TITLE I: PROTECTING THE OBESE WORKER?

JENNIFER SHOUP*

INTRODUCTION

Chances are, you consider yourself to be relatively enlightened, free from prejudices, and careful not to make judgments based upon characteristics like skin color or sexual preference. Yet, what would your first, unchecked thought be if a grossly overweight individual entered your office for a job interview? Though many of us hate to admit it, our first impression would probably not be a good one. Maybe we would assume the person was lazy or slovenly; maybe we would even assume he or she could not perform the available job simply due to excessive body weight. It would not be an unusual reaction; it seems many Americans, even those who consider themselves free from prejudice, are biased against obese individuals.

This Note will look at that bias, and consider whether obesity should qualify as a disability under the Americans With Disabilities Act (ADA).[1] In order to coherently address the question, this Note has been divided into four Parts. Part I will consist of an overview of the Rehabilitation Act[2] and the ADA. Part II will define obesity in its various forms. Part III will outline the First Circuit's decision in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,[3] examine the amicus brief submitted in Cook's favor by the Equal Employment Opportunity Commission (EEOC), and present the proposition that, in certain circumstances, obesity should be considered a disability under the ADA. Part III will also address whether the decision in *Cook* would apply in a case brought under the ADA. Finally, Part IV will consider the concerns that employers are likely to voice if obesity is recognized as a disability under the ADA and will suggest an alternative for eliminating discrimination based on obesity.

I. OVERVIEW—THE REHABILITATION ACT AND THE ADA

Congress enacted the Rehabilitation Act in 1973, under President Nixon. [4] Through this Act, Congress made a conscious effort to include individuals with disabilities in mainstream America, especially with regard to employment, by prohibiting the federal government and entities receiving federal assistance from discriminating against people on the basis of their disabilities.[5] An express purpose of the Act is to promote and expand

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* J.D. Candidate, 1996, Indiana University School of Law—Indianapolis; B.S., 1989, Butler University, Indianapolis, Indiana.

1. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

2. 29 U.S.C. §§ 701-797(b) (1988 & Supp. V 1993).

3. 10 F.3d 17 (1st Cir. 1993). *Cook* was decided under the Rehabilitation Act. *Id.* at 20.

4. 29 U.S.C. §§ 701-797(b) (1988 & Supp. V 1993); *see* HENRY PERRITT, JR., AMERICANS WITH DISABILITIES HANDBOOK (1990).

5. 29 U.S.C. § 701(a) (Supp. V 1993) reads as follows:

"Congress finds that . . . disability is a natural part of the human experience and in no way diminishes the right of individuals to—

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

employment opportunities for individuals with disabilities.[6]

The Rehabilitation Act provides that "no otherwise qualified individual with a disability[7] . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[8] The Act defines an "individual with a disability" as anyone who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[9]

The Rehabilitation Act is a step in the right direction in that it seeks to protect disabled individuals from discrimination based solely on their disabilities. However, because Congress limited the scope of the Act to institutions and organizations that receive financial assistance from the federal government, the Act allows the vast majority of employers, those in the private sector, to continue to discriminate against disabled workers.[10] Until the enactment of the ADA, federal law did not prohibit discrimination

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(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society."

The statute also states that "the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration in . . . employment . . . ." *Id.* § 701(a)(6).

6. 29 U.S.C. § 701(b) (1988 & Supp. V 1993). *See also* Elizabeth C. Morin, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 189 (1990).

7. Originally, the Act's language referred to "handicapped individuals." Congress replaced this language with the preferred phrase "individual with a disability" in 1992. With this change, the terminology of the Rehabilitation Act and the ADA are consistent. *See* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(f), 106 Stat. 4344, 4348. This Note will use the word "disability," rather than "handicap," unless quoting from a source that uses the word "handicap."

8. 29 U.S.C. § 794(a) (1988 & Supp. V 1993). To state a claim under the Rehabilitation Act, a claimant must show: 1) he or she is an "individual with a disability" within the meaning of the statute; 2) that he or she is "'otherwise qualified' to participate in the program or activity at issue"; 3) that he or she was "excluded from the program or activity 'solely by the reason of'" the disability; and 4) that the program or activity received federal financial assistance. Plummer v. Branstad, 731 F.2d 574, 577 (8th Cir. 1984); Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983); Doe v. New York State Univ., 666 F.2d 761, 774-75 (2nd Cir. 1981).

9. 29 U.S.C. § 706(8)(B) (1988 & Supp. V 1993). Under the regulations that implement the Rehabilitation Act, there are three ways in which persons can qualify for protection on the basis of a perceived disability. Individuals may be "regarded as having an impairment" if they have a physical or mental impairment that does not substantially limit a major life activity, but that is perceived by an employer as imposing such a limitation. Individuals may also be "regarded as having an impairment" if they have a physical or mental impairment that substantially limits a major life activity only because of their employer's attitudes toward the impairment, or if the individuals have none of the impairments described in the Act but are treated by an employer as though they do. 45 C.F.R. § 84.3(j)(2)(iv) (1993).

10. Morin, *supra* note 6, at 190; Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and The Future*, 1989 U. ILL. L. REV. 845, 850 (1989).

by employers in the private sector, by places of public accommodation, or by state and local government agencies that did not receive federal aid.[11]

The National Council on Disability[12] issued reports to Congress in 1986 and 1988 recommending civil rights legislation to ensure equal treatment for disabled individuals. Congress enacted the ADA in 1990[13] stating that in excess of 43,000,000 Americans have some form of mental or physical disability and that this number is increasing.[14] Congress also stated that disabled people are continually subjected to discrimination in numerous contexts,[15] and are severely disadvantaged vocationally, economically, and educationally.[16] Congress enacted the ADA to "remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[17] In essence, the ADA begins where the Rehabilitation Act leaves off. Title I of the ADA extends the protection given under the Rehabilitation Act because it prohibits private employers from discriminating against disabled individuals.[18]

Title I applies to employers,[19] employment agencies, labor organizations, and joint labor management committees.[20] It tracks the language of the Rehabilitation Act[21] and

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11. OGLETREE, DENKINS, NASH, SMOAK & STEWART, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS § 1.04[1] (1994) [hereinafter OGLETREE].

12. The National Council on Disability is an agency consisting of members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 780(a)(1)(A) (1988 & Supp. V 1993). These findings are reprinted in 1990 U.S.C.C.A.N. 330.

13. President Bush signed the ADA into law on July 26, 1990.

14. 42 U.S.C. § 12101(a)(1) (Supp. V 1993).

15. *Id.* § 12101(a)(5).

16. *Id.* § 12101(a)(6).

17. 29 C.F.R. app. § 1630 (1995). This is the EEOC's interpretive guidance explaining the major concepts of disability rights in Title I as discussed and defined in section 1630. It states that the EEOC is the agency responsible for enforcement of Title I, and that it will be guided by the provisions in the interpretive guidance when resolving charges of employment discrimination.

18. 42 U.S.C. § 12112 (Supp. V 1993); Morin, *supra* note 6, at 190; OGLETREE, *supra* note 11, at 2-24. Though this Note is only concerned with prohibited employment discrimination under Title I, the ADA prohibits more than just discrimination in employment. Other titles address discrimination against disabled people by state and local governments (Title II); discrimination against disabled people in the enjoyment of goods and services offered by places of public accommodation (Title III); discrimination in communication (Title IV); and various other issues (Title V).

19. The ADA defines an "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(5)(A) (Supp. V 1993). The ADA went into effect on July 26, 1992, two years after President Bush signed it into law. From that date until July 26, 1994, Congress limited the term "employer" to persons with "25 or more employees for each working day in 20 or more calender weeks in the current or preceding year." *Id.* On July 26, 1994, "employer" applied to persons with 15 or more employees. The ADA's definition of "employer" mirrors the definition in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b) (1988).

20. 42 U.S.C. § 12111(2) (Supp. V 1993).

