

TIPPING THE SCALES OF JUSTICE:
THE RIGHTS OF OBESE AND OVERWEIGHT WORKERS
UNDER THE CONCEPT OF HANDICAP ADMINISTRATION

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*The essence of discrimination ... is the formulation of opinions
about others not on their individual merits, but on their
membership in a class with assumed characteristics.¹*

One member of the size acceptance movement² once commented that if the 40-60 million fat people in the United States alone banded together, they would make a truly formidable voting block, an economic and political force more powerful than any other minority group.³ Unfortunately, the “fat vote” may have to await long and difficult years for its realization, because for all the involvement it could potentially muster from the large-sized members of society, its causes may also be the very reasons for their refusing to act. In a society where being fat is generally regarded as a stigma, it takes little effort at compassion and understanding to see why many fat people do not identify with each other. The ideals of multiculturalism – to be proud of who and what we are – which is the essence behind Louis Wirth’s influential definition of a minority,⁴ is not as

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¹ Jansen v. Food Circus Supermarkets Inc., 110 N.J. 363, 378 (1988).

² In recent years, advocates against size and weight discrimination in the United States have formed groups such as the National Association to Advance Fat Acceptance (NAAFA) which undertake, among others, legislative lobbying for size- and weight-sensitive laws, and public education campaigns about “fat” myths and stereotypes.

³ C. Blickenstorfer, *Never Have So Many Done So Little To Defend Their Own Rights*, 1995 DIMENSIONS 1.

⁴ Wirth defines “minority” as “a group of people who, because of their physical or cultural characteristics, are singled out from others in the society in which they live for differential and unequal treatment and who therefore regard themselves as objects of collective discrimination.”

accepted by obese and overweight persons as, for instance, homosexuals and AIDS activists, whose causes of late have gained considerable ground in terms of public recognition and acceptance. The vulnerability brought about by an overweight condition does not, however, stop at social or interpersonal dealings with family and friends. The disenfranchisement more often than not spills over to employment, education, access to public accommodations and to adequate medical care, and almost every other aspect of human existence. It is at this point where popular prejudice converts into curtailment of rights and deprivation of opportunities that obesity or being overweight becomes more than a medical or sociological typecast, but acquires legal significance as a protected classification.

That discrimination based on size and weight occurs in a wide variety of situations clearly bespeaks of a pervasiveness that the law cannot immediately and directly curtail. The law can, however, address such discrimination in specific areas. One of those areas is employment, where size and weight discrimination have of late become widespread, as is borne in the records of American legislation and litigation. While in the Philippine legal system, neither courts nor legislature have been confronted with the issue, it is only a matter of time (and perhaps of courage) before they will be, because obesity, as a medical condition with genetic and physiological underpinnings, is a disease that afflicts every society and culture, and is not the self-inflicted result of a "Westernized" lifestyle of compulsive eating that it is traditionally regarded to be. The significance of this paper is thus anchored on the universality of the weight problem, the stereotypes and stigmas to which obese persons, and particularly workers, are subjected to, and the pervasive discrimination against them by reason of their size and weight, a phenomenon which cuts across cultures and ways of life.

In seeking to address weight discrimination and grant its victims a legal recourse, this paper proposes that obesity be recognized as a disability and therefore be protected under handicap discrimination laws.

This paper is divided into three parts. The first part will focus on obesity as a medical condition, and its social, psychological and economic stigmas. It will establish that obesity is a disease, an involuntary and immutable condition, and will provide a backgrounder on psychological researches undertaken to evaluate societal perception of obese persons.

See Wirth, *The Problem of Minority Groups*, in *THE SCIENCE OF MAN IN THE WORLD CRISIS* 347 (1945).

The second part will treat of the legal approaches resorted to in proving and seeking to recover from weight discrimination, foremost and by far the most successful of which is to treat obesity as a form of handicap. United States federal handicap discrimination laws and decided cases will thereafter be discussed, particularly the Rehabilitation Act of 1973 and the Americans With Disabilities Act of 1990. This part will discuss how, of the several possible legal rubrics that could protect victims of weight discrimination, handicap discrimination law proves to be the most likely to afford general protection to the specific plight of the obese, and will also explore the possibilities of a broader construction of the term "handicap" to include obesity even in its mildest forms.

The third part involves situating the rights of these workers in the Philippine legal context: the applicable international instruments and Philippine laws.

I. OBESITY AS A MEDICAL CONDITION

Obesity is a disease. It is defined as "excessive levels of adipose tissue – fat cells – in the body".⁵ Obesity is classified into three levels based on the percentage one's body weight is over the normal body weight for one's height: mild obesity being a weight 20-40% over the norm; moderate obesity being a weight 41-100% over the norm; and morbid obesity being a weight more than twice the norm or more than 100 pounds over the norm.⁶

Studies show that thirty-two million Americans, or approximately 28%, are overweight and that 1.5 million Americans, or approximately 1 % are morbidly obese.⁷ Obesity is by far the most common chronic disease in the United States.⁸

Although the exact causes of obesity are not fully understood, the medical community considers the disease to be the result of physiological,

⁵ W. Taussig, *Weighing In Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act*, 35 B.C.L. REV. 927 (1994). See also B. Lukert, *Biology of Obesity*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 1 (1982).

⁶ W. Taussig, *supra*, note 5 at 929.

⁷ *Id.*

⁸ J. STEWART, *OBESITY: ETIOLOGY AND TREATMENT* 2 (1995). [Hereinafter referred to as *OBESITY*.]

psychological, and environmental factors. Physiological causes include dysfunction of the metabolic system, lack of appetite suppression signals to the brain, genetic disposition and an abnormal number and size of fat cells. Psychological causes include compulsive eating disorders and a need to support a self-image of substantiality stemming from low self-esteem. Environmental influences, such as a sedentary lifestyle or an unbalanced diet of fatty foods and poor nutrition, may also contribute towards a propensity for obesity.⁹

Medical research in recent years has begun to reject previous notions of obesity as a behavior disorder and instead, has focused on the genetic link to this disease. Conclusions have been drawn from these researches that a person's fat distribution is largely an inherited trait.¹⁰

Leptin

In 1995, Jeffrey Friedman and Stephen Burley identified an obesity gene "ob" implicated in obesity by studying overweight mice. They have discovered that obese mice have a defect in a gene that carries the instructions to make a protein called leptin, named from the Greek root leptos meaning "thin". Their findings indicate that when the ob gene is defective, either leptin is not synthesized in the fat cells, or there are no leptin receptors in the hypothalamus. Either way, leptin does not transmit its signal to stop eating. Treating these obese mice with leptin injections reduced their food consumption and increased their energy expenditure causing them to lose 30% of their body weight in two weeks without side effects. Normal mice receiving the leptin injections lost 12% of their body weight.¹¹

Further studies revealed that in humans, there is a high correlation between leptin levels and the amount of fat stored in the body. It has been advanced as a theory that leptin signals the hypothalamus, which coordinates eating behavior, sending messages to stop eating. This signal could be mediated by differences in the production of leptin. Reduced sensitivity to leptin would explain the higher levels of leptin found in obese people. The body would produce leptin at a greater rate to compensate for a faulty signaling process or action. They also found that leptin levels decreased with dieting. This reduced level of leptin means

⁹ W. Taussig, *supra*, note 5 at 930.

¹⁰ *Id.*

¹¹ *Id.*

that less is available to trigger the hypothalamus and may contribute to increased hunger and therefore, weight gain.¹²

A study of identical twins reared apart shows that twins maintained a weight and fat distribution similar to their twin siblings regardless of their environmental surroundings. Additionally, a study of adopted children revealed that children of biological parents of normal weight who were placed in adoptive homes with obese family members did not gain excessive weight. These boil down to the conclusion that genetics have an important role in the etiology of obesity, and that family environment alone has no apparent effect on one's propensity for obesity.¹³

Regardless of its causes, obesity is a disease which is associated with a variety of health risks and has been linked to a decrease in longevity. Excess body weight increases the risk of hypertension, coronary artery disease, diabetes mellitus, gallbladder disease, sleep apnea, gout, atherosclerotic disease, myocardial infarction, and certain types of cancer.¹⁴ The physical manifestation of obesity affects many major bodily systems including the cardiovascular, musculoskeletal, metabolic, skin, respiratory and digestive.¹⁵

While treatment for obesity generally consists of a reduced intake of calories to induce weight loss and a lifetime of weight maintenance, the concepts of treatment and cure should not be confused. Dietary treatment, the most common type prescribed, requires obese people to alter their behavior by eating less than their weight-regulating systems are driving them to eat, and to maintain this state of semi-starvation indefinitely to achieve weight loss. Once weight loss is achieved, however, the disease is not necessarily cured.¹⁶

¹² *Id.*

¹³ OBESITY, at 4, citing C. Bouchard, et. al., *The Response to Long Over-Feeding in Twins*, 322 NEW ENG. J. MED. 477 (1990) and A.J. Stunkard, et. al., *The Body-mass Index of Twins Who Have Been Reared Apart*, 298 NEW ENG. J. MED. 1483 (1990).

¹⁴ R. Atkinson and V. Hubbard, *Report On the NIH Workshop on Pharmacologic Treatment of Obesity*, 153 AM. J. CLINICAL NUTRITION 60 (1990).

¹⁵ *Id.*

¹⁶ OBESITY, at 4 .

