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The Equal Rights Review (ISSN 1757-1650)
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#### Citation Details

##### Citation for the version of the work held in 'OpenAIR@RGU':

<b>MIDDLEMISS, S. and DOWNIE, M., 2015. Anglo-American comparison of employers' liability for discrimination in employment based on weightism. Available from <i>OpenAIR@RGU</i>. [online]. Available from: <a href="http://openair.rgu.ac.uk">http://openair.rgu.ac.uk</a></b>
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##### Citation for the publisher's version:

<b>MIDDLEMISS, S. and DOWNIE, M., 2015. Anglo-American comparison of employers' liability for discrimination in employment based on weightism. <i>The Equal Rights Review</i>, 15 (2015), pp. 87-111.</b>
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# Anglo-American Comparison of Employers' Liability for Discrimination in Employment based on Weightism

Sam Middlemiss and Margaret Downie<sup>1</sup>

## Abstract

*This article analyses and compares research into discrimination based on weight (weightism) and the legal rules that cover it in the United Kingdom and the United States. Weightism is discrimination that is often based on stereotypical views of people who have weight issues, especially people who are obese or very thin. This article will restrict its attention to discrimination against obese employees; however, what is said applies to both categories of employees because extremely thin employees will experience similar discriminatory treatment at the hands of their employers and are entitled to the same legal protection. There has been a general lack of precedent in both jurisdictions which makes determining entitlement to legal rights difficult and uncertain. It is therefore particularly apt to review employers' liability in this area given the recent European Court of Justice decision in FOA, Kaltoft v Billund Kommune.<sup>2</sup>*

## Introduction

This article will consider the liability of employers for obesity discrimination. It is not intended to consider the broader implications of people being obese, such as the health costs,<sup>3</sup> the impact of obesity on social relations<sup>4</sup> and the general significance of obesity in employment.<sup>5</sup> Common stereotypes of obese persons are that they are lacking in self-con-

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2 *FOA, Kaltoft v Billund Kommune* (2014) WLR (D) 554.

3 In 2006 it was estimated that the National Health Service (NHS) spent at least £1 billion treating obesity-related conditions and also according to estimates in the same year, obesity was the cause of at least 18 million days of sick leave lost every year in the UK, which costs the economy £2.6 billion.

4 Rothblum, E.D., "The Stigma of Women's Weight: Social and Economic Realities", *Feminism Psychology*, Vol. 2, 1992, pp. 61–73.

5 Puhl, R. and Brownell K.D., "Obesity Research", *Bias, Discrimination, and Obesity*, Vol. 9, 2001, pp. 788–805.

fidence and discipline, lazy, unattractive, unintelligent or of poor character.<sup>6</sup> Whilst there is no legal definition of the term, in the United States, someone is considered medically obese if they have an excessive amount of body fat and have a Body Mass Index<sup>7</sup> of over 30.0.<sup>8</sup> In the United Kingdom, a similar measurement is used by Government Departments<sup>9</sup> and the British Medical Institute (based on the World Health Organisation's classification). There is no doubt that the number of people that are obese in the populations of the UK<sup>10</sup> and the US<sup>11</sup> has increased dramatically over the last twenty years.<sup>12</sup> Over the same period, the types and levels of discriminatory behaviour experienced by obese employees has also increased. The empirical research into weightism is considered in the first part of this article. The legal solutions reached in the UK and the US will then be analysed and contrasted with a view to identifying the most effective approach to eliminating such discrimination.

## 1. Research into Weightism

### a. Research in the UK

Considerable research has been carried out into the impact of obesity on employment matters. Researchers who carried out a study into the experience of obese employees<sup>13</sup> asked participants to look at a series of job applications that had a small photo of the job applicant attached and were asked to make ratings of the applicants' suitability, starting salary and employability. The researchers found that high levels of obesity discrimination were displayed across all aspects of employment. They also considered whether individual employee's insecurity with their own bodies (poor body image) and employers having "conservative per-

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6 The stereotypical views of extremely thin persons are similarly negative, namely that they are anorexic, unattractive, unhealthy and excessive in their dieting or exercise regimes.

7 The Body Mass Index (BMI) is the common tool used to determine an individual's level of weight, be that underweight, normal, overweight, or obese. BMI is defined by the National Institute of Health in the US (2002) as a measure of body weight relative to height.

8 Center for Disease Control, 2004.

9 For example, the Department of Work and Pensions.

10 The Health Survey for England produces yearly statistics which are published by the NHS Information Centre. In 1993, 13.2% of men were obese whereas in 2010 it was 26.2%. The number of obese women increased from 16.4% in 1994 to 26.1% in 2010.

11 According to a study in *The Journal of the American Medical Association*, in 2008 the obesity rate among adult Americans was estimated at 32.2% for men and 35.5% for women; these rates were roughly confirmed by the Centers for Disease Control and Prevention for 2009–2010. The figure in 1997 was around 19% of the population.

12 In the United States in 1991, four states were reporting obesity prevalence rates of 15%–19% and no states reported rates at or above 20%. In 2002, 18 states had obesity prevalence rates of 15%–19%; 29 states have rates of 20–24%; and three states have rates over 25%. (Obesity Trends, 2004).

13 O'Brien, K.S., Latner, J.D., Ebner, D. and Hunter, J.A., "Obesity Discrimination: The Role of Physical Appearance, Personal Ideology and Anti-Fat Prejudice", *International Journal of Obesity*, 2012.

sonalities"<sup>14</sup> were factors leading to obesity discrimination. They found that when employers (particularly conservative ones) selected an obese candidate for a job, there was a high likelihood that employee would be placed on a low starting salary and their leadership potential would be discounted.<sup>15</sup> Other researchers in the UK have reached similar conclusions. The pollsters company YouGov carried out a survey of more than 2,000 British adults over the age of 18 in a study conducted on behalf of *Slimming World* magazine.<sup>16</sup> They found that employees who were obese were:

*[T]wice as likely to earn a low salary, four times more likely to suffer bullying about their weight and six times more likely to feel their appearance has caused them to miss out on a promotion.*<sup>17</sup>

They also discovered that an element of sexism was involved. The findings showed that male employers were particularly prejudicial in their attitudes. One in four of the male bosses surveyed said they would turn down a potential candidate because of his or her weight and one in 10 admitted they had already done so. In an earlier survey in 2005 carried out by Personnel Today,<sup>18</sup> more than 2,000 UK based human resource professionals were contacted. The survey results revealed that almost half the respondents believed that obesity negatively affected employees' output, with more than a quarter believing that obesity was becoming a problem in their industry. Around a third of the human resources professionals surveyed considered obesity was a valid medical reason for not employing a person, while 11% thought that firms could fairly dismiss people because they are obese. The discrimination was not restricted to recruitment and selection decisions. Fifteen percent of respondents admitted that their organisation would be less likely to promote an obese employee and 12% suggested that obese employees were not suitable for client-facing roles. Research has shown that female employees who are obese are more likely to experience discrimination in employment than their male equivalents and are much more likely to experience discrimination than colleagues who are not obese. Women who are obese are more likely to be discriminated against when applying for jobs and receive lower starting salaries than their non-obese colleagues.<sup>19</sup>

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14 I.e. those displaying authoritarianism and social dominance.

15 The higher a participant's score on the measure of anti-fat prejudice, the more likely they were to discriminate against obese candidates. Those employers with a more authoritarian personality also displayed discrimination.

