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## The Heavy Issue: Weight-Based Discrimination in the Airline Industry

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# THE HEAVY ISSUE: WEIGHT-BASED DISCRIMINATION IN THE AIRLINE INDUSTRY

DENNIS M. LYNCH

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## I. INTRODUCTION

"If I were as fat as you, I'd hang myself."<sup>1</sup>

"Pound for pound, the American bias against fat people may be the most socially acceptable prejudice left. It is no longer considered acceptable to discriminate against minorities, women and the disabled. But in a society that . . . scorns the portly, overweight people continue to face ridicule and closed doors."<sup>2</sup> Obesity and overweight discrimination has often been described as the last safe area of bigotry and the final acceptable form of discrimination in America.<sup>3</sup> The myths about overweight individuals abound: they are lazy, slow, and lack energy and they are not good employees because they will drive customers away.<sup>4</sup>

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<sup>1</sup> Gordon B. Block, *So Long, Girth Control*, HEALTH, Feb. 1991, at 70 (quoting famous playwright George Bernard Shaw).

<sup>2</sup> Aaron Epstein, *Courts Review Bias Against the Overweight*, NEW ORLEANS TIMES-PICAYUNE, Jan. 9, 1994, at A2.

<sup>3</sup> Janet Cawley, *Last Target of Legal Bigotry: Obesity*, CHI. TRIB., May 12, 1993, at A1 (quoting Brooklyn Assemblyman Dan Feldman). In her article *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, Patricia Hartnett quotes another commentator, Sally E. Smith, in describing the reaches of this discrimination:

Fat people are discriminated against in employment, in that they are denied employment, denied promotions and raises, denied benefits, and sometimes fired, all because of their weight. Fat people are discriminated against in education, in that they are not accepted into graduate programs, and are harassed and expelled because of their weight. Fat people are denied access to adequate medical care, in that they are denied treatment, misdiagnosed, harassed, and treated as though every medical condition, from a sore throat to a broken bone, is a weight-related condition. Fat people are denied access to public accommodations, such as public transportation, airline travel, theaters, and restaurants because seating is not available for them.

Patricia Hartnett, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 RUTGERS L.J. 807, 808 n.4 (1993) (quoting Sally E. Smith, *Sizism—One of the Last "Safe" Prejudices*, CAL. NOW ACTIVIST, July 1990, at 1).

<sup>4</sup> Mary Vobril, *Battling Fat Bias in the Workplace*, NEWSDAY, Dec. 5, 1993, at 95.

Obese and overweight people are beginning to fight this discrimination, however, and while many would say there is no legal remedy if they are discriminated against, others think these individuals should have a claim for illegal discrimination.<sup>5</sup>

The airline industry is not immune to the issues involving overweight and obese individuals. In the context of overweight individuals, the airline industry encounters these issues when making hiring decisions for flight attendants. Furthermore, weight discrimination becomes an issue for airlines when they must accommodate and properly service an obese passenger while also insuring that the other passengers on the flight are comfortable and safe. This Comment will analyze the issue of weight-based discrimination in the airline industry and the possible legal options for eliminating the underlying discrimination and disparate treatment that exist. The focus will be on the two groups who are particularly susceptible to this form of discrimination: flight attendants and obese passengers.<sup>6</sup>

## II. FACTS ABOUT OVERWEIGHT AND OBESE PEOPLE

### A. DISTINCTION BETWEEN OVERWEIGHT AND OBESITY

The terms "overweight" and "obese" do not have the same meaning. An overweight person is an individual who weighs more than the average person of that height and sex according

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<sup>5</sup> Julie M. Buchannan, *Do the Overweight Have Rights?*, MILWAUKEE SENTINEL, June 7, 1993, at 11B.

<sup>6</sup> Pilots have been excluded from the scope of this Comment, in part, because the employer airline seems to have a valid reason for limiting the height and weight of pilots: the cockpit can only be a certain height and width. In legal terms, the airline has the valid defense of business necessity when dealing with the situation of pilots.

In *Boyd v. Ozark Air Lines*, 419 F. Supp. 1061 (E.D. Mo. 1976), the district court found that Ozark had met the burden of establishing that a height requirement for pilots is a business necessity. *Id.* at 1064. The court agreed with the fact that the cockpit can only accommodate a certain range of heights because pilots have to have the ability to use all of the instruments and still be in a position to see out the window. *Id.* Because of this evidence, the court agreed that a height requirement was definitely job related. *Id.* at 1065.

Presumably, the logic used by the court in *Boyd* would apply to weight requirements for pilots as well, although there are no cases that directly address this issue. Nevertheless, the business necessity defense appears to apply more readily to pilots than it would to flight attendants and, therefore, this Comment will focus on the flight attendant position and possible weight discrimination issues in this context.

to established insurance tables.<sup>7</sup> Obesity, on the other hand, is generally defined as "a bodily condition marked by excessive generalized disposition and storage of fat: corpulence."<sup>8</sup> There are two basic categories of obesity: significant obesity and morbid obesity.<sup>9</sup> Significant obesity is used to define a person whose weight ranges from twenty to thirty percent above the average or ideal weight.<sup>10</sup> Morbid obesity is the term used to describe a weight that is either 100 pounds over the average weight for a given group or twice the average weight for that particular group.<sup>11</sup> In this Comment, there will be no distinction drawn between significant and morbid obesity; both terms will be included in the single word "obesity."<sup>12</sup>

### B. CAUSES OF OBESITY

Obesity is often perceived as a voluntary condition that is caused by over-indulgence, but this is not necessarily the case.<sup>13</sup> In fact, obese individuals may actually consume fewer calories than non-obese people consume.<sup>14</sup> Some studies have concluded that an obese condition is often the result of a combination of genetic influences and environmental factors. In addition, an individual's metabolic rate has been hypothesized

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<sup>7</sup> See Donald L. Bierman, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951, 956 (1990). The average or ideal weight is the weight associated with the lowest mortality rates for various height and weight combinations as recorded by insurance companies.

<sup>8</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged 1981).

<sup>9</sup> A third category of obesity ("serious" or "gross obesity"), which falls between significant and morbid obesity, is sometimes referred to by authors. This is defined as weighing 30% to 35% over the ideal weight. See, e.g., Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 42 n.9 (1994).

<sup>10</sup> Bierman, *supra* note 7, at 956. For purposes of this Comment, only significant and morbid obesity will be considered.

<sup>11</sup> *Id.* (citing William E. Straw, *The Dilemma of Obesity*, 72 POSTGRADUATE MED. NO. 1, 121-26 (1982)).

<sup>12</sup> The distinction between overweight and obesity will, however, be used and it will be important to consider the differences between these two conditions and the difficulty in applying these terms separately during the discussion of obesity being viewed as a handicap. See discussion *infra* part V.A.

<sup>13</sup> One commentator stated that "[t]o conclude that obesity is caused by over-eating is no more meaningful than concluding that alcoholism is caused by too much drinking." Hartnett, *supra* note 3 at 808.

<sup>14</sup> See Hartnett, *supra* note 3, at 810 (citing *Born To Be Fat?*, U.S. NEWS & WORLD REP., May 14, 1990, at 62).

to partially control that person's weight.<sup>15</sup> The bottom line is that the underlying causes of obesity can vary from person to person and the single, common cause of obesity is, in general, unknown.<sup>16</sup> The results of the many studies done on overweight and obese conditions, though inconclusive as to the exact causes, seem to support a general theory that obesity is an immutable characteristic.

### C. PROBLEMS FACING OVERWEIGHT AND OBESE INDIVIDUALS

There is little question that society as a whole, whether consciously or unconsciously, discriminates against overweight and obese individuals.<sup>17</sup> At an early age, fat people have been stigmatized and the effects can lead to a feeling of low self-esteem for an entire lifetime.<sup>18</sup> An obese person is often viewed as responsible for their condition which, though true in some situations, is not always the case, because obesity is often an immutable characteristic.

