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Discrimination

Texas Hospital's Weight Policy for New Hires Draws Criticism, Raises Issues for Employers

Although probably not unlawful in most jurisdictions, a Texas hospital's former policy of refusing to hire obese individuals has employers and industry attorneys buzzing, employment law experts contacted by BNA said.

According to reports, Citizens National Medical Center (CNMC) in Victoria, Texas, instituted a policy against hiring applicants whose body mass index (BMI) exceeded 35. That meant a five-foot, five-inch tall applicant had to weigh less than 210 pounds to be hired by CNMC.

Shelly Frank, CNMC's employment manager told BNA in an April 12 email that CNMC has suspended the policy "in favor of wellness initiatives."

Even so, "everyone's talking about it," according to Gavin S. Appleby, a shareholder in Littler's Atlanta office. Appleby said he could understand the hospital's reasons for adopting the policy—a health care provider employer would want employees who projected a healthy image. Still, he said, the policy raised legal and ethical questions.

Sondra Solovay, a San Francisco Bay-area attorney who conducts employer discrimination training as a director at Workplace Answers, cautioned that adopting a weight policy is a "very risky practice to undertake." She, too, said she understands the desire for the policy, but said it "sends a bad message."

Employers Seeking Advice on Weight Policies. Appleby told BNA that employers are "knocking on the door" seeking advice about policies limiting employees' weight. So far, none has gone as far as CNMC, he said, generally because they fear the type of image issues that now are dogging the Texas provider.

It is similar to smoking, Appleby said, noting that he has received many inquiries from employer clients considering adopting policies against hiring smokers. Anti-smoking policies appear to be finding favor because "it's easier to pick on smokers," Appleby said. Weight is a more complicated issue.

Employers can show that health care insurance rates are higher for smoking employees, and the same may be true for obese employees. But, Appleby asked, "do employers really want to be in this battle?"

He predicted that there will be more employers adopting weight policies, but it is early yet, and the trend has not yet reached the "epidemic" stage.

Solovay told BNA that the trend may stall because the law is unclear on the legality of such policies. Refusing to hire obese employees, or imposing conditions on their employment, is "dangerous," she said.

A few cities, including Washington and San Francisco, have laws prohibiting employers from discriminating against employees or potential employees on the basis of weight, Solovay said. Michigan is the only state that bars weight discrimination, under its Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq. Section 37.2202(a) specifically prohibits employers from refusing to hire individuals based on their weight.

Federal Law: Unclear. The only federal statute that may restrict the practice of setting weight policies is the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., but in the wake of amendments to the statute, the law is murky, according to both Solovay and Appleby. Regulations implementing the amendments took effect in May 2011.

"Do employers really want to be in this battle?"

GAVIN APPLEBY, LITTLER, ATLANTA

Courts did not consider obesity alone to be a disability under the pre-amendment ADA, and thus generally did not allow ADA claims premised on weight discrimination, Appleby said. The Equal Employment Opportunity Commission (EEOC), however, has said that morbid obesity is a disability under the amended law. That position has not yet been tested, and Appleby said he was not certain how amenable courts would be to such a claim.

It is possible, he said, that courts would look favorably on claims in which the plaintiff alleged that a disability caused his or her weight gain or that his or her weight caused another type of disability. It may be harder under the amended ADA to get weight bias claims "to go away," Appleby said.

Solovay agreed that the ADA amendments clarified disability law and suggested that it may apply in cases of alleged weight bias. But, she said, "a plethora of things" have not happened since the amendments' adoption in 2008.

The law is "going to a place of fairness" and moving toward providing "more protection" against weight bias, Solovay told BNA, but it is not certain how soon the law will get there. She noted that more and more localities have adopted laws guarding against biases based on appearance, and that policies like CNMC's might be prohibited by such provisions.

Other Discrimination Protections May Come Into Play. Moving beyond the ADA, Solovay told BNA that victims of alleged weight discrimination may be able to take advantage of other statutory and constitutional protections. Weight alone might be a basis on which to bring a discrimination claim, she said, but if not, “the problem with casting the net so widely is that it will scoop up people protected by other discrimination laws.”

Solovay envisioned an employer interviewing potential employees and putting every person rejected because of their weight in a room together. At the end of the day, she said, the room would be filled mostly with women, African Americans, Hispanics, people over 40, and other protected classes, because those people have a greater tendency to be obese than young white men.

Allowing employers to reject such potential employees based on their weight makes weight a “loophole for other types of prohibited discrimination,” Solovay said.

Solovay also said it may be possible, in the appropriate context, to allege a constitutional violation against an employer that makes decisions based on weight.