The Set-Point Theory

The “set-point” theory states that obese people regulate their weight appropriately, but that regulation is around an elevated set point.¹⁷ Adult body weight is highly stable, increasing about half a pound per year over the lifetime.¹⁸ The set point is thought to be the balance point, the built-in homeostatic mechanism that regulates weight.¹⁹

After losing weight, the obese person’s system is likely to convert a normal intake of calories into excess fat because the metabolic dysfunction of the person’s weight-regulating system persists. In other words, the regulatory system is “set” at its prior, inappropriate level, regardless of weight loss. Weight loss alone, therefore, is not a cure for obesity.²⁰ Telling someone to combat obesity by eating differently is like telling someone to combat emphysema by breathing differently.²¹ In this light, the observation that 95% of people who lose weight regain it is hardly surprising.²²

Social Consequences

Obesity is a physical disability that is intensely stigmatized in society. People feel that the obese are responsible for their own condition²³, and thus embrace “weightism” as one of the last acceptable forms of prejudice and discrimination.²⁴ Psychological studies on societal attitudes towards the obese reveal that while the obese are generally perceived to be warm and friendly, they are rated as unhappy, lacking in self-confidence, self-indulgent, undisciplined, lazy and unattractive compared to the non-obese.²⁵ In a similar study, the obese were described as less active, less intelligent, less hardworking, less attractive, less

¹⁷ *Id.*, citing BEN KRENTZMAN, *THE SCIENCE OF OBESITY AND WEIGHT CONTROL* 2-4 (1995).

¹⁸ *Id.*, citing D. Weigle, *Human Obesity: Exploding the Myths*, *W. J. MED* 153, 421-429 (1990).

¹⁹ *Id.*

²⁰ W. Taussig, note 5 at 931.

²¹ *OBESITY*, at 7.

²² *Id.* See also R. Atkinson and V. Hubbard, *Report on the NIH Workshop on Pharmacologic Treatment of Obesity*, 153 *AM. J. CLINICAL NUTRITION* 156 (1994).

²³ *Id.*

²⁴ *OBESITY*, at 4.

²⁵ *Id.*, citing M. Tiggerman and E. Rothblum, *Gender Differences in Social Consequences of perceived Overweight*, 1988 *SEX ROLES* 18.

popular, less successful, less athletic, and less appropriately sex-typed than the non-obese.²⁶

Economic Consequences

Research has shown a correlation between obesity and lower socioeconomic status in developed nations, especially among women.²⁷ It has been assumed that obesity is caused by low socioeconomic status, but several studies present evidence that it is in fact obesity that causes low socioeconomic status. In a study that followed overweight and normal adolescents for seven years as they reached maturity, researchers found that overweight women were less educated (0.3 fewer years of school), less likely to be married (10%), had lower household incomes (\$6,710.00 less), and had higher rates of household poverty (10%) than women who were not overweight.²⁸ In another study, obese men and women were found more likely to have lower incomes than their parents than non-obese men and women.²⁹ These statistics indicate that it is obesity that causes poverty and not vice versa.

Perhaps this is because obese people are not given the same opportunities as the non-obese. Obese students who applied to elite colleges and universities in America were less likely to be accepted than their non-obese counterparts, even though they did not differ with the latter in academic performance, scholastic aptitude and IQ test scores, parental income or involvement in extracurricular activities.³⁰

The same pattern holds true when the obese enter the workforce. When identical job resumes accompanied by either a photograph or written description of the applicant were evaluated, written descriptions of the obese applicant include more negative stereotyping on supervisory potential, self-discipline, professional appearance, personal hygiene and ability to perform a physically

²⁶ *Id.*, citing M. Harris, R. Harris, and J. Bochner, *Fat, Four-eyed and Female: Stereotypes of Obesity, Glasses and Gender*, 12 J. APPLIED SOC. PSYCHOL. 503 (1982).

²⁷ *Id.*, citing S. Gortmaker, A. Must and J. Perrin, *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008 (1993).

²⁸ *Id.*

²⁹ *Id.* See also P. Goldblatt, M. Moore, and A. Stunkard, *Social Factors in Obesity*, 192 J. AM. MED. ASSO'N 192 (1965).

³⁰ *Id.*, citing H. Canning and J. Mayer, *Obesity: Its Possible Effect On College Acceptance*, 20 NEW ENG. J. MED. 275 (1966).

strenuous job.³¹ Similarly, when judged on their desirability as employees, obese persons are viewed as less competent, less productive, less industrious, disorganized, indecisive, inactive, less successful, less conscientious, less likely to take initiative, less aggressive, less likely to persevere, less ambitious, more mentally lazy and less self-disciplined than were underweight or average-weight persons.³² Thus, sociological and psychological research affirm the observation of employment discrimination against the obese as one based on prejudice rather than any differing ability.

Reluctance To Address Obesity As A Medical Condition

It is largely this public nature of obesity that explains why so little has been done to research and combat such a dangerous and stigmatizing condition. Simply too many health professionals, government officers, and even patients do not view obesity as a disease, despite the well-documented physiology of obesity and its response to drug therapy.³³ This lack of recognition in the public sector has erected a number of barriers to the pharmacologic treatment of obesity, some of these barriers being legislative grandstanding, limited state funding for research, and hindrances by state agencies to the licensing of drugs designed to address the condition.³⁴

It is then clear that aside from the fact that treating obesity is itself one uphill battle, the obese stand to suffer and endure harmful negative stereotypes perpetuated by a misinformed public.

II. LEGAL APPROACHES

Several possible legal rubrics could protect, and were in fact utilized to protect, victims of weight discrimination. One very tentative and tangential approach was to invoke the right of privacy in response to employers' demands for workers to submit to periodic weight monitoring and medical check-ups, to ascertain if they are still within the size and weight requirements of the

³¹ *Id.*, citing E. Rothblum, C. Miller, and B. Garbuttt, *Stereotypes of Obese Female Job Applicants*, 7 INT'L J. EATING DISORDERS 277 (1988).

³² *Id.*, citing J. Larkin and H. Pines, *No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preferences*, 6 SOC. WORK & OCCUPATIONS 31 (1979).

³³ *Id.*, citing R. Atkinson and V. Hubbard, *supra*.

³⁴ *Id.*

workplace.³⁵ Some individual victims of weight discrimination who are also members of other protected groups have opted to seek protection under race, sex, or age discrimination statutes.³⁶ Nevertheless, the legal rubric that has thus far afforded the most legal protection to victims of weight discrimination in employment is handicap discrimination law.

The Rehabilitation Act of 1973

The US Rehabilitation Act of 1973³⁷ was enacted in the wake of the return to the United States of thousands of handicapped Vietnam veterans, and of protracted lobbying from disabled groups dating back to 1917.³⁸ Interestingly, while the purpose of the Act was to provide a clear and comprehensive national mandate for the elimination of discrimination against disabled individuals, the guarantee against employment discrimination devolves around one single provision in the law, Section 504. The said section provides:

No otherwise qualified individual in the United States, xxx shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service.

There are thus two requisites to being a Section 504 plaintiff: (1) One must be “handicapped”; and (2) The handicapped person must be “otherwise qualified”.

“Handicapped”

The term “handicapped individual” is defined under Sec. 706(7)(B) of the same Act as “any person who (1) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment.”

³⁵ S. McEvoy, *Fat Chance: Employment Discrimination Against The Overweight*, 1 LAB. L. J. 3 (1992).

³⁶ A. Frisk, *Flight Attendant Weight Policies: A Title VII Wrong Without A Remedy*, 64 S. CAL. L. REV. 175 (1990).

³⁷ 29 U.S.C.A. 794.

³⁸ Ron L. Findley, *Handicap Discrimination In The Workplace: Winning a Rehabilitation Act Section 504 Claim By Contemporary Standards in the Eighth Circuit*, 53 UMKC L. REV. 412, 415 (1985).

In regulations promulgated to implement Section 5043³⁹, the term “physical or mental impairment” is defined as:

(A) [Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The regulations further provide that the objective severity of the disability is unimportant in determining whether a person is handicapped within the meaning of the Act. The critical consideration is whether a person has a disability that substantially limits a major life activity. The regulations interpret “major life activity” as including caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁴⁰

These provisions imply that the term “handicap” will encompass almost any disability.⁴¹ This implication is reinforced by the fact that the Act itself provides for limitations on what constitutes a handicap, these being: (1) alcohol or drug dependence, where such affects performance of a job, or threatens the safety or property of others; and (2) temporary conditions, e.g. pregnancy or broken bones, for the law specifically provides that the disability must be such as to “substantially limit” the performance of a major life activity.⁴² Clearly what is more controversial is the meaning of “otherwise disqualified”.

Otherwise Disqualified

Perhaps the most confusing, ambiguous and paradoxical phrase in all of Section 504, as suggested by the abundance of litigation it has produced especially in employment discrimination litigation, is the “otherwise disqualified” clause.

³⁹ *Id.*, at 417, citing 45 C.F.R. 84.1, 84.61 (1984). The regulations were promulgated by the US Department of Health, Education and Welfare (HEW), pursuant to Executive Order No. 11,914.

⁴⁰ S. Schreller, *To Be Otherwise Qualified: When Does Section 504 of the Rehabilitation Act Protect the Handicapped?*, 57 TEMP. L. Q. 179 (1984). See also 45 C.F.R. 84.2 (1984).

⁴¹ See *United States v. University Hospital*, 729 F.2d 144 (1984), where the definition was so broadly construed as to include a newborn with birth deformities, though the child could not technically perform “major life activities” even without the handicap.

⁴² Findley, *supra* note 38, at 415.

The competing interests of handicapped people and of employers is nowhere else more highlighted than in these two words. One author summarizes the paradox in this manner:

[S]ignificantly handicapped people in need of employment to provide sustenance and self-dignity but unable to perform completely or adequately in the employment context, versus management, whose primary concern is profit, having the right not to hire or retain those, such as the handicapped, who are unable to perform completely or to management's satisfaction.⁴³

In other words, while the US legislators in enacting the Rehabilitation Act avowed to come to the full aid of the handicapped, they refused to qualify by any way management's right to evaluate which employees would contribute to the greatest profit of the establishment. The "otherwise qualified" clause was inserted obviously to prevent the unreasonable extension of the guarantees of Section 504 to *all* handicapped individuals, no matter how severe the handicap. According to Ron Findley⁴⁴, to do so would entitle a comatose job applicant to sue an employer on the basis of the broadness of Section 504. While clearly such extreme results were not intended, it is worthy to note that the ambiguity of the scope of the "otherwise disqualified" clause runs in direct contrast with the generosity of the reach of the "handicapped" definition.

