Weighing In: Why Obesity Should Be Considered a Qualifying Disability Under the Americans with Disabilities Act

Anne Marie Hawley†

Anti-fat bias has been described as the last socially acceptable form of prejudice. Weight discrimination persists even though obesity affects over 100 million adults in the United States and obesity rates have continued climbing over the past few decades. Despite the discrimination that fat people face, there is no federal protection against weight discrimination. One potential solution to the lack of existing legal protections is the Americans with Disabilities Act (ADA).

Claimants challenging weight discrimination under the ADA argue that weight discrimination is a form of disability discrimination—namely, discrimination based on the medical condition of obesity. Although the medical community increasingly considers obesity to be a complex disease and not a simple consequence of lack of willpower, courts have resisted granting the ADA's protections to obese plaintiffs.

This Comment argues that courts should recognize obesity as an ADA-protected disability and provide relief to workers who have been discriminated against on the basis of their obesity. To support this thesis, I draw parallels between obesity and gender dysphoria—two highly stigmatized clinical conditions—to highlight how the movement to recognize gender dysphoria as an ADA-protected disability in some courts reveals promising new avenues for recognizing obesity as a disability under the ADA. I then turn to medical research to demonstrate that developing obesity, like developing gender dysphoria, is significantly influenced by genes and hormones. Therefore, obesity should qualify as an ADA-protected disability, even in circuits that have restricted obesity-as-a-disability ADA claims to cases where a plaintiff can show that their obesity is related to a physiological disorder.

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† B.A. 2019, Georgetown University; J.D. Candidate 2025, The University of Chicago Law School. I would like to thank Professor Sarah Konsky, Professor Katie Eyer, and the editors of the *University of Chicago Law Review* for their guidance and helpful feedback. Special thanks are also due to activist Aubrey Gordon and journalist Michael Hobbes, whose tireless advocacy inspired my research topic.

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INTRODUCTION

Anti-fat bias has been described as the last socially acceptable form of prejudice.[1] When analyzing data from Harvard's Implicit Association Test, researchers found that while negative attitudes towards LGBTQ people and people of color decreased between 2007 and 2016, anti-fat weight bias increased in the same period by 40%.[2] In employment settings, fat employees are less likely to get hired and promoted than their slim peers.[3] Heavier women in particular tend to face a wage penalty: every 10% increase in a woman's body mass is associated with a 6% decrease in income.[4] Additional studies show that fat people are more likely to be bullied in school, stereotyped by doctors, and convicted by juries.[5]

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1 Jane E. Brody, *Fat Bias Starts Early and Takes a Serious Toll*, N.Y. TIMES (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/well/live/fat-bias-starts-early-and-takes-a-serious-toll.html; Iyiola Solanke, *The Anti-Stigma Principle and Legal Protection from Fattism*, 10 FAT STUDS. 125, 135 (2021).

2 Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Research: How Americans' Biases Are Changing (or Not) Over Time*, HARV. BUS. REV. (Aug. 2, 2019), https://hbr.org/2019/08/research-on-many-issues-americans-biases-are-decreasing.

3 Josh Eidelson, *Yes, You Can Still Be Fired for Being Fat*, BLOOMBERG BUSINESSWEEK (Mar. 15, 2022), https://www.bloomberg.com/news/features/2022-03-15/weight-discrimination-remains-legal-in-most-of-the-u-s.

4 Pallavi Gogoi, *The Weight Bias Against Women in the Workforce Is Real—And It's Only Getting Worse*, NPR (Apr. 29, 2023), https://perma.cc/PWJ7-D95U. Men on average face lower wage penalties for being overweight than women do. *Id.*

5 *See, e.g.*, Eidelson, *supra* note 3.

Weight discrimination persists even though obesity affects over 100 million adults in the United States and obesity rates have continued climbing over the past few decades.[6] Obesity is a medical condition marked by an excessive accumulation of body fat, which is defined as a body mass index (BMI) of 30 or higher.[7] Obesity is frequently subdivided into three gradations: Class I obesity is a BMI of 30 to 34.9, Class II is a BMI of 35 to 39.9, and Class III—sometimes called "severe" or "morbid" obesity—is a BMI of 40 or higher.[8] BMI is a crude and often-criticized tool for measuring body composition because it does not account for gender or racial differences in body shape or composition.[9] BMI also fails to distinguish between body fat and lean muscle mass, meaning athletes and bodybuilders can have obese BMIs even though one would generally not consider them to be fat. Nevertheless, BMI is a medical standard widely used today to diagnose obesity.[10] It is easy and cheap to calculate, and it is often the measurement relied upon by courts when a plaintiff's obesity is at issue.[11]

Despite the discrimination that fat people face, there is no federal protection against weight discrimination. Workers who are intentionally paid less, denied promotions, or harassed by colleagues because of their weight often lose court challenges to their mistreatment under existing federal antidiscrimination laws such as Title VII of the Civil Rights Act of 1964.[12] Employers are generally found not liable for discrimination, in part because

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6 Between 1999 and 2020, the prevalence of adult obesity in the United States rose from approximately 31% to 42%. *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 17, 2022), https://perma.cc/3J3L-JBG3.

7 *Defining Adult Overweight & Obesity*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 3, 2022), https://perma.cc/SKD7-688Y. BMI is calculated by taking a person's weight (in kilograms) and dividing it by their height (in meters) squared. *Id.*

8 *Id.*

9 The BMI metric originated in height and weight tables developed in the 1830s using a sample comprised entirely of white European men. Aubrey Gordon & Michael Hobbs, *The Body Mass Index*, MAINT. PHASE (Aug. 3, 2021), https://perma.cc/QJJ6-3M6P. The tables were later embraced by eugenicists and used by U.S. insurance companies to charge fat customers higher premiums. *Id.* Today, Black and Hispanic adults experience the highest rates of age-adjusted obesity compared to other racial groups, and differences in educational attainment and socioeconomic status are also linked to different rates of developing obesity. *Adult Obesity Facts*, *supra* note 6.

10 Howard Rosen, *Is Obesity a Disease or a Behavior Abnormality? Did the AMA Get It Right?*, 111 MO. MED. 104, 105 (2014).

11 *See infra* Part II.

12 Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e et seq.).

weight is not a protected class.[13] As a result, affected obese workers are often denied relief from the courts.

The Fat Acceptance Movement has been advocating for better treatment and legal protection for fat people since the late 1960s.[14] The term "fat" has been embraced by activists as a neutral descriptor of body type like "tall" or "short" and is the term preferred by the Fat Acceptance Movement.[15] Two of the main fat rights organizations today—the National Association to Advance Fat Acceptance (NAAFA) and the Fat Legal Advocacy, Rights, and Education (FLARE) Project—advocate for the enactment of antidiscrimination protections for fat people as their top policy priority.[16]

Although the Fat Acceptance Movement has had some success, today, only one state and seven cities within the United States expressly protect individuals against weight discrimination in the workplace.[17] These local laws prohibit employers from firing or refusing to hire employees because of the employee's body size. To date, Michigan is the only state to have adopted statewide protections for citizens against height and weight discrimination in the workplace.[18] New York City is the most recent locality to adopt legislation prohibiting discrimination based on a

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13 Title VII protects against discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1). Plaintiffs pursuing weight-discrimination claims under Title VII have generally tried to cast an employer's weight requirements as unlawful sex discrimination, often without success. *See* Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 116–22 (2016).

14 *NAAFA's Origin Story & Fat Activism History*, NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, https://perma.cc/D3HK-RWA5.

15 For purposes of this Comment, the terms "fat" and "obese" are not interchangeable. I will use the term "fat" to describe individuals with large bodies and the term "obese" to describe individuals with the medical condition of obesity. The terms share significant overlap because many individuals who self-identify as "fat" will also have an obese BMI, but there may be some fat individuals who are not obese or obese individuals who would not describe themselves as fat. Because this Comment is situated in the disability and ADA context, the term "obesity" will be used more frequently because obesity is a recognized medical condition, whereas fatness is not.

16 *See About Us*, NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, https://perma.cc/2EKJ-SCPV; *What We Do*, FAT LEGAL ADVOC., RTS., & EDUC. PROJECT, https://perma.cc/Z9JU-PK68.

17 Vanessa Yurkevich, *New York City Passes Bill Banning Weight Discrimination*, CNN (May 11, 2023), https://perma.cc/VM9C-8XB2.

18 Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2202(1)(a) (1976). Similar legislation has been proposed in Massachusetts, New Jersey, and New York. Yurkevich, *supra* note 17.

person's height or weight in employment, housing, and public accommodations.[19] Individuals who live outside of these few jurisdictions with explicit statutory protections have limited recourse against weight discrimination.

One potential solution to the lack of federal legislation expressly banning weight discrimination is the Americans with Disabilities Act[20] (ADA). The ADA is a civil rights law that prohibits discrimination on the basis of disability. Claimants challenging weight discrimination under the ADA argue that weight discrimination is a form of disability discrimination—namely, discrimination based on the medical condition of obesity. However, even though the American Medical Association (AMA) has recognized obesity as a disease since 2013,[21] courts have resisted granting the ADA's protections to obese plaintiffs. Of the five circuits to have considered the issue, four refuse to recognize obesity as a disability unless the plaintiff can show that his or her obesity is caused by an underlying physiological disorder.[22]

This Comment argues that courts should recognize obesity as an ADA-protected disability. Individuals who have been discriminated against by their employers because they are obese should therefore be entitled to sue in court for damages and injunctive relief, including backpay and reinstatement. Courts' reluctance to cover obesity under the ADA is the result of outdated views that perceive fatness as a product of moral failure,[23] which is inconsistent with the medical community's understanding of obesity as a chronic, biologically influenced disease.[24] To support this thesis, I draw parallels between obesity and gender dysphoria,[25] two highly stigmatized clinical conditions, to highlight how the movement to recognize gender dysphoria as an ADA-protected disability reveals promising new avenues for recognizing obesity as a

19 New York City joins six other cities that have banned weight discrimination: Binghamton, New York; Madison, Wisconsin; Urbana, Illinois; Washington, D.C.; San Francisco, California; and Santa Cruz, California. Yurkevich, *supra* note 17.

20 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et seq.).

21 Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES (June 18, 2013), https://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html.

22 *See infra* Part II.A, Part II.B.

23 *See infra* Part II.C.

24 *See infra* Part IV.A.

25 Gender dysphoria is a condition marked by clinically significant distress resulting from the mismatch between a person's gender identity and their sex assigned at birth. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452–53 (5th ed. 2013) [hereinafter DSM-V].

disability under the ADA. As medical research into gender dysphoria evolves and reveals the influence of genes and hormones in developing the disorder, transgender plaintiffs have begun to have modest success in bringing disability-discrimination claims under the ADA. This trend suggests that courts may be increasingly willing to recognize as disabilities conditions that new medical research shows may have a physiological cause.[26]

Part I describes the framework for bringing disability-discrimination claims under the ADA and how Congress updated that framework through the Americans with Disabilities Act Amendments Act of 2008[27] (ADAAA). Part II describes the circuit case law brought under the ADA and ADAAA by obese plaintiffs alleging disability discrimination and then explores the bias underpinning the courts' reasoning. Part III analyzes how courts have analogously treated gender dysphoria under the ADA. I argue that courts' recent willingness to allow transgender plaintiffs to pursue disability-discrimination claims on the basis of gender dysphoria highlights how evolving medical understanding influences judicial recognition of new ADA-protected disabilities. Part IV surveys medical evidence suggesting that developing obesity, like developing gender dysphoria, is significantly influenced by genes and hormones and then concludes that obesity should qualify as a disability under the ADA. Part IV continues by addressing common concerns and counterarguments to recognizing obesity as a disability.

I. The Legal Framework for Challenging Weight Discrimination Under the ADA

Legal challenges to weight discrimination typically arise in the employment context. Workers who were discriminated against because of their size first tried to frame weight discrimination as a form of sex discrimination that could be challenged under Title VII of the Civil Rights Act of 1964. Much of the case law in this area centers around airline weight restrictions for female flight attendants.[28] Because weight is not a protected characteristic under Title VII—but gender is—plaintiffs had to

[26] Throughout this Comment, I use the terms "physical cause," "physiological cause," and "biological cause" interchangeably.

[27] Pub. L. No. 110-325, 122 Stat. 3553 (codified in various sections of Titles 29 and 42).

