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FAT RIGHTS AND FAT DISCRIMINATION: AN ANNOTATED BIBLIOGRAPHY

Yasmin Sokkar Harker¹

ABSTRACT This bibliography is a selection of articles, books and selected other material relevant to antidiscrimination laws and fat people. Prejudice against fat people has been widely discussed in the media. Many people are actively engaged in discourse about how our society treats fat people, and whether discrimination against them is acceptable. At the same time, a small but growing body of law has developed to address discrimination against fat people in employment and public accommodations. This bibliography is intended to assist scholars, practicing lawyers, policymakers, and activists by gathering, organizing and annotating the relevant literature and legal resources.

I. INTRODUCTION

Fat people are one of the most marginalized groups in the United States. In arenas as diverse as healthcare, employment, education and public transportation, fat people are targets of discrimination. Fat people are refused promotions at work.² Fat people are the targets of violence and bullying in school.³ Fat people are blamed for problems ranging from soaring healthcare costs⁴ to high greenhouse gas emissions.⁵ Discrimination against fat people is the

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²Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity* (2001), 9 *Obesity Research* 788, 790 (2001); Lauren E. Jones, *The Framing Of Fat: Narratives Of Health And Disability In Fat Discrimination Litigation*, 87 *N.Y.U. L. Rev.* 1996, 2003 (2012).

³Puhl, *supra* note 1, at 797; Julie C. Lumeng et al., *Weight Status as a Predictor of Being Bullied in Third Through Sixth Grades*, 125 *Pediatrics* 1301, 1304 (2010).

⁴Nanci Hellmich, *Rising Obesity Will Cost U.S. Health Care \$344 Billion a Year*, *USA Today* (Nov. 17, 2009) (available at http://www.usatoday.com/news/health/weightloss/2009-11-17-future-obesity-costs_N.htm); *Obesity Takes 9% of Health Spending*, *CBSNEWS* (July 27, 2009) (available at <http://www.cbsnews.com/stories/2009/07/27/health/main5190909.shtml>).

⁵Phil Edwards & Ian Roberts, *Population Adiposity and Climate Change*, 38 *Int'l Journal of Epidemiology* 1137, 1140.

fourth most common type of discrimination⁶ and the past twenty years has seen a significant increase in discrimination against fat people.⁷

The results of this marginalization are troubling. Fat people are the targets of harassment and bullying in the workplace.⁸ They are less likely to be hired, less likely to be promoted and more likely to be fired.⁹ For those who are employed, there is a significant “wage penalty” for fat people, even controlling for socioeconomic status and health.¹⁰

For fat women, the damages are worse. The “wage penalty” for fat women is higher than for fat men,¹¹ and women experience fat discrimination at a broader range of weights and throughout more stages of their careers.¹² One study found that for every sixty-four pounds, white women can expect a nine percent decrease in wages.¹³ The impact of anti-fat bias on women is not only economic; one study found that fat women criminal defendants were more likely to be perceived as guilty than their lean counterparts, but the same was not true of fat male defendants.¹⁴ Despite the statistics, few jurisdictions include weight or size as a protected category in their antidiscrimination laws.¹⁵

⁶Teri Morris, Student Author, *Civil Rights/Employment Law—States Carry Weight Of Employment Discrimination Protection: Resolving The Growing Problem Of Weight Bias In The Workplace*, 32 W. New Eng. L. Rev. 172, 189 (2010).

⁷Tatiana Andreyeva et al., *Changes in Perceived Weight Discrimination Among Americans, 1995–1996 Through 2004–2006*, 16 *Obesity* 1129, 1131 (2008).

⁸*Id.* at 1129.

⁹Lisa M. Finkelstein et al., *Bias Against Overweight Job Applicants: Further Explorations of When and Why*, 46 *Human Res. Mgmt.* 203, 218 (2007).

¹⁰Charles L. Baum & William F. Ford, *The Wage Effects of Obesity: A Longitudinal Study*, 13 *Health Economics* 885, 897 (2004).

¹¹*Id.*

¹²Katherine Mason, *The Unequal Weight of Discrimination: Gender, Body Size, and Income Inequality*, 59 *Social Problems* 411, 433 (2012).

¹³John Cawley, *The Impact of Obesity on Wages*, 39 *The Journal of Human Res.* 451, 468.

¹⁴N.A Schvey, RM Puhl, KA Levandoski & KD Brownell, *The Influence of Defendant’s Body Weight on Perceptions of Guilt*, 37 *Int’l Journal of Obesity*, 1275, 1279.

¹⁵Sondra Solvay, *Tipping the Scales of Justice: Fighting Weight Based Discrimination* 243 (Prometheus Books 2000).

Since the late 1980s many legal articles and books have been written about fat discrimination. The majority of them examine fat discrimination in an employment context, although a few look at other contexts, such as healthcare, education, public accommodations, jury selection, and criminal trials. Many of the articles advocate for the protection of fat persons under current federal, state, and local laws, particularly disability discrimination and sex discrimination laws. Others advocate for the explicit inclusion of weight as a protected category. A few, especially those claiming to come from a public health or medical background, explicitly argue against protecting fat people in antidiscrimination statutes.

The bibliography divides the literature first into sections by how it classifies fat discrimination: as general, disability, or sex discrimination. Within each section, the literature is subdivided by medium (articles, books, etc.), and then finally sorted within each medium by reverse chronological order, with the most recent first. Thus this document comprises the following major sections:

- I. Introduction to fat discrimination.
- II. Scope and purpose of the bibliography.
- III. Terminology used in this document.
- IV. Search terms for researching fat discrimination.
- V. Brief summary of laws that explicitly protect fat persons from discrimination.
- VI. Literature that discusses fat discrimination in general.
- VII. Literature that discusses fat discrimination as disability discrimination.
- VIII. Literature that discusses fat discrimination as sex discrimination.
- IX. Literature about fat rights advocacy or literature designed to assist fat rights advocates.

II. THE PURPOSE AND SCOPE OF THIS ANNOTATED BIBLIOGRAPHY

The purpose of this annotated bibliography is to assist individuals researching legal issues related to discrimination against fat persons. It is meant to guide practitioners working on fat discrimination cases, provide tools and resources for fat rights advocates and activists, and offer a starting point for scholars.

This bibliography includes literature that,

1. Contains a substantive legal discussion about United States law;
2. Covers discrimination against fat persons in any of the contexts mentioned earlier (employment, healthcare, etc.); and
3. Is of a scholarly nature and/or is published in a scholarly context.

Thus, included are scholarly articles (mostly from law review journals), books, reports, and websites. Not included are news reports, informal web content such as blog posts, unpublished manuscripts, and purely medical or scientific literature that does not include a substantive legal analysis.

This bibliography includes literature from 1993 through mid-2015. In 1993, the First Circuit Court of Appeals held that “obesity” as a disability could be protected under the Rehabilitation Act (RHA). It was the first major federal fat discrimination case in which the plaintiff prevailed. In response to that decision, a body of literature began to grow discussing the legal implications of discrimination against fat people. For that reason, 1993 is used as a chronological starting point.

To assemble this bibliography, the following databases were searched: WestlawNext, Lexis Advance, Google Scholar, HeinOnline, and EBSCO Host. All of the keywords listed in the “Search Terms” section (see below) were used in multiple configurations, in order to be as exhaustive as possible.

III. TERMINOLOGY

The terms “overweight” and “obese” are used by many scholars.¹⁶ However, many researchers, scholars, and advocates prefer to use the term “fat,” because unlike the terms “obese” or “overweight,” the word does not imply a problem or a pathology.¹⁷ For example, psychologist Christian Crandall uses the words “fat” and “antifat” in his scholarship because “they do not imply a medical condition (*e.g.*, *obese*), nor do they refer to some normative standard that may be genetically determined.”¹⁸ Other scholars use the term “fat” in order to create a discourse that is descriptive rather than prescriptive in nature.¹⁹

Likewise, many advocates and activists prefer to use the word “fat” in order to counteract the stigmatizing power of the word. For example, the constitution of the National Association to Advance Fat Acceptance states, “[w]e choose to use the word *fat* to describe ourselves in order to remove the negative connotations normally associated with larger-than-average body size.”²⁰

Scholar and activist Charlotte Cooper writes, “I use the term Fat Studies because of what I regard as its inherent critique of the medicalised concept [of] obesity. As an activist I am interested in

¹⁶Finkelstein, *supra* note 7, at 204.

¹⁷ Laura S. Brown, *Fat-Oppressive Attitudes and the Feminist Therapist: Directions for Change*, in *Overcoming Fear of Fat* 19, 28 (Laura S. Brown and Esther D. Rothblum eds., Routledge 1989).

