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A Disability Studies Perspective on the Legal Boundaries of Fat and Disability

Katie Warden†

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Abstract

Since the passage of the ADA, the question of who counts as disabled has been a heavily contested legal issue. Within this context, individuals who claim that their weight constitutes a disability challenge stereotypes of disabled people as innocent, unfortunate victims of personal tragedy. Their claims highlight both the tension

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between the social and medical models of disability, which are intertwined in the ADA, and the ways in which perceptions and stereotypes, rather than impaired bodies, can create disability. Drawing on theoretical insights from fat studies literature, this article examines the circumstances under which courts conclude that being fat is a status that deserves anti-discrimination protection under the ADA. Using content analysis and logistic regression models, I find that fat plaintiffs fared worse (1) when their claims were based on perceived (rather than actual) disability and (2) when courts required them to prove the underlying cause of their weight. Findings suggest that the social model of disability has not been fully implemented under the ADA, and fat and disability rights activists must carefully consider the way they frame cases to prevent the perpetuation of negative stereotypes of individuals in both categories.

Introduction

In 1990, Congress passed the Americans with Disabilities Act (ADA) to protect the rights of people with disabilities.[1] Over the next twelve years the Supreme Court narrowed the scope of the law, effectively diminishing the ADA's power.[2] During the same period, there was significant public outcry against the law based on two assumptions: that it provided disabled people unfair benefits and that it unduly burdened businesses.[3] Due to both these judicial decisions and the political climate, a heated debate emerged in the legal community about who counts as disabled under the law.[4] Individuals not typically considered disabled, such as fat people,[5] were a focal point of this controversy. This study assesses whether

1. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1)–(4).

2. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

3. *See* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS (2003).

4. *See* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003) [hereinafter BACKLASH].

5. I use the word "fat" as a descriptor, following many fat studies scholars who want the word to become just an ordinary term similar to "tall" or "dark-haired." Medical researchers, the media, and legal actors overwhelmingly use the terms "obese" or "overweight" and thus I sometimes use those terms when engaging with these mainstream contexts. Additionally, I use both "people with disabilities" and "disabled people," interchangeably. *See* Erin E. Andrews, Anjali J. Forber-Pratt, Linda R. Mona, Emily M. Lund, Carrie R. Pilarski & Rochelle Balter, *#SaytheWord: A Disability Culture Commentary on the Erasure of "Disability"*, 64 REHABILITATION PSYCHOL. 111 (2019); Barbara J. King, *'Disabled': Just #SayTheWord*, NPR, (Feb. 25, 2016), https://www.npr.org/sections/13.7/2016/02/25/468073722/disabled-just-saytheword [https://perma.cc/X6MX-PP4M].

fat is an ADA-protected status in the realm of employment discrimination and examines the judicial reasoning underlying the pertinent court decisions. The results reveal that courts continue to use disability status to differentiate between individuals deemed worthy of social support, such as the anti-discrimination protection examined in this paper, and those considered undeserving. Further, judges tend to use a medical model of disability, rather than a social model, to demarcate the line between the deserving and the undeserving; specifically, judges reinforce the medical model of disability by focusing on determining an underlying medical cause for a person's impairment.

The ADA defines disability according to a hybrid social–medical model. Under the ADA, disability is defined as "a physical or mental impairment that substantially limits [a] major life activit[y]."[6] Importantly, however, a person is considered disabled either if they actually have such an impairment or if they are perceived as having one.[7] Thus, the definition itself recognizes the importance of stereotypes and perceptions in creating the experience of disability.[8] Beginning in the late 1990s, the Supreme Court interpreted this definition quite narrowly, and thus excluded people with a variety of impairments from the statute's protection, including any person whose impairment could be mitigated through medication, prosthesis, or other forms of treatment, such as individuals with diabetes, epilepsy, mobility impairments, back problems, and even polio survivors.[9] By excluding these individuals from the category of disability, the court effectively ruled that discrimination on the basis of these conditions was permissible.

In making these determinations, the courts relied on traditional understandings and common-sense stereotypes of disability as a condition of dependency, helplessness, inability, and lack—the very stereotypes the ADA sought to change[10]—to decide who was deserving of disability-based anti-discrimination

6. 42 U.S.C. § 12102(1)(A).

7. *Id.* § 12102(1)(A)–(C).

8. *See* 29 C.F.R. § 1630.2(*l*) app. (2012) ("This third prong of the definition of disability was originally intended to express Congress's understanding that 'unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions.' 2008 Senate Statement of Managers at 9.").

9. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 35–37 (2009); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 26–27 (2000).

10. *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, *in* BACKLASH, *supra* note 4, at 122–23.

protection. In response to these decisions (which many scholars have characterized as a "judicial backlash"), Congress passed the ADA Amendments Act (ADAAA) in 2008, which explicitly overturned the Supreme Court's decisions regarding the definition of disability.[11] The ADAAA affirmed that the ADA should be interpreted in a way that provides protection to a broad range of disabled people.[12] In addition, the Amendments Act sought to shift the focus of legal disputes from the detailed analysis of an individual's bodily limitations to the evaluation of claims of discrimination and the determination of the reasonableness of potential accommodations.[13] Even after the passage of these amendments, however, the issue of which conditions count as legally protected disabilities continues to be a subject of debate among legal scholars as well as a frequent focus of court rulings.[14]

Within this context of judicial skepticism toward disability claims, the court experiences of fat individuals serve as a fruitful arena for examining the legal reasoning around disability. In these lawsuits, stereotypes of fat and stereotypes of disability clash and judges draw on competing logics of personhood to determine who is "truly disabled."[15] This article employs a mixed-methods approach, combining content analysis and regression modeling to identify which factors influence judicial decisions pertaining to whether fat is classified as a disability under the ADA, decisions that have important implications for social justice. Defining fat as a disability allows fat individuals to fight employment discrimination via currently existing legislation, shifts blame from individuals to social structure, and highlights the way in which prejudicial attitudes create disablement.

I develop my argument as follows: First, I review the pertinent literature; this summary includes a discussion of the scholarly insights from disability studies and fat studies, highlighting both tensions and overlap between these two fields, followed by an overview of the ADA, the judicial backlash against the ADA, and

11. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 § 2(a)(3)–(7); *see generally* BACKLASH, *supra* note 4 (discussing judicial and societal backlash against the ADA).

12. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(1).

13. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(6).

14. *See* BAGENSTOS, *supra* note 9; Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013).

15. *See* BAGENSTOS, *supra* note 9, at 38.

key judicial decisions about whether fat is a disability. Second, I describe the data and methodology used in the study. Third, I present the empirical results. Finally, I conclude with a discussion of the significance of the findings for political activism around fat rights, the need for disability rights activists to carefully consider the ways in which anti-discrimination litigation medicalizes disability, and the barriers that stereotypes continue to pose for both fat and disabled people seeking equal treatment in the employment sector.

I. Literature Review

A. Disability Studies

Traditionally, disability has been understood as bodily lack, excess, or flaw; as a personal tragedy; and as a medical problem.[16] Disability studies scholars assert that moving past medicalized assessments would benefit all disabled people.[17] Both historically and currently, disability serves as a category to distinguish between the deserving and undeserving poor, and medicine plays a key role in making this distinction.[18] When the rise of industrial factories and the standardization of the pace and modes of production left no room for impaired people to participate in the labor market, institutions, such as the poorhouse and workhouse, arose to house individuals who could not work.[19] In this context, disability came to serve as a proxy for worthiness, used to distinguish between those who could not work and those who would not work.[20] The medicalization of disability played a key role in this process by acting as a legitimating device capable of identifying and distinguishing between able-bodied workers who were shirking their duties and blameless disabled people. Disabled people were

16. Rosemarie Garland-Thomson, *Misfits: A Feminist Materialist Disability Concept*, 26 HYPATIA 591, 591 (2011). *See generally* THE DISABILITY STUDIES READER (Lennard Davis ed., 5th ed. 2017); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990).

17. *See, e.g.*, PETER CONRAD, THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS 148–61 (2007). *See generally* THE DISABILITY STUDIES READER, *supra* note 16.

18. *See* RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001); DEBORAH A. STONE, THE DISABLED STATE (1984).

19. *See* Vic Finkelstein, *Disability and the Helper/Helped Relationship: An Historical View*, *in* HANDICAP IN A SOCIAL WORLD (Ann Brechin, Penny Liddiard & John Swain eds., 1981); BRENDAN GLEESON, GEOGRAPHIES OF DISABILITY 99–126 (1997); OLIVER, *supra* note 16.

20. *See* O'BRIEN, *supra* note 18; STONE, *supra* note 18, at 32–39.

viewed as incapable of work and therefore deserving of support.[21] Unfortunately, this medicalized perspective continues to hinder disabled people today; the ADA has not improved disabled people's high rates of unemployment,[22] and disability rights advocates continue to fight stereotypes of disabled people as juvenile, innocent, and unable to work.

The disability studies literature seeks to shift this understanding to a conception "of disability as a social construction whose meaning is determined primarily through discourse," power, and knowledge.[23] An early step in this movement was the development of the social model of disability,[24] which separates impairment and disability (similar to the sex/gender distinction developed by feminist scholars).[25] Impairment refers to the abnormal body, whereas disability arises from a specific type of societal organization that excludes and devalues impaired people.[26] This shift from understanding disability as a personal tragedy to understanding disability as a problem of social justice was "theoretically groundbreaking"[27] and the latter remains the primary conception employed by disability rights activists today. The ADA and ADAAA implement the social model of disability by including individuals who are "perceived" or "regarded" as disabled (i.e., those who are disabled by the prejudices of others) within the law's protection—these individuals' disabilities do not arise directly from their bodies, but rather from the stereotypes held by others.[28]

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21. *See* Finkelstein, *supra* note 19; GLEESON, *supra* note 19; OLIVER, *supra* note 16; Marta Russell & Ravi Malhotra, *Capitalism and Disability*, 38 SOCIALIST REG. 211 (2002).