[28] *E.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609–10 (9th Cir. 2000); *see also* Shinall, *supra* note 13, at 118.

show that their employers' weight requirements were either applicable to or enforced against only women.[29] Title VII therefore did not apply to most instances of weight discrimination. The majority of weight-discrimination litigation and scholarship has focused instead on making weight-discrimination claims under federal statutes that prohibit disability discrimination.

Before the ADA was passed in 1990, Congress prohibited disability-based discrimination by government entities and recipients of federal funds through the Rehabilitation Act of 1973.[30] The ADA expanded the Rehabilitation Act's protections by outlawing discrimination based on disability in a range of areas, including private employment (Title I), government benefits and services (Title II), and places of public accommodation including transportation (Title III). The *New York Times* lauded the ADA as "the most sweeping anti-discrimination measure since the Civil Rights Act of 1964," noting it had the potential to "bring 43 million handicapped people into society's mainstream."[31] Courts' interpretation of the ADA in subsequent years, however, fell short of Congress's ambitions and significantly restricted the class of individuals who qualified for protection under the Act.[32] As a result, many disabled plaintiffs could not bring ADA claims, even when they had direct evidence that they were fired because of their disability.[33] In 2008, Congress overrode Supreme Court decisions that had narrowly construed the ADA's definition of "disability" by passing the ADAAA, which dramatically broadened the ADA's eligibility requirements. The ADAAA allowed many more individuals to bring disability-discrimination lawsuits and request reasonable accommodations. This Part provides background for how courts have analyzed weight-discrimination lawsuits brought as disability-discrimination claims by outlining

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29 When weight requirements apply to and are enforced equally against both sexes, however, courts have generally upheld the policies as valid grooming standards. *See* Dennis M. Lynch, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COM. 203, 214 (1996).

30 *See* Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq.).

31 Opinion, *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26.

32 *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that the inquiry into whether an individual is disabled should be made while considering any mitigating effects from medication or other treatment); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (holding that, to be disabled under the ADA, an individual must be substantially limited in abilities that are central to daily life rather than abilities that are used in the workplace).

33 Molly Henry, Note, *Do I Look Fat? Perceiving Obesity as a Disability Under the Americans with Disabilities Act*, 68 OHIO ST. L.J. 1761, 1768–71 (2007).

the framework for qualifying as disabled before and after the ADAAA.

A. ADA Framework for Weight-Discrimination Claims

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability 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."[34] The term "covered entity" generally refers to employers with fifteen or more employees.[35] To make out a disability-discrimination claim, the plaintiff must prove by a preponderance of the evidence that she is disabled within the meaning of the ADA, she is otherwise qualified for the job, and her employer discriminated against her on the basis of her disability in regards to hiring, promotion, termination, compensation, or other terms and conditions of employment.[36]

Qualifying as an individual with a disability is the biggest challenge for obese workers seeking ADA protection from weight discrimination in the courts.[37] An individual is disabled for the purposes of the ADA if he or she falls into one of three categories: (1) having "a physical or mental impairment that substantially limits one or more major life activities of such individual," (2) having "a record of such an impairment," or (3) "being regarded as having such an impairment."[38] In cases where plaintiffs assert that their weight is a disability, much of the dispute focuses on whether the plaintiffs' weight constitutes a "physical impairment," a term that the ADA does not define.[39] Congress has given the Equal Employment Opportunity Commission (EEOC) the authority to issue regulations implementing the ADA,[40] and the

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34 42 U.S.C. § 12112(a). Title I also requires employers to provide "reasonable accommodation" to disabled employees who are capable of "perform[ing] the essential functions of the employment position." *See id.* § 12112(b)(5); *id.* § 12111(8).

35 *Id.* § 12111(2), (5).

36 *Id.* § 12112(a).

37 *See, e.g.*, Henry, *supra* note 33, at 1766.

38 42 U.S.C. § 12102(2).

39 *See* Camille A. Monahan, Tanya L. Goldman & Debra Oswald, *Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 A.B.A. J. LAB. & EMP. L. 537, 544 (2014).

40 Historically, EEOC regulations were entitled to *Chevron* deference, meaning courts would defer to the EEOC's interpretation of the ADA so long as the agency's interpretation was reasonable. In practice, scholars have noted that whether the Supreme

EEOC interprets "impairment" to mean "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems."[41] The EEOC's regulations also explain that "[t]he definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder."[42] Before the ADA was amended, the EEOC's guidance stated that "except in rare circumstances, obesity is not considered a disabling impairment."[43] Consequently, many courts found that obesity is not an impairment under the ADA.[44]

In the late 1990s, the Supreme Court erected another impediment to bringing weight-discrimination claims under the ADA. In *Sutton v. United Air Lines, Inc.*,[45] the Court held that potential mitigating measures must be considered in determining whether an individual has an impairment.[46] The Court reasoned that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity."[47] Several district

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Court will defer to the EEOC "often feels like a flip of a coin" and has tended toward skepticism of the EEOC in the past. Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin*, 32 A.B.A. J. LAB. & EMP. L. 93, 111 (2016); *see also id.* at 107 ("In recent years, the Court's deference to the EEOC's ADA guidance has been unpredictable . . ."); Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1949–61 (2006). In the wake of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the EEOC's construction of the ADA will no longer bind courts, but it may still carry persuasive value depending on factors like the thoroughness and validity of the EEOC's interpretation. *Cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[41] 29 C.F.R. § 1630.2(h)(1) (2024). The EEOC also notes that the following functions are considered body systems: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine. *Id.*

[42] *Id.* pt. 1630 app. § 1630.2(h) (2016). A natural reading of the EEOC's regulation suggests that a plaintiff alleging a weight-based disability can show either that his or her weight is within the normal range but caused by a physiological disorder, or that the plaintiff's weight is outside the normal range and impacts at least one body system. *See* Monahan et al., *supra* note 39, at 544; *see also* BNSF Ry. v. Feit, 365 Mont. 359, 364 (Mont. 2012) (agreeing with this interpretation of the EEOC's regulatory guidance).

[43] 29 C.F.R. pt. 1630 app. § 1630.2(j) (2006). This language was removed when the EEOC amended its regulations in 2011 to reflect changes made by the ADA Amendments. However, the EEOC's interpretation of "impairment" has remained unchanged.

[44] *See infra* Part II.

[45] 527 U.S. 471 (1999), *superseded by* ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[46] *Id.* at 475.

[47] *Id.* at 482–83.

courts subsequently held that in some circumstances, plaintiffs can lose the right to claim that they are disabled when they have failed to take mitigating measures.[48] This presented a catch-22 for plaintiffs arguing that their obesity qualified as a disability. Lower courts applying *Sutton* to weight-discrimination claims sometimes concluded that plaintiffs were not disabled by their obesity because the plaintiffs failed to take the mitigating measure of losing weight.[49] At the same time, plaintiffs ran the risk that the court would consider them no longer "substantially limited" once they lost weight and therefore no longer disabled by their obesity.[50] Imposing a duty to mitigate also trivialized the difficulty of maintaining weight loss.[51] Roughly 80% of people who lose a significant amount of weight will not maintain their weight loss for twelve months.[52]

Because meeting the requirements of the Supreme Court's restrictive interpretation of "impairment" and "disability" proved to be an insurmountable hurdle for obese plaintiffs, many instead chose to pursue their weight-discrimination claims under the ADA's third "regarded as" or "perceived disability" prong.[53] Perceived disability claims in the weight-discrimination context generally argue that an employer believes an employee's obesity to be a disabling condition, when in fact it is not.[54] The ADA protects obese workers from the stigma of being perceived as disabled when they are capable of performing their required job duties. For example, imagine an employer who refuses to hire a fat person for a warehouse job. The employer believes the worker's size will prevent him or her from fulfilling the position's job responsibilities, such as being on one's feet all day and carrying heavy boxes medium distances. Assuming the worker is actually capable of performing these job duties, the employer has discriminated against the worker on the basis of the perceived disability of obesity.[55] As

[48] *See e.g.*, Burrell v. Cummins Great Plains, Inc., 324 F. Supp. 2d 1000, 1018–19 (S.D. Iowa 2004) (holding that a diabetic plaintiff who failed to follow his doctors' orders was not "regarded as" disabled by his employer); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 595 (D. Md. 2000) (holding that ADA plaintiffs have a duty to mitigate).

[49] Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 241 (2010).

[50] *Id.*

[51] *Id.* at 238.

[52] Rena R. Wing & Suzanne Phelan, *Long-Term Weight Loss Maintenance*, 82 AM. J. CLIN. NUTR. 222S, 223S (2005).

[53] Henry, *supra* note 33, at 1769.

[54] *Id.* at 1770.

[55] There are generally two situations in which an employer may discriminate against the worker on the basis of a perceived disability: either the employer believes the worker

discussed in Part II, plaintiffs have had some limited success in framing their obesity as a perceived disability.[56]

However, *Sutton* complicated perceived-disability claims by requiring plaintiffs to prove that their discriminating employer subjectively believed that the plaintiff had an impairment that substantially limited a major life activity.[57] Even with the benefit of discovery, plaintiffs were rarely able to find smoking-gun evidence that their employer perceived them as either unable to perform or significantly restricted in the condition, manner, or duration of performing a major life activity relative to the average person.

B. ADAAA Framework for Weight-Discrimination Claims

Sixteen years ago, Congress amended the ADA through the ADAAA. The ADAAA was intended to broaden the coverage of the ADA in response to the Supreme Court's narrow reading of the ADA in *Sutton* and other cases.[58] As a result, the ADAAA made it substantially easier for individuals to demonstrate that they had a qualifying disability. It changed the ADA's statutory framework in several ways.

First, the ADAAA added rules of construction to guide courts in the "disability" inquiry. Congress specifically instructed judges to construe the definition of disability "in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[59] It also sought to shift the focus of courts' analysis away from detailed evaluations of an individual's

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is obese when in fact he is not, or the employer is correct that the worker is obese but wrongly assumes that the worker's obesity substantially limits the worker's performance of one or more major life activities. *See Sutton*, 527 U.S. at 489. If the worker is both obese and cannot perform the warehouse job responsibilities, the worker may still be entitled to reasonable accommodations under 42 U.S.C. § 12112(5)(a)—but the worker will have the burden to establish that (1) he is actually disabled by his obesity, (2) the requested accommodation is reasonable, and (3) the individual is capable of performing the essential function of the job with a reasonable accommodation. If the employer can demonstrate that providing an accommodation to the obese worker would impose an undue hardship on its business operations, the worker will not be entitled to reasonable accommodations.

[56] *See infra* Part II (discussing Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997); Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); and EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436 (6th Cir. 2006)).

[57] *Sutton*, 527 U.S. at 489.

[58] *See* Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protection for Transgender People*, 35 TOURO L. REV. 25, 43 (2019) ("In 2008, Congress amended the ADA by abrogating a series of U.S. Supreme Court decisions that unduly narrowed the ADA's definition of disability contrary to legislative intent.").

[59] 42 U.S.C. § 12102(4)(A).

physical symptoms and limitations and toward an analysis of whether discrimination occurred.[60]

Second, the ADAAA clarified that the existence of a disability must be evaluated without regard to the ameliorative effects of mitigating measures such as medication.[61] Individuals managing their condition or symptoms through treatment thus remain covered by the ADA. Importantly, this change also recognizes that plaintiffs bringing disability claims under the ADA do not have a duty to mitigate their impairment.[62] This means that obese plaintiffs do not have a duty to mitigate their obesity through diet, exercise, or more extreme interventions like prescription medication or bariatric surgery—which can be prohibitively costly or carry the risk of serious side effects.[63]

Third, the ADAAA expanded the definition of "major life activity." Performing manual tasks, sleeping, standing, lifting, bending, and breathing are included in the list of covered major life activities under the new formulation.[64] Major life activities also encompass "the operation of a major bodily function," including respiratory and circulatory functions.[65] Many of the possible causes and effects of obesity fall under this broadened definition.[66]

Following these amendments, the EEOC relaxed its construction of "substantially limits" from an absolute standard to something more relative. The EEOC noted that "substantially limits" is not meant to be a demanding standard nor require extensive analysis.[67] Instead, individuals must show that their impairment substantially limits their ability to perform a major life activity *as compared to most people in the general population*; the impairment need not prevent or severely restrict an individual from performing a major life activity in order to be considered substantially limiting.[68] To meet this lower bar, an obese plaintiff therefore only needs to show that, for example, she has substantially worse heart or lung function than the general population

60 Katie Warden, *A Disability Studies Perspective on the Legal Boundaries of Fat and Disability*, 39 L. & INEQ. 155, 170 (2021).

