I. INTRODUCTION

“You can have her; I don’t want her. She’s too fat for me!” These were the words of a popular song in 1938; it probably was not intended to be hurtful, just funny. But “too fat for me” is not funny anymore. Obesity among the population in industrialized countries is one of the most serious public health threats of the modern era. Although many developed countries face this public health dilemma, the United States population actually has the highest prevalence of obesity among developed nations. It has not been disputed that there is a bias against fat people in modern American society. “Many have called anti-fat bias one of the last acceptable prejudices.” “While mainstream society condemns (and sometimes makes illegal) racism, sexism, and, to a lesser extent, homophobia, weight-based prejudice is freely exhibited in public, and often by members of the media.” This stigma exists despite the fact that a majority of Americans are now defined by the medical community as overweight or obese. One commentator has argued that allowing fat people to recover for obesity discrimination would “hinder the


3 Dargan Ware, Against the Weight of Authority: Can Courts Solve the Problem of Size Discrimination? 64 Ala. L. Rev. 1175, 1176 (2013).

4 See, e.g., Martin Bashir (MSNBC television broadcast Sept. 27, 2011) (on this broadcast, Martin Bashir not only refused to apologize for his jokes about New Jersey governor Chris Christie’s weight, he may be said to have blamed the nation’s current economic woes on fat people, giving a statistic for how much money is “wasted” on obesity and stating that he did not have to tell his audience “how much we need that money”).

5 Ware, supra note 3, at 1178.
construction of negative social norms around obesity. 6 Apparently he believes that condemning and ostracizing overweight people will encourage them to lose weight, although that plan has not worked for hundreds of years.

Obese individuals are frequent targets of weight-based discrimination. Recent national estimates show that the prevalence of reported weight discrimination among obese individuals has increased by 66% over the past decade 7 and is now comparable to rates of racial discrimination in the United States, especially among women. 8 Obese individuals are vulnerable to weight discrimination in many domains of daily living, including educational institutions, health care facilities, public accommodations, and the workplace. 9 The presence of weight discrimination in employment settings has been particularly well documented and shows that obese employees face unfair hiring practices, prejudice from employers, lower wages, harsher discipline, and wrongful termination compared with thinner employees. 10 In addition to the financial consequences of these inequities and unfair treatment, being a target of weight discrimination increases the risk for negative outcomes including depression, social rejection, anxiety, suicidality, avoidance of health care, and unhealthy behaviors that can reinforce weight gain and impair weight loss. 11 With two-thirds of Americans now overweight or obese, 12 millions are vulnerable to weight discrimination and its numerous consequences for psychological, social, economic, and physical well-being.

This article will first illustrate the economic impact of obesity on individuals and on our economy. In the Legal Perspective section we will review the ADA, ADAAA, the EEOC guidelines, and the current litigation defining obesity as a disability under the ADA. Most courts have permitted obesity to be defined as a disability only when the person is morbidly obese or when there is a physiological cause for the obesity. This article suggests that obesity could be analyzed similarly to an addictive disorder to determine if there is a disability. The fourth section of the article will review and analyze the managerial implications for obesity discrimination in employment.

10 C.W. Rudolph et al., A Meta-analysis of Empirical Studies of Weight-based Bias in the Workplace, 74 J. VOCATIONAL BEHAV. 1, 10 (2009).
11 Puhl & Heuer, supra note 9.
II. THE ECONOMIC IMPACT OF OBESITY

The trend towards higher levels of obesity and overweight in the world and in the United States specifically is well known and, sadly, striking. Using data from 2008, when all 191 countries in the world are ranked from largest percentage of the population classified as obese to the lowest, the U.S. occupies the 18th position, with a percentage of 33%. The next Western European country on the list is the United Kingdom at 26.9% while the lowest European rate is Switzerland at 17.5%. For the United States, the trends towards higher rates of obesity is conspicuous. In 1960 to 1962, the percentage of adults in the United States classified as obese or extremely obese was 14.3%. By 2011 to 2012, the percentage had jumped to 41.9%. In fifty years then, obesity rates in the United States have nearly tripled. A 2012 ranking of the States by obesity rate shows West Virginia and Mississippi occupy the top position with 35.1% of adults classified as obese. At the bottom of the scale, 21.3% of the adult population of Colorado are counted as obese. Given the large and growing obese population, the economic impacts of obesity require investigation. The impacts fall into three broad categories: effects on the individual, effects on businesses, and effects on government programs. For the purposes of this article, only the first two categories are examined. For the individual, obesity affects the size of the wages received and probability of employment. The channels through which wages and employment probability are affected come through reduced life expectancy, greater absenteeism, lower productivity, and other complications. A well-cited study found a significant negative effect of obesity, as measured by Body Mass Index (BMI) on wages. The most profound effects were found for white females. Wages of obese white women were 9 percent lower than non-obese, white women. A 9 percent lower wage is equivalent to one and a half years of schooling or 3 years of work experience. That is, the size of the wage reduction owing to obesity is the same as the wage differential between someone with 12 years of education versus someone else with 13.5 years of education.