22. *See* Michelle Maroto & David Pettinicchio, *The Limitations of Disability Antidiscrimination Legislation: Policymaking and the Economic Well-being of People with Disabilities*, 36 L. & POL'Y 370, 370–71 (2014).

23. *See* SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998); Garland-Thomson, *supra* note 16, at 591.

24. *See* OLIVER, *supra* note 16, at 78–94.

25. GAYLE S. RUBIN, DEVIATIONS: A GAYLE RUBIN READER 39 (2011) (describing "sex" as the "biological raw material of human sex and procreation" and "gender" as the "human, social intervention" that relentlessly rearranges "sex" for society into social conventions).

26. *E.g.* OLIVER, *supra* note 16, at 78–94; *but see* TOBIN SIEBERS, DISABILITY THEORY (2008); Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER, *supra* note 16 (arguing that both impairment and disability are socially constructed and that the social model discounts the embodied experience of impairment or disability).

27. *See* Garland-Thomson, *supra* note 16 at 592.

28. *See* 42 U.S.C. § 12102(3)(A); ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 4(a)(3); *see also* 29 C.F.R. § 1630.2(*l*) app. (2012) ("Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an

In the disability studies literature, disability encompasses a broad range of bodily differences. As scholar Rosemarie Garland-Thomson explained, "In short, the concept of disability unites a heterogeneous group of people whose only commonality is being considered abnormal."[29] Disability studies scholars tend to consider fat a disability both because negative stereotypes and cultural myths surround fat bodies and because inaccessible social structures may impose actual limitations on a fat body. Garland-Thomson and Lennard Davis, two of the most well-known disability studies scholars, have argued that fat should be considered a disability—for example, Lennard Davis wrote that the outcome in *Cook* (a First Circuit ruling considering morbid obesity to be a disability) "led to an enlightened land"[30]—and most scholars in the field follow this recommendation. This categorization of fat as a disability relies directly on the social model of disability, in which disability arises from both stereotypes, such as contempt for abnormal bodies, and social structures. Garland-Thomson concluded that "[t]he fat body is disabled because it is discriminated against in two ways: first, fat bodies are subordinated by a built environment that excludes them; second, fat bodies are seen as unfortunate and contemptible."[31]

B. Fat Studies

For fat studies scholars and activists, the fit between fat and disability is somewhat more complicated. Fat studies arose out of the work of grassroots political organizing and seeks to bring these

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actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be 'regarded as having such an impairment.' In short, to qualify for coverage under the 'regarded as' prong, an individual is not subject to any functional test. See 2008 Senate Statement of Managers at 13.").

29. Rosemarie Garland-Thomson, *Re-shaping, Re-thinking, Re-defining: Feminist Disability Studies* at 2, *in* BARBARA WAXMAN FIDUCCIA PAPERS ON WOMEN AND GIRLS WITH DISABILITIES (Ctr. for Women Pol'y Stud., 2001), https://www.womenenabled.org/pdfs/Garland-Thomson,Rosemarie,Redefining FeministDisabilitiesStudiesCWPR2001.pdf [https://perma.cc/HAL2-E4VF].

30. Still, there is more work to be done. Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 211 (2000) (citing Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17 (1st Cir. 1993)) ("While the plaintiff in *Cook* ultimately prevailed amid this orgy of purple prose and the journey of the court led to an enlightened land, the metaphors used still tell us that the court is out there in the dark. Despite the heroic efforts of this decision and the self-referential congratulations for this exploration and bringing of light to the darkness, which perhaps comprehendeth it not, the basic problem remains.").

31. Rosemarie Garland-Thomson, *Feminist Disability Studies*, 30 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 1557, 1582 (2005).

radical politics into the academy.[32] The discipline unites work from a variety of fields based on a shared focus on critiquing the negative stereotypes and stigma placed on the fat body.[33] Contemporary cultural discourses portray fat bodies as ugly, lazy, and unhealthy.[34] Sociologist Abigail Saguy suggested that the current dominant discourse frames fat as a public health crisis caused by a lack of personal responsibility.[35] Samantha Kwan and Jennifer Graves referenced both the health frame and the aesthetic frame, concluding that "current cultural discourses stigmatize fat bodies as ugly and unhealthy."[36] Fat studies scholars seek to subvert these dominant perspectives, asserting that fat bodies can be both healthy and beautiful. In addition, the field questions the prevalent assumption that weight is mutable and controllable.[37]

Fat individuals living in the context of the widespread anti-fat culture of the United States face discrimination, prejudice, and mistreatment in many aspects of their lives.[38] The stigma surrounding obesity limits social, educational, and employment opportunities.[39] This bias develops early in life—researchers have found that "children would rather play with other children who had missing legs or eyes than children who were obese; adults would rather be deaf or blind than fat."[40] Further, people report that if given the choice, they would prefer to be of normal weight and poor than fat and a millionaire.[41] Fat Americans may be less likely to attend prestigious schools, obtain desirable professions, and receive equal pay for their work.[42]

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32. *See* MARILYN WANN, FAT! SO? (1998).

33. *See* SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION (2000).

34. *See* SAMANTHA KWAN & JENNIFER GRAVES, FRAMING FAT. COMPETING CONSTRUCTIONS IN CONTEMPORARY CULTURE (2013); ABIGAIL C. SAGUY, WHAT'S WRONG WITH FAT? (2014).

35. *See* SAGUY, *supra* note 34.

36. *See* KWAN & GRAVES, *supra* note 34, at 101.

37. *See* Esther D. Rothblum, *Why a Journal on Fat Studies?*, 1 FAT STUD. 3, 4 (2012) ("[F]at activists felt that the terms 'overweight,' 'underweight,' and 'normal weight' all imply that there is an attainable 'ideal' weight when in fact there is a great diversity in weight.").

38. Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & LAW 220–23 (2009).

39. *Id.* at 221.

40. *Id.* (citing ELLEN RUPPEL SHELL, THE HUNGRY GENE: THE INSIDE STORY OF THE OBESITY INDUSTRY 18–19 (2002)).

41. *Id.*

42. *Id.*

Fat has been subjected to medicalization[43] through its association with medical problems such as osteoarthritis, cancer, cardiovascular disease, diabetes, gallbladder disease, hypertension, infertility, liver disease, pancreatitis, and sleep apnea.[44] According to a 1998 report by the National Institutes of Health (NIH), obesity (excess fat) is "a complex multifactorial chronic disease" caused by "social, behavioral, physiological, metabolic, cellular, and molecular" factors.[45] Critical scholars have begun to research the role of environmental toxins such as endocrine disrupters (which are present in many products and foods) in individuals' weight gain as well as the faulty assumptions in many of the studies that have found a correlation between fat and negative health outcomes.[46] For example, in a series of experiments conducted with mice, scientists found that although both the control and experimental groups were given the same amount of food and exercise, the latter group, which was exposed to endocrine disrupters, gained more weight.[47] These studies suggest, at the very least, that the cause of an individual's body size is up for debate. Finally, no studies using a large enough sample to permit generalization have demonstrated that long-term weight loss is possible or improves health.[48]

Thus, both fat and disabled people have bodies that are subject to medicalization, stigma, and structural or architectural exclusion. Like people with "traditional" disabilities, people who are fat encounter limitations in public places such as when they do not fit into spaces designed for average-sized people. For example, "[t]hey may not fit in the seats in a movie theatre; they may not be able to fit into a chair in a restaurant or on a ride in an amusement park."[49] Lawyer and fat studies scholar Sondra Solovay argued that severely

43. CONRAD, *supra* note 17, at 4 ("'Medicalization' describes a process by which nonmedical problems become defined and treated as medical problems, usually in terms of illness and disorders.").

44. *Overweight & Obesity Statistics*, 2017 NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES (2017), https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity [https://perma.cc/587H-S584]; NHLBI OBESITY EDUC. INITIATIVE EXPERT PANEL ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OBESITY IN ADULTS (US), CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS xi, 19 (1998) [hereinafter NHLBI OBESITY EDUC. INITIATIVE].

45. NHLBI OBESITY EDUC. INITIATIVE, *supra* note 44, at 27.

46. *See* JULIE GUTHMAN, WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM (2012); SAGUY, *supra* note 34.

47. GUTHMAN, *supra* note 46.

48. Paul Campos, Abigail Saguy, Paul Ernsberger & Eric Oliver, *The Epidemiology of Overweight and Obesity: Public Health Crisis or Moral Panic?*, 35 INT'L J. OF EPIDEMIOLOGY 55 (2005).

49. Korn, *supra* note 38, at 226–27.

obese people "are substantially limited in a major life activity that the average person has no difficulty with—navigating all places of public accommodation during the course of an ordinary day."[50]

Several fat studies scholars have examined the connections between fat and disability, highlighting the shared experience of stigma. Charlotte Cooper described how the social model of disability spoke to her own experience of fatness, remarking, "[f]at and disabled people encounter discrimination in all areas of our lives, from our families, from strangers on the street, in the workplace and in society, where we are constantly reminded that there is something wrong with us."[51] Cooper found commonalities between fat and disabled people in terms of physical access (fitting into spaces), experiences of shame and pity, a lack of appropriate media representation, and a shared "low social status."[52] Lucy Aphramor also identified parallels between the two groups, describing similarities in discrimination against fat job applicants and little people applying for jobs: in both instances, discrimination is related to stereotypical beliefs about abilities and fear of customers' negative reactions.[53] April Herndon made a parallel comparison between disability and fat, in this case exploring discrimination toward fat and Deaf people.[54] Finally, two recent theoretical articles suggested that fatness can be considered a disability.[55]

Despite the similarities between these models of fat and disability, fat activists have not generally aligned themselves under the umbrella of disability, instead seeking to pass size-based anti-discrimination laws.[56] Fat rights activists explain this approach as reflecting a desire not to be associated with the characteristics

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50. SOLOVAY, *supra* note 33, at 148.