The only case in which the US Supreme Court considered the meaning of the phrase "otherwise disqualified" was *Southeastern Community College v. Davis*,⁴⁵ which defined the same to pertain to an individual "who is able to meet all of a program's requirements in spite of his handicap." Put differently, the plaintiff must show that with reasonable accommodation, he could satisfactorily complete all his duties as any other employee. This means that his disability notwithstanding, he has all the essential qualifications necessary to perform his work and is thus in every respect similarly situated with his able-bodied co-workers. Hence, whether a disabled worker is otherwise disqualified seems to depend on whether he or she has appropriate skill, experience, training or education for the position.⁴⁶

⁴³ *Id.*, at 421.

⁴⁴ *Id.*

⁴⁵ 442 U.S. 397 (1979).

⁴⁶ B. Repa, *The Americans With Disabilities Act Opens Doors – Maybe*, 21 LAB. & EMP. L. UPDATE 56 (1995). Available at <http://www.brobeck.com/sslittle/laboct.htm>.

The Americans With Disabilities Act of 1990

The Americans With Disabilities Act of 1990 (ADA)⁴⁷ was enacted to provide a clear and comprehensive mandate to end discrimination against individuals with disabilities, and to bring persons with disabilities into the economic and social mainstream. It adopted in full the definitions in the Rehabilitation Act of 1973, and the mandate that an employer make reasonable accommodations for qualified individuals with disabilities, unless that would cause the employer undue hardship.

Operating under the definitions adopted from the Rehabilitation Act, the ADA specifically protects workers with AIDS, HIV infection, alcoholism, cancer, cerebral palsy, diabetes, emotional illness, epilepsy, hearing and speech disorders, heart disorders, learning disabilities such as dyslexia, mental retardation, muscular dystrophy, and visual impairment.⁴⁸

The ADA also took into consideration that discrimination often continues even after the effects of a disability have abated. Thus, the ADA prohibits discrimination against those who have had impairments in the past, including rehabilitated drug addicts and recovering alcoholics.⁴⁹

In recognition of the fact that discrimination often stems from prejudice or irrational fear, the ADA extended protection to job applicants and workers who have no actual physical or mental impairment, but may be viewed by others as disabled, e.g. someone badly scarred or epileptic. The ADA also attempted to damp down on "taint by association", as when an otherwise qualified worker is discriminated against because a brother, roommate or close friend has AIDS.⁵⁰

Obesity and Disability under the Rehabilitation Act and the ADA

The elements of a cause of action for disability discrimination under these two laws are clearly delineated. To prevail, the plaintiff must prove: (1) that he or she applied for a federally funded program; (2) that he or she suffered from a cognizable disability; (3) that in spite of the disability he or she remained "otherwise qualified" for the position; and (4) that he or she was not accepted,

⁴⁷ 42 U.S.C.A. 12101-12213 (1993).

⁴⁸ Findley, *supra*, note 38.

⁴⁹ *Id.*

⁵⁰ *Id.*

removed from work, or otherwise discriminated upon solely on the basis of his or her disability. The focus of this part will be on the second element, or whether obesity may be subsumed under the concept of disability.

To reiterate, the Rehabilitation Act and the ADA break down the definition of disability into three distinct categories. First, an individual with a "physical or mental impairment" that "substantially limits" one or more "major life activities". Second, an individual with a "record of such an impairment" satisfies the definition of disabled. Third, an individual who is regarded as having such an impairment, whether or not one truly exists, is also within the statutory meaning of disabled.

With respect to the first category, the regulations elaborating on both laws do not attempt to provide an inclusive list of impairments that are considered disabilities.⁵¹ Rather, these administrative regulations, buttressed by judicial interpretations of both laws as will be discussed in the latter part of this paper, have emphasized the expansive definition of disability. The regulations specifically decline to delineate a list of specific diseases for fear it would not be comprehensive.⁵²

As regards the second and third categories, it is clear that both laws do not intend to require that individuals be actually disabled. On the contrary, both protect individuals with "perceived disabilities", like those who are not disabled but have a record of being so, or are perceived as being so by their employers. The intention is to protect a worker chiefly on the basis of the social stigma of his circumstances, without passing unto him the burden of proving his disability as a clinical fact.

Obesity satisfies each of the categories in the statutory definition of disability. It is an *actual* disability in its more advanced stages, properly falling within the first category, and a *perceived* one in all its lesser stages because of the societal perception that being overweight is a disabling condition, and thus fitting within the frameworks of the second and third categories.

⁵¹ W. Taussig, *supra*, note 5 at 957.

⁵² *Id.*

Obesity as an Actual Disability

Obesity, in its advanced stages, is a disease that satisfies the statutory definition of an actual disability.

First, it is a “physical impairment” because it is a physiological condition that affects several bodily systems. The physiological causes of obesity include metabolic dysfunction, lack of appetite suppression signals to the brain, genetic disposition, and an abnormal number and size of fat cells.⁵³ Studies of identical twins reared apart in households with obese family members demonstrate that the causes of obesity are predominantly genetic, and are not the result of environmental factors.⁵⁴

Meanwhile, compulsive overeating disorders, which arguably result in a voluntary form of obesity, may very well satisfy the definition of “mental impairment”. Specialists consider compulsive overeating as a psychological disorder similar to bulimia and anorexia nervosa. Under the definition of “mental impairment” provided by the regulations, whereby such comprises of “any mental or psychological disorder”, obesity resulting from compulsive overeating would appear to qualify as an actual impairment.⁵⁵

It must also be noted that the text of the Rehabilitation Act or the ADA does not make any mention of voluntariness or mutability as an automatic disqualification for recognizing a particular condition as a physical or mental impairment.

Second, the disease of obesity clearly affects “major life activities”. As previously defined, “major life activities” consist of such everyday functions as walking, breathing, performing manual tasks and working. Medical professionals consider obesity to limit one's ability to walk, lift, end, stoop, kneel and work.⁵⁶

Third, a resolution must be made on the matter of whether obesity “substantially limits” these activities. The Department of Health regulations define “substantially limited” as significantly restricted in performing major life activities. Therefore, only the more severe conditions of obesity would

⁵³ See W. Taussig, *supra*, note 5 at 927.

⁵⁴ *Id.*, at 958.

⁵⁵ *Id.*, at 959.

⁵⁶ *Id.*

significantly restrict the ability to perform everyday functions, on a case-to-case basis, taking into account the severity, duration and long-term impact of the obese condition.⁵⁷

In sum, obesity in its more extreme stages, is likely to satisfy all of the requirements of an actual disability. In the alternative those afflicted with obesity in its milder stages, may claim under a perceived disability theory.

Obesity as a Perceived Disability

Whether or not it is a physiological disorder, obesity is a physical impairment because society perceives it to be one. The extensive range of employment discrimination cases, as will be subsequently discussed, prove that people perceive obesity as a “physical impairment... substantially limiting... major life activities”.

The law is clear that an individual needs only to be regarded as disabled to prevail on a perceived disability claim. Therefore, even without medical evidence that obesity is a physical impairment, victims of obesity discrimination need only show that their employers’ perceptions of their condition match with that of the rest of society.⁵⁸

But what is truly heartening about the perceived disability theory is that it is capable of being invoked by all workers suffering under any form of obesity. Obesity being medically defined as beginning at a weight that is twenty percent over one’s norm,⁵⁹ the reach of legal protection under the perceived disability argument may extend to a greater number of workers discriminated upon on the basis of weight. With a proper judicial affirmation of the medical definition, handicap discrimination law may adequately protect all victims of weight discrimination.

Obesity As A Protected Classification: A Comparative Analysis of American Case Law

A scrutiny of American case law, both federal and state, would reveal disparate reactions from the courts depending on the attendant circumstances,

⁵⁷ *Id.*

⁵⁸ *Id.*, at 960.

⁵⁹ *Id.*, at 929.

the law involved, the definitions contained therein, as well as the interpretation accorded such definitions. Without any definitive ruling from the US Supreme Court, state and lower federal courts are left by themselves to make a determination of whether obesity falls within the term handicap, making it a protected classification under the statute.

However, in other cases the courts have recognized other disabilities as falling within the term handicap, adding teeth to the argument that obesity can be deemed as included within the ambit and scope of such remedial social legislation. Thus, in *Thornhill v. Marsh*,⁶⁰ the court ruled that the plaintiff's back condition qualifies as a protected disability within the meaning of the Rehabilitation Act of 1973.⁶¹ In *School Board of Nassau County v. Arline*,⁶² the fact that the school authorities perceived plaintiff who had tuberculosis as being handicapped was sufficient to qualify said disease as a handicap. Similarly, possessing only one kidney was also deemed a handicap.⁶³ In *Heron v. McGuire*,⁶⁴ past drug addiction may be considered as a protected disability although the plaintiff, who had a current heroin addiction, was deemed unfit for police work. Diabetes also qualified as a protected disability as held in *Bentivegna v. United States Dept. of Labor*.⁶⁵ These diseases and illnesses have been classified as within statutory protection.

The issue of whether obesity is a protected classification has been squarely raised in several district courts in the United States but only one federal court has had the opportunity to settle the controversy. A dissection of these decisions would reveal the impelling reasons for the disparity of the rulings handed out by the various courts. In this chapter, the leading American cases which have dealt with the issue of obesity as a handicap will be anatomized in order to provide an adequate guide in resolving said issue.

