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## Private Rights in Public Places: A Weighty Issue

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# COMMENT

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### I. INTRODUCTION

June Allyson Green travelled on a Greyhound bus en route to Atlanta, Georgia from Fort Lauderdale, Florida. After the bus stopped briefly in Macon, Georgia, the bus driver demanded that Green get off the crowded bus because she weighed over 300 pounds and the man next to her could not fit into his seat. When she refused, several police officers handcuffed her and arrested her for disorderly conduct. Although the police later dropped the charges, Green filed a civil suit against Greyhound for \$ 2.25 million.<sup>1</sup>

Alexis Adams has also experienced overt displays of weight discrimination. She no longer shops for groceries during the day when stores are crowded. In the past, other customers have removed items from her cart and exclaimed "You don't need that."<sup>2</sup> Lauren R. Januz complains that he cannot eat in many restaurants that have "'fixed seats' or 'booths' in which the distance between the chair and the table is not adjustable."<sup>3</sup> Reacting to this dilemma in 1991, he threatened to bring a lawsuit against McDonald's if it did not remedy the problem confronting overweight customers.<sup>4</sup> The discrimination against these individuals is apparent when considering the reaction Mr. Januz received from an attorney he approached when seeking representation: "If anything,

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1. *Fat Lady Sings the Greyhound Bus Blues*, THE GAZETTE, Apr. 1, 1992, at A11.

2. Michael Blumfield, *Fat People Organize to Fight Against Discrimination*, THE GAZETTE, Apr. 26, 1992, at D1.

3. Mike Royko, *A Discrimination Charge Hits Bottom*, CHI. TRIB., May 22, 1991, at 3C.

4. *Id.*

McDonald's might be sending him a subtle and considerate message by providing chairs that don't accommodate his bulk. They might be saying: 'If you can't fit into our chairs, you shouldn't be eating our food.'"<sup>5</sup>

Sally Smith must purchase two seats if she plans to travel on commercial airlines, but the airlines refuse to double her frequent flyer mileage.<sup>6</sup> She now heads the National Association to Advance Fat Acceptance (NAAFA). The California based group fights discrimination based on obesity.<sup>7</sup> The group planned a "demonstration against South West Air to protest a recent incident in which a fat passenger was escorted from his seat by four armed policemen because he was 'encroaching' on his neighbour [sic]."<sup>8</sup>

The Civil Rights Act of 1964 prohibits discrimination in places of public accommodation.<sup>9</sup> It guarantees all individuals "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."<sup>10</sup> The statute, however, fails to recognize handicapped persons as a protected class. In response, Congress passed the Americans with Disabilities Act of 1990 (the "ADA") to protect against other prevalent forms of discrimination.<sup>11</sup> Arguing that obesity is a handicap, some have successfully used the ADA to challenge unfair employment practices based on the employee's weight and appearance.<sup>12</sup> Some states have enacted supplemental protections. For example, Michigan has passed its own legislation to specifically protect victims of weight discrimination in the employment context.<sup>13</sup> However, even with this legislation, June Allyson Green, Alexis Adams, Lauren Januz, and Sally

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5. *Id.*

6. James Bone, *Sizing Up the Opposition*, THE TIMES, Apr. 20, 1992, at Features.

7. *Id.*

8. *Id.*

9. 42 U.S.C. § 2000(a) (1992).

10. *Id.*

11. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1989). Congress signed the bill into law on July 26, 1990.

12. See discussion *infra* part III: WEIGHT AS A HANDICAP.

13. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (1992). Presently, Michigan is the only state that has passed such legislation. This state legislation serves an important function because "[t]here is no question that society in general discriminates against overweight people." Donald L. Bierman, Jr., *Employment Discrimination Against Overweight Individuals: Should Obesity be a Protected Classification?*, 30 SANTA CLARA L. REV. 951, 958 (1990). When NAAFA recently surveyed 445 of its members, the results indicated that "employers believed that fat people lacked energy, would be poor role models or were mentally handicapped." *Id.* at 959 (footnote omitted).

Smith have no protection against the weight discrimination that they experience daily in places of public accommodation.

This Comment will evaluate the issue of weight discrimination in public accommodations in light of the enactment of the ADA. Part I examines the legislative history of the ADA and state legislation prohibiting similar forms of discrimination. Part II discusses whether courts will consider weight as a handicap or disability, by examining the limited caselaw available in the employment context. Part III focuses on the rights of the obese to access public accommodations and their prospects for legal redress in the future. The Comment concludes with several remarks on the rights of the overweight and the proprietors who try to accommodate them.

## II. LEGISLATIVE HISTORY

### A. *Federal Legislation*

Thirty years ago, Congress enacted the Civil Rights Act of 1964.<sup>14</sup> This legislation attempted to eliminate discrimination on the basis of race, color, religion, or national origin in the contexts of employment and public accommodations, but it failed to protect the rights of the handicapped. In order to remedy this oversight, Congress enacted the Rehabilitation Act of 1973.<sup>15</sup> The Rehabilitation Act purported to "develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."<sup>16</sup> Further, the Rehabilitation Act prohibits discrimination and requires that employers provide reasonable accommodations for qualified handicapped employees.<sup>17</sup> The Rehabilitation Act defined an "individual with a disability" as any person who "(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."<sup>18</sup> A "physical or mental impairment," as used in this definition, included any physiological, neurological, musculoskeletal or sensory disorder.<sup>19</sup> According to the Act, "major life activities" encompass caring for one's self, performing manual tasks, walking, seeing, breathing, learning and working.<sup>20</sup> However, "[h]andicapped" is

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14. 42 U.S.C. § 2000e *et seq.*, (1990).

15. *Id.* §§ 701-96 (1993).

16. *Id.* § 701 (1993).

17. *Id.*

18. *Id.* § 706(8)(B).

19. 29 C.F.R. § 1613.702(b) (1992). "[E]xcept in rare circumstances, obesity is not considered a disabling impairment." 29 C.F.R. app. § 1630.

20. 29 C.F.R. § 1613.702(c) (1992).

not an absolute term but rather a label imposed by society, and much of handicap law consists of deciding who qualifies for that protected category."<sup>21</sup> The Act, however, "was limited to federal activities [activities that received federal funds] and left a gaping hole in the protections offered."<sup>22</sup>

B. *Rights and Remedies Under the Americans with Disabilities Act*

On July 26, 1990, President Bush signed the ADA into law.<sup>23</sup> The Act responded to Congressional findings that

some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older; . . . discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; . . . individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination; . . . [these individuals] are severely disadvantaged socially, vocationally, economically, and educationally; . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>24</sup>

The ADA "is a sweeping statute viewed as no less than a 'bill of rights' for citizens with a wide variety of disabilities who have been subjected to discrimination . . . and who generally have been excluded from many aspects of life taken for granted by the able-bodied."<sup>25</sup> Adopting the

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21. Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2046-47 (1987) (footnote omitted).