¹⁸Crandall, *supra* note 15, at 882.

¹⁹ Sondra Solovay & Esther Rothblum, *No Fear of Fat*, *The Chronicle of Higher Education* (Nov. 8, 2009) (available at <http://chronicle.com/article/No-Fear-of-Fat/49041/>).

²⁰ Nat’l Assoc. to Advance Fat Acceptance, *Constitution, Article 3* (2011), <http://www.naafaonline.com/dev2/about/byLaws/Constitution-VER09.pdf> (accessed Sept. 10, 2015).

Sokkar Harker

the use and reclamation of the word fat, to expunge shame from the term and reinforce its signification as a term of pride and identity.”²¹

Activist and blogger Lesley Kinzel discusses the word “fat” in the FAQ to her blog *Two Whole Cakes*, stating, “I use [the word fat] in an effort to demystify and destigmatize the word. Fat people are not bad!”²² The “Size Matters” section of the *Bitchmedia* blogs declares, “In this little space, in the ‘Size Matters’ portion of the Bitch blogs, ‘fat’ is either VALUE NEUTRAL or POSITIVE. ‘Obese/overweight/healthy weight’ and other nebulous terms are not allowed. Here, all weights are healthy.”²³ Activist Nancy Upton writes, “I feel like we’re more accepting as a society every day, and I think it’s time to realize that ‘fat’ doesn’t need to be an insult any more. It’s just a fact.”²⁴

This annotated bibliography generally uses the word “fat.” However, to reflect the content of the literature, specific annotations adopt the language used in the piece to which the annotation refers.

IV. SEARCH TERMS

Searching for literature on fat rights and fat discrimination can be daunting because of the multiple words and phrases used to describe the issues. What follows is a description of the terminology used in this literature. It is meant to assist researchers in finding literature relevant to their interests. All of the search terms listed below were used in assembling this bibliography.

²¹ Charlotte Cooper, *Fat Studies: Mapping the Field*, 4 *Sociology Compass* 1020, 1021 (Dec. 2010).

²² Lesley Kinzel, *Two Whole Cakes*, *FAQ*, <http://blog.twowholecakes.com/faq/> (accessed September 10, 2015).

²³ Tasha Fierce, *But You Have Such a Pretty Face*, *BitchMedia*, <https://bitchmedia.org/post/size-matters-but-you-have-such-a-pretty-face> (Aug. 9, 2010).

²⁴ Dodai Stewart, *The Best Entrant In American Apparel's Plus-Size Model Search*, *Jezebel*, [http://jezebel.com/5838386/size-12-woman-savors-mocking-american-apparels-distasteful-plus size-model-search](http://jezebel.com/5838386/size-12-woman-savors-mocking-american-apparels-distasteful-plus-size-model-search) (Sept. 8, 2011, 2:40 PM).

Literature written by advocates and activists generally use the terms “fat,” “fat discrimination” and “fat rights.” “Fat acceptance” is a term often used to describe a goal of advocacy and activism. This literature is usually geared towards legal and political advocacy and is meant to provide social, political and legal support for fat people.

Legal scholarship uses a number of terms to refer to literature written about fat discrimination. The terms “obesity,” “obesity discrimination,” “overweight,” “weight discrimination,” “weight-based discrimination,” “weight bias,” “fat” and “fat discrimination” have been used alone or in combination. Fat discrimination may also fall under the broader concepts of “appearance discrimination” and “disability discrimination.” Within the context of disability discrimination, the terms “obesity,” “severe obesity,” and “morbid obesity” are generally used. The handful of statutes and regulations that specifically prohibit fat discrimination generally use the term “weight,” and list “weight” or “height and weight” within a list of protected categories.

Sociology and psychology literature also uses a range of terms to refer to the issues. As with the legal literature, the terms “obesity,” “obesity discrimination,” “overweight,” “weight discrimination,” “weight-based discrimination,” “weight bias,” “fat” and “fat discrimination” have been used alone or in combination. The sociology and psychology literature also uses the terms “prejudice” and “stigma” in combination with “fat,” “weight,” and “obesity.”

V. CURRENT LAWS

Currently, there are no federal laws explicitly protecting fat persons from discrimination.²⁵ Michigan's Elliott-Larsen Civil Rights Act is the only state law that includes weight as a protected category.²⁶ Ombudsman Art Stine of the Michigan Department of Civil Rights stated in an interview, "Given that certain height and weight characteristics tend to be linked to certain ethnic groups or to women, state legislators decided that it was all the more appropriate to include body size as part of a comprehensive antidiscrimination policy."²⁷ In 2007, Massachusetts Representative Byron Rushing proposed legislation to add weight and height to the antidiscrimination laws.²⁸ At this time, the bill has not yet advanced through the legislature.²⁹ In March, 2013, the Utah legislature considered H.B. 132, which would have explicitly protected height and weight from workplace discrimination,³⁰ but the bill failed.³¹ Three cities, including San Francisco³² and Santa Cruz,³³ California and Binghamton, New York³⁴ also explicitly include weight as a protected category. The District of Columbia does not explicitly include weight, but does protect on the basis of "personal appearance."³⁵

VI. FAT DISCRIMINATION IN GENERAL

²⁵ Rebecca Puhl, *Weight Discrimination: A Socially Acceptable Injustice*, <http://www.obesityaction.org/educational-resources/resource-articles-2/weight-bias/weight-discrimination-a-socially-acceptable-injustice> (accessed September 12, 2015).

²⁶ Mich. Comp. Laws § 37.2202 (WL Current though P.A. No. 130 of the 2015 Regular Session, 98th Legislature).

²⁷ Solovay, *supra* note 14, at 245.

²⁸ Courtney N. Kubilis, Student Author, "Weighting" for Protection in Massachusetts: The Myth of Equal Opportunity in Employment, 42 Suffolk U.L. Rev. 211 (2008).

²⁹ MA H. 1758, 2013 Leg. 188th Sess. (Jan. 15, 2013), <https://malegislature.gov/Bills/188/House/H1758> (accessed September 1, 2015).

³⁰ UT Sen. 132, 2013 Sess., <http://le.utah.gov/~2013/bills/hbillint/hb0132.pdf> (accessed September 1, 2015)

³¹ *Minutes, Business and Labor Standing Committee* (Mar. 5, 2013), <http://le.utah.gov/~2013/minutes/HBUS0305.pdf> (accessed September 1, 2015)

³² San Francisco Police Code (Cal.) Art. 33 (2002) (available at <https://law.resource.org/pub/us/code/city/ca/SanFrancisco/Police%20Code/article33.html>) (accessed September 1, 2015).

³³ Santa Cruz Mun. Code (Cal.) Ch. 9.83 (1992) (available at <http://www.codepublishing.com/ca/santacruz/>) (accessed September 1, 2015).

³⁴ Binghamton Human Rights Law (N.Y.) § 45-2, (2009) (available at <http://www.binghamton-ny.gov/ordinance/binghamton-human-rights-law>) (accessed September 1, 2015).

³⁵ D.C. Mun. Code, Ch. 14, § 2-1402.11 (2006) (available at <http://dccode.org/simple/sections/2-1402.11.html>) (accessed September 1, 2015).

OVERVIEW

A number of scholarly articles and books have been written about legal protection for fat people. Most of these articles focus on discrimination in employment, however, there are a few that focus on other areas, such as fat discrimination in the courtroom.³⁶ The majority of articles advocate for protecting fat people under antidiscrimination laws, however, there are a variety of opinions on the best way to achieve this goal. Some commenters promote protection at the federal level,³⁷ while others promote protection at the state or local level.³⁸

SCHOLARLY ARTICLES

Michael L. Huggins, Student Author, *Not “Fit” for Hire: The United States and France on Weight Discrimination in Employment*, 38 *Fordham Int’l L.J.* 889 (2015).

This note compares legal protections for overweight people in the United States and France. It argues that the United States should look to French law and provide more expansive protections for its overweight citizens in the employment context. It provides a brief overview of antidiscrimination laws affecting weight discrimination at the federal, state, and local levels. It then provides an analysis of France’s statutory physical appearance antidiscrimination law, including its legislative history and case law. It concludes that France provides stronger protections to its overweight citizens through its physical appearance antidiscrimination law, and that the United States should do the same. The note offers three models for protection under U.S. law: make weight a protected class under the Civil Rights Act; protect obesity as a disability under the Americans with Disabilities Act (ADA); or create a statute modeled after the Age

³⁶ Valena Elizabeth Beety, *Criminality and Corpulence: Weight Bias in the Courtroom*, 11 *Seattle J. for Soc. Just.* 523 (2013); Maggie O’Grady, *A Jury of Your (Skinny) Peers: Weight Based Peremptory Challenges and the Culture of Fat Bias*, 7 *Stan. J. C.R. & C.L.* 47 (2011).

