

WEIGHING IN AGAINST OBESITY DISCRIMINATION: *COOK v. RHODE ISLAND, DEPARTMENT OF MENTAL HEALTH, RETARDATION, AND HOSPITALS* AND THE RECOGNITION OF OBESITY AS A DISABILITY UNDER THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

In November 1988, Bonnie Cook, at five foot three inches tall and over 300 pounds, applied for an available position as an institution attendant for the mentally retarded ("IA-MR") at a residential facility run by the state of Rhode Island.¹ Although she had previously worked for more than five years as an IA-MR for the same facility and had maintained an unblemished performance record at a similar weight, Ms. Cook's application was rejected, and she was told that she was too fat for the job.² Ms. Cook, however, did not go quietly.³ Rather, claiming discrimination on the basis of her weight, she managed to tip the scales of justice in her favor in the first federal court decision to acknowledge obesity as a disability under the Rehabilitation Act of 1973.⁴

Discrimination based on weight is a widespread phenomenon in the United States workplace.⁵ Many obese workers are underemployed or unemployed because of discrimination against them on account of their weight.⁶ Although Congress has not spoken directly to the issue

¹ Brief of Plaintiff-Appellee at 4, *Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.* ("MHRH"), 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).

² See *Cook v. Rhode Island, Dep't of MHRH*, 10 F.3d 17, 20-21 (1st Cir. 1993); Brief of Plaintiff-Appellee at 9-10, *Cook*, 10 F.3d 17 (No. 93-1093).

³ *Cook*, 10 F.3d at 21.

⁴ See *id.* at 20, 28 (in reaching its conclusion, the First Circuit upheld the district court's order endorsing a jury determination that Ms. Cook's obesity constituted a statutory disability); see also *Tipping the Scales of Justice*, PEOPLE, Dec. 13, 1993, at 99.

⁵ See Steven L. Gortunaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1011 (1993); Charles A. Register & Donald R. Williams, *Wage Effects of Obesity Among Young Workers*, 71 Soc. Sci. Q. 130, 139-40 (1990) (authors noted that wages of obese women were more greatly affected than those of obese men).

⁶ See Esther Rothblum et al., *Results of the NAAFA Survey on Employment Discrimination* (Fall 1987) (unpublished survey available from National Association to Advance Fat Acceptance ("NAAFA")) [hereinafter "*NAAFA Survey*"]. NAAFA is a non-profit corporation working for size acceptance that provides educational and referral services to its members and the general public.

of job bias against the overweight, it has enacted legislation prohibiting discrimination on the basis of disability, a term which it has explained should be interpreted expansively.⁷ And while no court had previously placed obesity within the federal definition of disability, some state courts have granted protection to the overweight under similarly worded state laws.⁸

In November 1993, the First Circuit, in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, became the first United States Court of Appeals to acknowledge morbid obesity as a disability under federal disability law.⁹ The First Circuit reasoned that conditions such as obesity that are arguably voluntary or mutable are not preempted per se from the protection of federal disability law.¹⁰ Additionally, the court recognized that the negative stereotypes that American society associates with the obese are evidence that society perceives obesity as a disability.¹¹ The First Circuit, however, limited its holding to the facts of Bonnie Cook's case and, therefore, to morbid obesity.¹²

This Note analyzes the *Cook* decision in light of previously existing disability law and argues for the inclusion of all classes of obesity within the statutory definition of disability as a necessary means of protecting the overweight from discrimination. Section I explores the medical information regarding the disease of obesity and the extent to which negative stereotypes have affected the overweight.¹³ Section II examines the Rehabilitation Act of 1973, the Americans with Disabilities Act and state statutory disability law.¹⁴ Specifically, section II focuses on the statutory definition of "disability" in light of legislative history and administrative regulations which have commented on the scope of this term. Section III reviews the state and federal case law leading up to

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⁷ See 45 C.F.R. part 84 App. A, Subpart A(3) (1993). See *infra* notes 89-94 and accompanying text for a discussion of the legislative intent concerning the statutory definition of disability.

⁸ See *infra* notes 117-51 and accompanying text for a discussion of relevant state case law.

⁹ See *Cook*, 10 F.3d at 20, 28. Morbid obesity is defined as a body weight that is more than twice one's optimal weight or more than 100 pounds over one's optimal weight. *Id.* at 20 n.1.

¹⁰ See *id.* at 23-24 & n.7.

¹¹ See *id.* at 23, 27, 28.

¹² See *id.* at 28.

¹³ See *infra* notes 18-63 and accompanying text.

¹⁴ See *infra* notes 64-116 and accompanying text.

the *Cook* decision.¹⁵ Section IV sets out the details of the district court and First Circuit opinions in the *Cook* case.¹⁶ Finally, Section V analyzes the First Circuit's reasoning and argues for the extension of the *Cook* holding beyond morbid obesity to obesity in general and for the prohibition of discrimination on the basis of weight.¹⁷

I. OBESITY

A. *Obesity as a Disease*

The disease of obesity is defined as excessive levels of adipose tissue—fat cells—in the body.¹⁸ Obesity is classified into three levels based on the percentage one's body weight is over the normal body weight for one's height: mild obesity being a weight 20–40% over the norm; moderate obesity being a weight 41–100% over the norm; and morbid obesity being a weight more than twice the norm or more than 100 pounds over the norm.¹⁹ Studies show that thirty-two million Americans (approximately twenty-eight percent) are overweight and that 1.5 million Americans (approximately one percent) are morbidly obese.²⁰

Although the exact causes of obesity are not fully understood, the medical community considers the disease to be the result of physiological, psychological and environmental factors.²¹ Physiological causes of obesity include dysfunction of the metabolic system, lack of appetite suppression signals to the brain, genetic disposition and an abnormal number and size of fat cells.²² Psychological causes of obesity include compulsive eating disorders and a need to support a self-image of

¹⁵ See *infra* notes 117–75 and accompanying text.

¹⁶ See *infra* notes 176–252 and accompanying text.

¹⁷ See *infra* notes 253–90 and accompanying text.

¹⁸ Barbara Lukert, *Biology of Obesity*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 1, 1 (Benjamin B. Wolman ed., 1982).

¹⁹ See *Cook*, 10 F.3d at 20 n.1; Gloria R. Leon, *Personality and Behavioral Correlates of Obesity*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 15, 22; Jordan W. Smoller et al., *Popular and Very-Low-Calorie Diets in the Treatment of Obesity*, in *OBESITY AND WEIGHT CONTROL*, 133, 133 (Reva T. Frankle & Mei-Uih Yang eds., 1988).

²⁰ See *32 Million Overweight*, *Joint Committee Reports*, 102 PUB. HEALTH REP. 111, 111 (1987); *The Oprah Winfrey Show: Inside the Life of an Obese Person* (Harpo Productions, Inc., Feb. 7, 1994) (transcript on file with the BOSTON COLLEGE LAW REVIEW).

²¹ M.R.C. Greenwood & Virginia A. Pittman-Waller, *Weight Control: A Complex, Various, and Controversial Problem*, in *OBESITY AND WEIGHT CONTROL*, 3, 10-11 (Reva T. Frankle & Mei-Uih Yang eds., 1988); Janet K. Grommet, *Assessment of the Obese Person*, in *OBESITY AND WEIGHT CONTROL* 111, 111 (Reva T. Frankle & Mei-Uih Yang eds., 1988).

²² See generally Mervyn D. Willard, *Obesity: Types and Treatments*, 43 AM. FAM. PHYSICIAN 2099 (1991).

substantiality stemming from low self-esteem.²³ Environmental influences, such as a sedentary lifestyle or an unbalanced diet of fatty foods and poor nutrition, may also contribute toward a propensity for obesity.²⁴

Recently, however, medical researchers studying obesity have begun to reject previous notions that obesity is primarily a behavioral disorder and, instead, have focused their research on the genetic links to this disease.²⁵ These researchers have concluded from genetic analyses that a person's fat distribution is largely an inherited trait.²⁶ A study of identical twins reared apart showed that twins maintained a body weight and fat distribution similar to their twin siblings regardless of their environmental surroundings.²⁷ Additionally, a study of adopted children revealed that children of biological parents of normal weight who were placed in adoptive homes with obese family members did not gain excessive weight.²⁸ Those conducting the above studies concluded that genetics have an important role in the etiology of obesity, and that the family environment alone has no apparent effect on one's propensity for obesity.²⁹

Regardless of its cause, obesity is a disease which has been associated with a variety of health risks and has been linked to a decrease in longevity.³⁰ The physical manifestation of obesity, excess weight, affects many major bodily systems including the cardiovascular, musculoskeletal, metabolic, skin, respiratory and digestive.³¹ Obesity has also been connected with an increased risk of specific health disorders such as heart disease, hypertension, diabetes, gall bladder disease, arthritis and cancer.³² Moreover, studies reveal that individuals with a body weight

²³ See *id.* at 2103-04.

²⁴ See *id.* at 2100.

²⁵ See Greenwood & Pittman-Waller, *supra* note 21, at 10.

²⁶ *Id.* The authors state that "[d]ata from genetic analyses strongly indicate that distribution of fat patterns may be inherited. . . . Thus, physiologic and genetic, as opposed to behavioral, factors provide strong correlations in determining a person's body weight." *Id.* Additionally, they conclude that "[r]ecognition of this concept is becoming increasingly important for understanding the etiology of obesity, and in determining approaches to rational treatments." *Id.*

²⁷ See Albert J. Stunkard, et al., *The Body-Mass Index of Twins Who Have Been Reared Apart*, 322 N. ENGL. J. MED. 1483, 1483 (1990).

²⁸ See Albert J. Stunkard et al., *An Adoption Study of Human Obesity*, 314 N. ENGL. J. MED. 193, 193, 195 (1986).

²⁹ See Stunkard, et al., *The Body-Mass Index of Twins Who Have Been Reared Apart*, *supra* note 27, at 1483; Stunkard et al., *An Adoption Study of Human Obesity*, *supra* note 28, at 193, 195.

³⁰ See Greenwood & Pittman-Waller, *supra* note 21, at 7; F.G.A.F. Hautvast & P. Deurenberg, *The Risks Associated With Obesity: Epidemiological Studies*, in BODY WEIGHT CONTROL 65, 65-68 (A.E. Bender & L.J. Brookes eds., 1987).

³¹ Hautvast & Deurenberg, *supra* note 30, at 67.

³² *Id.*

20%-25% above their optimal levels are associated with an increased mortality rate.³³

While treatment for obesity generally consists of a reduced intake of calories to induce weight loss and a lifetime of weight maintenance, the concepts of treatment and cure should not be confused.³⁴ Dietary treatment, the most common type prescribed, requires obese people to alter their behavior by eating less than their weight-regulating systems are driving them to eat, and to maintain this state of semi-starvation indefinitely to achieve weight loss.³⁵ Once weight loss is achieved, however, the disease has not necessarily been cured.³⁶

Studies of the long-term effects of dieting show a low success rate for maintained weight loss, thus, illustrating that weight loss is not a cure for obesity.³⁷ After losing weight, the obese person's system is likely to convert a normal intake of calories into excess fat because the metabolic dysfunction of the person's weight-regulating system persists.³⁸ Put another way, the regulatory system remains set at its prior, inappropriate level, regardless of weight loss.³⁹ Consequently, obese

³³ See Aviva Must et al., *Long-term Morbidity and Mortality of Overweight Adolescents: A Follow-up of the Harvard Growth Study of 1922 to 1935*, 327 NEW ENG. J. MED. 1350, 1350-55 (1992) (obesity during adolescence was associated with increased mortality among men and reduced functional status among women); Greenwood & Pittman-Waller, *supra* note 21, at 7 (authors cite the 1979 *Build Study* to support conclusion that the obese have an increased mortality rate).

³⁴ See Willard, *supra* note 22, at 2099; Carol J. Morton, *Weight Loss Maintenance and Relapse Prevention*, in OBESITY AND WEIGHT CONTROL, 315, 331 (Reva T. Frankle & Mei-Uih Yang eds., 1988).