22. Robert E. Stein, *A New 'Bill of Rights' for Millions: The Americans with Disabilities Act of 1990*, ARB. J. June, 1991 at 6, 8. Congress has since amended the Rehabilitation Act to cover all the activities of a federally-sponsored entity, but it has never applied to organizations which did not receive federal funds. *Id.*

23. 42 U.S.C. §§ 12101-213 (1992).

24. *Id.* § 12101.

25. Stein, *supra* note 22, at 6. "As stated by the House Education and Labor Committee: 'These provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on, among other things, presumptions, patronizing attitudes, fears and stereotypes about individuals with disabilities.'" Peter A. Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16 EMPLOYEE REL. L.J. 157, 171 (1990) (footnote omitted) (quoting H.R. REP. NO. 485, 101st Cong. 2d Sess., pt. 2, at 102 (1990)). Ronald L. Mace described an example of this discrimination before Congress in 1989. He testified that he and his wife were "refused service in seafood restaurant because they 'could not sit on the stools at . . . the oyster bar'; when asked about other arrangements Mr. and Mrs. Mace and their party were told 'to get out and don't ever come back'." Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923,

definition of "handicap" delineated in the Rehabilitation Act of 1973,<sup>26</sup> the ADA prohibited discrimination in employment, public services including public transportation, public accommodations operated by private entities, and telecommunications.

Title III, the most unique section of the ADA, combined attributes of both the Rehabilitation Act of 1973, in its protection of the handicapped, and the Civil Rights Act of 1964, in its extension to public accommodations.<sup>27</sup> Title III specifically prohibited discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>28</sup> Although clear in its mandate, applying Title III has proved quite difficult. "While there is

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924 n.7 (1989) (quoting *Americans with Disabilities Act of 1989: Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 70 (1989)).

26. "[D]isability' means, with respect to the individual- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (1992). The third prong includes

individuals who have physical or mental impairments that do not substantially limit a major life activity, but are treated . . . as constituting such a limitation, . . . any individual who has a physical or mental impairment that substantially limits a major activity only as a result of the *attitude* of others toward such impairment, or has no physical or mental impairment, but is treated . . . as having such an impairment.

Susser, *supra* note 25, at 161 (emphasis added); see also *infra* note 70.

27. "For individuals with disabilities, Title III of the Americans with Disabilities Act of 1990 . . . provides an analogous [to], but broader [than the Civil Rights Act of 1964], prohibition against discrimination in public accommodations." Robert L. Burgdorf Jr., "Equal Members of the Community: The Public Accommodations Provisions of the Americans with Disabilities Act, 64 TEMP. L. REV. 551, 553 (1991) (footnote omitted). A 1986 national survey, which "paint[s] a sobering picture of an isolated and secluded population of individuals with disabilities," emphasizes the importance of Title III. *Id.* "The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a grocery store, and never go to a church or synagogue." *Id.* (quoting NATIONAL COUNCIL ON DISABILITY, IMPLICATIONS FOR FEDERAL POLICY OF THE 1986 HARRIS SURVEY OF AMERICANS WITH DISABILITIES 35 (1988)). The two reasons cited for the isolation of overweight individuals from society were feelings of not being welcome and the inadequacy of public accommodations. *Id.* at 554.

28. 42 U.S.C. § 12182(a) (1992). "'Full and equal enjoyment' involves two distinct aspects. One is that the place of public accommodation must be physically accessible to a disabled individual. Second, the disabled individual must be able to have the full and equal enjoyment of the goods, services and facilities of places of public accommodation." Stein, *supra* note 22, at 12. "While the definition of public accommodations in the ADA is broad, it applies only to private entities. Buildings owned by state and local governments are not within the definition of public accommodation, but most will be covered by the 'public service' provisions in Title II of the ADA." Burgdorf, *supra* note 27, at 558-59 (footnotes omitted). Title II prohibits discrimination in specified public transportation services provided by private entities. "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public

considerable history under the Rehabilitation Act to interpret Title I of the ADA [to redress discrimination in the employment context], Title III has less to go on."<sup>29</sup> Because the Rehabilitation Act lacks a similar provision and the Civil Rights Act fails to cover handicapped persons, these Acts provide little guidance to courts interpreting Title III. Additionally, Congress could not compile an exhaustive list of all covered conditions, so courts must determine which disabilities constitute protected "handicaps."<sup>30</sup>

Further, Title III requires compliance with a series of accessibility mandates.<sup>31</sup> It guarantees disabled individuals equal access to public accommodations and an opportunity to participate equally in society, unless the modifications would "fundamentally alter" the business of the entity or result in an "undue burden."<sup>32</sup> If a business does not meet these specifications and adherence would not result in an undue burden, Section 12188 of the ADA provides for various remedies.<sup>33</sup>

Pursuant to Section 12188, the Attorney General must investigate violations, and if "such discrimination raises an issue of general public

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transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce." 42 U.S.C. § 12184(a).

29. Stein, *supra* note 22, at 12.

30. Susser notes:

[L]egislative history makes clear that the term [physical or mental impairment] includes such conditions, diseases, and infections as: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus (HIV), cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism. At the same time, it is clear that the term 'physical or mental impairment' does not include simply physical characteristics, such as blue eyes or black hair.

Susser, *supra* note 25, at 160.

31. 42 U.S.C. § 12182(b)(2)(A) (1992). These include reasonable modifications, auxiliary aids and services, and the removal of architectural barriers. Mr. Durenberger remarked in a Congressional hearing on the passage of the ADA:

Seventeen percent of the population—1 in 6 Americans—is challenged by some activities that most of us take for granted: Eating at a restaurant; going to a movie; riding a bus; visiting a doctor; shopping for groceries . . . . But that will all change. January 26 was the effective date for portions of the ADA that affect public accommodations and services . . . . *Tables, chairs, and racks may be rearranged in restaurants, theaters, and retail stores.*

138 CONG. REC. S614-03 (daily ed. Jan. 29, 1992) (emphasis added).

32. 42 U.S.C. § 12182(b)(2)(A) (1992).

33. These remedies are available to:

any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 [New construction and alterations in public accommodations and commercial facilities] of this title.