³⁷ Kari Horner, Student Author, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 *Cath. U. L. Rev.* 589 (2005).

³⁸ Kubilis, *supra* note 27; Morris, *supra* note 5.

Sokkar Harker

Discrimination in Employment Act, in which weight is specifically protected in the employment context.

Valena Elizabeth Beety, *Criminality and Corpulence: Weight Bias in the Courtroom*, 11 *Seattle J. for Soc. Just.* 523 (2013).

This article examines how the perception of fat people affects outcomes in the criminal justice system. It discusses cases in which the fatness of both defendants, and victims became an issue, and fat people were perceived as more guilty, more victimized, and less believable. It also discusses bias against fat prospective jurors and argues that sometimes striking jurors because of their fatness is a shield for striking jurors based on race and gender. It recommends jury instructions that address fat bias, possibly extending *Batson* to fat discrimination in jury selection, and increasing awareness of fat bias against defendants.

Dargan Ware, Student Author, *Against the Weight of Authority: Can Courts Solve the Problem Ware of Size Discrimination?*, 64 *Ala. L. Rev.* 1175 (2013).

This note analyzes weight discrimination under the Equal Protection jurisprudence. It examines the concepts of immutability and history of discrimination and argues that although there is debate as to whether weight is an immutable characteristic, weight discrimination can properly be subject to intermediate or strict scrutiny under the Equal Protection Clauses. It also argues that in most weight discrimination cases, fat people may be adequately protected under rational basis scrutiny because in most cases, there is no rational basis for the discrimination. The note then applies rational basis scrutiny in three different state action contexts: education, the family courts, and jury selection. After discussing weight discrimination and state action, it turns discrimination

Sokkar Harker

in the private sector and examines a number of different solutions, including state and local legislation, legislation based on appearance based discrimination, and the ADA.

Maggie O’Grady, *A Jury of Your (Skinny) Peers: Weight Based Peremptory Challenges and the Culture of Fat Bias*, 7 Stan. J. C.R. & C.L. 47 (2011).

This article argues that weight-based peremptory challenges are undesirable because they are state-based anti-fat bias. It argues that weight-based peremptory challenges disproportionately affect protected groups and can be used as pretext for racial, ethnic, or gender discrimination. It also argues that the challenges arbitrarily strike otherwise qualified jurors, hinder the effectiveness of the jury system, and are contrary to the idea of a representative jury. It concludes that all peremptory challenges should be abolished. It includes extensive discussion of instances in which weight has been used as a reason for a peremptory challenge.

Teri Morris, Student Author, *Civil Rights/Employment Law—States Carry Weight Of Employment Discrimination Protection: Resolving The Growing Problem Of Weight Bias In The Workplace*, W. New Eng. L. Rev. 172, 189 (2010).

This comment focuses on Massachusetts’ proposed legislation that would make it unlawful for employers to discriminate on the basis of weight. It discusses the negative impact of weight discrimination on employees and argues that the proposed legislation is necessary to ensure equal employment opportunities in Massachusetts. It discusses the inadequacies of federal anti-discrimination law and examines cases under other state and local laws that explicitly protect employees from weight discrimination. It concludes that Massachusetts should look to Michigan's Elliott-Larsen Act as a model for legislation preventing discrimination on the basis of weight.

Michelle Stover, Student Author, “*These Scales Tell Us That There Is Something Wrong with You*”: *How Fat Students Are Systematically Denied Access to Fair and Equal Education and What We Can Do to Stop This*, 83 S. Cal. L. Rev. 933 (2010).

This note examines fat discrimination in an education context. First, it describes the different types of discrimination fat students face, such as bullying, unattainable physical education requirements, and accessibility issues. It argues that these types of discrimination interfere with student education. It then analyzes the remedies fat students have under disability laws, in particular, the ADA, the RHA, and IDEA. It concludes that the ADA and the RHA are inadequate in addressing discrimination against fat students because many students would not qualify as disabled. It also concludes that IDEA is inadequate because it requires that students become “emotionally disturbed” before being afforded protection and because the remedies provided by IDEA may be isolating to the student. The note then argues that legislators should specifically include fat as a protected category under antidiscrimination laws, and that school districts should implement policies and procedures that raise awareness of fat discrimination.

Courtney N. Kubilis, Student Author, “*Weighting*” *for Protection in Massachusetts: The Myth of Equal Opportunity in Employment*, 42 Suffolk U. L. Rev. 211 (2008).

This note examines a Massachusetts bill that proposes to add weight and height to its antidiscrimination law. It discusses the history of the proposed legislation as well as the history of Massachusetts’ antidiscrimination law in general. It notes that opponents of the proposed legislation and opponents of the 1946 Massachusetts Fair Employment Practices Act both argued that increased protections for employees would lead to increased litigation, increased costs to employers, and would deter business investment. The article also examines weight-based

Sokkar Harker

discrimination cases that were brought under the Massachusetts handicap discrimination laws and reanalyzes them under the proposed legislation. It concludes that the proposed law would not lead to meritless litigation, nor would it deter business investment, and suggests that proponents of the bill adopt tactics used by previous civil rights proponents in Massachusetts and in other jurisdictions.

Lucy Wang, Student Author, *Weight Discrimination: A One Size Fits All Remedy*, 118 Yale L.J. 1900 (2008).

This note argues that weight discrimination is distinct from other forms of discrimination and that fat rights advocates should shift their focus from discrimination in employment to discrimination in health care. It examines case law involving disability discrimination, race discrimination, sex discrimination, and appearance discrimination claims, and concludes that the analysis found in these types of cases is inadequate for addressing the unique challenges of weight discrimination. It then presents alternative remedies for weight discrimination that focus on expanded health insurance coverage.

Kari Horner, Student Author, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 Cath. U. L. Rev. 589 (2005).

This comment examines the protection for fat persons under federal and state disability laws and compares it to the protection for fat persons under state and local laws that specifically address weight discrimination. It provides extensive discussion of Michigan, Santa Cruz, and San Francisco weight discrimination laws. It concludes that disability law offers inconsistent

Sokkar Harker

protection to fat persons and advocates for a national law specifically prohibiting weight-based discrimination. Using current state and local weight discrimination laws, it offers recommendations for such a national law.

Jessica Meyer, Student Author, *Obesity Harassment in School: Simply “Teasing” Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education*, 23 *Law & Ineq.* 429 (2005).

This article argues for protecting obese students from bullying. It examines protection for obese students under the ADA, RHA, and IDEA and argues that these existing disability discrimination statutes do not give enough protection because many students may not qualify as disabled. It argues that lawmakers should use three different sources to create a legal framework for protecting obese students: Title IX, Michigan’s weight discrimination law, and the Equal Protection Clause. It then offers two solutions for protection: explicitly including obesity as a protected category in IDEA; and enacting legislation that forbids bullying on the basis of obesity and punishes teachers and administrators who know about bullying and do not take action against it.

Elizabeth Kristen, Student Author, *Addressing the Problem of Weight Discrimination in Employment*, 90 *Calif. L. Rev.* 57 (2002).

This comment discusses remedies for fat discrimination in employment and uses the principles of self-determination, equality, and fairness to argue for legal protection of fat persons. Existing protections for fat persons are discussed, including protections under disability laws, disparate impact under race or sex discrimination laws, and state and local ordinances that explicitly address fat discrimination. Particular attention is given to federal disability laws; the state

Sokkar Harker

disability laws of California, New York, and New Jersey; and the weight discrimination laws in Michigan, San Francisco, and Santa Cruz. The comment concludes that fat persons are best protected under state and local laws and advocates for more weight discrimination protections at the local level.

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 (2001).

Using weight discrimination as an illustration, this article argues that current antidiscrimination laws do not correspond to the psychology of stereotyping, prejudice, and bias. As such, they fail to address many discriminatory practices and fail to protect many Americans from unfair, arbitrary, and capricious behavior. Combining an extensive discussion of psychological research with an analysis of weight discrimination under the current antidiscrimination laws, it argues that the current legal framework focuses on blaming individuals, where it should focus on providing remedies in an inherently biased society. It concludes that antidiscrimination laws should protect groups where there has been proof of systematic discrimination.

BOOKS/BOOK CHAPTERS

Sondra Solovay & Dylan Vade, *No Apology: Shared Struggles in Fat and Transgender Law*, in *The Fat Studies Reader* 176 (Ester Rothblum & Sondra Solovay eds., NYU Press 2009).