16 Of these, 227 were employers. Clare, A., "Lazy' obese workers face office discrimination", *Reuters*, 15 Jan 2010.

17 *Ibid.*

18 Personnel Today, "Obesity research: Fattism is the Last Bastion of Employee Discrimination", 25 October 2005, available at: <http://www.personneltoday.com/hr/obesity-research-fattism-is-the-last-bastion-of-employee-discrimination>.

19 The study was reported in 2011. It was led by the University of Manchester, UK, and Monash University, Melbourne. It examined whether a recently developed measure of anti-fat prejudice, the Universal Measure of Bias, predicted actual job discrimination on the ground of obesity.

These statistics clearly suggest that UK management is generally unsupportive of obese job applicants and employees. The research shows that employers are less likely to employ obese employees and even if they do, the pay levels will be affected and the majority of them will make sure that obese employees never rise up through the ranks of the organisation. Female employees are particularly badly affected as compared with men.

**b. Research in the US**

In the US, research into different aspects of weightism in employment has also shown that mistreatment of obese employees is a widespread activity. Researchers at Yale University had originally studied data collected from 3,437 adults as part of a national survey conducted in 1995 and 1996.<sup>20</sup> Their work was updated in 2006 with data from a survey of nearly 2,300 Americans.<sup>21</sup> The latter survey results showed that since the earlier research was undertaken, weightism continued to remain a problem. Discrimination on this basis was spiralling upward and becoming as common as other forms of discrimination. Rebecca Puhl, lead author of the study, said in a telephone interview regarding weight discrimination that it:

*[O]ccurs in employment settings and in daily interpersonal relationships virtually as often as race discrimination, and in some cases even more frequently than age or gender discrimination.<sup>22</sup>*

Most controversially, the researchers found that weightism was as common in the US as race discrimination:

*Our findings indicate that the prevalence of weight/height discrimination is high in the US, and is comparable to rates of racial discrimination. If this form of prejudice continues without sanction or interventions to shift societal attitudes, weight bias will likely remain socially acceptable and will harm future generations of overweight children and adults. Organized efforts to reduce weight bias are needed.<sup>23</sup>*

As in the UK research, obese women were twice as vulnerable as obese men, and discrimination happened much earlier in their lives. Also, the study found that women seemed to be vulnerable to weight discrimination even if they were only moderately overweight (as opposed to obese), whereas only severely obese men reported discrimination at a comparable rate.

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20 Puhl, R.M., Andreyeva, T. and Brownell K.D., "Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America", *International Journal of Obesity*, Vol. 32, 2008, pp. 992-1000.

21 *Ibid*.

22 Dye, L., "Study: Weight-ism More Widespread Than Racism", *ABC News*, 2 April 2008, available at: <http://abcnews.go.com/Technology/BeautySecrets/story?id=4568813>.

23 See above, note 20, p. 998.

The importance of race and the extent of its impact on female workers is highlighted in a study undertaken at Cornell University<sup>24</sup> where it was found that white obese women had worse labour market outcomes than any other obese workers and that “[t]he obesity penalty for wages was much greater for white than black females”.<sup>25</sup> Cawley, the author of the research study, also found in his research that obesity tended to lower the self-esteem of white women much more than black women: “[o]besity has a more adverse impact on the self-esteem of white females than on that of black and Hispanic females”.<sup>26</sup>

Another study undertaken by economists at Tennessee State University found that obese men and women can expect to earn on average anywhere from 1% to 6% less than non-obese employees, with obese women being the most affected.<sup>27</sup> This finding is similar to that in equivalent studies in the UK.

The research clearly demonstrates that there is a considerable amount of discrimination against obese employees in both jurisdictions and highlights particular issues, namely recruitment, equal pay, bullying and harassment, and dismissal. It also identifies an overlap with other forms of discrimination such as sex and race.

## 2. Legal Protection for Victims of Weightism

What follows is a consideration of the legal position of victims of weightism in the UK and the US with an emphasis on the issues highlighted by the research. The law relating to obesity will be examined under four broad headings, namely: discrimination law; equal pay law; liability for bullying and harassment; and the law relating to dismissal.

### a. *Discrimination Law*

Both the UK and the US have laws designed to protect employees from discriminatory treatment on certain grounds.

#### i. *UK Law*

UK anti-discrimination law derives from European Union law. In particular, Article 19 of the Treaty on the Functioning of the European Union and Directive 2000/78.<sup>28</sup> Neither of

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24 Cawley, J., “The Impact of Obesity on Wages”, *Journal of Human Resources*, Vol. 39 (2), 2004, pp. 451–474.

25 *Ibid.*, p. 468.

26 *Ibid.*

27 Baum II, C.L. and Ford, W.F., “The wage effects of obesity: a longitudinal study”, *Health Economics*, Vol. 13, Issue 9, 2004, pp. 885–899.

28 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

these list obesity as an unlawful ground for less favourable treatment. In the UK, protection against unlawful discrimination is provided by the Equality Act 2010 (Equality Act). There is no explicit protection for employees suffering from weight discrimination under that Act. The Equality Act lists nine protected characteristics which must not be the reason for less favourable treatment by an employer. These reflect the EU legislation and include sex, race, disability, gender reassignment, sexual orientation, religious or philosophical belief, pregnancy and maternity, and age. The Equality Act prevents direct discrimination (less favourable treatment on the basis of a protected characteristic)<sup>29</sup> and indirect discrimination.<sup>30</sup> Indirect discrimination occurs where the employer applies (or would apply) to the employee a “provision, criterion or practice” (PCP) and the PCP is applied (or would apply) to the employee with a protected characteristic and to others who do not share the protected characteristic but it puts, or would put, persons with whom the employee shares the characteristic at a particular disadvantage when compared with those who do not. The affected employee must actually be put at a disadvantage in order to bring a claim. An example would be requiring all applicants to be able to run a mile. Obese applicants would be at a disadvantage. The application of the PCP by the employer will be unlawful if it is not a proportionate means of achieving a legitimate aim.<sup>31</sup> The Equality Act also imposes liability on the employer for harassment of an employee because of his/her protected characteristic,<sup>32</sup> and prohibits employers from victimising an employee who has made or is threatening to make a claim under the Act.<sup>33</sup> The Act is not designed to combat obesity discrimination and weight is not a protected characteristic under the Act. However, under the legislation, there is the possibility of bringing a discrimination claim at the moment when the victim of weightism can identify discrimination because of one of the nine protected characteristics. The legal rules which are most appropriate and helpful to victims of weightism are those dealing with disability discrimination and sex and race discrimination.

#### *Weight and Disability Discrimination in the UK*

The medical link between obesity and disability is well established: “[t]he prevalence of both obesity and disability is increasing globally and there is now growing evidence to suggest that these two health priorities may be linked.”<sup>34</sup>

*Obesity (...) is listed under the World Health Organization’s International Classification of Diseases (ICD) (...) and this recognition of obesity as a disease and a*

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29 Equality Act 2010, Section 13.

30 *Ibid.*, Section 19.

31 *Ibid.*, Section 26.

32 *Ibid.*

33 *Ibid.*, Section 27.

34 Ells, L.J., Lang, R., Shield, J.P., Wilkinson, J.R., Lidstone, J.S., Coulton, S. and Summerbell, C.D., “Obesity and Disability – A Short Review”, *Obesity Review*, Vol. 7(4), 2006, pp. 341–345.