The rights of obese workers in the United States is a newly emerging right. Although the highest American court has classified other cases as falling within the term, only the Federal Court Of Appeal has squarely discussed the

⁶⁰ 866 F.2d 1182, 1184 (1989).

⁶¹ *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (1989).

⁶² 480 U.S. 273 (1987).

⁶³ *Dairy Equipment Co. v. Dept. of Industry, Labor and Human Relations*, 290 N.W. 2d 330 (1980).

⁶⁴ 803 F.2d 67, 68-69 (1986).

⁶⁵ 694 F. 2d 619 (1982).

issue in the leading case of *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*.⁶⁶

Arguments Against Classifying Obesity As A Handicap

Several reasons have been advanced by the district courts supporting their decisions ruling against the classification of obesity as a handicap, and consequently denying the plaintiff's prayer for relief under the anti-discrimination statutes. These decisions are usually based on the narrow interpretation of state laws enacted, not by the United States Congress, but by the local legislative bodies providing for protection in favor of individuals with disabilities. Other decisions, on the other hand, are anchored on the nature of obesity as a disease and the pecuniary considerations of the employer in providing for financial assistance to its employees and/or would-be-employees under workman's compensation laws. These reasons shall be tackled individually in this section to give a more detailed analysis of the cases.

Mutability and Voluntariness

Whether the condition of obesity of an individual is mutable and voluntary, on the one hand, or immutable and involuntary, on the other, has led some district courts to rule against the proposition to classify the disease as a protected disability. In the case of *Greene v. Union Pacific Railroad Co.*,⁶⁷ the Washington District Court ruled that because of the fact that the plaintiff's weight varied from time to time, the nature of his obesity was not immutable, and therefore, cannot claim protection under the state's anti-discrimination statute.⁶⁸

In *Greene*, the defendant, a common carrier, adopted certain rules regarding the physical condition of its employees in its "Physical Examination Rules". The validity and legality of these rules, used for the purpose of screening applicants for employment or for transfer, has been upheld as per *Rose v. Hanna Mining Co.*⁶⁹ When plaintiff applied for transfer to the fireman job category, his application was denied by the defendant due to the combination of three factors,

⁶⁶ 10 F.3d 17 (1993).

⁶⁷ 548 F. Supp. 3 (1981).

⁶⁸ *Greene v. Union Pacific Railroad Co.*, 548 F. Supp. 3, 5 (1981).

⁶⁹ 94 Wash. 2d 307 (1980).

to wit: his being overweight, his having a high blood pressure, and his advanced osteoarthritis of the spine.⁷⁰

According to the Court, plaintiff's borderline hypertension as well as his back condition cannot be classified as a handicap within the contemplation of the Washington laws against handicap discrimination. Similarly, his obesity, not being an immutable condition as his weight varied depending on his motivation in controlling his weight, was likewise not classified as a handicap.⁷¹ Adopting the definition of "morbid obesity" as a "condition of being in excess of one hundred pounds over the normal weight of one with a medium frame," the variation in plaintiff's weight implies the non-immutable nature of his physical condition. He was at times "morbidly obese but was at times not morbidly obese."⁷²

Similarly, the Missouri Court of Appeal denied the discrimination claim of the plaintiff in *Missouri Commission on Human Rights v. Southwestern Bell Telephone Company*.⁷³ In this case, Shirley Hodges submitted to a pre-placement medical evaluation conducted by the doctor of defendant company. The examining physician indicated that she weighed 205 pounds at five feet 4 inches (or 52 pounds overweight), that she suffered from high blood pressure, and had traces of albumin in her urine.⁷⁴ As a result thereof, her employment was deferred. Instead of waiting, she filed a complaint with the Missouri Commission on Human Rights alleging discrimination by reason of her handicap. The Commission ruled in her favor. But the decision was reversed on appeal.

The Missouri Court of Appeal affirmed holding that the reversal was proper. The fact of her obesity alone cannot be considered as a handicap as per ruling in *Philadelphia Electric Co. v. Commonwealth of Pennsylvania Human Relations Commission*,⁷⁵ and *Greene v. Union Pacific R. Co.*⁷⁶

As declared in *Midstate Oil Co., Inc. v. Missouri Commission on Human Rights*,⁷⁷ the pivotal issue in an unlawful discrimination case is "whether the

⁷⁰ *Rose v. Hanna Mining Co.*, 94 Wash. 2d 307 (1980).

⁷¹ *Rose v. Hanna Mining Co.*, 94 Wash. 2d 307 (1980).

⁷² *Rose v. Hanna Mining Co.*, 94 Wash. 2d 307 (1980).

⁷³ 699 S.W.2d 75 (1985).

⁷⁴ *Missouri Commission on Human Rights v. Southwestern Bell Telephone Company*, 699 S.W.2d 75, 76 (1985).

⁷⁵ 448 A2d 701 (1982).

⁷⁶ 548 F. Supp. 3 (1981).

⁷⁷ 679 S.W. 2d 842 (1984).

employer's challenged conduct was motivated by an invidious purpose or was based on a legitimate and rational consideration."⁷⁸ The burden of proving that one is a handicap lies with the person who claims to be a member of such protected group. Here, no evidence was presented by her to prove her handicap.

Furthermore, the Court noted that she did not seek medical treatment, "taking no steps to treat and control her impairment," and thus, she cannot get the benefit of the handicap law.

However, the Court, in this case did not resolve the issue as to whether the fact of obesity and having a high blood pressure together constituted a handicap which should be protected under the law.

In *Cassista v. Community Foods, Inc.*,⁷⁹ the California Supreme Court likewise denied the plaintiff's claim that she was discriminated against by reason of her weight on the ground that her condition was voluntary. Standing 5 feet and 4 inches tall and weighing 305 pounds, plaintiff applied for a position in the health food store of defendant. After being interviewed, her application was denied due to the perception of the employer that because of her physical condition, she could not cope with the pace of work.⁸⁰ Thus, plaintiff sued defendant claiming discrimination on the basis of her weight under the California Fair Employment and Housing Act which provides a similar definition of handicap as the federal laws.⁸¹

The California Supreme Court reversed the Court of Appeal decision that there was discrimination against her perceived handicap. According to the Court, when obesity is characterized as a voluntary condition, no protection under California law can be accorded to the claimant.⁸² Although the perceived handicap theory was incorporated in the statute, the Court determined that for obesity to qualify as an actual or perceived handicap, it must spring from a physiological disorder.⁸³ If the obesity is mutable and voluntary, it cannot be deemed as within the contemplation of the law.

⁷⁸ *Midstate Oil Co., Inc. v. Missouri Commission on Human Rights*, 679 S.W. 2d 842 (1984).

⁷⁹ 856 P.2d 1143(1993).

⁸⁰ *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1144-1145 (1993).

⁸¹ *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1145(1993).

⁸² *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1154 (1993).

⁸³ *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1154 (1993).

In *Tudyman v. United Airlines*,⁸⁴ a case not involving an obese individual but one who merely did not satisfy the weight requirement of his employer, the plaintiff was discharged from his employment as a flight attendant in United Airlines for exceeding by 15 pounds the maximum weight for his height.⁸⁵ However, the fact that he weighed 178 pounds does not mean that he was in poor shape. On the contrary, he was an avid body builder possessing a low percentage of body fat but a very high muscle percentage which accounted for his weight.⁸⁶ He claims section 504⁸⁷ protection on the ground that his exceeding the maximum weight was perceived by his employer as a handicap, thereby entitling him to legal protection.

The Court rejected the plaintiff's claim of unlawful discrimination under section 504. The low fat-percentage and high muscle-percentage possessed by the plaintiff constitutes a self-imposed and voluntary condition as distinguished from an involuntary one such as a glandular problem.⁸⁸

Furthermore, it was not the legislative intent of Congress to extend special protection in favor of body builders in enacting the statute.⁸⁹ Section 504 was not intended to protect those with voluntary impairments.⁹⁰ In this case, plaintiff is actually suing for his right to be both a body builder and a flight attendant, which right, however, is not within the contemplation of section 504.⁹¹

Business Necessity As An Exception

The anti-discrimination laws in favor of handicapped persons was not designed to burden the employers with employees who are handicapped and not qualified to perform their particular functions, to the detriment of the business. Thus, where the requirements of the job are translated to the qualifications needed and expected by the employer, the latter can validly refuse the employment of a person with a disability and who does not meet the valid qualifications set. This constitutes the "Business Necessity Exception" to section 504 of the Rehabilitation Act which has become the basis of several decisions in

⁸⁴ 608 F.Supp. 739 (1984).

⁸⁵ *Tudyman v. United Airlines*, 608 F.Supp. 739, 740 (1984).

⁸⁶ *Tudyman v. United Airlines*, 608 F.Supp. 739, 741 (1984).

⁸⁷ *Tudyman v. United Airlines*, 608 F.Supp. 739, 741 (1984).

⁸⁸ *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (1984).

⁸⁹ *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (1984).

⁹⁰ *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (1984).

⁹¹ *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (1984).

the US district courts. Section 504 was not enacted to prejudice the employer but only to prevent discrimination against disabled individuals.

Thus in *Velger v. Williams*,⁹² the court ruled that when the reason for the termination was related to the work performance of the employee, there exists no unlawful discrimination.