The stigma often attached to overweight and obese individuals can lead to a wide range of health problems and negative attitudes. In the case of an overweight individual, which is usually viewed as a mutable characteristic, anorexia nervosa may result.<sup>19</sup> Another illness that may result from a desire to be thin is bulimia, a disease that occurs when an individual consumes large amounts of food and then forces himself or herself to vomit.<sup>20</sup> In the obesity context, a survey in 1991 demonstrated that ten to twelve percent of the people surveyed would choose

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<sup>15</sup> Denise Grady, *Is Losing Weight a Losing Battle?*, TIME, Mar. 7, 1988, at 59. Other commentators, however, have stated that studies about the relationship between metabolism and weight have failed to establish any correlation between the two. See Bierman, *supra* note 7, at 957.

<sup>16</sup> Jane O. Baker, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 949-50 (1982).

<sup>17</sup> Donna M. Ryan, a long time member of the National Association to Advance Fat Acceptance (NAAFA), has recounted many stories from members of the group about how total strangers come up to the grocery carts of fat people, take food out of their carts, and tell the individual that they do not need certain items. See Cawley, *supra* note 3, at A1.

<sup>18</sup> See generally Scott Petersen, *Discrimination Against Overweight People: Can Society Still Get Away with It?*, 30 GONZ. L. REV. 105, 106 (1994/95).

<sup>19</sup> Paula B. Stolker, *Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 223, 227 (1992).

<sup>20</sup> *Id.*

to abort a fetus if there was a prenatal test that determined that the child would be obese.<sup>21</sup>

Overweight and obese people are fighting back by forming organizations and filing lawsuits that arise from situations involving explicit weight discrimination. The National Association to Advance Fat Acceptance (NAAFA) is a non-profit organization founded in 1969 that is dedicated to helping fat people become accepted.<sup>22</sup> It is interesting to note that NAAFA promotes the use of the descriptive term "fat" and one of the strongest advocates for size acceptance, Natalie Allon, often uses this term in her writings.<sup>23</sup> NAAFA has become increasingly active in supporting legislation to protect the rights of fat people and the organization even advocates overweight and obesity becoming political issues in election campaigns.<sup>24</sup> In addition to NAAFA, the filing of private lawsuits to combat weight discrimination has been met with occasional success.<sup>25</sup>

As stated earlier, the airline industry must confront overweight issues when hiring employees, especially flight attendants. In addition, the issue of obesity is seen in accommodating obese passengers on flights. In order to combat weight-based discrimination in the industry, fat individuals could attempt to classify their weight problem as a disability, and seek statutory protection to prevent this discrimination from continuing. The analysis in this Comment will begin with flight attendants, then shift to obese passengers, and, finally, determine what statutory protection might be available for both of these groups if an overweight or obese condition is recognized as a handicap.

### III. FLIGHT ATTENDANTS

#### A. HISTORY

In the competitive air travel market that resulted after World War II, airlines began to advertise their flight attendants as sex objects and many companies organized entire advertising cam-

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<sup>21</sup> Hartnett, *supra* note 3, at 812 (citing Karen Klinger, *Your Health: Few Would Abort Cystic Fibrosis Affected Fetus*, UPI, Aug. 31, 1991, available in LEXIS, Nexis Library, UPI File).

<sup>22</sup> See *id.* at 809 n.9; Bierman, *supra* note 7, at 958 n.54.

<sup>23</sup> See Kramer & Mayerson, *supra* note 9, at 41 n.1.

<sup>24</sup> Hartnett, *supra* note 3, at 41 n.9.

<sup>25</sup> See discussion *infra* part V.A.1. of *Cook v. Rhode Island, Dept. of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (holding that plaintiff's obesity constituted a disability under the Rehabilitation Act of 1973 and awarding \$100,000 in compensatory damages).

paigns around this idea. Because of these marketing techniques, airlines began enforcing age, weight, and height standards in order to insure that flight attendants fit within the "sex object" image.<sup>26</sup> Some of the advertising campaigns that resulted were Braniff's "Air Strip" (requiring flight attendants to change into various costumes), National Airline's "Fly Me—I'm Cheryl," and Southwest Airline's "Love" campaign (requiring flight attendants to serve "love potions" and "love bites").<sup>27</sup>

## B. LAWSUITS BY FLIGHT ATTENDANTS UNDER TITLE VII

The Civil Rights Act (the Act) was passed in 1964 and Title VII of the Act (Title VII) prohibits discrimination based on race, color, religion, sex,<sup>28</sup> or national origin.<sup>29</sup> In the 1970s, cases arose under Title VII that challenged the airlines' hiring practices for flight attendants. These cases challenged the "female only" distinction of flight attendants,<sup>30</sup> the requirement that

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<sup>26</sup> Toni S. Reed, Comment, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems*, 58 J. AIR L. & COM. 267, 271 (1992). Ms. Reed's comment more fully details the history of flight attendants and analyzes lawsuits under Title VII brought by flight attendants to challenge mandatory appearance standards of airlines.

<sup>27</sup> *Id.* According to another author, these sex campaigns of the 1970s are convincing evidence of the way airlines exploited women and their femininity. Due to pressure from the flight attendants who organized the influential group Stewardesses for Women's Rights in order to eliminate chauvinistic ad campaigns, and the public opinion associated with an increased awareness of a woman's rights in the workplace, airlines were forced to move to more subtle campaigns which capitalized on women as flight attendants. See Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175, 187 (1990).

<sup>28</sup> Interestingly, the word "sex" in Title VII of the Civil Rights Act was actually added as an attempt by Howard Worth Smith (known as Judge Smith) and other Southern Democrats to defeat passage of the Act in the House of Representatives. This attempt obviously failed and the inclusion of the word "sex" in the statute led to significant litigation, which insured equal treatment of women in employment situations. See WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 15 (2d ed. 1995).

<sup>29</sup> Specifically, Title VII mandates that:

It shall be unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000(e)(2) (1994).

<sup>30</sup> See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).



flight attendants remain unmarried,<sup>31</sup> and, most importantly for this Comment, the weight requirements for flight attendants.<sup>32</sup>

### 1. Female Only Positions

In *Diaz v. Pan American World Airways, Inc.*,<sup>33</sup> the plaintiff sought to invalidate the defendant airline's policy of hiring only women as flight attendants on the basis that this policy was sex discrimination in violation of Title VII. Celio Diaz applied for a job as a flight attendant with Pan American Airline in 1967. He was rejected, however, because the airline limited its hiring for the position to females. After the Equal Employment Opportunity Commission (EEOC) failed to resolve the dispute through voluntary conciliation, Diaz filed a class action in United States district court, alleging that Pan American had refused to hire him on the basis of sex, a violation of Title VII.<sup>34</sup>

At trial, Pan American admitted that it had a policy of restricting its hiring for flight attendant positions to females.<sup>35</sup> The issue, therefore, was whether being a female was a bona fide occupational qualification (BFOQ),<sup>36</sup> which, if proved by Pan American, would provide a defense for the practice.<sup>37</sup> The trial court found that passengers on Pan American flights preferred female attendants to males.<sup>38</sup> It also determined that Pan American's experience with both male and female flight attendants demonstrated that the performance of the female attendants was superior to males in all aspects of customer service.<sup>39</sup> Finally, on the basis of the expert testimony of a psychiatrist, the court found that females were better suited to care for the

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<sup>31</sup> See *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971); see discussion *infra* part III.B.2.

<sup>32</sup> See *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884 (E.D. Va. 1977); see discussion *infra* part III.B.3.

<sup>33</sup> 442 F.2d 385 (5th Cir. 1971).

<sup>34</sup> *Id.* at 386.