³⁵ See Smoller et al., *supra* note 19, at 133; Willard, *supra* note 22, at 2099-100. The results of prolonged semi-starvation may be more damaging than the condition of obesity itself. See C. Wayne Callaway, *Biologic Adaptations to Starvation and Semistarvation*, in OBESITY AND WEIGHT CONTROL, 97, 106-107 (Reva T. Frankle & Mei-Uih Yang eds., 1988). Semi-starvation predisposes one to bingeing, and repeated dieting leads to greater difficulty in losing weight, a greater efficiency in gaining weight, and a tendency to overeat once food becomes available. *Id.* Additionally, other costs of dietary treatment for obesity can include cold intolerance, hypertension, constipation and other gastrointestinal dysfunctions, depression, fatigue and sleep disorders. *Id.*

³⁶ See Willard, *supra* note 22, at 2099; Morton, *supra* note 34, at 331.

³⁷ See J.C. Cogan & E.D. Rothblum, *Outcomes of Weight-loss Programs*, 118 GENET. SOC. GEN. PSYCHOL. MONOGR. 385, 385 (1992) (after examining results of fifty weight-loss studies conducted in the 1980s, the authors argue that treating obesity through dieting techniques may be a misdirected goal); Morton, *supra* note 34, at 331 (research has indicated that people may experience weight gains during times of stress, and that motivation for weight control increases or decreases in relation to major life events).

³⁸ See Willard, *supra* note 22, at 2100 ("a low resting metabolic rate can be suspected when a patient follows a calorie-controlled diet but still has difficulty preventing weight gain"); Lisa Buckmaster & Kelly D. Brownell, *Behavior Modification: The State of the Art*, in OBESITY AND WEIGHT CONTROL 225, 226 (Reva T. Frankle & Mei-Uih Yang eds., 1988).

³⁹ See Buckmaster & Brownell, *supra* note 38, at 226. Because the body interprets a diet as a period of starvation, when the dieter goes off the diet, the body converts extra calories into fat in anticipation of the next period of starvation. NATIONAL ASSOCIATION TO ADVANCE FAT ACCEP-

individuals face an uphill battle in treating their disease, and they must also endure harmful negative stereotypes perpetuated by a misinformed public.⁴⁰

B. Stereotypes and Discrimination Based on Obesity

Now that prejudice against most formerly stigmatized groups has become unfashionable, if not illegal, one of the last acceptable forms of prejudice is that against obese persons.⁴¹

A majority of Americans regard obesity as a voluntary condition arising from a lack of self-control and, consequently, resulting in a variety of negative stereotypes of the obese.⁴² Studies disclose that both children and adults associate the obese with undesirable traits such as laziness, a lack of discipline, a lack of intelligence and a lack of energy.⁴³ Such stereotypes result in discrimination and job bias against the overweight, which in turn burdens society with a substantial social and economic cost.⁴⁴

TANCE, *DISPELLING COMMON MYTHS ABOUT FAT PEOPLE* (unpublished pamphlet). Thus, yo-yo dieting may lead to a "ratchet effect" resulting in a weight gain greater than the amount lost. *Id.* For more information about NAAFA see *supra* note 6.

⁴⁰ See Buckmaster & Brownell, *supra* note 38, at 226. In describing the difficulty an overweight person faces in attempting to lose weight, one commentator succinctly explained that "[a]n obese person going on a diet to overpower the set point . . . fights a difficult battle. Numerous studies show a remarkable tenacity in human physiology to maintain a fairly constant weight range and a preordained amount of fat." *Id.* According to NAAFA, it may be healthier to maintain a high, but stable, weight and to concentrate on personal fitness than to focus on weight loss, which often leads to the harmful effects of yo-yo dieting. See *DISPELLING COMMON MYTHS ABOUT FAT PEOPLE*, *supra* note 39.

⁴¹ Albert J. Stunkard & Thorkild I.A. Sorensen, *Obesity and Socioeconomic Status — A Complex Relation*, 329 *NEW ENG. J. MED.* 1036, 1037 (1993).

⁴² See Gortmaker et al., *supra* note 5, at 1011; George L. Maddox et al., *Overweight as Social Deviance and Disability*, 9 *J. HEALTH & SOC. BEHAV.* 287, 287 (1968); Natalie Allon, *The Stigma of Overweight in Everyday Life*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 130, 131 (Benjamin B. Wolman ed., 1982). In her February 7, 1994 show entitled *Inside the Life of an Obese Person*, Oprah Winfrey asked her audience members for their opinions of overweight people and received the following stereotypical responses: "Most overweight people are just hiding behind an excuse"; "I find it hard to look at overweight people and to understand what they're going through [and] the way they feel. They need to take control of their lives . . . [a]nd I think that they can change [their conditions]"; "They usually take up way too much room on buses and seats . . . at concerts, anywhere. They're demanding all these rights now. And I don't think they should have them . . . they have a choice. They don't have to be fat." *The Oprah Winfrey Show: Inside the Life of an Obese Person*, *supra* note 20.

⁴³ See Cynthia R. Jasper & Michael L. Klassen, *Stereotypical Beliefs About Appearance: Implications for Retailing and Consumer Issues*, 71 *PERCEPTUAL & MOTOR SKILLS* 519, 522 (1990); Register & Williams, *supra* note 5, at 131.

⁴⁴ See Gortmaker et al., *supra* note 5, at 1008-11 (obesity during adolescence has significant social and economic consequences greater than those of many other chronic physical condi-

Studies of grade school children reveal that discrimination against the obese is deeply rooted in the American psyche.⁴⁵ In one study, children were asked to rank pictures of children with various disabilities.⁴⁶ The child with no disability was ranked first, and the trait of obesity was consistently ranked last behind even physical dismemberment and facial disfigurement.⁴⁷ The authors of this study concluded that children were more concerned with disabilities affecting social relationships than with those affecting physical activities, and, therefore, that the obese child was the least socially desirable choice.⁴⁸

Similarly, a 1993 study conducted by Dr. Steven Gortmaker at the Harvard School of Public Health illustrated the significant social and economic consequences of obesity during adolescence.⁴⁹ The study tracked a sample of 10,039 randomly selected young Americans between the ages of sixteen and twenty-four over a seven year period.⁵⁰ The results showed that obese men and women were less likely to have married, had completed fewer years of education and had lower household incomes than their peers of normal weight.⁵¹ Because the study accounted for a wide variety of known causes of lower socioeconomic attainment, Dr. Gortmaker concluded that the results may best be explained by discrimination based on the stigma of obesity.⁵²

tions); Register & Williams, *supra* note 5, at 139 (economic penalty resulting from obesity is more severe to women than to men).

⁴⁵ See Stephen A. Richardson et al., *Cultural Uniformity in Reaction to Physical Disabilities*, 26 AM. SOC. REV. 241, 242, 246 (1961); see also Erma J. Wright & Tony L. Whitehead, *Perceptions of Body Size and Obesity: A Selected Review of the Literature*, 12 J. COMMUNITY HEALTH 117, 120 (1987).

⁴⁶ Richardson et al., *supra* note 45, at 242, 246.

⁴⁷ See *id.* at 245.

⁴⁸ See *id.*

⁴⁹ Gortmaker, *supra* note 5, at 1009-11.

⁵⁰ *Id.* at 1008.

⁵¹ *Id.* at 1009-10. The effects of obesity were much more severe for women than for men. *Id.* at 1010. Obese women were twenty percent less likely to be married, made \$6,710 less per year, completed fewer years of college and were ten percent more likely to live below the poverty line than women who were not overweight. *Id.* While obese men were eleven percent less likely to be married than men of normal weight, they were only marginally disadvantaged as compared to their peers in the remaining areas. See *id.*

⁵² *Id.* at 1011. Additionally, the researchers found no socioeconomic disparity between persons with a variety of other chronic physical conditions and their peers without these chronic conditions. *Id.* at 1009, 1011 (the chronic physical conditions included asthma, anomaly of the spine, diabetes, arthritis, epilepsy, cerebral palsy, lower-limb anomalies, vision impairment, muscular dystrophy and sickle cell anemia). Dr. Gortmaker reasoned that obesity differs from other chronic conditions in its visibility, for which society holds the obese individual responsible. *Id.* at 1011. Although the researchers hypothesized that the stigma of obesity would promote low self-esteem and would limit psychosocial development, which might help explain the negative socioeconomic impact of obesity, they found no such effect. *Id.* Therefore, Dr. Gortmaker concluded that there is a negative socioeconomic consequence of being overweight that is likely the result of weight discrimination. *Id.* at 1012.

Furthermore, surveys of obese workers reveal the harmful manifestation of stereotypes against the obese in the workplace.⁵³ A 1987 National Association to Advance Fat Acceptance ("NAAFA") survey of its obese members showed that forty percent of the obese men and sixty percent of the obese women who responded had not been hired for at least one job because of their weight.⁵⁴ Additionally, over thirty percent of the obese men and women surveyed had been denied promotions or raises and more than twenty-five percent had been denied benefits because of their weight.⁵⁵

Likewise, another study surveying business people revealed that executives in the highest wage group were seventy-five percent less likely to be overweight than their lower paid colleagues.⁵⁶ The study also showed that only nine percent of those executives in the highest wage group were more than ten pounds overweight.⁵⁷ Moreover, those conducting the study concluded that each pound of fat was likely to cost an executive \$1,000 per year in salary.⁵⁸

Obesity studies illustrate the widespread existence and alarming effect of weight discrimination.⁵⁹ The obese are socially stigmatized from early childhood and throughout their adult lives.⁶⁰ Additionally, overweight workers are less likely to be hired, and if hired much less likely to be promoted or even paid as well as their peers of normal weight.⁶¹ Not surprisingly, victims of obesity discrimination have begun seeking redress in court.⁶² The majority of such claims have arisen under disability statutes that define disability expansively, and, in addition to protecting those who are actually disabled, protect groups that are stigmatized by a perception of disability whether or not one truly exists.⁶³

⁵³ See NAAFA Survey, *supra* note 6; see also Allon, *supra* note 42, at 139.

⁵⁴ NAAFA Survey, *supra* note 6 (the sample size of the survey consisted of 367 women and 78 men).

⁵⁵ *Id.* (benefits that were denied included health and life insurance).

⁵⁶ Allon, *supra* note 42, at 139 (citing the Robert Half Association survey of 1978).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *supra* notes 45-58 and accompanying text. For a discussion of earlier studies regarding weight discrimination in employment see Jane Osborne Baker, Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 952-55 (1982).

⁶⁰ See, e.g., Gortmaker, *supra* note 5, at 1009-11; Wright & Whitehead, *supra* note 45, at 120.

⁶¹ See, e.g., Allon, *supra* note 42, at 139.

⁶² See, e.g., Tudyman v. United Airlines, 608 F. Supp. 739, 740-41 (C.D. Cal. 1984); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 793-94 (N.D. 1987); Gimello v. Agency Rent-A-Car Systems, Inc., 594 A.2d 264, 265 (N.J. Super. Ct. App. Div. 1991); see generally, James G. Frierson, *Obesity as a Legal Disability Under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 LAB. L.J. 286 (1993).

⁶³ See, e.g., Cook v. Rhode Island Dep't of MHRH, 10 F.3d at 20 (claim made under Reha-

II. STATUTORY DISABILITY LAW

A. *The Rehabilitation Act and the Americans with Disabilities Act*

It is the purpose of this [Act] . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ⁶⁴

The Rehabilitation Act of 1973 ("Rehabilitation Act")⁶⁵ and the Americans with Disabilities Act of 1990 ("ADA") protect the disabled against employment discrimination.⁶⁶ The Rehabilitation Act applies only to federal departments and agencies, and to employers who hold federal contracts or are recipients of federal financial assistance.⁶⁷ The ADA, which became effective in July of 1992, protects the disabled from discrimination by private employers with fifteen or more employees, and by state and local entities.⁶⁸ Both Acts define "disability" identically, and, therefore, the case law dealing with issues of disability under the Rehabilitation Act is valid precedent for similar cases arising under the ADA.⁶⁹

The elements of a cause of action for disability discrimination are delineated in § 504 of the Rehabilitation Act [hereinafter § 504].⁷⁰ To prevail, a plaintiff must prove: (1) that she applied for a position in a federally funded program; (2) that she suffered from a cognizable disability; (3) that in spite of her disability she remained "otherwise qualified" for the position; and (4) that she was not accepted "due solely to" her disability.⁷¹ The focus of this Note and the remainder of this section is on the second element regarding the statutory definition of disability.

bilitation Act of 1973); *Gimello*, 594 A.2d at 265 (claim made under New Jersey state disability statute).