*medical condition has implications for the way in which obese people are treated in the workplace. Attention needs to be given to the consequences of obesity in causing disability.*<sup>35</sup>

The legal link between obesity and disability is less clear and has been the subject of recent debate. Under Section 6 of the Equality Act:

- (1) A person (P) has a disability if –
- (a) P has a physical or mental impairment, and
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Long term means expected to last more than 12 months or until the person dies, if sooner. The protection is extended to a person who has had a disability in the past.<sup>36</sup>

An employer must not discriminate against a disabled person directly or indirectly.<sup>37</sup> In addition, in the case of disability discrimination, there is additional protection from disability related discrimination under Section 15 of the Equality Act (which will be discussed below) and the employer is under a positive duty to make reasonable adjustments to ensure that the employee is not disadvantaged.<sup>38</sup>

Tribunals and courts have been divided as to whether obesity fits within this definition and can be regarded as a disability in its own right. A decision by the UK Employment Appeal Tribunal (EAT) in *Walker v Sita Information Networking Computing Ltd*<sup>39</sup> concluded that obesity was not a disability under the Act. Despite this, the EAT accepted that other conditions associated with obesity such as diabetes may fall within the statutory definition. Walker weighed over 21 stone and suffered from a range of health problems such as diabetes, chronic fatigue syndrome, knee pain, bowel and stomach problems, anxiety and depression. At first instance, the Employment Tribunal considered that some of his conditions were associated with or compounded by his obesity. It was accepted by both parties that these conditions had a substantial and long-term adverse effect on his ability to carry out day to day activities, in accordance with the definition of disability under Section 6(1) of the Equality Act. However, as his complaints could not be attributed to a recognisable pathological cause,<sup>40</sup> the Tribunal concluded that Mr Walker was not disabled. On appeal, the EAT overturned this decision on

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35 Williams, N., *Managing Obesity in the Workplace*, Radcliffe Publishing, 2008, pp. 93–97.

36 In considering this definition regard must be had to the guidance which accompanies the Equality Act 2010, Code of Practice and the regulations issued under the Act.

37 See above discussion, page 5.

38 See above, note 29, Section 20.

39 *Walker v Sita Information Networking Computing Ltd*, EAT/0097/12.

40 The tribunal concluded that there was no physical or mental cause of the symptoms other than obesity.



the basis that it was not the cause of Mr Walker's symptoms that should be focussed on, but rather the effect. In this case, Mr Walker's health problems amounted to a disability, even though they had seemingly been caused by obesity which is not, in itself, a disability.

This decision not to recognise obesity as a disability in its own right meant that employers were not liable for making reasonable adjustments for obese persons and were not liable for bullying and harassment based purely on the employee's weight.

The Court of Justice of the European Union (CJEU) decision in the case of *Kaltoft v The Ministry of Billund* confirmed this approach but seemed to go further.<sup>41</sup> The case involved a child-minder who was dismissed because he was obese. There were no facts to suggest that his obesity affected his ability to perform his duties. The Danish court referred several questions to the CJEU including whether obesity could be regarded as a protected characteristic in its own right, and whether and in what circumstances it could be regarded as a disability.

The CJEU ruled that, "obesity does not in itself constitute a disability within the meaning of Directive 2000/78 on the ground that, by its nature, it does not necessarily entail the existence of a limitation."<sup>42</sup> However:

*[U]nder given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78.*<sup>43</sup>

The CJEU also considered the policy issue of whether self-inflicted conditions can be considered a disability. The CJEU decided that the origin of the disability and the extent to which the employee had contributed to it were irrelevant.<sup>44</sup>

In light of this decision, obesity does not qualify automatically as a disability but equally it is not excluded. Obesity is a form of physical impairment which may, depending upon its effects, amount to a disability. It is for national courts to decide on a case by case basis whether the obesity amounts to a disability. In the UK, in terms of the Equality Act, that would require demonstrating a substantial and long term adverse effect upon the ability to carry out normal day to day activities. So, workers could be protected under the Act if their obesity directly or indirectly had a serious detrimental impact on their day to day activities. There would be

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41 See above, note 2.

42 *Ibid.*, Para 58.

43 *Ibid.*, Para 59.

44 *Ibid.*, Para 55–57.

no need to prove a separate disability related condition such as diabetes. For example, if a person's obesity resulted in him experiencing serious depression, back problems or mobility issues, then his employer would need to be sensitive to this. Once a disability is established, if a person is frequently off sick because of treatment that they are receiving for their weight or because of weight related illness, then where an employee is reprimanded or dismissed because of his absences, as with any other condition, the employer risks being found to have discriminated on grounds of disability.

Obesity resulting in disability will give rise to various legal obligations, in particular the requirement to make reasonable adjustments to working practices and/or premises. This could take the form of making available work equipment or work spaces designed to accommodate larger people, or ensuring that the jobs they advertise for are suitable. Other adjustments might include offering parking spaces nearer to the entrance of the premises, altering work duties or reducing working hours. Failing to do this for applicants/employees could be a form of disability discrimination against obese employees for which the employer will be liable.

An employee must not be harassed because of their disability and if a person is subjected to jokes or comments about his weight, or physically or mentally tormented or abused then this could amount to harassment on the ground of disability under Section 26 of the Equality Act (which is considered further below).

Under Section 15 of the Equality Act, discrimination arising from a disability is prohibited where the employer treats the employee unfavourably because of something arising in consequence of the employee's disability, and cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer did not know, and could not reasonably have been expected to know, that the employee had a disability.<sup>45</sup> With respect to discrimination arising from a disability, if, for example, a school teacher suffered from severe depression that substantially adversely affected his ability to carry out his day to day activities, then he is treated as a disabled person for the purposes of the Act. If over-eating and obesity are a direct consequence of his depression, then a failure to promote him because he is obese would be discrimination arising from his disability (i.e. the depression). The difficulty with this is the need to establish that an obese employee is disabled before claiming that the behaviour complained of arose from the disability.

Whilst not protecting employees from disability discrimination on grounds of obesity *per se*, the *Kaltoft* decision is therefore an important clarification of the law in this area.

#### *Sex and Race Discrimination in the UK*

As identified earlier, research has indicated that female employees suffer more from weightism in the workplace than male employees and that race also is a factor. Section 11 of the

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45 Lack of knowledge of a disability is a general defence for an employer under the provisions.

Equality Act prohibits direct or indirect discrimination on the grounds of a person's gender and protects both men and women. An obese female employee could therefore potentially bring a direct or indirect sex discrimination claim if she is able to prove that she has experienced less favourable treatment by her employer compared to an obese man (or non-obese man) in the same employment. Direct discrimination in this context could be refusing to employ or promote her because of her sex (and additionally influenced by her size). It is also important to note that the claimant's sex need not be the sole, or even principal, reason for the treatment, as long as it has significantly influenced the reason for the treatment.<sup>46</sup> This is not necessarily an easy case to make when there is no evidence of a sexist reason for the discrimination and no comparator available. Sometimes it is not possible for the claimant to find a real person who is in the same or similar enough situation to them to use as a comparator. If this is the case then they can use a hypothetical comparator.<sup>47</sup> In *O'Reilly v BBC & Anor*,<sup>48</sup> the difficulties encountered in bringing a combined discrimination claim<sup>49</sup> (in that case for age and sex discrimination) were highlighted. A female TV presenter claimed the decision to discontinue her involvement in the programme country file was based on her age and sex. Only the former claim was upheld. The claimant had brought her claim on the basis that she had been discriminated against on the grounds of a combination of age and sex. The BBC ran an interesting argument in response, stating that the "old law" that applied to pre-Equality Act 2010 cases did not afford any protection against discrimination on combined grounds. The EAT unsurprisingly rejected this argument and confirmed its view that protection from discrimination on the grounds of "combined characteristics" was available under the "old law" because it is not necessary for any one protected characteristic to be the sole, or even the principal, reason for dismissal. The provision in the Equality Act 2010 dealing with combined discrimination claims has been repealed. However, it is arguable on the basis outlined by the tribunal in the *O'Reilly* case that dual or combined claims are still a possibility.

