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### Washington Supreme Court Holds That Obesity Is Protected Against Discrimination

The Washington State Supreme Court recently held obesity qualifies as an impairment under the Washington Law Against Discrimination (WLAD). The decision runs counter to other court decisions across the country finding obesity alone does not qualify as an impairment under the Americans with Disabilities Act (ADA).

#### **Applicant Alleges Obesity Discrimination**

In 2007, Casey Taylor received a conditional offer of employment from BNSF Railway Company (BNSF). The offer was contingent upon successful completion of a physical exam and medical history questionnaire. Taylor met the minimum physical requirements to perform the job's essential functions, but his medical exam revealed Taylor's body mass index (BMI) to be 41.3. People with BMIs above 40 are considered extremely obese.

Because of Taylor's obesity, BNSF's chief medical officer was unable to determine whether Taylor was medically qualified for the job. The company withdrew its employment offer. BNSF told Taylor it would reconsider if he paid for an array of medical tests or, alternatively, lost 10% of his body weight and kept it off for six months. Because Taylor was unemployed and uninsured at the time, he was unable to afford the extensive medical testing BNSF required to retain his offer.

Taylor sued BNSF, alleging the company violated the WLAD when it refused to hire him because of his obesity. The Washington State Supreme Court was asked to decide whether obesity qualifies as an impairment under the law.

#### **Court Determines Obesity Qualifies as Impairment**

The Washington Supreme Court, the state's highest court, held obesity always qualifies as an impairment under the WLAD because it is a physiological disorder that affects the normal functions of multiple bodily systems. To reach its conclusion, the court focused on the plain meaning of the statutory language of the WLAD.

The WLAD makes it unlawful to deny a person employment because of a disability unless the refusal to hire is based on a bona fide occupational qualification. The law defines "disability" as a physical impairment that: (1) is medically cognizable or diagnosable, (2) exists as a record or history, or (3) is perceived to exist whether or not it, in fact, does. The law further defines "impairment" to mean any physiological disorder or condition that affects one or more of a number of different bodily systems listed in the statute.

The bulk of the court's opinion deals with whether obesity qualifies as a "physiological disorder" or a "condition." Ultimately, the court determined it qualified as both.

The court found obesity qualifies as a physiological disorder in part because the medical community recognizes obesity itself—regardless of its cause—as a disease. While obesity is sometimes the result of an underlying physiological disorder, it is not always. The court explained, "Although it can be caused by life choices, [obesity] is still a disease, just as lung cancer is still a disease even though it can be caused by the choice to smoke cigarettes."

In addition to qualifying as a physiological disorder, the court found obesity is also a condition under the WLAD. The Washington Human Rights Commission (HRC), which is charged with creating policies and

adopting rules to effectuate the WLAD, defines a "condition" as an abnormality that underlies a person's failure to get or keep a job. A person is considered disabled by their condition if they are discriminated against because of the condition and the condition is "abnormal." The court "gave great weight" to the HRC's definition and noted the Washington Court of Appeals has already embraced a similarly broad understanding of "condition" in the employment discrimination context. *See Clipse v. Commercial Driver Servs.*, 189 Wn. App. 776 (2015). Taken together, these policies and decisions led the court to find obesity is a condition under the WLAD.

BNSF argued Taylor could not have been discriminated against on the basis of his weight because weight is not "abnormal." The court rejected this argument, explaining, "[t]he question before us is not whether *weight* is a condition under the WLAD, but whether *obesity* is." While all humans weigh something, not everyone is obese. Even though a large percentage of people are obese, the WLAD says a disability may be "common or uncommon," so the statute's use of "abnormal" cannot refer to the statistical frequency of a given condition. The court also pointed out that medical evidence demonstrates being obese is an abnormal condition. As such, the court held that obesity qualifies as a condition under the WLAD.

After establishing obesity qualifies as both a physiological disorder and a condition, the court relied on various medical studies to show obesity affects several of the bodily systems listed in the WLAD's definition of "impairment." Affected systems include the cardiovascular, musculoskeletal, lymphatic and endocrine systems.

Taken together, the determinations that obesity both (1) qualifies as a disorder and a condition and (2) affects various bodily systems led the court to conclude obesity is always an impairment under the WLAD. The ruling represents a break from at least three federal court decisions in other parts of the country, which found obesity did not qualify as an impairment under the ADA unless it was caused by an underlying physiological disorder. Washingtonians now enjoy a greater degree of protection under state law than under the ADA. *Taylor v. Burlington N. R.R. Holdings, Inc.*, No. 96335-5, 2019 WL 3023161 (Wash. July 11, 2019).

## **Takeaways for Employers**

Employers who use physical exams or medical history questionnaires as part of their hiring process should revisit their policies and procedures to determine if and how weight is assessed under such programs.

Employers should update any relevant training materials and notify hiring managers, supervisors and other personnel that obesity may not serve as the basis for an employment decision if an applicant is otherwise able to perform the job.

Finally, employers should be prepared to adjust their reasonable accommodation practices. Because obesity now always qualifies as an impairment under the WLAD, obese employees requiring accommodation should be handled in the same manner as employees requiring accommodation for any other disability.

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