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Given Equal Weight Under the Law: Expanding Title VII Protections to Prohibit Weight Discrimination

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GIVEN EQUAL WEIGHT UNDER THE LAW: EXPANDING TITLE VII PROTECTIONS TO PROHIBIT WEIGHT DISCRIMINATION

People come in all different sizes and shapes—and no one should ever be insulted or treated with less respect because of their weight.[1]

ABSTRACT

Approximately half of Americans have an overweight or obese body mass index (BMI), yet weight discrimination is legal in nearly every jurisdiction. This means employers can set BMI limits, maximum weights, waist sizes, and more with no legal consequences. This Note examines the history of anti-fat bias and weight discrimination and how that motivates weight discrimination in employment and in the law generally. It then discusses possible solutions. Currently, most scholars propose prohibiting weight discrimination on a state level through legislation similar to Michigan's Elliott-Larsen Civil Rights Act or on a federal level by recognizing obesity as a disability protected under the Americans with Disabilities Act (ADA). This Note proposes prohibiting weight discrimination by adding "weight" as a category protected under Title VII. As the cases discussed in this Note demonstrate, this is the most efficient and effective way to protect fat and non-fat employees alike from experiencing weight discrimination in the workplace. This Note discusses how Title VII would enable fat employees, in particular, to allege weight discrimination without needing to either prove that their weight physically disables them or having their weight deemed disabling regardless of its impact on their abilities. Employers should not be able to refuse to hire or to terminate an employee because of harmful stereotypes about fat people. Prohibiting weight discrimination on a federal level through Title VII would be an important step towards creating more inclusive work environments for all.

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INTRODUCTION

In 2007, Casey Taylor received a conditional employment offer to be an electronic technician for the BNSF Railway Company (BNSF), pending a physical exam.[2] Taylor had previous experience as an avionics technician in the Marine Corps and disclosed that he experienced back and knee pain resulting from his prior military service.[3] To ensure he could safely work for BNSF, Taylor's required physical exam included checking his height, weight, blood pressure, and "a physical capacities ('IPCS') test that indicated he had adequate shoulder and knee strength."[4] BNSF's outside medical examiners also requested Taylor's military medical records to determine the status of his back and knees, but Taylor was unable to obtain them quickly enough from the Veterans Administration (VA) for BNSF to review.[5] At his exam, Taylor measured 5'6" tall and weighed 256 pounds, placing him at a BMI of 41.3, which falls within the obese category.[6]

Given the lack of records beyond the exam and Taylor's BMI, BNSF determined it would not employ Taylor without further health evaluations, which he would need to pay for himself.[7] Taylor could not afford to pay for these evaluations, so BNSF said that instead of having to pay, "Mr. Taylor could be considered for the job if he lost 10% of his weight and maintained that weight loss for at least

2. Taylor v. BNSF Ry. Co., No. C11-1289JLR, 2021 U.S. Dist. LEXIS 162866, at *2–*3 (W.D. Wash., Aug. 27, 2021).

3. *Id.*

4. *Id.* at *5.

5. *Id.* at *4.

6. *Id.* at *5.

7. Taylor would need to submit "(1) a sleep study, (2) a medical report from a doctor documenting various 'cardiac risk factors' . . . (3) an exercise tolerance test, (4) hip and waist measurements performed by a physician's office or athletic facility, and (5) the complete VA disability determination once it became available." *Id.* at *6–*7.

six months."[8] In 2010, Taylor sued, alleging BNSF discriminated against him because of his obese BMI in violation of Washington's Law Against Discrimination (WLAD).[9] In 2019, the Washington Supreme Court held that obesity is a qualifying impairment under the WLAD and "does not have to be caused by a separate physiological disorder or condition because obesity itself is a physiological disorder or condition under the statute."[10] This ruling was a victory for Taylor in his lengthy, ongoing lawsuit.[11] It is also indicative of how the legal system fails to protect fat employees from weight discrimination and how, when it *does* protect them, it does so by deeming their bodies "a physiological disorder or condition."[12]

According to the Centers for Disease Control and Prevention (CDC), over forty percent of the United States adult population is classified as "obese."[13] Despite the prevalence of obesity and weight discrimination, Michigan is currently the only state with explicit civil rights protections for employees who experience weight discrimination.[14] Cities including San Francisco and Santa Cruz, California; Washington, D.C.; Urbana, Illinois; Binghamton, New York; and Madison, Wisconsin have enacted protections.[15] However, the vast majority of Americans remain unprotected.[16] This leaves people vulnerable because of the high rates of overweight and obese adults who report experiencing weight discrimination from their employers and/or coworkers.[17]

At present, legal scholarship on weight discrimination tends to focus on the opportunity to provide protection by classifying obesity

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8. Taylor v. BNSF Ry. Co., No. C11-1289JLR, 2021 U.S. Dist. LEXIS 162866, at *6 (W.D. Wash., Aug. 27, 2021).

9. Taylor v. Burlington N. R.R. Holdings, Inc., 444 P.3d 606, 609 (Wash. 2019).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/obesity/data/adult.html [https://perma.cc/2F4W-T7NF] (last visited Jan. 27, 2023).

14. *See* Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2102(1).

> The 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.

15. RUDD CTR. FOR FOOD POL'Y & OBESITY, WEIGHT BIAS: A POLICY BRIEF 3, https://media.ruddcenter.uconn.edu/PDFs/Weight%20Bias%20Policy%20Brief%202017.pdf [https://perma.cc/G23K-F5PU] (last visited Jan. 27, 2023).

16. *See id.*

17. ROBERTA R. FRIEDMAN & REBECCA M. PUHL, RUDD CTR. FOR FOOD POL'Y & OBESITY, WEIGHT BIAS: A SOCIAL JUSTICE ISSUE 2, https://media.ruddcenter.uconn.edu/PDFs/Rudd_Policy_Brief_Weight_Bias.pdf [https://perma.cc/B496-7S8X] (last visited Jan. 27, 2023).

as a disability.[18] If obesity were classified as a disability, obese employees alleging discrimination in employment could file suit under the Americans with Disabilities Act of 1990 (ADA).[19] Rather than utilizing the ADA for protection, this Note will propose expanding Title VII of the Civil Rights Act of 1964 (Title VII) to include weight as a category protected from discrimination using a similar approach to Michigan.[20]

Weight should be considered a protected category under Title VII because of the long history and continued impact of anti-fat bias.[21] Weight discrimination in employment is one of the many ways anti-fat bias continues to negatively impact fat[22] people,[23] but it is not exclusive to fat employees, as the BorgataBabes and Hooters cases demonstrate.[24]

When it comes to remedying weight discrimination in the employment setting, there are two main reasons why expanding Title VII is preferable to using the ADA. First, classifying obesity as a disability lends credibility to societal anti-fat bias by further medicalizing something that is neither inherently diseased nor disabled.[25] Second, ADA protections specifically for obese employees would

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18. Cheryl L. Maranto & Ann Fraedrich Stenoien, *Weight Discrimination: A Multidisciplinary Analysis*, 12 EMP. RESPONSIBILITIES AND RTS. J. 9, 11 (2000).

19. *See* Jay M. Zitter, *Employment Discrimination Against Obese Persons*, 111 AM. JUR. PROOF OF FACTS 3D 391 (2009); *Current Trends in Combating Weight Discrimination in the Workplace*, FISHER PHILLIPS (May 14, 2020), https://www.fisherphillips.com/news-insights/current-trends-in-combating-weight-discrimination-in-the-workplace.html [https://perma.cc/HPQ6-TPVU].