42 U.S.C. § 12188(a)(1) (1992).

importance, the Attorney General may commence a civil action in any appropriate United States district court."<sup>34</sup> The district court then has the option to grant the appropriate equitable relief,<sup>35</sup> award other relief within its discretion, including granting monetary damages to the aggrieved individual, if the Attorney General requests,<sup>36</sup> or assessing a civil penalty against the entity.<sup>37</sup> Because the provision only went into effect on January 26, 1992, the full extent and effect of these remedies have not yet been tested. However, prior to its enactment, Bonnie P. Tucker, Associate Professor of Law, predicted that "when the ADA is enacted, discrimination on the basis of disability will be as significant an issue as discrimination on the basis of race or sex."<sup>38</sup> Whether courts will consider weight a handicap still remains to be seen,<sup>39</sup> although obesity should constitute a disability under the definition supplied by the ADA.

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34. 42 U.S.C. § 12188(b)(1)(B)(ii) (1992).

35. This includes "(i) granting temporary, preliminary, or permanent relief; (ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and (iii) making facilities readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12188(b)(2)(A) (1992).

36. These damages may not include punitive damages. 42 U.S.C. § 12188 (b)(4) (1992).

37. 42 U.S.C. § 12188(b)(2)(C) (1992). The civil penalty may not exceed \$50,000 for a first violation or \$100,000 for any subsequent infractions. *Id.* The Act also specifically instructs the court to consider the defendant's "good faith effort or attempt to comply" with the mandates of the Act when determining the amount of an appropriate civil penalty. 42 U.S.C. § 12188(b)(5) (1992).

38. Tucker, *supra* note 25, at 939.

39. In a 1990 Congressional hearing, The Honorable William E. Dannemeyer shared his feelings on the protection of the overweight under the ADA and discussed a recent editorial from a local newspaper:

I would like to draw my colleagues' attention to . . . another application of the Americans with Disabilities Act, this time to full civil rights protections to overweight citizens who, presumably, will argue in court that their physical condition impairs their ability to carry out one or more major activities of life. . . . No one who voted for this well-intentioned legislation thought it would apply to the sort of situations described in this editorial. I respectfully suggest that, as the clever trial lawyers in this Nation learn how to manipulate the provisions of the ADA to suit their clients' purposes, there will be many additional such cases. . . .

[A] building contractor named Donald Keister demanded that he be declared a minority for purposes of government contracts. The city sets aside 25 percent of its contracts for firms owned by 'minorities.'

Now, Keister is white, and he's male, but he's very, very big, tipping the scale at an awesome 640 pounds. Because his amplitude hinders him in this work—he says he falls through floorboards whenever he visits construction sites—he has rightly declared that the disabilities act qualifies him as a minority. Ergo: Give him a contract.

136 CONG. REC. E3517-01 (daily ed. Oct. 26, 1990) (statement of The Honorable William E. Dannemeyer).



### C. State Legislation

Most state legislatures have also responded to weight discrimination by passing laws that protect the rights of the handicapped and disabled.<sup>40</sup> "In many cases, state and local court interpretations of state human rights laws are more expansive than federal court interpretations of the [ADA]. For example, state courts have held that state handicap acts cover the obese."<sup>41</sup> By interpreting the "handicap" provisions broadly, state courts have extended coverage to the overweight. Michigan even enacted a specific provision in 1985 that protected overweight individuals.<sup>42</sup> The Michigan law prohibits discrimination "with respect to employment, compensation, or a term, condition or privilege of employment, because of religion, race, color, national origin, age, sex, height, *weight*, or marital status."<sup>43</sup> Although the statute contains a public accommodations provision, it fails to list "weight" as a protected classification in public places.

Maryland contemplated legislation that would protect the rights of the overweight, but at the writing of this Comment, no such legislation had been passed.<sup>44</sup> The City of Santa Cruz also has proposed a municipal ordinance that declares it is "unlawful for a business establishment or place of public accommodation to . . . deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations . . . ."<sup>45</sup>

40. For example, Louisiana law provides: "In access to public areas, public accommodations, and public facilities, every person shall be free from . . . arbitrary, capricious, or unreasonable discrimination based on . . . physical or mental disability." LA. REV. STAT. § 49:146 (West 1992). The Maine statute declares:

It is unlawful public accommodations discrimination, in violation of this Act: . . .  
For any person who is the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, withhold from or deny to any person, on account of . . . physical or mental disability, . . . any of the accommodations, advantages, facilities or privileges of public accommodation . . . .

ME. REV. STAT. tit. 5, § 4592 (1992). See also CONN. GEN. STAT. § 46a-64 (1992); MD. ANN. CODE art. 49B, § 5 (1993); N.Y. [EXEC.] LAW § 296 (Consol. 1993) for similar provisions.

41. Note, *supra* note 21, at 2044 (footnote omitted); see discussion *infra* Part III: WEIGHT AS A HANDICAP.

42. Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (1992).

43. *Id.* (emphasis added).

44. Senator Donald F. Munson (R-Washington), commenting on the possibility of Maryland's passage of a bill banning weight discrimination, remarked, "[the law would address] discrimination on the basis of 'size' in the same manner current law bans it on the basis of race, creed, sex, age, color, national origin, marital status or handicaps. It would apply to discrimination in employment, housing and public accommodations. It would not outlaw rudeness." Richard Tapscott, *Md. Panel Aims Tales of Size-Based Bias; Senate Bill Would Extend Discrimination Law*, WASH. POST, Mar. 13, 1991, at B5.

45. SANTA CRUZ MUN. CODE § 9.83.05 (1992).

### III. WEIGHT AS A HANDICAP

As the ADA is only two years old, courts have not yet scrutinized its definition of "handicap" extensively. For that reason, it is difficult to predict whether courts will define weight as an ADA protected disability. Accordingly, an intuitive examination of how federal courts construe the definition in actions brought under the Rehabilitation Act and how state courts interpret "disability" under similar state laws is crucial to understanding this area.<sup>46</sup> Several recent cases examine the two obstacles that a litigant must overcome to establish a cause of action for weight discrimination: medical verification and the extent of the impairment. Courts have approached this issue in an arbitrary fashion. Each court has required a different proffer to establish a *prima facie* case of weight discrimination.<sup>47</sup>

In the recent decision of *Cook v. State of Rhode Island*,<sup>48</sup> the First Circuit examined weight discrimination in the employment context under the Rehabilitation Act, and contrary to the district court's decision, reasoned that obesity need not be immutable or involuntary to warrant protection under federal legislation.<sup>49</sup> After reapplying for a position as an attendant at an institution for the mentally ill, Bonnie

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46. It is important to note that the Rehabilitation Act only applies to discrimination in the workplace, as does most state legislation on point. Therefore, this discussion will concentrate on the employment context.