Indirect discrimination occurs when a PCP is applied to both sexes but the practical reality is that it puts one sex at a particular disadvantage. However, in indirect discrimination claims an employer will not be liable if the discrimination is justifiable by the employer because it is a proportionate means of achieving a legitimate aim. An example of a situation where this might apply is where a high degree of physical fitness is a prerequisite for employment, for example, air traffic controllers. The employer could argue that not selecting obese employees for the role is justifiable. Case law has shown that there are few jobs where someone's obesity will totally disqualify them from employment. There is a dearth of cases where claims

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46 *Nagarajan v London Regional Transport* [1999] IRLR 572.

47 Although not directly relevant to obesity the following case does usefully illustrate the use of hypothetical comparators. In *The Home Office v Saunders* (2006) ICR 318, the EAT endorsed the employment tribunal's decision that the correct comparator of a female prison officer conducting a search of a male prisoner was a male prison officer conducting a search of a female prisoner despite the fact that male officers were not permitted to carry out such searches.

48 *O'Reilly v BBC & Anor* 2200423/2010 (ET).

49 Initially made unlawful under the Equality Act 2010, but this section was subsequently repealed.

have been brought by obese employees on the basis of sex discrimination. This is surprising given that the research studies in both the UK and the US have shown that obese women are generally treated less favourably than obese men in the workplace. There is some evidence they will be treated less favourably than non-obese women in the workplace but there is no remedy under the Equality Act for this.

Almost identical provisions will apply in the case of race discrimination.

*ii. US Law*

The US federal law affords standard levels of protection against discrimination which apply across the US. The individual states also have anti-discrimination legislation which varies from state to state. These provisions sometimes offer greater protection than the federal legislation but cannot derogate from the minimum standard assured by federal law. As is the position in the UK, it is illegal to discriminate against someone because of his or her race or gender, etc.<sup>50</sup> However, in the US, federal law largely fails to protect people who are obese from bias or discrimination.<sup>51</sup>

*Federal Law Dealing with Weightism*

Title VII of the Civil Rights Act 1964<sup>52</sup> (Civil Rights Act), as amended, prohibits employment discrimination on the grounds of race, religion, sex and national origin. Discrimination on the basis of weight alone is not protected under the language of Title VII. It will be up to the plaintiff to show that the inequality of treatment he has experienced because of his weight can be brought under a ground of discrimination covered by existing legislation.<sup>53</sup>

Weightism is often combined with other discriminatory behaviour which could form the basis of a legal action for discrimination, as Theran has highlighted:

*Overweight people are at a high risk of discrimination due to disempowerment because of their weight or more specifically because of their weight combined with race, gender, and socioeconomic factors which operate synergistically to disadvantage them further.*<sup>54</sup>

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50 Title VII of the Civil Rights Act 1964.

51 In the US groups such as the National Association to Advance Fat Acceptance and the American Obesity Association lobby the US Government for legal rights for their members.

52 See above, note 50.

53 Valenti, C., "Victims of Lookism Face Uphill Battle", *ABC News* 13 May 2002.

54 Theran, E.E., "Free to be Arbitrary and Capricious: Weight Based Discrimination and the Logic of American Antidiscrimination Law", *Cornell Journal of Law and Public Policy*, Vol. 11, 2001, pp. 124–125.

While weightism is not included in the list of protected classifications, employers violate Title VII when they apply weight requirements in a discriminatory manner. An employer would violate Title VII if he or she enforced a weight requirement in a disparate fashion, e.g. making exceptions for men but not for women.

### *Weight and Disability Discrimination in the US*

Under federal law in the US, the Rehabilitation Act 1973<sup>55</sup> protects the rights of persons with disabilities in programs, facilities, or employment that receive federal funds, and the Americans with Disabilities Act (ADA)<sup>56</sup> extends this protection to employees in the private sector. In the employment area, both statutes prohibit discrimination against an otherwise qualified individual with a disability solely on the basis of their disability. The ADA governs the process of recruitment, hiring, training, promotion, pay, job assignment, leaves of absence, benefits, and social programs.<sup>57</sup> The Act defines “persons with disabilities” as including those who are regarded or perceived as having a disability which could include employees that are obese. As defined in the ADA, the term “disability” applies to the following:

1. people who have a physical or mental impairment that substantially limits one or more major life activities;
2. people who have a record of an impairment which substantially limits major life activities; and
3. people who may be regarded by others as having such impairment.

The definition is similar to the one used in the UK,<sup>58</sup> although it could be argued that these classifications are more general and hence easier to establish as a ground for action than the narrowly defined “day to day activities”<sup>59</sup> looked for under UK disability discrimination law. In *Cook v Rhode Island*,<sup>60</sup> a plaintiff who was “morbidly obese” was denied re-employment at a state home for the mentally impaired because the state claimed her obesity compromised her ability to evacuate patients in the case of an emergency. The state also claimed she was at a greater risk of developing ailments and that would increase the likelihood of absenteeism and claims for worker’s compensation. The First Circuit Court of Appeals found that concern over absenteeism and increased costs is not a valid basis for denying employment. The Court upheld a jury finding that the state denied Ms. Cook employment solely on the basis of her obesity, rather than on her ability to do the job, and it upheld a damages award of \$100,000.

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55 Rehabilitation Act of 1973, 29 U.S.C. § 701.

56 Americans with Disabilities Act 1990, 42 U.S.C. § 12101 et seq.

57 For employers with 25 or more employees, the requirements became effective on 26 July 1992. For employers with 15 to 24 employees, the requirements became effective on 26 July 1994.

58 Both jurisdictions include discrimination by perception in their definition.

59 See above, note 29.

60 *Cook v Rhode Island* 10 F.3d 17 (1<sup>st</sup> Cir. 1993).

The case law tends to support the idea that if obesity has a physiological reason behind it then it could be covered by the definition of disability in the legislation. In *Equal Employment Opportunity Commission v Resources for Human Development, Inc.*,<sup>61</sup> the Equal Employment Opportunity Commission (EEOC) filed its first lawsuit asserting that severe obesity was a protectable disability under the ADA. Although the case was unhelpful in defining when obesity is severe enough to constitute an ADA protected disability, it is now clear that the EEOC considers morbid obesity<sup>62</sup> to be a protectable disability under the ADA. The court also concluded that severe obesity may qualify as a disability regardless of whether it is caused by a physiological disorder.<sup>63</sup> This is similar to the approach taken by the EAT in the *Walker* case (considered above when they held that the cause of the obesity was not relevant in deciding if someone should be protected).<sup>64</sup> The American Medical Association has recently upgraded obesity from a condition to a disease which suggests that in their view obesity is not a minor impairment. In 2011, Congress amended the ADA to extend workplace disability protection automatically to morbidly obese people, who were defined as those 100% or more above the healthy weight range for their height. Earlier in 2011 (in April and July), the EEOC had gained settlements in its first two major cases brought against employers for weight-related workplace discrimination.<sup>65</sup>

#### *State Law and Disability Discrimination based on Weightism*

The approach taken to weightism differs amongst the US states. A research study undertaken by researchers from Yale University in 2008 found that only one state prohibited discrimination on the basis of weight and that was Michigan.<sup>66</sup> In Michigan, the Elliott Larsen Civil Rights Act 1976<sup>67</sup> states that persons have the opportunity to obtain employment without discrimination because of religion, race, colour, national origin, age, sex, height, weight, or marital status. So, in Michigan, weightism is a prohibited ground of discrimination in its own right. There are other pockets of legal protection provided by other states. In San Francisco, under City law it is unlawful to discriminate on the grounds of height or weight. Also, under the state law of the District of Columbia, it is unlawful to discriminate on the ground of

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61 *Equal Employment Opportunity Commission v Resources for Human Development, Inc* F. Supp. 2d, 2011 WL 6091560 (E.D. La. Dec. 2011).