<sup>35</sup> *Id.*

<sup>36</sup> The defense of a bona fide occupational qualification (BFOQ) is a statutorily created defense that is found in Title VII. See 42 U.S.C. § 2000(e)(2)(e) (1994). Essentially, this defense is available to defendant employers in disparate treatment cases (intentional discrimination of a protected class) if the employer can show that "the essence of the business operation would be undermined by not hiring a member of one sex [or national origin or religion] exclusively." *Diaz*, 442 F.2d at 388. It is important to note that race is never a permissible distinction for a BFOQ defense.

<sup>37</sup> *Diaz*, 442 F.2d at 388.

<sup>38</sup> *Id.* at 387.

<sup>39</sup> *Id.*

unique psychological needs of passengers.<sup>40</sup> Diaz filed a timely appeal of the trial court's decision in the Fifth Circuit.<sup>41</sup>

The Fifth Circuit started its analysis by noting that the essential function of an airline is to safely transport its passengers.<sup>42</sup> Because of this primary function, the court determined that the presence of male flight attendants would not minimize the ability of the airline to provide safe transportation.<sup>43</sup> The Fifth Circuit concluded by holding that "in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe . . . that all or substantially all [men] would be unable to perform safely and efficiently the duties of the job involved."<sup>44</sup> Thus, the Fifth Circuit reversed the district court, holding that the evidentiary findings did not justify the discrimination practiced by Pan American.<sup>45</sup>

## 2. *Single Status*

In *Sprogis v. United Airlines, Inc.*,<sup>46</sup> decided in the same year that *Diaz* struck down the sex barrier, the plaintiff challenged the requirement that female flight attendants remain unmarried. The plaintiff was employed by United Airlines as a flight attendant. Her employment was terminated on June 19, 1966 because she violated a company policy that required flight attendants to remain unmarried. Although United employed both male and female attendants, this restrictive policy had never been enforced against males. After filing a charge with the EEOC and receiving her notice of right to sue, Sprogis commenced her lawsuit in November 1968.<sup>47</sup>

The trial court held that the discharge of Sprogis was due to her recent marriage and this action constituted an unlawful employment practice.<sup>48</sup> The court granted the plaintiff's motion for summary judgment and concluded that she was entitled to reinstatement.<sup>49</sup> In addition, the court ordered United to pay

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 385.

<sup>42</sup> *Id.* at 388.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (citing *Weeks v. Southern Bell Tele. & Tele. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

<sup>45</sup> *Id.*

<sup>46</sup> 444 F.2d 1194 (7th Cir. 1971).

<sup>47</sup> *Id.* at 1197.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

compensation for all wages lost from the time of her illegal discharge to the time of her reinstatement.<sup>50</sup> United perfected an interlocutory appeal to the Seventh Circuit and all proceedings were stayed, pending the outcome of this appeal.<sup>51</sup>

The Seventh Circuit held that this rule violated Title VII because there was one standard for men and another for women.<sup>52</sup> As in *Diaz*, United claimed a BFOQ defense, contending that the unmarried status of female flight attendants was one of the essential functions of a flight attendant's duties.<sup>53</sup> The court rejected this BFOQ assertion by United because the airline failed to present even a "reasonably limited connection" between job performance and the no marriage rule.<sup>54</sup> "United has failed to explain why marriage should affect female flight cabin attendants' ability to meet the requirements of that position while at the same time leaving unimpaired the capabilities of male flight personnel, particularly [flight attendants]." <sup>55</sup>

### 3. Weight Requirements

In keeping with the flight attendant "sex object" theme,<sup>56</sup> airlines adopted height and weight requirements for their flight attendants. Not only were these standards applied in hiring practices but the airlines also used these height and weight maximums for disciplining and terminating flight attendants who exceeded the maximum weight for a given height.<sup>57</sup> Some airlines have justified these height and weight requirements on the basis of safety, because flight attendants must be able to operate emergency equipment or assist passengers in a crash landing.<sup>58</sup> Other airline companies maintain that these are appearance standards and are necessary to establish and fortify the image of a professional air carrier with the general public.<sup>59</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1198.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1199.

<sup>55</sup> *Id.*

<sup>56</sup> See discussion *supra* part III.A.

<sup>57</sup> As discussed by Ms. Reed in her comment, the airlines have become increasingly willing to relax weight standards. In 1991, for example, American Airlines increased its weight allowances in all height categories and added weight to reflect increases in age. Reed, *supra* note 26, at 301.

<sup>58</sup> *Id.* at 290.

<sup>59</sup> *Id.*; see also Whitesides, *supra* note 27, at 198.

Although there have been several challenges against the airlines' weight requirements, courts have upheld them under a several different theories. One theory on which courts have based their decisions is that these programs are valid business practices under Title VII. For example, in *Jarrell v. Eastern Air Lines, Inc.*,<sup>60</sup> the court held that Eastern's weight program<sup>61</sup> did not constitute discrimination, on its face nor in its effect, because weight is deemed a mutable characteristic.<sup>62</sup> Also, in *In re National Airlines, Inc.*,<sup>63</sup> the court found mandatory weight requirements non-discriminatory under the language of Title VII because they applied equally to both men and women.<sup>64</sup>

A second theory on which courts base their decisions upholding weight requirements for flight attendants is that there is no constitutional right violated by the imposition of these programs. In *Cox v. Delta Air Lines*,<sup>65</sup> the court upheld the weight program as valid because weight, since it can be altered, is not

<sup>60</sup> 430 F. Supp. 884 (E.D. Va. 1977).

<sup>61</sup> The following is the weight program Eastern Airlines had in place at the time of trial:

HEIGHT-WEIGHT CHART FOR FEMALE FLIGHT ATTENDANT

Height	Minimum Weight	Maximum Weight
62"	100 lbs.	115 lbs.
63"	104 lbs.	119 lbs.
64"	108 lbs.	123 lbs.
65"	112 lbs.	127 lbs.
66"	116 lbs.	131 lbs.
67"	120 lbs.	135 lbs.
68"	122 lbs.	140 lbs.
69"	124 lbs.	145 lbs.

HEIGHT-WEIGHT CHART FOR MALE FLIGHT ATTENDANT

Height	Minimum Weight	Maximum Weight
66"	124 lbs.	156 lbs.
67"	128 lbs.	161 lbs.
68"	132 lbs.	166 lbs.
69"	136 lbs.	171 lbs.
70"	140 lbs.	176 lbs.
71"	144 lbs.	181 lbs.
72"	148 lbs.	186 lbs.
73"	152 lbs.	191 lbs.

*Jarrell*, 430 F. Supp. at 888.

<sup>62</sup> *Id.* at 892.

<sup>63</sup> 434 F. Supp. 269 (S.D. Fla. 1977).

<sup>64</sup> *Id.* at 275.

<sup>65</sup> 553 F.2d 99 (5th Cir. 1977).

an immutable characteristic and, therefore, it is not protected by the Constitution.<sup>66</sup> In addition, the court in *Cox* seemed willing to validate these weight requirements on the basis that they are merely grooming standards and, thus, do not rise to the level of constitutional protection.<sup>67</sup>

At least one court, however, found an airline's weight requirement program invalid. In *Gerdom v. Continental Airlines, Inc.*,<sup>68</sup> the plaintiff was suspended and eventually terminated from her flight attendant position because her weight exceeded the maximum permitted for her height under Continental's program. Gerdom challenged the policy of Continental on the basis of sex discrimination, in violation of Title VII.<sup>69</sup> After judgment was entered against Gerdom in the district court, she appealed to the Ninth Circuit.<sup>70</sup>

The Ninth Circuit held that Continental's weight program violated Title VII.<sup>71</sup> The court found the program invalid because only women were required to adhere to maximum weights and heights.<sup>72</sup> The court rejected Continental's argument that the program was a grooming standard and distinguished this situation from other grooming cases because Continental's weight program imposed a greater burden on one sex, females, than the other.<sup>73</sup>

In summary, courts, for the most part have upheld height and weight requirements as valid, although the decisions are neither consistent nor predictable. Airlines, however, because of the significant number of lawsuits and the resulting big dollar settlements, have been increasingly willing to relax their weight requirements.<sup>74</sup> Nevertheless, the courts have been reluctant to classify these weight programs as discrimination claims arising

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<sup>66</sup> *Id.* at 101.