47. See *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17 (1st Cir. 1993); *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985); *Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co.*, 699 S.W.2d 75 (Mo. Ct. App. 1985).

48. *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17 (1st Cir. 1993).

49. *Id.* at 23-24. Cf. *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3 (W.D. Wash. 1981) (holding that obesity is not a handicap because it is not an immutable characteristic). *Greene* seems to rely on the argument that

appearance is under the control of the individual, and that individuals who do not present a more appealing physical appearance are themselves at fault. This argument is frequently made in the case of the obese. In many instances, however, this simply is not true. Recent evidence suggests that many obese people are overweight for biological reasons largely beyond their own control.

Note, *supra* note 21, at 2036 n.5 (footnotes omitted).

Furthermore, it is possible for medical professionals to differ in their findings on the cause of obesity. "Definitions of obesity make no mention of reasons or causes for the condition. . . . Frequently, however, the *underlying cause of the obesity is not understood or explainable*. While it is estimated that twenty percent of the population is obese, few of these people have an identifiable medical disorder causing the obesity." Bierman, *supra* note 13, at 957 (emphasis added) (footnotes omitted).

The requirement that a physiological or genetic problem, rather than self-imposed overeating, caused the litigant's obesity, may turn the trial into a "battle of the experts." This requirement will only be favorable to the overweight plaintiff if medical experts do not dispute the cause of her obesity, or if her experts carry greater credibility with the court. Realistically though, the defendant-corporation will have greater resources to accumulate its own extensive expert testimony to bolster its position. This approach gives the trial judge wide discretion to decide a medical ques-

Cook received the job, contingent on her losing weight.<sup>50</sup> She refused, and sued the State Department of Mental Health for discrimination based on her obesity. In determining whether obesity constituted a handicap, the lower court examined the administrative regulations pertaining to the interpretation of the Rehabilitation Act.<sup>51</sup> Since the regulation contemplates a "physiological disorder affecting a body system," Cook was required to proffer additional proof concerning the extent and effect of her disability.<sup>52</sup> However, the First Circuit noted the irrelevance of both mutability and voluntariness to the determination of whether weight may be considered a handicap and concluded mutability and voluntariness should only be examined in determining "whether a condition has a substantially limiting effect."<sup>53</sup> Upholding the jury's award of \$100,000 in compensatory damages, the First Circuit noted that in "a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences."<sup>54</sup>

Other courts have taken different approaches to resolve the issue. *State Div. of Human Rights v. Xerox Corp.*<sup>55</sup> and *Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co.*<sup>56</sup> demonstrate the inconsistency and the arbitrariness of each court's approach. In *Xerox*,<sup>57</sup> the court refused to differentiate between self-imposed obesity and that which results from an immutable condition, just as the First Circuit had.

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tion, and the final determination will likely be based on the judge's own experiences and perceptions of diet and weight control.

50. *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 834 F. Supp. 57, 60 (D.R.I. 1992), *aff'd* 10 F.3d 17 (1st Cir. 1993).

51. *Id.* at 62. According to 45 C.F.R. § 84.3(j)(2) (1992), physical impairment means "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems." Although the regulation does not include a comprehensive list of all disorders contemplated by the definition, it does list "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease." *Id.*

52. *Cook*, 834 F. Supp. at 62 (D.R.I. 1992). The lower court stated:

to the extent that obesity . . . is caused by systematic or metabolic factors and constitutes an immutable condition that she is powerless to control, it may be a physiological disorder qualifying as a handicap. Conversely, to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap.

*Id.* (citations omitted).

53. *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17, 23-24 (1st Cir. 1993).

54. *Id.* at 28.

55. 480 N.E.2d 695 (N.Y. 1985).

56. 699 S.W.2d 75 (Mo. Ct. App. 1985).

57. 480 N.E.2d at 695.

Xerox did not hire Catherine McDermott after she failed her preemployment medical exam because the doctor decided she was obese.<sup>58</sup> She brought suit alleging discriminatory hiring practices.<sup>59</sup> Although Xerox argued that they did not hire Catherine McDermott because of the statistical probability of future illness related to her obesity, the court held that an employer "cannot deny employment simply because the condition has been detected before it has actually begun to produce deleterious effects."<sup>60</sup> In response to other courts that require the obesity to be an immutable condition, a New York state court remarked: "We have found nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight."<sup>61</sup> Therefore, in this instance, the court considered obesity a handicap.

In contrast, the court in *Southwestern Bell*<sup>62</sup> required the litigant to show she had attempted to lose weight or seek medical treatment for her obesity. Southwestern Bell denied the plaintiff, Shirley Hodges, employment unless she "got her weight under control."<sup>63</sup> The court held that "by ignoring the situation and taking no steps to treat and control her impairment [Hodges] cannot get the benefit of the [Missouri] handicap law."<sup>64</sup> The court admitted that the ultimate issue, whether "a person with treatable but untreated obesity and moderately high blood pressure [is] disabled and handicapped within the meaning of the discrimination statute . . . ,"<sup>65</sup> could not be addressed due to the insuffi-

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58. McDermott stands five feet six inches tall and weighs 249 pounds. *Id.* at 696.

59. New York Human Rights Law prohibits employment discrimination against the disabled. It broadly construes "disability" as including "a physical, mental or medical impairment . . . , [which] is demonstrable by medically accepted clinical or laboratory diagnostic techniques." *Xerox*, 480 N.E.2d at 696 (citation omitted).

60. *Id.* at 698. *Cf.*, C. Wayne Callaway, M.D., *Obesity*, 102 PUB. HEALTH REP. 26-29 (Supp. 1987) ("[S]ome people come from families in which body size is genetically large. In spite of exercise and appropriate diet, they may still be well above the appropriate weight ranges in the tables . . . . Such people are metabolically normal, even though overweight.").

61. *Xerox*, 480 N.E.2d at 699.

62. *Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co.*, 699 S.W.2d 75, 79 (Mo. Ct. App. 1985).

63. *Id.* at 76. *But see* Callaway, *supra* note 60, at 12 ("If, on the other hand, a person is free from complications and there is a family history of large stature, then it is inappropriate to try to get her to meet arbitrary weight tables.").

64. *Southwestern Bell*, 699 S.W.2d at 79. *Contra* *Oregon State Correctional Inst. v. Bureau of Labor* 780 P.2d 743 (Or. Ct. App. 1989). Relying on an administrative rule, which provides "[c]onditions which are mutable only upon long-term treatment, and which . . . do not impair the individual's ability to perform the work involved . . . may not form the basis for rejection of the individual for a position. Examples include . . . obesity . . . ," the court held that obesity may describe an impairment where the plaintiff did not receive a position as a correctional officer because he was fifty pounds overweight. *Id.* at 747 (emphasis supplied).