20. *See Employment Discrimination Against Obese Persons*, *supra* note 19.

21. WENDY MURPHY, USA TODAY HEALTH REPORTS: DISEASES AND DISORDERS: OBESITY 79 (2012).

22. Throughout this Note, "fat" is used to describe individuals in large bodies who experience weight discrimination. "Obese" and "overweight" are used where they appear in body mass index (BMI) categories, legal language, or direct quotes. The Fat Acceptance Movement prefers "fat" as a descriptive term because of its neutrality compared to "obese," which is inherently medicalized and pathologized. *See* Laura S. Brown, *Fat-Oppressive Attitudes and the Feminist Therapist: Directions for Change*, *in* FAT OPPRESSION AND PSYCHOTHERAPY, 28 (Laura S. Brown & Esther D. Rothblum eds., 1989); *see also* EREC SMITH, FAT TACTICS 6 (2019). Because this Note aims to apply Fat Acceptance ideals of body neutrality and acceptance to employment discrimination law, the terminology used follows the lead of that movement.

23. *See, e.g.*, Davidson v. Iona-McGregor Fire Prot. and Rescue Dist., 674 So. 2d 858 (Fla. Dist. Ct. App. 1996) (stating that a firefighter was terminated for failing to maintain a set waist size); Parolisi v. Bd. of Examiners, 285 N.Y.S.2d 936 (N.Y. Sup. Ct. 1967) (explaining that a substitute teacher was denied her license because she was overweight); Richardson v. Chicago Transit Auth., 926 F.3d 881 (7th Cir. 2019) (stating that a bus driver was fired for exceeding employer's weight limit).

24. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272 (N.J. Super. Ct. App. Div. 2015); Complaint at 3, Smith v. Hooters of Roseville, Inc. (Macomb Cnty. Cir. Ct. 2010) (No 10-2213-CD).

25. Deborah McPhail & Michael Orsini, *Fat Acceptance as Social Justice*, 193 CANADIAN MED. ASS'N J. E1398, E1398 (2021).

exclude non-obese employees who experience weight discrimination in the workplace. This particularly impacts non-obese female employees who have sued employers for allegedly mistreating them for not meeting employers' appearance standards.[26]

Part I of this Note examines the history of anti-fat bias and weight discrimination and how they impact various parts of law and society.[27] Part II looks specifically at weight discrimination in employment and discusses two cases brought using Michigan's anti-discrimination law, which prohibits weight discrimination.[28] Part III argues that weight should be added to Title VII as a protected category and that this expansion is preferable to classifying obesity as a disability under the ADA.[29] Additionally, Part III discusses whether employers could claim that weight is a bona fide occupational qualification for certain jobs and their discrimination is therefore justified.[30] Prohibiting weight discrimination in employment through Title VII may not eliminate the biases underlying such discrimination, but it would nonetheless be an important step toward creating more tolerant and inclusive workplaces.

I. HISTORY OF ANTI-FAT BIAS AND WEIGHT DISCRIMINATION

To understand why weight should be protected under Title VII and why it is preferable to prohibit weight discrimination through Title VII instead of the ADA, one must understand the history of anti-fat bias.

A. Anti-fat Bias

Anti-fat bias generally refers to society's negative stereotypes and attitudes toward fat people, such as the perceptions that fat people are less intelligent, honest, or disciplined.[31] Weight discrimination, on the other hand, refers to the ways people are treated negatively due to their weight.[32] Information about the complexities of weight,

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26. *See, e.g.*, Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272 (N.J. Super. Ct. App. Div. 2015); Complaint at 3, Smith v. Hooters of Roseville, Inc. (Macomb Cnty. Cir. Ct. 2010) (No 10-2213-CD).

27. *See* discussion *infra* Part I.

28. *See* discussion *infra* Part II; Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2102(1).

29. *See* discussion *infra* Part III.

30. *See id.*

31. Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review*, 17 OBESITY 941, 941 (2009).

32. Rebecca Puhl, *Weight Discrimination: A Socially Acceptable Injustice*, OBESITY ACTION COALITION, https://www.obesityaction.org/resources/weight-discrimination-a-socially-acceptable-injustice [https://perma.cc/64MT-XH9N] (last visited Jan. 27, 2023).

dieting, and weight loss is readily available, yet anti-fat bias continues to pervade nearly every facet of life, from health care to employment to general social success.[33] This bias affects people of all ages, with studies showing that children express negative attitudes toward fat people by the time they reach elementary school or even preschool age.[34] The common narratives surrounding weight and fatness often involve portraits of overeating and place blame on fat individuals for their size.[35] The narrative of personal responsibility and blame for weight can even be seen in the terminology used to describe it: "[t]he word *obesity* comes from the Latin word *obesitas*, meaning 'having eaten so much that one becomes fat.'"[36]

Anti-fat bias is so strong that, even when exposed to research that discusses the complex factors which determine weight, it may still not result in kinder rhetoric. For example, columnist Ken Hecht responded to research on genetic factors by saying: "[i]n other words, some people are destined to be fatties. This is information that should be withheld from the fat multitudes because the obese will latch onto any excuse for failing to lose weight."[37] The narrative of blame surrounding anti-fat bias causes psychological harm to fat people, who experience high rates of depression and suicide.[38] It does not seem that improving individuals' health is the actual aim of anti-fat proponents, since research shows that stigma is not an appropriate or effective method for changing behavior.[39] Nor does weight always correlate with health.[40] Anti-fat bias does not exist in a vacuum, but rather has real-life consequences for fat people in all walks of life by causing weight discrimination.

B. Weight Discrimination

Anti-fat bias motivates weight discrimination and causes harm to fat and non-fat people alike. Aside from employment, two of its

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33. MURPHY, *supra* note 21, at 79.

34. GAIL SNYDER, KIDS AND OBESITY 34 (2019); MAXINE NEWMAN JIMERSON, CHILDHOOD OBESITY 67 (2009) (discussing a study of children who used terms such as "lazy, stupid, dirty, ugly, liars, and cheaters" to describe fat children).

35. *See, e.g.*, NEIL SEEMAN & PATRICK LUCIANI, XXL: OBESITY AND THE LIMITS OF SHAME 4 (2011) ("How many times have you seen a 'zaftig' person wolfing down potato chips or cookies in public and thought to yourself, 'Doesn't she have any shame?'").

36. SNYDER, *supra* note 34, at 8.

37. Ken Hecht, *Oh, Come On Fatties!*, NEWSWEEK 8 (Sep. 3, 1990).

38. *See* MICHAELA MILLER, WHAT IF WE DO NOTHING?: THE OBESITY EPIDEMIC 22 (2007) ("Obese women are 37 percent more likely to commit suicide than women of a healthy weight."); DAVID HASLAM & GARY WITTERT, FAST FACTS: OBESITY 65 (2014).