21. 29 U.S.C. § 794(a) (1988 & Supp. V 1993).

provides that "[n]o covered entity shall discriminate against a qualified individual[22] with a disability[23] because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[24] Title I requires employers to adopt unbiased hiring and promotion criteria and make reasonable accommodations[25] for the known physical or mental limitations of a qualified employee or applicant with a disability, unless it can be shown that the accommodation would impose an undue hardship[26] upon the operation of the business.[27]

Title I further mirrors the Rehabilitation Act in its definition of "disability." "Disability" under the ADA means, with respect to an individual: "(A) a physical or

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22. 42 U.S.C. § 12111(8) (Supp. V 1993) defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The interpretive guidance defines essential functions as those the individual holding the job must be able to perform unaided or with the assistance of reasonable accommodations. 29 C.F.R. app. § 1630.2(n) (1995). It also states that consideration shall be given to an employer's judgment as to what functions of a job are essential, and if an employer has written a description of the job before advertising or interviewing applicants, the description will be considered evidence of the essential functions of the job. *Id.*

23. The ADA uses the term "disability" instead of "handicap," which was the term originally used in the Rehabilitation Act. *See supra* note 7. The EEOC's interpretive guidance to Title I says that use of the term "disability" was an attempt by the House Committee on the Judiciary to use the "most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' . . . ." 29 C.F.R. app. § 1630.1(a) (1995) (citing H.R. REP. No. 485, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter HOUSE JUDICIARY REPORT]; S. REP. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter SENATE REPORT]; H.R. REP. No. 485, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter HOUSE LABOR REPORT]).

24. 42 U.S.C. § 12112 (Supp. V 1993). When comparing the ADA with the Rehabilitation Act, the only difference is that the Rehabilitation Act prohibits discrimination against "otherwise qualified individuals," while the ADA prohibits discrimination against "qualified individuals." 29 U.S.C. § 794(a) (1988 & Supp. V 1993).

25. 42 U.S.C. § 12111(9) (Supp. V 1993). Reasonable accommodations may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring; part time or modified work schedules, reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

26. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993); 29 C.F.R. § 1630.2(p) (1995). Undue hardship, decided on a case-by-case basis, results when an accommodation would be "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." 29 C.F.R. app. § 1630 (1995). Examples of factors to be considered in determining if an accommodation constitutes an undue hardship include: nature and cost of the accommodation; overall financial resources of the business; number of employees, and the overall size of the business with respect to the number of employees; effect the accommodation would have on expenses and resources; type of operation the business is involved in, including the structure, composition and functions of its work force; or impact otherwise because of such accommodation on the operation of the business. *Id.*

27. 29 C.F.R. app. § 1630 (1995).

mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[28]

To properly understand the definition of "disability," it is necessary to understand the terms the definition uses. The ADA defines "physical or mental impairment" as "any physiological disorder or condition . . . affecting one or more of [several] body systems . . . or any mental or psychological disorder."[29] It does not include physical characteristics such as "eye [or hair] color, . . . left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder."[30] "Major life activities" are those "basic activities that the average person . . . can perform with little or no difficulty . . . [including] caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive."[31] Whether an impairment "substantially limits" one or more of a person's major life activities is to be determined on a case-by-case basis.[32]

Finally, the defenses available to an employer faced with a charge of employment discrimination against a disabled individual are the same under the ADA and the Rehabilitation Act. These consist of business necessity and safety concerns.[33] Basically,

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28. 42 U.S.C. § 12102(2) (Supp. V 1993). The interpretive guidance to 29 C.F.R. § 1630.2(l) (1995) states that there are three ways an individual may satisfy being regarded as having a disability; the three ways are substantially similar to those enumerated under the Rehabilitation Act. *See supra* note 9. The first is that the individual may have an impairment which is not substantially limiting, but which is perceived by the employer as being substantially limiting. The second is that the individual may have an impairment which is substantially limiting only because of the attitudes of others toward the impairment. The third occurs when the individual does not have an impairment, but is regarded by an employer as having a substantially limiting impairment. 29 C.F.R. app. § 1630.2(l) (1995) (citing SENATE REPORT, *supra* note 23; HOUSE LABOR REPORT, *supra* note 23; HOUSE JUDICIARY REPORT, *supra* note 23).

The interpretive guidance says that the Supreme Court articulated the rationale behind the "regarded as" as part of the definition of "disability" in the context of the Rehabilitation Act in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). 29 C.F.R. app. § 1630.2(l) (1995). The Court in *Arline* noted that although an individual may have an impairment that does not substantially limit a major life activity, the reaction of others may prove just as disabling. 480 U.S. at 283; *see also* 29 C.F.R. app. § 1630.2(1) (1995).

29. 29 C.F.R. § 1630.2(h)(1)-(2) (1995).

30. 29 C.F.R. app. § 1630.2(h) (1995). This definition mirrors that used in the regulations that implement the Rehabilitation Act. *See* 34 C.F.R. § 104.3(j)(2)(i) (1995).

31. 29 C.F.R. app. § 1630.2(I) (1995). Again, this definition is the same as the definition in the regulations that implement the Rehabilitation Act. *See* 34 C.F.R. § 104.3(j)(2)(ii) (1995).

32. The interpretive guidance indicates that whether an impairment is substantially limiting is not necessarily based on the diagnosis or name of the impairment. Instead, it will be based upon the effect the impairment has upon the particular individual. 29 C.F.R. app. § 1630.2(j) (1995). Some of the factors courts have used to determine whether an impairment substantially limits a major life activity include: "(i) The nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he [actual or expected] permanent or long term impact . . . of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(l)-(iii) (1995).

33. 42 U.S.C. § 12113(a) (Supp. V 1993). The statute states:

It may be a defense to a charge of discrimination under this chapter that an alleged application of

the ADA mandates that employers consider disabled applicants for employment. This means that selection criteria must be unbiased, job related, and consistent with business necessity.[34] Employers must design employment selection procedures to assure that disabled individuals are not excluded from job opportunities unless they are actually unable to perform the job. If employers use tests in their hiring processes, the burden is on the employers to choose, and administer, tests that reflect an applicant's aptitude and skills and not his or her impairment.[35] Finally, employers must look at an applicant's ability to perform essential functions of a job, and must make reasonable accommodations to assist applicants in meeting legitimate job criteria.[36]

II. OBESITY AND ITS DEFINITIONS

The term "obese" is often used generically to describe those people society regards as too heavy. General dictionary definitions are fairly broad;[37] however, medical definitions distinguish specific categories of obesity. For example, if an individual weighs 20-40% above the normal weight for his or her height, he or she is classified as mildly obese. If that weight is 41-100% above normal, the individual is moderately obese. A person who weighs more than 100% of the normal weight for his or her height is considered severely or morbidly obese.[38] Approximately 25% of the population of the United States falls within one of the three classifications of obesity.[39]

Obesity manifests itself when an individual consumes more calories than he or she expends;[40] however, the specific cause of obesity is not known. Healthcare practitioners agree that there are many contributing factors including social, genetic, developmental and

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> qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . .

Id.

34. 42 U.S.C. § 12112(b)(6) (Supp. V 1993).

35. *Id.* § 12112(b)(7).

36. *Id.* § 12112(b)(5)(A).

37. The dictionary defines "obese" as "very fat or overweight; corpulent." THE RANDOM HOUSE DICTIONARY 1335 (2d ed. 1987); STEDMAN'S MEDICAL DICTIONARY, FIFTH UNABRIDGED LAWYER'S EDITION 973 (1984) [hereinafter STEDMAN'S]. *The Sloane Dorland Annotated Medical-Legal Dictionary* is slightly more specific and defines "obesity" as "an increase in body weight beyond the limitation of skeletal and physical requirement, as the result of an excessive accumulation of fat in the body." DORLAND'S notes that obesity ranges along a spectrum from "mildly inconvenient and/or unattractive to massive and often life threatening excess poundage." THE SLOAN DORLAND ANNOTATED MEDICAL LEGAL DICTIONARY 504 (1987) [hereinafter DORLAND'S].

38. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992).

39. Gordon B. Bloch, *So Long, Girth Control; Shed the Stigma, Not the Pounds: Research Shows When it Comes to Health, One Size Doesn't Fit All,* HEALTH, Feb. 1991, at 70, 70; *see also* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992) (approximately 24% of men and 27% of women in the United States are obese).

40. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 982 (16th ed. 1992).

psychological factors, a decrease in physical activity, and in some cases physiological and neurophysiological factors.[41] Further, obese individuals may suffer from other medical problems, such as: lower back pain; aggravation of osteoarthritis, especially in the knees and ankles; amenorrhea and other menstrual disturbances; high blood pressure; increased mortality due to cardiovascular disease; surgical mortality; and an increased death rate due to disease and accidents.[42] While it is possible for an obese person to lose weight, medical texts have described obesity as a condition that is chronic and likely to progress throughout life.[43] Evidence seems to suggest that it is rare for an obese person to lose weight and keep it off.[44]

The perception of obese individuals as undesirable is widespread. Recently, the National Association to Advance Fat Acceptance (NAAFA)[45] commissioned a survey that presented persuasive evidence of an underlying social bias against obese people. The study, performed by a team of researchers from the University of Vermont, found that overweight people not only experience discrimination when looking for a job, but also experience discrimination in virtually every aspect of their lives.[46] Other studies have presented similar findings. For example, a study in the *New England Journal of Medicine* involving 10,039 randomly selected young people found that significantly overweight adolescents and young adults, those above the 95th percentile for their age and sex earn less than their average-weight contemporaries. The study also found a corollary between obesity in women and an increased poverty rate, fewer years of schooling, and a negative impact upon the chances of ever marrying.[47] Another recent study, co-authored by

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41. *Id.* at 982-93; HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1671-73 (11th ed. 1987) [hereinafter HARRISON'S]. *See also* Sharlene A. McEvoy, *Tipping the Scales of Justice: Employment Discrimination Against the Overweight*, 21 HUM. RTS. Q., Summer 1994, at 24, 24-25 ("In 1992, at a National Institute of Health conference, experts stated there was increasing physiological, biochemical, and genetic evidence that obesity is not simply a problem of will power. Instead it is a complex disorder of energy metabolism.").

42. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 984 (16th ed. 1992).

43. *Id.*

44. *Id.* ("The prognosis for obesity is poor . . . ." The Merck Manual also states that attempts to lose weight may cause complications and that symptoms of anxiety and depression may appear in as many as half of the patients undergoing treatment for obesity); *see also* HARRISON'S, *supra* note 41, at 1675; Kimberly B. Dunworth, Cassista v. Community Foods, Inc.: *Drawing the Line at Obesity?*, 24 GOLDEN GATE U. L. REV. 523, 545 (1994) (noting that researchers consistently find obese people cannot control their weight).

45. NAAFA is a Sacramento based organization that states it is "not a diet group, but [instead it] seeks alternative ways to enrich the lives of its members and larger people everywhere through public education, research, advocacy, and support." Martin Everett, *Fat Chance*, SALES AND MARKETING MGMT., Mar. 1990, at 66.

46. *Id.*

47. *Medical Study Finds Bias On Basis of Weight Recommends Application of the ADA to Obesity*, Daily Lab. Rep. (BNA) No. 189, at D9 (Oct. 1, 1993) (The researchers hypothesized that discrimination against overweight people may account for the results, and they recommended that Congress extend the ADA to cover discrimination against overweight people). *See also Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040 (1987) (which found that the most important factor in determining candidate acceptability for a wide variety of jobs is appearance).

economist Daniel Hammermesh of the University of Texas, found that attractive people earned approximately five percent more than average looking people, and that "ugly" people earned approximately five percent less than average looking people.[48] Further, obese individuals are typically regarded as "lazy individuals who lack the self discipline to lose weight;"[49] and are generally thought to project a bad corporate image.[50]

Obese individuals are discriminated against throughout their lives in a variety of arenas. Because there is no federal legislation that prohibits discrimination on the basis of appearance, obese people often seek protection under the Rehabilitation Act or the ADA. They raise the proposition that they are disabled or, alternatively, that they are perceived by others as being disabled. While the ADA clearly does not provide protection for those who are merely overweight, it is much less clear on the question of when circumstances might warrant coverage of obesity as a disability.[51] Recently, the First Circuit Court of Appeals addressed this particular issue under the Rehabilitation Act in *Cook v. Rhode Island, Department of Mental Health, Rehabilitation, and Hospitals.*[52]

III. THE FIRST CIRCUIT TAKES A STAND

In *Cook*, a federal appeals court ruled for the first time that an employer violated the law when it refused to hire an obese individual. The ruling is also one of the first to deal with whether perceived disabilities that do not actually affect job performance are covered by federal law.[53]

Plaintiff Bonnie Cook had worked for the Defendant, Rhode Island, Department of Mental Health, Retardation, and Hospitals (MHRH) on two separate occasions as an institutional attendant for the mentally retarded. Both times her performance record was excellent. When she sought employment a third time, Cook was 5 feet 2 inches tall and weighed in excess of 320 pounds; MHRH refused to hire her. MHRH claimed that Cook's obesity impaired her ability to evacuate patients in an emergency, and that it increased her risk of developing serious medical problems, which made her more likely

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48. *Appearance Bias in Workplace is Widespread, and Usually Legal*, Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993).

49. James G. Frierson, *Obesity as a Legal Disability under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 LAB. L. J. 286, 293 (1993)

> [O]ur beliefs are firmly ingrained: thin people are beautiful, fat people are slobs; slim and trim individuals are active, go-getters, while fat people sit around and do nothing but complain; fat people could lose the weight, if they really tried; they just need to stop eating all the time; fat people will not have the energy and drive to do a good job.

Id.

50. *Id.* (citing Martin Everett, *Fat Chance*, SALES AND MARKETING MGMT., Mar. 1990, at 66).

51. The regulations that implement the ADA state that "except in rare circumstances, obesity is not considered [a disability]." 29 C.F.R. app. § 1630.2(j) (1995). The EEOC indicated in its interpretive guidance to the ADA that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact" generally would not be considered disabilities. *Id.*

52. 10 F.3d 17 (1st Cir. 1993).

53. *Id.* at 28; *see also Federal Law Bars Employment Bias Against the Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993).

to be absent from work and increased the likelihood of worker's compensation claims.[54] Cook brought a claim against MHRH under the Rehabilitation Act and alleged that MHRH discriminated against her on the basis of actual or perceived disability due to her morbid obesity. MHRH moved for dismissal; it contended that morbid obesity can never constitute a disability within the meaning of the Rehabilitation Act. The trial court denied MHRH's motion to dismiss.[55]

The trial court rejected MHRH's argument that obesity alone, without resulting incapacitating complications, could never be a disability as defined under the Rehabilitation Act. It stated that obesity could be considered an actual disability if the plaintiff could prove it to be a physiological disorder that substantially limited a major life activity.[56] The court specified that it would only consider obesity to be a physiological disorder if it was caused by "systemic or metabolic factors," and only if it constituted an immutable condition.[57] It further noted that, "to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap."[58]

The trial court then observed that if Cook could not establish that her obesity constituted an actual disability, she still might be able to prove she was disabled due to MHRH's perception of her.[59] In discussing the parameters of a disability claim, the court noted first that the Rehabilitation Act does not require employers to hire individuals who are unable to perform a job satisfactorily simply because the inability is due to a disability.[60] The court then held that for a claim based on perceived disability to be successful, the claimant must show that the employer believed that the condition substantially limited the claimant's capacity to do work for which he or she was otherwise qualified.[61] The court found MHRH apparently based its decision not to hire Cook solely on its perception that her obesity constituted a disability that would interfere with her ability to perform her job. The court refused to dismiss the claim and stated that if Cook's obesity was the sole reason for MHRH's decision, Cook would fall within the definition of "individual with a disability" under the Act.[62] The question of whether she was "otherwise qualified" fell to the jury, who found in favor of Cook and awarded her

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54. *Cook*, 10 F.3d at 20-21.

