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# WOMEN AND WEIGHT-BASED EMPLOYMENT DISCRIMINATION

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## I. INTRODUCTION

It is often said that overweight people are the last group against which it is acceptable to discriminate.<sup>1</sup> Sixty percent of overweight women and forty percent of overweight men describe themselves as having been discriminated against in the course of employment.<sup>2</sup> As this statistic suggests, weight-based discrimination disproportionately affects women.

Weight-based discrimination is not a problem that only affects a few women. Overweight women make up a large percentage of our population, as sixty-two percent of women aged twenty to seventy-four are overweight, and about half of those women are obese.<sup>3</sup> These overweight women endure more discriminatory conditions than overweight men.<sup>4</sup> One recent study revealed that higher body mass

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<sup>1</sup> See Rebecca Puhl and Kelly D. Brownell, *Bias, Discrimination and Obesity*, 9 OBES RES. 788, 788 (2001) ("It has been said that obese persons are the last acceptable targets of discrimination."); E.K. Daufin, *Hold the Slurs – Fat is Not a Four-Letter Word*, L.A. TIMES, Mar. 4, 1990, at M7 ("Where racist jokes have become, for the most part, fashionable only for fascists, it is still considered OK to poke fun at fat people.").

<sup>2</sup> Kari Horner, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589, 591 (2005) (citing Carolyn May McDermott, *Should Employers Be Allowed to Weigh Obesity in Employment Decisions? Cook v. Rhode Island Department of Mental Health, Retardation & Hospitals.*, 44 U. KAN. L. REV. 199 (1995)).

<sup>3</sup> American Obesity Association Women and Obesity Fact Sheet, [http://www.obesity.org/subs/fastfacts/obesity\\_women.shtml](http://www.obesity.org/subs/fastfacts/obesity_women.shtml) (last visited Jan. 30, 2007) (overweight and obesity are defined using Body Mass Index (BMI), which is a number calculated from a person's weight and height. Overweight is defined as a BMI of twenty-five or more and obese as a BMI of thirty or more).

<sup>4</sup> See, e.g., Horner, *supra* note 2, at 614-615 ("More women than men are victims of weight discrimination."); Dalton Conley and Rebecca Glauber, *Gender, Body Mass and Socioeconomic Status: Evidence from the PSID*, ADVANCES IN HEALTH ECONOMICS AND HEALTH SERVICES RESEARCH, Vol. 17, 253, 254 (2007) ("[O]besity is associated with a 17.51% reduction in women's wages . . . for men, being obese or overweight does not come with any economic penalties."); American Obesity Association Women and Obesity Fact Sheet, *supra* note 3, ("Women with obesity appear to have much more prejudice and discrimination directed against them than men with obesity."); Elizabeth E. Theran, "Free to Be Arbitrary and . . . Capricious;" *Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 157-158 (2001) ("[O]verweight women suffer more employment-related discrimination and greater wage effects than do overweight men.").

is associated with reductions in women's hourly wages, family income, and probability of marriage, with obese women experiencing a 17.51 percent reduction in wages from their standard weight counterparts.<sup>5</sup> In striking contrast, the only significant negative effect of obesity for men is that they are less likely to marry.<sup>6</sup>

Women on the whole earn less than their male counterparts. Although the gap between women and men in employment and wages is narrowing, there is still a long way to go before men and women achieve parity. Women's wages as a percentage of men's have gone from 62.3 percent in 1979 to 80.4 percent in 2004.<sup>7</sup> This still leaves a woman earning eighty cents to a man's dollar. Many argue that this remaining wage gap can be explained away with individual life choices.<sup>8</sup> However, there are also many who argue that these rationalizations are unfounded.<sup>9</sup> It is difficult to imagine that life choices account for the fact that although women make up nearly half of the workforce there are only two women in CEO positions at Fortune 500 companies and the fact that ninety of those five hundred companies don't have *any* women corporate officers.<sup>10</sup> It is also hard to blame life choices for the fact that wage gaps still exist when examining men and women who have chosen the same occupation.<sup>11</sup> Also, although many blame the wage gap on women who choose a part-time "mommy track," the gap actually widens as more overtime is worked.<sup>12</sup>

This Note proposes that weight-based discrimination, which affects nearly two-thirds of women, is part of the explanation of the wage gap problem affecting women. Recognizing weight-based discrimination should be a priority in addressing gender discrimination. This Note will examine the current methods available to address discrimination against overweight and obese women and analyze these methods. Part II will flesh out how weight-based discrimination manifests itself as a feminist issue, including the gendered perception of weight, the effect of these perceptions on women, and the intersection of weight with other systems of privilege. Part III will explore the existing federal and local avenues for addressing weight-based discrimination against women using civil rights and disability legislation. This Note will conclude in Part IV with a call to action to all feminists, both men and women, to take a hard look at weight-based discrimination

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<sup>5</sup> *Id.* at 264.

<sup>6</sup> *Id.* at 255.

<sup>7</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Women in the Labor Force: A Databook*, Table 16, <http://www.bls.gov/cps/wlf-table16-2005.pdf> (last visited Jan. 30, 2007).

<sup>8</sup> See WARREN FARRELL, *WHY MEN EARN MORE: THE STARTLING TRUTH BEHIND THE PAY GAP - AND WHAT WOMEN CAN DO ABOUT IT* (AMACOM 2005) ("The wage gap is not about corporate discrimination but about the division of labor that happens when men and women have children.").

<sup>9</sup> See Hilary M. Lips, *The Gender-Wage Gap: Debunking the Rationalizations* (2005), <http://www.womensmedia.com/new/Lips-Hilary-gender-wage-gap.shtml>.

<sup>10</sup> John Gettings and David Johnson, *Wonder Women: Profiles of Leading Female CEOs and Business Executives* (2005), <http://www.infoplease.com/spot/womenceo1.html>.

<sup>11</sup> See Lips, *supra* note 9.

<sup>12</sup> *Id.*

and creatively use existing avenues to address it as a women's issue.

## II. WEIGHT-BASED DISCRIMINATION AS A FEMINIST ISSUE

Feminists have said many times that division between women fans the flames of sexism.<sup>13</sup> For instance, racism can divide the women's movement. The question feminists ask is whether women, despite making up fifty-one percent of the population,<sup>14</sup> can ever achieve gender equality while twenty-five percent of those women also face racial discrimination,<sup>15</sup> by men as well as by other women. This intra-gender discrimination allows the existing system of sexism to perpetuate.

This same 'divide and conquer' framework applies to the weight-based discrimination. If the sixty-two percent of women who are overweight and obese are being systematically discriminated against based on their weight,<sup>16</sup> often times by other women, this discrimination has the potential to be incredibly divisive and destructive to women's overall achievement. It seems as though overweight and obese women would have an advantage in employment by their sheer numbers, but the evidence shows otherwise.<sup>17</sup> Weight-based discrimination against women in the workplace thrives on a variety of factors.

### A. Perception of Weight as It Relates to Gender

As noted above, women are more likely to be obese and overweight and obese women experience more discrimination than their male counterparts.<sup>18</sup> While simple genetics may play a role, some attribute the fact that women are more likely to be obese to the fact that women are less physically active than men and that many women have difficulty losing weight after childbirth.<sup>19</sup> Women are also held more strictly to the standards of image ideals than men, and creating a situation where failure of overweight women to meet weight expectations brings harsh judgment.<sup>20</sup>

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<sup>13</sup> For example, famed poet and social critic Audre Lorde said, "[T]he failure of academic feminists to recognize difference as a crucial strength is a failure to reach beyond the first patriarchal lesson. In our world, divide and conquer must become define and empower." Audre Lord, Remarks at the Second Sex Conference in New York City (Sept. 29, 1979), *SISTER OUTSIDER: ESSAYS AND SPEECHES*, (Ten Speed 1990), available at <http://www.poemhunter.com/quotations/famous.asp?people=Audre+Lorde>.

<sup>14</sup> RENEE SPRAGGINS, *WE THE PEOPLE: WOMEN AND MEN IN THE UNITED STATES* (U.S. Census Bureau 2005) at 2, available at <http://www.census.gov/prod/2005pubs/censr-20.pdf>.

<sup>15</sup> Approximately seventy-five percent of Americans identified themselves as white on the 2000 census, while the remaining twenty-five percent identified themselves as people of color. See *Census 2000 Brief: Overview of Race and Hispanic Origin*, (U.S. Census Bureau 2000) available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

<sup>16</sup> See *supra* note 3 and accompanying text.

<sup>17</sup> See *supra* Part I.

<sup>18</sup> See *supra* note 4 and accompanying text.