61 42 U.S.C. § 12102(4)(E)(i).

62 *See* Korn, *supra* note 49, at 241–42.

63 *See id.*

64 42 U.S.C. § 12102(2)(A).

65 *Id.* § 12102(2)(B).

66 *See infra* Part IV.A (discussing the biological underpinnings of obesity and its effects on various body systems).

67 29 C.F.R. § 1630.2(j)(i)–(iii) (2024).

68 *Id.* § 1630.2(j)(ii).

due to her obesity—not that her heart or lung function is severely restricted.

Additionally, the EEOC's updated regulations have made it easier for a plaintiff to pursue a claim under the "regarded as" prong. Under the ADAAA, an employer can be found liable when it takes an adverse employment action against someone based on a perceived impairment, even if the employer does not believe that the perceived impairment substantially limits the performance of a major life activity.[69] The amendments have therefore allowed obese plaintiffs to bring disability-discrimination claims when their employers perceive them as disabled due to their obesity without having to additionally prove that their employers believed, for example, that the plaintiffs' weight rendered them unable to work.[70]

By removing many of the barriers to qualifying as disabled under the ADA, the ADAAA was intended to make it easier for plaintiffs to bring legal challenges to workplace disability discrimination. It restored the disability inquiry to its true function: a type of standing inquiry. So long as a plaintiff could meet a threshold showing of membership in the protected class of disabled people, she could proceed to the merits question of whether discrimination in fact took place.[71]

II. Weight-Discrimination Cases Pre- and Post-ADA Amendments

This Part outlines the circuit court case law analyzing whether obesity is a protected disability under the ADA and its subsequent amendments. To qualify as disabled under the ADA or ADAAA, a plaintiff must show that she meets the definition laid out in 42 U.S.C. § 12102(1). This requires an obese plaintiff to show that their obesity is a physical or mental impairment that substantially limits one or more major life activities. Currently, circuit courts are split four-to-one over whether obesity qualifies as a "physical impairment."[72] Four circuits have substantially restricted the circumstances under which they will find plaintiffs

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69 *Id.* § 1630.2(*l*).

70 *See* Warden, *supra* note 60, at 170–71.

71 *Cf.* Monahan et al., *supra* note 39, at 559–60.

72 The circuit split comprises the First, Second, Sixth, Seventh, and Eighth Circuits. The Third and Ninth Circuits have avoided ruling on this question directly but have ruled against plaintiffs alleging weight discrimination on other grounds. *See* Lescoe v. Pa. Dep't

disabled by obesity by holding that obesity is not a "physical impairment" unless it is caused by or related to a physiological disorder.[73] By contrast, one circuit—the First Circuit—does not require obese plaintiffs to prove that their obesity results from a physiological cause.[74]

Although the ADAAA facially altered the analytical framework for the disability inquiry, in practice, courts' approach to analyzing whether obesity is a disability remained largely the same. To illustrate this pattern, this Part analyzes circuit court cases decided before and after the ADA amendments went into effect. The first Section explains that the Sixth Circuit was the first to adopt the "underlying physiological disorder" requirement for obesity in 1997, an approach that was endorsed and followed by the Second Circuit later that same year.[75] After 2008, plaintiffs tried to argue that the ADAAA abrogated the need for a specialized causation finding because it instructed courts to construe the Act broadly in favor of wide coverage.[76] But, as the second Section illuminates, both federal circuits that have considered the issue since the ADAAA went into effect have held that the underlying physiological disorder requirement remains good law because the ADAAA silently incorporated the pre-amendment definition of "impairment."[77] The final Section then highlights and critically evaluates the prejudiced assumptions that underlie the Second, Sixth, Seventh, and Eighth Circuits' physiological disorder requirement for obesity to qualify as a disability under the ADA.

A. Pre-ADAAA Circuit Court Cases

The first circuit court case to address the issue of whether obesity can qualify as a protected disability was *Cook v. Rhode*

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of Corr.-SCI Frackville, 464 Fed. App'x 50, 53 (3d Cir. 2012); Valtierra v. Medtronic Inc., 934 F.3d 1089, 1092 (9th Cir. 2019).

[73] *See* Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997); Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997); Morriss v. BNSF Ry., 817 F.3d 1104, 1110–12 (8th Cir. 2016); Richardson v. Chi. Transit Auth., 926 F.3d 881, 888–90 (7th Cir. 2019).

[74] Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17, 28 (1st Cir. 1993).

[75] *See Andrews*, 104 F.3d at 810; *Francis*, 129 F.3d at 286.

[76] *E.g.*, *Richardson*, 926 F.3d at 888–90; *Morriss*, 817 F.3d at 1110–12.

[77] *See Richardson*, 926 F.3d at 888; *Morriss*, 817 F.3d at 1108; *see also* 29 C.F.R. pt. 1630 app. § 1630.2(h) (2024) ("[T]he legislative history of the Amendments Act notes that Congress expect[s] that the current regulatory definition of these terms ["physical or mental impairment"], as promulgated by agencies such as the [EEOC] . . . will not change.").

Island Department of Mental Health, Retardation & Hospitals.[78] The plaintiff, Bonnie Cook, applied for a job as an institutional attendant at a state-operated facility for intellectually disabled adults.[79] The Department refused to hire Cook even though she had previously worked for the Department in an identical position.[80] The Department was concerned that her morbid obesity would limit Cook's ability to evacuate patients in an emergency, despite the fact that her routine prehire physical found no limitation on Cook's ability to do the job.[81] Cook sued the Department on a perceived disability theory and won.[82] The First Circuit upheld the judgment, concluding that there was sufficient evidence for a jury to conclude that Cook's morbid obesity was perceived as a cognizable disability.[83] For example, Cook presented expert testimony at trial that "morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and neurological appetite-suppressing signal system, capable of causing adverse effects" on the body.[84] The First Circuit found that, in light of this evidence, the jury plausibly could have found that Cook had a physical impairment.[85]

Despite this early success, plaintiffs in the years following *Cook* fell short of persuading courts that obesity is a disability under the ADA.[86] Four years after the First Circuit's decision in *Cook*, the Sixth Circuit held in *Andrews v. Ohio*[87] that obesity is not an ADA-protected impairment unless it is caused by an underlying physiological disorder.[88] The plaintiff-appellants were seventy-six law enforcement officers who sued the state of Ohio, alleging that the Ohio State Highway Patrol's fitness program—

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78 10 F.3d 17 (1st Cir. 1993).

79 *Id.* at 20.

80 *Id.* at 20–21.

81 *Id.*

82 *Id.* at 21. Cook made out her claims under § 504 of the Rehabilitation Act and not the ADA because her employer was a public, not private, institution. However, courts have treated the case law under both statutes as interchangeable for the purpose of determining the existence of a disability. *See, e.g.*, Wooten v. Farmland Foods, 58 F.3d 382, 385 n.2 (8th Cir. 1995); *see also* 29 U.S.C. § 794(d); 42 U.S.C. § 12117(b).

83 *Cook*, 10 F.3d at 28.

84 *Id.* at 23.

85 *Id.*

86 *See* Shinall, *supra* note 13, at 107–10.

87 104 F.3d 803 (6th Cir. 1997).

88 *Id.* at 808 ("[P]hysical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining actual or perceived disability.").

which included maximum weight limits for all its troopers—violated the ADA. The officers who exceeded the weight limit argued that the State perceived them as disabled due to their weight, even though the overweight officers were still capable of safely performing the essential functions of their position.[89] The Sixth Circuit affirmed dismissal of the case, concluding that the officers' weight was not an actual or perceived "impairment" within the meaning of the statute and its corresponding regulations.[90]

The *Andrews* court based its narrow interpretation of "impairment" on a close reading of the EEOC's guidelines and a cramped vision of whom the ADA is meant to protect. First, the court cited EEOC interpretive guidance explaining that the definition of impairment does not include "height, weight, or muscle tone that [is] within 'normal' range and [is] not the result of a physiological disorder."[91] The court initially interpreted the guidance to mean that only physical characteristics that result from a physiological disorder qualify as impairments under the ADA.[92] However, later in the opinion, the court appeared to acknowledge that the phrase "within 'normal' range" also informs the analysis, observing, "[t]he officers [ ] do not allege that their weights or their cardiovascular fitness *are beyond a normal range*, nor have they alleged that they suffer from a physiological disorder (which, for example, has produced excessive weight or lack of fitness despite their individual efforts)."[93] Plaintiffs later argued that the court's dicta meant that simply being overweight was not an impairment unless one could show it resulted from an underlying physiological cause, but Class III obesity could be a per se impairment without the additional showing.[94] The Sixth Circuit resolved this ambiguity years later in *EEOC v. Watkins Motor Lines, Inc.*,[95] emphasizing that a condition outside the normal range cannot, by itself, sustain a finding of an impairment. Instead, "to constitute an ADA impairment, a person's obesity, even morbid obesity,

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89 *Id.* at 805–06.

90 *Id.* at 808.

91 *Id.* (citing 29 C.F.R. pt. 1630 app. § 1630.2(h) (1995)).

92 *Andrews*, 104 F.3d at 808; *see also id.* at 810 ("[A] mere physical characteristic does not, without more, equal a physiological disorder.").

93 *Id.* at 810 (emphasis added).

94 *See, e.g.*, EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 441–42 (6th Cir. 2006). Under this interpretation, being overweight (but not obese) constitutes a weight within the normal range, while severe obesity is always beyond the normal range.

95 463 F.3d 436 (6th Cir. 2006).

must be the result of a physiological condition."[96] The Sixth Circuit also reconciled its approach with the First Circuit's, suggesting that its requirement that ADA plaintiffs prove a physiological cause for their obesity was consistent with *Cook* because the plaintiff in *Cook* introduced evidence that her Class III obesity was related to an underlying permanent metabolic disorder.[97]

Second, the Sixth Circuit rested its conclusion on the purpose of disability antidiscrimination laws. In its view, recognizing obesity or other physical characteristics as impairments would "distort the 'concept of an impairment [which] implies a characteristic that is not commonplace' and would thereby 'debase [the] high purpose [of] the statutory protections available to those truly handicapped.'"[98] The court's rationale implies a fear that recognizing obesity as an impairment would extend the ADA too far, underscoring a profound skepticism of obesity as a "real" disability and suggesting that obese workers are unworthy of the federal government's protection.[99] The Sixth Circuit thus echoed the Supreme Court's suspicion in *Sutton* that "Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."[100]

The Second Circuit, influenced by the reasoning in *Andrews*, joined the Sixth Circuit by holding in *Francis v. City of Meriden*[101] that "obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the [ADA and Rehabilitation Act] statutes."[102] The Second Circuit's reasoning closely parallels that of the Sixth Circuit. The court quotes the EEOC's guidance that "'impairment' does not include physical characteristics . . . that are within 'normal' range and are not the result of a physiological disorder"[103]

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[96] *Id.* at 442–43. Judge Julia Smith Gibbons concurred with the majority but wrote separately to emphasize that morbid obesity may have a physiological cause. *Id.* at 443 (Gibbons, J., concurring). Had the EEOC put forth evidence demonstrating that morbid obesity, "because of the nature of the disorder," always has a physiological cause, she likely would have dissented. *See id.* As discussed in Part IV.A, there is compelling evidence that obesity does in fact have a physiological cause.

[97] *Andrews*, 104 F.3d at 809; *see also Watkins*, 463 F.3d at 442.

[98] *Andrews*, 104 F.3d at 810 (quoting Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)).

[99] These themes will be expanded and explored in Part IV.

[100] *Sutton*, 527 U.S. at 484. In this analogy, obesity is cast as a correctable condition, which reflects society's prevailing—but false—view that obesity is a choice and can be easily remedied through diet and exercise; *see infra* Part IV.A.

[101] 129 F.3d 281 (2d Cir. 1997).

[102] *Id.* at 286.