55. *Id.* at 21.

56. Cook v. Rhode Island, Dep't of Mental Health, Rehabilitation and Hosps., 783 F. Supp. 1569, 1573 (D.R.I. 1992). To formulate this rule, the court relied on the regulations of the Department of Health and Human Services, which define a "physical or mental impairment" as "(A) any physiological disorder or condition . . . affecting one or more of the following systems: neurological; muscoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine . . . ." 45 C.F.R. § 84.3 (j)(2)(i) (1989).

57. *Cook*, 783 F. Supp. at 1573.

58. *Id.*

59. *Id.*

60. *Id.* at 1575 (citing 29 U.S.C. § 794(a) (1988 & Supp. V 1993)).

61. *Id.*

62. *Id.* at 1576. The definition of "individual with a disability" is one who is regarded as having a physical or mental impairment which substantially limits one or more of that person's major life activities. 29 U.S.C. 706(8)(B)(iii) (1988 & Supp. V 1993).

$100,000 in compensatory damages. The court entered judgment, and MHRH appealed.[63]

The EEOC, which implements and enforces both the Rehabilitation Act and the ADA, filed an amicus brief with the First Circuit supporting Cook's position. The EEOC opposed both MHRH's assertion that obesity never constitutes a disability and the trial court's view that obesity is covered only where a physiological cause renders it an immutable condition.[64]

The EEOC rejected the assertion, as did the trial court, that obesity can never constitute a disability within the meaning of either the Rehabilitation Act or the ADA. It urged that the question of whether obesity is a disability under the Rehabilitation Act, or under Title I of the ADA, should be decided on a case-by-case basis depending upon the duration and extent of the condition.[65] The EEOC argued that "[t]here is neither a basis for nor a need to craft special rules or an analytical approach specifically for obesity cases. Rather, the standard approach to determining whether a condition is a disability . . . as reflected in case law and administrative guidance, should simply be applied to obesity."[66] It contended that this approach yields the conclusion that "obesity may, in appropriate circumstances, constitute a disability."[67] The appropriate circumstance under which obesity may be a disability under the Rehabilitation Act, and Title I of the ADA, is when it constitutes "an impairment . . . [that] is of such a duration that it substantially limits a major life activity or is regarded as so doing."[68]

Turning to the definition of an "individual with a disability," the EEOC argued that obesity, in particular morbid obesity,[69] may meet the definition of a physical impairment even if it is not a physiological disorder. To make this argument, the EEOC focused on the definition of "impairment" as discussed by the Commission's interpretive guidance on Title I of the ADA.[70] The interpretive guidance states that "physical characteristics such as . . . weight . . . that are within 'normal' range and are not the result of a

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63. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 21 (1st Cir. 1993).

64. Brief of the Equal Employment Opportunity Commission as Amicus Curiae, Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17 (1st Cir. 1993) (No. 93-1093) [hereinafter EEOC brief].

65. *Id.* at 9. *See also EEOC Weighs In: Obesity is Protected Disability Under ADA, Rehabilitation Act,* Daily Lab. Rep. (BNA) No. 150. at D3 (Aug. 6, 1993); *Disabilities Act: ADA Requires Individualized Inquiries on Disability, Direct Threat, Official Says*, Daily Lab. Rep. (BNA) No. 141, at D27 (July 26, 1994) (Speaking at an employment law update sponsored by the American Law Institute and the American Bar Association, Peggy Mastroianni, an EEOC attorney and head of the ADA Policy Division, said that courts faced with the decision of whether an employee or applicant's medical condition is a disability covered by the ADA must pursue an individualized approach. She said that in every case except that of an HIV positive individual, the ADA requires courts to determine whether the claimed disability is an impairment that substantially interferes with one or more of the claimant's major life activities.).

66. EEOC brief, *supra* note 64, at 10-11.

67. *Id.*

68. *Id.* at 11.

69. *See supra* note 38 and accompanying text. The EEOC defines morbid obesity consistent with the definition given in THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16 ed. 1992).

70. EEOC brief, *supra* note 64, at 11.

physiological disorder" are not impairments.[71] The EEOC argued that morbid obesity, a condition partially defined as weight outside one's "normal" weight range, fell outside the limits of this provision and, therefore, individuals who are morbidly obese do not have to suffer from a physiological disorder to qualify as disabled. On these grounds, the EEOC disputed the court's finding that obesity must be a physiological disorder to constitute an actual impairment.[72]

The EEOC next considered whether obesity could "substantially limit" one or more of an individual's "major life activities." It noted that there is no interpretation of the term "substantially limits" in the regulations to the Rehabilitation Act, and turned instead to the interpretive guidance on Title I.[73] The interpretive guidance provides that whether an impairment is substantially limiting is determined by considering: "(1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. . . . The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis."[74] The EEOC took the position that obesity, like all other potential disabilities, should be analyzed in accordance with the above guidelines. It stated that morbid obesity is rare and chronic, and that a jury could find it a disabling impairment where there is evidence that it has a significant impact on a major life activity.[75]

The EEOC also refuted the trial court's finding that a condition must be involuntary or immutable to be covered under the ADA or the Rehabilitation Act. It noted that neither statute contained language requiring consideration of how individuals became impaired or whether they contributed to the impairment.[76] The EEOC compared morbid obesity with alcoholism, diabetes, emphysema, and heart disease, all of which are covered under both the Rehabilitation Act and the ADA even though they "may be caused or exacerbated by voluntary conduct."[77] The EEOC maintained that voluntariness should be relevant in determining whether an impairment is substantially limiting only if individuals could "easily and quickly" change the condition by altering their behavior.[78] Voluntariness is relevant in such a case because a condition that can be altered easily or quickly is transient

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71. 29 C.F.R. app. § 1630.2(h) (1995).

72. EEOC brief, *supra* note 64, at 12, n.6.

73. *Id.* at 12.

74. *Id.*; 29 C.F.R. app. § 1630.2(j) (1995).

75. EEOC brief, *supra* note 64, at 13. This position is consistent with the interpretive guidance to the regulations, which states that obesity may be a disability "in rare circumstances." 29 C.F.R. app. § 1630.2(j) (1995). *See also ADA Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, Supp. at 13 (Aug. 1, 1994); *Disabilities Act: ADA Requires Individualized Inquiries On Disability, Direct Threat, Official Says*, Daily Lab. Rep. (BNA) No. 141, at D27 (July 26, 1994); *EEOC Weighs In: Obesity is Protected Disability Under ADA, Rehabilitation Act*, Daily Lab. Rep. (BNA) No. 150, at D3 (Aug. 6, 1993). These reports reiterate that the EEOC has not taken the position that morbid obesity is always covered by the ADA. Instead, the contention is that an individual who is morbidly obese is a person with an "impairment" under the ADA; such individual still must establish that the impairment substantially limits a major life activity before he or she is considered "disabled."