<sup>19</sup> Rodger Doyle, *Sizing Up: Roots of Obesity Epidemic Lie in the Mid-20th Century*, *SCI. AM.* (Feb. 2006).

<sup>20</sup> SONDRÁ SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 105 (2000) ("Because women have less leeway in how they are expected to look, their seeming rejection of mainstream norms of appearance and their perceived refusal to conform to the

This harsh judgment often includes moral and character judgments that are unique to weight-based discrimination.<sup>21</sup> Studies have shown that attractive people are more likely to be perceived as “generous, sociable, interesting, modest, trustworthy, and sexually responsive.”<sup>22</sup> Unlike their unattractive yet thin counterparts, overweight individuals are seen not only as lacking these characteristics, but also being responsible for the way they are perceived and for the results that follow this perception.<sup>23</sup> These moral judgments tend to be harsher on women than men, as physical appearances have long been closely tied with women’s social value, while men traditionally draw social value from their earning power.<sup>24</sup>

Some even argue that as women have gained power through the feminist movement, weight has been used as a way of controlling women.<sup>25</sup> As women have increasingly inhabited the male-dominated realm of the workspace, shedding traditional feminine traits such as passivity and domesticity, weight has been used as a device for maintaining the status quo.<sup>26</sup>

While the statistics are difficult to gather, it appears that the higher up the corporate chain that women climb, the less tolerant the environment is of excess weight.<sup>27</sup> This corresponds with the fact that subjective evaluations are held to less scrutiny for “white collar” positions.<sup>28</sup> The higher a woman climbs, the more appropriate it is for a manager to base a decision on characteristics such as “intelligence, energy, stamina, competence, tidiness, ability to follow-through, winning attitude, and drive,”<sup>29</sup> which overweight individuals, particularly overweight women, are likely to score low on these measures based solely on their appearance.

### *B. Effects of Weight-Based Discrimination on Women*

The effects of this weight-based discrimination on women are far-reaching. First, weight-based discrimination can have a grave effect on the self-confidence

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boundaries set for them through cultural objectification may bring them particularly harsh judgment.”).

<sup>21</sup> *Id.* at 155.

<sup>22</sup> Jordan D. Bello, *Attractiveness as Hiring Criteria: Savvy Business Practice or Racial Discrimination?*, 8 J. GENDER RACE & JUST. 483, 495 (2004).

<sup>23</sup> SOLOVAY, *supra* note 20, at 102 (“Unlike biases against thin people perceived as unattractive, fat people tend to be viewed not only as ‘lacking’ but also as ‘responsible’ for the prejudices against them.”).

<sup>24</sup> Theran, *supra* note 4, at 145.

<sup>25</sup> *Id.* at 144.

<sup>26</sup> *Id.* (“Weight was already present as a device for moral condemnation and control . . . invoked here—by both women and men, it should be noted—in an attempt to maintain the existing social fabric.”)

<sup>27</sup> SOLOVAY, *supra* note 20, at 106 (“Fat employees . . . are sometimes passed over for promotions because of their weight.”).

<sup>28</sup> See *infra* notes 88-90 and accompanying text.

<sup>29</sup> SOLOVAY, *supra* note 20, at 155.

level of the individuals experiencing it.<sup>30</sup> This lack of confidence likely leads to reluctance to apply for certain jobs, particularly those that involve interaction with the public,<sup>31</sup> or for those higher positions for which subjective criteria are more likely to be used in selection.

Weight-based discrimination will also have the effect of putting overweight women behind their thinner counterparts in job experience and qualification.<sup>32</sup> For instance, an overweight woman may spend weeks or even months running into closed doors in her job search due to weight-based discrimination. Even if she manages to secure a job, she may encounter a thinner individual who began searching at the same time as she did, but spent less time hunting for a job and now has seniority over her. Weight-based discrimination might then lead to our hypothetical woman being passed over for promotions, putting her further and further behind her standard-weight counterparts.

Lastly, the difficulty that these women face in finding job success may lead to a lack of heavier women role-models.<sup>33</sup> This kind of disadvantage forms yet another destructive cycle. Role-models provide the essential functions not only of showing other similarly-situated individuals a vision of success, but also of debunking stereotypes among professional peers. The more overweight and obese women who are in positions of power, the easier it will be for similar women to achieve.

### *C. Intersection of Gender, Weight, and Other Systems of Privilege*

Overweight and obese women often have difficulty discerning whether the discrimination they feel is based on gender, weight, or a combination of both. Issues of privilege and difference are multi-layered and intersectional. While overweight women may experience gender and weight discrimination, depending on their other characteristics, they may also experience discrimination based on their race, national origin, disability, sexual orientation, or any number of other different factors. These other types of discrimination intersect with weight and gender in interesting and significant ways.<sup>34</sup> Most commonly, race intersects with weight, as African-Americans and Mexican-Americans have a higher rate of obesity than white Americans.<sup>35</sup> This may be due to cultural and genetic

<sup>30</sup> Horner, *supra* note 2, at 593 (“A majority of overweight and obese women report suffering from low self-confidence in the job search process.”).

<sup>31</sup> *Id.*

<sup>32</sup> SOLOVAY, *supra* note 20, at 101 (“Once the destructive cycle of employment discrimination starts it is hard to break . . . equal opportunities will fade not only due to active discrimination, but also because they will fall behind their peers in experience and self-confidence.”).

<sup>33</sup> *Id.* at 107 (“While women in general have few role models to choose from, fat women have even fewer.”).

<sup>34</sup> SOLOVAY, *supra* note 20, at 123 (“The multiple layers of prejudice, along with varying degrees of legal protection per category, combine to create special problems when seeking courtroom justice.”).

<sup>35</sup> Doyle, *supra* note 19.

differences, but it also may be attributed to another factor, income level.<sup>36</sup> In the United States, obesity levels tend to decrease as income level rises.<sup>37</sup> These layers of prejudice can make discrimination more difficult to pin down, and can also make it more difficult to hold an employer accountable using the existing legal remedies.

### III. EXISTING AVENUES

#### *A. Title VII and Weight-Based Discrimination as Gender Discrimination*

Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, national origin, sex, or religion.<sup>38</sup> The Act creates causes of action under two general types of employment discrimination claims called disparate treatment and disparate impact.<sup>39</sup> While the data shows that weight does significantly influence employer decision-making and that overweight women are significantly disadvantaged by these decisions,<sup>40</sup> weight is not a federally protected class or characteristic, and therefore cannot be remedied by a Title VII claim directly. However, discrimination against women that is based on weight is rooted in unhealthy and distorted stereotypes of what a capable woman looks like.<sup>41</sup> This discrimination, which on the whole affects only women and not men, can be addressed through the existing Title VII avenues.

#### 1. Disparate Treatment

Disparate treatment analysis is used to address cases of intentional discriminatory employment practices.<sup>42</sup> Under a disparate treatment claim, an employer's liability will depend on whether a protected trait motivated the employment decision.<sup>43</sup> This can be difficult for a plaintiff to prove, but the courts have developed a framework that makes it a bit easier.

##### *a. Making a Prima Facie Disparate Treatment Claim – The McDonnell Douglas Framework*

In response to the Title VII mandate that “[i]t shall be an unlawful employment practice for an employer to... discriminate against any individual... because of such individual’s race, color, religion, sex, or national origin,”<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 42 U.S.C. § 2000(e)(2) (2000).

<sup>39</sup> *The Supreme Court, 2002 Term Leading Cases, Federal Statutes and Regulations*, 117 HARV. L. REV. 400, 406 (2003) [hereinafter *Federal Statutes*].

<sup>40</sup> *See supra* note 5.

<sup>41</sup> *See* Kate Sablosky, *Probative “Weight”: Rethinking Evidentiary Standards in Title VII Discrimination Cases*, 30 N.Y.U. REV. L. & SOC. CHANGE 325 (2006).

<sup>42</sup> *Federal Statutes, supra* note 39, at 406.

<sup>43</sup> *Id.*

<sup>44</sup> 42 U.S.C. § 2000(e)(2) (2000) (emphasis added).

employers became increasingly sophisticated at hiding clear evidence of discriminatory motives behind pretextual reasoning.<sup>45</sup> In order to address this problem, the Supreme Court developed the McDonnell Douglas burden-shifting framework.<sup>46</sup> To make a prima facie case under this framework, a plaintiff must show that 1) she belonged to a protected class, 2) she applied and was qualified for a job for which the employer was seeking applicants, 3) she was rejected, despite her qualifications, and 4) after her rejection, the position remained open and the employer continued to seek applicants.<sup>47</sup>

It is possible that an overweight or obese woman would be able to put together a prima facie case of disparate treatment against one of the employers who failed to hire her despite her qualifications. Under the McDonnell-Douglas framework, this is not generally a difficult barrier to overcome.<sup>48</sup> It is important to note that she would need to bring her case based on her gender and not her weight, because weight is not a protected class under federal law. If a man was chosen over her or the job remained open, her case would be easier.