[103] *Id.* (quoting 29 C.F.R. pt. 1630 app. § 1630.2(h)).

to support its conclusion that obesity must relate to a physiological disorder to qualify as an impairment. But, in the next sentence, the *Francis* court adds that "a cause of action may lie against an employer who discriminates against an employee on the basis of the perception that the employee is morbidly obese."[104] The court thus appears to imply that Class III obesity—unlike an overweight BMI or milder forms of obesity—is a per se impairment because it clearly falls outside the normal weight range, regardless of whether the condition results from a physiological disorder. Rather than grapple with this possibility, however, the Second Circuit instead pivoted into purposive reasoning. Echoing the Sixth Circuit's concerns, the court worries that "[i]t would be inconsistent with [the statutory] purposes to construe the [ADA] to reach alleged discrimination by an employer on the basis of a simple physical characteristic, such as weight."[105] Recognizing that body size could potentially qualify as an impairment would threaten to transform the ADA's "regarded as" prong into "a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed" from the ADA's purpose to "protect the disabled."[106]

B. Post-ADAAA Circuit Court Cases

Despite the intervening passage of the ADAAA, the Eighth Circuit chose to adopt the approach of the Sixth and Second Circuits when it confronted the question of whether obesity constitutes a physical impairment under the ADA. The case, *Morriss v. BNSF Railway*,[107] involved a male applicant with Class III obesity who was offered employment in a safety-sensitive position at BNSF Railway, contingent upon a satisfactory medical review.[108] The Railway had a policy against hiring applicants with a BMI of 40 or more for safety-sensitive positions, and the Railway rescinded the plaintiff's employment offer because his BMI exceeded its standard.[109] Morriss challenged the Railway's decision on a perceived disability theory.[110] The Eighth Circuit rejected

[104] *Id.*
[105] *Id.* at 287.
[106] *Francis*, 129 F.3d at 287.
[107] 817 F.3d 1104 (8th Cir. 2016).
[108] *Id.* at 1106.
[109] *Id.* at 1106–07. The plaintiff's BMI was recorded as 40.9 and 40.4, respectively, at his two physical examinations with railway doctors. *Id.* at 1106.
[110] *Id.* at 1106–08.

Morriss's claim, concluding that Morriss failed to show that the Railway perceived his obesity as a physical impairment.[111] The court held that "even weight outside the normal range—no matter how far outside that range—must be the result of an underlying physiological disorder to qualify as a physical impairment under the ADA."[112]

Morriss attempted to distinguish the decisions in *Watkins* and *Francis*, arguing that the Sixth and Second Circuits' reasoning was inapplicable to his case because both were decided prior to the ADAAA's enactment.[113] However, the Eighth Circuit rejected this rationale: "[B]ecause the ADAAA did not alter [the] definition [of impairment]," the court concluded, "pre-ADAAA case law holding that obesity qualifies as a physical impairment only if it results from an underlying physiological disorder or condition remains relevant and persuasive."[114] The panel explained that Congress did not express disagreement with judicial interpretations of "impairment," and that the EEOC did not change its regulatory definition of "impairment" in 29 C.F.R. § 1630.2(h) after the ADAAA was passed.[115] The court thus glossed over the ambiguity in the case law over whether physical characteristics that are outside the normal range, but do not result from an underlying physiological cause, can qualify as impairments.[116]

To reach its conclusion, the Eighth Circuit explicitly rejected the EEOC's then-existing position that obesity can sometimes constitute an impairment within the meaning of the ADA. At the time, the EEOC's Compliance Manual stated that while "being overweight, in and of itself, generally is not an impairment, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment."[117] The EEOC's definition of severe obesity is roughly equivalent to Class III or morbid obesity.[118]

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111 *Morriss*, 817 F.3d at 1113.

112 *Id.* at 1108.

113 *Id.* at 1110.

114 *Id.* at 1111.

115 *Id.*

116 *Morriss*, 817 F.3d at 1111–12.

117 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 902.2(5)(ii) (2009). The EEOC removed this provision from its Compliance Manual by July 2012, noting that "the analysis in it has been superseded by the [ADAAA]." David M. Katz, *Obesity as a Covered Disability Under the ADA*, DAILY LAB. REP. (Oct. 5, 2012), https://perma.cc/8Z3D-2Q4S.

118 Shinall, *supra* note 13, at 111.

The Eighth Circuit refused to follow the EEOC's guidance for three reasons. First, the *Morriss* court held that the Compliance Manual provision "directly contradicts the plain language of the [ADA]," which required impairments to be "physical" in nature.[119] Although the ADA itself did not define "physical impairment," the Eighth Circuit interpreted those words to require an underlying physiological disorder or condition.

Next, the Eighth Circuit pointed to the EEOC's Appendix to § 1630.2(h)[120]—the same guidance referenced by the Sixth and Second Circuits. This provision explains that if a physical characteristic is in the normal range *and* not the result of a physiological disorder, it will not receive ADA protection. By contrast, the Eighth Circuit overwrote the conjunctive "and," replacing it with the disjunctive "or": the *Morriss* court argued that the "natural reading" of the regulation is that physical characteristics that are *either* in the normal range *or* not the result of a physiological disorder are not impairments.[121] This unduly narrow reading effectively revised the agency's guidance to comport with the Eighth Circuit's narrow view of whom the ADA protects.

Lastly, the court concluded that even if it accepted the EEOC's guidance that "body weight more than 100% over the norm" qualifies as a physical impairment without an underlying physiological disorder, Morriss's claim would still fail.[122] The Eighth Circuit interpreted "norm" as referring to the average weight of U.S. men of the plaintiff's age, which at the time was approximately two hundred pounds.[123] As a result, the court held that Morriss's weight had to be at least 399 pounds to qualify as an impairment.[124] By comparing the plaintiff's weight to that of the average U.S. man instead of the "healthy" or "normal" BMI weight range, the Eighth Circuit stripped the EEOC's use of the term "severe obesity" of its medical context. Elsewhere, the court

119 *Morriss*, 817 F.3d at 1112; *see also* 42 U.S.C. § 12102(1)(a).

120 As a reminder, the EEOC's guidance here reads, "The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. pt. 1630 app. § 1630.2(h) (2024).

121 *Morriss*, 817 F.3d at 1108.

122 *Id.* at 1112.

123 *Id.*

124 *Id.* Morriss, however, weighed less than three hundred pounds during the relevant timeframe. *See id.* at 1106.

acknowledged that Morriss's obesity had been diagnosed as "severe," "morbid," or "Class III,"[125] yet it implausibly interpreted the EEOC's guidance to require even more. The court's interpretation also weaponized the prevalence of obesity against Morriss, raising additional hurdles for obese plaintiffs seeking protection under the ADA.

A few years after *Morriss*, the Seventh Circuit weighed in on the issue and sided with the Sixth, Second, and Eighth Circuits' underlying physiological-cause requirement in *Richardson v. Chicago Transit Authority*.[126] The case involved a city bus driver, Richardson, with "extreme" obesity who was ultimately discharged after the safety department of the Chicago Transit Authority (CTA) determined that Richardson could not safely operate CTA buses.[127] Mark Richardson argued that the CTA violated the ADA by regarding him as too obese to work as a bus operator.[128] The court determined that "[w]ithout evidence that Richardson's extreme obesity was caused by a physiological disorder or condition, his obesity [was] not a physical impairment under the plain language of the EEOC regulation [§ 1630.2(h)]."[129] The court acknowledged that while the ADAAA broadened the scope of viable "perceived disability" claims and relaxed rules as to how severe an impairment must be to be considered a disability, Congress expected the meaning of impairment to stay the same.[130] Thus, the Seventh Circuit concluded, "the definition of physical impairment remains inextricably tied to a 'physiological disorder or condition.'"[131]

The Seventh Circuit in *Richardson* was also the first federal court of appeals to address medical arguments advanced by amici that obesity is in and of itself a physiological disorder and therefore a physical impairment within the meaning of the ADA.[132] Yet the court rejected this argument with minimal discussion. The

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125 *Morriss*, 817 F.3d at 1112.

126 926 F.3d 881 (7th Cir. 2019).

127 *Id.* at 884–86. Because Richardson weighed over the CTA's four-hundred-pound weight limit for bus drivers, the CTA administered a special driving-performance test to determine whether Richardson could perform all standard operating procedures on various CTA buses. *Id.* at 885. The CTA considered the examiners' observations and findings and determined it would be unsafe for Richardson to operate CTA buses. *Id.*

128 *Id.* at 886.

129 *Richardson*, 926 F.3d at 888.

130 *Id.* at 888–89.

131 *Id.* at 889 (quoting 29 C.F.R. § 1630.2(h)(1)).

132 *See id.* at 891.

panel's primary objection appeared to be what it called the "unavoidable, nonrealistic result" of recognizing the amici's position.[133] The court worried that "if [it] agreed that obesity is itself a physiological disorder, then *all* obesity would be an ADA impairment," meaning that "as high as 39.8% of the American adult population [would] automatically have an ADA impairment."[134] The court does not cite any statutory provision or legislative history to support its conclusion that this result runs counter to the text and purpose of the ADA and ADAAA.[135]

C. The Bias Underpinning the Circuit Courts' Logic

As the ADAAA and the EEOC's subsequent regulations made it easier for individuals to qualify for the ADA's protections, obese workers were hopeful they would fall within the Act's broadened scope. In the wake of the ADAAA, numerous firms advised clients to assume that obese employees were now protected from adverse employment actions and entitled to reasonable accommodations under the ADAAA.[136] Many scholars also opined that obese workers would have an easier time qualifying as disabled under the ADAAA than the ADA.[137] A 2021 empirical study of eighty-seven circuit and district court cases revealed that the ADAAA has indeed provided some benefit to obese plaintiffs.[138] Before the amendments went into effect, fewer than half of cases in which plaintiffs alleged obesity as the primary claimed impairment resulted in decisions determining that the plaintiff was disabled.[139] After the ADAAA, however, the percentage of plaintiffs deemed disabled rose to 64%.[140]

Many of the imagined gains provided by the ADAAA for obese plaintiffs challenging unlawful workplace discrimination have not come to fruition, however. Although the ADAAA should have

133 *Id.*

134 *Richardson*, 926 F.3d at 891 (emphasis in original).

135 *See id.*

136 Shinall, *supra* note 13, at 113. Additionally, firms advised clients that obese employees may be entitled to reasonable accommodations. *Id.*

137 *See e.g.*, Monahan et al., *supra* note 39, at 559; Abigail Kozel, Comment, *Large and in Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disability Act Amendments Act of 2008*, 31 HAMLINE J. PUB. L. & POL'Y 273, 323 (2009).

138 Warden, *supra* note 60, at 184.

139 *Id.*

140 *Id.*

altered courts' analyses in favor of plaintiffs, circuit courts' approach to whether obesity is a disability has largely stayed the same before and after the amendments went into effect. One compelling explanation for this trend is that courts have resisted recognizing obesity as a qualifying impairment because of an underlying perception that obese people are at fault for their fatness. Obesity is therefore cast as a moral failure.[141]

This underlying bias helps explain why four circuit courts have held that obesity is not an ADA-protected impairment unless it is caused by or related to a physiological disorder. Scholar Debra Oswald and practitioners Camille Monahan and Tanya Goldman have collectively argued that the physiological-cause requirement is "underpinned by unsupported beliefs that the overweight possess negative personality traits [such as laziness and lack of willpower] and enacts the ideology of blame by seeking to hold severely obese individuals accountable for the disability that is assumed to be within their control."[142] Proving that one's disability is outside of one's control is a legal requirement unique to fat plaintiffs. A person with lung cancer, for example, qualifies as disabled under the ADA even when one's cancer results from a voluntary smoking habit.[143] So would an individual with paraplegia whose paralysis resulted from a car accident while driving drunk.[144] The ADA contains no language suggesting that its protection is contingent on whether an individual contributed to his or her impairment.[145] Fat people alone are blamed for their disability, unless they can point to a cause more virtuous than overeating and insufficient exercise to justify their weight. When plaintiffs are legally required to show medical evidence that their obesity is related to a separate physiological diagnosis, plaintiffs are significantly less likely to be deemed disabled by courts.[146]

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141 *See* Lauren E. Jones, *The Framing of Fat: Narratives of Health and Disability in Fat Discrimination Litigation*, 87 N.Y.U. L. REV. 1996, 2002 (2012) ("A common narrative states that fat people are to blame for their situation."); Korn, *supra* note 49, at 221 (discussing the "prevalent belief that obesity is caused by a moral failure").

142 Monahan et al., *supra* note 39, at 554.

143 *See* 29 C.F.R. pt. 1630 app. § 1630.2(j)(3) (2024); Korn, *supra* note 49, at 245–46; Monahan et al., *supra* note 39, at 552.

