier*, 20 M.D.L.R. at 42-43.

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60. SOLOVAY, *supra* note 23, at 104; *see, e.g.*, *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 80 & n.1 (S.D.N.Y. 1989) (noting that an airline’s requirement that flight attendants’ weights “must result in satisfactory appearance in uniform” was directed “at ensuring a competent professional business look” (citation and internal quotation marks omitted)); Tyler & Fraser, *supra* note 14 (noting that “[a] person whose weight is out of proportion with his or her height” is not considered to have a professional appearance).

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61. EVELYN B. KELLY, OBESITY 145 (2006); SOLOVAY, *supra* note 23, at 104.

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62. KELLY, *supra* note 61, at 145; SOLOVAY, *supra* note 23, at 104.

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acknowledged as a factor in hiring decisions, especially in upper management positions.⁶³

Employers generally do not overtly state their reasons for rejecting the candidate, which makes it difficult to prove weight discrimination.⁶⁴ However, a survey conducted through the National Association for the Advancement of Fat Acceptance (NAAFA) reported that over forty percent of male respondents and over sixty percent of female respondents believed they were not hired because of their size, and some remarked their entire job interview focused on their weight.⁶⁵ Even if an applicant is able to prove discrimination, unless he or she is fortunate enough to live in one of the few areas of the country that includes weight in its antidiscrimination laws, there is little legal recourse.⁶⁶

B. *In the Door, Off the Furniture*

Once an applicant is hired, weight bias has been shown to continue into the workplace. Overweight employees are often viewed negatively.⁶⁷ They are stereotyped as lazy, less competent, less productive, unprofessional in appearance, and undisciplined, and are therefore less likely to receive promotions as a result of these be-

63. See, e.g., Meece, *supra* note 56 (national recruiting firm manager stating that “[a]pppearance is always a consideration” because “[e]xecutives are always in front of [large] groups”).

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64. See, e.g., Smith, *supra* note 35. Jamie Ferguson was told a department store “desperately needed summer help” when she applied for a job. *Id.* The store manager, however, “looked [her] up and down” and informed her there were no open positions. *Id.* The applicant believed she was rejected because of her weight. *Id.*; see also *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1145 (Cal. 1993) (noting testimony that indicated employer was concerned about plaintiff’s weight, although employer had told plaintiff she was not hired because it had “hired people with more experience”).

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65. ESTHER ROTHBLUM ET AL., RESULTS OF THE NAAFA SURVEY ON EMPLOYMENT DISCRIMINATION 4 (1989), available at http://www-rohan.sdsu.edu/~rothblum/doc_pdf/weight/ResultsoftheNAAFASurvey.pdf; see Myers & Rosen, *supra* note 13, at 221.

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66. See, e.g., Elizabeth Fernandez, *Teacher Says Fat, Fitness Can Mix*, S.F. CHRON., Feb. 24, 2002, at A21. Without San Francisco’s “fat and short” statute to support her case, Jennifer Portnick may not have been successful on her weight discrimination claim against Jazzercise. *Id.*

67. One study found that “overweight job applicants [were] judged more harshly than ex-felons or applicants with a history of mental illness.” Mark V. Roehling, *Weight Discrimination in the American Workplace: Ethical Issues and Analysis*, 40 J. BUS. ETHICS 177, 177 (2002); see also *Pinchock v. Gordon Food Serv., Inc.*, No. 200568, 1998 Mich. App. LEXIS 2489, at *2-3 (Ct. App. Mar. 10, 1998) (noting that sales representative was told she “would look a lot better” if she lost weight and that she was offered a \$500 incentive to lose fifty pounds (internal quotation marks omitted)).

liefs.⁶⁸ Seventy percent of NAAFA survey respondents claimed they were “questioned about their weight on the job or urged to lose weight,” and some employees stated they were deemed “bad role models.”⁶⁹ Thirty percent of respondents stated they believe they were denied promotions or raises due to their size.⁷⁰ “Nothing overt was ever said,” recalled Lynnda Collins, a multilingual contract administrator of twelve years, who was passed over for an international position in favor of a less qualified candidate who only spoke English, “but you just [knew what was] going on.”⁷¹ Overweight workers have watched promotions pass them by despite outstanding credentials and proven productivity, yet they said nothing because they did not want to risk losing their jobs.⁷² When they are promoted, the terms and conditions of their employment have been less favorable than their predecessor.⁷³

Heavier workers are also vulnerable to on-the-job harassment and hostile work environments.⁷⁴ Employees have reported being excluded from firm functions.⁷⁵ They have been asked to refrain from sitting on office furniture for fear of breakage.⁷⁶ Some em-

68. Puhl & Brownell, *supra* note 16, at 789-90; *see, e.g.*, *Nedder v. Rivier College*, 944 F. Supp. 111, 119 (D.N.H. 1996) (affirming jury’s finding that school supervisors believed that students perceived obese teachers as “less disciplined and less intelligent and . . . unsuitable role models”).

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69. ROTHBLUM, *supra* note 65, at 4. Jazzercise’s “fit appearance” requirement was based on the rationale that “Jazzercise sells fitness,” so instructors must “look leaner than the public.” Fernandez, *supra* note 66 (quoting Ann Rieke, Jazzercise District Manager, and Maureen Brown, Director of Franchise Programs and Services). This belief disqualified Jennifer Portnick, at 240 pounds, despite her demonstrated ability to do the job. *Id.* Radio talk-show host Neal Boortz agreed, stating Portnick did not have “the right to be a lard butt and lead an exercise class.” *Crossfire: Size Discrimination Laws: Weighing Pros, Cons* (CNN television broadcast May 9, 2002), transcript available at <http://archives.cnn.com/2002/ALLPOLITICS/05/09/cf.crossfire/>.

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70. ROTHBLUM, *supra* note 65, at 4.

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71. Smith, *supra* note 35.

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72. *See id.*

73. *See, e.g.*, *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 699-700 (S.D.N.Y. 1997). Grace Hazeldine, a morbidly obese employee, was promoted but was paid several thousand dollars less than her predecessor. *Id.* She did not receive the officer’s title he held or use of a company car, she had to share her assistant, and she was denied direct access to her supervisor. *Id.* at 700.

74. *See, e.g.*, *Butterfield v. New York*, No. 96 Civ. 5144, 1998 U.S. Dist. Lexis 18676, at *16 (S.D.N.Y. July 15, 1998). A corrections officer who underwent gastric bypass surgery received harassing phone calls where the person yelled into the phone, pretended to vomit, or banged the receiver against a hard object. *Id.* The calls were traced to his workplace. *Id.* When he filed a complaint, he received a dead rat in the mail. *Id.* at *18.

75. ROTHBLUM, *supra* note 65, at 4.

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76. *Id.*

ployees felt they were treated as though they were mentally handicapped.⁷⁷ When employees have complained, they have faced retaliation or termination.⁷⁸

C. *Weighing In*

Despite the substantial evidence of bias and discrimination in the workplace, efforts to pass weight-discrimination laws like H.R. 1850 have been controversial and primarily unsuccessful.⁷⁹ Proponents claim discrimination on the basis of weight creates serious medical, psychological, and economic consequences.⁸⁰ Fat is one of “the last bastion[s] of acceptable discrimination,”⁸¹ and “the stigma against fat [people] is consistent and severe.”⁸² Despite extensive research demonstrating that a person’s propensity for excess weight is a complex combination of genetics, environment, and behavior,⁸³ and that most diets fail,⁸⁴ there is a pervasive belief that weight is

77. *Id.*

78. *See, e.g.,* Marks v. Nat’l Commc’ns Ass’n, 72 F. Supp. 2d 322, 327 (S.D.N.Y. 1999). In *Marks*, when a top-earning sales person complained that a “thinner and cuter” colleague was promoted over her, she was suspended and eventually terminated. *Id.* In another situation, a plus-size sheriff’s deputy’s captain hung a poster of a fat cop eating a donut and stepping on a scale in the deputy’s office, visible to the entire squad room. Smith, *supra* note 35. The employee complained and was retaliated against when she began “whistleblower” activities. *Id.* She was eventually put on leave. *Id.*

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79. Representative Byron Rushing of Massachusetts has unsuccessfully proposed this type of legislation six times in the past twelve years as of 2008. Anderson, *supra* note 29. He proposed the bill again in 2009.

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80. RUDD REPORT, *supra* note 13, at 2. “Obesity is [a]ssociated with an [i]ncreased [r]isk of . . . psychological disorders such as depression . . . [and] psychological difficulties due to social stigmatization.” CALL TO ACTION, *supra* note 21, at 9 tbl.1.

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81. Tyler & Fraser, *supra* note 14 (quoting Sally Smith, the Executive Director of NAAFA); *see also* Puhl & Brownell, *supra* note 16, at 788.

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82. SOLOVAY, *supra* note 23, at 25. As a society, “we are surrounded by messages that fatness is . . . unhealthy, . . . unsightly and immoral.” J. ERIC OLIVER, FAT POLITICS: THE REAL STORY BEHIND AMERICA’S OBESITY EPIDEMIC 2 (2006); *see also* Rebecca Puhl, Obesity Action Coalition, Weight Discrimination: A Socially Acceptable Injustice, <http://www.obesityaction.org/magazine/oacnews12/Obesity%20Discrimination.pdf> (last visited Apr. 9, 2010) (“Obesity is highly stigmatized in our society.”).