Employed in 1984 having a probationary status as "hazardous waste investigator" for defendant Department of Environmental Conservation (DEC), the plaintiff in the Velger case brought an action praying for his reinstatement to his former position allegedly due to the arbitrary and capricious manner of his termination.⁹³

In deciding against the plaintiff, the court first noted that where the issue involves the termination of a probationary employee, bad faith being imputed, the court noted that the scope of judicial review is "limited to an inquiry of whether the employees dismissal was the product of bad faith and was, therefore, arbitrary and capricious".⁹⁴

The Court rejected plaintiff's claim since under the law in force (Executive Law section 292 (21) and section 296), there exists no unlawful discrimination when the person's condition is "in any way related to the duties the person was required to perform in connection with his position".⁹⁵ A similar ruling can be found in *Matter of Miller v. Ravitch*.⁹⁶ The termination was considered not unlawful since the duties of the job required a myriad of physical skills which, as borne by the evidence presented, were not demonstrated by the plaintiff during his training period.⁹⁷ He was consistently given a poor rating by his supervisors and peers due to his weight, among other reasons.⁹⁸ Hence, the termination here was not the result of discrimination but was for a valid cause, to wit, inadequate performance.

⁹² 500 N.Y. S.2d 411 (1986).

⁹³ *Velger v. Williams*, 500 N.Y. S.2d 411, 412 (1986).

⁹⁴ *Velger v. Williams*, 500 N.Y. S.2d 411, 412 (1986).

⁹⁵ *Velger v. Williams*, 500 N.Y. S.2d 411, 412 (1986).

⁹⁶ 470 N.Y. 2d 558 (1983).

⁹⁷ *Miller v. Ravitch*, 470 N.Y.S.2d 558, 559 (1983).

⁹⁸ *Miller v. Ravitch*, 470 N.Y.S.2d 558, 559 (1983).

In *Metropolitan Dade County v. Madeline Wolf*,⁹⁹ decided by the Florida Court of Appeals, Madeline Wolf applied for the position of communications operator in the fire alarm division of the fire department of the county.¹⁰⁰ Accepted as a probationary employee, she was later dismissed. Plaintiff contends that the reason for her dismissal was because she was some 53 pounds overweight, thus she was unable to satisfactorily pass a physical examination upon which qualification for employment was dependent.¹⁰¹ The trial court ordered her reinstatement on the ground that there was discrimination.

The Court of Appeal reversed the decision. Said the court, "The regulation relating to weight or overweight, like other health requirements, may properly be made a condition of employment, since there is reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is thereby more likely to become disabled during employment, to the detriment of the county financially and otherwise. As such, the regulation can be said to be grounded on *business necessity*."¹⁰²

If such a regulation is proper because based on business necessity, it is not necessary that the physical condition inhibited by the regulation be one which presently would impair the performance of the employee in the job sought or involved.

Ruling in favor of the authority of Armed Forces to promulgate its own regulations, the Court in *Shelton v. Brunson*,¹⁰³ denied relief prayed for by the plaintiff. Here, Michael Shelton was an Air Force sergeant who was discharged on the ground that he did not meet the physical requirements due to his high blood pressure and weight. For one to be eligible to be a commissioned officer, one must not weigh more than 183 pounds. Unfortunately, he weighed between 190 to 195 pounds.

The Court upheld the authority of the Armed Forces, using their own expertise and knowledge, to promulgate its own regulations provided they are

⁹⁹ 274 So. 2d 584 (1973).

¹⁰⁰ *Metropolitan Dade County v. Madeline Wolf*, 274 So. 2d 584, 585 (1973).

¹⁰¹ *Metropolitan Dade County v. Madeline Wolf*, 274 So. 2d 584, 585 (1973).

¹⁰² *Metropolitan Dade County v. Madeline Wolf*, 274 So. 2d 584, 585 (1973). (Emphasis supplied).

¹⁰³ 335 F. Supp. 186. (1971)

reasonable.¹⁰⁴ Here, such regulations were found to be reasonable and would not be reviewed by the courts absent any showing of any constitutional infirmity.

In the Greene Case, the denial of plaintiff's application for transfer was impliedly grounded on business necessity because of the likelihood that his physical condition would cause an impediment against the satisfactory performance of his duties. Said the Court in its decision, an applicant for transfer to such job possessing these three factors

would be less apt to be an efficient, safe, illness-free, and claims-free employee than one not having those conditions. I find that a person with plaintiff's weight and blood pressure would be significantly more apt to suffer a heart attack or a stroke than one not having those conditions. The fact that physicians refer to the condition of being overweight in excess of one hundred pounds as 'morbidly obese' leads the Court to believe ... that the longevity of one who is overweight at the time of his application for transfer to fireman is significantly and adversely affected by that condition of overweight.¹⁰⁵

Case Not Within the Contemplation of the Law: Flight Attendants

In the case of flight attendants who are subject to certain weight restrictions, some courts have rejected the argument that they are being discriminated against by reason of their weight. Although obesity is not claimed, some have used the same arguments raised by obese individuals in order to prevent their discharge from the airline company. The decisions, however, evince that these types of cases are not contemplated by section 504 and other anti-discriminatory laws.

In *Underwood v. Trans World Airlines, Inc.*¹⁰⁶, plaintiff's argument that being overweight is covered by the statute was, however, rejected by the Court. In this case, Joan Underwood, a flight-attendant in TWA, assailed the validity of the certain weight standards contained in the TWA In-Flight Service Manual. After being evaluated twice by a supervisor as exceeding the weight requirement set in the Manual, she was notified that her services were being terminated.¹⁰⁷

¹⁰⁴ *Shelton v. Brunson*, 335 F. Supp. 186 (1971).

¹⁰⁵ *Greene v. Union Pacific Railroad Co.*, 548 F. Supp. 5 (1982).

¹⁰⁶ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (1989).

¹⁰⁷ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 80-81 (1989).

A civil suit was filed in 1988 alleging that the weight program violated section 296 of the New York Human Rights Law (Executive Law) which provides that "it shall be an unlawful discriminatory practice ... for an employer ... because of disability ... to refuse to hire or to bar or to discharge from employment such individual or to discriminate against such individual..."¹⁰⁸

As amended, the term "disability" as defined in the HRL includes conditions "regarded by others as such an impairment" thereby covering such conditions of various degrees from those involving the "loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity."¹⁰⁹

Because of this, the Court ruled that plaintiff has no standing to question the standards set in the In-Flight Service Manual. Citing *Blum v. Yaretsky*,¹¹⁰ the Court reiterated the dictum that the "complaining party must also show that he is within the class of persons who will be concretely affected."¹¹¹ Furthermore, it is "not enough that the conduct of which plaintiff complains will injure someone." The plaintiff himself must be directly injured or will be injured.¹¹²

The court then distinguished the instant case from the *Xerox*¹¹³ case where the inclusion of "obesity" as a protected disability has been closely circumscribed and does not extend to plaintiff's position. Whereas in *Xerox*, the plaintiff therein was "clinically diagnosed" by the examining physician as being "morbidly obese",¹¹⁴ here, no such allegation was made. The Court ruled that a marked difference exists between obesity and merely being overweight, the difference not merely being "one of semantics"¹¹⁵. Here, plaintiff does not allege in her complaint that her condition amounts to obesity nor does she insist that her termination from employment was the result of discrimination based upon obesity. Neither is it alleged that the employer, Trans World Airlines, perceives her as being an obese individual.¹¹⁶ She does not even allege any impairment of any of

¹⁰⁸ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 83 (1989).

¹⁰⁹ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (1989).

¹¹⁰ 457 U.S. 991, 999 (1982).

¹¹¹ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 84 (1989).

¹¹² *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (1989).

¹¹³ *State Division of Human Rights v. Xerox Corp.*, 480 N.E. 2d 695 (1985).

¹¹⁴ *State Division of Human Rights v. Xerox Corp.*, 480 N.E. 2d 695, 696 (1985).

¹¹⁵ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (1989).

¹¹⁶ *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78 (1989).

the bodily functions. Clearly, she does not fall within the class contemplated by the statute, and therefore, cannot claim its protection.

On the other hand, anti-discrimination laws likewise do not contemplate every employment rejection case. An individual who was not accepted or terminated in one particular job because of his failure to meet the weight requirement set by the employer is not automatically considered a handicapped person to whom protection must be granted. Thus in the *Tudyman* case, the court held that there exists "no authority for the proposition that failure to qualify for a single job because of some impairment that a plaintiff would otherwise be qualified to perform constitutes being limited in a major life activity."¹¹⁷ Furthermore, courts do not require that an employee "be prevented from all employment in order to be considered handicapped..."¹¹⁸ Therefore, the "inability to obtain a single job does not render one "handicapped". In the instant case, an avid body builder who exceeds the maximum allowable weight for a United Airlines flight attendant is "not limited in a major life activity – he is only prevented from having a single job."¹¹⁹ Thus, the plaintiff in this case cannot avail of the statutory protection in favor of a handicapped individual.

Other Reasons Against Classifying Obesity As A Handicap

In *Krein v. Manor Nursing Home*,¹²⁰ the court held that mere assertion of obesity without proof thereof is not sufficient. The fact of obesity must be proved like any other question of fact. In this case, Mary J. Krein was employed from 1979 to 1984 as a nurse's aid by Marian Manor. Weighing over 300 pounds, she filed suit against defendant allegedly due to unlawful discrimination based on her obesity resulting in the termination of her employment. According to said court, obesity may be comprehended as falling within the statutory definition of physical handicap and disability. Using as basis Webster's Third New International Dictionary (1971), the court defined disability as "a physical or mental illness, injury or condition that hinders, impedes or incapacitates."¹²¹ On the other hand, handicap was defined as "a disadvantage that makes achievement unusually difficult especially a physical disadvantage that limits the capacity to work."¹²²

¹¹⁷ *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (1984).

¹¹⁸ *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (1984).

¹¹⁹ *Tudyman v. United Airlines*, 608 F. Supp. 739, 745 (1984).

¹²⁰ 415 N.W.2d 793 (1987).

¹²¹ *Krein v. Manor Nursing Home*, 415 N.W.2d 793, 796 (1987).