144 *Cf.* Monahan et al., *supra* note 39, at 539 ("The ADA does not question . . . if someone is a paraplegic because the person was born that way, was wounded in combat, was injured saving someone's life, or drove drunk and was in a car accident.").

145 *Cf. Cook*, 10 F.3d at 24 ("The Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment.").

146 Warden, *supra* note 60, at 186.

The adoption of the physical-cause requirement has had significant negative consequences for obese plaintiffs. The problem with requiring these individuals to prove the cause of their obesity is that many victims of weight discrimination will not be able to show that their obesity has a distinct underlying physiological cause.[147] Obesity is a complex medical condition that is influenced by many known biological factors,[148] but determining exactly which mechanism is responsible for the accumulation of excess fat in a particular individual is nearly impossible in most cases. For example, the testing necessary to determine the cause of one's obesity may not be widely available outside of scientific research settings.[149] Such testing is also unlikely to be medically necessary and therefore likely would not be covered by a patient's insurance provider, making testing cost prohibitive. Courts' narrow focus on proving the cause of a plaintiff's obesity is also out of step with medical researchers' general skepticism towards strong causational claims.[150] Science is generally more adept at demonstrating correlation than causation: courts—by rejecting correlational evidence and insisting that plaintiffs show a physiological cause of their obesity—demand stronger medical evidence than the average peer-reviewed medical journal would require.

The requirement embraced by the Second, Sixth, Seventh, and Eighth Circuits that plaintiffs must show that their obesity is caused by an underlying physiological disorder to qualify for ADA protection is misguided. Perhaps the requirement was defensible before the ADAAA when plaintiffs had to meet a high bar to prove that they were disabled, but it no longer makes sense to hold obese plaintiffs to a higher factual showing than other ADA plaintiffs. The underlying physiological-cause requirement is extralegal and atextual: it has no basis in the ADA's statutory language nor the regulations interpreting it.[151] "Physical," as it is used in the ADA, does not say or imply anything about what the *cause* of the impairment must be. Rather, the phrase appearing in the statute—"physical or mental impairment"—is best read to

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[147] Korn, *supra* note 49, at 233.

[148] *See infra* Part IV.A.

[149] *See* Julia S. El-Sayed Moustafa & Phillippe Froguel, *From Obesity Genetics to the Future of Personalized Obesity Therapy*, 9 NATURE REVS. ENDOCRINOLOGY 402, 408–09 (2013) (describing various forms of genetic testing for certain forms of obesity).

[150] *Cf.* Rebecca Goldin, *Causation vs Correlation*, SENSE ABOUT SCI. USA (Aug. 19, 2015), https://perma.cc/2NNM-LQK8 (discussing the inability to draw causational conclusions from many kinds of health studies).

[151] *See* Monahan et al., *supra* note 39, at 549–51.

describe, in binary terms, what kinds of impairments are covered: those of the body and those of the mind. This is underscored by the EEOC's parallel regulation in § 1630.2(h), which defines "physical or mental impairment" in two parts to encompass both "physiological disorder[s] and condition[s]"[152] and "mental or psychological disorder[s]."[153] Requiring obese plaintiffs to prove that their obesity results from a biological cause also contradicts the plain reading of the EEOC's regulations which do not require a physiological cause to be shown for weights outside the normal range.[154] Thus, the physiological-cause requirement distorts the ADA's statutory and regulatory text beyond recognition.

The physiological-cause requirement imposed by the Second, Sixth, Seventh, and Eighth Circuits also appears to misunderstand the nature of obesity by assuming that obesity must be the symptom of some other condition in order to count as a physical impairment. As the amici in *Richardson* pointed out, this legal test wrongly suggests that obesity cannot be a physiological disorder by itself. Yet the courts have failed to take seriously the argument that obesity may meet the circuits' own criteria for physical impairments. The physiological-cause requirement also risks perpetuating the implicitly biased belief that obese people whose weight is not the result of a known underlying physiological disorder are somehow personally culpable for their size and therefore unworthy of legal protection. Take, for example, two identical individuals who each weigh four hundred pounds. One knows that their weight is related to a thyroid condition, and the other does not know the cause of his obesity. Four circuits would treat obesity as an impairment for the first individual but not the second, even when the effects of obesity on both are exactly the same. For no other disability does the ADA allow such a distinction.

III. A PARALLEL STRUGGLE: ADA PROTECTION FOR TRANSGENDER INDIVIDUALS WITH GENDER DYSPHORIA

Drawing parallels between obesity and gender dysphoria underscores the conclusion that obesity should be considered a qualifying impairment under the ADA. Gender dysphoria describes the feeling of deep discomfort or distress that a person may experience when one's biological sex does not match one's gender

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[152] 29 C.F.R. § 1630.2(h)(1) (2024).
[153] *Id.* § 1630.2(h)(2).
[154] *See supra* note 42 and accompanying text.

identity.[155] Gender dysphoria is a useful analogue for understanding obesity in the disability context for two reasons. First, obesity and gender dysphoria each affect a deeply stigmatized and politically unpopular group. Courts have therefore historically resisted recognizing obesity and gender dysphoria as ADA-protected disabilities.[156] Second, both obesity and gender dysphoria have been accepted by the mainstream medical community as diagnosable clinical disorders since 2013. The last few decades of medical research have revealed biological mechanisms that contribute to obesity and gender dysphoria, respectively, highlighting the physiological roots of both disorders.

The trajectory of recent gender-dysphoria-as-a-disability cases highlights how the medical community has influenced courts' willingness to categorize newly recognized disorders as impairments. Transgender plaintiffs have recently had modest success challenging workplace discrimination under the ADA by alleging discrimination on the basis of the actual or perceived disability of gender dysphoria. How courts have analyzed these cases provides a blueprint for how courts could determine that obesity is a qualifying disability. For example, courts analyzing gender dysphoria under the ADA have suggested that whether a given disorder is diagnosable, involves crippling symptoms, or has a possible biological cause is relevant to the disability inquiry. Part of transgender plaintiffs' recent success under this analytical framework is due to new research indicating that gender dysphoria has a physiological cause related to genes and hormones. Courts should therefore be willing to consider medical research indicating that obesity also has a physiological cause attributable to a range of biological factors.[157] Therefore, even if one were to concede for the sake of argument that the ADA and its corresponding regulations *do* require obese plaintiffs to show that their obesity relates to an underlying physiological disorder, obese plaintiffs should automatically meet this showing based on the evolving medical understanding of obesity's cause.

This Part first explores the evolution of the name, definition, and diagnostic criteria for the condition currently known as gender dysphoria. Next, it surveys recent case law in which

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155 DSM-V, *supra* note 25, at 452–53.

156 *See generally* Dylan Vade & Sondra Solovay, *No Apology: Shared Struggles in Fat and Transgender Law*, *in* THE FAT STUDIES READER 167 (Esher Rothblum & Sondra Solovay eds., 2009).

157 *See infra* Part IV.A.

transgender plaintiffs have successfully alleged disability discrimination on the basis of real or perceived gender dysphoria. This analysis reveals that courts' willingness to recognize gender dysphoria as an ADA-protected disability appears to be tied to changing medical understandings of the condition—most notably, the recognition by the American Psychiatric Association (APA) that gender dysphoria constitutes a distinct mental disorder.

A. Updated Medical Diagnosis: Gender Identity Disorder to Gender Dysphoria

Attempts to recognize gender dysphoria under the ADA have unfolded against a unique statutory backdrop because the ADA explicitly excludes "transvestism," "transsexualism," and "gender identity disorders not resulting from physical impairments" from its definition of disability.[158] This statutory carve-out effectively prevented transgender litigants from raising disability-discrimination claims under the ADA for nearly three decades.[159] Before turning to the case law alleging gender dysphoria as a disability, it is helpful to briefly sketch what gender dysphoria is and how the diagnosis has evolved.

In 2013, the APA published the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).[160] The edition recognized a new mental disorder called "gender dysphoria," which is marked by clinically significant distress resulting from the mismatch between a person's gender identity and their sex assigned at birth.[161] Gender dysphoria replaced the previously recognized diagnosis of "gender identity disorder" (GID).[162] The

[158] 42 U.S.C. § 12211(b)(1). When Congress revisited the ADA in 2008, the resulting amendments did not remove these exceptions. Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 YALE HUM. RTS. & DEV. L.J. 1, 33 (2013) ("Instead of removing the GID exclusion once and for all, Congress enshrined its moral opposition to people with GID by preserving the exclusion.").

[159] Barry & Levi, *supra* note 58, at 42. Legislative history strongly suggests transgender individuals were excluded from the ADA's coverage because a small group of Senators were morally opposed to transgender people, whom they saw as harmful, deviant, and unworthy of legal protection. *Id.* at 9–25.

[160] *Id.* at 44. The Supreme Court has recognized the DSM as a "basic text[ ] used by psychiatrists and other experts" and has treated it as an authoritative source. Hall v. Florida, 572 U.S. 701, 704 (2014).

[161] DSM-V, *supra* note 25, at 452–53.

[162] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR, at 576–82 (4th ed., rev. 2000).

change in terminology is crucial because the new diagnosis of gender dysphoria does not obviously fit within the ADA's exception for gender identity disorders.

The difference between GID and gender dysphoria is not merely semantic—it reflects a significant change in medical understanding.[163] The DSM-V noted that "[t]he current term [gender dysphoria] is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se."[164] Cross-dressing or gender nonconformity are not in themselves mental disorders; a diagnosis of gender dysphoria requires "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[165] The DSM-V additionally noted that a growing body of scientific research suggests that gender dysphoria has a physical cause related to genes and hormones.[166] The updated manual specifically includes a subheading for "genetic and physiological" risk and prognostic factors which outlines evidence suggesting that gender dysphoria in some people may be linked to their prenatal hormone environment.[167] The most up-to-date version of the DSM, published in 2022, retains these important distinctions between gender dysphoria and the old GID diagnosis.[168]

B. Legal Recognition of Gender Dysphoria as a Disability

The newly available clinical diagnosis of gender dysphoria opened the courthouse doors to transgender litigants seeking protection from discrimination under the ADA. The first case in which a district court ruled that gender dysphoria qualified as an ADA-protected disability was *Blatt v. Cabela's Retail, Inc.*[169] The U.S. District Court for the Eastern District of Pennsylvania narrowly construed the term "gender identity disorders" as used in the ADA's § 12211 exceptions to refer to "only the condition of identifying with a different gender" and not to exclude disabling

[163] *See* Brief of Gay & Lesbian Advocates & Defenders et al. as Amici Curiae in Opposition to Defendant's Partial Motion to Dismiss at *6, Blatt v. Cabela's Retail Inc., 2015 WL 1360212 (E.D. Pa. May 18, 2017).

[164] DSM-V, *supra* note 25, at 451 (emphasis omitted).

[165] *Id.* at 453.

[166] *Id.* at 457.

[167] *Id.*

[168] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR, at 511–20 (5th ed., rev. 2022).

[169] 2017 WL 2178123 at *3 (E.D. Pa. May 18, 2017).

conditions that transgender people may have, such as gender dysphoria.[170] To reach its conclusion, the court relied upon and implicitly deferred to the APA's evolving understanding of gender identity disorders and gender dysphoria in the years since the ADA's enactment.[171]

Since the *Blatt* litigation, federal district courts have decided nearly seventy cases alleging discrimination based on gender dysphoria and seeking redress under either the ADA or the Rehabilitation Act. While not every court has followed the lead of the *Blatt* court,[172] the only federal circuit court to address the question of whether gender dysphoria qualifies as an ADA-protected disability agreed with the result in *Blatt*.

In *Williams v. Kincaid*,[173] a divided Fourth Circuit panel allowed a transgender plaintiff to pursue disability-discrimination claims on the basis of her gender dysphoria.[174] The court based its conclusion on two grounds. First, the court determined that the present-day diagnosis of "gender dysphoria" is distinct from the meaning of "gender identity disorder" as it was understood when the ADA was passed.[175] The court recounted the trajectory of the DSM's categorization and criteria, noting that "the APA's removal of the 'gender identity disorder' diagnosis and the addition of the 'gender dysphoria' diagnosis to the DSM-[V] reflected a significant shift in medical understanding."[176] The court thus concluded that gender dysphoria is not a gender identity disorder and therefore does not fall within an exception to the ADA.[177] Second, the court found that even if gender dysphoria was a gender identity disorder, the plaintiff's claim nevertheless fell within the ADA's safe harbor for gender identity disorders that result from physical impairment. The majority referenced "medical and scientific research identifying possible physical bases of gender dysphoria" to support its conclusion while caveating that the plaintiff need not

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170 *Id.* at *4.