62 Morbid obesity occurs when a person is 50% - 100% above their ideal body weight, 100 pounds above their ideal weight or has a BMI of 39 or more.

63 The Equal Employment Opportunity Commission's (EEOC) position is supported by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). The ADAAA significantly expanded the definition of "substantially limits" and "major life activities", thereby increasing the likelihood that obesity in all its forms constitutes a federally protected disability.

64 See above, note 39.

65 See above, note 61; and *Kratz v BAE Systems, Inc* (Civil Action No. 4:11-cv-03497).

66 See above, note 20, pp. 992-1000.

67 Elliott Larsen Civil Rights Act of 1976 Mich. Comp. Laws Ann. § 37.2101 (West 1994).

physical appearance.<sup>68</sup> Through legislative enactments or court decisions, several states have moved to outlaw discrimination based on size or weight. In various states, the equality law has been broadly interpreted to include discrimination on the ground of weight (or obesity) in the absence of specific protection.

In 2002, McDonald's restaurants were sued for breach of the ADA and the Connecticut Fair Employment Practices Act<sup>69</sup> when they refused to engage an employee on the basis that he was overweight. In New York, in the case of *State Division of Human Rights v Xerox Corp*<sup>70</sup> and in New Jersey, in the case of *Gimello v Agency Rent-a-Car Systems, Inc.*,<sup>71</sup> the courts found that obesity falls within the definition of disability or handicap under each state's human rights laws. In *Cassista v Community Foods, Inc.*, the Supreme Court of California found that obesity could be the basis of a violation of the state's fair employment law where there is a physiological systemic basis for the condition.<sup>72</sup> Also obesity may be regarded as a handicap under the state of Oregon's Fair Employment Practices Act, if the obesity substantially limits one or more of the person's major life activities, such as caring for oneself, working, walking, etc.<sup>73</sup>

The State Supreme Court in *BNSF Railway Company v Feit*<sup>74</sup> was asked to deliberate on whether obesity discrimination was unlawful under the state law of Montana which used the same terms as the ADA. The facts were that the railway company offered Eric Feit an offer of employment as a trainee conductor. The employment was conditional upon successful completion of a physical examination, drug screening, background investigation, proof of employment eligibility, and the company's medical history questionnaire. The company then informed Feit he was not qualified for this position because of the significant health and safety risks associated with his extreme obesity. He was told he would not be considered for the job unless he either lost 10% of his body weight or successfully completed additional physical examinations at his own expense. Regardless of the test results, the company did not guarantee Feit a job. With the exception of a sleep study test, he successfully completed the additional physical exams requested. The sleep test cost at least \$1,800 and he could not afford it. Because the company informed him that it would not consider him for the trainee conductor position unless he completed the sleep study, Feit set out to lose 10% of his weight and claimed he was successful. However, a genuine dispute arose regarding whether the company received documentation of his weight loss. Feit filed a complaint with the Montana

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68 The District of Columbia prohibits discrimination based on "personal appearance", which refers to "bodily condition or characteristics". The D. C. Human Rights Act of 1977, D.C. Code Ann. § 1-2501 (1981).

69 *Connecticut Fair Employment Practices Act* (FEPA) CONN. GEN. STAT. § 46a-51.

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

71 *Gimello v Agency Rent-a-Car Systems, Inc* 594 A.2d 264 (N.J. Spur Ct. App. Div 1991).

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

73 *Oregon Correctional Institution v Bureau of Labor and Industries*, 780 P.2d 743 (Or.App.1989).

74 *BNSF Railway Company v Feit* 2012 MT 47 also cited as No. OP 11-0463.

Department of Labour that the company had discriminated against him based on his physical or mental disability. The Montana Supreme Court in its analysis of Montana's state discrimination law looked to the EEOC's regulations and guidance on the ADA and relied upon it to reach the conclusion that obesity, even with no underlying medical condition, may constitute a disability. This is similar to the UK position after the *Kaltoft* decision.<sup>75</sup>

It is clear that many state laws hold employers liable for discrimination on grounds of obesity without requiring proof of further disability and still more when the obesity results in impairment of activities.

### *Sex and Race Discrimination in the US*

Federal law provides the minimum standard which applies across the US. However, there are some City laws which provide additional protection against sex discrimination and weightism.<sup>76</sup> Under federal statutes it is possible that an overweight or obese woman would be able to establish a prima facie case of disparate treatment against an employer who failed to hire her despite her qualifications<sup>77</sup> provided she pursued her case on the basis of her gender and not her weight. If a plaintiff is able to establish a prima facie case, then the burden would shift to the employer to put forward some legitimate non-discriminatory reason for rejecting the plaintiff. Although, unless it amounts to a disability, weightism is unprotected under federal law, an employer could simply defend his claim by showing that he does not want to employ obese people of either gender.

Although employers may appear to have a gender neutral policy for recruiting or promoting staff, if an obese woman can show that the policy has a disparate impact on obese women as a class and that there is statistical evidence of this, then a disparate impact case could be successful.<sup>78</sup> However, in a case involving flight attendants who claimed that an airline's maximum weight requirement for staff disparately impacted upon women, the Court of Appeals of New York ruled that the petitioners had failed to meet the requirements for a sex discrimination (disparate impact) claim. This was because there was no record of inequality of recruitment between men and women and no record that weight standards were used as an excuse to discriminate against women.<sup>79</sup> Similar provisions apply in relation to race discrimination.

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75 See above, note 2.

76 Santa Cruz and San Francisco.

77 Under the McDonnell-Douglas framework a test is established and is now used by the courts to establish if a prima facie case exists. *McDonnell-Douglas Corp. v Green*, 411 U.S. 792 (1973).

78 The courts would allow societal statistics to be produced but would equally be persuaded by employer-specific statistics.

79 *Delta v NY State Div of Human Rights*, 91 N.Y.2d 65 (1997). The court relied heavily on the fact that 90% of Delta Airline's flight attendants were women.



## **b. Equal Pay Law**

### *i. Equal Pay in the UK*

Female employees who are obese often receive lower pay than others in the workplace. This was shown by a study undertaken in 2000 by the Guildhall University.<sup>80</sup> The researchers found that obese women receive less pay than other women, and men who are obese were shown not to suffer pay discrimination in the same way.<sup>81</sup> Given that all the statistical evidence in the surveys above points to pay inequality being a practical reality for the majority of obese female employees, an equal pay claim is likely to be a relevant cause of action. However, to claim equal pay, such an employee would need to find a male comparator (real or hypothetical) in the same employment who is paid more than her and who is doing equal work to her. Equal work is defined under Section 65 of the Equality Act 2010 as: like work; work rated as equivalent; or work of equal value. When this is the case and she can prove it, a female employee will be successful in an equal pay claim. However, there is a defence available to employers in this situation, namely, that there is a material difference between the situation of the comparator and the claimant.<sup>82</sup> Examples would be if he was paid more because: he had more seniority (provided this was material to the difference in pay); more responsibility; or the market forces defence applied.<sup>83</sup> The second of these defences is most applicable because, as has been shown, obese employees are unlikely to be promoted once appointed and so unlikely to be placed in a supervisory role.