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83. CALL TO ACTION, *supra* note 21, at 1; *see also* Mark V. Roehling et al., *Investigating the Validity of Stereotypes About Overweight Employees: The Relationship Between Body Weight and Normal Personality Traits*, 33 GROUP & ORG. MGMT. 392, 401 (2008); CDC, Obesity and Overweight for Professionals: Causes, <http://www.cdc.gov/obesity/causes/index.html> (last visited Apr. 9, 2010).

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84. *See* David W. Haslam & W. Philip T. James, *Obesity*, 366 LANCET 1197, 1204 (2005); Michigan.gov, Michigan Surgeon General, Why Diets Fail, http://www.michigan.gov/surgeongeneral/0,1607,7-216-33084_33097---,00.html (last visited Mar. 27, 2010); *see also, e.g.,* Viscik v. Fowler Equip. Co., 800 A.2d 826 828 (N.J. 2002). Regina Viscik was overweight her entire life, despite trying dieting, pills, shots, and hospitalization. *Id.*

solely within the control of the individual.⁸⁵ As a result, overweight people are blamed for their condition,⁸⁶ becoming the victims of hostility and abuse at work, in public,⁸⁷ in the media,⁸⁸ and even in their own homes.⁸⁹ By including weight as a protected category, proponents hope to reduce unfair treatment of overweight people and change the social stigma associated with obesity.⁹⁰

Employers, on the other hand, have good reason to want employees who maintain a healthy weight. A recent report by the Conference Board, a nonprofit business research organization, estimated obese employees cost U.S. private employers about forty-five billion dollars annually in medical expenses and lost productivity.⁹¹ In a study conducted at Duke University, researchers “found the [heaviest] workers had 13 times more lost workdays due to work-related injuries” than their average-sized colleagues and seven times the amount of medical claims.⁹² As a result, some companies are considering imposing higher health-insurance premiums on overweight employees unless they meet certain medical standards.⁹³

85. Roehling, *supra* note 83, at 401. This widely held belief leads people to believe fat people do not care about themselves or lack self-control. *Id.* at 401-02; *see, e.g.,* Greene v. Union Pacific R.R. Co., 548 F. Supp. 3, 5 (W.D. Wash. 1981) (finding plaintiff’s weight “seemed to vary according to the motivation that he had for controlling [it]”).

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86. *See* OLIVER, *supra* note 82, at 6. Weight is commonly used as a measure of a person’s character. *Id.* If a person is fat, she is lazy, irresponsible, and unable to care for herself. *Id.* This moral connotation makes weight a “marker[] of social status whereby those with the resources or wherewithal to keep themselves thin rightly deserve their place at the top of the social ladder.” *Id.*; *see also* CALL TO ACTION, *supra* note 21, at XIII (agreeing that weight is a matter of personal responsibility but acknowledging it is also a community responsibility).

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87. For example, a 419-pound woman reported that she was taking a walk when three men pulled up, threw garbage at her, and called her a “fat blimp.” Sizing Up Weight-Based Discrimination, *supra* note 52.

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88. *See* Crossfire, *supra* note 69.

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89. SOLOVAY, *supra* note 23, at 25.

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90. RUDD REPORT, *supra* note 13, at 2.

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91. LINDA BARRINGTON & BARBARA ROSEN, THE CONFERENCE BOARD, WEIGHTS & MEASURES: WHAT EMPLOYERS SHOULD KNOW ABOUT OBESITY 4 (2008) [hereinafter THE CONFERENCE BOARD REPORT].

92. Associated Press, *Fat Staff Eat into Profits, Study Finds*, BOSTON GLOBE, Apr. 24, 2007, available at http://www.boston.com/yourlife/health/diseases/articles/2007/04/24/fat_staff_eat_into_profits_study_finds/; Truls Ostbye et al., *Obesity and Workers’ Compensation*, 167 ARCHIVES INTERNAL MED. 766, 769 (2007).

93. RUDD REPORT, *supra* note 13, at 4. Starting in 2009, Alabama state employees will be required to receive medical screenings, including body mass indexing evaluations. Don Fernandez, *Alabama ‘Obesity Penalty’ Stirs Debate: Plan Calls for State Employees to Pay More for Health Insurance if They Don’t Lose Weight*, WEBMD HEALTH NEWS, <http://www.webmd.com/diet/news/20080825/alabama-obesity-penalty->

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The primary concern for opponents of weight discrimination law is the belief there will be an increase in meritless litigation.⁹⁴ However, the inclusion of weight as a protected trait under Michigan’s Elliott-Larsen Act has resulted in few lawsuits, so the fear of increased litigation may prove to be baseless.⁹⁵ On the other hand, with the rate of obesity rising dramatically over the past twenty years⁹⁶ and reported weight bias increasing,⁹⁷ there are significant legal and ideological arguments warranting the inclusion of weight as a protected characteristic from employment discrimination.

II. WEIGHT-BASED DISCRIMINATION AND THE LAW

One of the basic tenets in American society is that citizens are entitled to equal employment opportunities.⁹⁸ Federal antidiscrimination law was created to support this goal by removing “artificial, arbitrary, and unnecessary barriers to employment”⁹⁹ and to

stirs-debate?page=3 (last visited Apr. 9, 2010). Obese employees will have a year to get in shape or they will be charged an extra twenty-five dollars a month for their health insurance. *Id.*

94. Carmichael, *supra* note 1. Republican analyst Todd Domke, a critic of the legislation, stated, “[W]e might as well add colorblind, left-handed, allergic-to-cashews, and get it over with.” Ken Maguire, *Height, Weight Bias Eyed*, ASSOCIATED PRESS, May 17, 2007, available at <http://www.telegram.com/apps/pbcs.dll/article?AID=FC/20070518/NEWS/705180695/1116>.

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95. RUDD REPORT, *supra* note 13, at 9. “Weight discrimination complaints accounted for 1.2 percent of all complaints to Michigan’s Department of Civil Rights in 2005” THE CONFERENCE BOARD REPORT, *supra* note 91, at 18. As of 2006, there have been fourteen published cases brought under the “height and weight” provision of the Act. ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 167 n.35 (2008). Other states that have offered broader protection to obese people under their state civil rights and disability laws have not been inundated with weight-related litigation, a circumstance that indicates extending legal protection would not “open the floodgates.” Natasha Benn, *Obesity Lawsuits Loom*, LEGAL TIMES, May 21, 2007, available at 2007 WLNR 28076241 (Westlaw).

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96. Trends by State, *supra* note 24.

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97. “In the past decade, reported discrimination based on weight has increased sixty-six percent.” Shkolnikova, *supra* note 20.

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98. U.S. CONST. amend. XIV, § 1 (providing that no State shall “deny to any person within its jurisdiction the equal protection of the laws”). The Supreme Court has interpreted this language to mean that “all similarly situated persons should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

99. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). “The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees.” *Id.* at 429-30. “The Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.” *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); see also *Hardy v. Stumpf*, 112 Cal. Rptr. 739, 741 (Ct. App. 1974) (holding “[i]t is well settled under present law that a person . . . does have the right not to be discriminated against in employment”).

“neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.”¹⁰⁰ Private employers have long enjoyed the right to choose the kind of employees they want as long as they apply the same job requirements equally and do not engage in unlawful discriminatory practices.¹⁰¹ The goal of antidiscrimination law is “to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one’s abilities.”¹⁰²

Accordingly, protected traits such as race, gender, national origin, religion, age, and disability have been historically recognized as worthy of protection by the legal system.¹⁰³ Stereotypical beliefs that African-Americans lacked the ability to do certain jobs, that they were lazy, less intelligent, and personally responsible for their failures led to their displacement from skilled labor and resulted in poverty.¹⁰⁴ Women were considered “emotionally incapable of leadership positions”¹⁰⁵ and “placed in the less challenging, the less responsible and the less remunerative positions on the basis of their

100. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000). In Texas, a federal district court held that an obese bus driver applicant was improperly discriminated against because of a “perception of disability based on ‘myth, fear or stereotype.’” *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 979 (S.D. Tex. 1996) (quoting Interpretive Guidance on Title I of the American with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(l) (2009)).

101. *Tudyman v. United Airlines*, 608 F. Supp. 739, 746-47 (C.D. Cal. 1984). “[I]f a physical characteristic is not an ADA impairment, an employer is permitted to prefer one physical characteristic over another . . .” *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006); see also *Tudyman*, 608 F. Supp. at 746-47 (holding “[f]or good or evil, private employers are generally free to be arbitrary and even capricious in determining whom to hire”).

102. H.R. REP. NO. 92-238, at 5 (1971), as reprinted in 1972 U.S.C.C.A.N. 2137, 2141. “[T]he very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.” *Griggs*, 401 U.S. at 434 (citing 110 CONG. REC. 7247 (statement of Senators Clark and Case)); see Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 LAW & SOC’Y REV. 397, 401 (2008) (stating antidiscrimination law conceptualizes the right of the individual to be judged on her capabilities, not irrelevant, stigmatizing traits).

103. H.R. REP. NO. 92-238, at 3 (“[Title VII] recognized the prevalence of discriminatory employment practices in the United States and the need for Federal legislation to deal with the problem.”); see *infra* note 122.