14 Id.
18 Id. at 451.
19 Id. at 451.
Several possible, though not mutually exclusive, explanations exist for the lower wages received by the obese. First, the obese may acquire less human capital (schooling or on-the-job training). Reduced life expectancy is a fact for the obese. An estimate of the reduced life expectancy indicates obese individuals have life span shortened by 3 years.\textsuperscript{20} Severely obese individuals live 10 years less, a figure comparable to the reduction in life span due to smoking.\textsuperscript{21} The quality of one’s life is also seriously degraded by obesity. One estimate suggests the effect of obesity is approximately equivalent to 20 years’ worth of aging.\textsuperscript{22} The payoff to investments in human capital come in the form of greater earnings obtained from enhanced skills and knowledge: the longer one participates in the labor market, the larger the payoff. Reduced life expectancy, which in turn shortens the length of labor market participation, diminishes the incentive to acquire human capital. The second possibility, which is interrelated to the first, is the obese tend to be more heavily concentrated in some occupations as compared with the non-obese. These occupations tend to be ones which pay lower wages.\textsuperscript{23} The effect is more pronounced for women, reflecting a greater tendency to be in the lowest of the low-paying occupations, e.g., the clerical and service sectors.\textsuperscript{24} Furthermore, if the obese tend to locate in low-paying occupations, the reward to investment in human capital is again diminished. The third possibility stems from lower productivity on the part of the obese, most notably absenteeism. The probability of missing work in the past year, number of days missed, and costs of absenteeism rise with clinical weight classification for both women and men.\textsuperscript{25} Specifically, the estimate is between 1.1 and 1.7 more extra days missed annually as compared to normal-weight employees.\textsuperscript{26}

Turning to the impact of employing the obese on business, the first one to consider is the last facet of the impact for the worker: absenteeism. The cost of absenteeism due to obesity has been estimated at between $4.3 billion\textsuperscript{27} to $8.65 billion\textsuperscript{28} for the United States. These figures do not include

\textsuperscript{21} Id.
\textsuperscript{24} Id. at 756.
\textsuperscript{25} John Cawley et. al., *Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity*, 49 J. OCCUPATIONAL & ENVT'L. MED. 1317 (2007).
\textsuperscript{27} Cawley, *supra* note 25, at 1317.
\textsuperscript{28} Andreyeva, *supra* note 26, at 1120.
the costs of “presenteeism;” the costs of obese workers not being productive while at work. Moreover, the medical costs experienced by the obese drive up the costs of providing healthcare. The additional healthcare “out-of-pocket” spending due to obesity was valued at somewhere between $3.8 and $6.9 billion dollars in the late 1990’s. The additional outlays for private medical insurance is somewhere between $9.5 and $16.1 billion dollars over the same time. Given the continued increase in the percentage of persons who are obese, these figures today would undoubtedly be significantly higher. One overall cost estimate of obesity to employers, which includes absenteeism, higher medical and disability claims, and higher workers compensation claims is that an average firm with 1,000 employees faces $285,000 per year in extra costs. Taken together, these factors serve to work against the obese in all facets of their labor market experience.

III. THE LEGAL PERSPECTIVE

A. Americans with Disabilities Act

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

It was not until 1990 that Congress finally passed the Americans with Disabilities Act (ADA) giving broad legal protection against disability discrimination. As it exists today the ADA applies to all employers with at least 15 employees and its protections extend to private, state, and local government employees. In 2008 Congress passed the ADA Amendments Act (ADAAA) to address general dissatisfaction with the interpretation and enforcement of the ADA. For example, Congress disagreed with the Supreme Court when it held that the definition of disability should “be interpreted strictly to create a demanding standard for qualifying as disabled.” After the ADAAA was passed it became clear that the definition

29 C. Ford Runge, Economic Consequences of the Obese, 56 DIABETES at 2669 (2007).
30 Id. at 2669.
33 Americans with Disabilities Act of 1990, 42 USCS §§ 12101 et seq.
of disability should be interpreted broadly, however it is still not clear what conditions warrant protection or what form of analysis should be conducted to determine the meaning of “disability” in each particular case. It is this definitional hurdle that must be overcome before employers clearly understand if, or when, discrimination based on obesity is illegal discrimination.