76. EEOC brief, *supra* note 64, at 16.

77. *Id.*

78. *Id.*

and, therefore, unlikely to significantly limit a major life activity.[79]

The First Circuit Court of Appeals affirmed the lower court's decision and upheld the jury's award.[80] In doing so, the court analyzed the interpretive regulations of the Rehabilitation Act, noting that the definition of "physical or mental impairment" was broad, the regulations themselves were open-ended, and the list of enumerated disorders was not exhaustive.[81]

With the above findings setting the stage for its analysis, the First Circuit rejected the trial court's holding that obesity must necessarily be an involuntary and an immutable physiological disorder to qualify for coverage under the Rehabilitation Act.[82] The court adopted the reasoning urged by the EEOC, and stated:

> [The Rehabilitation Act] contains no language suggesting that its protection is linked to . . . whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like.[83]

It concluded that voluntariness is relevant only in determining whether a condition has a substantially limiting effect.[84]

The court next considered whether Cook's morbid obesity substantially limited one or more of her major life activities. It found that although Cook's obesity may not actually have substantially limited her major life activities,[85] MHRH perceived it as limiting her work, which is a major life activity.[86] The court observed that MHRH failed to hire Cook

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79. In its brief, the EEOC specifically says that non-chronic, mild obesity may be an example of a condition easily or quickly changeable by an alteration in behavior. The logical conclusion, then, is that mild obesity is not likely to be of sufficient duration or impact to substantially limit a major life activity. If the mild obesity has become chronic, it is less feasible to say it is easily or quickly changeable. *Id.* at 17. This view is consistent with the view expressed in the EEOC's interpretive guidance which, though it does not elaborate on factors for determining whether, in general, obesity is a disability, does emphasize the general proposition that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are generally not disabilities" because they are not substantially limiting. 29 C.F.R. app. §1630.2(j) (1995).

80. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 20 (1st Cir. 1993).

81. *Id.* at 22-23. *See also* Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994). This case was decided after *Cook* and followed the *Cook* court's line of reasoning. The *Smaw* court, in deciding whether Smaw had a physical impairment, noted that the definition of "physical impairment" is far-reaching, and that the question of who is disabled is best suited to a case-by-case determination as opposed to simply looking to a list or category of impairments. *Id.* at 1472. The court also cited Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986) in support of this determination.

82. *Cook*, 10 F.3d at 23-24.

83. *Id.* at 24.

84. *Id.*

85. *Id.* at 25 (citing 45 C.F.R § 84.3(j)(2)(ii) (1995) which defines major life activities to include for one's self, walking, breathing, seeing, hearing, speaking, learning, working, and performing other manual tasks).

86. Cook herself told MHRH she was fully able to perform all major life activities; thus in this particular

because its physician believed her obesity interfered with her ability to walk, lift, bend, stoop, and kneel. The court concluded that MHRH did not simply perceive Cook's obesity as rendering her unable to perform the specific job of institutional attendant.[87] Instead, the court believed that MHRH perceived Cook's obesity as limiting her ability to perform a wide range of jobs; therefore, it held that there was ample evidence for the jury to find that MHRH discriminated against Cook because MHRH perceived her as having an impairment that substantially limited her major life activity of working.[88]

Writing for the court, Judge Bruce Selya held that "[i]n 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."[89]

One cannot help but wonder what impact this decision will have for obese individuals who face employment discrimination. Questions remain unanswered, such as whether the decision will apply to claims under the ADA as well as those under the Rehabilitation Act, and whether other circuits will agree with, and follow, Judge Selya's words. A strong argument can be made that this decision, at least among the courts bound by the First Circuit, paves the way for obesity claims under not only the Rehabilitation Act, but also under the ADA. The strongest support is found in the ADA itself.

The ADA specifically provides that the ADA and the Rehabilitation Act are to be considered in tandem. It states that "except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act]."[90] The statute also requires enforcement agencies to promulgate procedures to insure that complaints filed under both the Rehabilitation Act and the ADA are handled in a way that avoids "duplication of effort" and the application of conflicting standards.[91] Arguably, the ADA is meant to be an expansion of the protections afforded under the Rehabilitation Act, and, therefore, the law under the ADA should not diverge from the law developed under the Rehabilitation Act. Based on this view, to the extent the *Cook* case holds that obesity, particularly morbid obesity, may be a disability under the Rehabilitation Act, it also holds that obesity may be a disability under the ADA.

Further, many of the definitions of key terms, significantly the definition of "disability," are the same under both the ADA and the Rehabilitation Act.[92] Even if the

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case, morbid obesity was not an impairment that substantially limited one or more of the individual's major life activities.

87. *Id.* MHRH's physician was of the opinion that obesity affects "'virtually every body system,' including the cardiovascular, immune, muscoloskeletal, and sensory systems." *Id.* at 23 n.6.

88. *Id.* at 28.

89. *Id.*

90. 42 U.S.C. § 12201 (Supp. V 1993); 29 C.F.R. §1630.1(c)(1)-(2) (1995); *see also* 29 C.F.R. §1630.1(b) and (c) (1995) (which also states that the ADA does not preempt any state law granting individuals with disabilities protection greater than or equivalent to protection provided by the ADA); OGLETREE, *supra* note 11, at § 201[4].

91. 42 U.S.C. § 12117(b) (Supp. V 1993). *See also ADA, Joint Explanatory Statement of the Committee of Conference,* H.R. REP. No. 596, 101st Cong., 2d Sess. 66, *reprinted in* 136 CONG. REC. 4597 (1990); HOUSE LABOR REPORT, *supra* note 23, at 83; HOUSE JUDICIARY REPORT, *supra* note 23, at 83.

92. The EEOC's interpretive guidance says that in adopting the same definition of "disability" as the

ADA did not specify that the ADA and the Rehabilitation Act are to be considered together, the identical definitions lend force to the argument that, absent precedent under the ADA, decisions under the Rehabilitation Act are persuasive, perhaps even mandatory precedent.[93]

As the court in *Smaw v. Virginia Department of State Police*[94] denoted, the standards of the ADA mirror those of the Rehabilitation Act; therefore, it is logical to assume that cases under the ADA that are similar to those under the Rehabilitation Act will follow the trends established by the Rehabilitation Act.[95] The court in *Smaw* felt that the ADA would not create "a new avenue for claims in the area of disability discrimination; rather, the ADA incorporates the existing language and standards of the Rehabilitation Act in this area."[96]

IV. CONCERNS

A. Increased Perceived Disability Claims

Cook affirmed a finding of employment discrimination based upon perceived disability.[97] As the *Cook* court pointed out, such claims have, in the past, been rare. [98] However, it seems a legitimate concern that, in the wake of *Cook,* such claims will become more prevalent. *Cook* offers some reassurance, however, by indicating that a perceived disability claim, at least insofar as obesity is concerned, is relatively narrow. The court emphasized that MHRH's physician believed that Cook's obesity precluded employment in the healthcare industry in general, rather than merely perceiving her as limited in the ability to perform the single, specific job of institutional attendant.[99] Had MHRH viewed Cook as unable to perform the specific job in question, assuming that the job required unique physical skills, as opposed to unable to perform a wide spectrum of jobs that required no unique physical skills, it is unlikely that Cook would have prevailed under the perceived disability theory.[100]

Rehabilitation Act, "Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." 29 C.F.R. app. § 1630.2(g) (1995) (citing SENATE REPORT, *supra* note 23, at 21; HOUSE LABOR REPORT, *supra* note 23, at 50; HOUSE JUDICIARY REPORT, *supra* note 23, at 27.)

93. *See Federal Law Bars Employment Bias Against the Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993) (reporting that Cook's attorney believes that the First Circuit's ruling is applicable to claims brought under the ADA because of the similarity of the language in the two Acts, and because both have the same definition of disability. The EEOC agreed.).

94. 862 F. Supp. 1469 (E.D. Va. 1994).

95. *Id.* at 1474.

96. *Id.*

97. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 20 (1st Cir. 1993).

98. *Id.* at 22. "Up to this point in time . . . few 'perceived disability' cases have been litigated and, consequently, decisional law involving the interplay of perceived disabilities and Section 504 is hens teeth rare. Thus, this case calls upon us to explore new frontiers." *Id.*

99. *Id.* at 25.