A problem will arise, however, if another woman is chosen for the position. Despite the fact that most courts of appeal have held that the inability to show that the chosen candidate is not a member of the same protected group will not prevent the plaintiff from making a prima facie case,<sup>49</sup> this will severely limit a plaintiff's case. The prima facie case only raises an inference of discrimination because we presume that the acts of the employer, without further explanation, are likely the result of the employer's consideration of the impermissible factor.<sup>50</sup> The problem a hypothetical woman might face is that the discrimination she actually feels is occurring not based solely on the impermissible factor of gender, but also the permissible factor of weight. She is attempting to address her weight-and-gender-based discrimination within a framework geared only to address gender discrimination.

#### *b. Meeting the Disparate Treatment Burdens*

If a plaintiff is able to make out a prima facie case, then the burden shifts to the defendant to articulate some legitimate non-discriminatory reason for rejecting the plaintiff.<sup>51</sup> Under federal law, since weight is not a protected class, there is no reason that the reason could not be "I dislike fat people." Considering that many

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<sup>45</sup> *Federal Statutes*, *supra* note 39, at 406.

<sup>46</sup> *Id.*

<sup>47</sup> *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>48</sup> *Id.* ("The burden of establishing a prima facie case of disparate treatment is not onerous.")

<sup>49</sup> SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 42, 67 (2d ed. 2004) (quoting *Perry v. Woodward*, 199 F.3d 1126, 1138 (10th Cir. 1999)) ("Most courts of appeal have held that plaintiffs are not precluded from meeting the prima facie burden by an inability to demonstrate that the replacement employee does not share her protected attribute.") (internal quotations omitted).

<sup>50</sup> *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

<sup>51</sup> *See id.*



people would find this offensive, it is not likely that an employer would articulate such a reason. More likely, an employer would articulate one of the many vague and less insulting reasons that will suffice to meet its burden. One common legitimate non-discriminatory reason for not hiring someone is simply that another applicant made a better impression on the interviewer.<sup>52</sup>

Once the plaintiff makes a prima facie case of disparate treatment, if the employer cannot produce evidence of a legitimate non-discriminatory reason for weight standards, the employer then has to prove that the discriminatory standard can be justified as a bona fide occupational qualification (BFOQ) that is reasonably necessary to the normal operation of the particular business.<sup>53</sup> Customer preference rationale, which employers sometimes utilize to justify appearance-based criteria, will not suffice to meet this burden.<sup>54</sup>

However, so long as the employer articulates some reason or presents a BFOQ, in the end, the plaintiff still bears the burden of persuasion, and must show that the defendant's reason is "pretext" so that a reasonable trier of fact could conclude that there was discrimination.<sup>55</sup> Our hypothetical overweight or obese woman would be left attempting to prove that gender discrimination was the cause of her problem, when in fact she feels that the situation is much more complex than that.

*c. Mixed-Motive Claims – Price Waterhouse v. Hopkins*

In the case of *Price Waterhouse v. Hopkins*,<sup>56</sup> the Supreme Court addressed this type of problem by creating a "mixed-motive" analysis for discrimination cases. In *Hopkins*, the plaintiff was a female executive who was fired because she was perceived as too aggressive for a woman.<sup>57</sup> She was encouraged to conform to gender stereotypes by dressing more femininely and wearing makeup.<sup>58</sup> Since a man exhibiting the same behaviors would not be fired or asked to wear makeup, the Court held that Ms. Hopkins' showed that "her gender played a motivating part in an employment decision," and therefore the termination was impermissible gender discrimination.<sup>59</sup> The *Hopkins* mixed-motive framework seems particularly applicable to addressing the discrimination faced by overweight women, because it squarely addresses stereotypes that place different requirements on women and

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<sup>52</sup> 45C AM. JUR. 2D *Job Discrimination* § 2491 (2005).

<sup>53</sup> 42 U.S.C. § 2000e-2(e) (2000).

<sup>54</sup> Theran, *supra* note 4, at 177.

<sup>55</sup> See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

<sup>56</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 235.

<sup>59</sup> *Id.* at 258. (This language was codified by Congress in the Civil Rights Act of 1991, requiring a plaintiff to show that sex "was a motivating factor for any employment practice, even though other factors also motivated the practice.") 42 U.S.C. § 2000e-2(m) (2000).

men.<sup>60</sup> Here, women are held to a very different body image standard based on stereotypes about what a successful woman should look like.

The plaintiff may have some case-specific anecdotal evidence if, say, she was passed over for an overweight man. However, under *Hopkins*, the employer can avoid liability by showing that the same decision would have been made even if the plaintiff's gender had not been taken into account.<sup>61</sup> The employer might give many of the same explanations as the legitimate non-discriminatory reasons above. Statistical evidence would be strong circumstantial evidence to show a systematic and consistent pattern of discrimination.<sup>62</sup>

At least one scholar has argued that general societal statistics should be enough to raise a permissible inference that weight discrimination is evidence of sex discrimination.<sup>63</sup> However, many courts tend to distrust statistics, placing more emphasis on case-specific anecdotal evidence.<sup>64</sup> There is a move toward being more accepting of statistical evidence, and this is a move in the right direction for plaintiffs who experience complex discrimination such as weight-plus-gender discrimination.<sup>65</sup> A plaintiff could also develop statistics from the employment practices of the specific employer, and this would be more likely to be admissible. However, this information might be difficult to collect and difficult to analyze, particularly where there are not many employees to assess.

## 2. Disparate Impact

Title VII reaches beyond cases where the employer intentionally discriminates to proscribe employment actions that “deprive or tend to deprive any individual of employment opportunities... because of such individual’s race, color, religion, sex, or national origin.”<sup>66</sup> The Supreme Court has interpreted this language to mean that Title VII extends beyond coverage of overt discrimination to cover employment practices that appear fair, but have a discriminatory effect.<sup>67</sup> In order to make a *prima facie* case of disparate impact, a plaintiff must show that a facially neutral policy disparately impacts her or his protected group.<sup>68</sup>

### *a. Disparate Impact – Making a Prima Facie Showing*

Even before getting into a detailed analysis of the disparate impact case, the

<sup>60</sup> *Id.* at 250-252.

<sup>61</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

<sup>62</sup> The Court has held that circumstantial evidence is not only allowable, but even preferential to direct evidence in this type of case. *See generally* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

<sup>63</sup> *See Sablosky, supra* note 41, at 342-343.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 345-347.

<sup>66</sup> 42 U.S.C. § 703(a)(2) (2000).

<sup>67</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”).

<sup>68</sup> *See id.*

concept appears to be more appropriate than disparate treatment in addressing our hypothetical woman's problem. Overweight and obese women face more scrutiny than men for their weight, and this disparately impacts them when employment decisions are made. One recent study concludes that discrimination may be a causal mechanism behind the impact of body mass to wages in women.<sup>69</sup> Although employers may have facially neutral policies for hiring or promoting, so long as an overweight or obese woman can show that there is a statistical impact on overweight and obese women as a class, such that this weight-based decision-making disparately impacts women, then a disparate impact framework should apply. As above, it is possible that courts would allow societal statistics, or it is possible that a plaintiff could develop employer-specific statistics. Were a woman to acquire either kind of statistical data, it could show that the facially neutral policies of the company disparately impact women, meeting the prima facie burden for a disparate impact case.

Although the use of statistics paints a fairly clear picture of prima facie disparate impact discrimination, an overweight woman may still face several major barriers before making a prima facie case showing that weight discrimination disparately impacts women. First, courts may want more than bare statistics, as statistics alone might place undue pressure on employers.<sup>70</sup> It would help the case if there were some other indicator that discrimination was taking place. In some instances, a comment may have been made to a woman regarding her weight or there may be some other indicator that it was her status as an overweight woman that led to the outcome at issue. However, interviewers rarely use explicit weight requirements, or ask an applicant to step onto a scale, or indicate her weight on her application. Instead, the applicant suspects that an inherent bias in the interviewer caused her to rate lower on the subjective portions of the selection process.<sup>71</sup> Subjective employment practices are subject to impact analysis, but only in appropriate cases.<sup>72</sup>

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<sup>69</sup> Conley, *supra* note 4, at 272.

<sup>70</sup> See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988) ("We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures.").

<sup>71</sup> Patricia Hartnett, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 RUTGERS L.J. 807, 817 (1993) ("Weight requirements are often less a matter of weighing below some predetermined amount, than a subjective evaluation of weighing 'too much.'").