51. Charlotte Cooper, *Can a Fat Woman Call Herself Disabled?*, 12 DISABILITY & SOC'Y 31, 36 (1997).

52. *Id.* at 32, 36.

53. Lucy Aphramor, *Disability and the Anti-obesity Offensive*, 24 DISABILITY & SOC'Y 897, 903 (2009).

54. *See* April Herndon, *Disparate but Disabled: Fat Embodiment and Disability Studies*, 14 NWSA J. 120 (2002).

55. *See* Toby Brandon & Gary Pritchard, *'Being Fat': A Conceptual Analysis Using Three Models of Disability*, 26 DISABILITY & SOC'Y 79 (2011); Nathan Kai-Cheong Chan & Allison C. Gillick, *Fatness as a Disability: Questions of Personal and Group Identity*, 24 DISABILITY & SOC'Y 231 (2009).

56. *See* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD (2008) [hereinafter FAT RIGHTS]; Anna Kirkland, *What's at Stake in Fatness as a Disability?*, 26 DISABILITY STUD. Q. 1 (2006); Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 L. & SOC'Y REV. 397 (2008) [hereinafter *Think of the Hippopotamus*]; SAGUY, *supra* note 34.

stereotypical of disability: lack, dependency, and inability.[57] For example, in her interviews with fat rights activists, Kirkland found that they resisted an association with disability "because it complicated their arguments that fat people are fully functional and healthy."[58] In an exception to this pattern, activist Marilyn Wann suggested that using the disability label was a pragmatic choice, observing that "[i]n the dark times, you use whatever you have."[59] Overall, however, fat rights advocates have rejected the disability label because of its continued medicalization, which construes the problem of disability as arising from the body's limitations.[60] Fat activists see the fat body as healthy and beautiful—problems result not from fat bodies, but rather from society's negative response to fat people. This view aligns with a strong version of the social model of disability embodied by the ADA, in which disability arises not from the impaired body, but from society's reaction to such bodies.

One final perspective on the way fat fits, sometimes uneasily, as a disability is related to what Kirkland has called "logics of personhood," which are defined as "the ways we talk to each other . . . about whether a person's difference should matter for what she deserves, and why."[61] Anti-discrimination protection for disabled people has been justified by historical discrimination and segregation, as well as the view that their differences do not materially affect their ability to work.[62] In *Fat Rights*, Kirkland attempted to fit fat within the overall field of anti-discrimination law by examining logics of personhood. For example, the logic of actuarial personhood can justify race and gender protections.[63] Because these traits relate primarily to appearance and do not change an individual's functional ability, an employer should ignore these traits and focus on the abilities of the worker. However, this logic does not apply to someone who has a functional difference, such as an employee who uses a wheelchair and may require a sink to be lowered in the bathroom or a fat employee who may need a chair without armrests. In these cases, courts use a different logic of personhood, which Kirkland calls managerial individualism and defines as "a process-focused, context-specific approach to

57. Kirkland, *What's at Stake in Fatness as a Disability?*, *supra* note 56; Kirkland, *Think of the Hippopotamus*, *supra* note 56.

58. Kirkland, *Think of the Hippopotamus*, *supra* note 56, at 417.

59. *Id.* at 420 (quoting Marilyn Wann).

60. *Id.* at 422.

61. FAT RIGHTS, *supra* note 56, at 27.

62. *Id.* at 40–41.

63. *Id.* at 20–23.

differences that requires an organization to do something to accommodate the person with a disability."[64] Kirkland suggested that the logic of managerial individualism (a focus on the unique qualities of individual bodies and personal accommodations) depoliticizes identity groups, and that, in practice, including fat people within the ADA's category of disability would further medicalize fat and hinder the affirmatory politics desired by fat activists.[65] Specifically, under the ADA, fat people would be subject to the same medicalized court assessments of their "functional capacities" as other disabled people.[66]

Cases in which fat is alleged to be a disability reveal the differences between stereotypes of disabled people—who are perceived as deserving of pity or as unfortunate victims, helpless, and unable to work in or contribute to the labor market—and stereotypes of fat people—who are perceived as lazy, blameworthy, and victims of their lack of self-control rather than victims of bad luck. The pity reserved for disabled people in U.S. culture is not usually extended to fat people.[67] Studying fat as disability highlights the way that these stereotypes and the resulting prejudice, as well as physical architectural barriers, construct the experience of disability. Disability studies scholars assert that the devaluation of bodies considered "abnormal" constitutes a barrier to the social inclusion of disabled people and to the formation of an identity category based on bodily abnormalities.[68] Even when an individual obtains physical access to a space, the behaviors and attitudes of others may effectively eliminate the accessibility of the space.

C. Passage of the ADA and Subsequent Backlash

The ADA seeks to remedy the historical isolation, segregation, and discrimination that people with disabilities have encountered and to reaffirm the right of people with disabilities to participate

64. *Id.* at 22.

65. *Id.* at 133.

66. *Id.*

67. *See* SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE AND THE BODY 185–86 (Tenth Anniversary ed., 2003) (describing the "massive and multifaceted nature" of the industries built to promote slender bodies and how preoccupation with fat pushes women especially to police their own bodies).

68. *See, e.g.*, Irving Kenneth Zola, *Bringing Our Bodies and Ourselves Back In: Reflections on a Past, Present, and Future "Medical Sociology"*, 32 J. HEALTH & SOC. BEHAV. 1 (1991); Nick Watson, *Well, I Know This Is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and Disability*, 17 DISABILITY & SOC'Y 509 (2002).

fully in all aspects of society.[69] Passed with bipartisan support in 1990, top liberal and conservative supporters framed the bill as a way to move disabled people off of welfare and into the workforce. The ADA received such broad support because it appealed to both conservative cost-cutting interests and the liberal impetus to increase anti-discrimination protections.[70]

The ADA's language is not particularly revolutionary or different from the language used in other anti-discrimination laws, yet the law provides a unique legal solution. Under the ADA, employers must provide disabled workers with reasonable accommodations necessary for them to be effective in their jobs.[71] Unlike other anti-discrimination laws, which only provide monetary damages, the ADA gives workers the power to change their workplace environment to meet their needs and forces employers to adapt business practices to better serve their workers.[72]

Soon after its passage, courts began interpreting the ADA in ways that stripped it of its potential.[73] Specifically, courts narrowed the ADA's definition of disability to restrict the potential impact of the law by limiting the number of people it protected.[74] Ruth Colker provided empirical evidence of this restriction. According to Colker, from 1992 to 1998, 93 percent of ADA employment discrimination cases were decided in favor of employers, most often because employees were not considered disabled as defined by the ADA.[75]

The ADA implements a hybrid medical–social model of disability. Although the preamble of the legislation explicitly recognizes that disability arises from certain social relations rather than being the automatic outcome of having an impaired body,[76]

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69. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1)–(8) (1990).

70. *See* BAGENSTOS, *supra* note 9, at 5 (observing that "[b]oth liberal and conservative supporters of the ADA tapped into authentic aspects of disability rights thinking" and that "[t]hose aspects converged in support for the statute as it proceeded through Congress."); BACKLASH, *supra* note 4, at 273 (noting the ADA is supported by "the liberal terms of equal rights" and by "conservative cost-efficiency rationales.").

71. 42 U.S.C. § 12111(9)(A)–(B).

72. *See* Befort, *supra* note 14; Diller, *supra* note 9, at 39–47.

73. *See* BACKLASH, *supra* note 4.

74. *See* BACKLASH, *supra* note 4; BAGENSTOS, *supra* note 9; Diller, *supra* note 9, at 26–27.

75. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); *see also* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).

76. 42 U.S.C. § 12101(a)(1) (2012) ("[P]hysical or mental disabilities in no way

legal analysis continues to focus on an individual's body as the site of disability. Under the ADA:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[77]

This definition serves a gate-keeping function because meeting it is a threshold issue for employee-litigants in determining whether they are protected by the ADA.[78] An individual "who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment."[79]

In defining disability, the ADA attempts to move away from a strict medical understanding of disability. Determining whether an individual is disabled under the statute is supposed to be an individualized assessment based on a person's specific abilities and not a medical diagnosis.[80] There is no inherent or "per se" disability.[81] This individualized inquiry requires courts to move away from broad generalizations, stereotypes, and assumptions about disabled peoples' abilities. In practice, however, stereotypes

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diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination[.]"); *see also* 42 U.S.C. § 12101, § 2(a)(2), 122 Stat. 3553 (2008) ("[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.").

77. 42 U.S.C. § 12102(1)(A)–(C) (2012).

78. *See* 29 C.F.R. § 1630.2(g) app. (2012) (citing STATEMENT OF THE MANAGERS TO ACCOMPANY S. 3406, 110TH CONG. (2008) ("The first of these is the term 'disability.' 'This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA.' 2008 Senate Statement of Managers at 6.")).

79. 29 C.F.R. § 1630.1(c) (2012) (quoting H.R. REP. NO. 110-730 at 6 (2008)).

80. *See* 29 C.F.R. § 1630.2(j)(1)(v) app. (2012) ("The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.").

81. 29 C.F.R. § 1630.2(j)(3) app. (2012) ("As the regulations point out, disability is determined based on an individualized assessment. There is no 'per se' disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability.").

and medical diagnoses continue to play key roles in these individualized assessments.

