

ADA OBESITY IMPAIRMENT MUST BE PHYSIOLOGICAL

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Under the Americans with Disabilities Act (ADA), employers are prohibited from discriminating against any qualified "individual with a disability." The ADA defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities of the individual." 42 U.S.C. § 12102(2)(A). However, individuals who do not actually have a substantially limiting impairment are also covered under the statute if their employer "regards" them as being disabled. 42 U.S.C. § 12102(2)(C).

An "impairment," for purposes of the ADA, is any "*physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems.*" 29 C.F.R. § 1630.2(h)(1). (*Emphasis added.*) Accordingly, merely being overweight, in and of itself, is generally not considered an ADA impairment. Even morbid obesity (i.e., body weight more than 100% over the norm) is not an ADA impairment unless it is the result of a physiological condition. Further, to be considered an ADA impairment, the physiological condition which causes the obesity must substantially limit major life activities. ADA regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." See: *Equal Employment Opportunity Commission v. Watkins Motor Lines, Inc.* 463 F.3d 436 (6th Cir. 2006)

LOOK BETTER WORK BETTER

In the case of *Ivey v. District of Columbia* (D.C. 06/05/2008), plaintiff Shirley Ivey sued the District of Columbia alleging disability-related harassment and retaliation in the workplace because of her weight. Ivey had been a District of Columbia government employee since 1970. She began her tenure at the Department of Consumer and Regulatory Affairs (DCRA) in 1995 as a contact representative in the Building and Land Regulation Administration. Ivey was consistently reviewed at an overall satisfactory level, and none of her supervisors expressed serious issues with the quality or quantity of her work, with the exception of Lennox Douglas, who became her immediate supervisor in 1997.

Between 1995 and 2000, Ivey gained 150 pounds; this weight gain limited her ability to walk, breathe, and work. During 1997 and 1998, Ivey alleged that Douglas repeatedly told her that she would do a better job if she were more attractive, and that he would stop bothering her if she lost some weight. Further, Douglas would explain to Ivey that he would like her better if she looked like her attractive coworker. He consistently made "fat girl jokes," and told her that she could be his girlfriend if she lost weight.

In June 1998, Ivey complained to Dwight Reeves, the Acting Director of the DCRA, about Douglas' behavior. She also complained to Teresa Lewis, a DCRA administrator, and other management personnel, but the harassment continued. In alleged retaliation, Ivey contended that Douglas suspended her from work on July 22, 1998, "without cause, justification, or authorization." In front of two other management employees, Ivey alleged that Douglas told her

to leave, and that if she did not, he would have her removed. Ivey balked, and Douglas "lunged" at her as the other managers restrained him.

Ivey returned to work two months later, and on or about September 10, 1998, Douglas relocated her from a private office to a storage room. Ivey alleged that in the ensuing weeks, while no one was using her former office, she was forced to work in space that was dirty, "crammed with various storage items," contaminated with foul odors from the adjacent, "largely un-serviced" restroom, and equipped with "an antiquated typewriter and a broken desk chair."

On September 15, 1998, Ivey requested a meeting with Douglas and an Equal Employment Opportunity counselor. Douglas never granted that request. On September 28, Ivey was given thirty-days notice that she was being terminated on the grounds that she had been absent without leave and that she had negligently performed her duties. She exercised her right to appeal the termination to a "Disinterested Designee." The DCRA informed the Designee that it had dismissed the charge of being absent without leave. The Designee found no cause for Ivey's termination and rejected her proposed removal on October 19, 1998.

Before the Designee rendered his decision, however, Ivey suffered what appeared to be a heart attack on October 8, 1998, and left work to be treated at a hospital. Her diagnosis was subsequently downgraded to a less serious coronary condition. She returned to work on April 29, 1999, and was informed that she was being transferred to the Occupational Professional and Licensing Administration so that she would no longer be under Douglas' supervision.

#### ADA CLAIM

On December 7, 2000, Ivey filed suit in the Superior Court against the District of Columbia on December 7, 2000, alleging violations the Americans with Disability Act, as amended (ADA), 42 U.S.C. §§ 12101-12213 (2000 & Supp. 2007). The District filed a motion for summary judgment at the close of discovery. The trial court granted the motion, determining that Ivey had not made an adequate showing of disability for her ADA claims. Ivey appealed.

On appeal, Ivey argued that the trial court had erred in holding that she had not alleged sufficient facts to proceed with her claims under the ADA. In so doing, Ivey contended that her obesity rendered her disabled.

As cited by the appeals court, a "disability" within the context of the ADA "is defined as involving an impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2 (g)(1) (2008).

A disability substantially limits a major life activity if it significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. § 1630.2 (j)(1)(ii).

Within this regulatory definition of "disability," the court noted further that major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 1630.2 (i).

As characterized by the appeals court, the trial court had granted summary judgment to the District on Ivey's ADA claims because "there was no evidence that Ivey's weight gain had a physiological cause, nor was there any allegation in the complaint that her obesity had an impact on her work." According to the appeals court, "morbid obesity" could be considered a "disability" under the ADA "when supported by testimony that it is caused by a physiological condition." In this particular instance, however, the appeals court agreed with the trial court that Ivey had not offered any evidence that "a physiological condition caused significant impairment to Ivey's ability to perform her job." As a result, the appeals court determined that Ivey's "ADA claims cannot proceed under the theory that she has a disability."

Even if she was not disabled, Ivey argued in the alternative that she could "proceed under the ADA if she was regarded as disabled by Douglas."

According to the appeals court, to establish a "regarded as disabled" claim under the ADA, Ivey would have to show that "Douglas perceived Ivey's obesity to have a negative impact on her job. In this particular instance, the appeals court found no evidence that Douglas perceived Ivey's obesity as an impairment to her work.

The closest such evidence on the record is Ivey's deposition testimony, where she alleged Douglas told her she "could do better if [she] looked better." Placed in context, this appears to refer to Ivey doing better in her working relationship with Douglas. At most, this demonstrates that Douglas felt that Ms. Ivey's obesity impaired his ability to get along with her.

As a result, the appeals court concluded that Ivey's ADA claims "cannot proceed under the theory that she was perceived to have a disability."

Finally, Ivey argued that she should be allowed to proceed with a "disability retaliation claim" under the ADA given her "good-faith belief that she was discriminated against because of a disability when she first complained to management." The appeals court rejected this argument. In so doing, the appeals court found "no indication that Ivey had a good-faith, reasonable belief that she experienced discrimination because of a disability when she initially complained to Reeves." On the contrary, the appeals court noted that Ivey's initial EEOC complaint alleged "gender-based harassment and retaliation" with no mention of disability discrimination. According to the court, Ivey added her ADA claim much later in an amended complaint. As a result, the appeals court found that Ivey herself had not "classified the discrimination as disability discrimination until well after she took the actions that led to the alleged retaliation."

Having found insufficient facts to maintain a claim under the ADA, the appeals court affirmed the trial court's summary judgment in favor of the District of Columbia with regard to Ivey's ADA claims.