39. APRIL MICHELLE HERNDON, FAT BLAME 20 (2014).

40. *See* SEEMAN & LUCIANI, *supra* note 35, at 17.

main impacts are in health care and family law.[41] In health care, fat patients receive worse health care and have worse health outcomes than their non-fat peers.[42] Doctors focus on their weight and BMI regardless of health indicators such as cholesterol or blood pressure.[43] By doing so, doctors provide fat patients with worse care that can lead patients to avoid seeking care altogether.[44] This, in turn, allows health problems to be missed or untreated, leading to worse long-term health outcomes: "The long-term result of avoidance and postponement of care is that people with obesity may present with more advanced, and thus more difficult to treat, conditions."[45]

Anti-fat bias in health care is not only seen in fat patients' self-reported experiences, but also in how health care providers report viewing their patients.[46] When surveyed about how they would describe fat patients, doctors use descriptors such as lazy, obstinate, unhygienic, and hostile.[47] Fat patients are perceived as less healthy than non-fat patients even though high body weight does not, on its own, indicate poor health.[48] Regardless of their individual health statuses, fat patients face barriers in medical care because of their weight, from being refused surgery[49] and in vitro fertilization[50] to receiving worse cancer treatment because of chemotherapy dosing problems.[51] It is worth noting that even when health care providers do research the insidious ways that anti-fat bias and weight discrimination can negatively impact patient outcomes, the researchers still center weight loss as a primary goal.[52]

In family law, there are those who advocate removing fat children from their families to make them lose weight.[53] Weight discrimination

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41. Bethany Brumbaugh, *Health Care for Obesity and Eating Disorders: What Needs to Change*, THE HASTINGS CTR. (Feb. 28, 2020), https://www.thehastingscenter.org/health-care-for-obesity-and-eating-disorders-what-needs-to-change [https://perma.cc/B6KL-4K2U] (last visited Jan. 27, 2023); JIMERSON, *supra* note 34, at 1, 47.

42. S.M. Phelan, D.J. Burgess, M.W. Yeazel, W.L. Hellerstedt, J.M. Griffin & M. van Ryn, *Impact of weight bias and stigma on quality of care and outcomes for patients with obesity*, 16 OBESITY REVS. 319, 321 (2015).

43. SEEMAN & LUCIANI, *supra* note 35, at 17.

44. Phelan et al., *supra* note 42, at 321 ("For example, there is evidence that obese women are less likely to seek recommended screening for some cancers.").

45. *Id.*

46. JIMERSON, *supra* note 34, at 75.

47. *Id.*

48. Slightly more than half of overweight adults and nearly one-third of obese adults have test results within a healthy range while one-quarter of "recommended-weight" adults do not. SEEMAN & LUCIANI, *supra* note 35, at 17.

49. MURPHY, *supra* note 21, at 77.

50. HERNDON, *supra* note 39, at 50.

51. HASLAM & WITTERT, *supra* note 38, at 39.

52. Phelan et al., *supra* note 42, at 323.

53. JIMERSON, *supra* note 34, at 58.

also impacts families when courts remove children from their homes due to weight.[54] If one believes, as some obesity researchers do, that childhood obesity comes from an "'obesogenic' environment" of junk food and inactivity,[55] then this conclusion makes sense.[56] Parents who are unhelpful in their child's weight loss efforts and who exhibit "parenting deficiencies" may face charges of neglect resulting in their child's removal from the home.[57] Children could then be placed into foster care or weight-loss programs such as summer camps or residential programs.[58] Courts in the United States and Australia have actually removed children from homes and put them into state care using these arguments.[59]

In one case, Marlene Corrigan was prosecuted in the death of her thirteen-year-old daughter, Christina, who was put on her first diet at three months old and experienced lifelong health and weight problems.[60] Marlene Corrigan reportedly asked doctors, social workers, and school administrators for help in addressing Christina's rapid weight gain, to no avail.[61] After Christina's death, the coroner performed an external, visual autopsy for ten minutes before concluding that Christina died of heart failure solely on the basis of her weight.[62] Doctors, the media, and the public perpetuated and believed the narrative that Christina's weight was sufficient evidence to condemn Marlene.[63] However, the decision to focus only on Christina's weight left the exact cause of death a mystery and means Marlene may not have been to blame.[64] This is not to say that obesity may *never* indicate neglect or abuse, but rather that a child's weight may not always be an accurate indicator of the quality of their home life.

C. Obesity and Weight Loss Research

Given the personal-blame narrative surrounding weight, it is worth examining the history of obesity and weight loss research. Modern treatment for obesity began with behavioral therapy approaches

54. *Id.*
55. HASLAM & WITTERT, *supra* note 38, at 20–21.
56. JIMERSON, *supra* note 34, at 58.
57. Lindsey Murtagh & David S. Ludwig, *State Intervention in Life-Threatening Childhood Obesity*, 306 J. AM. MED. ASS'N 206 (2011).
58. JIMERSON, *supra* note 34, at 58.
59. HERNDON, *supra* note 39, at 58.
60. SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE 14 (2000).
61. *Id.* at 14–18.
62. *Id.* at 21.
63. *Id.* at 22.
64. *Id.* ("Had Christina died from a seizure, Marlene may have been innocent. Had Christina died from a sore which caused a massive infection to her body, Marlene may have been guilty of a felony.").

in the 1950s and 1960s and operated on the premise that obesity was caused by an obese eating style.[65] The goal of the therapy was to eliminate any abnormal eating behavior in order to return the patient to a "normal" weight that would then be permanently sustained.[66] However, weight loss is not as simple as the 1950s treatments thought, as the diet and weight loss industry in the United States can attest given its annual value of over $70 billion.[67] "Successful" weight loss has varying definitions, but generally entails weight loss which has lasted for some period of time, often one year or longer.[68]

When it comes to weight loss, an oft-cited statistic is that over ninety percent of dieting efforts fail.[69] That statistic originally comes from Albert Stunkard and Mavis McLaren-Hume's "1959 study of 100 obese individuals, which indicated that, 2 y[ears] after treatment, only 2% maintained a weight loss of 9.1 kg (20 lb [sic]) or more."[70] The difficulty of maintaining long-term weight loss without surgical intervention is discussed by both obesity researchers and Fat Acceptance[71] activists.[72] Weight loss programs which utilize non-surgical methods such as diet and/or exercise can assist participants in losing up to ten percent of their body weight safely, "but two-thirds of people gain most of it back within a year, and within five years, 90 to 95 per cent [sic] of weight lost is regained."[73] In the sixty years since Stunkard and McLaren-Hume's two percent success rate, researchers have not achieved much better.[74]

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65. HASLAM & WITTERT, *supra* note 38, at 57.

66. *Id.*

67. *United States' Weight Loss Market to Decline by 9% to $71 Billion in 2020—Assessment of the Changing Consumer Dieting Behavior due to COVID-19*, PR NEWSWIRE (June 4, 2020, 10:45 AM), https://www.prnewswire.com/news-releases/united-states-weight-loss-market-to-decline-by-9-to-71-billion-in-2020---assessment-of-the-changing-consumer-dieting-behavior-due-to-covid-19-301070748.html#:~:text=In%2DLanguage%20News-,United%20States'%20Weight%20Loss%20Market%20to%20Decline%20by%209%25%20to,Behavior%20due%20to%20COVID%2D19 [https://perma.cc/RCE8-DAPM].

68. Rena R. Wing & Suzanne Phelan, *Long-Term Weight Loss Maintenance*, 82 AM. J. CLINICAL NUTRITION 222S, 222S (2005).

69. *Id.*

70. *Id.*

71. *See* Sarah Simon, *The Feminist History of Fat Liberation*, MS. MAGAZINE (Oct. 18, 2019), https://msmagazine.com/2019/10/18/the-feminist-history-of-fat-liberation [https://perma.cc/C4WD-QCMD] ("Fat liberation's roots are in the 1960s, when the emergent Fat Acceptance Movement aimed to celebrate fat bodies and remove stigma from fatness in a long-term and meaningful way.").