65. *Southwestern Bell*, 699 S.W.2d at 77.

ciency of the evidence. The court remarked, however, that under the same definition of disability as provided for by the corresponding federal law, an obese person, by virtue of their weight alone, is "probably not" handicapped under the Missouri law.<sup>66</sup> Therefore, under this analysis, the litigant must demonstrate an unsuccessful attempt to lose weight or at least an attempt to receive medical attention to treat the physiological disorder. The conflict between the approaches of each court becomes more evident in the assessment of the difference between actual and perceived impairments.

The court in *Civil Serv. Comm'n of Pittsburgh v. Pennsylvania Human Relations Comm'n*<sup>67</sup> examined the distinction. The litigant needed to demonstrate that he belonged to a protected class, qualified for a specific position but did not receive it, and that the employer continued to then look for other applicants.<sup>68</sup> In addition, the complainant had to establish that he was handicapped within the meaning of the Pennsylvania Human Relations Act.<sup>69</sup> The lower court held that the litigant established his burden under the third prong of the definition, "regarded as having an impairment."<sup>70</sup> The Pennsylvania Supreme Court held that

[b]ecause [the complainant's] obesity was not shown to be a physiological disorder, a cosmetic disfigurement, or an anatomical loss affecting his body systems, and there is no evidence to indicate that obesity ever affects body systems, [he] has not shown that obesity is a handicap within the meaning of the PHRA [Pennsylvania Human Relations Act].<sup>71</sup>

Similar to the disposition of *Xerox*, the Pennsylvania Supreme Court failed to differentiate between "obesity which is self-imposed . . . [and]

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66. *Id.*

67. 591 A.2d 281 (Pa. 1991).

68. *Id.* at 282 (citing *General Elec. Corp. v. Pennsylvania Human Relations Comm'n*, 365 A.2d 649, 655-56 (Pa. 1976)).

69. The Pennsylvania Human Relations Act provides: "It shall be unlawful discriminatory practice . . . [f]or any employer because of the . . . non-job related handicap or disability of any individual to refuse to hire or employ such individual . . . if such individual is the best able and most competent to perform the services required . . ." *Pennsylvania Human Relations Comm'n*, 591 A.2d at 282 (quoting Act of October 27, 1955, P.L. 744, as amended, Act of 1974, P.L. 986, No. 318, 43 P.S. § 955(a)). The Pennsylvania regulations adopted the identical definition handicap that the ADA does. 16 PA. CODE § 44.4 (1993).

70. "[I]s regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider or a public accommodation as constituting such a limitation; 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 has none of the impairments . . . but is treated . . . as having such an impairment.

*Pennsylvania Human Relations Comm'n*, 591 A.2d at 283 (quoting 16 PA. CODE § 44.4 (1991)).

71. *Id.* at 284.

that which may be caused by a systemic malfunction."<sup>72</sup>

The district court in *Tudyman v. United Airlines*<sup>73</sup> analyzed another problem with defining "handicapped" individuals. Under the federal definition, a "'Catch 22' aspect appears: the plaintiff must first show that he or she has some impairment which substantially limits a major life activity, but this same plaintiff must show that he or she is not so handicapped as to be unable to perform the job."<sup>74</sup> The definition of "handicapped" utilized by both the Rehabilitation Act and the ADA attempts to remedy this situation by their third prong, "regarded as having such an impairment." According to the Senate Labor and Public Welfare Committee, this definition applies to "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning."<sup>75</sup> This definition should have allowed for the scenario addressed by the court in *Tudyman*, where a male body builder exceeded the weight limit proscribed for a job as a flight attendant. The court, however, did not believe that the airline perceived the plaintiff as handicapped solely because he did not qualify for this particular job.<sup>76</sup> The court refused to extend the definition to an applicant who failed to qualify for a particular job because of a single factor. If the court applied such a standard, any individual who failed to qualify for a specific job would be considered "handicapped" under the federal definition.<sup>77</sup> "This Court refuses to make the term handicapped a meaningless phrase."<sup>78</sup> The court also distinguished this case by emphasizing the issue of the voluntary and self-imposed nature of the plaintiff's "condi-

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72. *Id.* at 284 n.1.

73. 608 F. Supp. 739 (D.C. Cal. 1984).

74. *Id.* at 744.

75. S. REP. NO. 1297, 93d Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6414. The United States Supreme Court commented on the reasoning behind the third prong of the definition:

Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment . . . . [In this component of the definition,] Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment.

*School Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987) (footnote omitted).

76. "There is, however, 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." *Tudyman*, 608 F. Supp. at 745.

77. *Id.* at 746.

78. *Id.* The court actually seems to be disregarding the third prong of the definition, doing a disservice as a consequence, as the court appears to condone discrimination in the workplace. "For good or evil, private employers are generally free to be arbitrary and even capricious in determining whom to hire, unless the employer somehow discriminates on the basis of . . . handicap status, considerations which Congress has determined to be prohibited." *Id.* at 746-47.

tion.”<sup>79</sup> The court refused to consider his weight a disability because the litigants did not dispute the cause of the plaintiff’s obesity. This dilemma becomes more apparent in the following cases.

Many courts have considered weight as a handicap under prevailing state law. The analysis is similar because most state statutes mimic prevailing federal legislation. In *Gimello v. Agency Rent-A-Car Sys., Inc.*,<sup>80</sup> a New Jersey appellate court did not differentiate between discrimination based on an actual or a perceived handicap. Joseph Gimello sued Agency Rent-A-Car Systems under the New Jersey Law Against Discrimination, which prohibits handicap discrimination in the employment context.<sup>81</sup> Gimello claimed he lost his job because of his weight.<sup>82</sup> After examining the record, the court adopted a broad definition of “handicap” that included illnesses with physical and psychological manifestations,<sup>83</sup> and concluded that Agency discriminated against Gimello because of his weight.<sup>84</sup> The court failed to distinguish between an actual and perceived handicap and relied on the findings of the administrative law judge.<sup>85</sup> The administrative law judge perceived Gimello’s obesity as a handicap, and therefore, the court drew a similar conclusion.<sup>86</sup>

The court in *Krein v. Marian Manor Nursing Home*,<sup>87</sup> in contrast, stressed the importance of the distinction between an overweight individual who is actually handicapped and an individual who is merely regarded as being handicapped. Mary Krein, a nurse’s aid, alleged that she lost her job due to her weight. Under the North Dakota equivalent to the ADA, she sued for wrongful termination.<sup>88</sup> “However, the mere assertion that one is overweight or obese is not alone adequate to make a

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79. *Id.* at 746.