100. *Id.* at 25-26. The court stated that perceiving an individual as unable to perform a job that

Recently, the Eastern District of Virginia reiterated the limitations set forth in *Cook*, and delineated the necessary elements of a successful perceived disability claim.[101] In *Smaw*, a former Virginia state trooper brought suit against the Virginia State Police (VSP) under both the Rehabilitation Act and the ADA. She alleged that the VSP discriminated against her on the basis of actual and perceived disability. Smaw had been employed as a state trooper from 1982 until 1991. Although Smaw weighed 219 pounds at the time she was hired, which meant she exceeded the maximum weight for her job, the VSP hired Smaw with the understanding that she would lose enough weight to comply with departmental weight guidelines. Over the years, Smaw received numerous written warnings concerning her weight. In 1988, a VSP doctor worked with her to establish a weight loss goal of three pounds per month; Smaw consistently failed to meet this goal. As a consequence, the VSP released her from her job as a trooper and reemployed her as a dispatcher.[102]

In addressing Smaw's claims, the court recognized work as a major life activity.[103] However, the court noted that this does not necessarily mean working at the job of one's choice.[104] In support of its position, the court turned to the regulations implementing the ADA, which include the statement that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[105] The court also looked to prior case law for guidance, and noted that "courts have differentiated between an employer's rejection of an employee . . . due to a perception that the individual is unable to perform the duties of that job, and denial because the employer believes the individual is inherently incapable of working at any of a number of jobs."[106] The former does not violate either the Rehabilitation Act or the ADA; the latter violates both. Though it supported its position with other cases, the court relied most heavily on *Cook*. It noted that *Cook* makes it clear that an employer must regard an individual's impairment as "the type that would defeat many or all kinds of employment."[107] As the

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necessitated unique physical skills would not equal perceiving the individual as substantially limited in the major life activity of working. *Id.*

101. Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1472 (E.D. Va. 1994).

102. *Id.* at 1469, 1471-72.

103. *See* 29 C.F.R. § 1613.702(c) (1995) (listing activities that qualify as major life activities).

104. *Smaw*, 862 F. Supp. at 1473.

105. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1995)).

106. *Id.* at 1474. The court cited case law supporting the general principle that an employer has not violated either the Rehabilitation Act or the ADA because of the perception that an employee cannot do a specific job. For example, it referred to the statement by the Sixth Circuit that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the [Rehabilitation Act]." *Id.* (citing Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985) (also quoted in *Cook)). See also* Daley v. Koch, 892 F.2d 212, 214-16 (2d Cir. 1989) (sustaining rejection as a police officer because of personality traits of poor judgment and responsibility); Welsh v. Tulsa, 977 F.2d 1415, 1417-18 (10th Cir. 1992) (upholding termination of a firefighter due to minor sensory loss in one hand); Tudyman v. United Airlines, 608 F. Supp 739, 746 (C.D. Cal. 1984) (sustaining termination of airline steward due to bodybuilders bulk).

107. *Smaw*, 862 F. Supp. at 1473 (quoting Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 25 (1st Cir. 1993)). The language used in *Cook* reads as follows: "[d]enying an applicant

Smaw court states, this is a narrow view of how an employer must act in order to violate the Rehabilitation Act or the ADA on the basis of perceived disability.[108] Basically, it means that an employer must view the individual as unqualified for more than just a specific job or a narrow range of jobs. Instead, the employer must be shown to have viewed the individual as unqualified for a broad range of occupations. As the First Circuit Court of Appeals noted in *Cook,* there is a "significant legal distinction between rejection based on a job specific perception that the applicant is unable to excel at a narrow trade and a rejection based on a more generalized perception that the applicant is impaired in such a way as would bar him from a large class of jobs." [109]

On this basis, the court distinguished Smaw's claim from Cook's.[110] The court pointed out that, unlike the VSP, Cook's employer regarded Cook's obesity as a disability that would prevent many or all kinds of employment, as opposed to merely the particular position of institutional attendant.[111] In granting summary judgment for the VSP, the court found that the VSP's reasons for its decision to reclassify Smaw were job specific concerns rationally related to her ability to perform her duties.[112] Further, the VSP reemployed her as a dispatcher, a job still within her chosen field of law enforcement.[113] As a result, Smaw could not establish that the VSP regarded her obesity as a disability that foreclosed a broad range of employment opportunities.[114] The significance of this is that while there is an avenue open for a perceived disability claim under either the Rehabilitation Act or the ADA, that avenue is relatively narrow. Simply because employers perceive an employee or applicant as unable to perform a specific job due to a disability does not mean a court will determine that they have violated the Rehabilitation

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. . . a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying from a *broad spectrum of jobs*, can constitute treating an applicant as if her condition substantially limited a major life activity." *Cook,* 10 F.3d at 25 (emphasis added).

108. *Smaw*, 862 F. Supp. at 1473.

109. *Cook*, 10 F.3d at 26. Based on the brief it submitted in *Cook*, the EEOC seems to concur with this holding. The EEOC conceded that inability to perform a particular job, or a limited class of jobs, was insufficient in and of itself to establish a substantial limitation of a major life activity. Therefore, an employer's "perception that a physical or mental impairment prevented an individual from performing a particular job would not suffice by itself to show that the individual was perceived to be substantially limited in a major life activity." EEOC brief, *supra* note 64, at 18-19. The EEOC also cited cases supporting this position. For example, in Horton v. Delta Airlines, 1993 W.L. 356894 (N.D. Cal.), the court followed prior interpretations of the Rehabilitation Act in a case involving an overweight flight attendant. It granted summary judgment for Delta on a perceived disability claim, holding that working as a flight attendant was just one particular job with the airline and did not qualify as a substantial limitation of a major life activity under the ADA. This was especially true because the plaintiff failed to pursue opportunities for ground positions offered by the defendant. *See* EEOC interpretive guidance, 29 C.F.R. app. § 1630.2(j) (1995).

110. *Smaw*, 862 F. Supp. at 1475.

111. *Id.*

112. *Id.* The VSP's reasons included the fact that being a trooper requires that an individual "[be] able to protect oneself from assault, and to pursue, confront, and capture offenders." *Id.* Because these were job specific concerns, the VSP did not violate the Rehabilitation Act or the ADA. *Id.*

113. *Id.*

114. *Id.*

Act or the ADA. While this may seem weak reassurance to employers leery of perceived disability claims relating to obesity, it is, nonetheless, reassurance. Furthermore, such a concern is not of sufficient magnitude to prohibit perceived disability claims based on obesity.

Title I of the ADA seeks to eliminate employment discrimination based upon an individual's disability. As noted earlier, Congress had specific reasons for including perceived disabilities within the definition of "disability."[115] Being perceived as having a substantially limiting impairment may, in fact, prove to be as disabling as actually having such an impairment. Given this fact, it is certainly within the spirit of the Act to include those who are only perceived as unable to perform a wide range of occupations. For these reasons, notwithstanding the possibility of increased perceived disability claims based on an employer's perceptions of an obese worker, obesity should, in appropriate circumstances, be covered as a disability under the ADA.

Claims based on obesity as an actual disability are similarly limited. While *Cook* and *Smaw* recognize that obesity may constitute an actual disability in certain circumstances, the qualifying circumstances are narrow. This should ease the minds of employers who fear a proliferation of "obesity lawsuits." At first glance, the position taken by the EEOC, that obesity does not have to be a physiological disorder to constitute an impairment because obesity by definition falls outside one's "normal" range,[116] seems to lend force to the argument that all levels of obesity should be covered under the ADA. However, the EEOC's position only establishes that obesity can constitute an "impairment." As the court in *Smaw* stated, even if individuals can establish that their obesity qualifies as an impairment, they still must show that the impairment substantially limits their ability to perform a major life activity, such as working.[117] Thus, within the definition of "disability" there is a limitation that serves to topple the argument that obesity in all forms will be protected under the ADA. Protection is likely to be limited to those extreme cases involving an individual who is morbidly obese, because such an individual can more easily establish that the obesity interferes substantially with a major life activity. Because morbid obesity affects only approximately 0.5% of all obese people, which translates to less than 0.1% of the entire population,[118] it is unlikely that there will be many successful obesity claims under the ADA.