⁶⁴ 42 U.S.C.A. § 12101 (b) (West 1993).

⁶⁵ The Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (West Supp. 1994) [hereinafter "Rehabilitation Act"]. Congress amended the language of the Rehabilitation Act in 1992 to make it consistent with that of the Americans with Disabilities Act. *See id.* Throughout this Note, conditions covered by both of these statutes are referred to as "disabilities" except where quoting materials which use the former term "handicap."

⁶⁶ The Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1993) [hereinafter "ADA"].

⁶⁷ 29 U.S.C.A. § 794(a).

⁶⁸ 42 U.S.C.A. § 12111(5)(A).

⁶⁹ *See* 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2).

⁷⁰ *See* 29 U.S.C.A. § 794 (a). Section 504 of the Rehabilitation Act, which has since been codified as 29 U.S.C.A. § 794, states in relevant part that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." *Id.*

⁷¹ *See Cook*, 10 F.3d at 22; *see also supra* note 70 for the relevant statutory language. The term

The Rehabilitation Act and the ADA break down the definition of disability into three distinct categories that broadly describe the scope of the term.⁷² First, an individual with a "physical or mental impairment" that "substantially limits" one or more "major life activities" is a disabled person under the Acts.⁷³ Second, an individual with a "record" of such an impairment satisfies the definition of disabled.⁷⁴ And third, an individual who is "regarded" as having such an impairment, whether or not one truly exists, is also within the statutory meaning of disabled.⁷⁵

For an understanding of the breadth of the first prong of the definition of disability, the terms "physical impairment," "substantially limits," and "major life activities" require further explanation.⁷⁶ Neither Act, however, defines any of these terms. Therefore, it is necessary to look at the relevant administrative guidelines for clarification of their definitions.⁷⁷

The Department of Health and Human Services ("HHS") has enacted regulations implementing the Rehabilitation Act and the Equal Employment Opportunity Commission ("EEOC") has enacted regulations implementing the ADA—both of which interpret the above terms.⁷⁸ Both have identical definitions for "physical impairment" and "major life activities."⁷⁹ Under the regulations, a "physical impairment" is any physiological disorder or condition that affects a bodily system.⁸⁰

of art "solely by reason of" is referred to as "due solely to" in this Note to be consistent with the language used by the First Circuit in the *Cook* opinion.

⁷² See 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2). The Rehabilitation Act defines the term "disability" with respect to an individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C.A. § 706(8)(B). The ADA defines an "individual with a disability" as:

- (A) A physical or mental impairment that substantially limits one or more of the major life activities . . .
- (B) A record of such an impairment; or
- (C) being regarded as having such an impairment.

⁷³ 29 U.S.C.A. § 706(8)(B)(i); 42 U.S.C.A. § 12102(2)(A).

⁷⁴ 29 U.S.C.A. § 706(8)(B)(ii); 42 U.S.C.A. § 12102(2)(B).

⁷⁵ See 29 U.S.C.A. § 706(8)(B)(iii); 42 U.S.C.A. § 12102(2)(C). This Note refers to the analysis used under the "regarded" prong of the definition of disability as "perceived disability" analysis.

⁷⁶ See 29 U.S.C.A. § 706(8)(B)(i); 42 U.S.C.A. § 12102(2)(A).

⁷⁷ See 45 C.F.R. § 84 (1993); 29 C.F.R. § 1630 (1993).

⁷⁸ See *id.*

⁷⁹ See 45 C.F.R. § 84.3; 29 C.F.R. § 1630.2.

⁸⁰ See 45 C.F.R. § 84.3(j)(2)(i); 29 C.F.R. § 1630.2(h). The relevant language regarding the meaning of "physical impairment" is: "Physical . . . impairment means . . . any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the

"Major life activities" include basic everyday functions such as caring for one's self, walking, breathing, hearing and working.⁸¹

The EEOC regulations implementing the ADA similarly elucidate the term "substantially limits."⁸² According to these regulations, an individual is "substantially limit[ed]" if that individual is unable to perform, or is significantly restricted in performing, a major life activity that an average person can perform.⁸³ Additionally, the EEOC suggests that the nature, severity, duration and long term impact of the impairment may bear on the determination of whether an individual is substantially limited in a major life activity.⁸⁴

Although the EEOC and HHS regulations provide guidance to determine what constitutes a disability, they do not attempt to provide an inclusive list of impairments that are disabilities.⁸⁵ Rather, these administrative regulations, buttressed by judicial interpretations of the Rehabilitation Act and the ADA, have emphasized the expansive definition of disability inherent in federal disability law.⁸⁶ The HHS regulations specifically decline to delineate a list of specific diseases for fear it would not be comprehensive.⁸⁷ Similarly, the United States Supreme Court acknowledged that the Rehabilitation Act's definition encom-

following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i); *see also* 29 C.F.R. § 1630.2(h). Additionally, in Appendix A to the Health and Human Services ("HHS") regulations, "Analysis of Final Regulation," HHS expounds on its definition of impairment by stating that it includes "drug addiction and alcoholism" and "any condition which is mental or physical but whose precise nature is not at present known." 45 C.F.R. § 84, App. A, Subpart A(3).

⁸¹ *See* 45 C.F.R. § 84.3(j)(2)(ii); 29 C.F.R. § 1630.2(i). The regulations define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

⁸² *See* 29 C.F.R. § 1630.2(j).

⁸³ *See* 29 C.F.R. § 1630.2(j)(1). The relevant language of the regulation is as follows:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population. . . .

Id.

⁸⁴ *See* 29 C.F.R. § 1630.2(j)(2).

⁸⁵ *See* HHS Analysis of Final Regulation, 45 C.F.R. § 84 App. A, Subpart A(3).

⁸⁶ *See id.*; *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 279-80 & n.5 (1987).

⁸⁷ *See* 45 C.F.R. § 84 App. A, Subpart A(3). Regarding the definition of disability, HHS states that "[t]he definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." *Id.* Additionally, HHS states that "[t]he Department . . . has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps." *Id.*

passes a broad interpretation of disability, not limited to traditional handicaps.⁸⁸

With respect to the second and third prongs of the definition of disability, Congress made clear its intention for a broad interpretation.⁸⁹ The Acts do not require individuals to actually be disabled.⁹⁰ Rather, individuals who are not disabled but have a record of being so or are perceived as being so by their employers are also protected.⁹¹

The legislative history of the Rehabilitation Act sheds further light on Congress's intent to protect those perceived as being disabled.⁹² In discussing the phrase "regarded as having a physical impairment," the report of the Senate Labor and Public Welfare Committee states in part that this definition applies to an individual with some kind of visible physical impairment which in fact does not substantially limit that individual's functioning.⁹³ Additionally, the Senate Report states that the third prong of the definition was intended to include those persons discriminated against on the basis of disability, whether or not they are in fact disabled, just as Title VI prohibits discrimination on the basis of race, whether or not the person discriminated against is in fact a member of a racial minority.⁹⁴

Further guidance in interpreting the meaning of a perceived disability is provided by the HHS regulations which delineate three alternative explanations.⁹⁵ Under these regulations, an individual is perceived as disabled if: she has an impairment that is not substantially limiting but is treated as if it were; she has an impairment that is substantially limiting but only as a result of the attitudes of others toward such impairment; or she has no impairment but is treated as having a substantially limiting one.⁹⁶ Therefore, those persons who do

⁸⁸ *Arline*, 480 U.S. at 279-80 & n.5. The Supreme Court acknowledged that the HHS regulations, which "were drafted with the oversight and approval of Congress," were "of significant assistance" in "determining whether a particular individual is handicapped as defined by the [Rehabilitation] Act" and endorsed the conclusion of the HHS that "a broad definition, one not limited to so-called 'traditional handicaps,' is inherent in the statutory definition." *See id.*

⁸⁹ *See* 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2).

⁹⁰ *See* 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2).

⁹¹ *See* 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2).

⁹² *See* S. REP. NO. 1297, 93rd Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

⁹³ *See id.*

⁹⁴ *See id.* at 6389.

⁹⁵ *See* 45 C.F.R. § 84.3(j)(2)(iv).

⁹⁶ *See id.* The relevant language of the regulation is as follows:

Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that

not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities, are protected under federal disability law.⁹⁷

As a result of this broad definition of disability in the Rehabilitation Act and the ADA, more impairments and conditions are being accepted by the courts as disabilities.⁹⁸ The expansion of the concept of discrimination based on "perceived disabilities" has brought victims of obesity discrimination to court for redress.⁹⁹ So far, however, most of the protection for victims of obesity discrimination has not come from federal law, but rather from state disability statutes.¹⁰⁰

B. State Disability Statutes

Forty-nine states and the District of Columbia have enacted laws that prohibit employment discrimination against the disabled.¹⁰¹ These laws vary in the extent of their reach to private entities and in their definitions of disability.¹⁰² The state disability laws fall into three categories: statutes broader in scope, narrower in scope, or statutes of a similar scope as the federal laws.¹⁰³

substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

Id.

⁹⁷ See *id.*

⁹⁸ See, e.g., *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (9th Cir. 1989) (court held that applicant's back condition may qualify as protected disability under Rehabilitation Act); *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986) (court held past drug addiction may be considered a disability under Rehabilitation Act, but determined that plaintiff's current heroin addiction rendered him unfit for police work); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 623 (9th Cir. 1982) (court held that diabetes qualified as protected disability under Rehabilitation Act); see also 3A ARTHUR LARSON & LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 106.14(a) at 22-13 to 22-18 (1993).

⁹⁹ See, e.g., *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1145 (Cal. 1993); *Gimello v. Agency Rent-A-Car Systems, Inc.*, 594 A.2d 264, 265 (N.J. Super. Ct. App. Div. 1991); *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 480 N.E.2d 695, 695 (N.Y. 1985); see generally, *Frierson*, *supra* note 62.

¹⁰⁰ See, e.g., *Gimello*, 594 A.2d at 265; *Xerox*, 480 N.E.2d at 695, 699; see also LARSON & LARSON, *supra* note 98, §§ 107.30-107.32 at 22-118 to 22-131.

¹⁰¹ See LARSON & LARSON, *supra* note 98, § 107.31 at 22-118 n.1 for a complete listing of state statutes and the District of Columbia statute. Delaware is the only state that has not enacted a disability statute. See *id.* at 22-118.

¹⁰² Compare N.J. STAT. ANN. §§ 10:5-4.1, 10:5-5q (West 1993) (covering private entities and defining disability arguably more broadly than the federal statutes) with ARK. CODE ANN. § 20-14-301(b) (Michie 1991) (statute does not reach private employers) and UTAH CODE ANN. §§ 34-35-2(14), 34-35-6 (1988) (statute does not include perceived disability provision).

¹⁰³ See, e.g., MICH. STAT. ANN. § 3.548 (102)(1) (Callaghan 1990) (statute specifically includes

The statutes of two jurisdictions, Michigan and the District of Columbia, expressly provide broader protection than the federal disability laws.¹⁰⁴ Michigan's Elliott-Larsen Civil Rights Act prohibits discrimination against all of the traditionally protected classes and, in addition, includes the classes of height and weight.¹⁰⁵ Similarly, the District of Columbia outlaws discrimination on the basis of personal appearance.¹⁰⁶

The New York and New Jersey disability laws are examples of state laws that define disability differently than the federal laws and that have been interpreted by courts more broadly than the federal laws.¹⁰⁷ Both states' statutory definitions of disability include conditions that restrict the exercise of bodily functions or are demonstrable by medically accepted diagnostic techniques.¹⁰⁸ Although these definitions are not explicitly broader in scope than the federal ones, the courts of these two states have on occasion found obesity to fit within their respective statutes.¹⁰⁹

Conversely, some state disability laws are drafted more narrowly than their federal counterparts.¹¹⁰ The laws of Arkansas and Mississippi do not reach private employers, and South Carolina's law gives a constricted definition of disability.¹¹¹ Similarly, the definitions of dis-

weight as protected class); UTAH CODE ANN. §§ 34-35-2(14), 34-35-6 (1988) (statute does not include perceived disability provision); R.I. GEN. LAWS § 42-87-1 (1993) (statute defers to federal definitions in defining disability).

¹⁰⁴ See MICH. STAT. ANN. § 3.548 (102)(1) (Callaghan 1990); D.C. CODE ANN. § 1-2512 (a) (1992).