<sup>72</sup> See *Watson*, 487 U.S. at 990-991:

Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with 'a lot of money . . . for blacks to have to count.' Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to 'adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a)(2).

Another problem might be that even if you manage to show that weight was used as a factor in the employment decision, it can be difficult to show that it disparately impacts women. A hypothetical plaintiff would not be alleging that the interviewer's subconscious stereotypes about her gender negatively affected the subjective evaluation. The plaintiff would not even be arguing that the interviewer's subconscious stereotypes about overweight and obesity in general negatively affected women as a class. Rather, she would be arguing that the interviewer's subconscious stereotypes about her weight coupled with her gender negatively affected the subjective evaluation, and that this had a disparate impact on her gender. This argument would be best framed as a "sex-plus" claim, which is discussed more thoroughly below.<sup>73</sup> Still, while courts might sometimes recognize that overweight men and overweight women receive different treatment, they are generally unwilling to view this as evidence of discrimination.<sup>74</sup>

In a case involving flight attendants who claimed that an airline's overt weight requirements disparately impacted women, the Court of Appeals of New York ruled that the petitioners failed to meet the requirements for a sex discrimination disparate impact claim regarding the weight requirement, because there was no record of unequal hiring norms for men versus women and no record that the weight standards were pretext for discrimination against women.<sup>75</sup> The court relied heavily on the fact that ninety percent of Delta Airline's flight attendants were women.<sup>76</sup>

This case highlights another major barrier to making a disparate impact case based on weight and gender. The jobs where weight is most obviously considered—retail salespeople, waitresses, and flight attendants, for instance—tend to be female-dominated fields. If a retail store hires mostly slender women, it is discriminating against the sixty percent of women who are overweight, but it is difficult to prove that women are being discriminated against when they dominate a field or position. Even with these potential barriers, a plaintiff with strong statistical evidence and, ideally, other evidence that the employer's subjective criteria are being applied discriminatorily, may very well make out a *prima facie* case of disparate impact discrimination.

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We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

*Id.*

<sup>73</sup> See *supra* Section III.A.2.b.

<sup>74</sup> SOLOVAY, *supra* note 20, at 123 ("The courts are sometimes willing to recognize that men and women receive differing levels of weight harassment, although they may not consider it strong evidence of discrimination.").

<sup>75</sup> Delta v. NY State Div. of Human Rights, 91 N.Y.2d 65 (1997) ("There is no indication in the record that Delta's hiring norms in this respect were applied unequally as between men and women, or that the standards were used as a pretext to deprive women of equal opportunity or treatment.").

<sup>76</sup> *Id.*

*b. Sex-Plus Claims*

The term “sex-plus” was coined by Chief Judge Brown of the Fifth Circuit in his dissent to a decision not to rehear a sex discrimination case, *Phillips v. Martin Marietta*.<sup>77</sup> This case involved a woman who claimed that her status as a woman, combined with her status as a parent of preschool-aged children, led to her denial of employment.<sup>78</sup> The Middle District of Florida granted summary judgment in favor of the defendant and the Fifth Circuit denied rehearing, before the Supreme Court vacated and remanded the District Court’s decision.<sup>79</sup>

The Supreme Court’s opinion was rather bare,<sup>80</sup> as opposed to the dissent of Chief Judge Brown, which looked deeply at the issues. Judge Brown found that “[i]f ‘sex plus’ stands, [Title VII] is dead.”<sup>81</sup> He explained further that if employers were “[f]ree to add non-sex factors, the rankest sort of discrimination against women can be worked by employers.”<sup>82</sup> The non-sex factors were intended to include factors other than those already protected under the statute.<sup>83</sup> So, although overweight is not a protected class, when combined with gender in the sex-plus framework, it could be a considered non-sex factor in gender discrimination cases. In fact, the first example of such non-sex factors that Judge Brown gave was weight.<sup>84</sup> Judge Brown gave the example of weight minimums, presumably because women tend to weigh less than men on the whole. However, there is no requirement that the plus factor be something that is more likely to apply to women. Indeed, the plus factor in the *Phillips* case was parenthood of preschool age children, which presumably applies to just about as many men as women. So, there is no reason why a woman’s status as overweight or obese could not be a sex-plus factor based on this logic.

Judge Brown next looked at the Congressional intent to protect women, and how this would be affected were sex-plus factors found to be permissible means of discrimination.<sup>85</sup> Just as it would be incongruous to think that Congress would have intended employers to continue to be able to discriminate against women based on their parental status, it would be incongruous to think that Congress

<sup>77</sup> *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), *reh’g denied*, 416 F.2d 1257 (5th Cir. 1969), *vacated*, 400 U.S. 542 (1971).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See generally Phillips*, 400 U.S. at 542.

<sup>81</sup> *Phillips*, 416 F.2d at 1260.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at n.10. (“Of course the ‘plus’ could not be one of the other statutory categories of race, religion, national origin, etc.”)

<sup>84</sup> *Id.* (“This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like.”)

<sup>85</sup> *Id.* at 1261-1262 (“Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.”).

would have intended employers to be able to continue to discriminate against women based on a physical condition that affects nearly two-thirds of them.

The Supreme Court never adopted Judge Brown's "sex-plus" standard, but it did make clear that:

Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act.<sup>86</sup>

In sex-plus cases, plaintiffs must identify "persons of like qualifications," which is sometimes a great hurdle.<sup>87</sup> However, because being overweight is a factor that affects both men and women, a hypothetical plaintiff would likely be able to identify men who were similarly situated. Since women alone experience the penalties, this comparison could lead to compelling statistics.

*c. Job-related and Consistent with Business Necessity: The Employer's Response in Disparate Impact*

Once a plaintiff manages to establish a prima facie disparate impact case, the burden shifts to the defendant to show that the employment practice is "job-related for the position in question and consistent with business necessity."<sup>88</sup> If a business is able to make such a showing, then the discrimination is excused, unless the plaintiff offers an alternate employment practice that serves the business needs equally as well but without the discriminatory effect and can show that the employer failed to adopt this non-discriminatory alternative.<sup>89</sup> Assuming that a plaintiff with a weight-based gender claim of disparate impact manages to make a prima facie case, it has proven difficult for the employer to show that a weight requirement is job-related and consistent with business necessity. An employer would need to demonstrate that being overweight or obese was somehow demonstrably more relevant to the performance of women than to the performance of men.<sup>90</sup>

In the *Dothard* case, a prison guard applicant challenged the height and weight requirements placed on her and the prison failed to persuade the court that

<sup>86</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>87</sup> See Regina E. Gray, *The Rise and Fall of "Sex-Plus" Discrimination Theory: An Analysis of Fischer v. Vassar College*, 42 HOW. L.J. 71 (1998) ("The similarly situated category requirement runs counter to Title VII's focus on the individual plaintiff in disparate treatment cases. Furthermore, the requirement further disadvantages "sex-plus" plaintiffs by requiring comparison to an often nonexistent group of persons of the opposite sex with the same or similar characteristics.").

<sup>88</sup> 42 U.S.C. § 703(k) (1968).

<sup>89</sup> *Id.*

<sup>90</sup> See *Phillips*, 400 U.S. at 544.

the requirements were job-related and consistent with business necessity.<sup>91</sup> The prison argued that height and weight relate to strength, which is required in the position, but the court insisted that they develop a test that measures strength directly if strength is the job-related requirement.<sup>92</sup> Similarly, any argument that weight is related to physical stamina or agility would be insufficient to meet the job-related test requirement. It would be necessary for a company to develop a test that directly measures stamina or agility if these qualities are necessary to the business.