104. KIRKLAND, *supra* note 95, at 63. It was the plight of the African-American worker in the economy that led to the prohibition of racial discrimination in employment. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 194 (1979).

105. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1168 (1971) [hereinafter *Employment Discrimination*].

sex alone.”¹⁰⁶ They were paid less because they were less valued as employees.¹⁰⁷ Discrimination based on these characteristics resulted in inequitable employment opportunities and inferior status in society.¹⁰⁸

Weight bias has similarly disadvantaged individuals in the workplace.¹⁰⁹ Weight is the fourth most prevalent type of discrimination in the country,¹¹⁰ but in some cases weight discrimination may be more prevalent than race or gender discrimination,¹¹¹ and the effects may be greater.¹¹² “Being fat is [considered] one of the most devastating social stigmas today,”¹¹³ and weight discrimination has the potential to directly harm a large portion of the population.¹¹⁴

Weight discrimination is rooted in a false, stereotypical belief that obese people are lazy, less intelligent, and emotionally unsta-

106. H.R. REP. NO. 92-238, at 4.

107. See *id.*; Comment, *Sex Discrimination in Employment: An Attempt To Interpret Title VII of the Civil Rights Act of 1969*, 17 DUKE L.J. 671, 672 n.8 (1968) (citing *Hearings on H.R. 3861 and Related Bills Before the Special SubComm. on Labor of the House Comm. on Educ. and Labor*, 88th Cong., 1st Sess., 95-108, 184-86, 241-47 (1963)). Because women employees had high turnover rates and absenteeism, they were considered more expensive to employ. *Id.*

108. In 1962, House Report 1370 projected that, based on twelve days of hearings and testimony, fifty percent of U.S. citizens looking for work suffered employment opportunity discrimination based on “race, religion, color, national origin, ancestry, or age.” H.R. REP. NO. 87-1370, at 1 (1962). African-American workers made half the income of white workers, suffered higher unemployment levels, and received fewer educational opportunities. 110 CONG. REC. 7218-21 (Apr. 8, 1964) (discussion between Senators Clark and Johnston).

109. Three decades of obesity research has produced a body of literature that shows the marked discrimination fat workers face. Janna Fikkan & Esther Rothblum, *Weight Bias in Employment*, in *WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES* 15 (Kelly D. Brownell et al. eds., 2005).

110. Puhl, *supra* note 21, at 5; Wang, *supra* note 44, at 1919.

111. Roehling, *supra* note 44, at 983. “Employers are more likely to discriminate against people because of their weight than because of their sex or race.” Meece, *supra* note 56 (quoting Mark Roehling).

112. Shkolnikova, *supra* note 20. Seventeen percent of men and nine percent of women reported racial discrimination in the past decade. *Id.* Twelve percent of U.S. adults reported weight discrimination. *Id.* Among the severely obese, forty-five percent of women and twenty-eight percent of men reported weight discrimination. *Id.* African-American girls who experienced both weight and race discrimination reported the weight discrimination was more hurtful. Wang, *supra* note 44, at 1920.

113. Wang, *supra* note 44, at 1902.

114. *Id.* at 1919. “The obese . . . account for thirty-two percent of the . . . population,” compared to racial minorities at twenty-five percent and so face a greater risk of discrimination. *Id.*

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ble.¹¹⁵ And while other types of discrimination, such as discrimination based on race and sex, have become less acceptable to promulgate in public, society is openly prejudiced against the obese, with overweight women suffering the most discrimination.¹¹⁶ Overweight employees are rated less desirable as subordinates, co-workers, and supervisors,¹¹⁷ and case law has demonstrated they are treated as such.¹¹⁸ In this regard, discrimination against obese employees has arguably diminished employment opportunities and the economic welfare of this group.¹¹⁹ Thus, like race and sex, the law should also protect people from weight discrimination.

A. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 does not adequately protect weight from employment discrimination because the statute does not include weight as a protected characteristic standing alone.¹²⁰ In enacting civil rights legislation, Congress sought to achieve equality in employment opportunities by removing obstacles that had disadvantaged certain groups.¹²¹ A history of discrimination against the group at issue¹²² and the relation of the discrimination to the individual’s abilities were important considerations when determining characteristics that would receive legisla-

115. See Puhl & Brownell, *supra* note 16, at 789-90; Roehling, *supra* note 83, at 392.

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116. Puhl, *supra* note 21, at 1; Wang, *supra* note 44, at 1902.

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117. Roehling, *supra* note 67, at 177.

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118. See *Butterfield v. New York*, No. 96 Civ. 5144, 1998 U.S. Dist. Lexis 18676, at *16 (S.D.N.Y. July 15, 1998) (fellow officers refused to line up next to complainant and supervisors did nothing to correct the behavior); *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 273 (N.J. Super. Ct. App. Div. 1991) (top-earning salesman was blamed for high turnover in his office because “of his size and appearance”).

119. See *supra* notes 13-20 and accompanying text.

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120. See *infra* note 127 and sources cited.

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121. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (“The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [] employees over other employees.”). It is an unlawful employment practice for an employer “to limit, segregate, or classify” his employees in any way that deprives them of employment opportunities or adversely affects their status as employees. 42 U.S.C. § 2000e-2(a)(2) (2006).

122. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979) (quoting Senator Humphrey, 110 CONG. REC. 6547, 6548 (1964)) (finding that “the plight of the Negro in our economy” was Congress’s motivation in prohibiting race discrimination through Title VII). Before 1964, African Americans were relegated to “unskilled and semi-skilled” jobs. *Id.* Due to automation, the number of available jobs was decreasing, which created a serious unemployment issue. *Id.* In 1962, the nonwhite unemployment rate was 124% higher than the white rate. *Id.*

tive protection.¹²³ In this respect, discrimination against fat people shares many of the characteristics of the types of discrimination that have found remedy under civil rights laws.¹²⁴

The purpose of Title VII is to ensure that merit, not bias, is the basis of employment decisions with regard to employees¹²⁵—the presumption being that, once society is “blinded” to differences, people have an equal chance to succeed based on a fair assessment of their abilities.¹²⁶ However, because weight is not currently protected under federal or most state law, employers may lawfully discriminate against qualified individuals based on their weight. This lack of legal protection leaves many people vulnerable to discrimination and goes against the national policy of equal employment opportunity.¹²⁷

Preventing weight from being factored into employment decisions when it is unrelated to job performance supports the principle of equal employment opportunity. Nancy Parolisi was a 221-pound substitute teacher who was denied her license solely on the basis of her weight.¹²⁸ Despite having an excellent performance record for three years, the Board of Examiners denied Parolisi’s petition because her weight deviated more than forty percent from their adopted standards of health and physical fitness.¹²⁹ The court held that this “mathematical computation,” and its subsequent erroneous result, had no relation to Parolisi’s ability to perform the duties of the job.¹³⁰

123. SOLOVAY, *supra* note 23, at 111-12. “[W]hat differentiates sex from such non-suspect statuses . . . and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). R

124. SOLOVAY, *supra* note 23, at 113; *see supra* notes 109-118 and accompanying text. R

125. SOLOVAY, *supra* note 23, at 134. “A primary purpose of Title VII is to prohibit discriminatory practices in employment.” *Mich. Dep’t of Civil Rights v. Horizon Tube Fabricating, Inc.*, 385 N.W.2d 685, 687 (Mich. Ct. App. 1986) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982)). R

126. KIRKLAND, *supra* note 95, at 12. R

127. *Marks v. Nat’l Commc’ns Ass’n*, 72 F. Supp. 2d 322, 330 (S.D.N.Y. 1999) (holding that “discrimination based on weight *alone* . . . does not violate Title VII, unless issues of race, religion, sex, or national origin are intertwined”); Elizabeth E. Theran, *Legal Theory on Weight Discrimination*, in *WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES*, *supra* note 109, at 195, 202 (concluding cases cannot be brought under Title VII if they involve discrimination *only* on the basis of weight). R

128. *Parolisi v. Bd. of Exam’rs*, 285 N.Y.S.2d 936, 937 (Sup. Ct. 1967).

129. *Id.* at 937-38.

130. *Id.* at 938.

The only available federal law available to Parolisi was Title VII, which offered no direct protection from discrimination based on weight.¹³¹ The Board claimed weight that deviated from “normal” posed a safety threat to the teacher and her students and that obese people were generally prone to certain medical conditions, which would inevitably lead to absences.¹³² Because the Board’s findings were generalizations and not specific to the petitioner, the court determined the Board’s “guesswork” about Parolisi’s capabilities was “arbitrary and capricious” and in violation of the state constitution.¹³³

If Parolisi’s weight somehow diminished her ability to perform her job, the court acknowledged that the Board might have been justified in denying her license.¹³⁴ However, “obesity, standing alone, [was] not reasonably and rationally related to the ability to teach or to maintain discipline.”¹³⁵ The court also noted the lack of rejected petitions for *male* teachers based on their weight, inferring an aesthetic standard as opposed to a standard of merit and fitness; this deferential treatment may have been grounds for protection under Title VII as sex discrimination.¹³⁶ Federal protection proved to be unnecessary as Parolisi was able to prevail on her claim under state law.¹³⁷ Without the support of state law, however, she would have been legally banned from working in a position she was fully capable of performing, and had performed to a degree of excellence, simply based on her weight.