¹²² *Krein v. Manor Nursing Home*, 415 N.W.2d 793, 796 (1987).

According to the court, reliance on these definitions is proper considering that words used in a statute are to be “understood in their ordinary sense unless a contrary intention plainly appears.”¹²³ These ordinary definitions may, therefore, comprehend an obese condition which significantly impairs a person’s abilities.

However, while recognizing that obesity may be considered as a statutorily protected handicap, the mere assertion that one is overweight or obese is not alone adequate.¹²⁴ Like all questions of fact which must be proved in court, sufficient proof must be presented.

In this case, “Krein failed to demonstrate that her weight was a disability or handicap entitling her to pursue statutory relief for discriminations. According to her own testimony, she was “unaware” of any problems related to her weight except for her susceptibility to frequent flu and colds, which common ailments according to the court, “do not amount to a disability or handicap.”¹²⁵

On the other hand, in the 1986 case of *Russell v. Salve Regina College*,¹²⁶ the plaintiff was held not to have the necessary *locus standi* to bring a federal claim against a privately owned learning institution. In said case, Sharon Russell was expelled from defendant-school’s nursing program because of her obesity. The defendant filed a motion for summary judgment, which can only be granted when “there is no genuine issue as to any material fact and where the movant is entitled to judgment as a matter of law.”

The Court granted the Motion but not on all grounds set forth in defendant’s motion.

On the ground that there was unlawful discrimination on the basis of plaintiff’s handicap due to her obesity (she weighed 306-315 pounds at 5 feet 6 inches in height), in violation of Federal Statute, the Court ruled that the first element, that the college was receiving federal funding, which must be satisfied was lacking.¹²⁷ Thus, there was no longer any need to determine whether plaintiff’s obesity can be considered a handicap within the contemplation of the Rehabilitation Act of 1973, as amended.

¹²³ Krein v. Manor Nursing Home, 415 N.W.2d 793, 796 (1987).

¹²⁴ Krein v. Manor Nursing Home, 415 N.W.2d 793, 796 (1987).

¹²⁵ Krein v. Manor Nursing Home, 415 N.W.2d 793, 796 (1987).

¹²⁶ 649 F. Supp. 391 (1991).

¹²⁷ Russell v. Salve Regina College, 649 F. Supp. 391, 398 (1991).

Citing *Grove City College v. Bell*¹²⁸, the Court ruled that if the college only receives federal funding indirectly by way of tuition subsidies to students, the federal anti-discrimination law finds no application. A religiously affiliated college like Salve Regina College, administered by the Sisters of Mercy of the Roman Catholic Church, receiving “federal monies exclusively through its students, is subject to federal anti-discrimination laws only with respect to its financial aid program.”¹²⁹ Thus, federal statutes against discrimination have limited application on privately-owned and administered schools and colleges. In this case, plaintiff does not even assert that defendant the discrimination was with respect to scholarship assistance or other federal financial aid.

In virtue of the absence of adequate proof that the nursing program of defendant was supported by federal funds, no cause of action based on federal law may be invoked by plaintiff.

Arguments Favoring The Classification of Obesity As A Handicap

In several cases, American courts have recognized obesity as a handicap thereby giving obese persons protection against unlawful discrimination. Interpreting the provisions of the anti-discriminatory statutes liberally has broadened the scope thereof to include obesity as a protected handicap. Various reasons have likewise been forwarded in order to advance the rights of obese workers. This section shall discuss the arguments in favor of such classification.

Liberal Construction of the Statute to Achieve Its Primordial End

Being a remedial social legislation, the provisions thereof should be interpreted liberally.¹³⁰ Its general purpose is to “fulfill those provisions of the State Constitution that guarantee civil rights” whereas its specific purpose is to eradicate “all forms of discrimination in employment based on a person’s physical makeup.”¹³¹

Elucidating on the legislative intent of the Law Against Discrimination of New Jersey, the Superior Court of New Jersey explained that a liberal interpretation should be given the provisions of said law. In *Gimello v. Agency*

¹²⁸ 465 U.S. 555 (1984)

¹²⁹ *Russell v. Salve Regina College*, 649 F. Supp. 391, 397 (1991).

¹³⁰ *Clowes v. Terminix Int’l. Inc.*, 109 N.J. 590-595 (1988).

¹³¹ *Clowes v. Terminix Int’l. Inc.*, 109 N.J. 590, 591 (1988).

*Rent-A-Car Systems, Inc.*¹³², plaintiff Joseph Gimello, claiming to be a victim of discriminatory discharge, filed this action to recover damages from defendant. Weighing 225 pounds at a height of 5 feet 8 inches, he was fired allegedly because of his obesity which in no way affected his functions as an office manager. An office manager, according to the employer's manual, has the duty of "organizing and coordinating the daily activities within their respective rental offices in accordance with standard company operating procedure, while working to expand the office through cooperative efforts with the sales representatives."¹³³ As an added responsibility, the office manager is also tasked with the function of providing adequate training to the manager trainee.

Juxtaposed against the numerous commendations given Gimello for his efforts towards the success of his office, the Court concluded that his services were terminated solely because of his obesity. He was fired because of such condition perceived as an impairment by higher officials, but which in no way interfered with his performance as a manager.

Under the New Jersey Law Against Discrimination (LAD), it is prohibited to unlawfully discriminate against any person "because such person is or has been at any time handicapped ... unless the nature and extent of the handicap reasonably precludes the performance of the particular employment."¹³⁴ Furthermore, the New Jersey statute defines "handicapped" as:

suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.

¹³² *Gimello v. Agency Rent-A-Car Systems, Inc.*, 594 A.2d 264 (1991).

¹³³ *Gimello v. Agency Rent-A-Car Systems, Inc.*, 594 A.2d 264, 266 (1991).

¹³⁴ N.J.S.A 10:5-4.1, (L. 1978), c. 137 § 1.

Due to such broad definition of the term "handicapped", plaintiff's obesity was characterized as a handicap within statutory protection. It was further demonstrable by accepted diagnostic techniques.

Similarly, in *School Board of Nassau County v. Arline*¹³⁵, the court stamped its approval of the liberal construction of section 504 of the Rehabilitation Act of 1973. Here, Gene Arline taught elementary school in Nassau County, Florida from 1966 to 1979. However, on account of a third relapse of her tuberculosis within two years, she was discharged. After being denied relief in state administrative proceedings, she brought this suit in the federal court alleging unlawful discrimination on account of such illness, thereby violating section 504 of the Rehabilitation Act of 1973. During trial, expert medical testimony was presented characterizing her tuberculosis as being "in an acute form in such a degree that it affected her respiratory system," requiring her to be hospitalized for quite some time.

The Court affirmed the Court of Appeals' reversal of the decision of the lower court holding that persons with contagious diseases are within the ambit of the coverage of section 504 of said Act. The legislative intent of said statute, taken as a whole, as stated by Senator Humphrey and contained in the Congressional Record, is "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." Towards achieving this end goal, the legislative body not only augmented federal support for vocational rehabilitation, but more importantly addressed the widespread problem of discrimination against persons with handicaps. More specifically, section 504 seeks to ensure that those with a handicap are not denied jobs or other benefits because of the negative attitudes and/or ignorance of others vis-à-vis the nature of the impairment.

Distinction Between Mutability and Immutability NOT Contemplated By Law

In the leading case of *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,¹³⁶ the US Court of Appeals for the First Circuit became the first federal appellate court to hold that obesity is a disability within the definition contained in the Rehabilitation Act of 1973.¹³⁷ Here, the plaintiff,

¹³⁵ 480 U.S. 273 (1987).

¹³⁶ 10 F.3d 17 (1993).

¹³⁷ W. Taussig, *supra*, note 5 at 948.

Bonnie Cook, weighing over 300 pounds at 5 foot 3 inches, filed her application for the position of institutional attendant for the mentally retarded at the Ladd Center, a residential facility for retarded persons operated by defendant. According to her pre-employment physical examination, although she was morbidly obese, she was, nevertheless not limited in any manner in her ability to perform the duties and functions of the position,¹³⁸ although the evaluating physician recommended against her hiring because her condition would limit her ability to safely evacuate patients during emergency cases, and would likewise result in increased absenteeism and worker's compensation claims.¹³⁹ Thus, following such recommendation, Bonnie Cook was not hired.

Because of this, she filed this suit against defendant claiming disability discrimination. The Court of Appeals for the First Circuit affirmed the district court's decision. It rejected the argument that in order for a physical impairment to come within the purview of section 504, the same must be immutable.¹⁴⁰ Mutable conditions are not per se precluded from the statutory definition of physical impairment.¹⁴¹ No distinction having been made in the provisions of the law, no distinction should be made when its provisions are applied in a particular case. Mutability is not a necessary requirement under the law.¹⁴² It should be considered only as regards the substantiality of the physical impairment.¹⁴³

The First Circuit likewise found that her obesity was likely not a curable condition considering the permanent nature of a dysfunctional metabolism.¹⁴⁴

¹³⁸ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 20-21 (1993).

¹³⁹ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 21 (1993).

¹⁴⁰ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23-24 (1993).

¹⁴¹ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23 (1993).

¹⁴² Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23 (1993).

¹⁴³ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 23-24 (1993).

¹⁴⁴ Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals, 10 F.3d 17, 24 (1993).