<sup>67</sup> Whitesides, *supra* note 27, at 209.

<sup>68</sup> 692 F.2d 602 (9th Cir. 1982) (en banc).

<sup>69</sup> *Id.* at 603.

<sup>70</sup> *Id.* at 604.

<sup>71</sup> *Id.* at 605.

<sup>72</sup> *Id.* at 610 ("We hold that Continental's policy of requiring an exclusively female category of flight attendants, and no other employees, to adhere to the weight restrictions at issue here constitutes discriminatory treatment on the basis of sex").

<sup>73</sup> *Id.* at 605-06 ("In those [grooming standard] cases, unlike this case, no significantly greater burden was . . . imposed on either sex; that is the key consideration").

<sup>74</sup> Reed, *supra* note 26, at 301. Ms. Reed uses American Airlines, which historically had very strict standards, as an example of this willingness to relax the requirements. *Id.*

under Title VII<sup>75</sup> and have upheld weight requirements as valid grooming standards, as long as these apply equally to both sexes.<sup>76</sup> In other words, given the diversity of court decisions and the commentary written in this area, Title VII does not appear to be the proper statute for flight attendants to fight weight-based discrimination in the airline industry.<sup>77</sup> As long as these weight requirements are applied equally to men and women, courts appear willing to uphold them as valid and find these non-discriminatory under the language of Title VII.

#### IV. OBESE PASSENGERS

##### A. OBESITY IN AMERICA

The number of obese individuals in American society is ever increasing. In 1990, it was estimated that nearly twenty percent of the population fit within the definition<sup>78</sup> of obesity.<sup>79</sup> In 1994, the number increased and nearly one-third of all adults in the United States were estimated to be obese.<sup>80</sup> In addition, more than forty percent of the American population was considered at least ten percent overweight just four years ago.<sup>81</sup> These recent facts are convincing evidence that a substantial portion of the population remains either overweight or obese.

As seen, weight-based discrimination is common in today's society<sup>82</sup> and, with commercial air travel being more popular than ever, it is obvious that hundreds, if not thousands, of obese passengers board commercial flights every day. It seems safe to assume that these individuals experience some of the same biases that are often associated with obesity and which have been detailed by various NAAFA members.<sup>83</sup> It is difficult for obese

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<sup>75</sup> See *Jarrell*, 430 F. Supp. at 884; *In re Nat'l Airlines*, 434 F. Supp. at 269.

<sup>76</sup> See, e.g., *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 457 (D.C. Cir. 1973).

<sup>77</sup> See, e.g., Whitesides, *supra* note 27, at 200 ("[T]raditional Title VII judicial analyses based solely on the difference in treatment among a narrow class of employees will not reach some Title VII wrongs . . ."); Reed, *supra* note 26, at 339 ("[I]t is not clear that Title VII can adequately address all of the concerns of flight attendants about hiring standards . . ."); Tammy Julian, *How Title VII Has Affected the Airline Industry*, 11 ST. LOUIS U. PUB. L. REV. 281 (1992).

<sup>78</sup> See, discussion *supra* part II.A.

<sup>79</sup> Bierman, *supra* note 7, at 957 n.46 (citing a telephone conversation with William E. Straw, a family practice physician in Palo Alto, Cal.).

<sup>80</sup> Robert Kuczmarski, *Increasing Prevalence of Overweight Among U.S. Adults*, 272 JAMA 205 (1994).

<sup>81</sup> Stolker, *supra* note 19, at 228.

<sup>82</sup> See discussion *supra* part I.

<sup>83</sup> See note 17 *supra*.

ticket purchasing citizens to break the stereotypes so often associated with fat people and be properly serviced by airlines.<sup>84</sup> The issues facing obese passengers obviously go beyond the limits of the employer-employee relationship seen in the context of flight attendants, which makes it much more difficult for obese passengers to receive the services afforded to other passengers.

## B. LACK OF STATUTORY PROTECTION

Title VII does not provide any express protection for passengers because it is confined to employment situations.<sup>85</sup> Even if Title VII was extended beyond the employment context to cover airline passengers, it would still be insufficient protection against weight discrimination because nowhere in Title VII is "weight" used as a protected characteristic.<sup>86</sup> The challenges of airline weight programs by flight attendants under Title VII have been met with less than satisfactory results, suggesting that the Civil Rights Act is not the statute that can eliminate weight discrimination in the airline industry.<sup>87</sup> The bottom line is that if Title VII cannot be used by flight attendants as protection, it certainly is not the proper statute for obese passengers to seek redress for any discrimination they face. Because of the difficulties with Title VII affording adequate protection against weight discrimination, it is necessary for both flight attendants and passengers to focus their attention away from Title VII and look to other statutes as viable means to end discrimination based on weight. Part V takes a detailed look at one possible solution or alternative for these groups: overweight and obesity being classified as a handicap.

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<sup>84</sup> NAAFA has advised its members that one alternative is to travel on the least crowded flights, so that the airline has the option of accommodating them with an additional seat. This alternative was also suggested in the Canadian legislature in the early 1980s and a bill was proposed that would require commercial airlines to provide free extra seats to passengers who were either overweight or disabled. See Shari J. Ronkin, *Private Rights in Public Places: A Weighty Issue*, 48 U. MIAMI L. REV. 649, 668 (1994).

<sup>85</sup> See note 29 *supra*.

<sup>86</sup> "It shall be unlawful . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(e)(2) (1994).

<sup>87</sup> See, e.g., Hartnett, *supra* note 3, at 817 ("Title VII of the Civil Rights Act provides little protection for obese plaintiffs who allege that an employer has discriminated against them"); Stalker, *supra* note 19, at 249 ("The way the law stands today, employers can subjectively discriminate against the overweight by implementing their own standards of beauty or acceptability, and most employees have no remedy").

## V. LEGAL REMEDIES FOR WEIGHT-BASED DISCRIMINATION

### A. OVERWEIGHT AND OBESITY: A HANDICAP?

#### 1. *The Cook Decision*

Although classifying obesity as a handicap might appear to stretch the definition of the word to its outer limits, at least one court has ruled that morbid obesity can be classified as a disability.<sup>88</sup> In a case of first impression for the First Circuit, the court ruled that the anti-discrimination protection of the Rehabilitation Act of 1973 (Rehabilitation Act)<sup>89</sup> applied to an individual who suffered from morbid obesity.

The plaintiff, Bonnie Cook, had been employed by the defendant, who operated the Ladd Center, a residential facility for retarded individuals, as an institutional attendant. The Ladd Center was under the jurisdiction of Rhode Island's Mental Health, Retardation, and Hospitals (MHRH). Cook worked at the facility from 1978 to 1980, and again from 1981 to 1986. Both times that Cook left her employment, it was voluntary and she departed with an unblemished work record.

Cook reapplied for an identical position with MHRH in 1988 and, at that time, she stood 5'2" and weighed in excess of 320 pounds.<sup>90</sup> She was accepted on the condition that she complete a routine physical examination. The nurse who conducted the exam (an MHRH employee) concluded that Cook was morbidly obese<sup>91</sup> but found no limitations on her ability to complete all of the job requirements.