Title VII could incorporate weight if an employment decision based on weight resulted in the disparate treatment or disparate impact on members of a protected class.¹³⁸ Weight requirements have been deemed violations of Title VII where they have an inequitable impact on women.¹³⁹ For example, weight regulations im-

131. 42 U.S.C. § 2000 (2006); *see supra* note 127 and sources cited.

132. *Parolisi*, 285 N.Y.S.2d at 939.

133. N.Y. CONST. art. V, § 6. The State Constitution required that individuals be tested on their own particular abilities to perform the duties of the job. *Parolisi*, 285 N.Y.S.2d at 937.

134. *Parolisi*, 285 N.Y.S.2d at 940.

135. *Id.*

136. *Id.*

137. *Id.* (holding the standards the Board used to determine “merit and fitness” violated N.Y. CONST. art. V, § 6).

138. Roehling, *supra* note 44, at 988; *see supra* notes 5-6 (discussing disparate treatment and disparate impact).

139. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (holding that Alabama’s height and weight standards for correctional counselors were discriminatory because they excluded over forty percent of the female population while only excluding

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posed by Continental Airlines on its flight hostesses were found discriminatory because they applied only to female employees.¹⁴⁰ The key consideration was whether the regulation imposed an equal burden on both sexes.¹⁴¹ The policy was found to be facially discriminatory on the basis of sex and the weight requirements were not bona fide occupational qualifications.¹⁴² Thus, the employees were protected under Title VII. Although weight was not itself a protected characteristic under federal law, the employees were incidentally protected from being discriminated against on the basis of weight because of the disparate impact the regulations had on the female workers.¹⁴³ Because weight discrimination requires this type of “plus” claim¹⁴⁴ to be protected under Title VII, the federal law is inadequate to directly protect victims of weight bias in the workplace.

B. *Rehabilitation Act of 1973*

Victims of weight discrimination are also generally unsuccessful in claiming their obesity is a disability under federal law. One of the few court decisions to acknowledge obesity as a disability is *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*.¹⁴⁵ Bonnie Cook was rejected for an institutional attendant position she had successfully held twice before.¹⁴⁶ During a

less than one percent of the male population); *Hardy v. Stumpf*, 112 Cal. Rptr. 739, 743-44 (Ct. App. 1974) (noting that eighty percent of women were excluded from employment consideration under the requirement that police department applicants be five-foot-seven and one hundred and thirty-five pounds).

140. *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 603-04 (9th Cir. 1982) (en banc). A similar position exclusively held by men did not have the same requirements; thus, it constituted sex discrimination. *Id.* at 604.

141. *Id.* at 606.

142. *Id.* at 608. A “bona fide occupational qualification” is a qualification that is “reasonably necessary to the normal operation” or essence of an employer’s business. 42 U.S.C. § 2000e-2(e) (2006); *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000).

143. *Gerdom*, 692 F.2d at 610. Continental wanted to offer customers service by slender, attractive flight hostesses to better compete in the market, not because the weight affected the employees’ job performance. *Id.* at 608-09.

144. See *supra* note 8 and cases cited.

145. *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993). See William C. Taussig, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act*, 35 B.C. L. REV. 927 (1994), for a discussion of this case.

146. *Cook*, 10 F.3d at 20. Cook left the position voluntarily on both occasions, with a “spotless work record.” *Id.* The defendant conceded that she “met its legitimate expectations” with regard to her past performance. *Id.*

routine pre-hire physical, Cook, five-foot-four and 320 pounds, was categorized as “morbidly obese,” but the nurse did not find any limitations that would prevent her from performing the duties of her job.¹⁴⁷ Nonetheless, the Department of Mental Health, Retardation, and Hospitals (MHRH) refused to hire her for two reasons: concerns she would not be able to evacuate patients because of her limited mobility and fears that her condition heightened her risk for heart disease, which would lead to worker’s compensation claims and absenteeism.¹⁴⁸

Cook sued under section 504 of the Rehabilitation Act, which prohibits federally assisted programs from discriminating against otherwise qualified individuals solely on the basis of their disability.¹⁴⁹ To be considered “disabled” under the RHA, a person actually has to have, or be regarded as having, “a physical or mental impairment that substantially limits one or more major life activities.”¹⁵⁰ Cook pursued a “perceived disability theory,” claiming that while she was fully able, the employer viewed her as disabled because of a physical impairment, defined as “any physiological disorder or condition . . . affecting a major bodily system.”¹⁵¹ To prevail, Cook had to demonstrate that she either (1) had a physical impairment, but it did not substantially limit her ability to perform major life activities,¹⁵² or (2) that she did not have a physical impairment.¹⁵³ She also had to prove the facility treated her as though she was impaired (regardless of whether the impairment was actual or perceived) and substantially limited in one or more of her major life activities.¹⁵⁴

The court found that the Rehabilitation Act’s “perceived disability model can be satisfied whether or not a person actually has a physical or mental impairment” and that the definition of impairment was broad.¹⁵⁵ Cook offered expert testimony that claimed morbid obesity was a physiological disorder affecting various body systems, which satisfied the definition of “physical impairment.”¹⁵⁶

147. *Id.* at 20-21.

148. *Id.* at 21.

149. 29 U.S.C. § 794(a) (2006).

150. *Id.* § 705(9)(B).

151. *Cook*, 10 F.3d at 22 (citing 45 C.F.R. § 84.3(j)(2)(i)(A)).

152. “Major life activities” includes working. 45 C.F.R. § 84.3(j)(2)(ii) (2009).

153. *Cook*, 10 F.3d at 23.

154. *Id.*

155. *Id.* at 22.

156. *Id.* at 23.

Because there was direct evidence¹⁵⁷ that MHRH did not hire Cook because of her weight, the court found that MHRH improperly treated Cook as though she were handicapped in this respect.¹⁵⁸ The court held that MHRH's stereotyping was "exactly the sort of employment decision that the Rehabilitation Act seeks to banish."¹⁵⁹ Despite this decision, most courts have not followed the First Circuit in recognizing obesity—morbid or otherwise—as a disability within the meaning of the federal disability statutes.¹⁶⁰

C. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 (ADA) models itself after the Rehabilitation Act and was also "passed to ensure that merit, rather than bias, was used for judging people with disabilities."¹⁶¹ Employers are prohibited from discriminating against any "qualified individual with a disability."¹⁶² A "qualified individual" means a person who can perform the essential functions of the job with or without reasonable accommodation.¹⁶³ A disability could be "a record of such an impairment," or a person could be "regarded as having such an impairment."¹⁶⁴

In interpreting the ADA, the Equal Employment Opportunity Commission (EEOC) regulations have distinguished conditions that are impairments and physical conditions that are not impairments, such as weight "within 'normal' range" and weight that is

157. See *infra* note 190 (defining direct evidence).

158. *Cook*, 10 F.3d at 23.

159. *Id.* at 27.

160. See *supra* note 11 and cases cited for a discussion of courts rejecting obesity as a protected disability.

161. KELLY, *supra* note 61, at 146. One purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (2006).

162. 42 U.S.C. § 12112(a). The definition of "disability" is the same under both the ADA and the RHA. See *supra* text accompanying note 150.

163. 42 U.S.C. § 12111(8).

164. *Id.* § 12102(2)(B)-(C). In *EEOC v. Texas Bus Lines*, a bus driver applicant that was observed "waddling" down the hall was disqualified by the examining physician because he assumed she would not be able to "move swiftly" to evacuate passengers. *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 967-68 (S.D. Tex. 1996). The court found this disqualification impermissible, holding an "individual rejected from a job because of the 'myths, fears, and stereotypes' associated with" a disability would fall within the "regarded as" prong of the statute. *Id.* at 975-77.

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not “the result of a physiological disorder.”¹⁶⁵ The regulations state that “except in rare circumstances, obesity is not [covered].”¹⁶⁶

In *EEOC v. Watkins Motor Lines, Inc.*, the EEOC argued that morbid obesity, regardless of cause, demonstrated an impairment.¹⁶⁷ The court disagreed, declining to extend the definition of impairment under the ADA to “all ‘abnormal’ (whatever that term may mean) physical characteristics.”¹⁶⁸ The EEOC also argued that, even if morbid obesity is not considered an impairment for the purposes of the ADA, the employee should be protected because his employer perceived him to be disabled.¹⁶⁹ The court held that to do so would make the “regarded as” prong of the ADA a “catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed.”¹⁷⁰

An estimated ninety-eight percent of disability discrimination lawsuits under the ADA are decided in favor of the employer.¹⁷¹ For the claimant, an obesity disability claim is a catch-22.¹⁷² He must demonstrate an impairment that substantially limits his major life activity of working but at the same time show that his disability does not prevent him from being able to perform the job.¹⁷³ As a result, case interpretations of weight-based discrimination based on disability law have been inconsistent.¹⁷⁴

165. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2009).

166. *Id.* app. § 1630.2(j); *see Smaw v. Va. Dep’t of State Police*, 862 F. Supp. 1469, 1474-75 (E.D. Va. 1994) (holding that the ADA indicates that, generally, obesity does not qualify as a disability).

167. *EEOC v. Watkins Motor Lines*, 463 F.3d 436, 441 (6th Cir. 2006).

168. *Id.* at 443.