The third prong of the ADA's definition, "being regarded as having such an impairment" recognizes the role stereotyping plays in excluding disabled people. This aspect of the ADA's disability definition is particularly important for non-traditionally disabled people, such as the fat people whose cases are examined in this study. Legislative history indicates that Congress intended this prong of the definition to address "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities [which] are often just as disabling as actual impairments . . . ."[82] The Equal Employment Opportunity Commission (EEOC) uses the example of physical disfigurement to explain perceived disability:

> The third part of the definition protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such an impairment. For example, this provision would protect a severely disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others.[83]

In effect, a fat employee bringing a claim of perceived disability discrimination argues that the way others viewed and treated them based on their weight, rather than their weight in and of itself, made them disabled.

A final critical aspect of the disability definition for fat employees is the word "impairment." Although the ADA does not define impairment, various EEOC regulations do. For example, in the context of employment at the federal Institute of Museum and Library Services, a physical impairment is defined as "[a]ny 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; genitourinary; hemic and lymphatic; skin; and endocrine . . . ."[84] In addition, the Appendix to the EEOC regulations includes language distinguishing impairments and other physical characteristics: "The definition of the term 'impairment' does not include physical

82. 29 C.F.R. § 1630.2(*l*) app. (2012).

83. *The ADA: Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 1, 2002), https://www.eeoc.gov/eeoc/publications/adaqa1.cfm [https://perma.cc/KP53-GL23].

84. 45 C.F.R. § 1181.103(1).

characteristics such as eye color, hair color, left-handedness, or *height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder*."[85] Some courts have interpreted this guidance to mean that weights within the normal range can be an impairment if caused by a physiological disorder,[86] while others have held that to be an impairment, weight must be both outside the normal range and caused by a physiological disorder.[87]

In 2008, Congress passed the ADAAA for the explicit purpose of reversing the Supreme Court's narrow interpretation of who is considered disabled under the law.[88] Congress urged courts to shift their focus from whether an individual is disabled "enough" under the law to issues such as whether a discriminatory act had occurred or whether the accommodations an individual requested were reasonable.[89] The ADAAA eclipsed prior interpretations of the law and removed the substantial limitation requirement from the definition of a perceived disability.[90] Under the new statute, a person is categorized as disabled if they are treated adversely

85. 29 C.F.R. § 1630.2(h) app. (2012) (emphasis added) ("It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments.").

86. *See* Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997) (suggesting that plaintiffs' weights, which were not beyond a normal range, might be qualifying impairments if plaintiffs had "alleged that they suffer from a physiological disorder (which, for example, has produced excessive weight or lack of fitness despite their individual efforts)"); Francis v. City of Meriden, 129 F.3d 281, 286 (2nd Cir. 1997) (noting that simple (not morbid) obesity may be a qualifying impairment when it "relates to a physiological disorder"); Tudyman v. United Airlines, 608 F.Supp. 739, 746 (C.D. Cal. 1984) (distinguishing a situation in which a plaintiff bodybuilder's weight was in the normal range and exceeded an employer limit from a hypothetical case in "which the plaintiff's weight was involuntary—e.g., the result of a glandular problem").

87. *See* Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997); Francis v. City of Meridan, 129 F.3d 281, 286 (2nd Cir. 1997); EEOC v. Watkins Motor Lines, 463 F.3d 436, 443 (6th Cir. 2006); Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1111 (8th Cir. 2016).

88. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(a)(3)–(7); BACKLASH, *supra* note 4.

89. *Id.* § 2(b)(4)–(6).

90. *Id.* § 2(b)(3)–(6); *see also* 29 C.F.R. § 1630.2(*l*) app. (2012) ("Accordingly, the ADA Amendments Act broadened the application of the 'regarded as' prong of the definition of disability. 2008 Senate Statement of Managers at 9-10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the 'regarded as' prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.").

because of an actual or perceived impairment.[91] They do not need to prove that the impairment substantially limits a major life activity.[92] At least one study has found that employees with a variety of disabilities have won a significantly higher proportion of cases since the passage of the ADAAA. In an examination of 237 ADA decisions, Stephen F. Befort found that before the ADAAA, district courts decided nearly 75 percent of cases in favor of employers on the basis that the employees were not disabled, while after the ADAAA, only 46 percent of district court cases had similar outcomes.[93] These results suggest that the ADAAA had its intended effect of applying the ADA's protections to a broader range of employees.

D. A Review of Case Law: Fat as Disability

Under the ADA, eighteen cases[94] alleging employment discrimination on the basis of fat have reached appellate courts (15 before the application of the ADAAA and three after).[95] These cases

91. *See* 29 C.F.R. § 1630.2(*l*) app. (2012) ("To illustrate how straightforward application of the 'regarded as' prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.").

92. *See* 29 C.F.R. § 1630.2(j) app. (2012) ("In any case involving coverage solely under the 'regarded as' prong of the definition of 'disability' (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is 'substantially limited' in any major life activity. See 2008 Senate Statement of Managers at 10.").

93. *See* Befort, *supra* note 14, at 2050–51.

94. Only ten of these decisions were published, and therefore, have precedential value.

95. *See* Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993); Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997); Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Johnson v. Baylor Univ., 129 F.3d 607, No. 97-50194, 1997 U.S. App. WL 680835 (5th Cir. Sept. 18, 1997); Watters v. Montgomery Cnty. Emergency Commc'n Dist., 129 F.3d 610, No. 97-20118, 1997 U.S. App. WL 681143 (5th Cir. Oct. 13, 1997); Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661 (3d Cir. 1999) (not included in the sample because depression was the first claimed impairment); Pepperman v. Montgomery Cnty. Bd. of Educ., 201 F.3d 436, No. 99-1366, 1999 U.S. App. WL 1082546 (4th Cir. Dec. 2, 1999); McKibben v. Hamilton Cnty., 215 F.3d 1327, No. 99-3360, 2000 U.S. App. WL 761879 (6th Cir. May 30, 2000); Wilson v. Cap. Transp. Corp., 234 F.3d 29, No. 99-31156, 2000 U.S. App. WL 1568200 (5th Cir. Sept. 15, 2000); EEOC v. Watkins Motor Lines, 463 F.3d 436 (6th Cir. 2007); Greenberg v. Bellsouth Telecomm., Inc., 498 F.3d 1258 (11th Cir. 2007); Bass v. Lockheed Martin Corp., 287 F. App'x 808, No. 08-10549, 2008 U.S. App. WL 2831988 (11th Cir. 2008); Cordero v. Fla. Dep't of Env't Prot., 300 F. App'x 679, No. 08-11213, 2008 U.S. App. WL 4902656 (11th Cir. Nov. 17, 2008); Spiegel v. Schulmann, 604 F.3d 72 (2d Cir. 2010); Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010); Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F. App'x 50, No. 11-2123,

have focused on two primary issues: First, is fat an impairment (i.e., a physiological disorder)? Second, does a person's weight act as a substantial limitation? Importantly, many of these cases illuminated the role of stereotypes in disabling fat workers. Ten plaintiffs brought only claims of perceived disability, in effect arguing that being fat was a disability only because others perceived them as unable to do their jobs.[96] The first case of employment discrimination based on fat as a disability to reach a federal court of appeals laid out a framework that was later employed in subsequent litigation. In this case, Bonnie Cook brought and won a claim of perceived disability, arguing that she was disabled because of the erroneous, stereotypical beliefs of her employer regarding her weight.[97] Cook, an institutional attendant with a "spotless" work record, was not rehired after taking a voluntary leave because the hospital, her former employer, believed that her morbid obesity "compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments . . . ."[98] Although Cook did not claim that she, personally, was disabled by fat, she needed to prove that fat was an impairment that could form the basis of a claim of disability discrimination under the ADA.[99] Thus, Cook presented expert testimony that morbid obesity is a "physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems."[100] In addition, Cook demonstrated that morbid obesity is immutable; her expert witness testified that metabolic dysfunction continues even after weight loss.[101]

Other circuits interpreted *Cook* and the expert testimony presented in a variety of ways. The requirement that a fat litigant prove that their weight is (1) a physiological disorder itself or (2) caused by a physiological disorder shaped appellate decisions in the

2012 U.S. App. WL 505896 (3d Cir. Feb. 16, 2012); Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016); Kelly v. Univ. of Pa. Health Sys., 708 F. App'x 60 (3d Cir. 2017).

96. *See Spiegel*, 604 F.3d 72; *Greenberg*, 498 F.3d 1258; *EEOC*, 463 F.3d 436; *Wilson*, No. 99-31156, 2000 WL 1568200; *Walton*, 168 F.3d 661; *Francis*, 129 F.3d 281; *Watters*, No. 97-20118, 1997 WL 681143; *Johnson*, No. 97-50194, 1997 WL 680835; *Andrews*, 104 F.3d 803; *Cook*, 10 F.3d 17.

97. *Cook*, 10 F.3d at 22.

98. *Id.* at 20–21.

99. *Id.* at 23.

100. *Id.*

101. *Id.* at 24.

Second, Sixth, and Eighth Circuits.[102] In 1997, the Second and Sixth Circuits decided cases in which firefighters and police officers, respectively, challenged weight limits.[103] In both cases, the plaintiffs argued that their employers perceived them as disabled because they failed to meet weight limits.[104] However, neither court affirmed that the plaintiffs were disabled. The Second Circuit concluded that the firefighters had not shown that their weights were related to a physiological condition and the Sixth Circuit found that the officers did not allege that their weights were out of the normal range or caused by a physiological condition. Notably, both the Second and Sixth Circuit rulings addressed obesity, but not morbid obesity.[105] Both courts were concerned that extending the ADA to fat employees contradicted the law's purpose.[106] In justifying these decisions, the courts distinguished fat litigants from the "truly disabled," arguing:

> The ADA "assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by

102. Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1112–13 (8th Cir. 2016) ("In sum, we conclude that for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition. This remains the standard even after enactment of the ADAAA, which did not affect the definition of physical impairment. Because Morriss failed to produce evidence that his obesity was the result of an underlying physiological disorder or condition, the district court properly concluded that Morriss did not have a physical impairment under the ADA."); Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) ("Francis's claim fails because obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the statutes."); Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997) ("Because a mere physical characteristic does not, without more, equal a physiological disorder, where an employee's failure to meet the employer's job criteria is based solely on the possession of such a physical characteristic, the employee does not sufficiently allege a cause of action under these statutes.").