¹⁰⁵ See MICH. STAT. ANN. § 3.548 (102)(1) (Callaghan 1990).

¹⁰⁶ See D.C. CODE ANN. § 1-2512(a) (1992).

¹⁰⁷ See N.J. STAT. ANN. §§ 10:5-4.1, 10:5-5q (West 1993); N.Y. EXEC. LAW §§ 292(21), 296 (McKinney 1993).

¹⁰⁸ See N.J. STAT. ANN. §§ 10:5-4.1, 10:5-5q (West 1993); N.Y. EXEC. LAW §§ 292(21), 296 (McKinney 1993). The New Jersey statute defines Handicapped as "any . . . psychological, physiological or neurological condition which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." N.J. STAT. ANN. § 10:5-5q. Similarly, the New York statute defines disability as "a physical[,] mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. . . ." N.Y. EXEC. LAW §§ 292(21).

¹⁰⁹ See *Gimello*, 594 A.2d at 265; *Xerox*, 480 N.E.2d at 699.

¹¹⁰ See, e.g., ARK. CODE ANN. § 20-14-301(b) (Michie 1991) (statute does not reach private employers); MISS. CODE ANN. § 43-6-15 (1993) (statute does not reach private employers); UTAH CODE ANN. §§ 34-35-2(14), 34-35-6 (1988) (statute does not include perceived disability provision).

¹¹¹ See ARK. CODE ANN. § 20-14-301(b) (Michie 1991); MISS. CODE ANN. § 43-6-15 (1993); S.C. CODE ANN. §§ 43-33-60, 43-33-210 (Law Co-op. 1985). The South Carolina statute defines handicapped as "any person who is visually impaired, legally blind, deaf or hearing-impaired, has

ability in the laws of Utah and Virginia do not include perceived disabilities.¹¹² Additionally, the Tennessee statute does not define the term disability, thus leaving its scope open to interpretation.¹¹³

The majority of state disability laws, however, are written in language analogous to the federal statutes.¹¹⁴ Therefore, cases arising under these state disability laws provide persuasive authority in federal disability cases.¹¹⁵ In addition, because there is a dearth of federal case law regarding weight discrimination, a review of the pertinent state case law sheds light on the extent to which courts have been willing to recognize obesity as a protected disability.¹¹⁶

III. DISABILITY CASE LAW PRIOR TO *COOK V. RHODE ISLAND, DEPARTMENT OF MENTAL HEALTH, RETARDATION, AND HOSPITALS*

A. State Case Law

A review of the weight discrimination cases arising under state disability laws sheds light on the reasoning behind the arguments used on both sides of this issue.¹¹⁷ Courts that have rejected such state law claims have done so primarily because of a lack of medical evidence surrounding the plaintiff's condition.¹¹⁸ In the few cases in which the

a disability of incoordination or palsy resulting from brain, spinal or peripheral nerve damage, has an amputation of upper extremities, or is otherwise disabled in such a way as to interfere with his ability to use written or visual material." S.C. CODE ANN. § 43-33-210.

¹¹² See UTAH CODE ANN. §§ 34-35-2(14), 34-35-6 (1988), 34-35-6 (Supp. 1989); VA. CODE ANN. § 51.5-41 (Michie 1991).

¹¹³ See TENN. CODE ANN. §§ 8-50-103 (1993) (statute protects against employment discrimination based solely on physical, mental or visual handicap, but it does not define any of these terms).

¹¹⁴ For a detailed explanation of particular state laws see Frierson, *supra* note 62, at 290-92.

¹¹⁵ See, e.g., *Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hospitals*, 783 F. Supp. 1569, 1573 (D.R.I. 1992) (citing to state law disability cases as authority).

¹¹⁶ See, e.g., *Cassista*, 856 P.2d at 1144; *Gimello*, 594 A.2d at 265; *Xerox*, 480 N.E.2d at 699; *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 793-94 (N.D. 1987).

¹¹⁷ Compare *Cassista*, 856 P.2d at 1144 (plaintiff's condition of obesity held not to constitute disability under California law) with *Gimello*, 594 A.2d at 265 (obesity recognized as disability under New Jersey law) and *Xerox*, 480 N.E.2d at 699 (obesity recognized as disability under New York law). For a review of state disability case law in general, see Jane Massey Draper, Annotation, *What Constitutes Handicap Under State Legislation Forbidding Job Discrimination on Account of Handicap*, 82 A.L.R.4th 26 (1990).

¹¹⁸ See, e.g., *Krein*, 415 N.W.2d at 795-96 (court held that the existence of common ailments resulting from obesity failed to qualify obesity as a disability under North Dakota law); *Underwood v. Trans World Airlines*, 710 F. Supp. 78, 84 (S.D.N.Y. 1989) (because plaintiff's overweight condition had not been clinically diagnosed as an abnormal medical condition, court held it did not constitute a disability under New York law).

plaintiff has prevailed, however, the courts have concentrated on whether the plaintiff was perceived as disabled because of her weight.¹¹⁹

In 1987, in *Krein v. Marian Manor Nursing Home*, the North Dakota Supreme Court concluded that obesity is not a disability under North Dakota law unless accompanied by medically significant ailments.¹²⁰ In *Krein*, the plaintiff, terminated as a nurse's aid by the defendant nursing home, claimed employment discrimination on the basis of her obesity.¹²¹ The North Dakota law, however, did not contain a "perceived disability" provision and did not define disability.¹²² The *Krein* court, relying on a WEBSTER's dictionary definition of disability,¹²³ rejected the plaintiff's claim because she failed to demonstrate that her weight physically incapacitated her.¹²⁴ The court did concede, however, that the state law may comprehend an obese condition that significantly impairs a person's abilities.¹²⁵

Additionally, in the 1981 case of *Greene v. Union Pacific Railroad*, a federal district court applying Washington state law held that, because obesity is a mutable condition, it cannot be considered a disability.¹²⁶ In this case, the plaintiff was morbidly obese and worked for the defendant railroad.¹²⁷ Upon rejection of his request to transfer to the defendant's fire department, the plaintiff filed suit claiming disability discrimination.¹²⁸ The *Greene* court concluded that the plaintiff was not disabled because his weight varied and, thus, was not an immutable condition such as blindness or lameness.¹²⁹ Recent decisions, however, have found this reasoning unconvincing.¹³⁰

¹¹⁹ See, e.g., *Gimello*, 594 A.2d at 272-73.

¹²⁰ See 415 N.W.2d at 795-96.

¹²¹ *Id.* at 793-94.

¹²² See *id.* at 795. The court cited to the then existing North Dakota law, N.D. CENT. CODE §§ 14-02.4-01 and 14-02.4-03, that stated in relevant part: "It is the policy of this state to prohibit discrimination on the basis of . . . the presence of any mental or physical disability," and "[i]t is a discriminatory practice for an employer . . . to discharge an employee . . . because of . . . physical or mental handicap. . . ." *Id.*

¹²³ *Id.* at 796 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) as follows: "a physical or mental illness, injury or condition that hinders, impedes or incapacitates").

¹²⁴ See *id.*

¹²⁵ *Krein*, 415 N.W.2d at 796.

¹²⁶ 548 F. Supp. 3, 5 (W.D. Wash. 1981).

¹²⁷ *Id.* at 4-5.

¹²⁸ See *id.* at 5. The defendant's purported reason for rejecting the plaintiff's request was plaintiff's failure to meet the height and weight specifications for defendant's firefighting position. See *id.*

¹²⁹ *Id.* Alternatively, the court held that, even if obesity was a disability, the plaintiff was not "otherwise qualified" for a firefighting position because the defendant's height and weight requirements were a "bona fide occupational qualification." *Id.*

¹³⁰ See, e.g., *Gimello*, 594 A.2d at 265, 273; *Xerox*, 480 N.E.2d at 698-99.

For example, in 1985, in *State Division of Human Rights ex rel. McDermott v. Xerox Corp.*, New York's highest court held that obesity may constitute a disability under New York law whether or not it is an immutable condition.¹³¹ In *McDermott*, the plaintiff, a computer programmer, applied for a job with Xerox but failed a preemployment medical examination because she was obese.¹³² Xerox failed to explain why plaintiff's weight would interfere with the position in question, and plaintiff established that her weight had not affected her ability to perform similar jobs in the past.¹³³ In rejecting defendant's argument that the statute should only apply to disabilities that are immutable, the court concluded that New York state law protects all persons with disabilities and not just those with hopeless conditions.¹³⁴

Similarly, in the 1991 case of *Gimello v. Agency Rent-A-Car Systems, Inc.*, the Appellate Division of the Superior Court of New Jersey sustained plaintiff's claim of obesity discrimination under both an actual and perceived disability analysis.¹³⁵ In *Gimello*, the plaintiff claimed that he was fired from his position as office manager of a car rental agency because of his obesity, and not because of the performance-related problems as the defendant claimed.¹³⁶ The court recognized the plaintiff's obesity as a medical condition for which he had sought treatment and, therefore, concluded that it constituted an actual disability under the New Jersey law.¹³⁷ Additionally, the *Gimello* court concluded that the plaintiff was fired because his supervisors perceived his obesity as a defect when in fact it did not disqualify him in any proven sense from his present job or career path.¹³⁸

¹³¹ 480 N.E.2d 695, 698-99 (N.Y. 1985). The court described the relevant language of the then existing New York statute as follows: "the term 'disability' means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions [which] prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. . . ." *Id.* at 696.

¹³² *Id.* at 695-696 (plaintiff stood five feet, six inches tall and weighed 249 pounds).

¹³³ *See id.* at 696.

¹³⁴ *Id.* at 698. The court went on to emphasize that "nothing in the statute or its legislative history indicat[es] a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight." *Id.* at 699.

¹³⁵ *See* 594 A.2d 264, 273 (N.J. Super. Ct. App. Div. 1991).

¹³⁶ *Id.* at 265. Plaintiff produced memoranda praising his job performance and was able to show that, when he became subject to the supervision of a new manager, problems arose regarding his body weight. *Id.* at 266-68.

¹³⁷ *Id.* at 273. The relevant New Jersey statute relied on by the court defined "handicap" as: "suffering . . . from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which . . . is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." *Id.* at 274 (citing N.J. STAT. ANN. § 10:5-5q).

¹³⁸ *Id.* at 273.

Finally, in the most recent state court case to address the issue of obesity as a disability, *Cassista v. Community Foods, Inc.*, the California Supreme Court reversed the decision by the California Court of Appeal and held that obesity as a voluntary condition is not a disability under California law.¹³⁹ The plaintiff in *Cassista*, who was five feet four inches tall and weighed 305 pounds, applied for an available position in a health food store, and was rejected after an interview by the defendant, Community Foods.¹⁴⁰ Claiming employment discrimination on the basis of her weight, the plaintiff sued under the California Fair Employment and Housing Act which defines disability in a similar manner as the federal laws.¹⁴¹

The California Court of Appeal sustained Cassista's discrimination claim, holding that the defendant rejected Cassista because it perceived her as disabled.¹⁴² The appellate court concluded that Community Food's admission that it believed that plaintiff would not be able to keep up with the pace of work established that it regarded her as limited in major life activities and, thus, disabled.¹⁴³ Additionally, the court determined that the defendant's rejection of Cassista was based upon stereotypical beliefs about the abilities of overweight people and that it was precisely the type of conduct the state law was enacted to prevent.¹⁴⁴

On appeal, the Supreme Court of California disagreed and determined that when obesity is a voluntary condition it does not fall within the scope of the California law.¹⁴⁵ In rejecting the plaintiff's claim, the California Supreme Court held that, to qualify as either an actual or perceived disability under California law, obesity must result from a physiological disorder.¹⁴⁶ The *Cassista* court, however, relied on a portion of the federal district court opinion in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals* regarding mu-

¹³⁹ See 856 P.2d 1143, 1152-53, 1154 (Cal. 1993) (the court concluded that obesity must be the result of a physiological disorder even to qualify as a perceived disability) [hereinafter *Cassista II*]. For a similar analysis of obesity as a disability under state law see Civil Serv. Comm'n of Pittsburgh v. Commonwealth, Pennsylvania Human Relations Comm'n, 591 A.2d 281 (Pa. 1991). In that case, the Pennsylvania Supreme Court overruled the state appellate court which had found plaintiff's obesity to constitute a perceived disability. See *id.* at 284.