The ADA regulations define disability as “A physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such impairment; or being regarded as having such an impairment.” It is clear to see that this definition requires several additional definitions before it can be implemented. Although the Supreme Court had interpreted the terms “impairment” and “major life activity” narrowly, the ADAAA provides a non-exhaustive list of examples of major life activity that clearly expand the meaning. Major life activities now include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking communicating, and working. Additionally, the ADAAA extended the definition of major life activities to include bodily functions such as immune system functions, reproductive functions, respiratory and circulatory functions, normal cell growth, and bladder and bowel functions. Congress clearly intended to overrule the narrow standards articulated by the courts that had resulted in a denial of protection for impaired individuals.

If a prospective employee can perform the essential functions of the position, with or without reasonable accommodation, it would be illegal to fail to hire, or to retain as an employee, if the refusal was based on the impairment. Reasonable accommodation has no certain definition; it exists on a continuum. At one end is reasonable accommodation that an employer is required to make. Somewhere along the continuum the reasonable accommodation may become an undue hardship that excuses an employer from obligation. There are a number of factors that will be considered when making a factual decision regarding reasonable accommodation. Those factors include, but are not limited to, the size of the employer, the cost to the employer, the type of employer, and the impact of the accommodation on the employer’s operations. If obesity were to be legally defined as a disability,
then employers would be unable to discriminate on that basis and would also be required to make reasonable accommodation for their obese employees.

B. Equal Employment Opportunity Commission

Prior to the ADAAA, the Equal Employment Opportunity Commission (EEOC)\(^\text{42}\) generally did not recognize obesity as a disability. The guidelines stated that, “except in rare circumstances, obesity is not considered a disabling impairment.”\(^\text{43}\)

Prior to 2009, the EEOC and courts interpreted “impairment,” for purposes of the ADA, as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss.\(^\text{44}\) The onus was thus put on obese individuals to prove that their weight has a physiological cause, which most could not. Courts therefore rejected ADA coverage for disability discrimination claims by obese individuals, finding that obesity was a physical characteristic and not an impairment. In addition, courts determined that to be “regarded as” disabled under the third prong of the definition, one's perceived disability must be a covered impairment. Therefore, the ADA had not been a viable solution for legal resource for obese persons who were disabled or those who were regarded as disabled because of their obesity.\(^\text{45}\)

In 2008, Congress passed the ADA Amendments Act, which went into effect in January of 2009.\(^\text{46}\) The purpose of the Act was to make it easier for an individual seeking protection under the ADA to establish a claim of disability. Congress sought to undo the years of narrow interpretation by the EEOC and courts. The Act reinstates an expanded view of what constitutes a disability and also institutes a broad view of the third prong of the definition. In addition, Congress directed the EEOC to make a common sense assessment of whether an impairment substantially limits daily activities, instead of undertaking extensive analysis. The EEOC revised its regulations accordingly and the final version was published in the federal register in March 2011. One notable change in the EEOC’s interpretation is that it previously considered obesity a disabling impairment only in “rare circumstances,” but this language has been removed.\(^\text{47}\) The current guidance


\(^{43}\) Id.


\(^{47}\) BNSF Railway Co. v. Feit, 2012 MT 147 (Mont. 2012).
document states that, “severe obesity, which has been defined as body weight more than 100% over the norm … is clearly an impairment.”

The EEOC now agrees that severe obesity can be considered an impairment for purposes of the ADA’s definition of disability, as well as under the “regarded as” prong. In 2012, the EEOC obtained positive settlements for employees who were allegedly terminated based on their severe obesity as a covered disability and because the employers additionally regarded them as disabled because of their obesity.