169. *Id.* at 440.

170. *Id.* at 443 (citing *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997)).

171. Carmichael, *supra* note 1; *see, e.g., Francis*, 129 F.3d 281 (affirming lower court ruling for employer); *Smaw*, 862 F. Supp. 1469 (granting summary judgment for employer); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (affirming lower court on employment discrimination while reversing on wrongful termination for “retaliatory discharge for seeking workers compensation”).

172. *Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D. Cal. 1984).

173. *Id.* at 744 (holding plaintiff’s excess muscle from bodybuilding disqualified him from satisfying company weight regulations, even though he was capable and qualified to perform the duties required); *see also Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1154 (Cal. 1993) (where plaintiff lost her case *because* she argued her weight was not a hindrance to her job performance even though it was perceived as such by her potential employer).

174. In Berkeley, CA, an hour away from where Cassista lost her case, John Rossi argued his weight *was* a disability and his employer perceived him as disabled; he won a million dollars in damages. *See SOLOVAY, supra* note 23, at 154.

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The recent amendments to the ADA could potentially broaden its available protection. The amendments rejected restrictive judicial interpretations of the “substantially limits” standard¹⁷⁵ and added new definitions of “major life activities.”¹⁷⁶ In addition to working, employees could now be considered disabled if any of the following activities are restricted by their obesity: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, [or] communicating.”¹⁷⁷ While the amendments may help lessen the burden of proving obesity is a disability under the ADA, its current interpretation demonstrates that it is unlikely, and therefore inadequate, to protect against weight discrimination in employment.

III. WEIGHT AS A PROTECTED ANTIDISCRIMINATION CATEGORY

Despite the inadequacies of federal law, parties have successfully litigated weight-discrimination claims under broad interpretations of state civil rights and disability statutes.¹⁷⁸ The success of these cases supports the theory that state legislation like Massachusetts’s proposed H.R. 1850 is the most effective way to offer legislative aid. Instead of trying to fit weight discrimination into federal laws that were not designed to accommodate this kind of claim, the better alternative is to create new legal options through state laws.¹⁷⁹ Legislation like H.R. 1850 addresses the issue directly, providing a legal basis for discrimination based on weight.¹⁸⁰ This eliminates many of the obstacles weight discrimination claims currently face. For example, H.R. 1850 does away with the need to prove an underlying medical condition for a federal disability

175. The ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)-(b), 122 Stat. 3553, 3554. Congress found that the term “substantially limits” had been interpreted by the Supreme Court “to require a greater degree of limitation than was intended by Congress.” *Id.* § 2(a)(7).

176. *Id.* sec. 4(a), § 3(2).

177. *Id.*

178. See generally *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991); State Div. of Human Rights *ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985).

179. Puhl & Brownell, *supra* note 16, at 800.

180. Section 4 of Chapter 151B and Section 98 of Chapter 272 of the Massachusetts General Laws would be amended to add “height” and “weight” to the categories of unlawful forms of discrimination for employment, housing, and public accommodations. H.R. 1850, 2009 Leg., 186th Sess. (Mass. 2009).

claim¹⁸¹ and eliminates an additional level of discrimination based on sex, race, religion, age, or national origin for a federal civil rights violation.¹⁸²

Creating direct protection for weight would offer the states clear legal guidance and consistency in the courtroom. It would also support the congressional goal of equal employment opportunity by removing weight as a consideration for employment decisions unless weight is a bona fide occupational qualification.¹⁸³ It is much more logical and effective to ban weight-based discrimination outright than to distort weight into a disability or a “plus” claim. Weight protection would therefore properly apply an existing legal standard—one that protects citizens who have been wrongly prevented from equal employment opportunities because of negative, stereotypical beliefs. Weight protection would also affirm the societal principle that all citizens deserve to be treated fairly by being assessed based on their individual abilities.

A. *Protecting Weight Under the Elliott-Larsen Civil Rights Act*

The sole model for Massachusetts is Michigan’s Elliott-Larsen Act, which added height and weight to its antidiscrimination law to counteract those characteristics being used as proxies for other forms of discrimination.¹⁸⁴ Body size was included as part of a comprehensive antidiscrimination policy because height and weight characteristics “tend to be linked to certain ethnic groups or to women.”¹⁸⁵ Michigan courts modeled their decisions in accordance with Title VII,¹⁸⁶ using existing burden-of-proof frameworks as guidance to establish the necessary elements of weight discrimination.¹⁸⁷

181. See *supra* note 11 for examples of courts requiring that obesity be caused by a physiological condition to be considered a disability.

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182. See *supra* note 8 for a discussion of the protection of weight only when there is additional discrimination based on a protected characteristic.

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183. See *supra* note 142 (defining bona fide occupational qualification).

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184. See MICH. COMP. LAWS ANN. § 37.2101 (West 2001). Women who were kept out of traditional male jobs by minimum weight requirements used the Elliott-Larsen Act for protection against this discrimination, resulting in equal employment opportunities for those positions. KIRKLAND, *supra* note 95, at 44.

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185. SOLOVAY, *supra* note 23, at 245 (quoting Ombudsman Artstihe of the Michigan Department of Civil Rights).

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186. See Mich. Dep’t of Civil Rights v. Horizon Tube Fabricating, Inc., 385 N.W.2d 685, 687 (Mich. Ct. App. 1986).

187. Kristen, *supra* note 30, at 102. In analyzing cases under the Elliott-Larsen Act, the courts have used two burden-of-proof tests. The *McDonnell Douglas* test requires a plaintiff to prove that a prima facie showing of discrimination exists by a pre-

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Since weight is a protected characteristic under the Elliott-Larsen Act,¹⁸⁸ claimants need only prove a prima facie case¹⁸⁹ or offer direct evidence¹⁹⁰ of weight discrimination to qualify for statutory protection. There is no additional burden of needing to attach weight discrimination to “plus” claims under Title VII, and it eliminates the debate of whether obesity should be classified as a disability under the ADA. Weight is protected as a stand-alone characteristic.

Claimants must also prove that weight was one of the motivating factors for the alleged discriminatory employment decision.¹⁹¹ For example, when Marian Caskey was laid off, her employer required her to undergo a physical examination as a condition of being recalled.¹⁹² Although she was deemed physically able to resume work, the employer stated she would first have to lose 125 pounds.¹⁹³ The Civil Rights Commission found that the employer had “unlawfully failed and refused to recall claimant because of her weight.”¹⁹⁴

ponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant to put forth a legitimate, nondiscriminatory reason for its actions. *Id.* If successful, the burden reverts back to the plaintiff to show the reasons were merely pretext for the discrimination. *Id.* at 802, 805. The *Gallaway* test only requires the plaintiff to make a prima facie showing and the employer to prove a legitimate reason. *Gallaway v. Chrysler Corp.*, 306 N.W.2d 368, 371 (Mich. Ct. App. 1981); *see also* Thom, *supra* note 30, at 1239.

188. MICH. COMP. LAWS ANN. § 37.2101; *see supra* note 30 and sources cited.

189. A prima facie case is established when the plaintiff proves by a preponderance of the evidence that she was qualified for the position but rejected under circumstances that give rise to an inference of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802; Thom, *supra* note 30, at 1239. To establish a prima facie case, a plaintiff must first show she is a member of a statutorily protected group. MICH. COMP. LAWS ANN. § 37.2202(1)(a); *McDonnell Douglas*, 411 U.S. at 802 (holding plaintiff had to show he was a member of a racial minority).

190. Direct evidence “requires the conclusion that unlawful discrimination was at least a motivating factor.” *Lamoria v. Health Care & Ret. Corp.*, 584 N.W.2d 589, 593 (Mich. Ct. App. 1998) (per curiam) (quoting *Harrison v. Olde Fin. Corp.*, 572 N.W.2d 679, 683 (Mich. Ct. App. 1997)), *adopted*, 593 N.W.2d 699 (Mich. Ct. App. 1999) (special panel).

191. *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 291 (E.D. Mich. 1993); *see also* *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115, 1124 (E.D. Mich. 1988) (holding that a jury could reasonably conclude that plaintiff’s weight was a factor in her termination based on the requirement that she submit documentation to her employer regarding medical treatment for obesity).

192. *Mich. Dep’t of Civil Rights v. Horizon Tube Fabricating, Inc.*, 385 N.W.2d 685, 687 (Mich. Ct. App. 1986).

193. *Id.*

194. *Id.* Other “employees with less seniority were being recalled” before her, presumably without conditions attached. *Id.* The appellate court found that the defen-

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Likewise, Barbara Lamoria's supervisor was shown to have "made critical and harsh remarks" about "heavy people" that led one of Lamoria's co-workers to believe Lamoria would be fired.¹⁹⁵ The court considered these hostile remarks akin to racial slurs and "evidence of animus" of a characteristic protected from discrimination and an indication that the person who made the remarks may discriminate on that basis.¹⁹⁶ Lamoria also presented evidence that two other overweight employees were fired or forced to resign under this supervisor's watch.¹⁹⁷ Because Lamoria had "directly prove[n]" her weight was a determinative factor in her employer's decision to discharge her, the court held that she had established a claim of weight discrimination.¹⁹⁸

A plaintiff "must [also] present credible, direct evidence of wrongful discrimination" that is not "based on rumors, conclusory allegations, or subjective beliefs," nor "vague, ambiguous, or isolated remarks."¹⁹⁹ Wayne Hein, a 200-pound truck driver, believed his termination was the result of weight discrimination because his co-workers called him derogatory names, and his supervisor made fun of him in a cartoon caption.²⁰⁰ However, the court did not find the alleged prejudice played a part in his termination.²⁰¹ In *Byrnes v. Frito-Lay, Inc.*, the court found that an isolated comment about an obese employee's weight was not enough to establish that weight discrimination played a part in his replacement.²⁰² Despite being told he needed to lose weight "if he wanted to go anywhere with the company"²⁰³ and a manager threatening to fire him if he did not lose weight, the employee remained with the company for eighteen years and was repeatedly promoted.²⁰⁴ After he had been on medi-

dant did not prove that claimant failed to mitigate her damages from the loss of employment and upheld the lower court's award for attorneys' fees. *Id.* at 688-89.