103. *Francis*, 129 F.3d at 282; *Andrews*, 104 F.3d at 805–06.

104. *Francis*, 129 F.3d at 282; *Andrews*, 104 F.3d at 805–06.

105. *Francis*, 129 F.3d at 285 ("Francis only alleges that his employer disciplined him for failing to meet a general weight standard. He does not claim that his employer regarded him as suffering from a physiological weight-related disorder."); *Andrews*, 104 F.3d at 810 ("The officers herein do not allege that their weights or their cardiovascular fitness are beyond a normal range, nor have they alleged that they suffer from a physiological disorder (which, for example, has produced excessive weight or lack of fitness despite their individual efforts).").

106. *Francis*, 129 F.3d at 286; *Andrews*, 104 F.3d at 810 ("To hold otherwise would (to paraphrase the Fourth Circuit) distort the 'concept of an impairment [which] implies a characteristic that is not commonplace' and would thereby 'debase [the] high purpose [of] the statutory protections available to those truly handicapped.'").

> anyone whose disability was minor and whose relative severity of impairment was widely shared."[107]

In 2006, the Sixth Circuit extended the requirement of proving a physiological cause to morbid obesity.[108] More recently, the Eighth Circuit held that even after the ADAAA, employee-litigants must show that their morbid obesity is related to a physiological cause.[109]

A second group of appellate decisions focused not on whether fat was an impairment or a physiological condition, but instead on whether fat was a substantial limitation for plaintiffs. As in the first group of cases, fat employees in these cases also brought claims of perceived disability, as highlighted by the unpublished Fifth Circuit case *Johnson v. Baylor University*.[110] Johnson, a fat pilot, was terminated for failure to lose weight; Baylor University believed Johnson's weight had a negative impact on potential university donors flying in his plane.[111] As the court summarized, "Johnson's position put him in contact with many important university benefactors and therefore required a certain comeliness on Johnson's part that might not otherwise be required."[112] Johnson argued that his employer's perception of him as disabled was the basis for his termination.[113] The court concluded, however, that Johnson was not perceived as disabled, arguing that to prove this claim he would need to show that Baylor perceived him as being substantially limited in his ability to work in a broad range of jobs, not just jobs in which appearance must have a positive impact.[114] The Third, Sixth, and Eleventh Circuits have decided cases on similar grounds, finding that employees did not fit the disability definition because their impairments were not substantially limiting.[115]

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107. *Francis*, 129 F.3d at 286 (quoting Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)).

108. EEOC v. Watkins Motor Lines, 463 F.3d 436, 443 (6th Cir. 2007).

109. Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1111 (8th Cir. 2016).

110. Johnson v. Baylor Univ., No. 97-50194, 1997 WL 680835 (5th Cir. Sept. 18, 1997).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *3.

114. *Id.* at *4 (citing 42 U.S.C. § 12102(2)(C)) ("The 'regarded as,' or 'perception,' prong of the 'disability' definition requires that a plaintiff provide evidence that the *employer thought* that other employers would not hire him because of his obesity.").

115. Lescoe v. Pa. Dep't of Corr.-SCI Frackville, No. 11-2123, 2012 WL 505896, at *2 (3d Cir. Feb. 16, 2012) (quoting Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 185 (2002)) ("Although this Court has not definitively reached a position regarding

Since the *Cook* ruling, only the Tenth and Eleventh Circuits have treated fat as a disability under the ADA in published decisions.[116] In an unpublished decision, the Third Circuit considered a plaintiff's weight to be a protected disability; however, the plaintiff lost her case because her employer had articulated a non-discriminatory reason for her termination.[117] Thus, only three circuits have precedential decisions considering fat a disability. Given these precedents, it is not surprising that most law review articles on this topic have concluded that fat is rarely considered a disability by courts.[118] Further, these articles seem to assume

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whether obesity is a disability under the ADA that limits a major life activity, the District Court did not err in finding that Lescoe did not establish any major life activities that were adversely affected by his weight. He passed numerous medical and physical exams to obtain the position as well as a five-week training program. Moreover, Appellant 'must further show that the limitation on the major life activity is substantial.'"); McKibben v. Hamilton Cnty., No. 99-3360, 2000 WL 761879, at *5 (6th Cir. May 30, 2000) ("Although McKibben has not explicitly identified the 'regarded as' prong under which he proceeds, his arguments fall under the first prong. He insists that his alleged 'morbid obesity' constitutes an impairment and that the defendants regarded his weight as substantially limiting the major life activity of working. We disagree. Even if his alleged 'morbid obesity' qualifies as a physical or mental impairment that does not substantially limit the major life activity of working, McKibben has not offered any evidence that the defendants regarded his weight as such a substantial limitation."); Greenberg v. Bellsouth Telecomm., Inc., 498 F.3d 1258, 1264 (11th Cir. 2007) ("Greenberg has not shown that he has an impairment that substantially limits him in one or more major life activities. First, a person is 'substantially limited' in a 'major life activity' if he cannot care for himself; on this point, the evidence indicates that Greenberg bathed and dressed himself and could perform household chores.").

116. In so ruling, the Tenth Circuit explained:

> Here there are two potentially qualifying disabilities: obesity and diabetes. The question of whether the defendant is disabled was not decided by the district court. The district court stated that: 'For the sole purpose of determining whether summary judgment is appropriate in this case, this Court will . . . assume that Plaintiff has met his burden in proving that he is a disabled person.' . . . . On appeal, neither side has fully briefed this question nor is there a record on which to base a decision on whether Mr. Wilkerson is disabled. Further, we find other aspects of the analysis dispositive. Thus, like the district court, we will assume that Mr. Wilkerson has met this prong of the analysis.

Wilkerson v. Shinseki, 606 F.3d 1256, 1262–63 (10th Cir. 2010). *See also* Bass v. Lockheed Martin Corp., No. 08-10549, 2008 WL 2831988, at *3 (11th Cir. 2008) (holding that Bass did not show that the proffered reasons for his termination were pretextual).

117. Kelly v. Univ. of Pa. Health Sys., 708 F. App'x 60, 63–64 (3d Cir. Sept. 11, 2017).

118. *See, e.g.*, M. Neil Browne, Virginia Morrison, Barbara Keeley & Mark Gromko, *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 20 (2010) ("[O]bese plaintiffs alleging employment discrimination under the ADA or RHA have been met with fervent opposition."); Jeffrey Garcia, *Weight-Based Discrimination and the*

common-sense understandings of fat and disability, such as the notion that individuals are not at fault for being disabled but are at fault for being fat, rather than understandings put forth by disability and fat studies scholars.[119]

Americans with Disabilities Act: Is There an End in Sight?, 13 HOFSTRA LAB. L.J. 209, 228 (1995) ("In most cases, however, excess weight, without a related medical condition or other impairment, has not been considered a handicap."); Carol R. Buxton, *Obesity and the Americans with Disabilities Act*, 4 BARRY L. REV. 109, 127 (2003) ("Unless obesity is determined to be a disease, the Americans with Disabilities Act is not the place for the obese to seek shelter, with the exception of the perceived disability prong."); Patricia Hartnett, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 RUTGERS L.J. 807, 821 (1993) ("Though the proposed regulations acknowledge that obese plaintiffs may argue that their status constitutes a disability protected by the ADA, the Act states that it is generally not to be construed as providing such protection."); Abigail Kozel, *Large and in Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disability Act Amendments Act of 2008*, 31 HAMLINE J. PUB. L. & POL'Y 273, 327 (2009) ("Before 2009, essentially no claims for protection under an obesity-as-a-disability ADA protection stood a chance of success."); Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 81 (2002) ("[C]ourts have been generally unsympathetic to claims by fat plaintiffs under the [ADA] and the Rehabilitation Act."); Shannon Liu, *Obesity as an "Impairment" for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 166 (2010) ("[P]ast case law has not considered obese individuals as disabled or obesity as an impairment for ADA purposes."); Amie A. Thompson, *Obesity as a Disability Under the Americans with Disabilities Act Amendments Act and the Amendments' Effect on Obesity Claims Under the Pennsylvania Human Relations Act: Should Employers Anticipate a Big Change?*, 12 DUQ. BUS. L.J. 259, 271 (2010) ("[M]ost [courts] that have addressed the argument [that obesity is a handicap or disability] have found it unpersuasive."). *But see, e.g.*, Elizabeth E. Theran, *"Free to Be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113 (2001) (arguing that more courts will likely find obesity a protected disability).

119. For example, as Browne, Morrison, Keeley and Gromko describe:

> The cause of obesity properly plays a major role in our response to the treatment of obese persons under the law. In the extreme, suppose obesity were akin to childhood cancer. As a community, we would see the obese as vulnerable, as humans in need of our legal and financial sympathy.
>
> On the other hand, suppose obesity is similar to the effects of choosing to walk into the direct path of a raging rhinoceros. While we might want to claim that no one could make such a choice, there is too much extant evidence that many, and quite seemingly sensible, people make choices that have almost certain destructive consequences.
>
> In this latter instance, wherein obesity is the result of voluntary choices that reasonable people should understand as having severe consequences, the legal reaction to obesity would be to hold people accountable for their actions. We would treat the obese as responsible adults who knowingly chose a lifestyle of which obesity was a highly probable result. Thus, the obese should face the consequences of their actions, just as should anyone whose choices we sanction.