72. "Recidivism among those who lose weight by any method other than bariatric surgery is well recognized." HASLAM & WITTERT, *supra* note 38, at 22; Jaclyn Packer, *The Role of Stigmatization in Fat People's Avoidance of Physical Exercise*, *in* FAT OPPRESSION AND PSYCHOTHERAPY 50 (Laura S. Brown & Esther D. Rothblum eds., 1989).

73. SEEMAN & LUCIANI, *supra* note 35, at 22.

74. *See id.*

There are many possible explanations why long-term weight loss is so difficult to achieve, including genetics.[75] Scientists have so far identified up to 200 individual genes which may play a role in determining a given person's weight, meaning that there are possible explanations for weight at a genome level that cannot be changed through diet or exercise alone.[76] Genetics researcher Claude Bouchard describes how changes in even a single gene can result in an individual being fat.[77] These genetic components are also heritable, as Bouchard's research found that "the genetic component of BMI in a population comprising the whole range of BMI values accounts for about 40% to 50% of the variance adjusted for age and sex."[78] Not only that, but the heritability of genes relating to weight was substantially higher than average for higher BMI populations and lower than average in lower BMI populations.[79] Such genetic diversity and heritability means that, even if there were gene treatments available to address weight's genetic factors, the sheer number of potential combinations and permutations would still make addressing weight on a genetic level a difficult task.[80]

The genetics of weight mean that adult weights tend to stay close to a set point for each individual and do not fluctuate much above or below it.[81] This set point could be one reason why so few weight loss research subjects maintain their loss.[82] Not only is long-term weight loss complex and difficult, the cycle of losing and regaining weight has well-documented negative health effects.[83] So-called "'[y]o-yo' dieting" is, in itself, a risk factor for health problems including cardiovascular disease.[84] However, even if losing weight were easy and accessible, no one should have to alter their body to avoid discrimination. As Fat Acceptance researcher and activist Aubrey Gordon wrote, "our perception of someone else's health shouldn't determine how we treat them or what they can access."[85]

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75. *Id.* at 39.

76. *Id.*

77. Claude Bouchard, *Genetics of Obesity: What We Have Learned Over Decades of Research*, 29 OBESITY 802, 807 (2021).

78. *Id.* at 804.

79. *Id.*

80. SEEMAN & LUCIANI, *supra* note 35, at 39.

81. WENDY MURPHY, USA TODAY HEALTH REPORTS: DISEASES AND DISORDERS: OBESITY 18 (2012).

82. *Id.*

83. HASLAM & WITTERT, *supra* note 38, at 33.

84. *Id.*

85. Your Fat Friend, *We Have to Stop Thinking of Being 'Healthy' As Being Morally Better*, SELF (Aug. 7, 2020), https://www.self.com/story/healthism [https://perma.cc/Z3Z8-9JFR].

II. HISTORY OF WEIGHT DISCRIMINATION IN EMPLOYMENT AND CASE LAW

A. Weight Discrimination in Employment

There is currently no federal employment law prohibiting weight discrimination.[86] However, despite the lack of protections, plaintiffs can sue alleging weight discrimination under applicable state or local laws such as Michigan's Elliott-Larsen Civil Rights Act.[87] Although it is not treated as a problem under federal law, significant numbers of fat people report experiencing varying forms of discrimination and harassment in the workplace.[88]

Employers who express concern about their staff's weight tend to worry about its impact on productivity and health insurance costs.[89] One seemingly positive option to address those issues is to create an employer wellness program to promote healthy lifestyles.[90] Such programs aim to reward employees who follow health standards set by the employer while limiting benefits of employees who do not; essentially penalizing poor health as defined by the employer.[91] Employees penalized under these programs have limited recourse; limiting benefits access based on the effects of obesity or refusing to cover treatments relating to obesity is only legally discriminatory if obesity is classified as a disease or a disability.[92] Polina Arsentyeva, the author promoting these programs specifically to tackle obesity rates, has stated that obesity is not a suspect class for purposes of anti-discrimination legislation but has also said "it has become one of the last socially acceptable forms of discrimination."[93]

B. The BorgataBabes Case

Individuals who live outside of jurisdictions with explicit prohibitions of weight discrimination may seek protections through other

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86. *See* FRIEDMAN & PUHL, *supra* note 17.

87. *See, e.g.*, Farino v. Renaissance Club, No. 206031, 1999 WL 33440929, *1 (Mich. Ct. App. 1999).

88. *See* FRIEDMAN & PUHL, *supra* note 17 ("Compared to job applicants with the same qualifications, obese applicants are rated more negatively and are less likely to be hired . . . . More than half (54%) of overweight participants in a study reported they had been stigmatized by co-workers.").

89. Polina Arsentyeva, *The Social Burden of Obesity: Legal Implications of Employer and Gov't Sponsored Wellness Programs*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 129, 131 (2009).

90. *Id.* at 133.

91. *Id.*

92. *Id.* at 134.

93. *Id.* at 135–36.

anti-discrimination ordinances.[94] The BorgataBabes took this approach in their lawsuit against their employer casino for its stringent appearance standards limiting weight gain.[95] Twenty-one female employees of the Borgata Casino Hotel & Spa sued their employer, alleging that the casino's "personal appearance standards (the PAS) subjected them to illegal gender stereotyping, sexual harassment, disparate treatment, disparate impact, and as to some plaintiffs, resulted in adverse employment actions."[96]

The women worked as "BorgataBabes"—a specific job category at the casino—and were therefore required to adhere to the PAS set forth by their employer.[97] The PAS required all BorgataBabes to maintain specified levels of fitness, which included keeping their weight "proportionate" to their height.[98] In 2005, Borgata Casino updated and modified the PAS to state that, "barring medical reasons, BorgataBabes could not increase their baseline weight, as established when hired, by more than 7% (weight standard)."[99] Employees subject to the PAS were measured to establish their baseline weights and then signed the updated standards, with many saying they feared that refusal to sign would result in them losing their jobs.[100]

According to the plaintiff's lawsuit, over a five-year period, "686 female and 46 male associates were subject to the PAS, of which 25 women and no men were suspended for failure to comply with the weight standard."[101] The lawsuit was brought under New Jersey's Law Against Discrimination (LAD), which includes protections for gender and sexual orientation.[102] The LAD mentions employer appearance standards and states that employers may require their employees to follow "reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law."[103]

In ruling for the casino, the Court determined that the weight standard did not violate the LAD because "there is no protected

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94. *See, e.g.*, Farino v. Renaissance Club, No. 206031, 1999 WL 33440929, *1 (Mich. Ct. App. 1999).

95. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272, 278 (N.J. Super. Ct. App. Div. 2015).

96. *Id.*

97. *Id.*

98. *See id.* at 280 ("Female BorgataBabes were to have a natural hourglass shape; males were to have a natural 'V' shape with broad shoulders and a slim waist.").

99. *Id.* at 281.

100. *Id.*

101. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272, 281–82 (N.J. Super. Ct. App. Div. 2015).

102. *Id.* at 286.