The *Dothard* case involved a woman who failed to meet a weight requirement because she was not heavy enough. While instructive to the issue at hand, the case fails to touch on the special and complicated problems of gender stereotyping that go along with objective weight maximums and the women who exceed them. The court in a New York case involving a woman denied a teaching license because of her obesity discussed the intersection of these issues, warning that obesity standards often become aesthetic standards when applied to women.<sup>93</sup>

The *Dothard* case also involved an objective selection criterion in the form of an explicit weight cut-off, but a whole new set of problems arises when subjective criteria are used to evaluate applicants or employees. When it comes to subjective evaluation systems, courts draw a line between blue-collar jobs and managerial or supervisory positions.<sup>94</sup> While subjective evaluation systems are often proscribed by the courts when applied to blue-collar, lower-responsibility jobs, the courts give much more flexibility to employers to apply subjective criteria to supervisory, managerial, or professional jobs.<sup>95</sup> Subjective evaluation systems are likely to work against overweight employees, as managers tend to view overweight employees as lacking in self-discipline, lazy, less conscientious, less competent, sloppy, disagreeable, and emotionally unstable.<sup>96</sup> Although a supervisor's subjective evaluation of an employee's disposition or attitude would be proscribed by courts for a blue-collar position, the more supervisory or professional a job is, the more likely that these kinds of evaluations will be allowed. This leads to a situation where the very same stereotypes that fuel discrimination against overweight and obese people become more and more appropriate to use as valid selection criteria as the employee reaches toward more prestigious and higher paying jobs. It is no wonder that overweight women can expect to make thousands of dollars less than their standard-weight counterparts per year.<sup>97</sup>

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<sup>91</sup> See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

<sup>92</sup> *Id.*

<sup>93</sup> *Application of Nancy Parolisi v. Bd. of Exam'rs of the City of N.Y.*, 285 N.Y.S.2d 936, 940 (Sup. Ct., Special Term, Kings Cty., Part 1, 1967) ("When an objective standard of obesity . . . is applied to a female . . . applicant, it can become an aesthetic standard rather than the . . . commanded standard of merit and fitness.").

<sup>94</sup> ESTREICHER, *supra* note 49, at 186.

<sup>95</sup> *Id.*

<sup>96</sup> Puhl, *supra* note 1, at 3.

<sup>97</sup> See SOLOVAY, *supra* note 20, at 106 ("The *New England Journal of Medicine* reports that, on

Disparate impact cases can be very difficult to prove, as most employers use the Uniform Guidelines on Employee Selection Procedures to validate the compliance of their hiring and promoting practices with the law.<sup>98</sup> Also, as opposed to disparate treatment cases, punitive damages are not available in disparate impact cases,<sup>99</sup> leaving only injunctive relief, reinstatement or hiring, back pay and equitable relief.<sup>100</sup> This makes disparate impact cases less attractive to plaintiffs and attorneys.<sup>101</sup>

Bringing an action under the two basic theories of Title VII, disparate treatment or disparate impact, involves a variety of challenges for an overweight or obese woman attempting to remedy the injustice she has encountered in the search for employment for which she is qualified. Courts have consistently held that weight-based requirements do not violate Title VII, so long as they are applied equally to men and women, even if the requirements are purely cosmetic and inherently gendered.<sup>102</sup> Still, a strong argument can be made that weight-based requirements, particularly subjective ones, are applied disproportionately against women. Despite the great possibilities in this area, weight-based discrimination claims brought under Title VII rarely succeed.<sup>103</sup> Another available avenue of federal remedy with greater possibility of success is disability law. Disability law allows plaintiffs such as our hypothetical woman to make claims without relying on gender.

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average, fat women have a staggering \$6,710 less in income per year than thin women.”) (citing Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 14 NEW ENG. J. MED. 399 (1993)).

<sup>98</sup> See ESTREICHER, *supra* note 49, at 173. The authors describe the history of 29 C.F.R. §§ 1607.1-1607.7 (1978), also known as the Uniform Guidelines on Employee Selection Criteria (UGESP), noting that dicta in the case of *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), indicates that failure to follow the UGESP is not necessary, but indicating that the guidelines are “influential in employment litigation, and should be reviewed.” *Id.*

<sup>99</sup> 42 U.S.C. § 1977A (2000) (“In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination [not an employment practice that is unlawful because of its disparate impact] . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.”).

<sup>100</sup> See 42 U.S.C. § 706(g) (2000) (outlining available remedies for Title VII violations).

<sup>101</sup> See Major Charles B. Hemicz, *The Civil Rights Act of 1991: From Conciliation to Litigation: How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 66 (1993).

Section 102 clearly prohibits recovery of compensatory and punitive damages in disparate impact actions. This exclusion could affect a plaintiff’s litigation strategy because some cases are amenable to analysis under both disparate treatment and disparate impact theories. Jury trials are not available in disparate impact suits. Plaintiffs, therefore, will always attempt to establish a disparate treatment cause of action to try before the jury and to collaterally estop the court from entering findings on the disparate impact claims.

*Id.*

<sup>102</sup> Theran, *supra* note 4, at 177 (“[T]he courts have been consistent in holding that weight and appearance-based requirements and restrictions, even if the rationale is purely cosmetic and inherently gendered, do not violate Title VII so long as they are implemented in a gender-equitable manner.”).

<sup>103</sup> *Id.*



*B. The Rehabilitation Act and the Americans with Disabilities Act*

Citizens are protected from discrimination based on disability by the Rehabilitation Act of 1973<sup>104</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>105</sup> The Rehabilitation Act did not impose obligations on private employers. It focused, rather, on making federal agencies, federal buildings, and federal contractors free of barriers to the disabled.<sup>106</sup> The ADA extended the burden not to discriminate against any “qualified person with a disability” to all employers who are subject to Title VII.<sup>107</sup> In order to bring an action under the ADA, a plaintiff must have an actual or perceived disability.<sup>108</sup> This rubric has worked for some obese plaintiffs,<sup>109</sup> but many courts have failed to recognize obesity as a disability.<sup>110</sup>

1. Obesity as an Actual Disability

There are some times when obesity does physically limit a person’s life in such a way that the average person might consider it a disability. In order to meet the requirements of actual disability under the ADA, however, an individual must have “a physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>111</sup> The analysis of whether actual disability exists can be broken into two inquiries: whether the individual is impaired and whether the impairment is substantially limiting.

*a. Obesity as Impairment*

The Department of Health and Human Services defines physical impairment as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss” that affects one or more of a variety of enumerated body systems, from neurological to endocrine.<sup>112</sup> If your Body Mass Index<sup>113</sup> (BMI) puts you in the

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<sup>104</sup> 29 U.S.C. § 705 (2000) et seq.

<sup>105</sup> 42 U.S.C. § 12101 (2000) et seq.

<sup>106</sup> ESTREICHER, *supra* note 49, at 509.

<sup>107</sup> *Id.* (Note that in order to be subject to Title VII, an employer must have “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year,” and that the federal government and bona fide private membership clubs other than labor organizations are excluded. 42 U.S.C. § 701(b) (2000).)

<sup>108</sup> 42 U.S.C. § 12102(2) (2000). (“The term ‘disability’ means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”).

<sup>109</sup> *See, e.g.*, EEOC v. Tex. Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996); Cook v. R.I. Dep’t. of Mental Health, Retardation and Hosps., 783 F. Supp. 1569 (D. R.I. 1992); Greene v. Seminole Elec. Coop., 701 So. 2d 646 (Fla. Dist. Ct. App. 1997).

<sup>110</sup> *See, e.g.*, Walton v. Mental Health Ass’n of Se. Pa., 168 F.3d 661 (3rd Cir. 1999); Ridge v. Cape Elizabeth Sch. Dept., 77 F. Supp. 2d 149 (D. Me. 1999); Hazeldine v. Beverage Media Ltd., 954 F. Supp. 697 (S.D.N.Y. 1997); Cassista v. Cmty. Foods, Inc., 856 P.2d 1143 (Cal. 1993).

<sup>111</sup> 42 U.S.C. § 12102(2)(A) (2000).

<sup>112</sup> 45 C.F.R. § 84.3(j)(2)(i) (2006) (“[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological;

overweight or obese categories, the National Institutes of Health warn that you are at risk for health problems such as type-II diabetes, heart disease, stroke, cancer, sleep apnea, osteoarthritis, gallbladder disease, and fatty liver disease.<sup>114</sup> This list shows that being overweight or obese can affect several of the body systems listed by the Department of Health and Human Services guidelines (“the Guidelines”), including the musculoskeletal, respiratory and cardiovascular systems.

Indeed, obese plaintiffs often have experts testify that their obesity affects one or more of the required body systems.<sup>115</sup> However, courts generally find that obesity is not a “physical impairment” except in rare cases where the obesity stems from a physiological disorder.<sup>116</sup> Courts have pointed to the Equal Employment Opportunity Commission (EEOC) interpretive guidelines to the ADA, which indicate that physical traits “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” are not physical impairments within the meaning of the statute.<sup>117</sup>

There are times where obesity itself will be considered an impairment, but the obesity must reach an extreme level, often called “morbid obesity.” Morbid obesity is defined by the medical community as “either more than twice [one’s] optimal weight or more than 100 pounds over [one’s] optimal weight.”<sup>118</sup> Some courts are not satisfied with the diagnosis of morbid obesity, and require further showing that the condition is in fact a “physiological disorder” to warrant a finding of physical impairment.<sup>119</sup> Otherwise, weight must be a symptom of a physiological disorder in order to be considered an impairment under the statute.<sup>120</sup>

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musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitor-urinary; hemic and lymphatic; skin; and endocrine.”).

