

## Legal Trends

### OBESITY AND THE AMERICANS WITH DISABILITIES ACT

You are the Vice President of Sales at a large software company. One of your newest team members is obese and works remotely from his home two states away. Upon being invited to the annual sales conference, the team member asks if, as an accommodation to his size, you would pay for one first class airline ticket or for two coach seats. You refuse, telling the team member that you do not “have budget” for this and that it will “create morale issues” with other employees. You hang up, only to get a call a short time later from your Legal Department indicating that both you and the Company are being sued for disability discrimination. What just happened?

Although the Americans with Disabilities Act (ADA) was enacted almost 30 years ago, the question of whether obesity qualifies as a disability under the ADA continues to plague the Courts. The issue appears to be reaching a “perfect storm” as the rates of both business travel and obesity continue to increase. U.S. employers spent over \$5 billion dollars on travel in 2014 alone, a number that continues to increase with the health of the economy. Likewise, the National Institutes of Health report that the rate of “severe obesity” -- defined as having a body mass index (BMI) of greater than 40 -- increased 120% between 2000 and 2010 and now afflicts almost 6% of Americans. An additional 40% of Americans are “obese,” meaning they have a BMI of 30-40.

The Courts have traditionally taken the view that obesity is a disability for purposes of the ADA only if there is an underlying physiological condition causing the obesity. In 2016 the Eighth Circuit Court of Appeals (which covers North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas) did just that, ruling against a prediabetic man with a BMI of 40 whose employment offer was rescinded after a medical review. The Supreme Court declined to review the case. On the other end of the spectrum, the Equal Employment Opportunity Commission (EEOC) posits that obesity alone is a protectable physical impairment.

In the Eighth Circuit, the team member’s lawsuit likely would be thrown out. Under the EEOC’s position, however, the team member could be awarded damages for your “failure to accommodate” his disability by refusing to consider alternative travel arrangements. This issue is currently teed up for the influential Seventh Circuit Court of Appeals (which covers Wisconsin, Illinois and Indiana). In that case, the Court is considering whether the firing of a bus driver for the Chicago Transit Authority with a BMI of 80 was legal, even though he does not have an underlying medical condition. If the 7<sup>th</sup> Circuit disagrees with the 8<sup>th</sup> Circuit, then the issue might be taken up and resolved once and for all by the Supreme Court.

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