Browne et al., *supra* note 118, at 39–40. For other examples, see also:

> Imagine a healthy, active man who is involved in a tragic car accident. The

II. Methods

A. Sample

To collect this data set, I conducted multiple searches of Westlaw (a database used by legal scholars to collect and examine legal documents, including judicial opinions) using the key terms "obesity," "obese," "morbid obesity," "fat," and "Americans with Disabilities Act." These searches produced a list of hundreds of cases, which I then refined by retaining only those brought under the ADA and excluding cases brought under state and other anti-discrimination statutes.[120] I further narrowed the sample by focusing on instances of employment discrimination, which is a common practice in ADA research and ensures that cases share a similar underlying structure and present similar claims.[121] Finally, I restricted the sample to cases in which obesity or morbid obesity was the primary claimed impairment, excluding cases in which fat was included as part of a list of four or more medical diagnoses.[122]

> accident leaves him paralyzed from the waist down and he can no longer walk. He remains as active as he possibly can, with the aid of his wheelchair. Medical technology, as advanced as it has become, cannot restore the use of his legs. Compare him to a five-foot six-inch woman who began gaining weight at the age of eighteen. By the time she is 22, her weight has swelled to 385 pounds. Most likely due to her large body size, she is constantly hungry and sometimes eats six meals a day—mostly at fast food restaurants.
>
> Unlike the man in the wheelchair, she can change her condition, and she did. Under a doctor's supervision, she changed her eating habits and began an exercise routine. In the span of fifteen months, she lost one hundred pounds. Though at times difficult and seemingly impossible, she worked towards her goal and was able to achieve it. Now ask that man in a wheelchair what he would be willing to do to walk again. One can only guess what his answer would be. Congress seemingly recognized the immutability of a disability and the need for a law to protect the truly disabled.

Buxton, *supra* note 118, at 113; Kristen, *supra* note 118, at 82 ("[U]sing disability antidiscrimination laws is problematic from an ideological perspective, since most fat people would argue that they are not disabled and are in fact perfectly capable of doing the same work as thin people.").

120. I also included cases brought under the Rehabilitation Act because this is the statute under which federal employees bring claims of disability employment discrimination. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797 (2018).

121. *See generally* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75 (studying outcomes in ADA employment discrimination cases); Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75 (finding that plaintiffs bringing disability claims in court are more successful if their discrimination is charged with the EEOC).

122. For example, I excluded the Third Circuit decision in *Walton v. Mental Health Ass'n of Southeastern Pennsylvania* because Walton's primary impairment is depression. *See* Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 665 (3d Cir. 1999).

This process resulted in a data set of eighty-seven cases that occurred between 1993 and 2018. The data include every judicial opinion available on Westlaw in which fat was the primary claimed disability in an ADA employment lawsuit from 1990 to 2018. Unlike traditional legal research, the sample includes both commonly cited appellate cases and more obscure district court opinions. In addition, the sample includes unreported opinions (i.e., opinions that the ruling court regarded as having insufficient precedential value and thus are not available for citation as legal precedent).[123] The final sample includes cases from all twelve circuits, or legal regions. Each circuit is legally independent from the others, although the ADA, as a federal statute, applies equally in each region. An appellate court decision in a circuit sets the legal interpretation for lower district courts to follow, but the high courts in other circuits may interpret the ADA differently.

The sample has three notable limitations. First, relatively few acts of employment discrimination result in litigation[124] and the majority of cases settle out of court.[125] Therefore, this study of case law may not be representative of all disability discrimination in the workplace. Second, the sample does not include claims brought under state disability anti-discrimination statutes or claims seeking disability supplemental security income (SSI) benefits or workers' compensation. This choice was strategic. Although the extant research suggests that the ADA has not increased disabled people's employment rates[126] and that most people who bring cases under the ADA lose them,[127] scholars have found that the ADA holds symbolic meaning for many disabled people, even those who do not actively use the law.[128] Finally, not all states and circuits are

123. The lack of precedent does not affect the current analysis, which focuses not on legal precedent, but on how the ADA disability definition is applied to fat employee-litigants.

124. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 545 (1980).

125. *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010).

126. *See* Maroto & Pettinicchio, *supra* note 22, at 373.

127. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75, at 100.

128. *E.g.*, DAVID ENGEL & FRANK MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003) (demonstrating how the ADA plays a role in the positive identity formation of some disabled Americans). Based on in-depth interviews, Engel and Munger found that disability rights affirmed their respondents' belief in themselves as capable people and changed their thinking about their bodily difference. As a federal civil rights statute, the ADA may hold even more symbolic power in shaping disability identity.

equally represented in the sample, most likely due to specific state and municipal laws. The sample includes only one case from Michigan and no cases from California. The lack of cases from Michigan is likely the result of a state law prohibiting weight-based discrimination under which lawyers could bring a claim (Michigan is the only state with such a law).[129] Similarly, the absence of cases from California is likely the result of lawyers being able to bring claims under multiple municipal laws.[130] Municipalities in New York, Wisconsin, Illinois, and the District of Columbia also have weight-based protections that may have influenced the shape of this sample.[131]

B. Coding

I coded each legal opinion for the type of disability claim made by employees: actual disability, perceived disability, or both. I also coded for the year, court circuit (region), procedural stance, intersectional claims, expert witness testimony, and the primary legal issue. With respect to plaintiffs' demographic characteristics, I coded for gender, occupation, and weight (morbid or simple obesity). The dependent variable is whether the court considered the plaintiff disabled, which is a preliminary requirement to receiving anti-discrimination protection under the ADA. Because the research question examines whether fat is a disability under the ADA, the analysis focuses on the disability determination rather than whether the plaintiff won or lost the claim. To ensure inter-coder reliability, a second attorney reviewed and coded a random sample of 10 percent of the cases. There was full agreement between coders on all variables.

C. Variables

Many of the variables, such as procedural posture, year, and circuit, were explicitly listed in judicial opinions. Others required a further step to determine; for example, gender was identified through pronoun usage and first names. I coded opinions for weight by categorizing plaintiffs as either obese or morbidly obese, based

129. *See* Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.2101–2803 (West 1976). *See also Equality at Every Size*, NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, (September 18, 2020), https://naafa.org/eaes [https://perma.cc/6Z7A-ZLBD].

130. *See Equality at Every Size*, *supra* note 129 (describing both the San Francisco Administrative Code and the Santa Cruz Municipal Code).

131. *Id.* (discussing legal protections in Binghamton, NY; Madison, WI; Urbana, IL; and Washington, DC).

on the height/weight listed in the opinion or the courts' language use (e.g., describing a plaintiff as morbidly obese). Although fat studies scholars use the simple descriptor "fat," judicial opinions exclusively employed the medicalized terms "obese" and "morbidly obese." In three cases I could not determine whether an employee was considered obese or morbidly obese;[132] in the rest of the sample, sixty-four individuals were categorized as morbidly obese and twenty were categorized as obese. The variable "expert witness" identified cases in which the plaintiff presented testimony from a medical expert, physician, or nurse regarding their impairment or limitations. Using the coding system developed by Jonsson et. al., occupation was coded as either manual or non-manual and as belonging to one of ten meso-classes (classical professions, managers and officials, other professions, sales, clerical, craft, lower manual, service workers, primary [agriculture], or proprietors);[133] in three cases, I was unable to identify the plaintiff's occupation.[134]

Because prior research has found that employee-litigants who bring intersectional claims (more than one identity-based claim of discrimination) fare worse than those who bring single-focus claims,[135] I coded for whether the plaintiffs brought claims based on gender, racial, or age discrimination as well as disability. The independent variable for claim type (actual disability, perceived disability, or both) was easily determined based on court analysis in most cases, but I was unable to determine claim type in three cases.[136] In addition, I coded for the dispositive legal issue (the issue

132. *See* Lowe v. Am. Eurocopter, LLC., No. 1:10CV24–A–D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010) ("Plaintiff claims that she is disabled due to her weight."); Marsh v. Sunoco, Inc., No. 06-CV-2856, 2006 WL 3589053, at *3 (E.D. Pa. Dec. 6, 2006) ("Plaintiff alleges that Sunoco regarded him as disabled on account of his weight and discriminated against him on that basis in violation of the ADA."); Watters v. Montgomery Cnty. Emergency Commc'n Dist., 129 F.3d 610, No. 97-20118, 1997 WL 681143, at *2 (5th Cir. Oct. 13, 1997) ("In her Second Amended Original Complaint, Watters claims that she was perceived 'to be disabled because of her weight' and that her weight was perceived as severely restricting her 'ability to perform various job related tasks.'").

133. Jan O. Jonsson, David B. Grusky, Matthew Di Carlo, Reinhard Pollak & Mary C. Brinton, *Microclass Mobility: Social Reproduction in Four Countries*, 114 AM. J. SOCIO. 977, 997 (2009).

134. *See* Smaw v. Va. Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994); Funk v. Purdue Emps. Fed. Credit Union, 334 F. Supp. 2d 1102 (N.D. Ind. 2004); Bird v. County of Greene, No. 06-1281, 2007 WL 626106 (W.D. Pa. Feb. 23, 2007).

135. *See* Rachel Kahn Best, Linda Hamilton Krieger, Lauren B. Edelman & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 994–95 (2011).

136. *See* Franz v. Kernan, 951 F. Supp. 159 (E.D. Mo. 1996); Redd v. Rubin, 34 F. Supp. 2d 1 (D.D.C. 1998); Willis v. San Antonio ISD, No. SA-16-CA-00887-ESC, 2017 WL 3470944 (W.D. Tex. Aug. 11, 2017).

on which the case was decided): whether the plaintiff's fat was a physiological condition, whether the plaintiff was substantially limited, whether discrimination occurred, or another issue. Finally, I created dummy variables to control for precedent; these variables categorized circuits as having positive appellate decisions (a ruling that fat was a disability), no appellate decisions, or negative appellate decisions (a ruling that fat was not a disability).