195. *Lamoria*, 584 N.W.2d at 595.

196. *Id.*

197. *Id.*

198. *Id.* at 594.

199. *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 488 (6th Cir. 2000).

200. *Id.* at 484-85.

201. *Id.* at 489. Hein was terminated for refusing to work on a job that would have required him to be out of town when his blood pressure medication ran out. *Id.* at 484. He could have had the prescription refilled in advance but failed to do so. *See id.* at 486.

202. *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 292 (E.D. Mich. 1993).

203. *Id.* at 289.

204. *Id.* at 288.

cal leave for only four months, the company replaced him, citing the need to have the position filled.²⁰⁵

Because the Elliott-Larsen Act includes weight as a protected characteristic, direct legal protection and remedies are available for individuals who can prove weight played a part in their employer's discriminatory decision. This protection creates an equal legal playing field for applicants and employees to be assessed on their merits, not their appearance, in accordance with the purpose of antidiscrimination law. If passed, H.R. 1850 would offer the same level of legal protection as the Elliot-Larsen Act, creating a state-wide prohibition against discrimination based on weight in the workplace.²⁰⁶

B. *Protecting Weight as Social Legislation*

Weight was added to the Elliott-Larsen Act to “prevent[] discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.”²⁰⁷ If H.R. 1850 were to pass in Massachusetts, other states would be encouraged to pass similar legislation.²⁰⁸ This kind of “remedial social legislation”²⁰⁹ not only ensures that employee evaluations remain focused on employee merits and not measurements, but it also assists in the mental shift that will need to take place before the issue of obesity is ever successfully addressed.

Like Title VII, state civil rights laws are intended to be remedies for unlawful discrimination,²¹⁰ and, as such, they are “deserving of a liberal construction”²¹¹ in order to accomplish this important social goal. In *Gimello v. Agency*, the New Jersey Superior Court stated that the specific purpose of its civil rights law, the Law Against Discrimination (LAD), “was to eliminate all forms of discrimination in employment based on a person's physical

205. *Id.* at 289.

206. *See supra* note 26 and accompanying text.

207. *Neal v. Dep't of Corr.*, 583 N.W.2d 249, 251 (Mich. Ct. App. 1998).

208. Puhl, *supra* note 82. In 1989, Massachusetts became the second state to pass legislation protecting employment discrimination on the basis of sexual orientation. MASS GEN. LAWS ch. 151B, § 4 (2008); Kubilis, *supra* note 24, at 215. The bill had faced opposition and been defeated for seventeen years prior to its passage. *Id.*

209. *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 276 (N.J. Super. Ct. App. Div. 1991) (quoting *Clowes v. Terminix Int'l, Inc.*, 538 A.2d 794, 802 (N.J. 1988)).

210. *Id.* at 274.

211. *Id.* at 276 (quoting *Clowes*, 538 A.2d at 802).

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makeup.”²¹² Gimello’s obesity would probably not have been considered a handicap under the ADA, but the state court was able to use a broader definition of disability to encompass the plaintiff’s condition in order to protect him from discrimination based on his weight.²¹³ The New York Human Rights Law has also been broadly interpreted to find a complainant’s obesity constituted a disability within the meaning of the statute.²¹⁴ The Court of Appeals held that the “conclusion that obesity itself can constitute an impairment was a reasonable, commonsense interpretation of the statute.”²¹⁵

On the other hand, the California Supreme court in *Cassista v. Community Foods, Inc.* held that the plaintiff’s obesity was not a handicap under the state’s Fair Employment and Housing Act,²¹⁶ demonstrating the inconsistency that occurs as a result of not having direct protection for weight in state legislation.²¹⁷ The court noted its task was “to define ‘physical handicap’” within the boundaries “which the Legislature intended,” not “in terms [it] believe[d] to be morally just or socially desirable.”²¹⁸ This holding reflects the same judicial limitations of protecting weight discrimination found in the federal context, where obesity is not considered a disability within the meaning of the statute and, therefore, cannot be protected.²¹⁹ The court’s distinction between its obligation to uphold the law as intended by Congress, and the decision it *could have made* had the statute accommodated weight, could be interpreted as a call upon the legislature for direct weight discrimination protection. Considering the fact that a local ordinance was passed in response to the *Cassista* court’s inability to find weight discrimina-

212. *Gimello*, 594 A.2d at 276 (citing *Clowes*, 538 A.2d at 794); see N.J. STAT. ANN. § 10:5-5q (West 2002).

213. *Gimello*, 594 A.2d at 276.

214. State Div. of Human Rights *ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 698 (N.Y. 1985); see N.Y. EXEC. LAW § 292 [21] (McKinney 2005).

215. *McDermott*, 480 N.E.2d at 697.

216. CAL. GOV. CODE § 12900 (2005).

217. *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1147 (Cal. 1993) (holding that under the state’s Fair Employment and Housing Act, weight *could* qualify as a protected “handicap” or “disability” if it was a physiological condition that affected one or more of the basic bodily systems and limited a major life activity, but that the plaintiff did not establish that situation in this case).

218. *Id.* at 1146-47.

219. *Id.* at 1153. Despite prima facie evidence that weight was a primary reason why *Cassista* was not hired, she lost because she argued she was *not* handicapped. *Id.* at 1154.

tion unlawful,²²⁰ it is a clear demonstration that states could, and should, pass legislation that includes weight as a protected characteristic.

Banning weight discrimination has kept qualified employees working and it has forced employers to change discriminatory company policies, furthering the national goal of equal employment opportunity.²²¹ The few places in the country that do have weight discrimination laws have, in fact, seen evidence of that social change. In San Francisco, for example, fat activists protested a fitness center billboard that featured a picture of a space alien with a caption that read, "When they come they'll eat the fat ones first."²²² The San Francisco Human Rights Commission took notice, educated itself about the lack of legal protection for obese people, and held a hearing where it heard testimony about weight-based discrimination experienced in employment, housing, and health care situations.²²³ Based on this hearing, the Commission voted unanimously to prohibit discrimination based on height or weight.²²⁴

If weight discrimination plaintiffs had the protection afforded under the Elliott-Larsen Act and the few local ordinances available,²²⁵ the outcome of these cases may have been decidedly different. Toni Cassista may have worked at Community Foods without issue,²²⁶ Joseph Gimello's supervisor would not have been allowed to fire a highly successful sales manager,²²⁷ and skilled customer service representatives might actually represent the customers they

220. SANTA CRUZ, CAL., MUN. CODE, ch. 9.83 (1992), available at <http://www.codepublishing.com/CA/SantaCruz/>; SOLOVAY, *supra* note 23, at 233.

221. Kristen, *supra* note 30, at 102. Both Continental and United Airlines changed their employee weight requirements as a result of litigation. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 849 (9th Cir. 2000); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 604 (9th Cir. 1982) (en banc). Jazzercise acknowledged the "value of 'fit appearance' as a standard [was] debatable" as a result of the Portnick controversy. Elizabeth Fernandez, *Exercising Her Right to Work: Fitness Instructor Wins Weight-Bias Fight*, S.F. CHRON., May 7, 2002, at A1.

222. SOLOVAY, *supra* note 23, at 236.

223. *Id.*

224. *Id.* at 237.

225. See SANTA CRUZ, CAL., MUN. CODE, 92-11 ch. 9.83; District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1402.11 (LexisNexis 2001).

226. Toni was twice rejected for a job with Community Foods, Inc. *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1145 (Cal. 1993).

227. *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 265-66 (N.J. Super. Ct. App. Div. 1991).

serve.²²⁸ In this respect, Massachusetts should add height and weight to existing antidiscrimination laws to further the goal of ensuring equal employment opportunities for its citizens. Despite this goal, however, the legislature does have its opposition.

C. *Arguments Against H.R. 1850*

1. Employer Autonomy

Traditionally, legislators and courts have supported private employers' rights to choose their employees as long as they apply the same job requirements equally, and their employment decisions and practices are not unlawfully discriminatory.²²⁹ The Supreme Court has stated,

By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.²³⁰

Because excess weight is considered a “physical characteristic” like eye color, it has not risen to the level of requiring legal discrim-

228. See *Marks v. Nat'l Commc'ns Ass'n*, 72 F. Supp. 2d 322, 326-27 (S.D.N.Y. 1999); *Phila. Elec. Co. v. Pa. Human Relations Comm'n*, 448 A.2d 701, 702-03 (Pa. Commw. Ct. 1982).

