

# PUBLICATION

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## Ugh! – Does this ADA Claim Make Me Look Fat?

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**We are all familiar with the Americans with Disabilities Act. The ADA prohibits discrimination based upon actual or perceived medical disabilities, and the ADA requires employers to accommodate employees with disabilities subject to certain exceptions. By now, we're also all familiar with the ADA Amendments Act of 2008. The ADAAA effectively overturned four United States Supreme Court rulings that had narrowed the scope and coverage of the ADA. The ADAAA did this by substantially broadening the statutory language of the ADA. Under the now-amended ADA, it is much, much easier to establish that one has a disability that is otherwise covered (and therefore protected) by the ADA. Does that mean that obese employees are now a protected class, on the same footing as employees with physical injuries or mental illness? While every employee and every case is different, the answer will often be yes.**

Under the ADA, as amended by the ADAAA, a disability is most commonly defined and very broadly interpreted as “a physical or mental impairment that substantially limits one or more major life activities” or “being regarded as [i.e., perceived as] having a physical or mental impairment that substantially limits one or more major life activities.” Life activities are most easily thought of as routine activities that people do on a daily basis: eat, sleep, breathe, walk, see, hear, go to work, etc. Under the now-amended ADA, if an employee can show that his obesity limited his ability to, for example, walk, breathe, go up or down stairs, or stand for more than a nominal period of time, then that employee is likely disabled. Likewise, if an obese employee can show that her employer perceived her as limited in her ability to, for example, walk, breathe, go up or down stairs, or stand for more than a nominal period of time, then that employee is also likely disabled under the ADA, as amended. “Perceived as” claims are usually based on comments in the workplace, most often a supervisor or manager telling an employee that she shouldn't do or she should be careful doing something because she is overweight (or fat or too heavy). “Perceived as” claims can also be based on actions that are not necessarily ill-intended. For example, an employer may not place an obese employee in a higher paying position that requires the employee to stand for long periods of time because the employer assumes that prolonged standing will be difficult for the obese employee.

Does this mean that every employee in the workplace that could stand to lose a few pounds is now part of a protected class? No, not at all. Courts have been clear that obesity, which is a medical condition, is what can trigger the protections of the ADA, as amended. In fact, most reported cases on this subject have involved employees who suffer from extreme or morbid obesity. While the medical definitions of morbid obesity may vary, it is typically defined as 100 pounds over ideal body weight or a Body Mass Index above 40.

Does an employer need to engage in the interactive process if an overweight (but maybe not obese) employee requests an accommodation? Yes, but this is more practical advice than an absolute. Employers should have a written, well-disseminated policy outlining how a request for accommodation should be made. If a request for accommodation is made, then the employer should engage in the interactive process with the employee. The interactive process should, at a minimum, reveal the nature of and the reasons for the requested accommodation, and the interactive process should be well documented.

Must an employer provide an accommodation if one is requested by an overweight (but maybe not obese) employee? No. Regardless of whether the employee is overweight or morbidly obese, the ADA, as amended, only requires employers to make reasonable accommodations, i.e., only those accommodations that do not work an undue hardship on the employer or its business. Also, an accommodation can be (and most often will be) reasonable despite the fact that it isn't the specific accommodation requested by the employee. Whether an accommodation is reasonable is a fact-intensive inquiry. When faced with such an inquiry, employers are strongly advised to involve employment counsel or informed HR personnel.

Should an employer respond to complaints of harassment by an overweight (but maybe not obese) employee? Yes, employers should promptly respond to all complaints of harassment regardless of the employee's shape, size, or appearance. Plus, an employee can bring a claim for hostile work environment under the ADA, as amended. To establish a hostile work environment, an employee needs to show, among other things, that he was subjected to harassment (e.g., name calling, ridicule, changes in working conditions, unfair treatment, etc.) because of his disability or perceived disability, which can include obesity. And notably, promptly responding to complaints of harassment is a key factor in whether the employer can successfully defend against a subsequent lawsuit.

If you want more information on obesity and the ADA or copies of the court decisions generally referenced above, feel free to contact us or your regular Baker Donelson attorney.