Despite the fact that Cook passed the pre-employment physical, MHRH refused to hire her. MHRH asserted two reasons for balking at Cook's rehiring. First, it claimed that Cook's condition compromised her ability to evacuate patients in case of an emergency. Second, MHRH stated that her morbid obesity put her at greater risk of developing serious ailments, a fact that would, MHRH speculated, increase the likelihood of workers' compensation claims and promote absenteeism. When Cook

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<sup>88</sup> *Cook v. Rhode Island, Dept. of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

<sup>89</sup> Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797 (1988 & Supp. V 1993).

<sup>90</sup> Cook had always been overweight and this appears to have been the case during her previous two employments with MHRH. Although she was overweight, she had not attained this state of morbid obesity until she reapplied in 1988. See *Cook*, 10 F.3d at 20 n.1.

<sup>91</sup> See discussion *supra* part II.A (defining morbid obesity).



failed to satisfy the request by MHRH to reduce her weight "to something less than three hundred pounds,"<sup>92</sup> she was denied employment.

Cook did not go away quietly. She sued MHRH in federal district court under the Rehabilitation Act, alleging that she was the victim of discrimination due to her obesity. She proceeded under a perceived disability theory,<sup>93</sup> contending that she was physically able to carry out her job functions, but was denied employment because MHRH believed she was impaired. The jury found in favor of Cook and awarded her \$100,000 in compensatory damages.<sup>94</sup> MHRH immediately appealed the verdict to the First Circuit.

The First Circuit recognized that "few 'perceived disability' cases have been litigated and, consequently, decisional law involving the interplay of perceived disabilities and section 504 [of the Rehabilitation Act of 1973] is hen's-teeth rare. Thus, this case calls upon us to explore new frontiers."<sup>95</sup> Due to the uncontested jury instructions, which charged the jury to consider the plaintiff's case under the first and third prongs of a perceived disability claim,<sup>96</sup> the court did not consider the second method, dealing with an impairment that substantially limits a person's major life activities.<sup>97</sup> The court indicated that this second prong arguably fell within the scope of Cook's claim but did not determine the matter since Cook did not cross-appeal this issue.<sup>98</sup>

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<sup>92</sup> 783 F. Supp. 1569, 1571 (D.R.I. 1992).

<sup>93</sup> There are three ways in which a person can qualify for protection on the basis of a perceived disability claim under either the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1992. The individual must show that he or she either:

A.) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient [in the case of Cook, MHRH] as constituting such a limitation;

B.) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

C.) has none of the impairments defined . . . but is treated by a recipient [MHRH] as having such an impairment.

45 C.F.R. § 84.3(j)(2)(iv) (1995); *see also Cook*, 10 F.3d at 22 n.4; Kramer & Mayer-son, *supra* note 9, at 45.

<sup>94</sup> *Cook*, 10 F.3d at 21.

<sup>95</sup> *Id.* at 22.

<sup>96</sup> *See supra* note 93.

<sup>97</sup> *Cook*, 10 F.3d at 22.

<sup>98</sup> *Id.*

The First Circuit continued its analysis, explaining the alternative showing that Cook must make in order to prevail on her perceived disability claim. In order to satisfy the first prong, Cook had to show that "while she had a physical or mental impairment, it did not substantially limit her ability to perform major life activities."<sup>99</sup> If unable to satisfy the first test, Cook must show that "she did not suffer at all from a statutorily prescribed physical or mental impairment . . . and she also had to prove that MHRH treated her impairment (whether actual or perceived) as substantially limiting one or more of her major life activities."<sup>100</sup> The court reasoned that, in order for Cook to prevail on appeal, the evidence only had to support one theory and the court "believe[d] the record comfortably justifies either finding."<sup>101</sup>

MHRH made two arguments on appeal, both of which were rejected by the court.<sup>102</sup> First, MHRH asserted a mutability argument.<sup>103</sup> MHRH claimed that Cook's morbid obesity was a mutable condition and, since Cook could simply lose weight and rid herself of this disability, she should not be viewed as a handicapped individual protected by section 504.<sup>104</sup> The First Circuit, in rejecting the mutability argument, noted that this notion of mutability is not mentioned anywhere in the statute and found the proposition that immutability is a prerequisite for protection very disturbing.<sup>105</sup> "MHRH baldly asserts that . . . morbid obesity is a mutable condition and that, therefore, one who suffers from it is not handicapped within the meaning of the federal law because she can simply lose weight and rid herself of any . . . disability. This suggestion is as insubstantial as a pitchman's promise."<sup>106</sup> The court continued its rejection of this argument by analyzing the logic of a perceived disability case and held that "[s]o long as the prospective employer responds to a perceived disability in a way that makes clear that the employer regards the condition as immutable, no more is exigible."<sup>107</sup>

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<sup>99</sup> *Id.* at 23 (citing 45 C.F.R. § 84.3(j)(2)(iv)(A) (1995)).

<sup>100</sup> *Id.* (citing 45 C.F.R. § 84.3(j)(2)(iv)(A),(C) (1995)).

<sup>101</sup> *Id.*

<sup>102</sup> *Cook*, 10 F.3d at 23.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 23 n.7.

<sup>106</sup> *Id.* at 23.

<sup>107</sup> *Id.* at 24.

The court similarly rejected the second argument by MHRH. The defendant-appellant asserted that because morbid obesity is caused or exacerbated by voluntary conduct, it cannot qualify as an impairment.<sup>108</sup> In dismissing this "legally faulty premise," the court determined that the Rehabilitation Act does not suggest that its coverage is linked to how a person became impaired.<sup>109</sup> In fact, the statute "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."<sup>110</sup>

After rejecting both of MHRH's defenses, the court determined that it was appropriate for the jury to have concluded that MHRH regarded Cook's morbid obesity as substantially limiting one or more of her major life activities.<sup>111</sup> Next, the court determined that Cook was properly categorized by the jury as "otherwise qualified" to work as an institutional nurse for MHRH.<sup>112</sup> Finally, in conclusion, the First Circuit determined that the evidence justified the jury's finding that the defendant rejected Cook's request for employment due solely to her condition.<sup>113</sup> In affirming the trial court's decision, the court ended by remarking that "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good', morbid obesity can present formidable barriers to employment."<sup>114</sup>

In summary, the First Circuit in *Cook* announced a rule that morbid obesity is a protected disability under a perceived disability theory in the Rehabilitation Act (and, presumably, under the Americans with Disabilities Act as well). The court rejected the defense that the plaintiff's condition was mutable because there is nothing in the disability statutes that sets forth a requirement of immutability. In other words, the court's reasoning implies that there are conditions that might be mutable but are still protected disabilities under the statutes. Based on this logic, a plaintiff might get around the ongoing debate among experts as to whether or not obesity is mutable because, at least

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* (citations omitted).

<sup>111</sup> *Id.* at 25.

<sup>112</sup> *Id.* at 26.

<sup>113</sup> *Id.* at 28. ("MHRH has not offered a hint of any non-weight-related reason for rejecting plaintiff's application.").

<sup>114</sup> *Id.*

according to the court in *Cook*, this is a moot point because a condition of immutability is not required.