B. Disability Discrimination v. Appearance Discrimination—A Cautionary Note

Cook's attorney felt that their victory was the first "unqualified success" for severely overweight people, because the court interpreted a generally applicable federal law in their favor.[119] However, one must take care not to read too much into *Cook*. As discussed in the preceding section, *Cook*, and subsequently *Smaw*, are relatively narrow decisions. Moreover, the cases point to a fact that is important to remember. The ADA and the

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115. *See supra* note 28.

116. EEOC brief, *supra* note 64, at 12 n.6. *See also* 29 C.F.R. app. § 1630.2(h) (1995).

117. *Smaw*, 862 F. Supp. at 1474.

118. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 984 (16th ed. 1992).

119. *Federal Law Bars Employment Bias Against Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993).

Rehabilitation Act are statutes prohibiting discrimination against individuals who are disabled, whether they are actually disabled or perceived by potential or actual employers as disabled. They do not prohibit discrimination solely on the basis of a person's appearance. As of yet, federal law does not prohibit appearance discrimination; neither *Cook* nor *Smaw* changes that.

The decision in *Cook*, that obesity may be a disability in certain situations, does help those individuals who are morbidly obese; but it does not necessarily offer hope for the mildly or moderately obese person, or the person who is simply overweight and regarded by society as unattractive.[120] As Miriam Berg, President of the Council on Size and Weight Discrimination in New York, points out, "a lot of the discussion of disability is really a smokescreen." In reality, the issue obese individuals fight regularly is discrimination based on appearance.[121]

It is not the purpose of either the ADA or the Rehabilitation Act to protect those who suffer from appearance discrimination; for this reason, appearance discrimination should not be covered under the perceived disability provisions of either Act. Nevertheless, discrimination based on some aspect of an individual's appearance, such as obesity, is an important issue that must be remedied. One solution is to enact legislation that designates weight as a protected classification. As noted earlier, a substantial portion of the United States' population falls within one of the classifications used in the medical definition of obesity,[122] and that number is increasing.[123] Because obese individuals comprise a relatively large percentage of the population, protection from discrimination is warranted. This position is strengthened by the fact that a significant factor in the enactment of the Civil Rights Act of 1964,[124] the Age Discrimination in Employment Act of 1967,[125] the

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120. *See Appearance Bias in Workplace is Widespread, and Usually Legal,* Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993) (citing Sally Smith, executive director of NAAFA, as pointing to the fact that the *Cook* decision protects the morbidly obese, not the just generally overweight). *See also Smaw*, 862 F. Supp. at 1474-75 (The court cites 29 C.F.R. § 1630 (1995) and notes that "case law and the regulations both point unrelentingly to the conclusion that a claim based on obesity is not likely to succeed under the ADA.").

121. *See Appearance Bias in Workplace Is Widespread, and Usually Legal*, Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993). This article touches on whether appearance can be a perceived disability under the ADA, and seems to answer in the negative. The article states that being considered by employers as unattractive, for example due to obesity, is not likely to create a viable claim of discrimination based upon perceived disability because being considered unattractive is not the same as being perceived as having "a substantially limiting impairment." One example given is the misconception that all blondes are stupid. This misconception may result in discrimination; but, because having blonde hair is not perceived as having a substantially limiting impairment, it will not be covered under the ADA or the Rehabilitation Act. To couch this in the language of the interpretive guidance, blonde hair is a physical characteristic that is "normal" and is not the result of a physiological disorder; therefore, it is not an impairment. 29 C.F.R. app. § 1630.2(h) (1995).

122. *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992) ("The prevalence of obesity in the USA is 24% of men and 27% of women.").

123. Karol V. Mason, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REF. 337 (1982).

124. 42 U.S.C. § 2000e(b) (1988).

125. *See* 29 U.S.C. § 621(a)(1)-(4) (1988 & Supp. V 1993).

Rehabilitation Act,[126] and the ADA,[127] was the large number of people affected by discrimination on the basis of race, age, and disability, respectively.[128] Therefore, because the prevention of employment discrimination against obese individuals is a desirable goal, it seems only logical to pass legislation to prohibit discrimination against obese individuals.[129]

C. Wellness Programs—Another Cautionary Note

More employers are promoting healthy lifestyles for employees.[130] Generally, this is accomplished through a wellness program, which is a combination of activities designed to promote good health and prevent disease. The primary goal of wellness programs is to educate employees on how to modify unhealthy behavior such as smoking or poor eating habits. Typical programs include such services as the taking of a medical history, blood pressure testing, weight control counseling, and cholesterol screening. Increasingly, employers are becoming more pro-active in promoting good health. For example, many employers either provide on-site exercise facilities or subsidize health club memberships. These efforts seem to be paying off. Studies indicate that businesses with wellness programs have shown substantial health-related cost savings, such as decreases in employee absences and turnover, and reduced insurance premiums.[131] In a world recognizing obesity as a potential disability, a viable concern employers may have is whether employee wellness programs are, in and of themselves, discriminatory. The answer seems to be maybe, though not necessarily.

The ADA exempts wellness programs from the Act's strictures so long as they are voluntary and the medical information generated is used in a manner consistent with the ADA's requirements.[132] Programs are considered voluntary so long as an employee is not

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126. *Id.* § 701(a)(1)-(6).

127. *See* 42 U.S.C. § 12101(a)(1)-(9) (Supp. V 1993) (findings and purposes in enacting the ADA).

128. *See supra* notes 128-130 and accompanying text.

129. To date Michigan is the only state to have codified a prohibition against discrimination on the basis of weight. This is the Elliot-Larsen Civil Rights Act, codified at MICH. COMP. LAWS §§ 37.2101-37.2803 (1985) ("The opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, age, sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right." MICH. COMP. LAWS § 37.2102 (1985)). The District of Columbia has a statute that does not address weight specifically, but does prohibit discrimination based on personal appearance. D.C. ANN. CODE § 1-2501 (1992).

130. *See Health Promotion: Keeping Employees Physically Fit*, J. ACCT., Sept. 1992, at 21 (among 618 surveyed employers, 76% are making efforts to manage employees' health).

131. *See, e.g.*, George R. Violette, *The Benefits of a Wellness Program*, J. ACCT., June 1991, at 126, 126.

132. 42 U.S.C. § 12112(C)(4)(B) (Supp. V 1993). The EEOC sets out certain requirements concerning the medical records generated from a wellness program: The records must be maintained in a confidential manner, in files separate from the employee's personnel file; they cannot be used to limit health insurance coverage eligibility; and they cannot be used to take adverse employment action or deny promotional opportunities. 29 C.F.R. app. § 1630.14(d) (1995). *See also* HOUSE LABOR REPORT, *supra* note 23, at 75; HOUSE JUDICIARY REPORT, *supra* note 23, at 43-44.

required to participate as a condition of employment.[133]

Considering the language of the ADA, the fact that obesity may be recognized as a disability does not mean wellness programs are per se problematic. An employer simply needs to make sure that the focus of the program is on health, not weight loss. An ideal wellness program emphasizes education, and aims to help individuals lower fat intake and reduce cholesterol levels. Because insufficient exercise is the leading preventable cause of heart disease, an ideal wellness program should also encourage regular, moderate exercise to improve cardiovascular fitness. A program following these guidelines will be well rounded both physically and mentally. It will not promote counterproductive feelings of low self esteem in those who have trouble controlling their weight, and should achieve its goal of lowering an employee's risk level for disease. [134] This, after all, is really what a "wellness" program is all about; promoting health and decreasing the likelihood of future health care costs, rather than encouraging all people to reach a certain, predetermined "ideal" weight.