80. 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991).

81. It “prohibit[s] any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment.” N.J.S.A. § 10:5-4.1 (Supp. 1993). “Handicapped” is defined as “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.” *Id.* § 10:5-5q.

82. *Gimello*, 594 A.2d at 265.

83. *Id.* at 276.

84. *Id.* at 273.

85. *Id.*

86. *Id.* The court did note, however, that medical evidence clearly supported the existence of Gimello’s obese condition. *Id.* at 278.

87. 415 N.W.2d 793 (N.D. 1987).

88. In relevant part, North Dakota law provides: “It is a discriminatory practice for an employer . . . to discharge an employee because of physical or mental handicap . . . .” N.D. CENT. CODE § 14-02.4-03 (Supp. 1993).

claimant one of the class of persons afforded relief for discrimination under NDCC Ch. 14-02.4. Something more must be shown.”<sup>89</sup> Adopting the common definitions of disability and handicap found in Webster’s Dictionary,<sup>90</sup> the court required evidence that the plaintiff’s obesity actually hindered her ability to work. Based on the factual record, the court concluded that her weight did not impair her abilities.<sup>91</sup> However, this analysis does not contemplate individuals who are “regarded as having an impairment.” Therefore, under North Dakota state law, a litigant could not prevail in a suit without proving an actual impairment.<sup>92</sup>

The aforementioned cases illustrate the difficulty in predicting court decisions regarding obesity in the future. While some courts will mandate a medical verification of the cause of the condition, others will require the litigant to establish that she has attempted to seek treatment. Regardless of the evidence a particular court will require to establish a *prima facie* case under the ADA, an overweight individual should be afforded protection from discrimination if she satisfies the more liberal standard, “regarded as having an impairment.” In instances where she receives different treatment because of the stereotypes and prejudices

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89. *Krein*, 415 N.W.2d at 796.

90. Webster’s Dictionary defines “disability” as “a physical or mental illness, injury or condition that hinders, impedes or incapacitates” and “handicap” as “a disadvantage that makes achievement unusually difficult esp. a physical disadvantage that limits the capacity to work.” *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1971)). The court utilized this same approach, including the dictionary definition of “handicap,” in *Philadelphia Elec. Co. v. Pennsylvania Human Relations Comm’n*, 448 A.2d 701 (Pa. Commw. Ct. 1982). After applying for a position as a customer service representative, the Philadelphia Electric Company “classified Ms. English as unsuitable for work” because she weighed 340 pounds. *Id.* at 703. She responded by filing a complaint under the Pennsylvania anti-discrimination legislation, alleging she was denied employment “because of her handicap/disability, obesity which does not substantially interfere with her ability to perform the essential function of the job.” *Id.* The court held that “morbid obesity may be a handicap or disability within the meaning of the Act, but the condition of morbid obesity alone, is no such handicap or disability.” *Id.* at 707. After adopting the aforementioned definitions of “handicap” and “disability,” the court established a two-prong test to be met for Ms. English to prevail on the merits. The test required her to prove that when she applied for the position she was handicapped under the Act’s provision and that Philadelphia Electric Company did not employ her for that reason. *Id.* at 705. After evaluating the record, the court concluded that Ms. English failed to establish her burden of proof, as she did not suffer from a handicap which hindered her ability to perform the tasks required of a customer service representative.

91. *Krein*, 415 N.W.2d at 796.

92. *But see Barnes v. Washington Natural Gas Co.*, 591 P.2d 461 (Wash. Ct. App. 1979). After Peter Barnes lost his job due to the erroneous belief that he suffered from epilepsy, he brought an action against his employer under the Washington State Law Against Discrimination. The court reasoned that although the plaintiff did not actually suffer from epilepsy, “[i]t would defeat legislative purpose to limit the handicap provision of the law against discrimination to those who are actually afflicted with a handicap . . . and exclude from its provision those perceived as having a condition [and are in turn discriminated against].” *Id.* at 465.



society "associates" with her obesity, she should be afforded legal redress for her emotional or financial injury, regardless of whether the discrimination occurs in the employment or public accommodations context.

In conjunction with weight and appearance discrimination, an individual may be a victim of another form of discrimination, such as sex or race discrimination.<sup>93</sup> "Obesity can be closely associated with other protected classes such as race, sex, color, age or religion."<sup>94</sup> In our society, women and minorities are judged differently in regard to their weight.<sup>95</sup> Different standards have been applied to men and women in defining what is an appropriate appearance. Society allows men to be heavier than women before they are discriminated against.<sup>96</sup> Additionally, women and minorities have a greater propensity for obesity. Therefore, as a result, these groups are subject to "double discrimination."<sup>97</sup>

According to Susie Orbach, a specialist in the treatment of compulsive eating, women react to the different expectations in society often by overeating.<sup>98</sup>

Fat is a social disease, and fat is a feminist issue. Fat is *not* about lack of self-control or lack of will power . . . It is a response to the inequality of the sexes. Fat expresses experiences of women today in

93. See Note, *supra* note 21, at 2042 (footnote omitted) ("Some individual victims of appearance discrimination who are also members of other, protected groups may find protection under race, sex, or age discrimination statutes.").

94. Bierman, *supra* note 13, at 964. "Consequently, obesity should be afforded the same legislative protections that accompany being a member of a protected class." *Id.*

95. According to a public health report:

A redefinition of obesity is urgently needed. Our current definitions discriminate against women more than men [sic], and then we have this paradox that the same amount of obesity in a woman is not as hazardous as the same amount of obesity in men.

Our current definitions discriminate against older people, and they discriminate against black women, in particular. Even if one uses the most conservative definition, 60 percent of black women over 45 years of age are considered obese, and some 35 percent of white women over 45 years of age are considered obese.

Callaway, *supra* note 60 at 29.

96. *Id.* at 26-29.

97. Bierman, *supra* note 13, at 962. The Supreme Court responded and held that "disparate impact analysis is appropriate whether the employer's discrimination was objective [based on sex or race] or subjective [based on weight or appearance]. Thus, a plaintiff who can prove that subjective weight discrimination adversely impacts the race or sex grouping that the person belongs to will have a plausible cause of action." *Id.* (footnotes omitted).

98. SUSIE ORBACH, *FAT IS A FEMINIST ISSUE* (1978). Orbach asserts:

For the compulsive eater, fat has much symbolic meaning which makes sense within a feminist context. Fat is a response to the many oppressive manifestations of a sexist culture. Fat is a way of saying "no" to powerlessness and self-denial, to a limiting sexual expression which demands that females look and act a certain way, and to an image of womanhood that defines a specific social role.