Perceived-Handicap Theory

Under section 504 of the Rehabilitation Act of 1973, even if no actual handicap exists, so long as the employer perceives the person as being a handicapped individual, the latter will be protected by the statute. The perception, therefore, of the existence of a substantially limiting impairment in spite of its non-existence¹⁴⁵ gives a cause of action in favor of one against whom the perception was directed. In *Bonnie Cook's* case, the court ruled that an "employer's perception that the impairment was immutable would suffice"¹⁴⁶ to give the obese person a right to seek redress from the courts. Furthermore, the "stereotype that overweight people are slower, more easily tired, less mobile and less hardworking than persons of normal weight" would more likely convince the courts that obesity is perceived as an impairment affecting major life activities.¹⁴⁷ This theory was applied in the case of *Andersen v. Exxon Co.*¹⁴⁸

In analogous cases, the courts have interpreted section 504 as extending to cases where the employer merely perceives that the person possesses a certain disability. In *Poff v. Caro*¹⁴⁹, the court granted relief in favor of 3 homosexual men. Here, the landlord refused to enter into a contract of lease with plaintiffs, 3 homosexual men, because of the former's fear that they might contract AIDS, although they were not in fact afflicted with the disease.

Judge Humphrey granted the injunction prayed for holding that distinction between actual and perceived handicap "makes no sense". The Law Against Discrimination (LAD) should not, under any reasonable interpretation thereof, allow a landlord to discriminate against someone whom he "erroneously thought was a member of a religious or racial minority, since that interpretation would only protect against discrimination in cases where the wrongdoer accurately perceived the discriminatee's classification."

¹⁴⁵ *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 22 (1993).

¹⁴⁶ *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 24 (1993).

¹⁴⁷ *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 26 (1993).

¹⁴⁸ 446 A.2d 486 (1982).

¹⁴⁹ 549 A.2d 900 (1982).

Applying the perceived-handicap theory, the act employed by the landlord was held to constitute unlawful discrimination under the LAD, and consequently, plaintiffs should be given its protection.

In the Gimello case, where the plaintiff was fired because of his obesity which was perceived by higher officials as an impairment, but which in no way interfered with his performance as a manager, the court discussed the perceived-handicap theory. The court noted that the scope of the New Jersey Law Against Discrimination is not limited to cases where the individual actually possesses a handicap. Its prohibition against discrimination extends to such cases where the employer merely perceives the individual as handicapped, stamping approval to the "perceived-handicap theory" of discrimination. However, there was no opportunity to apply the theory in this case since the plaintiff's obesity was already proved by medical evidence presented. The employer's perception is not "particularly important when a real medical or pathological condition exists."¹⁵⁰

Furthermore, under the perceived-handicap theory, all forms of obesity are likely to constitute cognizable disabilities within the Rehabilitation Act and the ADA.

Employer Can Refuse or Terminate Employment For Valid Causes Only

Policy arguments that the floodgates will be opened if ever protection under anti-discrimination statutes is extended to obese persons because the employers will be unfairly burdened financially with respect to granting insurance benefits and workmen's compensation claims, have been advanced. However, in some cases, American district courts have rejected this argument. Thus, in the Xerox case, the court held that there is nothing in the statute which gives any right in favor of the employer to refuse an otherwise qualified person "simply because they have possibly treatable condition of excessive weight." Employment could only be refused when the condition was related to the duties to be performed by the applicant. Furthermore, when an impairment exists, employment may not be denied because of any "actual or perceived undesirable effect the person's employment may have on disability or life insurance programs."

¹⁵⁰ Gimello v. Agency Rent-A-Car Systems, Inc., 594 A.2d 264, 276-277 (1991).

Obesity As A Medically Demonstrable Handicap

Obesity is "predominantly an involuntary disease for which no cure is available."¹⁵¹ Proponents of the Mutability theory (that Obesity to be considered a disability must be mutable) have a mistaken notion that the proper treatment therefor is semi-starvation and weight loss.¹⁵² However, even if there is a decrease in weight as a result of dieting, it would still not correct the metabolic dysfunction of an obese person. It might even result in harmful side effects.¹⁵³

Because it is a disease, it can be proven by medical evidence during trial. According to the Rehabilitation Act and the ADA, obesity, once proven by competent evidence, will automatically be considered a handicap and consequently, the obese person will be given the protection due him.

In the 1985 case of *State Division of Human Rights v. Xerox Corp.*¹⁵⁴ decided by the New York Court of Appeal, Xerox Corporation refused to hire Catherine McDermott as a computer programmer solely on the ground of her obesity, in spite of the fact that she has held comparative positions in the past where her physical condition did not interfere with the kind of work she performed. The examining physician of defendant corporation found that she was 5 feet 6 inches tall and weighed 249 pounds, thus classifying her as "grossly obese" and consequently recommended against her employment.¹⁵⁵

Disability was defined in section 296 (1) of the New York's Executive Law as:

a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to physical, mental or medical conditions which are unrelated to

¹⁵¹ W. Taussig, *supra*, note 5 at 958.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 480 N.E. 2d 695 (1985).

¹⁵⁵ *State Division of Human Rights v. Xerox Corp.*, 480 N.E. 2d 695, 696 (1985).

the ability to engage in the activities involved in the job or occupation which a person claiming protection of this article shall be seeking.¹⁵⁶

The Human Rights Appeal Board reversed and dismissed the complaint since being overweight without any proof of any impairment is not a disability covered by the statute. Her being overweight can only be attributed to "a voluntarily induced condition unrelated to any glandular or organic deficiency,"¹⁵⁷ implying that for obesity to be considered as a handicap within the contemplation of the statute, it must be immutable.

The Court of Appeals, however, reversed this decision. Under New York law where the term "disability" is given a more expansive definition and scope, disabilities are "not limited to physical or mental impairments, but may also include medical impairments." The statute affords protection to all persons with disabilities, whether the disability be already existing or one which might exist in the future. Thus, the disability may be manifested in either of 2 ways, to wit:

1. By preventing the exercise of a normal bodily function; or
2. By being "demonstrable by medically accepted clinical or laboratory diagnostic techniques."

Thus, under no. 2, once medically diagnosed as possessing such disability, even if the person is not prevented from exercising a normal bodily function, such person can avail of the protection granted by the statute. The employer cannot refuse the employment of an otherwise qualified applicant "simply because the condition has been detected even before it has actually begun to produce deleterious effects."

In the case at bar, the applicant was clinically diagnosed by the examining physician of defendant corporation as being "morbidly obese" and therefore, was protected under the law.

¹⁵⁶ Executive Law § 296 [1][a], L. 1974, ch. 988 §2, as cited in *State Division of Human Rights v. Xerox Corp.*, 480 N.E. 2d 695, 696 (1985).

¹⁵⁷ *State Division of Human Rights v. Xerox Corp.*, 480 N.E. 2d 695, 697 (1985).

III. OBESITY AS A HANDICAP IN THE PHILIPPINE SETTING

Under Article XIII, Sec. 1 of the 1987 Constitution, Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities.¹⁵⁸ Furthermore, the Constitution directs the government to afford full protection to labor and to promote full employment as well as equality of employment opportunities for all persons.¹⁵⁹ The fundamental law mandates that the State must protect the rights of all within its jurisdiction, without making any distinction. Where no distinction has been made nor intended, so must we not make any. In addition, under the Declaration of Principles and State Policies., the Constitution values the dignity of every human person and guarantees full respect for human rights.¹⁶⁰

Towards this end, the General Assembly of the United Nations, of which the Philippines is a member, approved Resolution No. 3447. Under its Declaration on the Rights of Disabled Persons proclaimed on December 9, 1975, the signatory states, including the Philippines, recognize the necessity of giving assistance to disabled persons towards the development of their abilities in and the promotion of their integration in normal life. Accordingly, a disabled person was defined as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities. Towards the promotion of equality among all persons, no distinction was made by the General Assembly as regards the nature of the disability. Whether it is congenital or not, so long as a deficiency in the physical or mental capabilities of the individual is manifest, he is deemed a handicap, and therefore, possesses all the rights accorded and recognized by the Resolution.

Furthermore, the General Assembly recognized that disabled individuals possess the inherent right to respect for their human dignity. They likewise have the same fundamental rights as their fellow citizens of the same age, which implies that they have the right to enjoy a decent life, as normal and full as possible. Consequently, they shall be protected against all forms of treatment of a discriminatory, abusive or degrading nature.

¹⁵⁸ CONST. (1987), art. 13, sec. 1.

¹⁵⁹ CONST. (1987), art. 13, sec. 3.

¹⁶⁰ CONST. (1987), art. 2, sec. 11.

Recently, the Philippine legislature enacted Republic Act 7277, otherwise known as the Magna Carta for Disabled Persons.¹⁶¹ The act declares as a policy of the State “full support to the improvement of the total well being of disabled persons and their integration into the mainstream of society.”¹⁶² The State likewise recognizes that disabled individuals possess the same rights as other people to take their proper place in society.¹⁶³ They should, like other persons without any disability, be able to live freely and as independently as possible.¹⁶⁴ Consequently, the rights that they possess and the benefits that they enjoy must never be perceived as welfare services by the government.¹⁶⁵ Respect must be accorded the disabled. It is a declared policy for the state to exert all efforts to remove all social, cultural, economic, environmental and attitudinal barriers that are prejudicial to disabled persons.¹⁶⁶

In the same way that the enactment by the US Congress of the Rehabilitation Act of 1973 and the ADA are considered as a remedial social legislation designed to eradicate society’s discrimination against people with disabilities., the Magna Carta for Disabled Persons was promulgated towards the removal of the social stigma permeating from society’s aversion against disabled persons. Hence, by virtue of the Constitutional directive to equalize employment opportunities for all, including the disabled, section 5 of RA 7277 prohibits employment discrimination against the disabled. Section 5, paragraph 1, provides:

Equal Opportunity for Employment. – No disabled person shall be denied access to opportunities for suitable employment. A qualified disabled employee shall be subject to the same terms and conditions of employment and the same compensation, privileges, benefits, fringe benefits, incentives or allowances as a qualified able bodied person.¹⁶⁷

More specifically, section 32 states:

Section 32. Discrimination on Employment. – No entity, whether public or private, shall discriminate against a qualified disabled person by reason of disability in regard to job application procedures, the

¹⁶¹ Rep. Act No. 7277 (1992), 88 O.G. 2538.