This book chapter outlines the legal struggles shared by fat persons and transgendered persons. It argues that both fat and transgendered persons are expected to reinforce fat phobic and transgender phobic body norms in order to access their civil rights. It gives examples of cases in which fat and transgendered people are asked by the legal system to apologize or explain why

Sokkar Harker

their bodies do not fit into size or gender norms. It outlines legal strategies for both fat and transgendered persons, and calls for legal protections that acknowledge difference in size and gender.

Anna Kirkland, *Fat Rights: Dilemmas of Difference and Personhood* (NYU Press 2008).

Using fat discrimination as a case study, Kirkland presents a framework for deconstructing and discussing antidiscrimination laws. Instead of focusing on whether or not “fatness” should qualify as a protected category, she focuses on “explaining what we do when we make choices about difference” and “evaluating and anticipating, what those choices, as they are expressed in the law, are likely to mean for persons.”³⁹ Kirkland provides what she terms “logics of personhood” to deconstruct how we talk and reason about difference. The author’s six logics of personhood are functional individualism, embedded personhood, blame-shifting, diversity, actuarial personhood, and managerial individualism. Each one of the “logics of personhood” illuminates a particular presumption underlying our antidiscrimination laws. Although Kirkland focuses specifically on fat discrimination, she offers a novel approach to understanding antidiscrimination laws in our society.

Kelly D. Brownell, Rebecca M. Puhl, Marlene B. Schwartz & Leslie Rudd, *Weight Bias: Nature, Consequences and Remedies* (The Guilford Press 2005).

This edited collection is divided into four parts: the nature and extent of weight bias; the origins and measurement of weight bias; consequences of weight bias; and remedies for weight bias. The articles within each part cover a variety of perspectives, including psychological, sociological,

³⁹ Anna Kirkland, *Fat Rights: Dilemmas of Difference and Personhood* 4 (NYU Press 2008).

Sokkar Harker

political, and legal. They discuss weight bias in employment, in health care settings, in childhood, within families, and in the media. The collection also includes articles discussing legal theories and legal remedies, as well as legal advocacy related to weight bias.

Sondra Solovay, *Tipping the Scales of Justice: Fighting Weight Based Discrimination* (Prometheus Books 2001).

This title provides a general overview of weight-based discrimination in a variety of contexts and discusses the legal implications for each one. It calls for more legal protection for fat persons in all contexts and provides recommendations for policy-based and legislative action. It also covers weight-based discrimination in education, child custody, employment, jury selection, healthcare, and commitment cases. Chapters discussing weight-based discrimination as disability discrimination and sex discrimination are also included, and are further discussed in later sections of this bibliography. Appendices include resources for advocacy as well as selected weight discrimination laws.

VII. FAT DISCRIMINATION AS DISABILITY DISCRIMINATION

OVERVIEW

For nearly three decades, courts, scholars, and commentators have grappled with the question of whether fatness can be considered a disability under disability discrimination laws. Fat discrimination as disability discrimination first gained acceptance in 1985, after the New York Court of Appeals found that a plaintiff was disabled under New York State disability law in *State*

*Division of Human Rights on Complaint of Catherine McDermott v. Xerox Corp.*⁴⁰ In that case, the Xerox Corporation refused to hire complainant Catherine McDermott as a computer programmer because she was “obese,” and therefore not medically acceptable. She filed a complaint with the State Division of Human Rights, and the Commissioner sustained the complaint. Thereafter, the Board of Appeals reversed the Commissioner’s decision, finding that “being obese without proof of any impairment” was not covered as a disability under the statute.⁴¹ The Appellate Division disagreed with the Board of Appeals, finding that obesity itself could constitute an impairment under the statute. The Court of Appeals agreed, stating “[w]e have found nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight.”⁴²

In the federal courts, fat discrimination as disability discrimination gained prominence after the 1993 First Circuit decision in *Cook v. State of R.I., Dep’t of Mental Health, Retardation, & Hospitals*.⁴³ In 1988, Bonnie Cook, a 329 pound woman, applied for an attendant position at MHRH, a Rhode Island state residential center for disabled persons. She had worked for the same facility for over five years and she had voluntarily left with a satisfactory record. At the time of her reapplication, a pre-hire physical found her to be morbidly obese, but found no physical limitations on her ability to do the job.⁴⁴ The facility denied her the position based on her weight, claiming that her weight would limit her ability to assist the residents during an emergency evacuation.⁴⁵ Cook sued in the Rhode Island District Court under Section 504 of the RHA. A jury found in favor of Plaintiff Cook and awarded her \$100,000 in compensatory

⁴⁰ *State Div. Of Human Rights v. Xerox Corp.*, 65 N.Y. 2d 213 (1985).

⁴¹ *Id.*

⁴² *Id.* at 699.

⁴³ *Cook v. State of R.I., Dep’t of Mental Health, Retardation & Hospitals*, 10 F.3d 17 (1st Cir. 1993).

⁴⁴ Brief for Appellant at 37, *Cook v. R.I.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).

⁴⁵ *Id.* at 41-42.

damages. MHRH filed for a judgment notwithstanding the verdict, which the court denied. The Federal Appeals Court First Circuit affirmed, finding that obesity could be considered a disability under the Rehabilitation Act, stating:

In a society that all too often confuses “slim” with “beautiful” or “good,” morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences.⁴⁶

Since the *Xerox* and *Cook* cases, several fat discrimination plaintiffs have sued under federal or state disability discrimination laws, however, only two percent of employment discrimination cases make it to trial and are resolved in favor of the plaintiff.⁴⁷ In the past three decades, a body of legal literature discussing fat discrimination as disability discrimination has come into existence. Much of the literature focuses on federal disability discrimination laws. A number of articles were published shortly after the *Cook* decision and focus on its impact on future federal litigation.⁴⁸ Another wave of articles were published after the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), and focus on the impact of the ADAAA on fat discrimination litigation.⁴⁹ There are also a number of articles about fat discrimination under state laws, such as Washington State’s disability discrimination laws and California’s

⁴⁶ *Cook v. Rhode Island*, 10 F.3d 17, 28 (1st Cir. 1993).

⁴⁷ Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. of Empirical Legal Studies 175, 184-187.

⁴⁸ William C. Taussig, Student Author, *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); Steven M. Ziolkowski, Student Author, *The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*, 74 B.U. L. Rev. 667 (1994); Jay R. Byers, Student Author, *Cook v. Rhode Island: It’s Not Over Until the Morbidly Obese Woman Works*, 20 J. Corp. L. 389 (1995); Carolyn M. Mcdermott, Student Author, *Should Employers be Allowed to Weigh Obesity in their Employment Decisions? Cook v. Rhode Island, Department of Mental Health, Retardation and Hospitals*, 44 U. Kan. L. Rev. 199 (1995).

⁴⁹ Jane B. Korn, *Too Fat*, 17 Va. J. Soc. Pol’y & L. 209 (2009); Abigail Kozel, Student Author, *Large And In Charge Of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify As Disabled Under The Americans With Disability Act Amendments Act Of 2008*, 31 Hamline J. Pub L. & Pol’y 273 (2009).

antidiscrimination laws.⁵⁰ Most of the literature focuses on employment discrimination generally, although some articles choose specific aspects of employment, such as workplace wellness programs.⁵¹ A majority of the articles argue for protection of fat people, but a few, especially those claiming to come from a medical or public health perspective, do not.⁵²

SCHOLARLY ARTICLES

Jennifer Vallor, Student Author, *Gut Check: Why Obesity is Not a Disability Under Tennessee Law and How the Legislature Can Address the Obesity Epidemic*, 9 *Tenn. J.L. & Pol'y* 265 (2013).

This note looks at obesity as a disability under the Tennessee antidiscrimination laws and argues that obesity should not qualify as a disability. It first examines the definition of disability under federal and Tennessee laws. The note then considers medical definitions of obesity and federal disability cases in which obesity has been considered a disability. It also looks at obesity and a disability under other state laws, including Washington State, Pennsylvania, New York, and New Jersey. The note then goes on to argue that obesity should not qualify as a disability under Tennessee law because it is a mutable condition, and because it does not further the legislative intent of the statute. Finally, the note proposes that the legislature should explicitly excluded obesity from the Tennessee antidiscrimination laws and should pass laws that promote nutrition and physical activity.

⁵⁰ Scott Petersen, Student Author, *Discrimination Against Overweight Persons: Can Society Still Get Away with it?*, 30 *Gonz. L. Rev.* 105 (1994); Kimberly B. Dunsworth, Student Author, *Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?*, 24 *Golden Gate U. L. Rev.* 523 (1994).

⁵¹ Steven C. Sizemore, Student Author, *A Fatter Butt Equals a Skinnier Wallet: Why Workplace Wellness Programs Discriminate Against the Obese and Violate Federal Employment Law*, 11 *Wyo. L. Rev.* 639 (2011).