171 *Id.* at *2 n.1.

172 *See, e.g.*, Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018) (rejecting the *Blatt* court's reasoning and holding that gender dysphoria is not a protected disability under the ADA because it counts as a "gender identity disorder" and therefore falls within an enumerated statutory exception).

173 45 F.4th 759 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023).

174 *Id.* at 774.

175 *Id.* at 767.

176 *Id.* at 769.

177 *Id.*

"explain[ ] the precise biomechanical processes by which her condition arose."[178]

Williams elucidates how fat workers might be able to make out similar disability-discrimination claims. Although *Williams* reflects only one circuit court's thinking, it nevertheless outlines how future courts of appeals may evaluate nontraditional disability-discrimination claims in light of new medical knowledge. The Fourth Circuit majority relied upon three facts in determining that gender dysphoria is a disability: (1) medical practitioners treat gender dysphoria as a diagnosable disorder;[179] (2) gender dysphoria involves "disabling symptoms"[180] like distress rather than simply describing the condition of being transgender; and (3) gender dysphoria possibly has a biological cause.[181] As Part IV will illuminate, the medical community treats obesity analogously on all three grounds. Obesity is classified as a disease, meaning it involves an "impairment of the normal functioning of some aspect of the body," "characteristic signs or symptoms," and "harm or morbidity."[182] Obesity is also more than the condition of being fat; it is a state of metabolic dysregulation and hormonal dysfunction resulting in symptoms that include joint pain, immobility, sleep apnea, and low self-esteem.[183] Finally, medical research suggests the obesity has a physiological cause and is not simply a "consequence of a chosen lifestyle exemplified by overeating and/or inactivity."[184]

IV. OBESITY SHOULD BE CONSIDERED A QUALIFYING DISABILITY

The medical and cultural understanding of obesity is changing, and it is time for the courts to catch up. At the same time that doctors were learning more about the origins and symptoms of gender dysphoria, the medical understanding of obesity was also evolving. Recent studies have revealed the significant role that genetics and other biological factors play in developing obesity. While there is no monolithic explanation of what causes obesity, scientific research reveals that whether one is or will become

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178 *Williams*, 45 F.4th at 771–72.

179 *Id.* at 768–69.

180 *Id.* at 768.

181 *Id.* at 771.

182 *Resolution 420: Recognition of Obesity as a Disease*, AM. MED. ASS'N HOUSE OF DELEGATES 1 (June 2013), https://perma.cc/SU98-5BY3 [hereinafter *AMA Resolution*].

183 *Id.*

184 *Id.* at 2.

obese is significantly influenced by biology. These biological contributors to obesity cut against the strong social perception that being overweight is voluntary and driven by individual choices regarding diet and exercise.

These changes in medical understanding are beginning to shift the cultural understanding of obesity too. Much popular commentary over the last few years has analyzed the influence of prescription drugs Ozempic and Wegovy on cultural ideas of fatness and thinness.[185] Some commentators are hopeful that the drugs' popularity could help society see "that metabolism and appetite are biological facts, not moral choices."[186] Some users of Ozempic have remarked that before taking the drug, they had never experienced the naturally occurring brain signals that remind a person to stop eating.[187] Accounts like these underscore the prominent role that neural and metabolic processes play in obesity and challenge traditional societal conceptions that obesity is caused by simple gluttony and failure of willpower.

Exploring what medical evidence reveals about the nature of obesity should impact courts' analysis and lead courts to recognize obesity as a qualifying disability. This Part proceeds in three sections. The first Section considers how the framework laid out in *Williams* offers a path by which the circuits can reevaluate their outdated analyses of obesity. Applying the current medical understanding of obesity to the *Williams* factors compels the conclusion that obesity should be considered a disability under the ADA. The subsequent Section briefly summarizes the reasons why obesity should be considered a disability under the existing legal standard. The final Section concludes by considering the implications of recognizing obesity as an ADA disability and rebuts

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[185] *See generally, e.g.*, Helen Lewis, *The Other Ozempic Revolution*, THE ATLANTIC (Nov. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/11/ozempic-wegovy-social-revolution-weight-loss/676002/; Tressie McMillan Cottom, Opinion, *Ozempic Can't Fix What Our Culture Has Broken*, N.Y. TIMES (Oct. 9, 2023), https://www.nytimes.com/2023/10/09/opinion/ozempic-obesity-fat-diabetes.html; Ruth Marcus, *I Lost 40 Pounds on Ozempic. But I'm Left with Even More Questions.*, WASH. POST (June 6, 2023), https://www.washingtonpost.com/opinions/2023/06/06/ozempic-weight-loss-ruth-marcus/. Although outside the scope of this Comment, many commentators (including those aforementioned) have explored the dark side of Ozempic and other weight-loss drugs. *See, e.g.*, Aubrey Gordon & Michael Hobbs, *Ozempic*, MAINT. PHASE (Oct. 10, 2023), https://perma.cc/6U2M-86T5.

[186] Jia Tolentino, *Will the Ozempic Era Change How We Think About Being Fat and Being Thin?*, NEW YORKER (Mar. 20, 2023), https://www.newyorker.com/magazine/2023/03/27/will-the-ozempic-era-change-how-we-think-about-being-fat-and-being-thin.

[187] *Id.*

common counterarguments against extending the ADA's protections to obese workers.

A. Analyzing Obesity Under the *Williams* Factors

Just as courts have become increasingly willing to recognize gender dysphoria as a disability, so too should courts more willingly recognize obesity as a disability. The same factors that allowed the Fourth Circuit to conclude in *Williams* that gender dysphoria is a protected disability are also present in the obesity context: (1) medical practitioners treat obesity as a diagnosable disorder; (2) obesity is associated with disabling symptoms; and (3) obesity possibly has a biological cause. These commonalities between obesity and gender dysphoria help illuminate why recognizing obesity as a disability is consistent with the ADA's text and purpose.

Applying the *Williams* factors to obesity demonstrates that obesity should be treated as a disability under the ADA. For too long, the physiological-cause requirement unduly imposed by the Second, Sixth, Seventh, and Eighth Circuits has allowed employers to legally fire or refuse to hire or promote workers for being fat. As a result, these four courts have improperly cut short the intended reach of the ADA and ADAAA. Circuits deciding as a matter of first impression whether obesity is a disability under the ADA should analogize to the reasoning in *Williams* and hold that obesity is a qualifying disability. Such a holding would allow both workers who are actually disabled by their obesity, as well as workers who are perceived as obese by their employers but who are not substantially limited by their obesity, to seek legal protection if they are discriminated against on the basis of their weight.

The four circuits that have adopted the physiological-cause requirement do not necessarily have to overrule their past precedents to comport with the reasoning in *Williams*. Instead, the Second, Sixth, Seventh, and Eighth Circuits should hold that obese plaintiffs automatically meet the physiological-cause requirement (and thus qualify as having a physical impairment) because obesity is per se related to, and in part caused by, a physiological disorder.[188] Updating the law in this way would bring together the latest medical understanding of obesity and the ADAAA's vision for broader disability protection to provide fat workers the basic legal protection they deserve.

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[188] *See infra* Part IV.A.3.

1. Obesity as a diagnosable disorder.

Just as the APA's recognition of gender dysphoria as a mental disorder made the Fourth Circuit more willing to recognize the condition as an ADA-protected disability,[189] so too should the AMA's recognition of obesity as a chronic disease push courts to recognize obesity as a qualifying disability under the ADA.

The AMA lagged behind several other medical and governmental organizations that had recognized obesity as a disease prior to 2013. In 1998, the National Institutes of Health (NIH) published clinical guidelines describing obesity as a complex multifactorial chronic disease.[190] In 2002, the Internal Revenue Service (IRS) decided that expenses incurred for treating obesity would qualify as deductible medical expenses.[191] Later that same year, the Social Security Administration (SSA) decided obesity would count as a valid medical source of impairment for Social Security Disability claims.[192]

The AMA first classified obesity as a chronic disease more than ten years later, in 2013.[193] According to the AMA, a "disease" is characterized by "an impairment of the normal functioning of some aspect of the body" that results in "harm or morbidity."[194] This definition resembles the ADA's definition of disability, which covers impairments that substantially limit the operation of a major bodily function as compared to most people in the general population.[195] In its 2013 resolution, the AMA House of Delegates explained that, congruent with these disease criteria, "there is now an overabundance of clinical evidence to identify obesity as a multi-metabolic and hormonal disease state."[196] It also emphasized its intention to combat the stigma that obesity results from simply overeating and not working out.[197] The resolution stated, "[t]he suggestion that obesity is not a disease but rather a conse-

189 *See Williams*, 45 F.4th at 769.

190 Theodore K. Kyle, Emily J. Dhurandhar & David B. Allison, *Regarding Obesity as a Disease: Evolving Policies and Their Implications*, 45 ENDOCRINOLOGY & METABOLISM CLINICS N. AM. 511, 513 (2016).

191 *Id.*

192 *Id.*

193 Pollack, *supra* note 21. For a summary of the public reaction to the AMA Resolution, see Kyle et al., *supra* note 190, at 514–15.

194 *AMA Resolution*, *supra* note 182, at 1.

195 *See supra* text accompanying notes 66–68.

196 *AMA Resolution*, *supra* note 182, at 1.

197 Pollack, *supra* note 21.

quence of a chosen lifestyle exemplified by overeating and/or inactivity is equivalent to suggesting that lung cancer is not a disease because it was brought about by individual choice to smoke cigarettes."[198] Because the AMA, NIH, IRS, and SSA uniformly agree that obesity is not a failure of responsibility but rather a complex disease state, courts should treat their consensus as persuasive evidence that obesity also meets the ADA's definition of disability.

2. Obesity's disabling symptoms.

Obesity is a disorder, not a status, and involves disabling symptoms. The Fourth Circuit finds it persuasive that gender dysphoria is a diagnosable disorder associated with disabling symptoms,[199] and medical research confirms that obesity belongs in the same category. Obesity is distinct from physical characteristics that are also genetically influenced such as eye color, hair color, left-handedness, or height because there is stronger evidence that obesity adversely affects one's body systems.[200]

The negative effects of obesity are well known. Obesity is associated with worse lung function and decreased lung volume.[201] Self-reported rates of shortness of breath and wheezing at rest and upon exertion also tend to be higher in obese individuals compared to lean individuals.[202] Excess weight also forces the heart to do more work, which can negatively affect the heart's function and structure.[203] Individuals with obesity also tend to suffer from joint pain, immobility, and sleep apnea.[204] Although not every obese person will experience these symptoms, the fact that obesity in general adversely affects the body is enough to show that obesity satisfies the *Williams* court's "disabling symptoms" prong.

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198 *AMA Resolution*, *supra* note 182, at 1.

199 *Williams*, 45 F.4th at 768.

200 *Compare Health Risks of Overweight & Obesity*, NAT'L INST. DIABETES AND DIGESTIVE AND KIDNEY DISEASES (May 2023), https://perma.cc/8NUU-NWGG, *with* Y.P. Zverev & J. Chisi, *Is Handedness Related to Health Status?*, 16 MALAWI MED J. 14 (2004), *and* Peter Frost, Karel Kleisner & Jaroslav Flegr, *Health Status by Gender, Hair Color, and Eye Color: Red-haired Women Are the Most Divergent*, 12 PLOS ONE 1 (2017).

201 Christopher Zammit, Helen Liddicoat, Ian Moonsie & Himender Makker, *Obesity and Respiratory Diseases*, 3 INT'L J. GEN. MED. 335, 336 (2010).

202 *Id.* at 337.

203 *See e.g.*, M. Javed Ashraf & Paramdeep Baweja, *Obesity: The 'Huge' Problem in Cardiovascular Diseases*, 110 MO. MED. 499 (2013).

204 *AMA Resolution*, *supra* note 182, at 1.