103. *Id.* at 289.

class based solely on one's weight."[104] In addition, the standard was deemed to not discriminate on the basis of sex because, although the plaintiffs showed disproportionate discipline of female employees, "such simple statistical disparities [were] insufficient to show the weight standard was facially discriminatory."[105]

Interestingly, the court goes out of its way to describe how BorgataBabes operate as entertainment and says that "the costume may lend authenticity to the intended entertainment atmosphere."[106] Per the court, if plaintiffs disliked the PAS, they could have simply taken one of the casino's non-PAS positions, which offered less flexible hours, less beneficial earnings, and fewer overall benefits.[107] Two plaintiffs did transfer to non-PAS positions, but ultimately quit, while several others struggled to comply due to medical conditions or post-pregnancy weight gain.[108] The appellate court affirmed summary judgment dismissing claims that the PAS were facially discriminatory under the LAD because the LAD does not protect employees "based on weight, appearance, or sex appeal."[109] However, it held that the claims alleging Borgata created a hostile work environment through sexual harassment were improperly dismissed and remanded for those to be tried.[110]

In the years since Jacqueline Schiavo filed the first complaint against Borgata in 2008,[111] it is unclear whether the plaintiffs have yet reached the end of their litigation. Although the appellate court remanded the hostile work environment claims to the trial court in 2015, it had to reiterate its position in 2019 after the trial court dismissed the claims once again.[112] Had the LAD prohibited weight discrimination, it is unclear how that might have impacted the BorgataBabes due to their "entertainer" designation.[113] Even if entertainers were exempted, surely other New Jersey employees could still benefit from such protections.

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104. *Id.*
105. *Id.* at 292.
106. *Id.* at 293.
107. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272, 293 (N.J. Super. Ct. App. Div. 2015).
108. *Id.* at 282.
109. *Id.* at 279.
110. *Id.* at 278–79.
111. *Id.* at 282.
112. Jim Walsh, *Borgata Babe servers can take weight-gain lawsuit to jury*, THE COURIER-POST (May 20, 2019, 10:25 PM), https://www.courierpostonline.com/story/news/2019/05/20/borgata-babes-weight-gain-gender-bias-lawsuit/3742371002 [https://perma.cc/ZB4U-PNG2].
113. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272, 293 (N.J. Super. Ct. App. Div. 2015).

C. Hooters Waitresses

In 2010, Cassandra Smith sued Hooters in Michigan after being put on "weight probation" for thirty days.[114] When Smith began working at Hooters, she actually weighed more than she did when she was put on probation: "[a]ccording to the complaint, Smith is 5'8" tall and weighs 132.5 pounds (60 kg), down from 145 pounds (66 kg) when she was recruited for employment in 2008."[115] Smith worked at the Roseville Hooters restaurant in Michigan for two years, during which time she received positive feedback on her work and was promoted to a supervisory role.[116]

At her final performance evaluation meeting when she was placed on weight probation, Smith's supervisors and two corporate employees suggested she join a gym to improve the fit of her extra-small uniform.[117] At the time Smith filed her complaint, Hooters waitress uniforms were allegedly available only in sizes small, extra small, and extra-extra small.[118] The two corporate Hooters employees told Smith to contact them if necessary and said they would understand if she failed her weight probation and decided to quit.[119] However, Smith was not told how her uniform was supposed to fit or how much weight she had to lose to come off of weight probation.[120] She was ultimately terminated.[121]

Smith sued Hooters under Michigan's Elliott-Larsen Civil Rights Act, alleging that the restaurant chain's weight standards constituted weight discrimination in violation of the Act.[122] Her suit also included gender discrimination and intentional infliction of emotional distress claims.[123] If the weight and height information in the complaint is accurate, Smith's BMI when she was hired was twenty-two and when she was fired it was 20.1, both within the "normal" range.[124]

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114. Jonathan Stempel, *Hooters sued by ex-worker for weight bias*, REUTERS (May 24, 2010, 5:36 PM), https://www.reuters.com/article/us-hooters-bias-lawsuit/hooters-sued-by-ex-worker-for-weight-bias-idUSTRE64N5NS20100524 [https://perma.cc/B8B8-6E8E].

115. *Id.*

116. Complaint at 3, Smith v. Hooters of Roseville, Inc. (Macomb Cnty. Cir. Ct. 2010) (No 10-2213-CD).

117. *Id.* at 4.

118. *Id.*

119. *Id.* at 5.

120. *Id.*

121. *Id.* at 6.

122. Complaint at 7, Smith v. Hooters of Roseville, Inc. (Macomb Cnty. Cir. Ct. 2010) (No 10-2213-CD).

123. *Id.* at 8.

124. *Calculate Your Body Mass Index*, NAT'L HEART, LUNG, AND BLOOD INST., https://www.nhlbi.nih.gov/health/educational/lose_wt/BMI/bmicalc.htm [https://perma.cc/4GX4-UCHG] (last visited Jan 27, 2023).

Another Hooters waitress, Leanne Convery, also brought suit against the company in Michigan.[125] Convery alleged facts similar to Smith, including being fired after failing to satisfactorily complete her weight probation.[126] She worked for the same location as Smith for five years and was 4'11" and 115 pounds when she was fired.[127] This means her BMI was 23.2, which is within the "normal" range.[128] Convery alleged that not only was she placed on weight probation, but that her manager encouraged her to increase weight loss by using drugs to suppress her appetite.[129] Another Roseville location waitress, Melissa Jacquemain, alleged in an affidavit "that employees used Adderall, cocaine and Vicodin, [and] employees older than 30 weren't consider [sic] for hire."[130] Convery did allegedly undergo significant weight loss during her weight probation, dropping to 100 pounds, but she was still terminated.[131]

Both Smith and Convery evidently signed arbitration agreements in their employment contracts but were initially able to proceed with their cases because it was unclear whether they signed the agreements knowingly.[132] However, the decision to move forward in court was overturned on appeal and both cases ultimately moved to arbitration for settlement.[133] Throughout the cases, Hooters maintained that weight probation was not company policy[134] and also that its waitresses were entertainers not subject to weight discrimination protections.[135]

Courts have not ruled whether Hooters waitresses are entertainers, but they have permitted other Hooters business practices.[136]

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125. Aaron Foley, *Second ex-waitress at Roseville Hooters files suit; attorney Mark Bernstein confident about both cases*, MLIVE (June 2, 2010, 7:46 PM), https://www.mlive.com/news/detroit/2010/06/second_ex-waitress_at_rosevill.html [https://perma.cc/7EUH-34FJ].

126. *Id.*

127. *Id.*

128. NAT'L HEART, LUNG, AND BLOOD INST., *supra* note 124.

129. Foley, *supra* note 125.

130. *Id.*

131. Jameson Cook, *Hooters case to continue*, MACOMB DAILY (June 17, 2021, 6:19 AM), https://www.macombdaily.com/2010/08/24/hooters-case-to-continue [https://perma.cc/BHZ3-BKKX].

132. David Mittleman, *Ex-Hooters Waitresses Win First Round in Court Battle Over Weight Discrimination*, LANSING INJURY L. NEWS (Aug. 27, 2010), https://lansing.legalexaminer.com/workplace/workplace-discrimination/exhooters-waitresses-win-first-round-in-court-battle-over-weight-discrimination [https://perma.cc/26EB-38S6].