The dependent variable, whether the court ultimately considered the plaintiff disabled or non-disabled, was based on a close reading of the judicial opinions. In some of the cases coded as disabled (fourteen cases, or sixteen percent of the sample), the court did not directly rule that the specific employees were disabled, but rather "assumed" that these employees were disabled as defined by the law in order to analyze the remainder of their legal claims. Determining whether an employee-litigant is disabled as defined by the law is a threshold issue—to evaluate a claim of discrimination, the court must necessarily consider a person disabled, otherwise the law would simply not apply to the situation. Courts that assume employees are disabled to proceed with an evaluation of their claims of discrimination are following Congress' intention, as expressed in the ADAAA, that the determination of disability "not demand extensive analysis . . . ."[137] Thus, these cases were coded as disabled. In contrast, in cases that were coded as not disabled, the courts had explicitly ruled that the ADA did not apply to a specific plaintiff because they were not disabled.

D. Analysis

I conducted two logistic regression models because "this is the standard procedure for analyzing binary dependent variables."[138] The relatively small sample size placed constraints on the multivariate statistical analyses due to limited degrees of freedom and low statistical power. Because of these challenges, the inclusion of a large number of independent variables in the models would have reduced statistical efficiency and almost certainly ensured that no factors would have a significant effect. Therefore, I selected control variables particularly carefully.

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137. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(5) ("[T]o convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .").

138. *See* Richard York, *Kyoto Protocol Participation: A Demographic Explanation*, 24 POPULATION RSCH. & POL'Y REV. 513, 520 (2005).

III. Results

Table 1 includes a list of all cases in the sample as well as the year and region in which the final decision was published. The table also shows the types of claims made by employees (perceived/actual) and whether the court considered the employee disabled under the ADA. In addition, the percentage of employees considered disabled is listed next to the circuit name.

Table 1: All Cases by Circuit with Year, Claim Type, and Disability Decision

First Circuit (75%)		**Second Circuit (54%)**		**Third Circuit (60%)**	
Cook 1993, P	D	*Smallwood* 1995, A	D	*Motto* 1997, P	D
Nedder 1995, P A	D	*Francis* 1997, P	N	*Polesnak* 1997, P	D
Ridge 1999, P	N	*Hazeldine* 1997, A	D	*McCarron* 2001, A	D
Perez 2009, P A	D	*Butterfield* 1998, P A	D	*Goodman* 2005, P	N
		Furst 1999, P A	N	*Marsh* 2006, P	N
		Honey 2002, A	D	*Bird* 2007, A	D
		Connor 2003, P	D	*Ni* 2010, A	N
		Warner 2003, P	D	*Lescoe* 2011, P A	N
		Alfano 2006, P A	D	*Clem*^ 2017, P A	D
		Spiegel 2006, P	N	*Kelly*^ 2017, A	D
		Caruso 2008, P A	N		
		Frank 2010, P A	D		
		Sibilla^ 2012, P	N		
Fourth Circuit (20%)		**Fifth Circuit (55%)**		**Sixth Circuit (29%)**	
Smaw 1994, P A	N	*Texas Bus* 1996, P	D	*Andrews* 1997, P	N
Pepperman 1999, A	N	*Johnson* 1997, P	N	*Miller* 1997, A	D
Hill 2009, P A	N	*Watters* 1997, P	N	*McKibben* 2000, P	N
Michaels 2011, A	N	*Wilson* 2000, P	N	*Brantley* 2006, A	N
Bucklew 2012, A	D	*Whaley* 2002, P	N	*Cox* 2006, A	N
		Magnant 2006, A	D	*Watkins* 2006, P	N
		Melson 2009, A	D	*Hopkins* 2007, P R	D
		Tedford 2010, A	N		
		Lowe^ 2010, P A	D		
		Resources^ 2011, P	D		
		Willis^ 2017, -	D		
Seventh Circuit (45%)		**Eighth Circuit (50%)**		**Ninth Circuit (67%)**	
Bryant 1997, P	D	*Morrow* 1996, A	D	*Beem* 2011, A	D
Clemons 1997, P	N	*Franz* 1996, -	D	*Hayes* 2011, A	D
Bochenek 1998, P A	N	*Fredergill* 1997, P	N	*Valtierra*^ 2017, P A	N
Zarek 1998, P	N	*King* 2000, P A	N		
Funk 2004, P A	D	*Whittaker*^ 2014, P A	D		
Barrett 2009, A	D	*Morris*^ 2016, P A	N		
Revolinski 2011, P A	N				
Budzban 2013, A	D				
Luster-Malone 2013, A	N				
Richardson^ 2017, P	N				
Shell^ 2018, P	D				
Tenth Circuit (100%)		**Eleventh Circuit (33%)**		**D.C. Circuit (100%)**	
McDonald 1995, A	D	*Barnett* 1997, A	D	*Redd* 1998, -	D
Wilkerson 2010, A	D	*Murray* 1999, P	N	*Bunyon* 2002, A	D
Carpentier^ 2018, P	D	*Coleman* 2000, P A	N		
		West 2000, A	N		
		Cordero 2007, A	D		
		Dale 2007, P	N		
		Greenberg 2007, P A	N		
		Bass 2008, A	D		
		Cristia 2008, P A	N		
		Middleton 2008, P A	N		
		Powell^ 2014, P A	N		
		White^ 2017, P A	D		

NOTE: ^ indicates that the ADA Amendments Act of 2008 applied. D indicates that the court treated an employee as disabled and reviewed the rest of the claim. N indicates a determination that the employee was not disabled. P refers to a claim of perceived disability, A refers to a claim of actual disability, and R refers to having a record of disability. – indicates that the court opinion did not explain whether an employee-litigant brought a perceived or actual disability claim. The percentage of cases in which employees were deemed disabled is listed next to each circuit heading.

The opinions were split evenly, with employees considered disabled by the courts in 50.57 percent of the cases and explicitly deemed not disabled as defined by the ADA in 49.43 percent of the cases. The percentage of employees considered disabled varied dramatically across circuits, however, from 20 percent in the Fourth Circuit to 100 percent in the Tenth Circuit. In eight of the twelve regions or circuits, 50 percent or more of employees were considered disabled under the ADA; three of these circuits had published appellate court decisions ruling that an obese or morbidly obese employee was not disabled.[139]

There was also variation in disability determinations over time. In the first decade covered in the study, 1990 to 2000, thirty-three cases were brought, and 42 percent of these employee-litigants were considered disabled. From 2001 to 2008, twenty-four cases were brought, and 50 percent of employee-litigants were considered disabled. Finally, from 2009 to 2018, thirty cases were brought, and 60 percent of these employee-litigants were deemed disabled under the law. These fluctuations over time may reflect Supreme Court decisions and the 2008 passage of the ADAAA by Congress (the potential effects of these events are discussed in more detail below). Among cases decided after the amendments act went into effect on January 1, 2009, the rate of employees deemed disabled rose to 64 percent (nine out of fourteen cases).

139. *See* Francis v. City of Meridan, 129 F.3d 281 (2d Cir. 1997); Spiegel v. Schulmann, 604 F.3d 72 (2d Cir. 2010); Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F. App'x 50 (3d Cir. 2012); Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016).

Table 2: Logistic Regression Results for Disability Determinations

	Model 1 Log-odds coefficient (Standard error)	*Model 2* Log-odds coefficient (Standard error)
Only Actual Claim	1.164 (0.571)*	
Only Perceived Claim	-0.127 (0.613)	
Positive Appellate Decision	0.437 (0.558)	
Period 1993–2000	-0.573 (0.591)	-0.790 (0.659)
Period 2001–2008	-0.278 (0.597)	-0.196 (0.711)
Period 2009–2018 (reference)		
Any Appellate Decision		0.408 (0.596)
Physiological Cause		-3.013 (0.726)*
Substantial Limitation		-2.284 (0.603)*
Constant	-0.217 (0.499)	1.517 (0.585)
N	84	87
Pseudo R^2	0.08	0.263

***p < .05**

The regression models revealed three statistically significant variables: bringing only an actual (as opposed to a perceived) disability claim, a court focus on physiological condition, and a court focus on substantial limitation. Some seemingly important variables, including gender, occupation, bringing intersectional claims, and providing expert witness testimony, were not statistically significant in the models. However, given the small sample size, these results do not necessarily indicate that these factors are not relevant.

In Model 1, bringing only a claim of actual disability increased the likelihood that a plaintiff would be considered disabled by the courts. Negative appellate decisions did not have a statistically significant effect. Claim type (perceived disability, actual disability, or both) was statistically significant in many iterations of Model 1, suggesting that courts have struggled to understand the social model of disability, in which disability can and does arise when individuals act on stereotypical beliefs.

Model 2 confirmed that both aspects of the ADA's disability definition (1—possession of physical or mental impairment; 2—substantial limitation of major life activities) pose significant hurdles for fat plaintiffs. The requirement in certain districts that plaintiffs present expert testimony that their weight either (1) is a physiological condition or disorder or (2) is caused by such a condition or disorder hindered plaintiffs' claims that their weight is

a physical impairment. When this type of medicalization was the primary legal issue, as it was in twenty cases, plaintiffs were significantly less likely to be deemed disabled by a court. To my knowledge, this requirement is unique to fat plaintiffs (although there are no parallel studies in which researchers analyzed all or most cases for other specific categories of disability) and likely reflects the pervasive influence of negative stereotypes that portray fat as a character flaw rather than a medically neutral impairment.