C. In the Courts

The circumstances under which obesity is considered a disability have caused confusion for employers and courts and is an evolving area of case law under the ADAAA. As discussed in the previous section, before the amendments to the ADA, obesity generally was not recognized as a disability. “Most courts held that unless the employee could prove that his or her obesity was caused by some underlying physiological condition such as diabetes or a hormonal imbalance, obesity did not qualify as a disability and could not form the basis of an ADA claim.” In 2002 this perspective was shared in a New Jersey case. After four days of work a female employee was fired for an alleged poor work ethic. But the employee was morbidly obese because of a genetic condition and believed this was the real cause for her termination. A jury agreed and awarded her a large sum of money. However, four years later, the Sixth Circuit clarified the standard of proof and limited the grounds for which employees could be successful. First, the court determined that only “morbidly” obese persons could qualify as having a disability, and furthermore plaintiffs have to prove that their obesity was not “transitory” i.e., it existed only because of lack of exercise and overeating. Disability under the ADA would only exist when the obesity was due to a physiological condition, and in addition, the employee was limited in a major life activity and/or the employees perceived the employee to be limited.

48 EEOC Compliance Guidelines §902.2(c)(5). Available at http://www.eeoc.gov/policy/docs/902cm.html.
51 Alexander, supra note 41, at 630.
52 Id.
Following passage of the ADA amendments in 2008, cases are emerging that reflect the expanded understanding of the ADA’s coverage for obesity-related claims. In a groundbreaking shift, several persons have successfully alleged that they suffered discrimination because of their obesity. For example, in 2010 a federal district court in Mississippi, found that when an employer perceived an employee’s weight to be a disability, she could recover under the ADA.\(^{55}\) The employer perception developed from the fact that she was unable to walk from the parking lot. The court never reached the issue of whether the plaintiff was actually disabled. The employee alleged that she was continuously ridiculed, and eventually fired, because she was obese. The court denied the defendant’s motion to dismiss the claim.

A year later, in 2011, the EEOC filed sued against a company that fired a morbidly obese employee.\(^{56}\) The company agreed to pay $125,000 to settle after a federal district judge refused a motion filed by the company for summary judgment. “The court held that severe obesity is an impairment within the meaning of the ADA and, moreover, if a charging party is severely obese, there is no requirement that the obesity be based on a physiological cause.”\(^{57}\)

In a third case, the employee was qualified to perform the essential functions of his position, but had requested a seat belt extender as an accommodation for his disability.\(^{58}\) Although the company perceived him as disabled, it refused to discuss reasonable accommodations with him. The employer eventually entered into a consent decree which required it to pay the employee $55,000 and to agree to training on disability discrimination and reasonable accommodation for its human resource personnel.

D. An Alternate Analysis

Obesity costs employers in the United States an estimated $73 billion a year, due to increased medical cost, absenteeism, and reduced productivity.\(^{59}\) Should the solution to this expensive problem be to exclude obese individuals from the workplace? Then would we just be supporting these people through our tax dollars? If we view overeating as only a destructive habit or bad judgment call, then the solution may be to just allow obese

\(^{57}\) Alexander, supra note 41, at 631.
individuals to bear the consequences of rejection. But an alternate approach may be to analyze the underlying problem of overeating; it might lead to a solution that could help the obese individuals and reduce costs to employers. This article suggests that society might view obesity as an addictive disorder and treat it appropriately. If we can begin by reframing the problem of compulsive overeating as an addiction and thus rethink treatment, we will have removed the greatest obstacle of all from the path to recovery.

Addiction is becoming more widely understood as a ‘syndrome’ which is not substance-specific, but which may have multiple unique expressions, e.g., drug addiction, compulsive gambling, or alcoholism. Viewed from this perspective, obesity can be understood as a manifestation of the addictive process of compulsive overeating, much as cirrhosis is an outcome of compulsive alcohol consumption. By extension, focusing interventions on obesity without recognizing the process leading to it might be expected to be about as successful as attempting to treat the debt incurred by a compulsive gambler without recognizing the compulsive behavior.

Research has revealed similarities between overeating and other addictive disorders. An article in The Journal of Addictive Disease asserts, “Overeating in obese individuals shares similarities with the loss of control and compulsive drug taking behavior observed in drug-addicted subjects.”

Obesity is a complex disease of appetite regulation and energy metabolism that is controlled by many factors. It can result from several possible genetic and environmental interactions some of which may entail a more direct genetic association (i.e., a genetically regulated response to sweet food which is perceived as reinforcing) or alternatively an indirect association that makes the individual genetically more susceptible to environmental stressors that will then favor food consumption.