### *ii. Equal Pay in the US*

The Equal Pay Act 1963 protects women and men who perform substantially equal work in the same establishment from sex-based wage discrimination. Unfortunately there is no record of how many legal claims for equal pay have been taken by obese employees against their employers. However, there is statistical evidence that shows that inequality of pay is a problem for obese employees in the US. An article published in 2000<sup>84</sup> revealed interesting findings from a study funded by the National Association to Advance Fat Acceptance. Namely, it found that on average only 9% of top male executives at the time were obese. It also found that upper-level managers, male or female, that were 20% overweight, typically earned ap-

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80 Barry Harper of the department of economics at London Guildhall University undertook the first large-scale investigation of the issue of obesity in employment in the UK when he surveyed a sample of over 11,000 people aged 33, examining the effects of looks, height and obesity on hourly pay, employment, etc. (Harper, B., "Beauty, Statute and the Labour Market: A British Cohort Study", *Oxford Bulletin of Economics and Statistics*, Vol. 62, 2000, pp. 773–802).

81 *Ibid.*

82 See above, note 29, Section 69.

83 An employer may need to pay one group of workers more than another, even though their work is of equal value, because the going rate for the job is higher.

84 Voros, S., "Weight Discrimination Runs Rampant in Hiring", *Career Journal Europe*, 2000.

proximately \$4,000 less than their thinner co-workers. Overall, the study showed that obese people normally were paid 10% to 20% less than their thinner colleagues.<sup>85</sup>

This lack of legal protection against weightism in relation to pay under federal and state law is disappointing given the fact that the problem of weightism in employment is on the increase according to the Yale study.<sup>86</sup>

### **c. Bullying and Harassment**

#### *i. Liability for Bullying and Harassment in the UK*

In the UK, if individuals are bullied or harassed at work by colleagues or a supervisor because of their weight they can raise a grievance against their employer if the employer has failed to take reasonable steps to protect them from such behaviour.<sup>87</sup> When following a grievance procedure is inappropriate<sup>88</sup> or fails to achieve a satisfactory result for an employee, the employee can potentially claim harassment under Section 26 of the Equality Act 2010. In order to do this, the employee will need to show that the behaviour was undertaken on the basis of one of the protected grounds. In cases where harassment or bullying is prompted by someone's weight, the relevant ground of inequality will most likely be because of their sex or disability.<sup>89</sup>

With respect to disability, a Belfast employment tribunal in *Bickerstaff v Butcher*<sup>90</sup> found obese workers in Northern Ireland are entitled to the same protection as disabled persons if they are subjected to humiliating or degrading treatment, or treatment which violates the employee's dignity. The decision followed the ruling in the *Kaltoft* case in respect of the definition of disability, allowing obesity to be a protected trait. The tribunal in this case applied these principles and found that harassment on grounds related to obesity was unlawful and actionable.

Where no link can be found to a protected characteristic or the obesity is not severe enough to amount to a disability, the employer may still be vicariously liable under the Protection

85 Another study by the Harvard School of Public Health explained that the households of obese women earn \$6,710 less than the average household.

86 See above, note 20.

87 There is no statutory protection against bullying in the UK although it could be treated as harassment under the Equality Act 2010 or form the basis of an action in tort when it leads to the victim experiencing illness, or unfair dismissal if the victim is forced to resign because the failure of the employer to protect them from such behaviour amounts to a breach of contract.

88 For example, when bullying or harassment is being perpetrated by the victim's supervisor and there is no independent person in the employer's organisation who could deal with the grievance, it is unlikely employment tribunals will expect employees to follow a grievance procedure which is likely to be biased.

89 Other possibilities are a common law action under the law of tort or contract.

90 *Bickerstaff v Butcher* NIIT/92/14.

from Harassment Act 1997 (Harassment Act) (sections 1 to 7 of which only apply to England and Wales) for harassment suffered by obese workers by employees in the course of their employment.<sup>91</sup> Section 1 states that:

*(1) A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other. (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*

As a consequence of the House of Lords decision in *Majrowski v Guys and St Thomas Trust*,<sup>92</sup> it was established that an individual could bring a claim under the Harassment Act if he can establish that he has been subjected to a course of conduct (more than one incident) which amounts to harassment and which the harasser knew or ought to have known amounted to harassment of him. It would amount to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment. This would certainly apply to obese employees who suffer harassment or bullying because of their size. The benefit of bringing in a claim under the Harassment Act is that there is no need for the plaintiff to tie in the behaviour they have suffered with a protected characteristic. However, a limitation in a civil claim is that it is only available as a remedy for conduct which amounts to a breach of Section 1 of the Act and is behaviour that is sufficiently serious as to constitute a criminal offence under Section 2 of the Act.<sup>93</sup>

Section 2 of the Harassment Act sets out when someone commits an offence of harassment as follows:

- (1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.*
- (2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.*

This requirement limits the applicability of the Act to the most serious kinds of harassment or bullying.<sup>94</sup> In *Marinello v City of Edinburgh Council*, it was held by the Inner House of the Court of Session in Scotland, that in order to succeed in a claim under the Act, a claimant

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91 Middlemiss, S., "Liability of Employers under the Protection from Harassment Act", *Edinburgh Law Review*, Vol. 10, 2006, pp. 307–309.

92 *Majrowski v Guys and St Thomas Trust* (2006) IRLR 695.

93 Although a similar standard applies in Scotland, different sections of the Act apply.

94 *Conn v The Council of the City of Sunderland* [2007] EWCA Civ 1492; and *Veakins v Keir Islington Ltd* [2009] EWCA Civ 1288.

must demonstrate that the behaviour complained of amounts to at least two instances of oppressive and unacceptable conduct that is targeted at him and calculated to cause him alarm or distress.<sup>95</sup> Unlike the Equality Act, there is no protection offered for victimisation of the employee because he has brought a claim under the Harassment Act. The Harassment Act includes a remedy of an injunction or damages (for anxiety caused by the harassment and financial loss resulting from the harassment). Regarding the latter claim, an employee will not have to prove he has suffered any psychiatric or physical injury in order to claim compensation.

Obese employees are therefore afforded protection only from serious incidents of bullying and harassment in the workplace and there is no protection from victimisation from the employer for bringing a claim under this Act.

*ii. Liability for Bullying and Harassment in the United States*

Title VII of the Civil Rights Act imposes employer liability for discriminatory workplace bullying or harassment. This is very similar to the liability for harassment offered in the UK under the Equality Act. In order for the protection to apply the harassment must be for a discriminatory reason. As mentioned above, obesity is not included in the protection offered by the Civil Rights Act unless it is linked with another discriminatory reason such as sex or race.

As in the UK, there is a two part test – the first part is objective and the second part is subjective. Both parts of the test must be satisfied in order for a claim to succeed.<sup>96</sup> The conduct is considered actionable if it creates an environment that a reasonable person would find hostile or abusive and the victim perceives the environment to be hostile and abusive. Factors to be taken into account when considering the first part of the test include whether the conduct was physically humiliating or a single comment and whether the behaviour has unreasonably interfered with the performance of the victim’s work. Unlike UK law, US federal law provides protection against third party harassment. The employer has a defence to an action if he has taken reasonable steps to prevent the conduct or to remedy it promptly. However, this defence does not apply if the harassment has resulted in an adverse employment decision.<sup>97</sup>

During the last 15 years, there has been a greater understanding of workplace bullying in the US and the model Healthy Workplace Bill developed by Professor David C. Yamada<sup>98</sup> has been adopted by just over half of all states. This legislation provides an effective remedy for workplace bullying and harassment without the need to prove a discriminatory reason for the conduct complained of. It makes it unlawful for an employer to subject an employee to an “abusive

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95 *Marinello v City of Edinburgh Council* (2011) IRLR 668.