¹⁴⁰ *Cassista v. Community Foods*, 10 Cal. Rptr. 2d 98, 101 (Cal. Ct. App. 1992) [hereinafter *Cassista I*].

¹⁴¹ See *id.* at 101, 102, 103-105.

¹⁴² *Cassista I*, 10 Cal. Rptr. at 105.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 110.

¹⁴⁵ See *Cassista II*, 856 P.2d at 1152, 1154.

¹⁴⁶ *Id.* at 1153-54. Additionally, the physiological disorder must affect one or more of the bodily systems and limit a major life activity, or be perceived as limiting one. *Id.* at 1153.

table and voluntary conditions that was subsequently overturned by the United States Court of Appeals for the First Circuit.¹⁴⁷

The state law disability cases show a split in the reasoning used by courts in analyzing obesity as a protected disability.¹⁴⁸ Courts that focus on the medical aspects of the disease tend to view obesity as a voluntary condition and are reluctant to classify it as a disability.¹⁴⁹ Alternatively, courts that have expanded the term disability beyond immutable conditions have found obesity to qualify as both an actual and perceived disability under state law.¹⁵⁰ Prior to the *Cook* case, however, no court had found obesity to constitute a disability under federal law.¹⁵¹

B. Federal Case Law

The federal disability case law prior to the First Circuit's decision in *Cook* dealt primarily with conditions other than obesity.¹⁵² For example, in 1987, the United States Supreme Court recognized tuberculosis as a protected disability and indicated that the federal definition of disability is an expansive one.¹⁵³ Additionally, several federal appellate and district courts have extended the reach of the Rehabilitation Act to various other impairments.¹⁵⁴ Of the few courts that have directly addressed the disease of obesity, however, none has found it to be a federally protected disability.¹⁵⁵

¹⁴⁷ See *id.* at 1152; see also *Cook*, 10 F.3d at 23-24 & n.7.

¹⁴⁸ See *supra* notes 117-47 and accompanying text for a discussion of relevant state case law.

¹⁴⁹ See, e.g., *Greene*, 548 F. Supp. at 5 (obesity held not to be within Washington disability discrimination laws due to its arguably mutable nature). For a discussion of this case see *supra* notes 126-130 and accompanying text.

¹⁵⁰ See, e.g., *Gimello*, 594 A.2d at 273. For a discussion of this case see *supra* notes 135-138 and accompanying text.

¹⁵¹ See, e.g., *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (federal district court rejected plaintiff's claim that his excessive weight constituted a disability under Rehabilitation Act).

¹⁵² See, e.g., *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (9th Cir. 1989) (court held that applicant's back condition may qualify as protected disability under Rehabilitation Act); *Heron v. McGuire*, 803 F.2d 67, 68-69 (2d Cir. 1986) (court held past drug addiction may be considered disability under Rehabilitation Act, but determined that plaintiff's current heroin addiction rendered him unfit for police work); *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 623 (9th Cir. 1982) (court held that diabetes qualified as protected disability under Rehabilitation Act); see also *LARSON & LARSON, supra* note 98, § 106.14(a) at 22-13 to 22-18.

¹⁵³ See *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 278-280 & n.5, 284-285, 289 (1987).

¹⁵⁴ See *supra* note 152 for a description of three cases holding various impairments to constitute statutory disabilities.

¹⁵⁵ See, e.g., *Tudyman*, 608 F. Supp. at 746 (federal district court rejected plaintiff's claim that his excessive weight constituted disability under the Rehabilitation Act).

In the 1987 case of *School Board of Nassau County, Florida v. Arline*, the United States Supreme Court interpreted the Rehabilitation Act's definition of disability and determined that the contagious disease of tuberculosis fell within the scope of the Act.¹⁵⁶ In reaching its holding, the Court endorsed the HHS regulations, which it emphasized were drafted with the oversight and approval of Congress.¹⁵⁷ Additionally, the Court noted that a broad interpretation of disability, rather than one limited to traditional handicaps, was inherent in the statutory definition.¹⁵⁸

In *Arline*, the plaintiff sued the defendant school board for employment discrimination after being fired from her teaching job due to her tuberculosis.¹⁵⁹ The Supreme Court held that a person suffering from a contagious disease can be considered a disabled person under the Rehabilitation Act, and concluded that the plaintiff here was such a person.¹⁶⁰ In determining that tuberculosis was a cognizable disability, the *Arline* Court emphasized that society's accumulated myths and fears about disease are as debilitating as the physical limitations that flow from actual impairment.¹⁶¹

Similarly, several federal appellate and district court decisions have extended the reach of the Rehabilitation Act to a variety of non-traditional disabilities.¹⁶² These courts have found alcoholism, allergies, back problems, cancer, cerebral palsy, diabetes, drug addiction, epilepsy, heart disease and multiple sclerosis to constitute disabilities under the Rehabilitation Act.¹⁶³ In contrast, although a few district courts had considered the issue prior to the *Cook* case, none had recognized obesity as a federally protected disability.¹⁶⁴

For example, in the 1984 case of *Tudyman v. United Airlines*, the United States District Court for the Central District of California rejected plaintiff's argument that his excessive weight constituted a dis-

¹⁵⁶ 480 U.S. at 289.

¹⁵⁷ See *id.* at 279.

¹⁵⁸ See *id.* at 278-80 & n.5.

¹⁵⁹ *Id.* at 276.

¹⁶⁰ *Id.* at 289. The Court, however, remanded the case for a determination of whether the plaintiff was otherwise qualified for her position. *Id.*

¹⁶¹ *Arline*, 480 U.S. at 284.

¹⁶² See, e.g., *Thornhill*, 866 F.2d at 1184 (court held that applicant's back condition may qualify as a protected disability under Rehabilitation Act); *Heron*, 803 F.2d at 68-69 (court held past drug addiction may be considered disability under Rehabilitation Act, but determined that plaintiff's current heroin addiction rendered him unfit for police work); *Bentivegna*, 694 F.2d at 623 (court held that diabetes qualified as protected disability under Rehabilitation Act); see also LARSON & LARSON, *supra* note 98, § 106.14(a) at 22-13 to 22-18.

¹⁶³ See *supra* note 162.

¹⁶⁴ See *Cook*, 10 F.3d at 20, 22 (court describes case as "pathbreaking 'perceived disability' case").

ability under the Rehabilitation Act.¹⁶⁵ The plaintiff in *Tudyman*, an avid bodybuilder, brought suit after being rejected as a flight attendant by the defendant airline because he failed to meet specified weight guidelines.¹⁶⁶ Because the plaintiff voluntarily chose to maintain his weight above the airline's standard, the court held for the defendant.¹⁶⁷ The *Tudyman* court reasoned that the Rehabilitation Act did not protect the plaintiff's right to be both a bodybuilder and a flight attendant.¹⁶⁸

Similarly, the issue of obesity as a § 504 disability arose in the 1986 case of *Russell v. Salve Regina College* but was never reached by the court.¹⁶⁹ The plaintiff in *Russell* claimed that her expulsion from defendant's nursing program was the result of obesity discrimination, and, in the alternative, that the defendant had breached its contract with her.¹⁷⁰ The United States District Court for the District of Rhode Island dismissed plaintiff's § 504 claim because of her failure to show that the defendant was the recipient of federal funds.¹⁷¹ In discussing the breach of contract claim, however, the *Russell* court made known its aversion to weight discrimination.¹⁷² The court questioned whether Russell's weight was a legitimate impediment to completing the nursing program or whether the College's evaluation was tainted by an unreasonable aversion to obesity.¹⁷³

In sum, the federal appellate and district courts have followed the Supreme Court's expansive interpretation of disability in *Arline* and have extended the Rehabilitation Act's protection to several non-traditional disabilities.¹⁷⁴ Prior to the *Cook* case, however, no court had

¹⁶⁵ 608 F. Supp. 739, 746 (D.C. Cal. 1984).

¹⁶⁶ *Id.* at 740-41.

¹⁶⁷ *Id.* at 746. The plaintiff, although overweight, had excessive muscle tissue and a relatively small amount of fat tissue, and thus was not obese in the medical sense. *See id.* at 741.

¹⁶⁸ *Id.* at 746.

¹⁶⁹ *See* 649 F. Supp. 391, 395-396, 398 (D.R.I. 1986), *aff'd*, 890 F.2d 484 (1st Cir. 1989), *rev'd on other grounds*, 499 U.S. 225 (1991) (Court reversed regarding separate issue of whether questions of state law are reviewable on appeal de novo).

¹⁷⁰ *Id.* at 395-96 (plaintiff made a total of eight separate claims).

¹⁷¹ *Id.* at 397-98.

¹⁷² *See id.* at 406.

¹⁷³ *Id.* at 406. The court stated that:

A genuine question exists as to whether adipositis was, in Russell's case, a legitimate impediment to due fulfillment of the clinical requirements of the nursing program (as Salve maintains), or whether the College's evaluation was tainted by an unreasonable aversion to obesity or by a desire to expel Russell because she did not conform to the "Salve image."

Id.

¹⁷⁴ *See supra* notes 162-64 and accompanying text for a description of various conditions which have satisfied the definition of disability.

recognized obesity as a federally protected disability.¹⁷⁵ It was in view of this body of existing law that the United States Court of Appeals for the First Circuit heard Bonnie Cook's case.

IV. THE *COOK v. RHODE ISLAND, DEPARTMENT OF MENTAL HEALTH, RETARDATION, AND HOSPITALS* DECISION

On November 22, 1993, the United States Court of Appeals for the First Circuit, in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, became the first federal appellate court to hold that an individual's obesity may be included within the Rehabilitation Act's definition of disability.¹⁷⁶ The plaintiff in the case, Bonnie Cook, who was five foot three and weighed over 300 pounds, claimed disability discrimination against the defendant for its refusal to hire her because of her weight.¹⁷⁷ The Court of Appeals for the First Circuit upheld the district court's order granting the plaintiff equitable relief and endorsing a jury's verdict, which recognized Ms. Cook's morbid obesity as a statutory disability and granted her compensatory damages.¹⁷⁸ Additionally, the Court of Appeals rejected the reasoning of the district court in an earlier opinion that obesity can only be a disability when it is an immutable or involuntary condition.¹⁷⁹ In reaching its holding, the First Circuit reasoned that employment discrimination based on negative stereotypes about overweight people is the type of behavior that federal disability laws were enacted to prevent.¹⁸⁰

In November 1988, Bonnie Cook applied for an available position as an institutional attendant for the mentally retarded ("IA-MR") at the Ladd Center, a residential facility for retarded persons operated by Rhode Island's Department of Mental Health, Retardation, and Hospitals ("MHRH").¹⁸¹ Ms. Cook had previously worked at the Ladd Center as an IA-MR from 1978 to 1980 and from 1981 to 1986, leaving, on both occasions, voluntarily and with a spotless performance record.¹⁸²

¹⁷⁵ See *supra* notes 165-173 and accompanying text for a discussion of federal case law rejecting claims concerning obesity as a disability.

¹⁷⁶ See *Cook v. Rhode Island, Dep't of MHRH*, 10 F.3d 17, 20, 28 (1st Cir. 1993) [hereinafter *Cook II*]. The court limited its holding to the facts of the case, which concerned the plaintiff's morbid obesity. *Id.* at 28.

¹⁷⁷ See *id.* at 20-21.

¹⁷⁸ See *id.* at 21, 28 (upholding jury award of \$100,000 in damages to Ms. Cook, and equitable relief of appointment to position for which she had applied).

¹⁷⁹ See *id.* at 23-25 & n.7 (rejecting reasoning in district court's opinion denying defendant's motion to dismiss).

¹⁸⁰ See *id.* at 27.

¹⁸¹ Brief of Plaintiff-Appellee at 4, *Cook II*, 10 F.3d 17 (No. 93-1093).

¹⁸² *Cook II*, 10 F.3d at 20.