The genetic factors include both neuromodulators such as leptin, and a number of neurotransmitter systems involved with the reinforcing properties of food including GABA, dopamine, opioids, and serotonin. These neurotransmitters also play an important role in feeding behavior and satiation; a large body of evidence suggests that dopamine (DA) may be one of the neurotransmitters linking the genetic and environmental factors that

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60 See DEBORAH C. SCHWARTZ, A SUBSTANCE CALLED FOOD (1989).
62 Id.
contribute to obesity. Patients in clinical studies who were treated with typical and atypical antipsychotic medications, which block DA D2 receptors, showed significant weight gain. In addition, “Dopaminergic agonists (e.g., amphetamine, cocaine, methylphenidate) that increase brain dopamine concentration have anorexigenic effects.”  

Many researchers have focused on how the body’s fuel levels control appetite, but as obese individuals know, habits and desires often override metabolic need. These habits and desires share some of the characteristics of drug using behavior in drug-addicted subjects. Researchers have compared the role of DA in drug abuse and its involvement in the mechanism of obesity. The role of DA in addiction (loss of control and compulsive drug intake) is poorly understood, but a number of studies have reported on the role of dopamine and its receptors on alcohol and drug abuse.

One example is the role of DA on cocaine addiction, which is considered to be one of the most reinforcing of the abused drugs. Animal studies have shown that the ability of cocaine to block the dopamine transporters appears to be crucial for its reinforcing effects. In humans, the reinforcing effects of cocaine used intravenously or smoked can lead to rapid escalation of drug intake and compulsive drug administration . . . We have shown that overexpression of DA D2 receptors in the nucleus accumbens, which is the brain region associated with the reinforcing effects of drugs of abuse, in animals previously trained to self-administer alcohol resulted in a marked reduction in alcohol intake that returned to baseline levels as the DA D2 receptors decreased to their prior levels.

Although the mechanism of these behaviors is not well understood, in prior studies with positron emission tomography (PET) in drug-addicted subjects documented reductions in striatal dopamine (DA) D2 receptors. In pathologically obese subjects, we found reductions in striatal DA D2 receptors similar to that in drug-addicted subjects. Moreover, DA D2 receptor levels were found to have an inverse relationship to the body mass index of the obese subjects. We postulated that decreased levels of DA D2 receptors predisposed subjects to search for reinforcers; in the case of drug-addicted subjects for the drug and in the case of the obese subjects for food as a means to temporarily compensate for a decreased sensitivity of DA D2 regulated reward circuits. Understanding the

63 Id.
mechanism in food intake will help to suggest strategies for the treatment of obesity.\textsuperscript{64}

If the underlying causes of drug addiction are similar, then should not the ADA approach also be similar? There are a number of cases where recovering drug addicts have been treated as having disabilities and being worthy of employer accommodation.

As early as 1978 a federal district court determined that a categorical exclusion of methadone program participants and those with a history of drug addiction was ruled unlawful.\textsuperscript{65} More recently, in 2012, an employer entered a consent decree agreeing to pay a recovering drug addict $37,500 as well as other remedial relief.\textsuperscript{66} The employer, an insurance company, had offered the applicant, a recovering drug addict who has been enrolled in a methadone treatment program for a number of years, a position with the company subject to a clean drug test. After the drug test showed the presence of methadone, the applicant submitted a letter to the insurance company from his treatment provider explaining that he was participating in supervised methadone treatment program and taking legally prescribed medication as part of the treatment. Upon receiving this information, the insurance company notified the applicant that he was not eligible for hire and withdrew its offer of employment.

\textbf{IV. MANAGERIAL IMPLICATIONS}

The prevalence of being overweight or obese is a world-wide trend that now surpasses food insecurity as a global concern. The World Health Organization defines a body mass index (BMI) above 25 as overweight and exceeding 30 as constituting obesity.\textsuperscript{67} Weight control is a very sensitive issue that crosses the line between work and personal life, but the health risks and potential financial costs to an organization has made it a legitimate concern.\textsuperscript{68} The potential discrimination against obese individuals in the workplace impacts virtually every aspect of human resource management.