D. Voluntary Claims

It has been suggested that one concern about recognizing obesity as a disability is the potential flood of "voluntary" condition discrimination claims.[135] An argument to rebut this concern is much the same as the one addressing the possibility of increased perceived disability claims; protecting obesity in certain circumstances, much like protecting alcoholism and drug addiction, falls within the purpose and plan of the ADA. To exclude an obese person who is disabled, or perceived as so, merely because the number of claims may possibly increase due to so called "voluntary" conditions is counter to the intent of

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133. In determining the meaning of "voluntary," it may be helpful to note that under the Age Discrimination in Employment Act, financial incentives to encourage employees to accept early retirement are considered voluntary so long as the employee has the choice to keep working. 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993). Such incentives are voluntary even if the offer is viewed as too good to refuse or the choice is a difficult one. *See* Henn v. National Geographic Soc'y, 819 F.2d 824, 828-30 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987).

134. Bloch, *supra* note 39, at 70 (quoting Adam Drewnowski, Ph.D., Director of the Human Nutrition Program, School of Public Health, University of Michigan).

135. Dunworth, *supra* note 44, at 545. The ADA specifically protects certain "voluntary" conditions such as alcoholism and drug addiction, to the extent that such individuals are not actively using. The Act specifically states that "individual with a disability" does not include an individual who is "currently engaging in the illegal use of drugs when the [employer] acts on the basis of such use." 42 U.S.C. § 12114(a) (Supp. V 1993). While alcoholism is specified by the Act as a disability, the ADA allows employers to hold alcoholics and rehabilitated drug users to the same qualifications or job performance standards as other employees. *Id.* § 12114(c)(4). As a result, discrimination against an individual because of alcoholism or previous drug use is prohibited, but an employer can take action against an employee whose job performance is impaired by active use. *See also* 29 C.F.R. § 1630.3(b)(1)-(3) (1995). Both alcoholism and previous drug use are also protected under the Rehabilitation Act. *See* 45 C.F.R. app. § 84 (1995). The ADA specifically excludes other "voluntary" conditions, such as compulsive gambling, exhibitionism, and transvestitism. 28 C.F.R. § 35.104 (5)(i)-(iii) (1994). Further, diseases such as emphysema and heart disease, which may have been caused or exacerbated by voluntary behavior, have been found to be disabilities under federal law. *See* EEOC brief, *supra* note 64, at 16.

Congress in enacting the ADA. Further, to deny such individuals recourse under the ADA implies a judgment that such individuals are less seriously impaired, or less deserving of legal protection than others who suffer from conditions similarly caused or exacerbated by voluntary conduct, such as alcoholics or rehabilitated drug users.

Admittedly, the same judgment is implied by not allowing claims the ADA specifically excludes; however, the language of the ADA concerning those "abnormalities" is unambiguous and specifically excludes them from consideration as potential disabilities. The language relating to obesity is not nearly as clear. The regulations that implement the ADA specifically provide that there may be times, albeit rare, when obesity may qualify as a disability.[136] Thus, rather than prohibiting claims based on obesity, the regulations concede that such claims may be valid and, instead, limit the claims to rare circumstances. Concern over an increased number of voluntary claims should not override the language of the ADA and implement a bar to obesity claims.

Additionally, concern over increased "voluntary condition" claims is arguably irrelevant here because medical evidence shows that obesity, particularly morbid obesity, is not always a voluntary condition. As noted earlier, while it is not clear exactly how obesity is caused, many factors, including genetic, social, endocrine and metabolic, psychological, and developmental factors, contribute to an individual's obesity.[137] Furthermore, the prognosis for obesity is poor; often, if untreated, it continues to progress.[138] As the *Cook* court indicated, "it is plausible to come to the conclusion that obesity is not a voluntary condition."[139] This renders an argument based on increased voluntary condition claims moot.

E. A Significant Increase in Claims Generally?

It is likely that as more conditions become recognized as possible disabilities, employers will worry that the number of claims filed against them under the ADA will skyrocket, and that the cost of accommodating disabled employees will rise. There is merit to this concern. Each year since the enactment of the ADA, the number of claims brought under it has increased.[140] However, as of November 1993, "failure to hire"

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136. 29 C.F.R. § 1630.2(j) (1995).

137. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 982 (16th ed. 1992).

138. *Id.*

139. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 23 (1st Cir. 1993). The court makes this observation because Cook had presented expert testimony to the effect that morbid obesity is a "physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse affects within the muscoskeletal, respiratory, and cardiovascular systems." *Id.*

140. *See* Gary Phelan, *Making the ADA a Reality in the Workplace*, TEX. LAW., March 7, 1994, at 22. For example, in August 1992, 384 charges were filed; in August 1993, 1,400 charges were filed. During the first year that Title I was in effect, 12,670 charges were filed with the EEOC alleging discrimination based on disability; and every month since the ADA went into effect, the number of charges filed has increased substantially. *See also Latest EEOC Data Show Record Charges, Sharp Increases In Inventory of Pending Cases*, Daily Lab. Rep. (BNA) No. 152, at D5 (Aug. 10, 1993). From October 1, 1992 to June 30, 1993, 10,737 charges were filed under Title I of the ADA. The ADA now accounts for 16.5% of charges brought to the EEOC.

complaints comprised only 13% of all ADA claims. Nearly one-half of the employment discrimination claims are brought because individuals believed they were discharged due to an actual or perceived disability; "failure to reasonably accommodate a disabled individual" comprises the second largest category of claims.[141] These claims can easily be avoided. Often an employer merely needs to ask employees what they need in order to do the job. Further, according to the EEOC, the good news is that approximately 60% of disabled individuals need no accommodations whatsoever, and about 70% of the necessary accommodations cost employers less than $100.[142] In the case of an obese individual, the necessary accommodations, if any, would be minimal. Generally, an employer needs only to be conscious of the furniture purchased for the business.

Employers also worry about escalating health care costs. It is certainly true that health care costs can be devastating to employers who provide health care to their employees, especially smaller employers.[143] However, considering the statute in question, this is a weak argument. Concern over high absenteeism and increased worker's compensation is a prohibited basis for denying employment;[144] in fact, such reasons contributed to the enactment of the ADA. As the court in *Cook* pointed out, unless absenteeism rises to such a level that the person is no longer qualified, the Rehabilitation Act, and by analogy the ADA, requires employers to "bear absenteeism and other miscellaneous burdens involved in making reasonable accommodations in order to permit the employment of disabled persons."[145]

CONCLUSION

In certain circumstances, obesity should be protected under the ADA. The arguments against this position, and the potential concerns regarding effects of such recognition, pale beside the strong argument made by the EEOC and the rationale in the *Cook* case. This Note in no way advocates recognizing all forms of obesity as a disability. Discrimination against mildly and moderately obese individuals would be best resolved through some form of appearance discrimination legislation. The key phrase for obesity cases under the ADA is "certain circumstances." As the EEOC has recommended, the court should consider whether obesity is an impairment that substantially limits one or more of a person's major life activities on a case-by-case basis, and not subscribe to an all-or-nothing view of the problem.

Employers need to be as sensitive to obese individuals as they are to other individuals who may be considered disabled. They need to examine hiring practices and ensure that their businesses do not perpetuate stereotypes of obese individuals. Employers need to be careful of the wellness program they implement. Although it is understandable that

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141. *See* William Flannery, *Rights Act Generates Few Suits*, ST. LOUIS POST DISPATCH, April 6, 1994, at 8.

142. *See Employment Discrimination: Avoiding Charges of Discrimination Against the Handicapped*, 19 ABA L. PRAC. MGMT. 35 (1993).

143. *See* Jay W. Waks, *Disabilities Act May Affect Medical Costs*, NAT'L L. J., June 15, 1992, at 18.

144. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 27-28 (1st Cir. 1993).

145. *Id.*

employers want to minimize health care costs, they must be careful not to penalize overweight workers or coerce participation. Even without a federal law prohibiting appearance discrimination, employers should employ a person based on that person's qualifications, and not on his or her physical appearance.