133. *Arbitrator Will Decide Hooters Weight Cases*, CBS DETROIT (June 17, 2011, 10:51 AM), https://www.cbsnews.com/detroit/news/arbitrator-will-decide-hooters-weight-cases [https://perma.cc/HRN2-TH3B].

134. Foley, *supra* note 125.

135. Mittleman, *supra* note 132.

136. *Guys won't be joining Hooters Girls*, TAMPA BAY TIMES (Oct. 2, 2005), https://www.tampabay.com/archive/1997/10/01/guys-won-t-be-joining-hooters-girls [https://perma.cc/6VCS-QXFN].

In 1997, the restaurant chain paid $3.75 million to men who alleged that hiring only women for front-of-house positions constituted discrimination.[137] As part of the settlement, Hooters could continue to exclude men from serving tables, but the company did create new positions to hire more men.[138] According to Hooters, they are "in the business of providing vicarious sexual recreation and female sexuality is a bona fide occupational qualification."[139]

If Hooters is permitted to hire only women as Hooters Girls, can it also restrict Hooters Girls' weights? Hooters would argue it can because its waitresses are entertainers subject to certain appearance standards, as it argued regarding its gender discrimination in hiring.[140] However, neither Convery nor Smith were obese when they were fired from Hooters, and Smith actually lost weight over the course of her employment.[141] Therefore, Hooters would likely need to explain not only how weight is an essential part of being a Hooters Girl, but also why the company fired a waitress who lost weight and what weight it requires. These are hypothetical arguments that have not yet been raised in lawsuits against Hooters or similar restaurants, but it is worth noting how non-obese employees can also experience weight discrimination.

Were a court to hold that Hooters waitresses were still subject to weight discrimination protections, both Convery's and Smith's calculated BMIs fell within the normal weight category,[142] meaning they are protected because Michigan's statute mentions "weight," not "obesity."[143] That distinction further reinforces why statutory language matters in weight discrimination. Even if there were precedent for successfully suing employers under the ADA for discriminating against obese employees, that precedent would still necessitate that the plaintiffs be obese. If employees were not obese, they would lack standing to sue under the statute.[144] The fact that fat employees are more likely than non-fat employees to report experiencing weight discrimination should not prohibit non-fat employees from being protected.[145] All employees deserve a workplace free from weight discrimination, regardless of their weight, and anti-discrimination legislation should reflect that goal.

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137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*; *see* Mittleman, *supra* note 132.
141. Foley, *supra* note 125; Stempel, *supra* note 114.
142. Foley, *supra* note 125; Stempel, *supra* note 114.
143. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2102(1).
144. *See* discussion *infra* Section III.A.
145. *See* FRIEDMAN & PUHL, *supra* note 17.

D. Deborah Marks' Promotion

While working as a telemarketer for National Communications Association (NCA), Deborah Marks "weighed approximately 270 pounds."[146] She was, by all accounts, a good employee, and she became "Telemarketer of the Year" in 1993, her first year on the job.[147] Although she was productive and skilled as a telemarketer, she did not always get along with her supervisors and disagreed with them about certain business operations and procedures.[148] Nonetheless, Marks wished to advance within the company and sought a promotion to become a sales representative, a position she did not receive.[149] The promotion went instead to Selena Thomas, who allegedly told Marks that an NCA executive said Marks would have been promoted, had she lost weight.[150]

When Marks confronted her supervisors about this information and said she should have been promoted, executives allegedly said, "Deb, I've told you, outside sales, presentation is extremely important. Lose the weight and you will get promoted."[151] For the next several days, Marks spoke with other telemarketing employees about the promotion and alleged discrimination, until, on February 9, 1994, she was suspended for a week without pay.[152] After further discussions and disagreements with supervisors and executives, Marks was fired.[153] On November 11, 1995, Marks sued NCA, alleging its weight and appearance standards were stricter for women than men and that NCA therefore engaged in illegal gender discrimination.[154] The district court granted summary judgment in NCA's favor after determining that Marks failed to establish a *prima facie* case of discrimination.[155]

This case matters not because of the outcome, but because of how the court discusses weight as a valid employment qualification.[156] Because weight discrimination is legal and gender discrimination is not, NCA conceded in its motion that it did not promote Marks due to her weight, not due to her gender.[157] Unlike Borgata

146. Marks v. Nat'l Commc'ns Ass'n, Inc., 72 F. Supp. 2d 322, 326 (S.D.N.Y. 1999).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. Marks v. Nat'l Commc'ns Ass'n, Inc., 72 F. Supp. 2d 322, 326 (S.D.N.Y. 1999).
153. *Id.* at 327.
154. *Id.*
155. *Id.* at 341.
156. *Id.* at 338.
157. *Id.* at 331–32.

or Hooters, NCA can hardly claim that its sales representatives are "entertainers" subject to special appearance standards, but the district court endorses such standards in this instance, anyway: "Moreover, NCA's rationale for employing a slim and attractive sales force is obvious, certainly normal in the industry, and, in all probability, a long-established tradition."[158] The court takes for granted that a "long-established tradition" of discrimination toward fat employees is reasonable justification to continue such discrimination.[159] Whether Marks should have been promoted or not, courts should not endorse such discriminatory reasoning merely because it views it as an acceptable preference.[160] Where weight has no relation to the work at hand, employees should be protected from weight discrimination, regardless of traditions.

III. EXPANDING TITLE VII

Title VII and other anti-discrimination laws were passed to address the history of unequal and unfair treatment of the groups they protect.[161] Its 1964 enactment came in the wake of civil rights successes in desegregation, but also in the wake of reactionary racist violence.[162] The scope of anti-discrimination protections was debated until it eventually included race, color, religion, sex, and national origin.[163] The modern statute prohibits employers from firing, refusing to hire, or otherwise discriminating against employees because of a protected category.[164] In the decades since its enactment, Title VII has played a key role in expanding protections for workers, and it is time for the legislature to expand those protections further in line with the purpose of Title VII.[165]

A. Adding Weight as a Protected Category

If Title VII were expanded using language similar to Michigan's Elliott-Larsen Act, more people would be protected because the Act does not require plaintiffs alleging weight discrimination be a

158. Marks v. Nat'l Commc'ns Ass'n, Inc., 72 F. Supp. 2d 322, 338 (S.D.N.Y. 1999).
159. *Id.*
160. *See id.*
161. *Equal Employment Opportunity Program*, *EEO Terminology*, NAT'L ARCHIVES, https://www.archives.gov/eeo/terminology.html#p [https://perma.cc/VGP8-VEVT] (last visited Jan. 27, 2023).
162. *See Title VII History*, PLC LAB. & EMP. (Jan. 15, 2013) (on file with author).
163. *Id.*
164. 42 U.S.C.A. § 2000e-2. Unlawful employment practices.
165. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

certain weight to file suit.[166] Rather, the Act's general prohibition of weight discrimination ensures plaintiffs such as Cassandra Smith and Leanne Convery can bring suits.[167] When originally enacted, Title VII decided which categories to protect based on the "larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment" they faced.[168] Weight could be added as a protected category because of the widespread practice and history of weight discrimination.[169]