A critical aspect of the obesity dialogue is that of personal responsibility and immutability in controlling weight. Should individuals be held accountable for their weight or is it out of their control? Many of the biases that exist about obese individuals are based on the perception that weight is

\begin{thebibliography}{99}
\bibitem{Id} Id.
\end{thebibliography}
within an individual’s control, and thus the obese are often stigmatized as lazy and undisciplined. However, there is ample evidence that the changing food environment, such as larger portion sizes and increasing amounts of sugar in processed food, has greatly contributed to increasing body size. Public health approaches to the problem recognize that obesity must be addressed by both individual choices and collective responsibility.\textsuperscript{69} Initial policy approaches were primarily educational promoting healthy choices and publicizing the danger. More recent legislation and regulatory actions have focused on “foods of minimal nutrition value” and providing more consumer information, such as calories in menu items and food marketing,\textsuperscript{70} so wiser choices can be made. Organizations share in the collective responsibility for addressing obesity issues.

\section*{A. Application and Employment Interviews}

When beginning the selection process, obesity bias may be limited if there is no visual representation of the potential employees during the application phase. However, if photographs of applicants are available, the role of automatic obesity stereotypes will impact those selected for interviews. In one study, two job applicants with similar credentials but one with a normal weight photo and one a manipulated obese photo were sent to 985 different job openings. Months later these hiring managers were given an implicit association test that assessed the degree to which they automatically associated obese people with lower work performance relative to normal-weight individuals.\textsuperscript{71} They found a strong and consistent relationship between hiring managers’ automatic anti-obesity bias and the probability that they would not invite an obese applicant for an interview.

In another study, participants rated job applicants for entry-level positions with high or low visibility and physical demands.\textsuperscript{72} The study noted stereotypical characteristics with overweight individuals including lacking self-discipline or self-control, lazy, less conscientious, less competent, sloppy and emotionally unstable and less likely to get along with others.\textsuperscript{73} Applicants who are overweight may be perceived as not having the right personality or image for jobs due to presumptions about extraversion, conscientiousness, agreeableness and emotional stability. Thus jobs with


\textsuperscript{70} \textit{Id}. at 385.


\textsuperscript{73} \textit{Id}. at 869.
high visibility may be perceived as less appropriate for overweight individuals. Stereotypical characteristics of overweight individuals include their being less active or energetic and resulting in discrimination when applying for jobs with high physical demands.\footnote{Id. at 871.}

In a field study, weight-related discrimination was more common than other types of discrimination, such as sexual orientation, religion, or disability.\footnote{Id. at 869.} Weight discrimination appears to be more problematic for women due in part to society’s stringent norms regarding the ideal weight for females.\footnote{Id. at 870.} Thus companies and organizations may prohibit submission of applications with photographs to minimize discrimination.

During the interview process, implicit stereotypes may matter less because more information is available to the recruiter that allow more focus on a person’s traits beyond a potential weight stereotype.\footnote{Agerstrom & Rooth, supra note 71, at 799.} Expressing negativity toward the obese is not socially acceptable in the context of productivity since the attitude may be due to perceived variables such as poor physical health and fatigue that may impact productivity rather than the obesity itself.\footnote{Id.}

B. Performance Appraisals

Performance appraisals are one of the most critical aspects of human resource management due both to the role they play in organizational rewards, such as promotions, compensation, training, and development opportunities, and the impact on morale and performance.\footnote{Regina Ferreira Bento et al, The Stigma of Obesity and Discrimination in Performance Appraisal: A Theoretical Model, 23 INT’L J. HUM. RESOURCE MGMT., 3196 (2012).} In addition, they are often performed by managers who are expected to have the human resources expertise to perform and enact human practices but may not have specific training to do so.\footnote{Id. at 3196.} So-called “aversive weightism” recognizes the stress between the intention of objectivity and the unconscious influences of the stigma against obesity.\footnote{Id. at 3197.} Appraisal systems are so vulnerable to bias that they have been dubbed “one of the thorniest tasks a manager faces, particularly when the assessments are used to dispense rewards.”\footnote{Id. at 3204.} Findings consistently show weight bias in performance evaluations and outcomes, including a wage penalty for obesity that is higher for women than men in

\footnotesize{\begin{itemize}
\item \footnote{Id. at 871.}
\item \footnote{Id. at 869.}
\item \footnote{Id. at 870.}
\item \footnote{Agerstrom & Rooth, supra note 71, at 799.}
\item \footnote{Id.}
\item \footnote{Regina Ferreira Bento et al, The Stigma of Obesity and Discrimination in Performance Appraisal: A Theoretical Model, 23 INT’L J. HUM. RESOURCE MGMT., 3196 (2012).}
\item \footnote{Id. at 3196.}
\item \footnote{Id. at 3197.}
\item \footnote{Id. at 3204.}
\end{itemize}}
both the United States and the European Union. Rewards should be tied to fairness, objectivity, and rationality based on performance, but the obesity bias makes this difficult to ensure.