3. Obesity's biological origins.

Obesity is not simply or primarily a lifestyle choice—it has physiological roots. In *Williams*, the Fourth Circuit relied on the fact that "medical and scientific research identif[y] possible physical bases of gender dysphoria"[205] to support its conclusion, in the alternative, that gender dysphoria is not a "gender identity disorder[ ] not resulting from [a] physical impairment[ ]."[206] Thus the court recognized that general medical evidence is sufficient to show a physical cause without the plaintiff needing to "explain[ ] the precise biomechanical processes by which her condition arose."[207] By parallel reasoning, obesity should also be considered an impairment in the circuits that require plaintiffs to show that their obesity results from an underlying physiological disorder or condition.

The medical understanding of obesity is similar to the understanding of gender dysphoria: researchers cannot say definitively what causes the disorder, but the importance of biological influences is clear.[208] Genetics is one mechanism that appears to influence obesity, and recent scientific studies have shown that genetic differences can help explain individual variation in body weight.[209] The pace of discovery started off slowly but has been accelerating with the advent of genome-wide association studies (GWAS).[210] In the context of obesity studies, GWAS compare the genomes of normal weight participants and obese participants and screens the data for associations between genetic variants and obesity.[211] Between 2007 and 2022, nearly sixty GWAS identified more than one thousand independent genetic loci associated with obesity traits.[212] These studies reveal links between obesity and genetic variants impacting the parts of the brain responsible

[205] *Williams*, 45 F.4th at 771.

[206] 42 U.S.C. § 12211(b)(1).

[207] *Williams*, 45 F.4th at 772.

[208] *Compare* Julia Bulluz, *Scientists Don't Agree on What Causes Obesity, but They Know What Doesn't*, N.Y. TIMES (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/opinion/obesity-cause.html, *with* Ferdinand Boucher & Tudor Chinnah, *Gender Dysphoria: A Review Investigating the Relationship Between Genetic Influences and Brain Development*, 11 ADOLESCENT HEALTH, MED. & THERAPEUTICS 89, 97 (2020).

[209] *See, e.g.*, El-Sayed Moustafa & Froguel, *supra* note 149, at 408 (discussing studies whose "findings have provided wider recognition of the genetic contributors to obesity").

[210] *See id.* at 404–06; Ruth J. F. Loos & Giles S. H. Yeo, *The Genetics of Obesity: From Discovery to Biology*, 23 NATURE REVS. GENETICS 120, 122 (2022).

[211] Loos & Giles, *supra* note 210, at 122–23.

[212] *Id.* at 122.

for appetite regulation and reward seeking.[213] The identification of obesity-associated genetic variants has helped "draw[ ] a somewhat unexpected picture of obesity as a disorder driven largely by . . . dysregulation of satiety signals at the neurological level."[214]

Obesity also appears to be related to hormone function. The hormone leptin regulates the balance between calories consumed and calories burned in order to maintain the body's normal weight over time.[215] Weight-loss drugs like Ozempic work by mimicking the feeling of fullness that leptin produces to naturally tell a person when to stop eating.[216] Having obesity results in high levels of leptin, which can cause leptin resistance.[217] People with leptin resistance are less sensitive to leptin, which interferes with the sensation of satiety and causes a person to eat more even when they already have sufficient fat stores.[218] Leptin resistance can also cause a body to enter starvation mode, causing the brain to slow down one's metabolism to save energy and burn fewer calories.[219] Both of these effects can lead to additional weight gain.[220]

B. Obesity Should Be Considered a Disability Under the ADA Definition

Applying the *Williams* framework for determining whether a medical condition qualifies as an ADA-protected disability presents one model by which future courts could conclude that obesity also qualifies as a disability. To the extent *Williams* may not provide a completely comprehensive framework for the analysis,[221] however, one can also argue that recognizing obesity as a disability is consistent with the text of the ADA and the EEOC's implementing regulations. That is what this Section aims to do.

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213 *Id.* at 127; *see also* J. ERIC OLIVER, FAT POLITICS: THE REAL STORY BEHIND AMERICA'S OBESITY EPIDEMIC 101 (2006) ("[G]enes not only determine our natural weight range, but they also determine our energy levels, feelings of hunger and satiation, and the ways our bodies absorb sugar and fat.").

214 El-Sayed Moustafa & Froguel, *supra* note 149, at 408.

215 *Leptin & Leptin Resistance*, CLEVELAND CLINIC (Feb. 23, 2022), https://perma.cc/Z8QJ-BDZ6.

216 Tolentino, *supra* note 186.

217 *Leptin & Leptin Resistance*, *supra* note 215.

218 *Id.*

219 *Id.*

220 *Id.*

221 *See* Kincaid v. Williams, 143 S. Ct. 2414, 2417–18 (2023) (Alito, J., dissenting from the denial of certiorari) (opining that "several aspects of the Fourth Circuit's reasoning are troubling," including the court's inattention to the ADA's catch-all category and its "uncharitable" interpretation of the relevant legislative history).

People with obesity should qualify as disabled under the ADA because obesity meets the statutory definition of a "disability." Depending on one's obesity symptoms, an obese person may qualify as either actually disabled by "having a physical [ ] impairment that substantially limits one or more major life activities"[222] or regarded as disabled due to "an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[223] It is clear that obesity qualifies as a "physical impairment" within the meaning of the ADA. Obesity meets the EEOC's regulatory definition of impairment because medical research confirms that obesity is a "physiological disorder" that "affect[s] one or more body systems," such as the neurological, musculoskeletal, respiratory, cardiovascular, and/or circulatory systems.[224] Recognizing obesity as an impairment is not wholly without precedent. Citing relevant medical evidence, the Supreme Court of Washington decided in 2019 that obesity always qualifies as an impairment under the state's disability antidiscrimination statute.[225] The court specifically relied on the AMA's recognition of obesity as a disease as well as a position statement by the American Association of Clinic Endocrinologists that described obesity as an "altered physiological and metabolic state, with environmental, genetic, and hormonal determinants."[226] The court also relied on several medical studies cited by amici and ultimately concluded that "obesity is not merely associated with other health problems" but instead is itself a disorder that "inherently affects one or more body systems."[227]

Some scholars have suggested that only weights in the most extreme obesity category—Class III obesity or what is sometimes called severe or morbid obesity—should automatically qualify as an impairment.[228] However, the science does not support the requirement that plaintiffs make a heightened showing of severe or

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[222] 42 U.S.C. § 12102(1).

[223] *Id.* § 12102(3)(A).

[224] 29 C.F.R. § 1630.2(h).

[225] *See* Taylor v. Burlington N. R.R. Holdings, Inc., 444 P.3d 606, 608 (Wash. 2019). The definition of "impairment" under the Washington Law Against Discrimination is nearly identical to the EEOC's regulations defining impairment under the ADA. *Compare* Wash. Rev. Code § 49.60.040(7)(c)(i) (2024), *with* 29 C.F.R. § 1630.2(h).

[226] *Taylor*, 444 P.3d at 613 (citing Jeffrey I. Mechanick et al., *American Association of Clinical Endocrinologists' Position Statement on Obesity and Obesity Medicine*, 18 ENDOCRINE PRAC. 642, 644 (2012)).

[227] *Id.* at 615.

[228] Monahan et al., *supra* note 39, at 539 n.6; *see also* Christine L. Kuss, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under*

morbid obesity before their weight qualifies as an impairment because mild or moderate obesity also adversely affects major body systems. The BMI categories—which progress from underweight to healthy weight to overweight to obese—also support understanding obesity as a per se impairment because obesity categorically falls outside the healthy or normal weight range as defined in the medical context.[229] Therefore, all obese BMIs should qualify as impairments.[230]

Obesity should also be considered an impairment in the four circuits that require plaintiffs to show that their obesity results from an underlying physiological disorder or condition. Medical research shows that the accumulation of substantial excess fat is related to metabolic and hormonal irregularities,[231] which suggests that obesity is indeed related to a physiological disorder. Because obesity in general has a physiological cause, courts should not require plaintiffs to identify the specific cause of their own obesity. Existing medical testing is likely not precise enough to determine the cause of obesity at the individual level. As previously mentioned, any tests that do exist may not be widely available outside of research settings and may be prohibitively costly for most workers to access.[232] Fat people should not be penalized because technology is insufficiently advanced or accessible to meet the courts' overly demanding standard which applies to obesity alone.

C. Implications of Recognizing Obesity as a Disability

It is time for federal courts to grant obese plaintiffs the ADA's protection. Recognizing ADA claims that allege obesity as an actual or perceived disability will provide legal recourse to fat workers who are not hired, not promoted, or fired on account of their weight. Plaintiffs who can show that their obesity substantially

the Americans with Disabilities Act, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 568 (1996) ("[M]orbid obesity should, and moderate and mild obesity can, be entitled to disability status under the ADA.").

229 *See Defining Adult Overweight & Obesity*, *supra* note 7.

230 This does not mean that obesity will be a disability in every circumstance; a plaintiff who asserts that their obesity is an ADA-protected disability will still have the burden to show that their weight substantially limited a major life activity or was perceived as a disability by their employer.

231 *See, e.g.*, *AMA Resolution*, *supra* note 182 (describing obesity as a "multi-metabolic and hormonal disease state").

232 *See supra* note 149 and accompanying text.

limits the performance of a major life activity can also seek reasonable accommodations.

Recognizing obesity as an impairment will also lead to more just outcomes for obese workers. Many conditions that disproportionately affect people with obesity are already recognized impairments under the ADAAA. For example, people with obese BMIs face an increased risk of developing Type 2 diabetes, coronary artery disease, depression, ovulatory infertility, asthma, obstructive sleep apnea, Alzheimer's disease, and arthritis.[233] The presence of these comorbidities should be treated as evidence that obesity is a physical impairment itself. It is also important to recognize obesity as an impairment because in the vast majority of cases where an obese plaintiff with one of these additional conditions faces discrimination, that discrimination will be on the basis of the plaintiff's weight or body size—not their heart disease or other diagnosis. Body size is directly observable whereas most of obesity's comorbidities, such as heart disease, are usually not. Employers cannot discriminate on the basis of a condition that they do not know an employee has, and most employers are unlikely to be aware of an obese worker's other invisible health conditions.[234] Therefore, plaintiffs often will not be able to show that their diabetes or other comorbidity was the but-for cause of their discriminatory treatment, and they will thus lose their ADA claims—even when the plaintiffs were discriminated against because of their weight. When obesity is properly treated as an impairment, however, plaintiffs will have a cause of action and be able to litigate their weight-discrimination claims. Under the "regarded as" prong, obese plaintiffs who do not experience disabling symptoms from their obesity will likewise receive legal protection, regardless of whether the employer subjectively thought the plaintiff's body size substantially limited the performance of major life activities. Obese victims of weight discrimination will then have a chance to seek remedies, including monetary damages (e.g., backpay, front pay, compensatory damages, punitive damages, and attorneys' fees and costs); injunctive relief (e.g., reinstatement, reasonable accommodations, and reference letters); or both.

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[233] *Obesity Consequences: Health Risks*, HARV. T.H. CHAN SCH. PUB. HEALTH, https://perma.cc/H3EY-DYU7.

[234] Employees may, in some cases, have to disclose health conditions to their employer if their position requires a medical screening. Such circumstances are governed by 42 U.S.C. § 12112(d), which includes the requirement that the medical examination be job-related and consistent with business necessity.

Still, some worry that recognizing obesity as a disability will extend the ADA too far by recognizing that approximately 40% of adults in the United States have an ADA impairment—which the Seventh Circuit has called an "unavoidable, nonrealistic result."[235] As the reasoning goes, this would risk overextending judicial resources by opening the floodgates to more litigation.[236] Similarly, one may worry that recognizing obesity as a disability will lead to a slippery slope that may open up the ADA to covering other common chronic conditions, like high blood pressure or high cholesterol, that the medical community recognizes as distinct diagnoses.

Although it may be pragmatic for courts to curtail the ADA's coverage to ensure operational efficiency, the statute does not afford judges the discretion to make that policy decision themselves. Nowhere does the ADA suggest that a disability must be uncommon to qualify for coverage. The fact that obesity affects nearly 40% of adults in the United States does not mean obesity is any less of a physical impairment affecting one or more body systems. Courts have already recognized that conditions even more prevalent than obesity, such as hypertension, are protected disabilities under the ADA.[237] Indeed, the ADAAA expressly states that the definition of disability should be construed liberally in favor of broad coverage.[238] There is therefore little reason to atextually narrow the ADA's reach for fear that too many people would then fall into the protected class of the disabled.[239]

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[235] *Richardson*, 926 F.3d at 891.