Modern Title VII cases such as *Bostock v. Clayton County* have addressed the expansive nature of its protections.[170] In that case, the Supreme Court clarified that Title VII's prohibition of sex discrimination forbids employers from firing employees for their sexual orientation or gender identity.[171] The original legislators might not have intended such protections when they drafted the Civil Rights Act in 1964, "[b]ut the limits of the drafters' imagination supply no reason to ignore the law's demands."[172] The mere fact that homosexual and transgender individuals were politically unpopular sixty years ago is insufficient to permit discrimination against them now:

> But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.[173]

Sexual orientation and gender identity are protected under Title VII because discriminating against gay and transgender employees necessarily discriminates on the basis of their sex.[174] If an employer fires a male employee who has a male partner but does not also fire a female employee who has a male partner, that employer has violated Title VII.[175]

This expansive approach to Title VII is important because *no* employers should be permitted to discriminate on the basis of an

166. Dargan Ware, Note, *Against the Weight of Authority: Can Courts Solve the Problem of Size Discrimination?*, 64 ALA. L. REV. 1175, 1204 (2013).
167. *Id.*
168. 29 C.F.R. § 1608.1. Statement of Purpose.
169. *See* FRIEDMAN & PUHL, *supra* note 17, at 4; *see also supra* discussion, Sections I.B, II.A.
170. *Bostock*, 140 S. Ct. at 1737 (2020).
171. *Id.*
172. *Id.*
173. *Id.* at 1751.
174. *Id.* at 1741.
175. *Id.*

employee's weight. Both fat and non-fat employees should be protected, which is best achieved by adding "weight" to Title VII's protected categories, not "obesity."[176] In his *Bostock* opinion, Justice Gorsuch explains the Court is not adding categories, but merely interpreting "a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[177] *Bostock* looked to the definitions of each individual term within Title VII to conclude that sexual orientation and gender are protected.[178] If the Court undertook that same analysis in weight discrimination cases, outcomes would depend on whether the statute said "weight" or "obesity."

It matters whether employers are prohibited from discriminating against an individual because of weight ("the amount that a [person or] thing weighs")[179] or because of obesity ("a condition characterized by the excessive accumulation and storage of fat in the body").[180] Leanne Convery, for example, was not obese and was discriminated against because of her weight,[181] and would therefore most likely not be protected unless weight is explicitly protected. Prohibiting weight discrimination protects fat and non-fat employees alike regardless of their BMI and would make alleging *prima facie* discrimination simpler for plaintiffs. For these reasons, weight should be added to Title VII as a protected category.

B. Using Title VII Rather Than the ADA

Adding weight as a protected category rather than classifying obesity as a qualifying disability under the ADA is preferable for several reasons. From a social standpoint, labeling obesity a disability could have stigmatizing effects on fat people who already experience widespread anti-fat bias and weight discrimination.[182] From a legal standpoint, prohibiting weight discrimination under Title VII would protect more employees[183] and may result in higher success rates for plaintiffs than the ADA.

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176. *Supra* Introduction.

177. *Bostock*, 140 S. Ct. at 1738 (2020).

178. *Id.* at 1739–41.

179. *Weight*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/weight [https://perma.cc/X4YM-TAYK] (last visited Jan. 27, 2023).

180. *Obesity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/obesity [https://perma.cc/F4P4-QHJ2] (last visited Jan. 27, 2023).

181. Foley, *supra* note 125.

182. NAAFA, *I Am Not a Disease! Fact Sheet*, https://static1.squarespace.com/static/5e7be2c55ceb261b71eadde2/t/612445396f3e045a2efba2bc/1629766970268/NAAFA+I+Am+Not+a+Disease+Fact+Sheet.pdf [https://perma.cc/RR53-RFCN] (last visited Jan. 27, 2023).

183. *See supra* discussion Section III.A.

To succeed in a case alleging ADA disability discrimination, a plaintiff must show that they are disabled.[184] Andrea Tucker sued her former employer, Unitech Training Academy (Unitech), for firing her, alleging Unitech discriminated against her due to her obesity in violation of the ADA.[185] When she needed more ink for her classroom printer, Unitech told her they would not get her more ink and to use another floor's printer instead.[186] More than once, the elevator was broken so Tucker had to take the stairs, which she told campus director, Michelle Hammothe, was physically uncomfortable for her.[187] Unitech ultimately fired Tucker, citing "poor classroom management [and] failure to perform required tasks after multiple warnings."[188] Tucker sued, alleging she was actually fired in retaliation for reporting misuse of printer ink funds and that, additionally, Unitech discriminated against her in violation of the ADA.[189]

However, Tucker lost her ADA claim because the court said that while her "weight was a physical impairment, she has not shown that it substantially limited a major life activity."[190] According to the Court, because Tucker used the stairs and never told Unitech she was disabled or requested accommodations, she had no ADA claim.[191] Tucker also said at trial that her weight did not inhibit her life.[192] Tucker's ADA disability discrimination claim failed, but it outlined the problems fat employees face when bringing ADA claims if their weight does not significantly limit their life. If Unitech fired Tucker because of her weight and did not have a non-weight-related reason, then Tucker should be able to sue them for weight discrimination.

In Casey Taylor's case, the Washington Supreme Court outlined how the state's anti-discrimination law, WLAD, was more expansive than the ADA.[193] To succeed in his claim, Taylor did not have to show his weight actually rendered him disabled; he only needed to show BNSF perceived him to be disabled and discriminated against him based on that perception.[194] In fact, BNSF did not hire Taylor because it was concerned about his physical capabilities but it also "did not dispute that Mr. Taylor could perform the essential functions of the

184. Tucker v. Unitech Training Academy, Inc., 783 F. App'x 397, 399 (5th Cir. 2019).
185. *Id.*
186. *Id.* at 398.
187. *Id.* at 399.
188. *Id.*
189. *Id.*
190. *Tucker*, 783 F. App'x at 400.
191. *Id.* at 389–99.
192. *Id.* at 400.
193. Taylor v. Burlington N. R.R. Holdings, Inc., 444 P.3d 606, 611 (Wash. 2019) ("We also expressly recognized that the WLAD's definition of 'disability' is broader than the definition in the ADA.").
194. *Id.* at 610.

job 'in these proceedings.'"[195] It did not matter that Taylor passed the BNSF physical and had normal blood pressure; to BNSF's Dr. Michael Jarrard, it mattered more that Taylor's BMI put him at higher risk of developing conditions like sleep apnea.[196]

Both Andrea Tucker and Casey Taylor alleged weight discrimination by their employers.[197] However, the ADA, by itself, did not protect either of them.[198] In Tucker's case, whether weight was truly a motivating factor in her termination or not, the Court's opinion shows what a high bar the ADA creates for fat employees not physically impaired enough by their weight for it to "substantially limit[] one or more major life activities of such individual."[199] On the other hand, in Taylor's case, the Court held that BNSF's belief that his weight impaired him was sufficient to qualify for protection under Washington state law.[200]

Under the *Taylor* formula, if a fat employee (with an obese BMI) is fortunate enough to live in a state where state courts have held obesity to be a "physiological disorder or condition," then they are disabled under that state's law, like Taylor in Washington.[201] If an employer then refuses to hire them because of their obese BMI "and the applicant is able to properly perform the job in question," then they can bring suit under their state's anti-discrimination law.[202] If state law is silent on obesity and they must rely on the ADA instead, then fat employees can only bring suit if their weight impairs them enough to constitute a physical disability.[203]

Weight discrimination has significant, negative impacts on fat employees,[204] so why should it be legal to discriminate against them in one jurisdiction but not another? Rather than rely on piecemeal protections depending on where potential plaintiffs live, it would be much more efficient to expand federal protections under Title VII to prohibit weight discrimination. Use of Title VII would also avoid reinforcing the idea that fatness is inherently a disease and further stigmatizing fat people.[205]

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195. Taylor v. BNSF Ry. Co., No. C11-1289JLR, 2021 U.S. Dist. LEXIS 162866, at *5 (W.D. Wash., Aug. 27, 2021).