229. See National Labor Relations Act, 29 U.S.C. § 151 (2006) (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”). The Act proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device. *NLRB v. Audio Indus., Inc.*, 313 F.2d 858, 861 (7th Cir. 1963).

230. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; see also *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006); *Marks*, 72 F. Supp. 2d at 330 (holding that employers may take weight or other physical characteristics into consideration); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746-47 (C.D. Cal. 1984); *Phila. Elec. Co.*, 448 A.2d at 708 (“It has always been the rule that an employer may be selective about the persons he employs as long as he does not *unlawfully* discriminate among the applicants.”).

ination protection without an underlying medical origin.²³¹ Without proof of a medical origin, weight could be used as a basis for expanding disability legislation to cover those who could control their weight through diet, exercise, or medication, which is outside the scope of the law's intention, and it could subject employers to costly discrimination lawsuits.

The freedom employers enjoy to choose their own employees must be balanced against the employee's right to be free from discrimination, however. "The essence of discrimination [has been defined] as the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics."²³² Currently protected characteristics, such as race and sex, were given legal shelter because minorities and women were misjudged collectively as a group, negatively affecting their employment opportunities.²³³ Likewise, the pervasive and consistent negative stereotypes surrounding obese people demonstrate that heavier workers are also misjudged as a group and suffer the same loss of equitable opportunities in the workplace.²³⁴ Therefore, the same standards that have been used to render discrimination unlawful based on other irrelevant characteristics should also be applied to weight.

Some employers have used the rationale that their employment practices are based on business decisions. For example, an airline's practice of only hiring thin hostesses as a competitive measure was found to be unlawful discrimination.²³⁵ Inherent to this hiring practice was the assumption that, to be attractive, a person must not exceed a certain weight, and that customers preferred at-

231. The appendix to the federal regulations, which defines "impairment" for the purposes of the ADA, describes weight as a "physical characteristic" and, therefore, does not contemplate weight as a protected trait within the meaning of the statute. 29 C.F.R. pt. 1630 app. § 1630.2(h) (2009); *see also* Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) (stating that to hold weight as anything other than a physical characteristic would open the door to a range of traits not meant to be covered by the ADA and RHA); Andrews v. Ohio, 104 F.3d 803, 808 (6th Cir. 1997) (holding that "physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for determining either actual or perceived disability" (quoting 29 C.F.R. pt. 1630 app. § 1630.2(h))).

232. *Gimello*, 594 A.2d at 278 (quoting Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682, 689 (N.J. 1988)).

233. *See supra* notes 103-108 and accompanying text.

234. Puhl & Brownell, *supra* note 16, at 789. Participants who had negative impressions of obese workers stated the obesity directly led to their judgments. *Id.*

235. *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (en banc).

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tendants “who conform[ed] to a traditional image.”²³⁶ The court stated, “It has long been established . . . that passengers’ preference . . . cannot justify discriminatory airline hiring policies.”²³⁷

The same aesthetic prejudice has been used to keep qualified workers from other jobs that require customer interaction,²³⁸ creating a “place” for obese workers much like the inferior status minorities and women were historically relegated to in society.²³⁹ Allowing this practice reinforces the “formidable barriers to employment” by a society that “all too often confuses ‘slim’ with ‘beautiful’ or ‘good.’”²⁴⁰ In the same way customer preferences are not allowed to dictate the acceptable image of the employee, an employer should not be able to make discriminatory aesthetic choices when appearance is not relevant to the job. Critics of the Massachusetts bill have argued if weight is legally protected, legislation will have to extend to all types of physical characteristics.²⁴¹ However, this is too broad of a conclusion considering the lack of documented evidence that employees are experiencing the same barriers to employment because of hair or eye color discrimination to the same extent that employees are being discriminated against based on their weight. If those characteristics result in the level of employment discrimination currently experienced by obese workers, they may be right.

2. The Cost of Obesity

One of the strongest arguments employers have asserted when considering weight in employment decisions is the associated costs relating to obesity.²⁴² “Obesity accounts for a large share of the . . . costs of employee healthcare,” which thirty-eight percent of U.S. CEOs cite as “a major obstacle to expanding their . . . workforces.”²⁴³ Overweight and obese adults have a higher risk of

236. *Id.*

237. *Id.* The weight limitations had no bearing on the individual’s ability to do the job, nor did Continental attempt to hire only thin males, rendering its employment practice discriminatory. *Id.* at 608-09.

238. See *supra* note 49 for discussion of customer service jobs.

239. *Employment Discrimination*, *supra* note 105, at 1167.

240. *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 28 (1st Cir. 1993).

241. See *supra* notes 94-95 and accompanying text for a discussion about the fear of increased meritless litigation.

242. THE CONFERENCE BOARD REPORT, *supra* note 91, at 6-10.

243. *Id.* at 6-7.

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health problems,²⁴⁴ which contributes to absenteeism and lost productivity.²⁴⁵

The courts have allowed employers to reject overweight employees based on those considerations, even if the employee did not have health problems. For example, the termination of an overweight fire department communications operator was upheld because obese employees were “more likely to become disabled during employment, to the detriment of the county financially and otherwise.”²⁴⁶ The employee’s weight “[did] not have [a] deleterious effect upon her health or her ability to perform the job in question,” but the court held the physical problem did not have to “be one which presently would impair the performance of the employee.”²⁴⁷ In other words, despite the fact that the employee was able to perform her job and was in good health, the employer was allowed to fire her because of the presumption of future health issues and the potential costs to the employer.

Similarly, Joyce English, a 341-pound customer-service-representative applicant, was deemed “unsuitable” for work because of her “abnormal weight,” despite passing all pre-employment tests and otherwise demonstrating her fitness.²⁴⁸ “[T]here [was] not even a scintilla of evidence” that there was anything wrong with her, and “she was perfectly able to do a regular day’s work at all times.”²⁴⁹ Prior to the medical exam, the employer “considered [her] to be qualified . . . and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job.”²⁵⁰ After the medical department deemed her a “high risk” for health problems, the employer refused to hire her.²⁵¹ The court held that the “employer has the inherent right to discriminate among applicants . . . and to eliminate those who have a high potential for absenteeism and low productivity.”²⁵² Thus, English,

244. *Id.* at 8. Overweight and obese adults have a higher risk of some cancers, Type II diabetes, heart disease, and strokes. *Id.*; CALL TO ACTION, *supra* note 21, at 8.

245. THE CONFERENCE BOARD REPORT, *supra* note 91, at 10; *see supra* note 92 and accompanying text.

246. Metro. Dade County v. Wolf, 274 So. 2d 584, 585 (Fla. Dist. Ct. App. 1973).

247. *Id.*

248. Phila. Elec. Co. v. Pa. Human Relations Comm’n, 448 A.2d 701, 702-03 (Pa. Commw. Ct. 1982).

249. *Id.* at 707.

250. *Id.* at 705.

251. *Id.* at 704.

252. *Id.* at 708.

an able employee, lost the opportunity to work, and an employer lost a potentially valuable employee.

A court's consideration of employer costs and applicant or employee weight is distinguishable in cases where the employee or applicant has a current medical condition. For example, an employee seeking to transfer to a firefighter position was denied the position on the basis of his weight, advanced osteoarthritis of the spine, and borderline hypertension.²⁵³ The court supported the employer's belief that these physical problems would make the employee "less apt to be an efficient, safe, illness-free, and claims-free employee."²⁵⁴ Because the nature of the work required taking the employee's present health into consideration, weight was properly evaluated as a component of the employee's individual qualifications.

Historically, female employees were also considered more costly and less useful than their male counterparts, which served as a justification for paying them less for the same work.²⁵⁵ Erroneous beliefs that women were physically less capable of doing the same work as men and would have higher rates of absenteeism led to the prohibition of gender discrimination.²⁵⁶ Similarly, discrimination based on the stereotypical perception that obese workers are inherently destined to suffer current or future health issues at the expense of the employer should be equally invalid.²⁵⁷ The *Parolisi* court seemed to agree, noting that an employer "might as well deny a candidate [employment] because of the possibility that the candidate (might) meet with an accident in the foreseeable future."²⁵⁸

It is inherently discriminatory to require overweight workers to prove their fitness and ability when other workers are initially presumed competent. Even when negative assumptions about workers' competence are proven false, employers are still lawfully allowed to disqualify them on the basis of their weight.²⁵⁹ Other kinds of employees have additional costs associated with them—those with families, for example—but there is no evidence to sug-

253. *Greene v. Union Pacific R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981).

254. *Id.*

255. Comment, *supra* note 107, at 672 n.8.

256. *Employment Discrimination*, *supra* note 105, at 1168.

257. Roehling, *supra* note 67, at 185-86.

258. *Parolisi v. Bd. of Exam'rs*, 285 N.Y.S.2d 936, 939 (Sup. Ct. 1967) (quoting *In re Warner*, 1 Ed. Dept. Rep. 58 #6460 (June 11, 1968)).

259. See, e.g., Roehling, *supra* note 44, at 980. A survey of employers found 15.9% determined obesity to be "an absolute bar to" hiring an employee "and 43.9% considered obesity conditional medical grounds for not [hiring] an applicant." *Id.*

gest those expenses are taken into consideration in a way that negatively affects the applicant's prospects of being hired.²⁶⁰ This inequitable treatment places the obese applicant at a substantial disadvantage.