According to one researcher, weightism is now where racism was fifty years ago. As previously noted, however, it is often based on a common misconception that it is controllable and individuals perpetuate their own condition through self-indulgence, gluttony, and laziness. Obesity is not immutable like race. The greater the level of obesity, the greater the stigma due to greater visibility. The intensity of the obesity makes it more likely that it will be associated with negative impact on performance appraisals. Ironically, the obesity stigma appears to be more negative for whites. However, weightism still appears to be more socially acceptable and legally defensible than other stigmas, such as race or gender.

The obesity stigma extends to the level of the chief executive officer of United States organizations, but there is an unusual “twist” to the statistics. Among women who are overweight, the discrimination is found to be less detrimental but still exists. Men who are overweight are actually overrepresented among chief executive officers. However, once a man or woman reaches the obesity level, both sexes experienced similar bias. While overweight women experience a wage penalty, overweight men actually experience a wage premium.

C. Increased Health Costs/Absences and Lower Productivity

As noted above, obese individuals, especially women, tend to be penalized for advancement in an organization. Well-established links between obesity and debilitated health and absenteeism may contribute to managers’ preference for normal-weight employees. Not being promoted can result in lower self-acceptance and self-esteem, as well as having serious socio-economic, psychosocial and health consequences. Although

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83 Id. at 3197.
84 Id. at 3204.
85 Id. at 3200.
86 Id.
87 Id. at 3206.
88 Id. at 3207.
89 Id. at 3216.
90 Patricia V. Roehling et al., Weight Discrimination and the Glass Ceiling Effect Among Top U.S. CEO’s, 28 EQUAL OPPORTUNITIES INT’L, 179-96 (2009).
91 Agerstrom & Rooth, supra note 71, at 799.
93 Id.
health benefits typically cover the health effects of obesity, such as diabetes or heart disease, they usually do not cover treatment of obesity itself, which can be a highly debilitating condition.94 Studies consistently show a positive correlation between employee obesity and increased health-care costs and illness-related absenteeism in organizations.95 Although both employers and employees believe that overweight and obesity result from poor lifestyle choices or poor willpower and are preventable, both also believe that overweight and obesity cause health problems that may require a health care intervention.96 Addressing obesity may begin but must not end with personal responsibility; a more holistic approach is required.97 Despite various governmental and political programs, no societal entity is better positioned and equipped to modify people’s behavior than business.98

A landmark HERO (Health Enhancement Research Organization) study done in the early to mid-nineties and supported by a consortium of employers and worksite health promotion advocates sought to quantify the financial consequences to employers of having workers with elevated health risks detected through the administration of a health risk assessment which is a staple of most worksite health promotion programs.99 In a follow-up study done from 2005-2009, of the ten modifiable health risk factors that were part of a routine workplace health promotion program, the risks most associated with increased expenditures included having biometric values related to obesity, being physically inactive and reporting being depressed and unable to manage stress. Poor nutrition and eating habits were correlated with increasing health care costs.100

Another aspect of obesity is its impact on the physical wellbeing of an individual. Physical wellness in the form of proper nutrition combined with physical activity has been shown to be an important precursor to psychological well-being. Psychological wellbeing or happiness has been shown to be critical to worker productivity.101 As employers address the obesity issues of its employees, increased worker productivity may help offset the costs of health care and wellness programs.

97 Id.
98 Hodges et al., supra note 95, at 344.
100 Id. at 2479-80.
Obesity is more prevalent among the Millennial generation and will negatively impact their productivity and resulting economic prosperity.\textsuperscript{102} As the children of Baby Boomers and successors of Generation X, they are characterized by optimism and activity, but have poor health habits, including inactivity and poor nutrition that contribute to the early development of overweight and obesity. Programs that have been effective for earlier generations will not work for Millennials.\textsuperscript{103} As Millennials become a larger proportion of the workforce, their obesity issues will have a greater impact.