[236] There is a secondary risk that recognizing obesity as a disability will be impractical for employers because it would potentially require them to provide reasonable accommodations to a sizeable proportion of their workforce. This counterargument implicates the ADA's reasonable accommodations provisions, which are largely outside the scope of this Comment. However, it is worth briefly mentioning that the ADA imposes several constraints on who is entitled to reasonable accommodations. Obese workers requesting accommodations would have to prove that they are actually disabled by their obesity; "perceived" disabilities do not qualify for reasonable accommodations. 42 U.S.C. § 12112(b)(5)(a). The employer can oppose providing accommodations by (1) showing that the worker has not met his burden to prove that the requested accommodation is reasonable under 42 U.S.C. § 12111(9) and that he is capable of performing the essential functions of the job with or without reasonable accommodation under 42 U.S.C. § 12111(8), or (2) demonstrating that providing an accommodation to the obese worker would impose an "undue hardship" on the employer's business operations under 42 U.S.C. § 12111(10).

[237] *See, e.g.*, Gogos v. AMS Mech. Sys., Inc., 737 F.3d 1170, 1173 (7th Cir. 2013).

[238] 42 U.S.C. § 12102(4)(A).

[239] There is also evidence that recognizing obesity as a disability will not overwhelm the court system. For example, the First Circuit already recognizes obesity as a disability in some circumstances, and its composite district courts have only adjudicated three additional cases between 1993 and 2018 in which obesity was the primary claimed disability in an ADA employment lawsuit. Warden, *supra* note 60, at 183 tbl.1. The six circuits that

Congress also knows how to explicitly exclude common conditions from the ADA's coverage when it wants to. The ADAAA included a specific carve-out for nearsightedness or farsightedness; if these conditions can be corrected with ordinary eyeglasses or corrective lenses, they will not be considered a qualifying vision impairment.[240] If Congress wanted to exclude obesity from coverage, it could have said so when it amended the ADA.

Others fear that classifying obesity as a disability will be unnecessarily overinclusive. It may strike one as unfair that individuals with obese BMIs who experience no physical limitations as a result of their weight will be entitled to the same legal protection from discrimination as those who suffer from significantly capability-restricting disabilities like blindness. Similarly, one may be leery that a very muscular person with a BMI high enough to count as obese will receive the law's protection despite being the picture of health.

However, these objections overlook the ADA's core limiting principle: discriminatory intent. Congress chose to cabin the ADA's reach by requiring plaintiffs to show that their disability was the but-for cause of an adverse employment action taken against them. To receive the ADA's protection, obese plaintiffs must plausibly allege that their employer discriminated against them *because they were obese*. When a plaintiff cannot show that their obesity was outcome determinative—in other words, the straw that broke the camel's back and made a difference in the employer's adverse decision—the plaintiff will fail to make the requisite showing of discriminatory intent. The adverse employment action requirement may also function as a limit on the reach of weight-discrimination claims brought under the ADA. Employment actions that can be challenged under the ADA include (but are not limited to) termination, failure to promote, and failure to hire.[241] Changes in title or reporting relationships, negative performance review without a demotion or change in pay, suspension

have yet to decide whether obesity constitutes an impairment or disability under the ADA also did not see an influx of ADA weight-discrimination cases in the same period. *Id.* One plausible reading of this trend is that many employers are complying with the ADAAA's expanded reach and assuming that they should not discriminate on the basis of weight; the outliers who do continue to discriminate against fat workers therefore should not be shielded from liability just because most entities are complying.

[240] *See* 42 U.S.C. § 12102(4)(E).

[241] *See* Barnes v. Nationwide Mut. Ins. Co., 598 F. App'x 86, 90 (3d Cir. 2015); 42 U.S.C. § 2000e-2(a)(1).

with pay, and general unpleasantness are generally not considered adverse employment actions.[242] Claims that fail to plausibly allege discriminatory intent or an adverse employment action can be quickly disposed of at the motion to dismiss or summary judgment stage.

Additionally, employers can successfully defend against weight-discrimination claims in instances where a nonobese BMI is required to perform the essential functions of the position.[243] Although the ADA does not contain a "bona fide occupational qualification" defense similar to that in Title VII, one must be capable of performing the essential functions of the employment position that one holds or desires, with or without reasonable accommodation, in order to be a "qualified individual" under the ADA.[244] Employers may also impose employee weight guidelines for safety reasons—for example, an airline may have a maximum weight policy for flight attendants—if the employer can show a significant risk of substantial harm that cannot be reduced or eliminated through reasonable accommodation.[245]

Another potential concern is that recognizing obesity as a disability would incentivize or encourage people to be fat.[246] But this

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[242] The threshold question is whether such actions count as a "term[ ], condition[ ], [or] privilege of employment" under 42 U.S.C. § 12112. Many challenged actions will fail to meet this bar. If the action is found to affect a term or condition of employment, the court will then ask whether the action resulted in some disadvantageous change or "some harm" to the plaintiff. Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024). *Muldrow* thus leaves the door open to a category of de minimis harms that could not support finding an ADA injury, in part because they are too slight to support an inference of intentional discrimination. *Id.* at 976. This two-step framework provides an essential guardrail for keeping many frivolous lawsuits out of courts.

[243] One of the elements of a disability-discrimination claim is that the plaintiff is "qualified" for the relevant job. *See* 42 U.S.C. § 12112(a). Under 42 U.S.C. § 12111(8), a qualified individual is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Section 12111(8) instructs courts to consider the employer's judgment as to what functions of a job are essential.

[244] *See id.* § 12111(8).

[245] While reasonable accommodations are outside the scope of this Comment, it is clear that the severity of one's actual disability is relevant to the analysis of what accommodations would be reasonable for an employer to provide a disabled employee under the ADA.

[246] *E.g.*, NATALIE BOERO, KILLER FAT: MEDIA, MEDICINE, AND MORALS IN THE AMERICAN "OBESITY EPIDEMIC" 40 (2012) (acknowledging "fears that anything that accepts larger people as normal will encourage further increases in weight and spread the obesity epidemic"). Such fears are also often expressed in coded language. *See, e.g.*, Lee Stoner & Jon Cornwall, *Did the American Medical Association Make the Correct Decision Classifying Obesity as a Disease?*, 7 AUSTRALIAN MED. J. 462, 463 (2014) ("Arguably of utmost importance, labelling obesity as a disease may foster a culture of personal irresponsibility, whereby individuals are absolved from practicing healthy lifestyle behaviours.").

fear is illogical. Fat people already face immense societal pressure to be thin, and many of the social costs for being fat such will not be reached by antidiscrimination law.[247] Not only are fat people subjected to shaming and ridicule because of their body size, they are also inundated with a constant stream of advertised weight-loss solutions. And it is profitable to tell consumers to change their bodies: the weight-management market in the United States alone is a $32.6 billion industry that is forecast to grow at a 10% compounded annual growth rate from 2023 to 2030.[248] We should be far more worried about the expressive effects of our thin-obsessed culture rather than the message sent by recognizing obesity as an ADA-qualifying disability. Assertions that there should be high legal barriers for the obese to challenge workplace mistreatment simply "highlight[ ] the need to challenge anti-fat prejudices" and protect the obese from employment discrimination.[249]

On the other end of the spectrum, some fat-acceptance advocates believe that disability law is not the appropriate vehicle for combatting weight discrimination.[250] Some are concerned that classifying obesity as a disability will further pathologize larger bodies and reinforce damaging stereotypes that there is something inherently wrong or unnatural about being fat.[251] The transgender community was also divided over whether their legal advocacy strategy should embrace disability arguments.[252] Yet both groups' hesitance to accept disability-related arguments subscribes to a normative belief that disabled bodies are bad bodies. This ableist conception has been termed the medical model of disability. Professor Alison Kafer has described the medical model of disability as a paradigm that "frames atypical bodies and minds

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[247] *See supra* text accompanying notes 3–5 (discussing manifestations of anti-fat bias); Monahan et al., *supra* note 39, at 540–43.

[248] GRAND VIEW RESEARCH, WEIGHT MANAGEMENT MARKET SIZE, SHARE & TRENDS ANALYSIS REPORT (2023).

[249] Monahan et al., *supra* note 39, at 558.

[250] Amici National Association of Manufacturers et al. made a similar argument in *Taylor v. Burlington Northern Railroad Holdings, Inc.*, arguing that obesity should not be recognized as an impairment under Washington's state antidiscrimination law (WLAD) because it would have a stigmatizing effect on obese individuals. 444 P.3d at 616. The court, however, rejected this, noting, "It is difficult to see how protection under the WLAD will produce more psychological harm than is caused by companies freely and openly refusing to hire people because of their obesity." *Id.*

[251] *Cf.* Vade & Solovay, *supra* note 156, at 167–69.

[252] *Id.* at 172–73.

as deviant, pathological, and defective, best understood and addressed in medical terms."[253] Under this approach, "[s]olving the problem of disability [ ] means correcting, normalizing, or eliminating the pathological individual."[254]

But the medical model is not the only way to conceptualize disability. The alternative—a social model of disability—seeks to resolve some of the tension at the heart of disability-discrimination claims. The social model of disability reframes disability as primarily a social condition: people are disabled by society's discriminatory reaction to their medical conditions, not by the functional limitations imposed by the medical conditions themselves.[255] The ADA amendments explicitly endorsed and codified this approach by stating the following finding:

> [I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.[256]

Accepting the label of disability, therefore, does not require accepting and internalizing the social stigma that comes along with it. Some courts have started acknowledging this approach already, with the Third Circuit holding that a plaintiff can make out a perceived disability claim if he or she has "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."[257] By focusing on how the perception of obesity stigmatizes large-bodied individuals, advocates in the fat community can gain greater legal protections under the ADA's "regarded as" prong without conceding that obesity impairs or somehow weakens fat people.

CONCLUSION

Weight discrimination is a persistent and pernicious problem in the United States. Millions are impacted by anti-fat bias every year and suffer its attendant economic consequences. The recent

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253 ALISON KAFER, FEMINIST, QUEER, CRIP 5 (2013).

254 *Id.*

255 Barry & Levi, *supra* note 58, at 27.

256 Pub. L. No. 110-325, 122 Stat. 3553 (2008).

257 Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F. App'x 50, 53 (3d Cir. 2012).

rise of Ozempic and other drugs touting "miraculous" weight-loss results could worsen the problem by promising a future without fat.[258] Yet, the reality is that fat people are not going away—and they deserve legal protection.

For the vast majority of fat people who live outside the few specific jurisdictions that ban weight discrimination, the ADA is likely the best model for combatting weight discrimination. When an individual is fired or not hired because of their obesity, that individual can challenge the employer's action on the grounds that the employer discriminated on the basis of an actual or perceived disability of obesity. Medical research confirms that courts should treat obesity as a per se impairment because obesity is related to a host of biological contributors—satisfying the "physiological disorder" requirement—and impacts one or more body systems, including the circulatory and respiratory functions. The medical community has also recognized obesity as a chronic disease for over a decade. The parallels between efforts to recognize obesity and gender dysphoria as qualifying disabilities highlight courts' recent willingness to extend the ADA's protection to highly stigmatized clinical conditions when a diagnosis has gained credibility in the medical community and evidence suggests that the condition has a physiological cause.

Still, the ADA falls short of supplying a completely satisfying legal answer to the problem of weight discrimination. Disability-discrimination claims will not cover everyone who experiences weight discrimination—only those whose weights are medically categorized as obese. It can also only protect individuals from employment discrimination and not the myriad other harms incidental to anti-fat bias. Nevertheless, the ADA can be a useful vehicle for protecting fat workers until Congress passes federal legislation outlawing weight discrimination nationally. Absent such watershed legislation, however, states and cities can also play an important role in safeguarding fat workers' rights by passing their own anti-weight-discrimination ordinances. Equity demands that workers of all shapes and sizes be given equal employment opportunities. For too long, fat people have been forced to bear the burden of society's baseless myths and stereotypes. Recognizing obesity as a qualifying disability under the ADA

[258] *E.g.*, Fady Shanouda & Michael Orsini, *Ozempic, the 'Miracle Drug,' and the Harmful Idea of a Future Without Fat*, THE CONVERSATION (Aug. 20, 2023), https://perma.cc/AQB7-RGBP.

would affirm obese workers' right to be free from disabling prejudice and could finally tip the scales of justice closer to equality.