⁵² Adam R. Pulver, Student Author, *An Imperfect Fit: Obesity, Public Health, and Disability Anti-discrimination Law*, 41 *Colum. J.L. & Soc. Probs.* 365 (2008); Kate S. Arduini, Student Author, *Why the Americans with Disabilities Act Amendments is Destined to Fail: Lack of Protection for the "Truly" Disabled, Impracticability of Employer Compliance and the Negative Impact it Will Have on Our Already Struggling Economy*, 2 *Drexel L. Rev.* 161 (2009).

Lauren E. Jones, Student Author, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. Rev. 1996 (2012).

This note argues that the fat rights movement's focus on healthy fat bodies undermines its overarching goal of achieving justice for all bodies, regardless of health. It includes an extensive discussion of disability and disability rights, and of fatness as a disability. It analyzes cases in which the plaintiff claimed fatness as a disability, and a case in which the plaintiff argued that her fatness was not disabling, and concludes that both approaches are harmful to the fat rights movement and the disability rights movement. It explains that legal strategies focusing on the healthiness of the fat plaintiff risk excluding other fat people from legal protection. On the other hand, it explains that legal strategies arguing that the fat plaintiff is disabled risks coopting the work of the disability rights movement and possibly makes it more difficult for other disabled persons to get legal relief. Finally, it argues for statutes that explicitly protect fat persons as the best option for protecting fat workers from discrimination.

M. Neil Browne, Virginia Morrison, Barbara Keeley & Mark Gromko, *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 Mich. St. U. J. Med. & L. 1 (2010)

Co-authored by a professor of economics, an attorney, a nursing instructor, and a professor of biology, this article argues that because personal responsibility is a significant factor in obesity, it should not be protected by disability discrimination laws. The article describes how obesity has been treated under federal and state disability discrimination laws and argues that because obesity is a voluntary and mutable condition, courts should not extend protection to it. It also argues that obese persons cost their employers a significant amount in health care costs. The article then

Sokkar Harker

looks at the legislative history of the ADA and the RHA and argues that the legislature did not intend for obesity to be a covered condition. It concludes that extending protection to obese individuals would be at odds with the purpose of disability discrimination laws, and that a better response to obesity would be to create laws that promote healthier food choices.

Shannon Liu, Student Author, *Obesity as an Impairment for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. Pub. Int. L.J. 141 (2010)

This note compares the ADA of 1990 and the ADAAA of 2008, focusing on whether obesity can be considered a disability under the statutes. It gives an overview of the ADA and the ADAAA, examining both the statutory language and leading case law defining “disability” and “impairment” under both statutes. It also discusses EEOC guidelines under the ADA. The note argues that the ADAAA broadens the scope of covered individuals by changing the definition of “impairment.” And then examines obesity-as-disability cases under both the ADA and the ADAAA. Finally, it concludes that the ADAAA will ultimately expand disability protections for obese plaintiffs, but will decrease the amount of litigation because of its clearer standards. It also offers suggestions for newer EEOC guidelines under the ADAAA.

Steven C. Sizemore, Student Author, *A Fatter Butt Equals a Skinnier Wallet: Why Workplace Wellness Programs Discriminate Against the Obese and Violate Federal Employment Law*, 11 Wyo. L. Rev. 639 (2010).

This comment examines workplace wellness programs and discusses their validity under the ADA and the Genetic Information Nondiscrimination Act (GINA). It gives an overview of typical workplace wellness programs and their impact on obese employees. It then analyzes cases of

Sokkar Harker

obesity discrimination under the ADA, including the *Cook* case, and concludes that workplace wellness programs unlawfully discriminate under the ADA by requiring obese employees to pay higher insurance premiums than their thinner counterparts. It also argues that workplace wellness programs unlawfully discriminate under GINA, by requiring employees to fill out family medical history questionnaires in exchange for insurance premium reductions. Despite the voluntary nature of most workplace wellness programs, the comment argues that because they provide financial incentives for participate, they still violate antidiscrimination laws.

Kate S. Arduini, Student Author, *Why the Americans with Disabilities Act Amendments is Destined to Fail: Lack of Protection for the “Truly” Disabled, Impracticability of Employer Compliance and the Negative Impact it Will Have on Our Already Struggling Economy*, 2 Drexel L. Rev. 161 (2009).

This note argues that the ADAAA of 2008 fails to address problems faced by disabled persons and their employers under the ADA. Although the note covers a broad range of disabilities under the Act, it includes a lengthy discussion of discrimination against the obese. Specifically, it argues that because the amendments extend ADA coverage to obese persons under the “regarded as” prong, they will negatively impact American employers and open the door to frivolous lawsuits.

Jane B. Korn, *Too Fat*, 17 Va. J. Soc. Pol'y & L. 209 (2009).

In this article, the author continues her examination of obesity as a disability, this time examining obesity under the 2008 ADAAA. The article begins with a substantial discussion on obesity in contemporary society, including statistics on who is obese, possible causes of obesity and the demographics of obesity. It also provides extensive discussion of the social stigma against obese

Sokkar Harker

people. It then looks at obesity under the ADA and the ADAAA, giving special attention to the impairment requirement. It finds that under both the ADA and the ADAAA, most obese people are not able to meet the impairment requirement because they do not have an underlying physiological disorder causing the obesity. It concludes that despite the fact the ADAAA was designed to provide a broader scope of protection, it will not provide protection to more obese people because the impairment requirement did not change. It concludes that the EEOC should redefine impairment so that an underlying physiological disorder is not required or that the definition of impairment should be interpreted not to require an underlying physiological disorder. In the alternative, the article suggests that obesity discrimination should be analyzed like appearance discrimination cases.

Abigail Kozel, *Large And In Charge Of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify As Disabled Under The Americans With Disability Act Amendments Act Of 2008*, 31 Hamline J. Pub L. & Pol'y 273 (2009).

This article examines the ADAAA and focuses on whether obesity as disability claims are likely to be more successful after its passage. It includes discussion of the relationship between obesity, healthcare, and employers; a brief history of obesity as disability claims under the ADA; and an examination of the legislative history behind the Amendments to the Americans with Disabilities Act. It analyzes the impact of the Amendments as of the time of the writing. The article concludes that despite the potential burden to employers, obesity as disability claims will likely be more successful due to the passage of the ADAAA..

Adam R. Pulver, Student Author, *An Imperfect Fit: Obesity, Public Health, and Disability Anti-discrimination Law*, 41 Colum. J.L. & Soc. Probs. 365 (2008).

Sokkar Harker

This note seeks to analyze obesity discrimination through a public health law context rather than a civil rights context. It describes public health law as legal interventions for “establishing norms for healthy behavior,” including “theories of action” such as the incentivizing of healthier choices, increasing healthy choices, and eliminating unhealthy choices. It discusses the protective effects and stigmatization and concludes that disability discrimination protections should not be extended to obese persons, because doing so would normalize obesity and advocate unhealthy choices.

Molly Henry, Student Author, *Do I Look Fat? Perceiving Obesity as a Disability Under the Americans with Disabilities Act*, 68 Ohio St. L.J. 1761 (2007).

This note follows the development of cases under state and federal disability discrimination laws, focusing on cases in which the plaintiff was “perceived as” or “regarded as” being disabled because of his or her obesity. It gives an overview of the ADA, describing how “disability” has been defined by the EEOC and case law, with a focus on the “perceived disability” prong of the definition. It then offers a history of lawsuits under disability discrimination laws, with extensive treatment given to lawsuits in which the courts did not find the plaintiff to be disabled. The article also covers the Air Carrier Access Act of 1986, which applies to disability discrimination against airline passengers. Part IV provides an analysis of *EEOC v. Watkins Motor Lines*, a Sixth Circuit case in which the plaintiff was perceived to be unable to fulfill the requirements of his job. Part V considers the future of disability discrimination cases under the ADA and argues that courts should consider morbid obesity an impairment as a matter of law.

Carol R. Buxton, Student Author, *Obesity and the Americans with Disabilities Act*, 4 Barry L. Rev. 109 (2003).

Sokkar Harker

This comment argues that like alcoholism and drug addiction, obesity should be protected by antidiscrimination laws and that protection should be at the state level. It urges state legislators to pass laws with language narrowly tailored to address obesity discrimination. The comment analyzes cases under the ADA, state disability statutes, and the Air Carrier Access Act, and concludes that obesity as disability cases are treated inconsistently in the courts. It concludes that current disability laws are not adequate enough to address obesity discrimination, and that laws specifically about obesity discrimination are necessary.

Jane Byeff Korn, *Fat*, 77 B.U. L. Rev. 25 (1997).