*Id.* at 20.

ways that are seldom examined and even more seldom treated.<sup>99</sup>

Accordingly, women are more likely to be discriminated against based on their weight. "Nonetheless, the legal rubric most likely to afford general protection for appearance discrimination victims appears to be handicap discrimination law."<sup>100</sup> Therefore in the future, overweight women will likely have better success fighting weight discrimination using legislation such as the ADA.

#### IV. PROTECTION IN PUBLIC ACCOMMODATIONS

##### A. A Right to Legal Redress

Prior to the enactment of a public accommodations law establishing a private cause of action, the court in *Marsh v. Edwards Theatres Circuit, Inc.*<sup>101</sup> declined to grant a handicapped plaintiff redress after being denied access to a public place.<sup>102</sup> Robert Marsh, a quadriplegic, sued the owner and operator of a movie theater chain for unlawful discrimination under California law,<sup>103</sup> after they denied him admission because of his physical handicap.<sup>104</sup> The court answered the question of whether "California law which prohibits discrimination against the physically handicapped in access to public accommodations require the operator of such accommodations, absent specific legislation mandating it, to make structural modifications in order to facilitate access"<sup>105</sup> in the negative. The lack of a legislative mandate requiring them to do so and the need to meet fire regulations to keep insurance premiums down prompted this answer. The court reasoned:

The varied and distinctive nature of the numerous handicaps from which so many people suffer suggests, however, that the problem is one for which the legislative branch of government is uniquely equipped to solve. It is in the legislative halls where the numerous factors involved can be weighed and where the needs can be properly

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99. *Id.* at 6 (emphasis in original).

100. Note, *supra* note 21, at 2042 (footnote omitted).

101. 64 Cal. App. 3d 881 (Cal. Ct. App. 1976).

102. *Contra* *Bush v. Greyhound Lines, Inc.*, 669 P.2d 324 (Or. 1983). The *Bush* court addressed the needs of handicapped individuals to seek legal redress when discriminated against. Melvin Bush, confined to a wheelchair, sued Greyhound Lines, Inc. after they refused to allow him to travel on one of their routes. Relying on state law, the court held that the plaintiff had a private cause of action against the bus company for its discriminatory action. *Id.*

103. At this time, the Civil Rights Act of 1964, the only federal legislation in place, did not protect an individual from discrimination by a private entity based on a physical handicap. The relevant California statute provided that "[p]hysically disabled persons shall be entitled to full and equal access, as other members of the general public, to accommodations." CAL. [CIV.] CODE § 54.1 (Supp. 1993).

104. Marsh could have entered the theater, but would have had to sit in a regular seat and did not want to risk injury being removed from his wheelchair. *Marsh*, 64 Cal. App. 3d at 886.

105. *Id.*

balanced against the economic burdens which of necessity will have to be borne by the private sector of the economy in providing a proper and equitable solution to the problem.<sup>106</sup>

After a careful analysis, the court concluded that California law simply requires the private business to "open its doors on an equal basis to all that can avail themselves of the facilities without violation of other valid laws and judgments."<sup>107</sup> The court seemed to be beckoning the legislature to give public accommodation laws the force and effect it desired.

The ADA accomplished this. Even though overweight individuals may be considered "handicapped" by some courts, they still must establish they are entitled to protection in public accommodations and able to maintain a private cause of action.<sup>108</sup> While the Rehabilitation Act did not establish a private cause of action, Congress specifically provided for one in the ADA. To successfully maintain a discrimination suit, the obese litigant must demonstrate that she has an impairment which either affects or is regarded as affecting a "major life activity."<sup>109</sup> The definition includes "caring for one's self," which, in view of society's harsh treatment of the overweight, should be construed broadly to include access to public places where an individual may purchase food, drinks, or be entertained. If the court considers each member of society's "right" to access to public accommodations as fundamental, it must defend the rights of the obese in public places. Consideration of such a right as fundamental serves as the only way to break down the stereotypes and prejudices that the ADA was designed to combat.

Additionally, the litigant must establish that the defendant failed to comply with the architectural and accessibility requirements of Title III.<sup>110</sup> The ADA depicts discrimination as a failure to make "reasonable modifications" or "take such steps as may be necessary" to ensure that disabled persons have equal access to accommodations, unless it would result in an "undue burden" or "fundamentally alter" the nature of the business.<sup>111</sup> In determining whether a modification would place an "undue burden" on an entity, the House Education and Labor Committee instructs courts to make a case-by-case determination, considering the "overall size of the business, the type of operation, and the nature and

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106. *Id.* at 888.

107. *Id.* at 892.

108. An insightful court in *Eastern Paralyzed Veteran's Ass'n, Inc. v. Metropolitan Transp. Auth.*, 426 N.Y.S.2d 406, 408 (N.Y. Sup. Ct. 1980), identified the issue in this type of case more precisely as whether alleged discrimination exists or whether there was a failure to accommodate the special needs of the complainant.

109. 29 C.F.R. § 1613.702(a) (1992).

110. *See supra* text accompanying notes 31-37.

111. 42 U.S.C. § 12182(b)(2)(A)(ii) (1992).

the cost of the required accommodation.”<sup>112</sup> To decide if a business will be “fundamentally altered” by complying with Title III, the court may consider whether the modifications would “endanger a program’s viability, [involve] ‘massive’ financial expenditures, . . . ‘jeopardize the effectiveness’ of a program or . . . involve a ‘major restructuring’ of an enterprise.”<sup>113</sup> These interpretations of “undue burden” and “fundamental alteration” leave much discretion with the court in making its determination.<sup>114</sup>

Section 12183(a) further mandates that all newly constructed facilities after July 26, 1990 must be accessible to disabled persons unless it is structurally impracticable.<sup>115</sup> Therefore, all new facilities must now comply with these directives. Accordingly, new restaurants and theaters should be required to install larger seating. Courts should place stricter standards on these structures since they have been placed on notice that society will no longer tolerate substandard accommodations for the disabled and the overweight. Since the ADA recently went into effect, it is only a matter of time before courts will specifically dictate what modifications they deem reasonable and where *prima facie* cases of discrimination exist.

### B. *Airplanes as Places of Public Accommodation*

Although airlines are not considered a “public accommodation” under the definition supplied by the ADA, overweight individuals do experience discrimination when travelling on airplanes and often seek redress.<sup>116</sup> A 1986 amendment to the Federal Aviation Act provides: “No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.”<sup>117</sup> Using this provision and its predecessor,<sup>118</sup> many

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112. Susser *supra* note 25, at 171.