A comparison to prior research[140] and legal scholarship[141] shows that with respect to the second aspect of the ADA's definition of disability (substantial limitation of major life activities), fat plaintiffs fared similarly to other potentially disabled people. When courts focused on this aspect of the disability definition (relative to the impairment aspect), fat litigants were significantly less likely to be considered disabled under the ADA. However, this finding may be less important in the future because the ADAAA specifically sought to lower the bar for proving a substantial limitation. Of the twenty-six cases in the sample that focused on substantial limitations, only six occurred after the passage of the ADAAA. Because the ADAAA did not, however, change the definition of impairment, determining whether fat is a physiological condition may remain an obstacle for fat plaintiffs.

IV. Discussion

Since the passage of the ADA in 1990, courts have struggled to determine whether obesity is an ADA-protected disability. The finding that 50 percent of employee-litigants were considered disabled and thus legally protected, while 50 percent were not, highlights the lack of a legal consensus on this issue. This result may also represent a failure to equitably apply the ADA to similarly situated employees, although the pattern makes sense in the context of the ADA's mandate that courts individually assess a plaintiff's condition. Further, the results align with prior empirical studies of the ADA, which have found that prior to the ADAAA, most people bringing a claim of disability employment discrimination lost because courts did not consider them

140. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75; Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75; Befort, *supra* note 14.

141. *See* BACKLASH, *supra* note 4; O'BRIEN, *supra* note 18. *See, e.g.*, BAGENSTOS, *supra* note 9 (examining the definition of "disabled" through the creation of disability law).

disabled.[142] While the experiences of fat employees who bring ADA claims is typical of ADA employee claimants overall—courts have struggled to determine the disability status of employees with a variety of impairments—the requirement that an individual prove an underlying cause for their impairment appears to be unique to fat plaintiffs. This requirement, along with judicial reluctance to accept fat people's claims of perceived disability, suggests that traditional, individualized, and medicalized understandings of disability continue to hold sway in the courts. Within these traditional perspectives, disability is understood as arising from an individual's body rather than social structures; this understanding allows space for anti-fat stereotypes to influence legal judgments.

Employee-litigants who argued that they were actually disabled by their fat, and not just stereotyped as disabled, were more likely to be considered disabled by the courts and thus covered by the ADA. Their weight may have substantially limited their abilities more than the weights of employees bringing only perceived disability claims. However, weight was not a statistically significant predictor of disability outcomes, and the content analysis revealed no relationship between weight and the likelihood of being considered disabled. Alternatively, courts may have been more comfortable with actual disability claims because these claims reflect common-sense ideas of disability (i.e., that a disability is primarily the result of an individual's physical deficit). Claims of perceived disability, in contrast, reflect the social model of disability (espoused by disability rights activists, scholars, and parts of the ADA itself) in which the major limitations of disability arise because of societal discrimination, prejudice, and stereotyping. The limitations resulting from the physical impairment itself are less important in the social model. This understanding of disability has not yet overtaken more traditional perspectives in mainstream society. Fat studies argues for a strong version of the social model, asserting that nothing is inherently wrong with fat. Instead, fat becomes a limitation when others perceive it to be a character flaw, a moral failing, or a sign of an individual's weakness.

These perceptions of fatness likely underlie some of the courts' requirements to prove that a person's weight is a physiological condition or is caused by a physiological condition. The ADA and Rehabilitation Act have no requirement that employees must prove

142. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75; Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75; Befort, *supra* note 14.

the cause of their impairment.[143] The EEOC regulations defining impairment state that a physical impairment is any physiological disorder (not something caused by a physiological disorder) that affects a major bodily function.[144] Thus, this requirement seems to reflect judicial discomfort with the notion that fat individuals are disabled. Further, the notion that fat individuals contributed to their weight is not the only belief underlying this discomfort, as shown by the treatment of other conditions that can be caused by an individual's conduct. Recent EEOC regulations include lists of expected ADA-protected disabilities (conditions that are usually, but not always, disabilities under the ADA) that are not traditionally thought of as disabilities and that may be caused by an individual's conduct, such as diabetes, cancer, skin burns, and HIV.[145] Indeed, many recognized disabilities may be caused in some part by an individual's conduct. Sky-diving accidents can lead to mobility impairments, poor judgment can lead to amputations, Deaf people sometimes choose not to have curative surgery. Therefore, the requirement that an individual must prove the cause of their fatness may have less to do with actual causation and more to do with proving their deservingness.

As Anna Kirkland argued in her analysis of logics of personhood, courts rely on different rationales to determine who is worthy and deserving of anti-discrimination protection.[146] Historically, disability has been used as a medicalized rationale to differentiate the undeserving and deserving poor. In the focal cases, courts turned to this medicalized tradition to determine whether fat employees are worthy of anti-discrimination protection. Specifically, some courts attempted to make this determination via the requirement of cause. Is fatness a trait that deserves protection? Or is it a trait that society should discourage by not providing legal protection? This shift toward the use of disability as a medicalized rationale is ironic, given the disability rights movement's calls to

143. As the First Circuit has explained:

> The Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions 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.

Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17, 24 (1st Cir. 1993).

144. 29 C.F.R. § 1630.2(h)(1) (2012).

145. 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

146. *See* FAT RIGHTS, *supra* note 56.

move away from medicalized understandings of disability. More importantly, the view that fat people are not disabled hurts claims for social inclusion of traditionally disabled people by solidifying negative stereotypes about the "truly disabled."

Many of the courts that focused on identifying physiological causes stated in their decisions that it was the court's role to distinguish the "truly disabled" from fat people, whose limitations were characterized as relatively minor.[147] This understanding of disability contradicts the work of disability rights activists and scholars, as well as those involved in fat studies, in two ways. First, this perspective emphasizes a view of disabled people as radically different from non-disabled people because of the severity of their impairments, and it attempts to locate disability in the body, instead of in society. However, survey and interview data suggest that most people with disabilities identify stereotypes as the primary barrier they encounter, not limitations resulting from their impairment.[148] Many disability studies scholars argue that disabled people do not want a cure for their impairments, they want access and equal treatment,[149] which suggests that the impairments of people considered traditionally disabled are not as severe as commonly thought. Second, this understanding of disability ignores a key insight of the social model of disability. What counts as a disability will necessarily change over time because disability arises from the interaction of the social world and an impairment.[150] Therefore, definitions of disability must consider the way cultural values give rise to disability. At one moment in history, a society may view an impairment as a valuable difference while at another, it may view the same impairment as a tragedy or a defect. Under the social model of disability, an impairment becomes a disability

147. *See, e.g.*, Coleman v. Ga. Power Co., 81 F.Supp.2d 1365, 1370 (N.D. Ga., 2000) (observing the court's conclusion that Coleman's obesity was not a disability was "necessary in order to avoid a dilution of the ADA" which "was meant to protect people who are truly disabled").

148. *See, e.g.*, Harlan Hahn, *Paternalism and Public Policy*, 20 SOC'Y 36 (1983); Micheal L. Shier, John R. Graham & Marion E. Jones, *Barriers to Employment as Experienced by Disabled People: A Qualitative Analysis in Calgary and Regina, Canada*, 24 DISABILITY & SOC'Y 63 (2009); Dana Wilson-Kovacs, Michelle K. Ryan, S. Alexander Haslam & Anna Rabinovich, *'Just Because You Can Get a Wheelchair in the Building Doesn't Necessarily Mean that You Can Still Participate': Barriers to the Career Advancement of Disabled Professionals*, 23 DISABILITY & SOC'Y 705 (2008).

149. *See* ELI CLARE, BRILLIANT IMPERFECTION: GRAPPLING WITH CURE 184 (2017) ("Cure promises us so much, but it will never give us justice."); Garland-Thomson, *supra* note 16.

150. Garland-Thomson, *supra* note 16 at 591 (arguing that disability is derived from social incompatibility rather than an individual's shortcoming). *See generally* Shakespeare, *supra* note 26.

when society creates policies and structures that isolate, discriminate against, and culturally devalue the people who possess that physical characteristic.

Conclusion

In conclusion, fat fits within a strong social model of disability, a model that truly understands that disability arises from cultural reactions to a devalued body, not the body itself. The ADA reflects a strong social model through the claim of perceived disability. As disability and fat rights advocates bring claims under the ADA, they should carefully consider whether to emphasize the physical limitations of their clients or the stereotypical understandings that create disabling limitations. Courts currently reward those who conform to traditional notions of disability as arising from the limited body, however, this representation of disability may not benefit the disability rights movement as a whole. Instead, it may further medicalize disability. Future research should examine fat-as-a-disability determinations at the state level, within other federal statutes, and internationally. Although many states follow the ADA interpretations in analyzing state law claims, New York, which has found fat to be a covered disability in the past, is a notable exception.[151] Further, the Canadian Transport Agency recently affirmed in an adjudication that fat could give rise to disability based on particular social structures and contexts.[152] Future research could identify more jurisdictions in which fat has been treated as a disability. Policy makers and disability rights activists should consider fat studies scholars' assertions that there is nothing wrong with the fat body. This perspective aligns with research on disabled people's lived experiences, which has shown that stereotypes are the primary barrier people report. Courts must move away from the current medicalized understanding of disability and recognize that, for both fat and disabled people, stereotypes give rise to disablement.

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151. *See* Frank v. Lawrence Union Free Sch. Dist., 688 F. Supp. 2d 160, 169 (E.D.N.Y. 2010) (comparing *State Div. of Human Rights on Complaint of McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 219 (N.Y. 1985), in which "clinically diagnosed" obesity was found to constitute a disability under the New York State Human Rights Law, with *Delta Air Lines v. New York State Div. of Human Rights*, 91 N.Y.2d 5, 72–73 (N.Y. 1997), in which plaintiffs had to establish they were "medically incapable of meeting Delta's weight requirements").

152. Estate of Eric Norman v. Air Canada, Decision No. 6-AT-A-2008, CAN. TRANSP. AGENCY (Jan. 10, 2008), https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008 [https://perma.cc/8V7R-CNDT].