96 *Harris v Forklift Systems Inc*, 510 US 17 (1993).

97 *Burlington Industries Inc v Ellerth* 524 US 742 (1998); *Faragher v City of Boca Raton* 524 US 775 (1998).

98 Yamada, D.C., “Emerging Responses to Workplace Bullying”, *Politics & Civil Rights Legal Review*, Vol. 329, 2012–2013.

work environment". The victim can raise a private action for damages or an injunction in the state courts. An abusive work environment is defined as the situation where an employer or one or more employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both. Abusive conduct may be physical or verbal and a single act can be considered sufficient if it is serious enough. Again the employer has a defence where he exercised reasonable care to prevent and promptly correct any actionable behaviour and the complainant unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. The employer is not prevented from taking action against the victim for poor performance, misconduct or economic necessity. Damages will be awarded but there is usually a limit placed on the amount which may be awarded unless the harassment has resulted in an adverse employment decision. Only where the conduct complained of has been extreme will the claimant be able to recover damages for emotional distress. There is protection from retaliation which is the equivalent of the protection from victimisation provided in the Equality Act in the UK.

In most states in the US, there is therefore protection from harassment for obese employees without the need for the harassment to be severe. However, the damages for emotional distress are limited.

#### *d. The Law Relating to Dismissal*

Personnel Today has found that obese people are more likely to be made redundant than non-obese people.<sup>99</sup> Of greater concern is the fact that 10% of the respondents thought they could dismiss an employee because of their size. At first sight, the law relating to dismissal in the UK appears radically different from that in the US, with the former adopting a dismissal only for just cause model and the latter the employment at will model.

##### *i. Dismissal in the UK*

The UK system of unfair dismissal proceeds from the standpoint that an employee should not be dismissed unless for just cause. The Employment Rights Act 1996 (ERA) contains the basic right for employees with two years of service<sup>100</sup> not to be unfairly dismissed. Sections 98 (1) and (2) of the ERA list five potentially fair reasons for dismissal. If the principal reason for dismissal is a person's size, the dismissal would be unfair unless the employer shows that the dismissal was fair because the person's weight fell within one of the potentially fair reasons, such as capability, conduct or some other substantial reason for dismissal. There are therefore limited situations where an employer could defend a decision to dismiss an employee who is obese and was dismissed purely because of his/her size. The reason of capability is the most obvious to apply in the limited circumstances where obesity may affect a person's

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99 See above, note 18.

100 One year for people employed before 6 April 2012 as per Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012/989.

ability to do his work, for example a flight attendant who is too large to walk along the aisle of an aeroplane may be incapable of performing his or her job.<sup>101</sup> In addition, the ERA specifies that the employer must act reasonably in treating the reason as sufficient reason for dismissal in the specific case. The employer must also follow fair procedures in order for the dismissal to be regarded as fair.

In a Scottish case<sup>102</sup> Ronald Agnew, aged 42, was a 25 stone postman who was taken off delivery duties and ended up losing his job on health grounds when his managers at the Royal Mail claimed they could not find another job for him. Mr Agnew claimed he was treated unfairly as other workers in a similar position had been given the chance to undertake lighter duties to avoid dismissal. He claimed he could have carried out a driving job, but management argued that his bulk made it difficult for him to fit into a van. Mr Agnew pointed out he could drive his Ford Escort car without difficulty. A Glasgow employment tribunal held that Mr Agnew had been unfairly dismissed, recommended he should be reinstated and awarded him £24,278 compensation.

Where an employee suffers harassment or other forms of abuse or bullying because of his or her size, the employee could be entitled to leave his or her job and claim constructive dismissal. This is because the behaviour of the harasser could be a breach of the implied term of trust and confidence in a contract of employment that imposes a duty on an employer to have general respect for his staff within the workplace and treat them accordingly.

The law relating to unfair dismissal therefore offers a reasonable amount of protection to obese employees.

#### *ii. Dismissal in the United States*

In contrast to the UK, the US system of dismissal proceeds on the basis that in most cases, private sector employment in the US is “at will” which refers to the right of an employer to dismiss an employee at any time and for any reason (good or bad) provided the dismissal does not fall within one of the five exceptions. The first exception is the federal anti-discrimination legislation described above. It is therefore unlawful for employers to dismiss workers based on their gender, race, disability, pregnancy or other characteristics. The other exceptions are all state provisions, namely: state anti-discrimination legislation described above, public policy, implied contract and good faith.<sup>103</sup> Some states adopt all of these exceptions, others only some and a minority recognise none.

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101 Other examples may include employment in the armed forces, emergency services, or working for an airline as an air traffic controller or on board a plane.

102 Unreported in 2001.

103 Montana and Arizona have enacted unjust termination laws which require employers to dismiss only on just cause and allow employees to seek relief by filing complaints with government agencies, bring private law suits, or both.

The public policy exception applies where an employee is dismissed for enforcing their rights under state law or refusing to violate public policy in some way, e.g. by refusing to commit an illegal act. This exception is likely to apply to obesity dismissals in limited circumstances, for example, employers cannot legally dismiss workers for reporting sexual harassment, discrimination and other unlawful practices which could be directed at obese employees.

The implied contract exception applies where it can be said that the contract impliedly promises job security. There is no requirement under the law of the US for employers to have written employment contracts but such contracts are commonly provided for senior management or key employees. Further, if a contract is for a fixed term it will often provide that employers can only dismiss workers for good or just cause unless the contract itself provides alternate grounds for termination. Obese employees who do not have a written contract of employment may be able to bring a wrongful termination action based on rights provided by employee handbooks or manuals. For example, when a company handbook or manual provides a disciplinary process that must be followed before termination then a failure to follow the process and dismiss an employee may support a wrongful termination action by them. In certain states, the courts will enforce verbal contracts and any terms within them dealing with termination of employment. So if an employee was told by his employer he had a job for life or would only be dismissed for just cause then provided he can prove the term exists he may be successful in claiming wrongful termination.

The good faith exception has been adopted by a minority of states and is broadly equivalent to the UK unfair dismissal legislation, implying a term into the contract that the parties will act in good faith. This could be construed to mean either that the employer must have just cause for the dismissal or, if given a narrower interpretation, that the employer will not dismiss in bad faith or maliciously. In states which recognise this exception to employment at will, employees who are dismissed for obesity will have legal redress, unless the obesity amounts to a disability.

It can therefore be seen that the level of protection against dismissal for being obese varies tremendously from state to state and the only protection available to all obese employees is the federal anti-discrimination legislation which offers protection only when the employee can be said to be discriminated against on grounds of another protected characteristic such as sex, race or disability.

Federal, state and local government workers on the other hand are protected by the Fifth and Fourteenth Amendments, which prohibit the government from depriving any person of "life, liberty or property" without due process of law. These employees are considered to have a property interest in their jobs, and the right to due process places significant restrictions on arbitrary dismissals unrelated to job performance. Some additional protection is provided by federal, state and local civil service laws. The US equal employment oppor-

tunity laws<sup>104</sup> prohibit discrimination in the workplace and this includes discriminatory dismissals of employees. Therefore public sector workers who are obese in the US have a level of protection against dismissal but again the main thrust of this protection is through the discrimination laws.

Because the impact of the employment at will doctrine is so strong in the US<sup>105</sup> it can make it difficult for employees to prove wrongful termination.