196. *Id.* at *3 ("Dr. Jarrard did not believe that Mr. Taylor had such conditions, only that he was prone to developing them.").

197. *Taylor*, 444 P.3d at 609; *Tucker*, 783 F. App'x at 399.

198. *Taylor*, 444 P.3d at 611; *Tucker*, 783 F. App'x at 399.

199. *Tucker*, 783 F. App'x at 400.

200. *Taylor*, 444 P.3d at 616.

201. *Id.* at 609.

202. *Id.* at 608.

203. *Tucker*, 783 F. App'x at 400.

204. *See* FRIEDMAN & PUHL, *supra* note 17.

205. *See* NAAFA, *supra* note 182.

C. Bona Fide Occupational Qualifications

There are circumstances where an employer may claim their discrimination was justified because it constituted a bona fide occupational qualification (BFOQ) for the position.[206] BFOQs, as defined within federal anti-discrimination law, permit an employer to require the employee to belong to a certain protected category where "reasonably necessary" for a given employer.[207] For example, a school operating as a religious school may choose to hire employees who follow that particular religion.[208]

When former firefighter Donald Scott Davidson was hired by Iona-McGregor Fire Protection and Rescue District, the District added a condition to his employment that he lose four inches from his waistline in six months.[209] Davidson met the standard conditions for employment, but the District allegedly perceived him to be obese.[210] Over the next fifteen months, Davidson claimed he did lose weight but was approached at least twice with a new agreement requiring weight loss and maintenance of his smaller thirty-six-inch waist size, which Davidson refused to sign.[211] Davidson's supervisor reportedly told him that failure to lose the specified weight would result in termination.[212]

Aside from the weight and waist requirements imposed by Iona-McGregor, Davidson met all other firefighter requirements, including those of the state, yet he was ultimately terminated.[213] Davidson filed suit, alleging that obesity was covered by Florida's Human Rights Act of 1977 as a handicap and therefore he had been unlawfully terminated.[214]

On appeal, the Court explained that employment discrimination against those with qualifying handicaps was prohibited "unless the absence of the handicapping condition is necessary based on a bona fide occupational qualification."[215] Iona-McGregor claimed weight was a BFOQ for firefighters, but that issue was not resolved by the appellate court.[216] Although it did not explicitly discuss weight as a BFOQ, it did note that Davidson was capable of his firefighting duties

206. 42 U.S.C.A. § 2000e-2(e).
207. *Id.*
208. *See id.*
209. Davidson v. Iona-McGregor Fire Prot. and Rescue Dist., 674 So. 2d 858, 859 (Fla. App. Ct. 2d Dist. 1996).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 859–60.
215. *Davidson*, 74 So. 2d at 860.
216. *Id.* at 860–61.

and that being fired solely because Iona-McGregor perceived him as "obese" was sufficient for a *prima facie* case of discrimination.[217]

There may well be circumstances where weight could qualify as a BFOQ, for example in Mark Richardson's case against Chicago Transit Authority (CTA), his weight exceeded the guidelines for CTA bus seats.[218] CTA actually did not base employment decisions solely on this fact, however, as drivers who exceeded this weight could still drive "if the safety department finds they can safely perform their job."[219] During Richardson's safety evaluation, the test administrators found multiple safety concerns that indicated Richardson might not be able to safely drive the bus, such as difficulty operating the gas and brake pedals and inability to adequately see the bus floor.[220]

Accepting these concerns as true and valid safety issues, CTA's individualized assessment shows how weight by itself still does not have to be the sole determining factor in employment.[221] Even where weight could potentially be a BFOQ, employers need to demonstrate that being a particular weight, waist size, or BMI is "reasonably necessary" for that employer and position.[222] CTA's approach of testing employee performance to ensure safe and adequate performance of the job could be one way for employers to demonstrate this that could benefit both employers and employees.[223]

It seems, given Davidson's ability to perform firefighting duties,[224] and Casey Taylor's ability to perform engineering duties,[225] that weight would not be a reasonably necessary BFOQ in either of their cases.

CONCLUSION

At present, there are no federal protections for employees who experience weight discrimination. There are, however, protections in Michigan and six other local jurisdictions.[226] If obesity were recognized as a disability, obese employees could seek protection using the ADA.[227] However, ADA protections are less favorable because of

217. *Id.* at 860.
218. Richardson v. Chicago Transit Auth., 926 F.3d 881, 885 (7th Cir. 2019).
219. *Id.*
220. *Id.*
221. *Id.*
222. 42 U.S.C.A. § 2000e-2(e).
223. *Richardson*, 926 F.3d at 885.
224. Davidson v. Iona-McGregor Fire Prot. and Rescue Dist., 74 So. 2d 858, 860 (Fla. App. Ct. 2d Dist. 1996).
225. Taylor v. BNSF Ry. Co., No. C11-1289JLR, 2021 U.S. Dist. LEXIS 162866, at *11 (W.D. Wash., Aug. 27, 2021).
226. *See* FRIEDMAN & PUHL, *supra* note 17.
227. Cheryl L. Maranto & Ann Fraedrich Stenoien, *Weight Discrimination: A Multidisciplinary Analysis*, 12 EMP. RESP. AND RTS. J. 9, 11 (2000).

the history of anti-fat bias in health care and society, the medicalization of fatness, and the flaws of the BMI.[228] From a legal perspective, the ADA would leave non-obese employees who experience weight discrimination unprotected entirely. It would also be more difficult to apply, because employees would need to demonstrate that their weight majorly limits their ability to perform standard life activities.[229]

Non-obese employees potentially have other routes to protect them from experiencing weight discrimination, such as the Borgata-Babes' argument that the PAS were based in sex and gender stereotyping.[230] However, those arguments seem to be harder to win than they would be if weight was protected, since the Borgata judge did not find there was disparate impact in the enforcement of the PAS despite the fact that no male employees were suspended.[231] If alternative routes to protect employees from experiencing discrimination fail in court, then it is time for the law to take a new approach.

If one seeks to address discriminatory behavior negatively impacting people due to a history of bias against a given group, it makes more sense to protect *all* individuals who may be subject to that discriminatory behavior rather than further stigmatizing that group by classifying their features as a disease. Prohibiting weight discrimination through the ADA rather than through Title VII would add to this stigmatization by medicalizing fatness.[232] It would leave many employees unprotected if they were discriminated against for their weight or size but did not qualify as obese under BMI standards. Michigan and the other local jurisdictions which clearly prohibit weight discrimination have already found a way to address this problem.[233] It is time for the federal government to follow their lead.

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228. *See* NAAFA, *supra* note 182.

229. *Tucker*, 783 F. App'x at 400.

230. Schiavo v. Marina Dist. Dev. Co., LLC, 123 A.3d 272, 291–92 (N.J. Super. Ct. App. Div. 2015).

231. *Id.* at 294.

232. *See id.* at 289.

233. FRIEDMAN & PUHL, *supra* note 17.

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