Appleby told BNA it may be possible to claim that weight discrimination has a disparate impact on people protected under other discrimination laws, but said he has not seen statistics supporting the theory. He said it may be difficult to prove statistically that a weight policy had an impact on protected classes.

Alternatives to Weight Policies. Appleby and Solovay agreed that, while adopting a weight policy can be tricky, employers can have legitimate reasons for wanting to do so. Beyond image issues, self-insuring employers may have found that they are paying more for health care for their heavier employees and are seeking ways to limit their costs.

There also may be questions about whether an obese employee could perform all the essential tasks of the job, Appleby said. The ADA grants limited protection to employees who cannot perform essential job functions, he said. The employer must provide a reasonable accommodation, but how far must the employer go to accommodate an obese employee? In a hospital setting, for example, nurses often are called on to move or turn patients. What must the employer do to reasonably accommodate an employee unable to perform that task?

Rather than establishing a blanket policy setting a maximum BMI, employers would be smarter to adopt appropriate job-related criteria, Appleby said. For example, the employer could say that a nurse must be able to lift a certain amount of weight or stay on her feet for a certain amount of time. Cases construing the ADA have sanctioned employer-created physical ability tests, Appleby said. Such restrictions may reduce the number of applicants qualified for the job.

Another possibility, according to Appleby, would be to adopt a wellness initiative for all employees that includes a weight loss program. This is a “no brainer,” he said, as long as participation in the program is voluntary. An involuntary program could raise the same problems as a weight requirement, he said.

Appleby noted that many employers already have adopted wellness programs, and that they vary tremendously. Some use a “biggest loser” approach, he said, referring to a television program in which the individual who loses the most weight is declared the winner. These programs, however, usually are offered only to

existing employees and new hires, since they are very expensive.

Weight Bias in Health Care. Solovay expressed concern that the CNMC’s former policy could add to the problem of weight bias in health care generally. What kind of message does it send to obese patients, she asked, if none of their caregivers look like them?

Experts on weight regulation issues also condemned CNMC’s former policy. Dr. Linda Bacon, for example, called the policy “absolutely abhorrent.” A nutrition professor in the biology department at City College of San Francisco and an associate nutritionist at the University of California, Davis, Bacon also is the author of the book *Healthy at Any Size: The Surprising Truth About Your Weight*.

According to Bacon, BMI is not a good indicator of health. “It astounds me that a hospital could be so unaware of health issues,” she told BNA. “Research has shown that people with high BMIs are healthy” and can present positive role models, she said.

Dr. Rebecca Puhl, research director at the Rudd Center for Food Policy and Obesity at Yale University, in a March 27 statement about CNMC’s policy said: “Turning down qualified job applicants because of their body weight is blatant discrimination, and prevents these individuals from making meaningful contributions to their community as competent health care professionals.”

“The body weight of health professionals, like the general population, varies considerably,” Puhl said. “A health professional’s body weight is irrelevant in his or her ability to provide appropriate, sensitive, and evidence-based health care to patients.”

Patient Issues. The focus on weight, moreover, “is dangerous and detrimental” to a patient’s health, Bacon said. Better health outcomes in patients can be achieved by supporting patients’ appreciation of their bodies, she said. Studies have shown that people who are treated badly “are more prone to make poor health choices,” she said.

The problem is particularly noticeable in health care, where reports that physicians are treating heavier patients differently are common. A 2009 Rudd Center report related that 70 percent of the surveyed obese women said they had experienced weight bias by doctors. As a result, the patients said, they were reluctant to seek health care and put off important preventive services.

The same study reported that one out of every three doctors said they react negatively to obese patients, that they spend less time with such patients, that they are reluctant to order preventive health care screenings for the patients, and that they engage in less intervention with obese patients. Patients also complained of being the targets of derogatory comments and jokes by health care professionals and of not being provided with appropriately sized medical equipment.

In another piece published in the June 2010 issue of the *American Journal of Public Health*, Puhl reported that obese patients feel that their health care providers do not take their health concerns seriously because the providers tend to blame the patient’s weight for all of their health care problems.

While she said she had not seen any legal cases stemming from weight bias in health care, Solovay told BNA that this is a developing area of the law. There likely are

cases being brought alleging that weight bias resulted in a denial of health care services or medical malpractice but, she said, the claims probably are being settled out of court.

BY MARY ANNE PAZANOWSKI

The employment provisions of the Elliott-Larsen Civil Rights Act are available at <http://op.bna.com/hl.nsf/r?Open=mapi-8tfslm>.