During a pre-employment physical, a nurse determined that, although Ms. Cook, at five foot three inches and over 300 pounds, was morbidly obese, she was not limited in any manner in her ability to perform the duties of an IA-MR.¹⁸³ MHRH, however, relying on the opinion of the Ladd Center's Dr. O'Brien, refused to hire Bonnie Cook because of her morbid obesity.¹⁸⁴ MHRH endorsed Dr. O'Brien's conclusion that Ms. Cook's condition would limit her ability to safely evacuate patients in the case of an emergency, and would result in an increase in absenteeism and workers' compensation claims.¹⁸⁵

As a result, in November 1990, Bonnie Cook brought suit against defendant MHRH in the United States District Court for the District of Rhode Island, claiming disability discrimination under § 504 of the Rehabilitation Act and analogous state laws.¹⁸⁶ Ms. Cook claimed that MHRH unlawfully rejected her application for employment on the basis of her morbid obesity.¹⁸⁷ In response, MHRH filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, claiming that plaintiff's suit was time-barred and asserting that morbid obesity is not a disability within the meaning of the Rehabilitation Act.¹⁸⁸

A. The District Court Opinion Denying Defendant MHRH's Motion to Dismiss

In its 1992 opinion denying defendant's Rule 12(b)(6) motion to dismiss, the district court concluded that Ms. Cook's claim was timely, and that Ms. Cook could possibly prove that her obesity was a physical impairment or that MHRH perceived it to be a physical impairment as required under the Rehabilitation Act.¹⁸⁹ In dismissing MHRH's claim of untimeliness, the court explained that the statute of limitations under § 504 is that applied by the state to its most analogous type of cause of action.¹⁹⁰ Here, Bonnie Cook was well within the three years

¹⁸³ See *id.* at 20-21.

¹⁸⁴ See *id.* at 21, 28 & n.13.

¹⁸⁵ See *id.*

¹⁸⁶ Brief of Plaintiff-Appellee at 1-2, *Cook II*, 10 F.3d 17 (No. 93-1093). Plaintiff invoked pendent jurisdiction of the federal district court for her analogous state law claims arising under R.I. GEN. LAWS § 42-87-1. *Id.* at 1. Because of the similarity between the federal and state claims, the courts focused their attention on the federal claim arising under the Rehabilitation Act. See *Cook II*, 10 F.3d at 21 n.2.

¹⁸⁷ See *Cook v. Rhode Island, Dep't of MHRH*, 783 F. Supp. 1569, 1570-71 (D.R.I. 1992) [hereinafter *Cook I*].

¹⁸⁸ See *id.* at 1571.

¹⁸⁹ *Cook I*, 783 F. Supp. at 1572, 1573-74, 1576.

¹⁹⁰ *Id.* at 1572.

allowed for state personal injury claims in Rhode Island.¹⁹¹ Regarding the issue of obesity as a disability, the court noted that neither the legislative history nor the text of the statute provided any guidance and, therefore, focused its attention on the regulations promulgated by the HHS.¹⁹²

Because the HHS regulations do not specifically refer to obesity, the district court reasoned that in order for obesity to be considered an actual disability it must be shown to be a physiological disorder affecting one of the bodily systems enumerated in the regulations.¹⁹³ The court, citing both *Tudyman* and *Greene*, stated that Ms. Cook would have to establish that her morbid obesity resulted from an immutable medical condition that she was powerless to control.¹⁹⁴ Additionally, the court explained that under the HHS regulations the plaintiff would have to establish that her condition substantially limited one or more major life activities, such as her ability to work.¹⁹⁵ In rejecting defendant's motion, the court concluded that the issues surrounding obesity as a cognizable disability could not be decided from the limited record before it.¹⁹⁶

Finally, the district court acknowledged that Ms. Cook could prevail on a perceived disability argument even if the complaint indicated that she was not actually disabled.¹⁹⁷ The court emphasized that the language "regarded as having such an impairment" extended the reach of the Rehabilitation Act to individuals with some kind of visible physical condition which either does not substantially limit their functioning, or limits their functioning only because of the negative reactions of others to their condition.¹⁹⁸ Because MHRH refused to hire

¹⁹¹ *Id.* The court assumed that R.I. GEN. LAWS § 9-1-14, governing actions for personal injury, was most analogous. *Id.* Defendant erroneously argued that the thirty day statute of limitations following denial by the EEOC in Title VII cases applied. *Id.* at 1571.

¹⁹² *See id.* at 1572-73. The court found the HHS regulations to be particularly relevant because it was through this agency that the Ladd Center received federal funding, thus, placing it within the scope of the Rehabilitation Act. *See id.* at 1573.

¹⁹³ *Id.* at 1573. The following bodily systems are enumerated in the relevant regulation: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine. 45 C.F.R. § 84.3(j)(2)(i)(A); see *supra* notes 78-81 and accompanying text for a discussion of the HHS regulations defining "physical impairment" and "major life activities."

¹⁹⁴ *Cook I*, 783 F. Supp. at 1573.

¹⁹⁵ *Id.* at 1574. For a discussion of the Equal Employment Opportunity Commission ("EEOC") regulation defining "substantially limits," 29 C.F.R. § 1630.2(j), see *supra* notes 82-84 and accompanying text.

¹⁹⁶ *See Cook I*, 783 F. Supp. at 1574.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1575 (quoting S. REP. NO. 1297, 93rd Cong., 2d Sess. 4 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6414; and *Arline*, 480 U.S. at 283).

Cook solely because of her obesity, the court concluded that, if Ms. Cook could demonstrate that MHRH perceived obesity as a disability and that she was otherwise qualified for the IA-MR position, she would be successful in proving her claim.¹⁹⁹

Bonnie Cook's case was tried before a jury in September 1992.²⁰⁰ Defendant, MHRH, moved for judgment as a matter of law at the close of testimony.²⁰¹ The court reserved judgment and submitted the case to the jury on three interrogatories to which defendant made no objection.²⁰² The jury decided in favor of Ms. Cook and awarded her \$100,000 in compensatory damages.²⁰³ Additionally, the court denied defendant's motion for judgment as a matter of law and granted plaintiff equitable relief, ordering her appointment to the IA-MR position with retroactive seniority.²⁰⁴ Subsequently, MHRH filed a timely appeal from the final judgment of the district court.²⁰⁵

B. *The First Circuit's Opinion*

The United States Court of Appeals for the First Circuit affirmed the district court's order and held that Ms. Cook's morbid obesity was a federally protected disability.²⁰⁶ In reaching its holding, the First Circuit rejected the reasoning endorsed by the district court in the earlier *Cook* opinion, and advanced by the defendant, that a physical impairment must be immutable to qualify under § 504 as a disability.²⁰⁷ Additionally, the court discounted the defendant's arguments that its rejection of the plaintiff for a single position did not violate the statute, and in the alternative that Ms. Cook was not otherwise qualified for the IA-MR position.²⁰⁸

¹⁹⁹ See *id.* at 1576. MHRH offered an additional argument that it had made a reasonable accommodation by agreeing to hire Ms. Cook if she reduced her weight to 300 pounds or less. *Id.* The court swiftly rejected this argument stating that: "there is no indication that MHRH made any such modification to accommodate Cook's obesity. Rather what it did was require Cook to reduce or eliminate her alleged handicap in order to be hired." See *id.*

²⁰⁰ Brief of Plaintiff-Appellee at 2, *Cook II*, 10 F.3d 17 (No. 93-1093).

²⁰¹ *Cook II*, 10 F.3d at 21.

²⁰² *Id.*

²⁰³ *Id.* The jury found that Ms. Cook, apart from her morbid obesity, was qualified to perform the duties of an institution attendant for the mentally retarded ("IA-MR"), and that defendant did not reasonably believe that Ms. Cook lacked such qualifications. *Id.* at 21 n.3.

²⁰⁴ Brief of Plaintiff-Appellee at 3, *Cook II*, 10 F.3d 17 (No. 93-1093); see also *Cook*, 10 F.3d at 21.

²⁰⁵ *Cook II*, 10 F.3d at 21.

²⁰⁶ See *id.* at 28.

²⁰⁷ See *id.* at 23-24 & n.7.

²⁰⁸ *Id.* at 25-28; see also Brief of Defendant, Appellant at 18-28, *Cook*, 10 F.3d 17 (No. 93-1093).

The First Circuit structured its analysis around the four elements of a § 504 failure to hire cause of action.²⁰⁹ Initially, the court addressed the first element requiring that the defendant employer be a recipient of federal funding.²¹⁰ Because MHRH conceded that the Ladd Center obtained substantial funding from the HHS, the First Circuit concluded that the plaintiff had satisfied the first element of her claim.²¹¹

Next, the *Cook* court addressed the second element of the plaintiff's claim regarding morbid obesity as a cognizable disability.²¹² Because Ms. Cook pursued her claim solely under the "regarded" as having a disability prong of the statute, the court limited its opinion to a perceived disability analysis.²¹³ The court referred to the HHS regulations that define a perceived disability as a "physical impairment" that does not "substantially limit" a "major life activity" but is treated as if it does, or the perception of a substantially limiting impairment when no actual impairment exists.²¹⁴

In analyzing the second element, the First Circuit initially determined that Ms. Cook's morbid obesity could reasonably be considered a "physical impairment."²¹⁵ The court reasoned that the expert testimony that morbid obesity resulted from metabolic and appetite suppression dysfunctions, and that it adversely affected the musculoskele-

²⁰⁹ See *Cook II*, 10 F.3d at 22. To prevail on a disability discrimination claim under section 504 of the Rehabilitation Act [hereinafter § 504], the plaintiff has the burden of proving: (1) that she applied for a position in a federally funded program; (2) that she suffered from a cognizable disability; (3) that in spite of her disability she remained otherwise qualified for the position; and (4) that she was not accepted due solely to her disability. See *id.*; see *supra* notes 70-71 and accompanying text for an explanation of these elements.

²¹⁰ *Cook II*, 10 F.3d at 22.

²¹¹ See *id.*

²¹² *Cook II*, 10 F.3d at 22. The First Circuit structured its analysis by examining in sequence the terms "physical impairment," "substantially limits," and "major life activities" as they related to Ms. Cook's condition. See *id.*; see also 29 U.S.C.A. § 706(8)(B). See *supra* notes 72-84 and accompanying text for an explanation of the statutory meaning of each of these terms.

²¹³ See *Cook II*, 10 F.3d at 22-23; see also 29 U.S.C.A. § 706(8)(b). See *supra* notes 89-97 and accompanying text for a discussion of the *perceived disability* prong of the statutory definition of disability.

²¹⁴ *Cook II*, 10 F.3d at 22-23. The relevant language from the HHS regulations is as follows:

[i]s regarded as having an impairment means (A) has a physical . . . impairment that does not substantially limit major life activities but that is treated . . . as constituting such a limitation; . . . or (C) has none of the impairments . . . of this section but is treated . . . as having such an impairment.

45 C.F.R. § 84.3(j) (2)(iv) (1993). See *supra* notes 95-97 and accompanying text for a discussion of the above HHS regulations.

²¹⁵ *Cook II*, 10 F.3d at 23. Physical impairment is defined in the HHS regulations as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine. . . ." 45 C.F.R. § 84.3(j) (2)(i) (A) (1993). See *supra* notes 72-80 and accompanying text for further explanation of this statutory term.

tal, respiratory and cardiovascular systems, qualified Ms. Cook's condition as a physical impairment.²¹⁶ Alternatively, the court emphasized that § 504's perceived disability prong may be satisfied whether or not the plaintiff actually has a physical impairment.²¹⁷

The First Circuit determined that even if Ms. Cook's obesity was not a physical impairment, MHRH treated it as one.²¹⁸ The court reasoned that Dr. O'Brien's statement that morbid obesity affects "virtually every [body] system" supported a finding that defendant regarded Ms. Cook's condition as a physical impairment.²¹⁹ The *Cook* court continued its analysis by addressing the defendant's two arguments opposing this conclusion.²²⁰

The First Circuit rejected defendant's first argument that mutable conditions are per se precluded from the statutory definition of physical impairment.²²¹ The court reasoned that because no mention of mutability is made within the statute or regulations, it is not a necessary requirement.²²² Rather, the court determined that mutability should only be considered as to the substantiality of the physical impairment.²²³

Moreover, the court cautioned the defendant about confusing the treatment used for obesity with its cure.²²⁴ Although it acknowledged that perennial undereating may result in weight loss, the First Circuit found that plaintiff's morbid obesity was likely not curable because of the permanent nature of a dysfunctional metabolism.²²⁵ Finally, the court held that, even if immutability were a requirement, under the perceived disability doctrine, an employer's perception that the impairment was immutable would suffice.²²⁶

Similarly, the First Circuit dismissed defendant's second argument that morbid obesity resulting from voluntary conduct cannot be considered a physical impairment.²²⁷ For support, the *Cook* court relied on prior cases in which other supposed "voluntary" conditions had been

²¹⁶ *Cook II*, 10 F.3d at 23.