D. Wellness Opportunities

Employers congregate people in the same place for hours and have direct access to them. They can offer employees more healthful meal and snack options in onsite cafeterias, in vending machines and at meetings. Ironically, the technology that has made food cheaper has also made work more sedentary.\textsuperscript{104} Employees in sedentary jobs may be encouraged to be more active by offering opportunities such as onsite fitness facilities, walking trails, clubs, and competitions as well as exercise breaks or extended wellness lunch breaks.\textsuperscript{105}

The Affordable Care Act encourages workplace wellness programs primarily by promoting programs that reward employees for changing health-related behavior. While this may help employers recognize cost savings, it may also penalize employees for their poor health, which is prohibited by the Act. To avoid such outcomes, three assumptions must be met, including:

1. Programs can identify employees with specific health risks and target incentives to address those with greater cost-effectiveness than general approaches.

2. Financial incentives will induce employees to modify behavior and improve health.

3. Improvements in health will lead to cost savings for employers.

Federal regulation of wellness initiatives dates back to the Health Insurance Portability and Accountability Act (HIPAA), which forbids employers from


\textsuperscript{103} Id. at 240.

\textsuperscript{104} Darlus Lakdawalla et al., \textit{Welfare-Enhancing Technological Change and the Growth of Obesity}, 95 AM. ECON. REV. 253, 253-57 (2005).

\textsuperscript{105} Berry et al., \textit{supra} note 93, at 347-48.
discriminating against employees based on health status. Both HIPAA and the ACA allow employers wide latitude in rewarding employees for participation regardless of achievement. There may also be health contingent programs, but these must comply with other nondiscrimination laws, such as the Genetic Information Nondiscrimination Act of 2008 and the Age Discrimination in Employment Act.106

While most employers are interested in the risk reduction of health care costs, absenteeism and reduced productivity, a direct connection to the benefits of wellness programs may not be obvious. The impact of wellness programs on medical costs requires three to five years to appear according to the American Journal of Health Promotion and provides an ROI of $3.48 per dollar in health care costs and $5.82 per dollar in absenteeism.107 Wellness programs that were successful in limiting costs included appropriate financial incentives, for example in weight loss, effective information delivery and the provision of high quality care.

As previously noted, the Millennial generation is being particularly hard hit with obesity and will respond differently to strategies to improve health and wellness. The technology that has contributed to their dilemma also illustrates the importance of technology in wellness efforts that may include online health questionnaires, risk assessments, and educational modules to promote healthy eating and exercise.108

E. Managerial Summary

As the obesity “epidemic” continues, employers will be forced to address issues in terms of bias in the workplace and potentially increasing costs due to health care, absenteeism and lower productivity. With the recent designation of obesity as a disease by the American Medical Association, more accommodation may be required by the Americans with Disabilities Amendment Act (2008) and the potential for litigation for lack of such accommodation looms.

Given the prevalence of obesity and potentially increasing costs, it is in the best interest of organizations to take a proactive approach that includes wellness programs to address them. Whether obesity is an issue of immutable characteristics or personal responsibility, employers have a vested interest in ensuring the best possible health to maximize productivity.

106 Jill R Horwitz et al., Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers, 32 HEALTH AFF. 468-76 (2013).
108 Barkin, supra note 102, at 242-43.
V. CONCLUSION

It is undisputed that more Americans are gaining more weight every day. It is also undisputed that obese individuals are made to pay for their supposed laziness, their lack of character, and various other negative descriptors attached to them. In the second section of the article the authors have documented how both obese individuals and their employers are paying higher costs because of the added pounds. In the past obesity has rarely been defined as a disability under the ADA so employers are not obligated to accommodate the extra needs that an obese individual might have. The courts have generally only required employer accommodation when a person is morbidly obese and/or a physiological cause has been identified as the cause of the extra weight. In this article it is proposed that employers and the courts may select another form of analysis to identify the disability of an obese individual. By identifying the underlying cause of obesity, an addictive disorder much like addictions to alcohol, drugs, or gambling, then society is better able to formulate an appropriate treatment plan that might be successful.

Current management practices indicate serious bias against obese individuals in both employment and assessment of performance. In addition, obesity can result in increased health care costs and absenteeism and lower productivity. The designation of obesity as a disease has also raised the profile of accommodation under the Americans with Disabilities Amendment Act and potential litigation. Therefore, employers must take a proactive approach that includes actions to minimize bias as well as providing wellness options to ensure all employees are in the best possible health to maximize productivity.