<sup>113</sup> See *supra* note 3.

<sup>114</sup> *Do You Know the Risks of Being Overweight?*, National Institutes of Health, [http://win.niddk.nih.gov/publications/health\\_risks.htm](http://win.niddk.nih.gov/publications/health_risks.htm) (last visited Feb. 13, 2007).

<sup>115</sup> See, e.g. *Cook v. R.I. Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993) (“[S]he presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.”).

<sup>116</sup> *Francis v. Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (“[O]besity, except in special cases where the obesity relates to a physiological disorder, is not a ‘physical impairment’ within the meaning of the statutes.”).

<sup>117</sup> See, e.g., *Francis*, 129 F.3d at 286 (emphasis added) (citing 29 C.F.R. § 1630.2(h) (YEAR)).

<sup>118</sup> MERCK MANUAL 950, 953 (15th ed. 1987).

<sup>119</sup> See, e.g. *Coleman v. Ga. Power Co.*, 81 F. Supp. 2d 1365, 1370 (N.D. Ga. 2000)

Although this court will not say that morbid obesity cannot be shown to be a physical impairment in some cases, having applied the above standard to the facts of this case, the court finds that Plaintiff has not met his burden of showing that his morbid obesity is a physical impairment as he has not shown that it is a “physiological disorder.” *Id.*

<sup>120</sup> 29 C.F.R. § 1630.2(h) (2006).

*b. Obesity as Substantially Limiting*

If an overweight or obese plaintiff manages to present a qualifying impairment, either by showing obesity that meets the physiological disorder standards or obesity that is a symptom of another physiological disorder, then it still remains to be shown that the impairment “substantially limits one or more major life activities.”<sup>121</sup> The Guidelines define major life activities by giving the examples of “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>122</sup> Although it may seem that obesity could limit some of these life activities, such as walking, courts have been reluctant to make such a finding. For example, a New Hampshire court refused to find that a professor’s morbid obesity substantially limited her major life activity of walking, even though she could not walk far enough to participate in graduation.<sup>123</sup> As a general rule, moderate restrictions on the ability to walk will not be considered a disability.<sup>124</sup>

Work is another major life activity that obese plaintiffs might argue is substantially limited. According to the Guidelines, “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”<sup>125</sup> The plaintiff must show that she is prevented from performing a “class of jobs or a broad range of jobs.”<sup>126</sup> This can make using work as the substantially limited major life activity very difficult for any disability plaintiff. One obese plaintiff who had trouble with using work as a major life activity was a mechanic who was fired because of his morbid obesity.<sup>127</sup> The *Coleman* court found that although the plaintiff was limited in the ability to use aerial lift devices, which was one aspect of his job, he was not unable to work in a broad range of jobs, and therefore failed to meet the substantial limitation requirement.<sup>128</sup> The plaintiff ran into the problem of being so obese that his employer perceived him as unable to do his job effectively, but not so obese as to substantially limit his work in such a way that allowed him protection under the ADA. It might seem that the provision in the ADA that covers being “regarded as” having an impairment was designed to cover just this type of plaintiff, but presenting a case using the “regarded as” test has its own set of problems, which will be discussed later in this Note.<sup>129</sup>

*Cook v. State of Rhode Island Department of Mental Health, Retardation and Hospitals* is a case that many advocates point to when addressing weight-based

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<sup>121</sup> 29 C.F.R. § 1630.2(g)(1) (2006).

<sup>122</sup> 29 C.F.R. § 1630.2(i) (2006).

<sup>123</sup> See *Nedder v. Rivier Coll.*, 944 F. Supp. 111 (D. N.H. 1996).

<sup>124</sup> *Id.* at 116.

<sup>125</sup> 29 C.F.R. § 1630.2(j)(3)(i) (2006).

<sup>126</sup> *Id.*

<sup>127</sup> See *Coleman v. Ga. Power Co.*, 81 F. Supp. 2d 1365 (N.D. Ga. 2000).

<sup>128</sup> *Id.* at 1371 n.8.

<sup>129</sup> See *infra* Part III.B.2

discrimination with disability law.<sup>130</sup> Bonnie Cook was an institutional attendant at a residential facility for the mentally disabled.<sup>131</sup> Cook's weight was in the morbidly obese range, and her employer required her to lose weight in order to keep her job.<sup>132</sup> When she failed to meet the weight loss requirement, Cook was fired and she subsequently brought an action under the Rehabilitation Act (the Act).<sup>133</sup> The defendant employer first argued that Cook did not fall under the protections of the Act because she was not actually disabled.<sup>134</sup> The court ruled that obesity could be considered a handicap if Cook could show that 1) her obesity "constitutes an immutable condition that she is powerless to control" and 2) that this condition "substantially limits one or more... major life activities."<sup>135</sup>

### c. Immutability

The Cook court was incorrect when it required a showing that Bonnie Cook was powerless to control her obesity.<sup>136</sup> The degree of volition or mutability of the disability are not factors that are mentioned anywhere in the statutes, and are not regularly considered when examining other types of disability. The jury ultimately found in favor of Cook, but her success does not mean that these types of requirements should not raise concerns for other plaintiffs.<sup>137</sup> Consider, for example, a court finding that an employer need not make accommodations for a deaf employee who could use hearing aids but chooses not to, or for an amputee who could walk using a prosthesis but uses a wheelchair instead. Mutability is only relevant in disability cases to determine whether a plaintiff is substantially limited.<sup>138</sup> Note that mutability requirements like the one used in *Cook* are on unstable ground after the Supreme Court's finding in the *Sutton* case, discussed below.<sup>139</sup>

## 2. Obesity "Regarded As" a Disability

It is also possible under the Guidelines to be considered disabled if you are "regarded as" having an impairment that substantially limits one or more major life activities.<sup>140</sup> Obese plaintiffs frequently face employers who regard obesity as a

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<sup>130</sup> *Cook v. State of R.I. Dep't of Mental Health, Retardation and Hosps.* 783 F. Supp. 1569 (D. R.I. 1992); See generally Hartnett, *supra* note 72 and McDermott, *supra* note 2 for discussions of *Cook* as a landmark weight-based discrimination case utilizing disability jurisprudence.

<sup>131</sup> *Cook*, 783 F. Supp. at 1571.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1573-1574.

<sup>136</sup> See SOLOVAY, *supra* note 20, at 141.

<sup>137</sup> *Id.* at 141-142 ("[W]hen the issue of volition is raised by the court it becomes a huge hurdle for fat people fighting discrimination.").

<sup>138</sup> *Id.* at 142.

<sup>139</sup> See *infra* Part III.B.3.

<sup>140</sup> See 29 C.F.R. §1630.2(g)(3) (2006).

factor that prevents them from doing a job effectively, when it in fact does not.<sup>141</sup> The clear language of the Guidelines covers individuals who either: 1) have an impairment that does not significantly limit major life activities, but are treated by their employer as if they do have such an impairment, 2) have an impairment that only substantially limits major life activities as a result of the attitudes of others toward such impairment, or 3) have no impairments but are treated by an employer as if they do.<sup>142</sup> However, the “regarded as” disabled categorization can be confusing for courts,<sup>143</sup> and many courts are reluctant to extend ADA coverage to people who are not actually disabled.

This issue was addressed by the court in the *Cook* case. The court concluded that if a perception of Cook’s obesity as a handicap motivated the defendant’s failure to hire Cook, she was handicapped within the meaning of the statute.<sup>144</sup> While Cook succeeded on this point, many courts are reluctant to extend ADA coverage to overweight plaintiffs using the “regarded as” analysis.<sup>145</sup>

Some scholars feel that discrimination by judges and a poor understanding of the law by the courts have contributed to the difficulty plaintiffs face in weight-based discrimination cases.<sup>146</sup> However, the Supreme Court has held and many other scholars agree that the law, at least, is being correctly interpreted when overweight plaintiffs are denied coverage in the “regarded as” disabled context, because the inquiry into the subjective opinions of the employers is meant to examine only whether the employer believes that the plaintiff is substantially limited and not whether the employer believes that the particular condition is an impairment.<sup>147</sup> So, even if a plaintiff manages to show that an employer’s negative action was based on a belief that the plaintiff was substantially impaired by weight,

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<sup>141</sup> See *infra* note 126 and accompanying text.

<sup>142</sup> See 29 C.F.R. §1630.2(l) (2006).

<sup>143</sup> See SOLOVAY, *supra* note 20, at 141.