## 2. *The EEOC Position in Cook*

The Equal Employment Opportunity Commission (EEOC) filed an amicus brief in support of the plaintiff's position in *Cook*. The EEOC urged the First Circuit to consider obesity as a disability under both the Rehabilitation Act and the Americans with Disabilities Act, which became effective in July 1992, after *Cook* filed her claim against MHRH.<sup>115</sup> Further, the EEOC argued that no bright-line test for obesity should be adopted by the courts and asserted that the issue of disability should be examined on a case-by-case basis<sup>116</sup>. The EEOC conceded that obesity is not what one would think of as a traditional disability but it noted that obesity is a lifelong condition, even though it might be possible for an obese person to lose weight.<sup>117</sup> Although the *Cook* decision was a case dealing with morbid obesity, the EEOC did not maintain that protection should be limited to this context.<sup>118</sup>

## 3. *The Cassista Decision*

Although the court in *Cook* ruled that an employer could be in violation of disability laws under a perceived disability theory for considering an individual's weight when making an employment decision, the holding of the California Supreme Court in *Cassista v. Community Foods, Inc.*<sup>119</sup> seems to reflect the majority view of the courts in the area of obesity as a handicap. In *Cassista*, the California Supreme Court held that a person's weight may not be considered a disability under California state law unless the claimant can establish a physiological basis for the alleged handicap.<sup>120</sup>

The plaintiff in *Cassista* was a 5'4" woman who weighed 305 pounds when she applied for one of three openings at Community Foods, a health food store in Santa Cruz. The duties required for the position included running the cash register,

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<sup>115</sup> See Sharlene A. McEvoy, *Tipping the Scales of Justice: Employment Discrimination Against the Overweight*, 21 SUM HUM. RTS. 24, 28 (1994).

<sup>116</sup> See Charles T. Passaglia, *Appearance Discrimination: The Evidence of the Weight*, 23 COLO. LAW. 841, 843 (1993).

<sup>117</sup> See McEvoy, *supra* note 115.

<sup>118</sup> *Id.*

<sup>119</sup> 856 P.2d 1143 (1993) (en banc).

<sup>120</sup> *Id.* at 1153.

carrying fifty pound bags of produce, stacking thirty-five to fifty pounds of grain, and performing various other manual labor tasks. The plaintiff, who had previously managed a sandwich shop and worked as an aide in a nursing home, became interested in the job because she believed the company shared her concerns about the environment.

The first step in the hiring process for Community Foods was a thirty minute interview. During this interview, Cassista and members of the store discussed the job requirements and her previous experience. She was asked if she had any physical limitations which would affect her ability to do the job and Cassista stated that she did not. Later, Cassista learned the openings had been filled by three other candidates.

Several weeks after the initial interview, the plaintiff learned of a fourth opening. Despite resubmitting her application, she was informed that she had not been selected for this position either. Cassista asked the personnel coordinator of Community Foods how she might improve her chances for future openings. The coordinator replied that people with more experience were hired but admitted that there was some concern about her weight and how this would affect her ability to meet the job requirements.

Cassista proceeded to file a complaint with the Department of Fair Employment and Housing (Department), alleging weight discrimination. When the Department decided not to file a complaint in the matter, Cassista filed suit in state court. She alleged that she was denied employment in violation of California's Fair Employment and Housing Act (FEHA) because the defendant regarded her as having a physical handicap due to her excessive weight.

At the close of evidence, the jury returned an unanimous verdict in favor of Community Foods.<sup>121</sup> The California Court of Appeals, in turn, reversed the trial court's decision, holding that the defendant considered the plaintiff's weight a physical disability, in violation of the FEHA.<sup>122</sup> The Supreme Court of California granted review to determine whether the plaintiff established a *prima facie* case for handicap discrimination within the meaning of the FEHA.

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<sup>121</sup> *Id.* at 1146.

<sup>122</sup> *Id.*

After citing extensive authority, which included both judicial<sup>123</sup> and legislative interpretations of federal statutes on which the FEHA is modeled, the court concluded that obesity does not qualify as a disability unless there is proof of a physiological cause.<sup>124</sup> Because Cassista wholly failed to show either an actual disorder or a perceived disability in the eyes of her prospective employer, the court reversed the court of appeals and affirmed the trial court's judgment for the defendant.<sup>125</sup> Thus, while weight may qualify as a protected handicap or disability within the meaning of the FEHA, it is necessary for the plaintiff, according to the Supreme Court of California, to establish medical evidence which shows that a condition of excessive weight is the result of a physiological condition and limits a major life activity.

#### 4. *State Legislation: Michigan*

Potential plaintiffs should look past federal law and encourage states to enact legislation that protects the overweight. Michigan is the trend setter in this area, making overweight and obesity a protected class under its discrimination laws.<sup>126</sup>

Michigan's Elliott-Larsen Act is "[a statute] to define civil rights and to prohibit discriminatory practices, policies, and customs in the exercise of those rights."<sup>127</sup> The Michigan law is comprehensive in its protection against discrimination and mandates that an employer shall not do any of the following:

- a. Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
- b. Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the em-

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<sup>123</sup> It is interesting to note that the California Supreme Court cited the trial court's decision in *Cook* as support for its conclusion that obesity must be accompanied by other physiological disorders in order to constitute a handicap. See *id.* at 1151. As seen in the First Circuit's reversal of the trial court in *Cook*, however, this requirement of a physiological disorder is not necessary to protect an employee from disability discrimination. One might question whether the California Supreme Court would be willing to rethink its decision in *Cassista* given the First Circuit's reversal in *Cook*, which, of course, occurred after the California Supreme Court decided *Cassista*.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1154.

<sup>126</sup> Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2202 (1996).

<sup>127</sup> *Id.* §§ 37.2101-.2205(a).

ployee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, sex, height, weight, or marital status.<sup>128</sup>

The law does allow an employer to apply for an exemption if the employer makes a sufficient showing that any of the protected classes are a bona fide occupational qualification.<sup>129</sup> If the employer makes the showing that this qualification is necessary to the normal business operations, an exemption may be granted.<sup>130</sup> In *Byrnes v. Frito-Lay, Inc.*,<sup>131</sup> the district court held that a plaintiff seeking to establish a prima facie case of discrimination based on weight and age under the Elliot-Larsen Act did not have to prove that such illegitimate criteria were the sole reason or even the main reason for the decision.<sup>132</sup> The illegal discrimination alleged by the plaintiff did, however, have to be one of the deciding reasons in determining whether the plaintiff was hired or discharged.<sup>133</sup>

In *Byrnes*, the plaintiff, who was an overweight<sup>134</sup> individual, began working for the defendant as a warehouse manager in 1970. After a few months, Byrnes was promoted to route salesman where he was supervised by Fred Cahill. With the support of Cahill, Byrnes was soon promoted to district manager, despite the fact that Cahill's supervisor, Dutch Froehlich, did not want to promote the plaintiff because of his excessive weight. Byrnes was transferred to Cincinnati, Ohio in 1971 and Froehlich insisted that Cahill supervise Byrnes or Froehlich would fire Byrnes because he would not lose weight. Cahill continued supervising Byrnes, who became a regional manager, but Cahill's supervisors continued to insist that the plaintiff lose weight, despite the fact that he was doing a good job.

In 1988, Cahill was transferred and the plaintiff was assigned a new supervisor, Mary Ellen Johnson. Apparently, Johnson's management style was different from Cahill's and Byrnes became irritated with his new supervisor. The plaintiff claimed

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<sup>128</sup> *Id.* § 37.2202(1)(a)-(b).

<sup>129</sup> *Id.* § 37.2208.

<sup>130</sup> *Id.*

<sup>131</sup> 811 F. Supp. 286 (E.D. Mich. 1993).

<sup>132</sup> *Id.* at 291.

<sup>133</sup> *Id.*

<sup>134</sup> The court classifies Byrnes as "overweight." *Id.* at 292. Under the definitions for overweight and obesity, however, the plaintiff's condition is more properly categorized as obesity, since he was 5'8" and weighed between 230 and 240 pounds. See discussion *supra* part II.A.

that Johnson told him at an evaluation that if he wanted to advance any further with the company, he would have to lose weight.

In September 1989, Byrnes began a medical leave of absence at his doctor's recommendation. This leave was necessitated by the fact that the plaintiff's blood pressure was fluctuating and this was caused, according to Byrne's doctor, by stress. In late 1990, the plaintiff was instructed to clean out his desk because a replacement had been hired. When asked, a representative of the defendant said that Byrnes had not been fired but that the position needed to be filled because the plaintiff was unable to return to work. During all of the years of his employment, the plaintiff was approximately 5'8" and weighed between 230 and 240 pounds. After his official termination, the plaintiff brought an action against his employer, alleging weight discrimination under the Elliott-Larsen Act.