In 2011, the UK government contemplated introducing the equivalent of employment “at will”,<sup>106</sup> whereby employees could be sacked without cause and at the whim of an employer.<sup>107</sup> The proposed change in the law did not happen but may well be reconsidered in the future.<sup>108</sup> It can be seen from the research that any forms of lookism<sup>109</sup> (including weightism) would undoubtedly be a common reason for dismissal under a legal system where employment at will was allowed. It can also be seen that the US system of employment results in a situation where employers have little liability for dismissing an employee for weight related reasons. Ironically, while the UK shows signs of moving away from a just cause system of unfair dismissal, over the last 15 years approximately 10 states in the US have introduced bills to impose dismissal only for just cause.<sup>110</sup> These systems would protect obese employees in the same way that the UK unfair dismissal does. It is clear that a “just cause” system offers more protection for such employees.

## Conclusion

The numerous studies undertaken in both jurisdictions have shown that employees will face various consequences in the workplace for being obese including: discrimination in recruitment practices; inequality in entitlement to wages and benefits; limited access to promotion; and bullying and harassment.<sup>111</sup> While most forms of discrimination in the workplace in both

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104 Civil Rights Act 1964, Americans with Disabilities Act 1990 etc.

105 States may also adopt the 1991 Model Employment Termination Act, which requires employers to show good cause for discharging employees under the Doctrine but, no state to date has adopted it.

106 The Beecroft report was commissioned in 2011 by the Prime Minister’s Office and it recommended a “Compensated No Fault Dismissal System”, Beecroft, *A Report on Employment Law*, 2012, available at [www.bis.gov.uk](http://www.bis.gov.uk).

107 At least for employers with 10 or less employees.

108 Morris, N., “Cable forces U-turn on ‘fire at will’ job reform”, *The Independent*, 22 May 2012.

109 Middlemiss, S., “Beauty’s Only Skin Deep? Legal Liability of Employers for Discrimination on the Ground of Physical Appearance: A Comparative Analysis”, *Contemporary Issues in Law*, Vol. 8, 2006/2007, pp. 18–46.

110 Kreuger, A.B., “The Evolution of Unjust-Dismissal Legislation in the United States”, *ILR Review*, Vol. 44, 1991, pp. 644–660.

111 Kristen, E., “Addressing the Problem of Weight Discrimination in Employment”, *California Law Review*, 2002, Vol. 90, pp. 57–109.



jurisdictions are unacceptable and legislated against, there are other types of discrimination that are still legally acceptable and weightism is amongst them. There are various social, legal<sup>112</sup> and political reasons for this<sup>113</sup> which, due to the need for brevity, have not been fully explored in this article.<sup>114</sup> However, the fact is that for most employers in both jurisdictions, obese people do not conform to the physical model that they expect of their employees:<sup>115</sup> “[t]he further you are from the societal ideal of beauty, the discrimination you face is exponentially harder.”<sup>116</sup> Calls have been made through the lobbying body the Size Acceptance Movement<sup>117</sup> and various other individuals or organisations for specific legal protection against discrimination relating to an individual’s weight in the UK.

Neither the US nor the UK recognise obesity as a separate protected characteristic. However, some progress has been made in providing protection to obese employees. As a result of Federal case law and legislative amendments in the US and the application of the *Kaltoft* case in the UK, obesity related disabilities will not be considered outside of the scope of disability discrimination simply because they may to some extent be considered to be self-inflicted. Obesity may be considered a disability when it gets to the stage that the employee’s professional life and daily activities become limited. The US recognises severe obesity as a disability once it reaches 100% of normal weight and some US states have gone so far as to recognise it as a disability in its own right. The failure to recognise obesity as a disability in its own right or indeed to recognise it as a separate protected characteristic means that prejudice against obese persons is not tackled at an earlier stage. Until the obesity is severe, the employer need not make reasonable adjustments and the employee does not receive the protection against bullying and harassment offered to other types of discrimination, but is obliged to rely on other less favourable legislation, namely the Harassment Act in the UK and the healthy workplace laws in the US. The overlap with race and sex discrimination provides some protection in the event that the employee can show combined discrimination, but this applies only to some obesity cases and is difficult to prove. This is particularly restrictive since research shows that pay is a particular issue and the equal pay legislation in both jurisdictions is restricted to sex discrimination.

Although 22% of the working age population are defined as obese in the UK (and around a third in the US), with the exception of disability discrimination cases, there have hardly been

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112 There is a genuine concern amongst the judiciary that any successful weightism case will lead to a torrent of claims.

113 Library Index, “Legal Political and Social Issues of Overweight and Obesity – Weight-based Discrimination”, available at <http://www.libraryindex.com/pages/1224/Political-Legal-Social-Issues-Overweight-Obesity-WEIGHT-BASED-DISCRIMINATION.html>.

114 See above, note 5.

115 Hospitals in Texas banned the hiring of obese workers.

116 Solovay, S., *Tipping the Scales of Justice: Fighting Weight-Based Discrimination*, Prometheus Books, 2000.

117 See above, note 25. They have suggested that employers should take some responsibility for promoting healthy lifestyles amongst its workforce and offer incentives to ensure that employees remain fit, active and healthy.

any reported discrimination cases relating to a worker's obesity. It is clear that overweight and obese job applicants and workers will often be subjected to weight-based discrimination in employment. Increasingly employers are being encouraged to promote and support the health of their workers.<sup>118</sup> It has largely been left up to tribunals and courts to develop the law in this area and the UK government in particular has no plans to legislate.

Why then has no specific legal protection against weightism been introduced as yet in either the UK or US? A common viewpoint adopted in respect of weightism is that it is not a form of discrimination that should be protected against because the individuals concerned can ultimately regulate their own weight, whereas the individuals who have legal protection under the Equality Act have no control over the protected characteristics that apply to them; “[o]ne of the reasons that weightism is not given the same legal and social awareness as other forms of prejudice is because weight is often thought to be controllable.”<sup>119</sup>

There currently appears to be no willingness amongst legislators in both jurisdictions to amend this and extend comprehensive legal protection to victims of weightism. Managers therefore currently have the prerogative of excluding from employment or restricting the opportunities within the workplace of those persons that are in their view less attractive, including those that are obese. The decision of the CJEU in *Kaltoft*<sup>120</sup> makes it clear that the cause of obesity is not important, only the effect, and this may require the legislators in the UK to think again. If so, the impact could prove significant for UK employers, given that this jurisdiction has the highest percentage of obesity in Europe. It is hoped that this article will help to highlight this problem and put pressure on the legal establishment to take action.

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118 The National Institute of Clinical Excellence (NICE) provides guidelines for employers to adopt in promoting a healthier working environment, with proposals such as healthier food in office canteens, encouragement of staff to exercise during lunch breaks and more workplace showers. Larger employers will be expected to install bike sheds and all employers should discourage staff from using the lifts in favour of using the stairs. NICE *Obesity, The prevention, identification, assessment and management of overweight and obesity in adults and children – Clinical Guidelines*, 2006, CG43.

119 Nourishing the Soul, “Weightism is a Human Rights Issue”, 5 January 2011. Obesity expert Boyd Swinburn, director of the World Health Organisation’s Collaborative Centre for Obesity Prevention at Deakin University, said: “There are a lot of studies to show obese people are prejudged in social situations and employment and so on.” “‘Weightism’ denies fat people human rights”, *News.com.au*, 12 July 2012, available at: <http://www.news.com.au/national/weightism-denies-fat-people-human-rights/story-fcynjr2-1226423926047>.

120 See above, note 2.