²¹⁷ *Id.* at 22.

²¹⁸ *Id.* at 23.

²¹⁹ *Id.* at 23 & n.6.

²²⁰ *See id.* at 23.

²²¹ *See Cook II*, 10 F.3d at 23-24 & n.7.

²²² *Cook II*, 10 F.3d at 23 n.7. The court stated that "[m]utability is nowhere mentioned in the statute or regulations, and we see little reason to postulate it as an automatic disqualifier under section 504." *Id.*

²²³ *Id.* at 23 n.7, 24.

²²⁴ *See id.* at 24.

²²⁵ *See id.*

²²⁶ *Id.*

²²⁷ *Cook II*, 10 F.3d at 24.

held to constitute physical impairments under § 504.²²⁸ Emphasizing the absence of any statutory language regarding voluntariness, the court reasoned that the manner in which an individual became impaired is of little consequence.²²⁹ Additionally, the court reiterated that the ample medical testimony in the record suggested that Ms. Cook's morbid obesity was a physiologically-based condition, not a voluntary condition.²³⁰

The *Cook* court continued its analysis of obesity as a cognizable disability by examining whether MHRH regarded plaintiff's condition as "substantially limiting" one or more of her "major life activities."²³¹ Looking first to define "major life activities," the court referred to the HHS regulations which define the term as basic everyday functions including caring for one's self, performing manual tasks and working.²³² The court found that Dr. O'Brien's testimony that he believed that Ms. Cook's morbid obesity would interfere with her ability to walk, lift, bend, stoop and kneel was reason enough for the jury to properly conclude that MHRH viewed plaintiff's suspected impairment as impeding her major life activities.²³³

In concluding its analysis of the second element of the plaintiff's claim, the First Circuit held that the defendant treated Ms. Cook as if her morbid obesity "substantially limited" a major life activity.²³⁴ Unable to find guidance within the Rehabilitation Act, the court endorsed the definition of "substantially limits" provided in the EEOC regulations implementing the ADA.²³⁵ The First Circuit determined that Dr. O'Brien's admission that he believed plaintiff's obesity foreclosed a broad range of employment options in the health care industry was sufficient to resolve this issue.²³⁶ It held that a jury could reasonably have inferred

²²⁸ See *id.* The court noted the following conditions to which "the Act indisputably applies . . . [and] that may be caused or exacerbated by voluntary conduct such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like." *Id.*

²²⁹ See *id.* (voluntariness is only relevant in regards to the substantiality of the impairment).

²³⁰ *Id.* at 24.

²³¹ *Id.* at 25.

²³² See *Cook II*, 10 F.3d at 25. The relevant language is as follows: "[m]ajor life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3 (j) (2)(ii) (1993). See *supra* notes 78-81 for further discussion of the statutory meaning of "major life activities."

²³³ *Cook II*, 10 F.3d at 25.

²³⁴ See *id.*

²³⁵ See *id.* at 25 n.10. The EEOC regulations suggest that the nature, severity, duration, and long term impact of the impairment be taken into account when determining whether or not an impairment is a substantially limiting one. See 29 C.F.R. § 1630.2(j) (2). See *supra* notes 82-84 and accompanying text for further explanation of "substantially limits."

²³⁶ *Cook II*, 10 F.3d at 25.

from this statement alone that defendant regarded plaintiff's condition as substantially limiting her ability to work, a major life activity.²³⁷

Moreover, the court dismissed defendant's argument that a single rejection for employment cannot constitute substantially limiting a plaintiff's ability to work.²³⁸ The *Cook* court reasoned that a requirement of multiple rejections would promote the performance of futile acts contrary to sound principles of law.²³⁹ Accordingly, the First Circuit held that the rejection of an applicant for a single job that requires no unique physical skills can constitute treating an applicant as if her condition substantially limited a major life activity—the ability to work.²⁴⁰ Therefore, because Ms. Cook had satisfied each part of the second element of her claim, the court concluded that her morbid obesity was a protected disability within the Rehabilitation Act.²⁴¹

The *Cook* court next examined the third element of plaintiff's cause of action concluding that Ms. Cook was "otherwise qualified" for the IA-MR position.²⁴² Because MHRH did not make specific inquiries into Ms. Cook's capabilities but relied, instead, on generalizations about the obese, the First Circuit questioned whether it had even presented evidence sufficient to raise a factual question.²⁴³ Emphasizing that the Rehabilitation Act requires an individualized inquiry, the court characterized the defendant's action as an employment decision based on stereotyping.²⁴⁴ Moreover, the First Circuit rejected MHRH's concern about an increase in absenteeism as a basis for denying employment because the Rehabilitation Act requires employers to accept absenteeism as a reasonable accommodation for the disabled.²⁴⁵ Finally, the court determined that Ms. Cook's proven record of performance in the same job for over five years and MHRH's own nurse's report

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.* at 26.

²⁴⁰ *Id.* The court distinguished the precedents cited by the defendant as cases in which the applicant failed to qualify for a job possessing unique qualifications rather than general ones. *Id.* (distinguishing *Tudyman*, 608 F. Supp. 739, among others). The First Circuit emphasized the "significant legal distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on [a] more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs." *Id.* (concluding that the latter rejection substantially limits an applicant's ability to work).

²⁴¹ *See Cook II*, 10 F.3d at 26.

²⁴² *See id.*

²⁴³ *Id.* at 27.

²⁴⁴ *Id.* (citing to *Arline*, 480 U.S. at 287, for support). The court stated that MHRH's rejection of Ms. Cook was "a graphic illustration of an employment decision based on stereotyping — exactly the sort of employment decision that the Rehabilitation Act seeks to banish." *Id.*

²⁴⁵ *Id.* at 27 & n.11; *see also* 45 C.F.R. § 84.12 (regarding reasonable accommodations required by employers).

that plaintiff had passed her physical exam supported a finding that plaintiff was "otherwise qualified" for the IA-MR position.²⁴⁶

Finally, in addressing the fourth element of Ms. Cook's § 504 claim, the First Circuit held that MHRH declined to hire the plaintiff "due solely to" her morbid obesity.²⁴⁷ The court determined that defendant's stated reasons for not hiring Ms. Cook—that she put herself at risk because of her obesity, her impeded ability to evacuate patients, and the increased chance of Workers' Compensation injuries—were all related to the plaintiff's weight.²⁴⁸ Because the defendant failed to offer any non-discriminatory reasons for its hiring decision, the court concluded that a jury would be hard pressed not to find that MHRH rejected Ms. Cook "due solely to" her morbid obesity.²⁴⁹

Because Bonnie Cook presented sufficient evidence to prove each of the four elements of a § 504 claim, the First Circuit concluded that MHRH illegally discriminated against her on the basis of her weight.²⁵⁰ In reaching its holding, the *Cook* court rejected the defendant's reasoning that arguably mutable or voluntary conditions are exempted from statutory protection.²⁵¹ Moreover, in its conclusion, the First Circuit emphasized that federal disability law was enacted to combat discrimination based on the type of negative stereotypes that society unjustly associates with the overweight.²⁵²

V. THE RECOGNITION OF OBESITY AS A DISABILITY: TOWARD ENDING WEIGHT DISCRIMINATION

What is to be done about this problem? . . . [T]he extension of the Americans with Disabilities Act to include the overweight . . . would certainly be a beginning.²⁵³

²⁴⁶ *Cook II*, 10 F.3d at 27–28. Plaintiff weighed about the same amount when she previously worked in this position. Brief of Plaintiff-Appellee at 8–9, *Cook II*, 10 F.3d 17 (No. 93–1093). In 1981 she weighed 240 pounds and in 1983 her weight had reached 300 pounds (height and weight tables introduced by MHRH classified a woman of plaintiff's stature as morbidly obese at 234 pounds or more). *Id.* at 9 & n.12.

²⁴⁷ *Cook II*, 10 F.3d at 28.

²⁴⁸ *Id.* at 28 & n.13. Additionally, MHRH's appellate brief states that Dr. O'Brien "declined to give medical clearance to hire the plaintiff based solely on her weight." Brief of Defendant, Appellant at vii, *Cook II*, 10 F.3d 17 (No. 93–1093); see also *Cook II*, 10 F.3d at 28 n.13.

²⁴⁹ See *Cook II*, 10 F.3d at 28.

²⁵⁰ See *id.*

²⁵¹ *Id.* at 23–24 & n.7.

²⁵² See *id.* at 27, 28. In its summation, the First Circuit made clear its position on weight discrimination: "In a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences." *Id.* at 28.

²⁵³ Stunkard & Sorensen, *supra* note 41, at 1037 (regarding the problem of prejudice against obese persons).

In recognizing morbid obesity as a federally protected disability, the First Circuit has taken a significant step toward eradicating weight-based discrimination. Although limiting its holding in *Cook* to morbid obesity, the court's reasoning was not based on the number of pounds that Bonnie Cook was overweight.²⁵⁴ Rather, the court correctly focused its analysis on society's stereotypical perceptions of overweight people that promote discrimination.²⁵⁵

Future courts should endorse the First Circuit's reasoning and extend the holding in *Cook* beyond morbid obesity to the prohibition of all weight discrimination. Although not addressed in *Cook*, courts should consider obesity as an *actual* disability because, in its more advanced stages, obesity satisfies each of the terms within the statutory definition. Additionally, under a *perceived* disability analysis, courts should extend federal protection to all stages of obesity because of the societal perception that being overweight is a disabling condition.

A. Obesity May Be Considered an Actual Disability

Ample evidence supports the conclusion that obesity, at least in its more advanced stages, satisfies the statutory definition of an actual disability.²⁵⁶ The disease of obesity is a "physical or mental impairment" that affects "major life activities," and opposing arguments that obesity is a voluntary or mutable condition are misguided.²⁵⁷ Whether obesity "substantially limits" a major life activity, however, is a harder question that must be decided on a case by case basis.²⁵⁸

First, obesity is a "physical impairment" because it is a physiological condition that affects several bodily systems.²⁵⁹ The physiological causes of obesity include metabolic dysfunction, lack of appetite suppression signals to the brain, genetic disposition, and an abnormal number and size of fat cells.²⁶⁰ Additionally, studies of identical twins reared apart and adopted children in households with obese family members demonstrate that obesity is predominantly caused by genetic factors and is not the result of environmental factors.²⁶¹ And, health

²⁵⁴ See *Cook II*, 10 F.3d at 27, 28.

²⁵⁵ See *id.*

²⁵⁶ See *supra* notes 72-88 and accompanying text for a discussion of the federal statutory definitions of disability.

²⁵⁷ See *supra* notes 18-40 and accompanying text for a discussion of the disease of obesity.

²⁵⁸ See *supra* notes 82-84 and accompanying text for a discussion of the meaning of "substantially limits."

²⁵⁹ See *supra* notes 18-40 and accompanying text for a discussion of the disease of obesity.

²⁶⁰ See Willard, *supra* note 22, at 2099.

²⁶¹ See Stunkard et al., *The Body-Mass Index of Twins Who Have Been Reared Apart*, *supra* note 27, at 1483; Stunkard et al., *An Adoption Study of Human Obesity*, *supra* note 28, at 193. See *supra*

evaluations of the obese population convincingly demonstrate that this disease markedly affects at a minimum the musculoskeletal, metabolic, cardiovascular, digestive and respiratory systems.²⁶²

Similarly, compulsive overeating disorders, which arguably result in a voluntary form of obesity, may very well satisfy the definition of "mental impairment."²⁶³ The HHS regulations define "mental impairment" as any mental or psychological disorder.²⁶⁴ Therefore, because specialists consider compulsive overeating as a psychological disorder similar to bulimia and anorexia nervosa, a resulting condition of obesity would appear to qualify as an actual impairment.²⁶⁵

In contrast, arguments pertaining to the voluntary or mutable nature of obesity have no statutory basis and rarely apply to obesity. Nowhere within the text of the Rehabilitation Act or the ADA is there any mention of voluntariness or mutability as an automatic disqualifier for recognizing a particular condition as a physical or mental impairment.²⁶⁶ To the contrary, the implementing regulations of the Rehabilitation Act specifically include diseases such as alcoholism and drug addiction that arguably result from voluntary behavior and may be mutable.²⁶⁷ Moreover, obesity is predominantly an involuntary disease for which no cure is available.²⁶⁸ Proponents of the "voluntary" and "mutable" arguments mistakenly confuse the treatment of semi-starvation and weight loss with the cure for obesity. Such treatment, however, does not correct the metabolic dysfunction of an obese individual, and may result in harmful side effects.²⁶⁹

notes 25-29 and accompanying text for further discussion of studies commenting on the genetic etiology of obesity.