<sup>144</sup> *Cook v. R.I. Dep’t. of Mental Health, Retardation and Hosps.*, 783 F. Supp. 1569, 1575 (D. R.I. 1992) (“[I]t appears that [the defendant] refused to hire Cook solely because of her obesity. Therefore, if the reason for that decision was that [the defendant] perceived obesity as a ‘handicap,’ Cook would be an ‘individual with handicaps’ within the meaning of [the Act]”).

<sup>145</sup> See, e.g. *Ridge v. Cape Elizabeth Sch. Dep’t.*, 77 F.Supp.2d 149 (D. Me. 1999) (finding that evidence of the employer making frequent comments about plaintiff’s weight, asking the plaintiff whether she could fit under a table to unplug a computer, and asking whether the plaintiff could handle all of the walking required in the expanded library was not sufficient to show the employer believed her abilities to walk or work were substantially limited); See also *Hazeldine v. Beverage Media Ltd.*, 954 F. Supp. 697 (S.D.N.Y. 1997) (finding that testimony that the employer told the plaintiff that she could work harder if she lost weight is not sufficient evidence for a reasonable jury to conclude that the employer regarded her as substantially limited in her ability to work).

<sup>146</sup> SOLOVAY, *supra* note 20, at 143 (“[S]hallow investigation, confusion about the law, court hostility, and employer manipulation have resulted in unfair, muddled, inconsistent decisions in . . . fat-as-disability cases”).

<sup>147</sup> See ESTREICHER, *supra* note 49, at 540 (describing the Supreme Court’s analysis in the case of *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999): while the definition of “regarded as having such an impairment” allows the “substantially limits” element to be totally dependant on the attitudes of others toward such an impairment, the “impairment” element cannot be totally dependant on the subjective perceptions of employers or others.); *Cf.*, e.g., *Francis v. City of Meriden*, 129 F. 3d 281 (2d Cir. 1997) (“[S]ince being overweight is not an impairment, being regarded as overweight is also not.”).

this is highly unlikely to rise to the standard required by the law, because “weight within a normal range” is specifically excluded from the EEOC definition of “impairment.”<sup>148</sup> Reliance on these guidelines combined with individual judges’ bias against overweight individuals make it extremely difficult for an overweight plaintiff to prevail using a “regarded as” disabled claim.

### 3. The Sutton Case and Obesity

One particular recent Supreme Court case appears to have made a major impact on disability discrimination theory, particularly as it pertains to obesity, although the case itself had nothing to do with weight.<sup>149</sup> In the *Sutton* case, the Supreme Court ruled that mitigating circumstances may not be considered when determining whether an individual is substantially limited in a major life activity.<sup>150</sup> In this case, the plaintiff’s visual impairment—severe myopia—was not considered a disability under the ADA because the plaintiff utilized corrective eyewear to mitigate the impact of the disability.<sup>151</sup>

This ruling has made waves in disability-rights circles, as many worry that this holding narrows the reach of the ADA for both actual and “regarded as” disabilities.<sup>152</sup> Indeed, in the *Coleman* case,<sup>153</sup> the court dismissed the plaintiff’s diabetes as a substantial physiological effect of his obesity because he had it under control with drugs.<sup>154</sup> Obese people with high blood pressure, arthritis, or other physiological symptoms of being over-weight may run into this same problem if they mitigate their problems with treatment.

### 4. Successful Obesity-as-Disability Claims

Actions for weight-based discrimination based on an obesity-as-disability theory are unpredictably and inconsistently decided. Different jurisdictions have proven more or less willing to recognize obesity as a disability,<sup>155</sup> or to recognize “regarded as” disability claims.<sup>156</sup> The choice between asserting that the major life activity of work or that another major life activity has been substantially limited

<sup>148</sup> SOLOVAY, *supra* note 20, at 143.

<sup>149</sup> See *Sutton*, 527 U.S. at 471.

<sup>150</sup> *Id.* (“[T]he determination whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as assistive or prosthetic devices.”)

<sup>151</sup> *Id.*

<sup>152</sup> See SOLOVAY, *supra* note 20, at 136, 165 n.14 (giving the example of an individual with a leg prosthesis who runs marathons and may be fired from a job, because of his missing limb, without the coverage of the ADA since in his mitigated state he is not impaired.)

<sup>153</sup> *Coleman v. Ga. Power Co.*, 81 F. Supp. 2d 1365 (N.D. Ga. 2000).

<sup>154</sup> *Id.*

<sup>155</sup> See *Homer*, *supra* note 2 at 606 (“Courts have differed substantially in their determinations as to whether the ADA includes obesity.”).

<sup>156</sup> See *id.* at 607-608 (“Some state courts have not yet recognized a ‘regarded as’ disability claim as another option for a plaintiff under the ADA. In courts recognizing a ‘regarded as’ disability claim, the plaintiff may experience varying treatment, depending on the court’s particular approach.”).

can dramatically affect the course of litigation, sometimes leading to absurd results.<sup>157</sup> With so many different standards being applied by the courts regarding obese plaintiffs, protections for these plaintiffs are shifting and unpredictable.<sup>158</sup>

### 5. Perceptions of Obesity as a Disability

There are also many overweight and obese people who do not perceive their weight as a disability and do not wish others to perceive it as a disability. An example of such a person is Jennifer Portnick, a five-foot eight, two hundred and forty pound aerobics instructor who applied to Jazzercise, Inc. and was turned away because she did not meet their “looking fit” requirement.<sup>159</sup> Not only was Ms. Portnick not disabled as defined in the statute, but filing a claim under the ADA would go against the whole premise of her claim—that she was just as capable as a standard weight candidate.

Application of disability law to obese plaintiffs requires that myths about obesity as impairment are perpetuated rather than dispelled.<sup>160</sup> Genuine physical impairment generally has nothing to do with the actual cause of the employment discrimination at issue,<sup>161</sup> and disability law ignores the appearance-based discrimination which is more likely at the root of an obesity discrimination case.<sup>162</sup>

Employers may be uneasy around overweight individuals and may be more comfortable assuming that they cannot perform the tasks required for the job than with having a frank discussion with them about what the job entails and how those requirements mesh with their specific abilities. Additionally, it is possible that the employers simply do not like to have obese individuals in their offices. A potential plaintiff may not fit into the disability framework if she does not identify herself as disabled and has not been told by any of her potential employers that they perceive

<sup>157</sup> Compare *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (“When the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.”) with *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 n.16 (2002) (“When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.”). In *Sutton*, visual impairment did not affect the plaintiffs’ working enough while in *Williams*, carpal tunnel syndrome did not affect the plaintiff’s manual tasks enough (the Court only addressed those tasks central to most people’s daily living, such as brushing teeth and vacuuming). Because the plaintiff in *Williams* did not assert that her ability to perform manual tasks *at work* was impaired, this was not considered.

<sup>158</sup> Horner, *supra* note 2, at 610 (“Substantial differences in the manner in which courts apply disability law to obesity leave overweight people with inconsistent and unpredictable legal protection.”).

<sup>159</sup> *Id.* at 589 (citing Elizabeth Fernandez, *Exercising Her Right to Work*, S.F. CHRON., May 7, 2002, at A1.).

<sup>160</sup> *Id.* at 618 (“[P]rotection through disability law perpetuates negative myths about obesity by requiring plaintiffs to prove that weight constitutes a physical impairment that employers regard as a disability.”).

<sup>161</sup> See Hartnett, *supra* note 72, at 825-826.

<sup>162</sup> Horner, *supra* note 2, at 615 (“Disability law protection does not account for the reality that employers are more likely to discriminate against overweight women on the basis of appearance rather than on the basis of a ‘regarded as’ disability.”).

her as disabled. The ADA and the Rehabilitation Act are not designed to address the complex and subtle discrimination that an overweight or obese woman might experience.

### *C. Weight-Based Discrimination Claims Locally*

Local provisions give litigants a mixed bag of tactics for addressing weight-based discrimination. Although federal law often gets the most attention, sometimes it is in the litigants' best interest to utilize local statutes and ordinances. Other times the local provisions prove just as unaccommodating as federal law. Sometimes bringing an action in a particular locality may supply even less coverage than federal law seems to provide, when local courts interpret federal statutes in a particularly strict manner.

#### 1. Local Disability Law

State disability statutes vary, and may prove easier or more difficult to use than federal disability statutes, depending on the jurisdiction.<sup>163</sup> Different localities also interpret federal law differently. Some state courts do not even recognize "regarded as" disability claims as an option for litigants under the ADA.<sup>164</sup> Even the courts that do recognize "regarded as" claims, are often confused about how to apply the standard, as discussed above.<sup>165</sup> Courts vary widely in defining what constitutes "substantially limited" and "major life activity."<sup>166</sup> In the end, just as with federal disability statutes, plaintiffs such as our hypothetical woman are left attempting to use a system that is not designed to address the type of discrimination that they are experiencing.