In Michigan and municipalities that include weight in their antidiscrimination laws, "additional organizational costs thought to be associated with overweight employees are not [considered] legal justification for discriminating against [those] individuals."²⁶¹ Passing legislation like H.R. 1850 would remove the barrier of weight consideration, allowing applicants to compete fairly for the job.

3. Equal Application

Opponents of H.R. 1850 have questioned the legislation's broad protection for weight and the lack of an underlying medical requirement for discrimination protection.²⁶² Without specified boundaries, opponents are concerned that any resident would be able to file a weight discrimination complaint, including people who are considered ideal weight or underweight.²⁶³ However, weight bias "has the potential to affect every [person] because . . . there is no 'minimum weight requirement' for discrimination."²⁶⁴ Therefore, the remedy should be equally expansive.

Opponents argue that there is already legislation in place—The Americans with Disabilities Act—under which people who feel discriminated against can state their claim.²⁶⁵ There are various concerns, however, with using disability laws to protect employment and civil liberties. Under federal law, "there is no standard for . . . how obese a person must be . . . to be considered [disabled]"; only morbid obesity has been held to be a handicap.²⁶⁶ The courts have supported the idea that "if a physical characteristic is not an ADA impairment, an employer is permitted to prefer one physical characteristic over another," leaving the door open for continued discrimination based on the negative perceptions and stereotypes

260. Roehling, *supra* note 67, at 186.

261. *Id.*

262. See Feldman & Ashton, *supra* note 29.

263. *Id.*

264. Theran, *supra* note 22, at 136.

265. RUDD REPORT, *supra* note 13, at 8.

266. Puhl & Brownell, *supra* note 16, at 800. See generally Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993); Underwood v. Trans World Airlines, Inc., 710 F. Supp. 78, 84 (S.D.N.Y. 1989) (holding that "the difference between obesity and overweight is not merely one of semantics" (internal quotation marks omitted)).

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associated with the overweight.²⁶⁷ Most people are not heavy enough to be considered disabled, nor do they wish to be perceived as disabled.²⁶⁸ For a group that already experiences significant bias due to their weight, defining this characteristic as a disability only serves to create further stigmatization.²⁶⁹ People who have struggled to be accepted argue “that it is not their bodies that cause [the] problems,” but, rather, it is the way society treats them—as inferior, incompetent, and undeserving—that creates the need for broader protection.²⁷⁰ Because weight-based discrimination is not limited to a certain-sized individual,²⁷¹ the legal remedy available through H.R. 1850 would need to apply to everyone without restriction.

4. Mutability

While it is acknowledged that a history of discrimination has created the need for protection based on characteristics like race and sex, weight is, arguably, a mutable condition that some feel does not rise to the same level.²⁷² However, there is no language in the federal statutes requiring immutability as a prerequisite to the recognized impairment.²⁷³ Whereas race and gender “are understood to be outside the realm of personal choice [and] irrelevant to one’s merit and capacities,”²⁷⁴ fat is “a marker of bad character” and a condition “people bring on themselves.”²⁷⁵ As a result, some believe stigmatizing weight will shame or motivate weight loss; but, studies have demonstrated the opposite result: people coping with the stigma eat more, refuse to diet, and avoid physical activity, lead-

267. *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006).

268. Carmichael, *supra* note 1.

269. SOLOVAY, *supra* note 23, at 129.

270. *Id.*

271. *See supra* note 4 and cases cited (reviewing discrimination found in a variety of weight ranges).

272. Feldman & Ashton, *supra* note 29. Two Boston employment attorneys criticized the proposed Massachusetts bill for seeking to protect individuals “merely on ‘weight’—as if weight were immutable and worthy of protected status on par with an individual’s race or sex.” *Id.*

273. *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 24 n.7 (1st Cir. 1993) (holding immutability is only relevant when determining the substantiality of physical limitation); *cf. Greene v. Union Pacific R.R. Co.*, 548 F. Supp. 3, 5 (W.D. Wash. 1981) (holding obesity is not a handicap because it is “not an immutable condition such as blindness or lameness”).

274. Kirkland, *supra* note 102, at 401.

275. Anderson, *supra* note 29 (quoting Anna Kirkland). The fact that the obese plaintiff did not appear to suffer from any medical conditions led employer’s physician to assume her weight was the result of “bad dietary habits.” *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 698 (N.Y. 1985).

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ing to more health problems and a poorer quality of life.²⁷⁶ And while voluntary behavior arguably contributes to a person’s obesity, the RHA “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.”²⁷⁷

The erroneous belief that losing weight is simply a matter of self-control is rebutted by years of scientific studies that have demonstrated that “significant weight loss is a [process that is] difficult to achieve and sustain over time.”²⁷⁸ Re-categorizing obesity to reflect the complexity of its nature²⁷⁹ and reducing the misconception that it is controllable would benefit the goal of eliminating discrimination based on weight. Re-categorizing obesity could also serve to reduce the stigma associated with obesity in the same way legislation helped educate society about alcoholism and AIDS, allowing advancement in treatment and prevention.²⁸⁰ Researchers have found that “[p]roviding individuals with factual knowledge regarding stigmatized groups has, in some instances, improved the attitudes towards those groups.”²⁸¹ Likewise, “[l]egal intervention,” such as H.R. 1850, has been deemed “especially appropriate when there are no corrective social and moral norms.”²⁸²

CONCLUSION

“Weight discrimination in the . . . workplace is a [pervasive circumstance] that has a significant negative impact on the lives of [countless] individuals.”²⁸³ If allowed to continue, this “ugly condition in society”²⁸⁴ will continue to “create[] a legacy of lost opportunity for some,” while providing “an unfair advantage for

276. RUDD REPORT, *supra* note 13, at 3.

277. *Andrews v. Ohio*, 104 F.3d 803, 809 (6th Cir. 1997) (quoting *Cook*, 10 F.3d at 24) (internal quotation marks omitted); *see also id.* (noting the RHA’s coverage of alcoholism, AIDS, diabetes, and cancer from smoking cigarettes).

278. RUDD REPORT, *supra* note 13, at 8. “[D]iets fail 90-98% of the time,” supporting the theory that “failure to lose weight does not necessarily correlate with a lack of effort or discipline on the part of the dieter.” Kubilis, *supra* note 24, at 218.

279. There is a growing consensus that the origin of obesity may be indeterminable as a medical, genetic, environmental, or behavioral source, potentially altering its classification. *See sources cited supra* note 83.

280. RUDD REPORT, *supra* note 13, at 9.

281. Roehling, *supra* note 83, at 420.

282. Wang, *supra* note 44, at 1920.

283. Roehling, *supra* note 67, at 187.

284. *Phila. Elec. Co. v. Pa. Human Relations Comm’n*, 448 A.2d 701, 708 (Pa. Commw. Ct. 1982).

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others.”²⁸⁵ In attempting to pass H.R. 1850, Representative Rushing, like his fellow supporters, believes this bill is a necessary measure to protect basic human rights.²⁸⁶ Antidiscrimination law is rooted in the ideology that “[c]apable people should not be prevented from contributing to the economy and society.”²⁸⁷ Therefore, everyone is entitled to contribute and, if capable, is expected to contribute. All individuals deserve the same access to employment opportunities, the right to work and live without harassment, and the right to earn an equal amount of pay for their work.²⁸⁸ The same ideological arguments supporting other antidiscrimination laws apply to the weight-bias discussion. If the scientific evidence that strongly suggests weight is an uncontrollable characteristic in many circumstances is accurate, then it is wrong to discriminate against people based on that characteristic.²⁸⁹ Excess weight does not necessarily render a person incapable, and, as such, people who are able to contribute to the economy and society should not be prevented from doing so.²⁹⁰ Discrimination is wrong when it impacts a person’s fundamental rights, freedom, or dignity.²⁹¹ Weight discrimination law would provide a legal framework for employers and courts to prevent capable individuals from being disadvantaged. It would result in more equitable hiring practices, where candidates would be selected based on ability rather than appearance, leading to job retention and increased financial security. It would also “stop people from using weight as a shortcut, a quick and dirty way of making stereotypical assessments of a person.”²⁹² Until weight is brought under the protection of antidiscrimination law, employers will be able to legally discriminate on this basis, contributing to the systematic disadvantage of qualified employees at all levels of the employment process. Representative Rushing hopes H.R. 1850 will impact society beyond the courthouse, changing the way overweight people are viewed and treated, so that lawsuits based on discrimination become obsolete.²⁹³ In this respect,

285. SOLOVAY, *supra* note 23, at 118.

286. See Carmichael, *supra* note 1.

287. SOLOVAY, *supra* note 23, at 27.

288. Puhl & Brownell, *supra* note 16, at 801.

289. SOLOVAY, *supra* note 23, at 27.

290. *Id.*

291. *Id.*

292. *Id.* (citation and internal quotation marks omitted).

293. See Carmichael, *supra* note 1. H.R. 1850 is currently in the Joint Committee on Workforce and Labor Development. A public hearing has not yet been scheduled.

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WEIGHT BIAS IN THE WORKPLACE

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Massachusetts should add weight to existing antidiscrimination laws to further the goals of ensuring equal employment opportunities for its citizens.

Teri Morris