This article argues that obesity should be protected under the ADA as either an actual or perceived disability. It begins by discussing the concept of mutability as it relates to disability and the way the courts apply the ADA. It concludes that obesity should not be considered a mutable condition and that mutability is irrelevant to the analysis of whether or not an individual is disabled. Having dealt with the issue of mutability, the article goes on to discuss obesity under as a disabling impairment under the ADA. It finds that obesity is indeed a disabling impairment under the ADA. It also examines obesity discrimination as discrimination on the basis of perceived disability. Finally, the article discusses the advantages and disadvantages of treating obesity discrimination as a form of potential disability discrimination, appearance discrimination and gender discrimination

Amy M. Frisk, *Obesity as a Disability: An Actual or Perceived Problem?*, 1996-May *Army Law*. 3 (1996).

This article examines weight discrimination under the Rehabilitation Act of 1973, which prohibits discrimination against federal employees or employees in federal programs. It gives an overview

Sokkar Harker

of obesity cases that interpret the meanings of “impairment,” “major life activity,” “essential functions,” and “reasonable accommodation” under the Act. The article also discusses “perceived disability” and includes extensive analysis of the *Cook v. Rhode Island* case.

Christine L. Kuss, Student Author, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. Contemp. Health L. & Pol’y 563 (1996).

This note argues that obesity should be protected as a disability under the ADA, with significant discussion dedicated to the medical aspects of obesity. It discusses the medical etiology, epidemiology and pathogenesis of obesity, and looks specifically at genetic influences, endocrine and metabolic influences, psychological influences, brain disorders, social influences, developmental influences, adipose tissue distribution, and treatment.

Milena D. O’Hara, Student Author, *“Please Weight to be Seated”’: Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations*, 17 Whittier L. Rev. 895 (1996).

This comment examines the history and purpose of the ADA with specific attention to the public accommodations section. It then examines federal and state disability discrimination cases that have analyzed whether obesity is a disability, and concludes that obesity is a disability that should be protected by the ADA, not just in an employment context, but also in a public accommodations context. It offers illustrations of creative seating accommodations in restaurants and movie theaters that do not place an undue burden on businesses.

Sokkar Harker

Jay R. Byers, Student Author, *Cook v. Rhode Island: It's Not Over Until the Morbidly Obese Woman Works*, 20 J. Corp. L. 389 (1995).

This comment looks at the First Circuit decision in *Cook v. Rhode Island* from an employer's point of view. In doing so, it analyzes weight discrimination under each prong in the four-prong test used for claims under the Rehabilitation Act, and offers an analysis of potential weight discrimination claims under the ADA. It also analyzes the facts necessary for a prima facie case of weight discrimination and advises employers on how to avoid weight discrimination claims.

Jeffrey Garcia, Student Author, *Weight-Based Discrimination and the Americans with Disabilities Act: Is There an End in Sight?*, 13 Hofstra Lab. & Emp. L.J. 209 (1995).

This note analyzes weight-based discrimination as disability discrimination under state and federal law and argues that the definition of disability should explicitly include obesity. It examines the language of the ADA, as well as judicial decisions that discuss obesity as a disability. It provides extensive analysis of three categories of cases: those in which obesity was not found to be a disability; those in which weight standards were found to be a bona fide occupational qualification; and those in which obesity was found to be a disability. It concludes that the ADA does not provide sufficient protection to overweight people because obesity can be considered a voluntary condition, because physical examinations provide pretext for refusing to hire obese people, and because the definition of disability under the ADA is too restrictive to encompass most obese persons. The article concludes that obesity should explicitly be included in the definition of disability.

Sokkar Harker

Carolyn M. Mcdermott, Student Author, *Should Employers be Allowed to Weigh Obesity in their Employment Decisions? Cooke v. Rhode Island, Department of Mental Health, Retardation and Hospitals*, 44 U. Kan. L. Rev. 199 (1995).

This note examines the decision in *Cook v. Rhode Island* and concludes that the court's determination that obesity should be protected as a perceived disability under federal law was correct. It further argues that statutory protection of obesity should be explicit and extended to two classes of obesity: obesity that is caused by systemic or metabolic factors, and morbid obesity.

Jennifer Shoup, Student Author, *Title I: Protecting the Obese Worker?*, 29 Ind. L. Rev. 206 (1995).

This note's focus is the pivotal decision in *Cook v. Rhode Island*, its context and a thorough discussion of possible effects of the decision. It begins by covering the history of federal disability protection from the RHA through the ADA, and examines the purpose of and relationship between these laws. It summarizes the definitions, causes, and perceptions of obesity in medical, social, and legal contexts. Next, it describes the decision and reasoning of the *Cook* case. The note then explores in detail potential effects of *Cook* on future RHA and ADA disability claims, discrimination cases, wellness programs, and in other contexts. It concludes that obesity will not always be protected under the ADA, and that appearance discrimination laws may afford better protection in many obesity discrimination cases.

Kimberly B. Dunsworth, Student Author, *Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?* 24 Golden Gate U. L. Rev. 523 (1994).

Sokkar Harker

In *Cassista v. Community Foods*, the plaintiff applied for a position at a health foods store, and was explicitly rejected because of her weight. She sued under California's Fair Employment and Housing Act (FEHA) and lost at the trial level. The Court of Appeals overturned the trial court decision, finding that she had a physical disability under the FEHA. On appeal, the California Supreme Court reversed, finding that the plaintiff did not have a physical disability. This note gives a history of FEHA and an overview of related federal statutes. It then examines the California Supreme Court's application of FEHA, arguing that the court ignored a significant part of the "plain language of the statute" and failed to apply a liberal construction of the statute. It concludes that the California Supreme Court view that obesity is a voluntary state and should not be protected, is shortsighted and contravenes the purpose of FEHA.

Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through A Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 Cal. W. L. Rev. 41 (1994).

This article analyzes workplace obesity discrimination under disability statutes, focusing on perceived disability claims. It looks at both *Cook v. State of R.I., Dep't of Mental Health, Retardation, & Hospitals* and *Cassista v. Community Foods* and specifically discusses how those cases deal with disability discrimination. It finds that while *Cassista* (relying on the district court decision in *Cook*) requires that the employer perceive the disability to have a physiological cause, the final opinion in *Cook* (from the California Supreme Court) does not. It then looks to literature from sociology and psychology regarding the stereotyping of obese individuals and describes the negative stereotyping of obese people, particularly in the employment context. It concludes that because of the negative stereotypes faced by obese people, the precedent regarding perceived disability discrimination found in *Cook* is valuable for combating discrimination.

Scott Petersen, Student Author, *Discrimination Against Overweight Persons: Can Society Still Get Away with it?*, 30 Gonz. L. Rev. 105 (1994).

This comment looks at the development of obesity discrimination suits with particular attention to Washington State's disability discrimination statutes and *Greene v. Union Pacific Railroad Co.*, a 1981 Washington federal district court decision rejecting a discrimination claim based on obesity. Several arguments from the *Greene* decision are examined, including obesity as a voluntary condition, obesity as a mutable condition, the effect of obesity on insurance costs, and the effect of obesity on a safe working environment. The comment argues that *Greene* no longer provides good precedent for obesity discrimination cases because it predates case law that recognizes a more liberal definition of “handicap” and predates medical research that suggests obesity is not a voluntary or mutable condition.

William C. Taussig, Student Author, *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. (1994).

This note analyzes the *Cook* decision, cases leading up to the *Cook* decision, and the legislative history of disability discrimination statutes and regulations. It also examines current scientific research on obesity and concludes that disability discrimination laws should protect all levels of obesity, not just morbid obesity. It explains that obesity should be protected as an actual disability at all levels, because obesity has physiological causes, is predominantly involuntary, and affects major life activities. Whether obesity “substantially limits” major life activities can be resolved on a case by case basis. Further, it explains that all levels of obesity should be

Sokkar Harker

protected as a perceived disability because the societal stigma of obesity is so great that obese persons are generally perceived as substantially limited in their ability to work.

Steven M. Ziolkowski, Student Author, *The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*, 74 B.U. L. Rev. 667 (1994).

This note examines the viability of weight-based discrimination cases under the ADA after the First Circuit decision in *Cook v. Rhode Island*. It argues that although Bonnie Cooke prevailed under the “perceived disability” theory, the *Cook* decision did not adequately clarify the evidentiary burden for subsequent plaintiffs. Further, it argues that contrary case law predating the *Cook* decision could hinder subsequent plaintiffs. It concludes that the Equal Employment Opportunity Commission (EEOC) should solve this problem by amending its regulations to define obesity as an impairment, to limit the importance of voluntariness, and to rethink the concept of “substantially limiting” in an ADA claim.