#### 2. Local Discrimination Laws Prohibiting Weight-Based Discrimination

##### *a. State Laws*

There are a few pockets around the country with discrimination statutes or ordinances that prohibit weight-based or appearance-based discrimination outright.<sup>167</sup> Only two states, Michigan and the District of Columbia, currently

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<sup>163</sup> *Id.* at 609 (comparing the state disability statutes of New Jersey, which lacks a "major life activities handicap" requirement with that of California, which requires a showing that "obesity affects one or more other body systems.").

<sup>164</sup> *See id.* at 607 (citing *Walton v. Mental Health Ass'n of Se. Pa.*, 168 F.3d 661, 665 (3rd Cir. 1999)).

<sup>165</sup> *See supra* Part III.B.2.

<sup>166</sup> *See Horner, supra* note 2, at 609 (comparing *Ridge v. Cape Elizabeth Sch. Dept.*, 77 F. Supp. 2d 149, 157 & n.2 (D. Me. 1999) (finding that plaintiff's tendonitis which interfered with her inability to lift was sufficient to show that she was substantially limited in a major life activity) with *Hazeldine v. Beverage Media, Ltd.* 954 F. Supp. 697, 699 (S.D.N.Y. 1997) (finding that a plaintiff's inability to walk one block, lift heavy objects, run, jog, bend, or kneel does not suffice to show she is substantially limited in major life activities)).

<sup>167</sup> *See Elliott-Larsen Civil Rights Act*, MICH. COMP. LAWS ANN. § 37.2102 (2001); Human Rights



have laws that specifically prohibit weight-based discrimination.<sup>168</sup> The most explicit is Michigan's Elliott-Larsen Act,<sup>169</sup> which states that,

[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.<sup>170</sup>

The Elliott-Larsen Act has been around since 1975, but it has not been used for weight-based discrimination litigation many times since then.<sup>171</sup> The easy passage of the law and the little litigation utilizing it seem to suggest that Michiganders have not had a problem with integrating this law into their lives.<sup>172</sup>

The District of Columbia also has a law that protects overweight plaintiffs from employment discrimination.<sup>173</sup> The Human Rights Law provides:

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.<sup>174</sup>

While not as explicit as the Michigan statute, the definitional provisions of this law make it clear that "bodily condition or characteristics," of which weight would presumably be one type, are included in the definition of "personal appearance."<sup>175</sup>

Act, D.C. CODE ANN. § 2-1404.01 (2001); S.F., CAL., POLICE CODE art. 33 (2000); SANTA CRUZ, CAL., CODE ch. 9.83 (1992).

<sup>168</sup> Theran, *supra* note 4, at 189.

<sup>169</sup> MICH. COMP. LAWS ANN. § 37.2102 (2001).

<sup>170</sup> *Id.*

<sup>171</sup> Theran, *supra* note 4, at 190.

<sup>172</sup> SOLOVAY, *supra* note 20, at 245 (quoting a 1999 interview by Marilyn Wann of Art Stine, Ombudsman of the Michigan Department for Civil Rights, who said:

Michigan added height and weight to the Civil Rights Act in 1975, and its passage was very easy. Given that certain height and weight characteristics tend to be linked to certain ethnic groups or to women, state legislators decided it was all the more appropriate to include body size as part of a comprehensive antidiscrimination policy. There wasn't even much debate about it. Since then, I'd estimate that eight or ten weight-related cases have come before our commission for a decision. Overall, . . . people simply haven't had a big problem with it.

<sup>173</sup> Human Rights Act, D.C. CODE ANN. § 2-1404.01 (2001).

<sup>174</sup> *Id.*

<sup>175</sup> The D.C. Code defines "personal appearance" as:

[T]he outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate,

*b. Local Ordinances*

It is also possible to protect individuals from weight-based discrimination using local ordinances. However, only two localities in the United States currently do so.<sup>176</sup> Both of these localities are in California—San Francisco and Santa Cruz—calling into question the fact that California is often typecast as the most weight-critical of the states. Both of these local ordinances drew heat from the media, which predicted that the ordinances spelled doom for local employers and public accommodations.<sup>177</sup> However, the City Attorney of Santa Cruz reported that the ordinance there has generated very little activity and no litigation.<sup>178</sup> Some sources also indicate that individuals have moved to Santa Cruz for the specific reason of being protected from weight-based discrimination.<sup>179</sup>

The Santa Cruz ordinance, which was passed in 1992, prohibits arbitrary discrimination on the basis of “age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight, or physical characteristic.”<sup>180</sup> In 2000, San Francisco amended the existing Police Code to incorporate weight and height as characteristics that are protected against employment, housing, and public accommodations discrimination.<sup>181</sup> While the Santa Cruz ordinance has been around longer, the San Francisco provision is particularly interesting because a City Commission has developed guidelines that flesh out how such a law may actually work.<sup>182</sup> The guidelines indicate a progressive outlook on weight and height and outline how a community can work toward reaching the ideal of all people being included and accepted regardless of a

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however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.

D.C. Code Ann. § 2-1401.02 (22) (2001).

<sup>176</sup> Theran, *supra* note 4, at 193.

<sup>177</sup> *See id.* at 193-194.

<sup>178</sup> *See* SOLOVAY *supra* note 20, at 243-244 (quoting a correspondence from Santa Cruz City Attorney John Barisone to the author on May 18, 1999, who said:

The ordinance has been generally well received by the City’s residents, landlords, and businesses and the only activity which it has generated since its adoption has been an occasional phone call from an individual or entity inquiring into one’s rights under the ordinance or what one must do to ensure that he or she is in compliance with the ordinance’s mandates. To my knowledge, there have been no private enforcement actions taken pursuant to the ordinance and the City has not been required to take any formal actions as a result of ordinance violations.).

<sup>179</sup> *See id.* (quoting Dawn Atkins, founder of the Santa Cruz Body Image Task Force).

<sup>180</sup> SANTA CRUZ, CAL., CODE ch. 9.83 (1992).

<sup>181</sup> S.F., CAL., POLICE CODE art. 33 (2000).

<sup>182</sup> CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMMISSION, COMPLIANCE GUIDELINES TO PROHIBIT WEIGHT AND HEIGHT DISCRIMINATION (2001) [hereinafter COMPLIANCE GUIDELINES], *available*

*at* [http://www.naafa.org/fatf/sf\\_height\\_weight\\_guidelines.pdf#search='San%20Francisco%20Human%20Rights%20Commission%20Compliance%20Guidelines%20Weight'](http://www.naafa.org/fatf/sf_height_weight_guidelines.pdf#search='San%20Francisco%20Human%20Rights%20Commission%20Compliance%20Guidelines%20Weight')

person's shape or size.<sup>183</sup>

Overall, if a plaintiff lived in one of these states or localities, she would likely have a much easier time bringing a claim for weight discrimination than if she lived elsewhere. While the discrimination that she encounters may still be elusive and complex, these laws address weight-based discrimination squarely. Ordinances that prohibit weight-based discrimination would work toward creating a fairer environment for overweight and obese women, which would have a substantial impact on gender discrimination as a whole. Of course, these provisions would also work to benefit men who are overweight and obese. Still, so long as they do not work to give the overweight men who are not currently experiencing any wage penalties a wage premium, then the provisions will ultimately work toward balancing the inequities in this area. More importantly, provisions such as these will work to foster an environment where weight is not used as a proxy for ability, a result that would undoubtedly help women. Unfortunately, the states and localities where this option is available are the exception and not the rule, and it is unlikely that such ordinances would be available in the vast majority of cases. Also, the lack of litigation makes it unclear what the chances of success would be.

#### IV. CONCLUSION

More women are receiving lower wages because of their weight than women who are not overweight, and this wage difference is an impact not felt by men. This wage penalty for weight no doubt impacts the overall wage gap between men and women. By focusing on and addressing weight-based discrimination, which is seemingly tangential to gender discrimination, a big step can be made toward closing the employment and wage gap between men and women. The feminist community can dramatically impact the gender gap in employment by addressing weight-based discrimination either through existing avenues, or more importantly, by working through legal and social means to make their own communities places where people of all shapes and sizes can succeed. If feminists want to see women achieving more, then all of us, thick and thin, need to rally behind the sixty-two percent of women who are overweight or obese<sup>184</sup> to ensure that weight is not given weight in employment decision-making.

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<sup>183</sup> *Id.* at 3 (“It is the intent of the Human Rights Commission that programs, services, and facilities are accessible and functional for people of all weights and heights.”).

<sup>184</sup> See *supra* note 3 and accompanying text.