After the defendant removed the action to federal court, the district court found that the Elliott-Larsen Act adopted the federal analysis for employment discrimination cases.<sup>135</sup> Thus, in order to prove the prima facie case, the plaintiff must show (1) that he is a member of a protected class; (2) that he was qualified for the position; (3) that he was discharged from the job; and (4) that he was replaced by an individual who is not a member of the protected group.<sup>136</sup> If the plaintiff proves the prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory rationale for the action taken.<sup>137</sup>

In *Byrnes*, the court held that the plaintiff had failed to prove the prima facie case.<sup>138</sup> From the facts presented, the plaintiff was unable to demonstrate that he was qualified for the position at the time of his discharge.<sup>139</sup> In addition, the court held that the plaintiff offered no proof that the defendant's decision to terminate his employment was based, even partially, on his weight condition.<sup>140</sup> Thus, the court granted the defendant's motion for summary judgment, although they did not determine the showing necessary for a plaintiff to make a valid weight discrimination claim under the Elliott-Larsen Act.<sup>141</sup>

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<sup>135</sup> *Byrnes*, 811 F. Supp. at 291.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 292.

<sup>141</sup> *Id.*



Because Michigan is the sole state that has passed legislation that specifically remedies weight-based discrimination in the employer-employee context (and it is not even clear, according to *Byrnes*, exactly what a plaintiff must prove in a weight discrimination case), waiting for state legislative action will be of little help to flight attendants who are discriminated against because of their weight. In addition, even the "ray of hope" offered by the Michigan law is not applicable to protect overweight and obese passengers because these travellers fall outside the scope of the employee-employer area. Given the state of the law today, the best answer for both flight attendants and obese passengers appears to be to argue that weight is a handicap and deserves protection under federal laws that prohibit handicap discrimination. Assuming, for the time being, that the courts become more willing to follow the reasoning in *Cook* and classify obesity as a handicap, there are two separate statutes that could be asserted. For flight attendants, the answer lies in the Americans with Disabilities Act (ADA)<sup>142</sup> and for obese passengers, their safe haven is found in the Air Carrier Access Act (ACAA).<sup>143</sup>

## B. FLIGHT ATTENDANTS: AMERICANS WITH DISABILITIES ACT

### 1. *History of the ADA*

The Rehabilitation Act of 1973<sup>144</sup> was enacted by Congress to allow handicapped individuals equal access to employment opportunities. The Act defines a handicapped individual as "any person who i) has a physical or mental impairment which substantially limits one or more . . . major life activities, ii) has a record of such an impairment, or iii) is regarded as having such an impairment."<sup>145</sup> Further, this federal law only prohibits discrimination against handicapped individuals when the activity in question is federally funded.<sup>146</sup> This problematic limitation means that the Rehabilitation Act does not extend to private organizations, which leads to only a small percentage of handicapped individuals falling within the Rehabilitation Act's protection.<sup>147</sup>

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<sup>142</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

<sup>143</sup> Air Carrier Access Act of 1986, 49 U.S.C. § 1301(3) (1994).

<sup>144</sup> See *supra* note 89.

<sup>145</sup> 29 U.S.C. § 706(8)(B) (1994).

<sup>146</sup> *Id.* § 794.

<sup>147</sup> *Stolker, supra* note 19, at 229.

The limitations of the Rehabilitation Act demonstrated the necessity for a comprehensive federal law to protect individuals with disabilities from discrimination. Due to this recognized need, President Bush signed the ADA into law on July 26, 1990.<sup>148</sup> The ADA responded to findings that more than 43,000,000 Americans have one or more physical or mental disabilities, and the number is increasing as medical techniques allow the population as a whole to live longer.<sup>149</sup> Congress recognized that discrimination against people with disabilities persists in areas such as employment, housing, public accommodations, education, and transportation and individuals who have been the subject of this discrimination have often had no legal recourse to redress this treatment.<sup>150</sup> Finally, Congress stated that these individuals are disadvantaged based on characteristics that are beyond their control and they have become the victims of stereotypic assumptions that are not indicative of the individual's ability to significantly contribute to society.<sup>151</sup> Because of these factors, Congress expanded the coverage of protection against disability discrimination announced by the Rehabilitation Act by passing the ADA, the provisions of which are generally applicable to all employers, employment agencies, and labor organizations in the private spectrum.<sup>152</sup> Thus, the Rehabilitation Act remains the disability law for the federal government and federal contractors and the ADA covers all areas of private employment.

## 2. *Relevant Provisions of the ADA*

The ADA prohibits discrimination "against a qualified individual with a disability."<sup>153</sup> The ADA adopted the definition of "handicap" from the Rehabilitation Act and, essentially, set up an alternative three-prong definition for proving that a disability exists.<sup>154</sup> As one prong of this test, the ADA protects those persons "perceived" to have a physical or mental impairment that substantially limits a major life activity even if the individual is

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<sup>148</sup> 42 U.S.C. §§ 12101-12213 (1994).

<sup>149</sup> *Id.* § 12101.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* § 12111(3).

<sup>153</sup> *Id.* § 12112(a).

<sup>154</sup> See discussion *supra* part V.B.1. Just to reiterate, the ADA defines a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

not actually impaired.<sup>155</sup> The ADA regulations define "substantially limiting" as any impairment that causes an individual to be "unable to perform a major life activity [or] [s]ignificantly restrict(s) . . . the condition, manner, or duration under which an individual can perform a particular major life activity as compared to . . . the average person."<sup>156</sup> In considering whether a condition "substantially limits a major life activity," courts should look at: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment.<sup>157</sup>

In offering its interpretative guidance to the ADA, the EEOC has helped to explain the scope of the ADA and situations where it applies. For example, any individual who is rejected from a job because of the "myths, fears, and stereotypes" associated with a particular disability would be covered under the "regarded as" (the third prong) definition of disability.<sup>158</sup> In conclusion, the EEOC states that "[i]f the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear, or stereotype' may arise."<sup>159</sup> With this statement, the EEOC commands an investigation into whether stereotypical

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<sup>155</sup> 29 C.F.R. § 1630.2(1) (1995).

<sup>156</sup> *Id.* § 1630.2(j)(1).

<sup>157</sup> *Id.* § 1630.2(j)(2).

<sup>158</sup> See Kramer & Mayerson, *supra* note 9, at 49 (citing the EEOC clarification of 29 C.F.R. § 1630.2(1) in 29 C.F.R. pt. 1630 app. at 398). The article by Kramer and Mayerson gives a much more thorough analysis of a perceived disability claim under the Rehabilitation Act and the ADA. For purposes of this Comment, the analysis and proof models of a plaintiff's perceived disability claim will be briefly summarized.

There are three alternative ways that a plaintiff can satisfy a perceived disability claim. First, the plaintiff can show that he or she has a physical or mental disability that does not substantially limit a major life activity but is treated by a covered employer as a limitation. Kramer & Mayerson, *supra* note 9, at 45. Second, the plaintiff can show that he or she has a physical or mental disability that substantially limits a major life activity only because of the attitudes of others towards the disability. *Id.* A final alternative for proving a perceived disability claim is for the plaintiff to show that there is not a defined physical or mental impairment but that he or she is treated by a covered employer as having such a substantially limiting disability. *Id.* In summary, the ADA does allow for these perceived disability claims, which are provable by any of the three above models. This could provide an avenue for eliminating weight discrimination by the airline employer against flight attendants.