James G. Frierson, *Obesity as a Legal Disability under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 Labor Law J. 286 (May 1993).

This article argues that obese persons should be defined as disabled under disability laws because they are subject to stereotypes and bias. Even obese persons who are not substantially limited in personal, major life activities are substantially limited in the major life activity of work because they are likely to be refused jobs. It argues that obese persons should be defined as disabled because they are regarded as such. In making its arguments, the article analyzes cases in which obesity was ruled to be a disability and cases in which obesity was ruled not to be a disability. It also provides discussion on obesity as a medical condition and obesity as a voluntary condition.

Patricia Hartnett, Student Author, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 Rutgers L.J. 807 (1993).

This note analyzes protection from discrimination against obese people in the workplace. It looks at protection under Title VII of the Civil Rights Act of 1964, the ADA, the RHA, and state disability statutes. It pays special attention to workplace physical examinations, pre-employment medical screenings, and lifestyle screenings. It concludes that current statutes would not cover most situations in which obese people are discriminated against because many of them would not be considered disabled, nor would they be placed in a protected class under Title VII. It argues that legislatures should pass laws that protect obesity as a personal characteristic with a focus on protecting the privacy interests of non-work behavior. It offers sample policies and describes exceptions to such legislation.

BOOKS/BOOK CHAPTERS

Sondra Solovay, *Is an Ample Body an Able Body?* in *Tipping the Scales of Justice*, 128 (Prometheus 2000).

This chapter focuses on fat discrimination as a form of disability discrimination. It compares the argument that weight should be a protected as a disability with the argument that characterizing fat as disabling would be detrimental to the fat community. It provides an extensive analysis of the ADA and *Cook v. Rhode Island*. It also provides an analysis of “extreme weight,” weight “outside the normal range,” and weight “within the normal weight range” under current disability laws, and argues for additional legislation to outlaw all fat prejudice.

REPORTS

Jennifer Staman, Cong. Research Serv., RS22609, *Obesity Discrimination and the Americans with Disabilities Act (2007)*.

This Congressional Research Service Report discusses obesity under the ADA and related Equal Employment Opportunity (EEO) regulations. In part I, the report analyzes obesity discrimination claims under the regulatory language promulgated by the EEOC. In part II, the report discusses selected cases in which the courts have considered obesity discrimination as a basis for a claim under the ADA or Section 503 of the RHA..

VIII. FAT DISCRIMINATION AS SEX DISCRIMINATION

OVERVIEW

Fat women face even more severe discrimination than their male counterparts. Fatness in women is seen as more undesirable than in men.⁵³ Fat women are considered unfeminine and bear additional stigmatization by family, employers, and health professionals.⁵⁴ In the employment arena, fat women suffer an even greater wage penalty than men,⁵⁵ and experience discrimination at a lower body mass index.⁵⁶ Further, while fat men receive lower wages during the early stages of their careers, they tend to “catch up” to their thinner colleagues as their time on the job

⁵³ Jane B. Korn, *Fat*, 77 B.U. L. Rev. 25, 32-33 (1997).

⁵⁴ *Id.* at 25.

⁵⁵ Elizabeth 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 (2001).

⁵⁶ Mason, *supra* note 11, at 431.

increases.⁵⁷ In contrast, fat women earn less than their thinner colleagues at all stages of their career.⁵⁸

Nevertheless, there are only a few fat discrimination cases brought under Title VII. The most well-known cases are flight attendant cases from the 1970's and 1980's in which female airline attendants were expected to adhere to stringent weight restrictions.⁵⁹ Several of those lawsuits failed because the courts found that men were similarly burdened by weight restrictions.⁶⁰ For example, in *Jarrel v. Eastern Airlines*, the court found that the weight restrictions applied equally to males and females, even though flight attendants were over ninety percent female, thus making the determination difficult.⁶¹ The court stated "That Eastern has imposed weight limitations upon a predominantly female job classification, while relevant.....is not dispositive."⁶²

SCHOLARLY ARTICLES

Alexandra W. Griffin, Student Author, *Women and Weight-Based Employment Discrimination*, 13 *Cardozo J.L. & Gender* 631 (2007).

This note examines protection for overweight and obese women as sex discrimination under Title VII, federal disability laws, and local and state weight discrimination laws. Based on research demonstrating the severe employment and wage penalties for overweight and obese women, it concludes that current laws do not offer adequate protection and contribute to the wage gap

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ James G. Frierson, *Obesity as a Legal Disability Under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 *Labor Law J.* 286 (May 1993).

⁶⁰ Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 *J. Air L. & Com.* 203, 212-213 (1996).

⁶¹ *Jarrell v. Eastern Air Lines, Inc.*, 430 F.Supp. 884 (E. D. Va. 1977).

⁶² *Id.* at 892.

Sokkar Harker

between men and women. It recommends that the feminist community focus on weight-based discrimination to help close the gender based wage gap.

Kate Sablosky, *Probative “Weight”: Rethinking Evidentiary Standards in Title VII Sex Discrimination Cases*, 30 N.Y.U. Rev. L. & Soc. Change 325 (2006).

This article argues that because women face greater amounts of weight-based discrimination in employment, evidence of weight-based discrimination should have probative influence in Title VII sex discrimination claims. The article provides a survey on obesity data, focusing on data concerning obesity in women. It then discusses the weight aspect of gender stereotyping and finds that women face great wage penalties for failing to conform to society's conception of the ideal female form. It cites to studies showing that women are held to stricter weight standards, and that mildly obese women face wage penalties, whereas men only face wage penalties at the highest weights. The article looks at both the legislative history and judicial interpretations of Title VII, and concludes that Title VII should be applied broadly enough to encompass weight-based sex discrimination. It concludes that sex-based weight discrimination statistics should be used in Title VII cases and offers model jury charges that permit inference of sex discrimination based on weight.

Dennis M. Lynch, Student Author, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. Air L. & Com. 203, 212-213 (1996).

This comment examines weight discrimination in the airline industry. First it discusses a line of Title VII sex discrimination cases in which female airline attendants were required to adhere to restrictive weight guidelines. It then focuses on legal remedies for weight discrimination under disability statutes, state statutes, and the Air Carrier Access Act, which prohibits discrimination

Sokkar Harker

against handicapped individuals in the provision of air transportation. It then argues that weight discrimination should be explicitly protected by antidiscrimination statutes, including the Air Carrier Access Act.

BOOKS/BOOK CHAPTERS

Sondra Solovay, *Intersectionality Issue in Weight Discrimination: Weight Requirements as Sex Discrimination*, in *Tipping the Scales of Justice*, 122 (Prometheus 2000).

This chapter focuses on discrimination based on a person's weight, plus another characteristic, such as race or sex. Cases in which fat women, but not fat men, are denied employment opportunities are discussed. Cases in which persons were denied employment opportunities because of race and weight, and because of weight and race and sex, are also discussed.

IX. FAT RIGHTS ADVOCACY

A BRIEF HISTORY OF ADVOCACY

The fat rights movement developed in the 1960's and 1970's and is rooted in the social movements of that era, such as women's rights and gay rights.⁶³ It was a response to the discrimination and stigmatization of fat people, and provided a venue for political activism and social support.⁶⁴ Like other social movements, the fat rights movement sought to enact political

⁶³ Sobel 233-2343.

⁶⁴ *Id.* at 238-241

change in order to challenge societal beliefs and practices.⁶⁵ It has done so through rallies and boycotts, publications of books and articles, engaging with mainstream medical and health organizations.⁶⁶ More recently, internet activists have participated in the movement through the “fat-o-sphere,” a community of bloggers advocating for fat acceptance.⁶⁷

One of the earliest examples of advocacy was radio personality Steve Post’s 1967 “Fat-In” in Central Park.⁶⁸ According to the New York Times, approximately 500 people attended, displaying banners and buttons with slogans such as “Fat Power.”⁶⁹ Two years later, Bill Fabrey founded the National Association to Aid Fat Americans (NAAFA), the first national organization dedicated to the rights of fat people. Now called the National Association to Advance Fat Acceptance, NAAFA aims to advocate for the rights of fat people through a combination of “public education, advocacy, and support.”⁷⁰ NAAFA is currently the largest organization dedicated to fat acceptance and fat rights advocacy. Around the same time, Lew Louderbeck published “Fat Power,” which argued for civil rights for fat people.⁷¹

In 1972, a few NAAFA members splintered off into a group named the Fat Underground (also known as F.U.).⁷² Influenced by both feminist activism and radical therapy, members of the Fat Underground sought fat acceptance through a more confrontational stance than NAAFA, specifically within the health and medical establishment.⁷³ In 1973, the group released the Fat

⁶⁵ *Id.* at 237.