²⁶² See Willard, *supra* note 22, at 2099; Hautvast & Deurenberg, *supra* note 30, at 67.

²⁶³ See 45 C.F.R. § 84.3 (j)(2)(i)(B).

²⁶⁴ See *id.* "Mental impairment" is defined as "any mental or psychological disorder, such as . . . emotional or mental illness. . . ." *Id.*

²⁶⁵ See Milton v. Kline, *Hypnotherapy in the Treatment of Obesity*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 268, 268-89 (Benjamin B. Wolman ed., 1982) (author classifies anorexia nervosa, bulimia and obesity under the term feeding disturbance, a type of obsessional disorder). Additionally, obesity is often associated with diminished self-esteem and depression, further evidence that obesity may fit within the definition of mental impairment. See Benjamin B. Wolman, *Depression and Obesity*, in *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 88, 88 (Benjamin B. Wolman ed., 1982) (discussing his clinical practice in treating obese patients for over thirty years, author states that all of his patients "suffered from various degrees of depression and were torn by feelings of helpless anger directed toward themselves").

²⁶⁶ See Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 706 (West Supp. 1993); Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1993).

²⁶⁷ See 45 C.F.R. § 84, App. A., Subpart A(4).

²⁶⁸ See *supra* notes 34-40 and accompanying text for a discussion of the treatment and the lack of cure for obesity.

²⁶⁹ See *supra* note 35 for a discussion of the side effects of dieting. A similar argument that is also easily dismissed is that obesity is controllable and should, therefore, not be considered a

Second, the disease of obesity clearly affects "major life activities."²⁷⁰ The implementing regulations define "major life activities" as everyday functions such as walking, breathing, performing manual tasks and working.²⁷¹ The *Cook* case illustrates that medical professionals consider obesity to limit one's ability to walk, lift, bend, stoop, kneel and work—functions which fit within the above definition.²⁷² The harder question then is whether obesity "substantially limits" these activities.

Only those persons who are moderately or morbidly obese, as opposed to those who are mildly obese, are likely to satisfy the requirement that their impairments "substantially limit" major life activities.²⁷³ The EEOC regulations implementing the ADA define substantially limited as significantly restricted in performing major life activities.²⁷⁴ Therefore, only the more severe conditions of obesity would likely significantly restrict one's ability to perform everyday functions such as walking, sitting or working. Accordingly, and as the regulations suggest, this determination should be made on a case by case basis, taking into account the severity, duration and long term impact of the obese condition.²⁷⁵

In sum, obesity, in its more extreme stages, is likely to satisfy all of the requirements of an actual disability. Therefore, victims of obesity discrimination should pursue their claims, and courts should sustain them, under an actual disability theory if their conditions are substantially limiting ones. In the alternative, claimants of obesity discrimination should base their claims on the much stronger argument that obesity is a perceived disability.

B. Obesity Is a Perceived Disability

Because obesity is perceived by much of society as a disability, it falls well within the grasp of federal disability law. Studies that depict

disability. See Frierson *supra* note 62, at 293–94 for a discussion of this argument. The author notes that other controllable diseases such as epilepsy and diabetes are considered disabilities under federal law. See *id.*

²⁷⁰ See 45 C.F.R. § 84.3(j)(2)(ii); 29 C.F.R. § 1630.2(i).

²⁷¹ 45 C.F.R. § 84.3(j)(2)(ii); 29 C.F.R. § 1630.2(i) ("functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

²⁷² See *Cook II*, 10 F.3d at 25 (referring to statements made by Dr. O'Brien and supported by the decision-makers at MHRH).

²⁷³ See *supra* notes 82–84 for a discussion of the meaning of "substantially limits."

²⁷⁴ See 29 C.F.R. § 1630.2(i).

²⁷⁵ 29 C.F.R. § 1630.2 (j)(2). Furthermore, in its amicus curiae brief on behalf of Bonnie Cook, the EEOC emphasized to the court that "[t]here is no reason why this approach is unreasonable or unworkable in the specific case of obesity," and it suggested that "whether an individual's obesity is a covered disability turns on the duration of the condition and its long-term impact." Brief of the EEOC as *Amicus Curiae* at 13, *Cook II*, 10 F.3d 17 (No. 93-1093).

a wide range of negative stereotypes associated with obesity demonstrate that Americans perceive obesity as a "physical impairment" affecting "major life activities."²⁷⁶ Additionally, the stigma of obesity has resulted in extensive employment discrimination, proving that society perceives the obese as "substantially limited" in their ability to work.²⁷⁷

Whether or not it is a physiological disorder, obesity is a physical impairment because society perceives it as one. The law is clear that an individual need only be regarded as disabled to prevail on a perceived disability claim.²⁷⁸ Therefore, even without medical evidence that obesity is a physical impairment, victims of obesity discrimination can prevail by merely showing that their employers' perceptions of their conditions match with that of the rest of society.²⁷⁹ Additionally, the stereotype that overweight people are slower, more easily tired, less mobile and less hardworking than persons of normal weight would likely be found by most courts to constitute a perception that obesity affects "major life activities."²⁸⁰

Demonstrating that a person's obesity was perceived as "substantially limiting" a major life activity is also more easily proven under a perceived rather than an actual disability analysis. An employer who discriminates against an obese applicant for a job requiring no unique physical skills is likely to perceive that applicant as precluded from similar positions within that particular industry.²⁸¹ An employer's single rejection of an obese person for a job for which she is otherwise qualified, therefore, constitutes a perception that the applicant is substantially limited in her ability to work, a major life activity.²⁸²

²⁷⁶ See *supra* notes 41-48 and accompanying text for a discussion of the negative stereotypes associated with the obese.

²⁷⁷ See *supra* notes 49-58 and accompanying text for a discussion of the scope of employment discrimination against the overweight. The EEOC's Interpretive Guidance on Title I of the ADA states that "if an individual can show that an employer . . . made an employment decision . . . based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability." 29 C.F.R. part 1630, App. at 406 (1993).

²⁷⁸ See, e.g., 29 U.S.C.A. § 706(8)(B)(iii).

²⁷⁹ See *Cook II*, 10 F.3d at 23 (court held that MHRH's stated reasons for not hiring Cook — its concern over her limited mobility, and a heightened risk of heart disease — proved that it treated Cook's obesity as if it affected her musculoskeletal and cardiovascular systems).

²⁸⁰ See Jasper & Klassen, *supra* note 43, at 522.

²⁸¹ See *Cook II*, 10 F.3d at 26. The First Circuit stated that "[i]f the rationale proffered by an employer in the context of a single refusal to hire adequately evinces that the employer treats a particular condition as a disqualifier for a wide range of employment opportunities, proof of a far-flung pattern of rejections may not be necessary." *Id.*

²⁸² See *id.* Although Ms. Cook was not limited in working within the health care industry, the First Circuit held that MHRH's perception that she was foreclosed from a wide range of health care positions constituted a substantial limitation on her ability to work. See *id.* at 25-26.

Consequently, under a perceived disability theory, all forms of obesity are likely to constitute cognizable disabilities within the Rehabilitation Act and the ADA. Moreover, because obesity is defined as beginning at a weight that is twenty percent over one's norm,²⁸³ the reach of federal protection under the perceived disability prong of the statutes may extend to the majority of those discriminated against on the basis of their weight. If subsequent courts follow the precedent set by the *Cook* court, federal disability law may adequately protect victims of obesity discrimination.

C. Arguments Against Recognizing Obesity as a Disability are Unconvincing

The policy arguments made against including obesity as a cognizable disability within federal disability law are based on economic and freedom of choice theories and are flawed.²⁸⁴ The first argument assumes that extending protection to the obese will open the floodgates for further extensions of federal disability law which will put an unfair economic burden on employers.²⁸⁵ The second argument promotes an employer's choice in deciding who to hire and is based on the fear that all impaired applicants who are denied employment will claim discrimination regardless of the merits of their claims.²⁸⁶ Both arguments are easily dismissed.

First, ample evidence demonstrates the very real cost to society of discrimination against the overweight.²⁸⁷ Protection for the obese will ease this heavy economic burden on society, and will cost employers relatively little as few or no accommodations will likely be required to employ obese workers.²⁸⁸ Additionally, arguments that more groups will seek protection are largely based on similar negative and fear driven stereotypes against such groups. If new impairments satisfy the defini-

²⁸³ Lukert, *supra* note 18, at 1.

²⁸⁴ See Baker, *supra* note 59, at 966-68.

²⁸⁵ See *id.* at 966, 968. The author states that "[e]xtending protection to obese persons may attract the attention of other stigmatized groups in society, who may seek the benefits of being classified as handicapped." *Id.* at 968.

²⁸⁶ See *id.* at 966, 967-68 (author comments on concerns over governmental intrusion into private decision making of employers).

²⁸⁷ See *supra* notes 41-58 and accompanying text for a discussion of the extent of employment discrimination against the overweight.

²⁸⁸ See *Cook II*, 10 F.3d at 27 & n.11. The court explains that the costs of a possible increase in absenteeism, and other miscellaneous burdens, must be absorbed by employers as a reasonable accommodation for disabled employees under the Rehabilitation Act and ADA. See *id.* (citing 45 C.F.R. § 84.12 as requiring accommodations such as job restructuring and modified work schedules).

tion for disability within the Rehabilitation Act or the ADA, then protection should be granted, and society will likely benefit from the full employment of the most qualified applicants regardless of their impairments. Arguments grounded in fear and ignorance should not prevent the progress of American society toward a discrimination-free workplace.

Second, the argument promoting an employer's freedom of choice fails because federal disability law does not prevent an employer from hiring the most qualified applicants. Rather, it encourages this practice and requires that claimants prove that they were "otherwise qualified" and rejected "due solely to" their impairments. Selecting unimpaired candidates over impaired ones for legitimate reasons such as being better trained or more qualified is perfectly legal.²⁸⁹ Additionally, if an employer faces a groundless claim of discrimination by an impaired applicant, it merely has to rebut the claim with evidence of a non-discriminatory reason for its decision.²⁹⁰ Federal disability law, therefore, is not an excuse for the unqualified disabled; it is a form of necessary protection for the qualified disabled who face unwarranted discrimination by employers who make hiring decisions on the basis of negative stereotypes.

VI. CONCLUSION

Every person, regardless of size, has the right to a life of dignity and respect.²⁹¹

The First Circuit's holding in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals* that morbid obesity is a protected disability under federal disability law is an important first step toward ending discrimination against the overweight. In light of the grave cost to American society that this stereotype driven form of

²⁸⁹ See *Cook II*, 10 F.3d at 26-27. An employer may also reject a disabled applicant if a specific inquiry of that applicant reveals that she fails to satisfy bona fide job qualifications that are legitimate prerequisites for the job. See *id.* at 26. See *supra* notes 243-247 and accompanying text for a discussion of the distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on generalizations about the applicant's class.

²⁹⁰ See *Cook II*, 10 F.3d at 28. See Baker, *supra* note 59, at 966, for an argument that appearance cannot be used by employers as a bona fide job qualification to disqualify obese job applicants. The author explains that the similar contention that appearance was a business necessity was used by employers to perpetuate racial discrimination against African-Americans and was rejected by the EEOC as an illegitimate business reason. See *id.*

²⁹¹ NATIONAL ASSOCIATION TO ADVANCE FAT ACCEPTANCE (unpublished pamphlet available from NAAFA) (describing the ultimate message of the organization). See *supra* note 6 for more information regarding NAAFA.

discrimination has created, however, further protection is required. Although Congress has not spoken directly to this issue, the Rehabilitation Act and the ADA contain the necessary safeguards to prevent obesity discrimination. Moreover, because the *Cook* court's reasoning does not focus on the number of pounds that an obese individual is overweight, subsequent courts should be successful in extending its holding to all levels of obesity under a perceived disability analysis. The other federal circuits should follow the First Circuit's lead and put an end to discrimination against the overweight.

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