¹⁶² Rep. Act No. 7277 (1992), sec. 2, para. a.

¹⁶³ Rep. Act No. 7277 (1992), sec. 2, para. b.

¹⁶⁴ Rep. Act No. 7277 (1992), sec. 2, para. b.

¹⁶⁵ Rep. Act No. 7277 (1992), sec. 2, para. b.

¹⁶⁶ Rep. Act No. 7277 (1992), sec. 2, para. e.

¹⁶⁷ Rep. Act No. 7277 (1992), sec. 5.

hiring, promotion, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The following constitute acts of discrimination:

- a) Limiting, segregating or classifying a disabled job applicant in such a manner that adversely affects his work opportunities;
- b) Using qualification standards, employment test or other selection criteria that screen out or tend to screen out a disabled person unless such standards, test or other selection criteria are shown to be job-related for the position in question and are consistent with business necessity;
- c) Utilizing standards, criteria, or methods of administration that:
 - 1) have the effect of discrimination on the basis of disability;
or
 - 2) perpetuate the discriminations of others who are subject to common administrative control.
- d) Providing less compensation, such as salary, wage or other forms of remuneration and fringe benefits, to a qualified disabled employee, by reason of his disability, than the amount to which a non-disabled person performing the same work is entitled;
- e) Favoring a non-disabled employee over a qualified disabled employee with respect to promotion, training opportunities, study and scholarship grants, solely on account of the latter's disability;
- f) Re-assigning or transferring a disabled employee to a job or position he cannot perform by reason of his disability;
- g) Dismissing or terminating the services of a disabled employee by reason of his disability unless the employer can prove that he impairs the satisfactory performance of the work involved to the prejudice of the business entity; Provided, however, That the employer first sought to provide reasonable accommodations for disabled persons;
- h) Failing to select or administer in the most effective manner employment test which accurately reflect the skills, aptitude or other factor of the disabled applicant or employee that such test purports to

measure, rather than the impaired sensory, manual or speaking skills of such applicant or employee, if any; and

i) Excluding disabled persons from membership in labor unions or similar organizations.¹⁶⁸

Compared with its counterpart under the American legal system, section 32 provides for a more comprehensive and detailed list of prohibitions, outlining the discriminatory acts of the employer. However, such enumeration, considering the remedial nature of the legislation, should not be interpreted as an exhaustive list but merely as a detailed guide as to the kind of practices proscribed by the Republic Act.

It can be clearly evinced from these provisions that the rights of disabled persons under Philippine Law are given adequate protection. However, just like in the United States, the law does not specifically state that obesity is considered a handicap covered by the statutory protection. The authors of this paper, however, strongly believe, from a comparative analysis of the provisions of RA 7277 and the provisions of the Rehabilitation Act and the ADA, as well as from the legal approach utilized in American jurisprudence, that obesity lies within the coverage of the Magna Carta for Disabled Persons, and consequently, a cause of action lies in favor of an obese worker in the Philippines in the event that he is discriminated against.

Philippine and American Anti-Discrimination Laws Compared

A cause of action under American law requires four essential elements, namely: (1) that the plaintiff applied for a position in a federally funded program; (2) That plaintiff suffered from a cognizable disability; (3) That in spite of plaintiff's disability, he remains "otherwise qualified" for the position; and (4) that she was not accepted due solely to his disability.

With the exception of the first element regarding federal funding, all the other requisites must be proved if a discriminatory claim is brought before Philippine courts. Under section 32 of RA 7277, the prohibition against discrimination applies not only to public entities, but also to private establishments. Thus, the fact that the private entity does not receive financial assistance in whatever form from the government is of no moment. The

¹⁶⁸ Rep. Act No. 7277 (1992), secs. 32, 33.

movement against all forms of discrimination must be undertaken by all, not just the State.

Impelled by the same laudable purpose, the anti-discrimination laws of the Philippines and the United States have provided for definitions of certain terms, quite similar to each other. In defining a disabled person, paragraph a of section 4 of RA 7277, provides: "Disabled persons are those suffering from restriction or different abilities, as a result of a mental, physical or sensory impairment, to perform an activity in the manner or within the range considered normal for a human being."

On the other hand, impairment is defined as "any loss, diminution or aberration of psychological, physiological or anatomical structure or function."

Similarly, the US Department of Health and Human Services, in connection with the proper implementation of section 504 of the Rehabilitation Act of 1973, promulgated regulations defining these terms which are also contained in the US statute, to wit:

1. Physical or Mental Impairment:

a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the ff. body systems: neurological; musculoskeletal; special sense organs; respiratory including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine;

b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Given these definitions, obesity, whether mutable or immutable may be considered as an impairment because it constitutes either a diminution or at least an aberration of the psychological, physiological or anatomical structure or function. Obesity constitutes a physical impairment because it is a physiological condition that affects several bodily systems. It is caused either by a "metabolic dysfunction, lack of appetite suppression signals to the brain, genetic disposition, and an abnormal number and size of fat cells."¹⁶⁹ And even assuming that obesity was the result of overeating disorders, it may still fall within the

¹⁶⁹ W. Taussig, *supra*, note 5 at 957.

scope of “mental or psychological” impairment, which is also included in the definition. Since the medical experts have likened compulsive overeating as a psychological disorder like anorexia nervosa, mutable obesity is still considered as an actual impairment.¹⁷⁰

Under the federal laws of the US, there are three possible types of people who are deemed handicapped within the scope of the Rehabilitation Act, to wit:

1. Those who presently have some impairment substantially limiting a major life activity;
2. Those who have been so limited in the past; and
3. Those who are regarded by others as being so.¹⁷¹

Under Philippine law, although the phraseology may be different in insignificant ways, disability is likewise defined as:

1. A physical or mental impairment that substantially limits one or more psychological, physiological, or anatomical function of an individual or activities of such individual;
2. Record of such an impairment; or
3. Being regarded as having such an impairment.¹⁷²

Under the first classification of a handicapped person, the Philippine definition, instead of using the phrase “major life activity”, the statute utilized a more expansive definition. So long as at least one psychological, physiological or anatomical function or activity of an individual is substantially limited, without necessity of such function or activity from being a major life activity, a person is already deemed a handicap to whom protection is accorded.

With regard to the second classification, presentation of a mere record that he has previously suffered an impairment would entitle the person to avail of the provisions of the statute. The third classification in both jurisdictions recognize the perceived-handicap theory. When the employer merely perceives

¹⁷⁰ *Id.*, at 958.

¹⁷¹ *As cited in Tudyman v. United Airlines*, 608 F.Supp. 739, 744 (1984).

¹⁷² *As cited in Tudyman v. United Airlines*, 608 F.Supp. 739, 744 (1984).

the employee or applicant as being impaired, in spite of the fact that he is not so impaired, he will be regarded as a handicapped individual.

Furthermore, handicap is defined by the law as a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the function or activity, that is considered normal given the age and sex of the individual.

Generally, the two jurisdictions have established virtually the same definition of an individual with a “disability” or “handicap”. More particularly, the Philippine statute provides for an even broader definition of the term. Consequently, the American legal system can be an adequate source from which to obtain the gaps in Philippine law. Given the similarities between the laws of these two countries, the rules applicable to one can be applied by analogy to the other jurisdiction. In the Philippines, the issue of whether obesity can be classified as a protected group within the meaning of the Magna Carta for Disabled Persons has not yet been settled by the Supreme Court. In the absence of jurisprudence and other legal rules on the matter, American jurisprudence and the manner of implementation made by the US government of its anti-discrimination laws will carry great weight and influence. The regulations established by the US Department of Health and Human Services may be used in order to have a working definition of certain terms which are relevant, but which are unfortunately not defined under RA 7277, such as “has a record of such an impairment” and “is regarded as having an impairment”. Said regulations have defined these terms as follows:

Has a record of Such an Impairment: A history of, or has been misclassified as having, mental or physical impairment that substantially limits one or more major life activities.

Is regarded as Having an Impairment:

- a. Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;
- b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

c. Has none of the impairments ... but is treated by a recipient as having such an impairment.¹⁷³

In the case of *Consolidated Rail Corp. v. Darrone*,¹⁷⁴ the Court held that these regulations provide "an important source of guidance on the meaning of section 504."¹⁷⁵ The Department of Health and Human Services, as the entity charged with the duty to implement and enforce the anti-discrimination law in particular cases, was given the authority to promulgate interpretative regulations in accordance with the legislative intent of preventing discrimination against the handicapped.

IV. CONCLUSION

*Every person, regardless of size, has the right to a life of dignity and respect.*¹⁷⁶

Obesity discrimination is a stereotype-driven form of classification that the law must recognize and protect. It is this circumstance of biological default and social stigma that has driven the American lawmakers and courts to regard it, whether in an actual or perceived sense, as a handicap, and thus deserving of protection under its handicap discrimination laws. Whereas the Philippine legal system has yet to be confronted with an actual controversy on the matter, it is important to consider that Philippine disability laws, by their tone and breadth, are accommodative of the concept, if not to a degree higher than American federal laws. In a developing economy as that of the Philippines where labor is the chief commodity and tool of subsistence upon which the lives of entire families depend, the recognition of obesity discrimination becomes markedly essential if only to affirm the equality principle that everyone who is able and willing to work must be given work, whether big or small, wide or tall.

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¹⁷³ As cited in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-631 (1985).

¹⁷⁴ 465 U.S. 624 (1985).

¹⁷⁵ *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-635 (1985).

¹⁷⁶ W. Taussig, *supra*, note 5, at 962, citing an unpublished pamphlet of the National Association to Advance Fat Acceptance (NAAFA).