⁶⁶ *Id.* at 238-239

⁶⁷ Roni Caryn Rabin, *In the Fatosphere, Big Is In, or at Least Accepted*, N.Y. Times (Jan. 22, 2008), (available at http://www.nytimes.com/2008/01/22/health/22fblogs.html?_r=0.)

⁶⁸ Charlotte Cooper, *What’s Fat Activism?* 5 (Dep’t of Sociology, University of Limerick, Working Paper No. 2, 2008) (available at <http://www3.ul.ie/sociology/docstore/workingpapers/wp2008-02.pdf>).

⁶⁹ *Curves Have Their Day in Park; 500 at a’ Fat-in’ Call for Obesity*, N.Y. Times, June 5, 1967, at 54.

⁷⁰ NAAFA, *About Us*, <http://www.naafaonline.com/dev2/about/index.html> (accessed Sept. 10, 2015).

⁷¹ Cooper, *supra* note 67, at 6.

⁷² Dan Fletcher, *The Fat-Acceptance Movement*, Time (July 31, 2009) (available at <http://content.time.com/time/nation/article/0,8599,1913858,00.html>).

⁷³ Sara Fishman, *Life in the Fat Underground*, Radiance Magazine (Winter 1998), (available at http://radiancemagazine.com/issues/1998/winter_98/fat_underground.html).

Liberation Manifesto, which declared, “fat people of the world, unite! You have nothing to lose.”⁷⁴ The group spent several years disrupting the diet and weight loss industry through workshops, rallies, and public confrontation.⁷⁵

Through the 80’s and 90’s, a number of books critiquing society’s emphasis on slimness, and promoting civil rights for fat people were published.⁷⁶ In 1983, the New Haven Fat Liberation Front published the anthology Shadow on a Tightrope: Writings by Women on Fat Oppression.⁷⁷ In 1994, NAAFA board member Marilyn Wann began publishing the “zine Fat?So!” and in 1999 published a book of the same name.⁷⁸ In 1998, activist Charlotte Cooper published *Fat and Proud: The Politics of Size*.⁷⁹

By the 2000’s, fat rights had entered the academia. In 2006, Smith College hosted a “Fat and the Academy” Conference,⁸⁰ in 2009, the *Fat Studies Reader* was published,⁸¹ and in 2012, *Fat Studies: An Interdisciplinary Journal of Body Weight and Society* was published.⁸² Around the same time, a robust network of bloggers, dubbed the “fatosphere” emerged. In addition to fat acceptance and activism, many of the blogs tackle topics such as fashion,⁸³ nutrition,⁸⁴ health and exercise.⁸⁵ To date, there are many active blogs in the “fatosphere.”⁸⁶

⁷⁴ John Cawley, *The Oxford Handbook of the Social Science of Obesity*, 174 (Oxford University Press, 2011).

⁷⁵ Fishman, *supra* note 72.

⁷⁶ See, e.g., Susan Bordo, *Unbearable Weight* (U. of Cal. Press 1993); Glenn Gaesser, *Big Fat Lies* (Gurze Books 2002); Laura Fraser, *Losing It* (Plume 1998); Charles Roy Schroeder, *Fat Is Not a Four Letter Word* (Chronimed 1992).

⁷⁷ Cooper, 9

⁷⁸ Marilyn Wann, *History, Fat!So?*, <http://fatso.com/about/> (accessed Sept. 10, 2015).

⁷⁹ Charlotte Cooper, *Print, Dr. Charlotte Cooper*, <http://charlottecooper.net/publishing/print/> (accessed Sept. 10, 2015).

⁸⁰ *Fat and the Academy*, <http://sophia.smith.edu/sizematters/FATA/> (accessed Sept. 10, 2015).

⁸¹ *The Fat Studies Reader*, NYU Press, <http://nyupress.org/books/9780814776315/> (accessed Sept. 10, 2015).

⁸² *Fat Studies: An Interdisciplinary Journal of Body Weight and Society*, Taylor & Francis Online (2014), <http://www.tandfonline.com/toc/ufts20/current#.VDMNWodGUi0> (accessed Sept. 10, 2015)

⁸³ *Fashionista*, <http://fashionista.livejournal.com/> (accessed Sept. 10, 2015).

⁸⁴ *The Fat Nutritionist*, <http://www.fatnutritionist.com/> (accessed Sept. 10, 2015).

⁸⁵ *Fathletes*, <http://fathletes.livejournal.com/> (accessed Sept. 10, 2015).

⁸⁶ See, e.g., *Fatties United!*, <https://fattiesunited.wordpress.com/> (accessed Sept. 10, 2015); *The Well-Rounded Mama*, <http://wellroundedmama.blogspot.com/> (accessed Sept. 10, 2015); *Obesity Timebomb*, <http://obesitytimebomb.blogspot.com/> (accessed Sept. 10, 2015).

SCHOLARLY ARTICLES

Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 *Law & Soc'y Rev.* 397, 401 (2008).

This article discusses rights consciousness in the fat acceptance movement through a series of interviews with NAAFA members. The author looks at the logics of fat rights and fat acceptance used by NAAFA members, specifically within the framework of civil rights and rights consciousness. It includes a discussion of how interviewees manage their own fat identities and their analysis as to why anti-discrimination laws should protect fat people.

Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests Over Obesity*, 30 *J. Health Pol. Pol'y & L.* 869 (2005).

This article studies the claims and strategies of opposing groups in the obesity debate and argues that the groups are essentially engaged in a framing contest over the nature and consequences of obesity. Anti-obesity activists and researchers frame obesity as a disease, a risky behavior and public health epidemic, whereas fat acceptance activists and researchers frame obesity as an aspect of body diversity. It provides an extensive examination of published material and interviews with both groups and discusses the implications of framing on the outcomes of the debate.

Anna Kirkland, *Representations of Fatness and Personhood: Pro-Fat Advocacy and the Limits and Uses of Law*, 82 *Representations* 24 (2003).

Sokkar Harker

This article evaluates representations of fatness in legal decisions and evaluates how those representations affect the legal landscape for fat people. The article presents four models of fat representation: the “Transcendental model,” in which the intrinsic worth of the fat person is prioritized; the “Communal Rational model,” in which the reasonableness of the fat person is prioritized; the “Functional model,” in which the ability of the fat person to do the job is prioritized; and the “Actuarial model,” in which the fat person is represented as an aggregate of risks, and the risk posed by the fat person is prioritized. The article examines cases that exemplify each of the four models and argues that the operation of these representations within in the law should inform the strategies of fat rights advocates.

BOOKS/BOOK CHAPTERS

Sondra Solovay, *The Fat Lady is Screaming, Not Singing: Continuing the Fight Against Fat Discrimination*, in *Tipping the Scales of Justice* (Prometheus 2000).

This chapter discusses different approaches, both legal and nonlegal, to fat rights activism and advocacy. It recounts stories of persons who had experienced fat discrimination and fought back through lawsuits, legislative advocacy, letter writing, protesting, and direct confrontation. It concludes fat rights advocacy should be taken seriously and included as a component of progressive politics.

ONLINE RESOURCES

Council on Size and Weight Discrimination, <http://www.cswd.org/> (accessed September 12, 2015).

Sokkar Harker

The Council on Size and Weight Discrimination is a non-profit group advocating for the rights of fat people, particularly in the areas of employment, health care and the media. The Council's website includes a "Legal Action" page outlining current statutes and ordinances protecting fat people, a summary of selected cases about weight discrimination, and a list of attorneys with experience in weight discrimination. The website also offers statistical information and a list of selected studies on weight discrimination.

National Association to Advance Fat Acceptance, <http://www.naafaonline.com/dev2/> (accessed Sept. 12, 2015).

The National Association to Advance Fat Acceptance (NAAFA) is one of the oldest civil rights organizations dedicated to enhancing the quality of life for fat people and protecting fat people from discrimination. NAAFA's website has a number of resources on their website, including a "Laws on Place" page that outlines current statutes and ordinances protecting fat people. It also has a "Weight Discrimination Resources" page with selected articles about size discrimination in the workplace and selected websites and books. A "Recommended Reading" page offers suggested readings across a number of categories.

Weight Bias and Stigma, Yale Rudd Center for Food Policy and Obesity, http://www.yaleruddcenter.org/what_we_do.aspx?id=10 (accessed Sept. 12, 2015).

The Yale Rudd Center for Food Policy and Obesity has a "Weight Bias and Stigma" page that offers a lot of information about weight bias in a number of areas including healthcare, employment, education, and the media. A valuable feature of this website is the "Publications" page which offers links to a number of research articles about weight bias and stigma.