113. Burgdorf, *supra* note 27, at 561 (footnotes omitted).

114. See Bierman, *supra* note 13, at 962 (“A finding of discrimination based on obesity will generally be very fact specific and a determination of reasonable accommodation will be required in each case. This means that although discrimination based on obesity would be prohibited, each instance of discrimination would necessitate litigation in order to determine if the obesity was the reason for the employment related decision.”).

115. 42 U.S.C. § 12183(a)(1) (1992).

116. *Americans Disabled for Accessible Pub. Transp. (ADAPT) v. Skywest Airlines, Inc.*, 762 F. Supp. 320 (D. Utah 1991).

117. 49 U.S.C.A. § 1374(c)(1) (West Supp. 1992). The statute adopts the three prong test for handicap from the Rehabilitation Act and the ADA. “[H]andicapped individual” means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.” *Id.* at § 1374(c)(2).

118. “No air carrier . . . shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . or subject any particular person . . . to any unjust

handicapped individuals have successfully challenged airline discrimination and maintained private causes of action.<sup>119</sup> However, the question remains whether airlines will grant overweight individuals "equal access" to their accommodations without infringing on the rights of their other customers. Whether overweight people have a right to legal redress when they are discriminated against still lingers as an uncertainty.

Canada has proposed one answer to this dilemma. The Canadian government contemplated adopting a regulation which would require airlines to provide free extra seats to overweight or disabled individuals.<sup>120</sup> This regulation is being

challenged on [Canadian] Constitutional grounds by an association representing 105 airlines operating here. . . . "What we are contending is that by giving free seats to the obese or disabled we would be discriminating against the other passengers. The cost of those extra seats would have to be borne by the other passengers, adding to the discrimination."<sup>121</sup>

This argument fails, however, if the seating policy is applied when the additional seats are available and not occupied by other passengers. It seems unreasonable for the airline to not try to accommodate their obese and disabled customers if they would not incur any additional cost. This policy is exactly what NAAFA urged Southwest Airlines to adopt during its recent protest.<sup>122</sup> The group further urges its members to travel

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discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C.A. § 1374(b) (West Supp. 1992).

119. In *Americans Disabled for Accessible Pub. Transp. (ADAPT) v. Skywest Airlines, Inc.*, 762 F. Supp. 320 (D. Utah 1991), the court evaluated the availability of redress for handicap discrimination on an airplane, under the Rehabilitation Act and the Air Carrier Access Act. Skywest Airlines implemented a policy under which persons confined to wheelchairs could not travel without a companion. After being refused permission to board a Skywest Airlines flight because of this policy, Barbara Toomer brought an action under the Rehabilitation Act of 1973 and the Air Carrier Access Act (ACAA). *Id.* at 322. The court granted summary judgment for the claim based on the Rehabilitation Act because the airline did not receive adequate federal funds. (This problem though, would be remedied by the wording of the ADA because it applies to private entities, if the Legislature intended for it to apply to airplanes.) In response to her other claim, Skywest responded that Congress enacted the ACAA to make the Rehabilitation Act applicable to air carriers regardless of whether they received federal funds, and therefore, the same remedies should be available under both statutes. *Id.* at 326. After evaluating the legislative history, the court held that because the ACAA was enacted to supplement the Rehabilitation Act, the same remedies must be available under both statutes, and that did not include punitive or emotional distress damages, but did include compensatory damages. *Id.* at 326-27.

120. Michael T. Kaufman, *Airlines Fighting Free-Seat Ruling in Canada*, N.Y. TIMES, Oct. 10, 1982, at A22.

121. *Id.*

122. In addition, the group requested that Southwest Airlines "[a]pologize for harassment of fat passengers, [s]ensitize personnel to size-related issues, [and a]ccommodate special needs of fat passengers." *Southwest Protest* (NAAFA, Sacramento, Ca.).

on the least crowded flights so that this may be a viable option.<sup>123</sup>

## V. CONCLUSION

The rights of the overweight may no longer be ignored. In the employment context, it seems plausible that overweight individuals should be afforded legal redress, because employers specifically cite weight and appearance as the reason for refusing to hire or terminating employees. In this same regard, weight should constitute a disability in public accommodations.<sup>124</sup> First, the definition of "disabled" applies to each title of the ADA. The ADA affords individuals the right to "full and equal enjoyment" of public accommodations and mandates a series of necessary structural modifications.

[The] access requirements represent a crystallization of societal conviction that, at this point in our development, we have enough understanding of the significant life limitations imposed by attitudinal, architectural, and communications barriers on millions of our citizens to recognize that continued toleration of such barriers is folly. To continue to erect inaccessible public facilities, for example, when access can be provided cheaply, is to continue a form of discrimination that can be characterized as ignorant at best — at worst, as intentional.<sup>125</sup>

Additionally, the ADA established a specific remedy whereby an aggrieved party could recover damages. While the Rehabilitation Act did not establish a private cause of action, Congress specifically provided for one in the ADA. Consistent with the American form of government, the ADA exemplifies Congress protecting the rights of all its citizens, especially where such prevalent forms of "intentional" discrimination exist, as in newly constructed facilities. Victims of such discrimination must have the opportunity to maintain a cause of action to assert their rights to equal access and equal enjoyment of public accommodations.

Therefore, under the ADA, June Allyson Green may be able to recover special damages based upon the humiliation and indignity she suffered if she can establish that Greyhound denied her "full and equal enjoyment" and that reasonable accommodations could have been pro-

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123. *Airline Travel Tips for the Large-Size Person* (NAAFA, Sacramento, Ca.).

124. The court may soon have to address this precise issue in *Torcasio v. Murray*, 12 F.3d 206 (4th Cir. 1993), where the Fourth Circuit remanded the case to determine whether a prisoner, who alleged that the prison facility inadequately accommodates his obesity, states a cause of action under both the Rehabilitation Act of 1973 and the ADA. In a prior decision, *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), the court ruled that a similar issue, involving a paraplegic, was moot because the prisoner had been transferred to an "adequate" facility prior to the court's adjudication of the issue.

125. Burgdorf, *supra* note 27, at 580.

vided without an undue burden. Lauren R. Januz may be able to force McDonald's, as well as other restaurants, theaters, and places of public accommodation, to meet the needs of their overweight customers by adhering to the accessibility requirements of the ADA and installing flexible, larger seating, and commercial airlines may attempt to accommodate obese passengers by giving them unoccupied seats, so that they and the other passengers around them may experience "full and equal enjoyment" of the flight. Although the rights of the overweight should be accorded certain weight, the rights of the remainder of the population should not be compromised. If proprietors of public accommodations understand the special needs of some of their customers and those customers understand the added expense of accommodation, the need for legal redress may one day become unnecessary.

SHARI J. RONKIN