

IF EMPLOYEE CAN DO THE JOB, HER WEIGHT IS NOT THE EMPLOYER'S PROBLEM

QUESTION: I am a manager in a distribution company and Allison, one of the employees I supervise, has a weight problem. When she first started working here she was just a little bit heavy, but now she's morbidly obese. The reason this is an issue is because our office spaces are very small cubicles and are filled with necessary work equipment. All employees have a computer on one side and a library of large reference books which take up a lot of space in the cubicles. Employees must spin in their office chairs to move quickly back and forth between facing the computer keyboard and finding information in the books, often while speaking on the phone at the same time.

Although Allison doesn't seem to have problems with these "cubicle acrobatics" and her work has always been exemplary, I'm afraid that if she continues to gain weight she will soon be unable to move around as quickly and her performance will suffer.

My other concern is that her size will project a negative image to our clients and business associates since I think others who see her will get the impression that we hire slow and lazy employees.

I've mentioned to her more than once that I'm concerned about her escalating weight and I've encouraged her to see a doctor to rule out the possibility that her weight gain is being triggered by an underlying medical problem. She seemed touched by my concern, but told me not to worry about her and that she had things under control. But it's obvious to me that she is not taking my concerns seriously, since she just keeps gaining weight.

Allison's refusal to heed my advice is really irritating to me. I want to take action that will persuade her to get on a weight loss program. So I'm thinking that if I suspend her from work she'll have no choice but to follow my advice, and she'll thank me in the long run.

I discussed my plans with our HR Specialist and she is insistent that I cannot suspend or take any action against Allison based upon her weight. Is the HR specialist right?

ANSWER: Yes, the HR Specialist is right to advise you not to take any employment action against Allison because of her weight. Any such action is potentially illegal discrimination as it may violate federal or state disability laws.

Federal and state disability anti-discrimination laws protect applicants and employees with a disability from discrimination in the workplace. The law defines disability as "a physical or mental impairment that substantially limits one or more major life activities." (ORS 659A.100, 42 USC 126 §12102).

There are three types of individuals protected under these laws: those who have a physical or mental impairment that substantially limits major life activities; those who are *regarded* or perceived as having such an impairment; or those who have a *record* of such an impairment.

The first question is, does Allison have legal protection because of an actual disability? According to the federal Equal Employment Opportunity Commission (EEOC), being overweight does not automatically mean a person has a disability. (Otherwise, an astonishing percentage of us would qualify!).

However, the EEOC has indicated that severe obesity could limit a person's life activities enough for her to qualify as a person with a disability. Courts have interpreted these situations differently: some have held that the difficulties commonly arising out of obesity (difficulty walking, using

stairs, using office equipment, etc.) are not "substantial" limitations. Others have focused on the medical conditions related to the obesity rather than the obesity itself (i.e. diabetes, heart disease, etc.). Still others have indicated obesity is a disability only if the cause is physiological (i.e. caused by a disorder, rather than by overeating and lack of exercise).

As stated above, the issue is not settled. Employers need to be cautious when evaluating an employee's ability to perform a job if the employee's weight is at issue.

Also, even in cases where an employee's weight does not constitute an impairment, or the impairment does not constitute a disability, an employer's weight-based employment decisions may constitute a violation of disability protections based on the "regarded as" or "record of" contexts in cases when the employer mistakenly regards an applicant or employee as disabled.

In 1990, the Commissioner of the Oregon Bureau of Labor and Industries issued a final order finding that an employer violated state disability law by refusing to hire an applicant because of his weight. The Commissioner found that the employer regarded the applicant as having a physical impairment which even with reasonable accommodation would prevent the performance of the work, when in fact there was not sufficient evidence that this was true.

The most important principle employers should keep in mind, and certainly significant given your situation with Allison, is that employers should focus on employees' work performance and resist ill-fated, paternal or maternal urges to apply their own brand of assistance to employees. Don't make assumptions about the problems Allison *may* have in the future because of her weight. Evaluate her current performance, and treat her just as you would any other employee regardless of her weight.

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