<sup>159</sup> *Id.*

prejudices about a particular disability played a role in the employer's decision.<sup>160</sup>

In *School Board v. Arline*,<sup>161</sup> a school teacher who was fired from her job because of her susceptibility to tuberculosis brought an action against the school district alleging that her termination was in violation of the Rehabilitation Act.<sup>162</sup> Gene Arline was fired from her job as an elementary school teacher after she suffered her third relapse of tuberculosis within two years. After being denied relief in an administrative hearing, Arline filed a lawsuit alleging discrimination on the basis of a disability.<sup>163</sup>

After being denied relief in the district court, Arline appealed and the court of appeals reversed, holding that Arline's condition fell within the protection of the Rehabilitation Act.<sup>164</sup> The school district appealed to the Supreme Court, which granted certiorari.<sup>165</sup> The Court decided that the legislative history of the Rehabilitation Act demonstrates that Congress intended to extend coverage to individuals who were simply "regarded as" having an impairment.<sup>166</sup> In determining that perceived disability claims were actionable, the Court reasoned that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."<sup>167</sup>

### 3. *Argument for Flight Attendants Under the ADA*

Since the ADA became effective, only one case, *Cook*, has determined that a broad definition of disability includes obesity under a perceived disability claim.<sup>168</sup> Continuing with the as-

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<sup>160</sup> *Id.*

<sup>161</sup> 480 U.S. 273 (1987).

<sup>162</sup> Again, although this case arises under the Rehabilitation Act, courts will look to decisions based on the Rehabilitation Act as guidance for their decisions under the ADA.

<sup>163</sup> *Airline*, 480 U.S. at 276.

<sup>164</sup> *Id.* at 277.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 282.

<sup>167</sup> *Id.* at 283.

<sup>168</sup> Recall that *Cook* was decided under the Rehabilitation Act of 1973. Since Congress modeled the ADA after the Rehabilitation Act, however, the courts will often look to past decisions under the Rehabilitation Act for guidance as to how the ADA is to be interpreted. For a discussion of a perceived disability in general, see *supra* notes 93 and 158.

sumption that courts will become more willing to view overweight and obesity as a handicap in some situations, the ADA could be the vehicle used by flight attendants to challenge any remaining weight requirements by airlines as illegal because they discriminate against individuals who have an actual or perceived disability.

The argument for flight attendants under the ADA is fairly easy, once the initial step of classifying obesity or being overweight as a handicap has been established. The second step in the flight attendant's argument should focus on airline weight programs and establish that any weight requirements imposed by the employer airline consider an individual's weight in making employment decision. If there is an applicant for a flight attendant position who is obese and that individual is turned down for employment in part for being too heavy, this is impermissible under the ADA because it takes into consideration an actual or perceived disability.<sup>169</sup> The applicant would, it follows, be allowed to file a complaint with the EEOC and, if the EEOC decides not to pursue any action against the employer, obtain a notice of right to sue and file a private cause of action in federal court.

The basic framework of the above argument has failed in at least one case in state court, but the facts of the case concerned overweight, not obese, individuals. In *Underwood v. Trans World Airlines, Inc.*,<sup>170</sup> the plaintiff sued her airline employer under New York state handicap laws. Joan Underwood was employed by the defendant airline for more than twenty years as a flight attendant. Trans World Airlines (TWA) maintained certain standards concerning the appearance of their flight attendants,

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<sup>169</sup> Obviously, this example sets up a best case scenario for the plaintiff, but the employer appears to have a couple of justifications for denying employment. First, the employer may be able to prove a valid BFOQ defense. The argument would be that if the applicant is so obese that he or she cannot fit down the aisles or fit through exit doors, which are clearly essential job functions for a flight attendant, the denial of employment is justified. Second, the ADA requires an employer to make reasonable accommodations for an individual with a handicap as long as no undue hardship results. The employer could make a showing that it would be unable to accommodate this applicant unless its planes were widened in order to allow for more room, a fact which could be viewed by a trier of fact as something that is unreasonable or poses an undue hardship and, therefore, not required under the ADA. Thus, a defendant airline would have BFOQ and undue hardship as defenses and a plaintiff would necessarily have to be prepared to counter these, because the defenses would be relevant in the context of an obese flight attendant.

<sup>170</sup> 710 F. Supp. 78 (S.D.N.Y. 1989).

including guidelines for their weight. The defendant's employment manual mandated that, only after a TWA supervisor determined that excess weight detracted from an attendant's appearance, should the provisions of the weight program be applied.<sup>171</sup>

On or about September 4, 1987, the plaintiff was informed by a supervisor that she was overweight and failed to comply with TWA's appearance standards. Underwood was placed on a formal weight program and a goal weight of 142 pounds was set. Soon after the goal weight was set, the plaintiff was informed that she would be suspended without pay for thirty days, effective February 7, 1988, if she could not reach her assigned goal weight by that date.

After seeking redress through internal channels and unwilling to wait for further administrative hearings, Underwood filed a civil lawsuit in New York state court, alleging that TWA's weight program violated the New York State Human Rights Law. Subsequently, the airline removed the action to federal court, contending subject matter jurisdiction based on federal question, since the Railway Labor Act applied and pre-empted the plaintiff's state law claims. The court denied the plaintiff's motion to remand back to state court and granted the defendant's motion to dismiss.<sup>172</sup>

In ruling for the defendant, the court recognized that the term disability in the New York law was "defined to include persons 'clinically diagnosed' as having the 'disease of active gross obesity.'"<sup>173</sup> The court continued, however, that the inclusion of obesity as a disability should be interpreted narrowly and not extend to individuals in the plaintiff's position.<sup>174</sup> The differ-

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<sup>171</sup> The court noted that the formal weight program set forth in the manual provides for a "goal weight" to be achieved by the flight attendant. *Id.* at 81 n.4. This goal is calculated by taking the hiring weight and increasing it by 12%. *Id.* Nevertheless, if the flight attendant is deemed satisfactory in appearance, she can be removed from the weight program even if her weight exceeds the goal weight. *Id.* at 81 n.4.

<sup>172</sup> *Id.* at 85-86.

<sup>173</sup> *Id.* at 84 (citing *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985)). In *Xerox*, the plaintiff was denied a position as a systems consultant because she was obese. Apparently, the Director of Health Services for Xerox recommended that the company refrain from hiring her because of the effect she would have on the company's insurance program. Xerox admitted that she was qualified and that her condition would not affect her ability to perform the job. The court concluded that the plaintiff's obese condition was an impairment within the meaning of the statute. *Id.*

<sup>174</sup> *Id.* at 84.

ence between obesity and overweight is not one of semantics, according to the court, and it was significant that the plaintiff did not contend that she suffered from an obese condition.<sup>175</sup> Drawing this distinction between obesity and overweight, the court concluded that Underwood was not within the class of persons the statute intended to protect.<sup>176</sup> There appears, therefore, to be some room for interpretation as to whether a person who has been medically diagnosed as obese would fall within New York state handicap laws; both *Underwood* and *Xerox* indicate that obese individuals would be afforded protection.

By arguing under a *Cook* analysis and classifying an obese condition as a handicap, many applicants for flight attendant positions could seek protection under the ADA. Because the ADA protects handicapped individuals from discrimination by employers, a person's inability to meet weight requirements imposed by the airline could be viewed as an employment decision that illegally takes a disability into account. Thus, these weight programs would become an impermissible means of measuring an employer's ability to perform the job of flight attendant.

There are, however, a couple of problems with this argument under the ADA. First, in both *Cook* and *Xerox*, the plaintiffs suffered from a condition of morbid obesity. If the protection under the ADA only applies to this extreme condition, flight attendants are essentially back to their original position because it appears that an employer airline could assert a valid BFOQ for rejecting an individual who suffers from morbid obesity. The airline would argue that the individual's condition is a serious safety concern and the airline could probably demonstrate that a person in this condition could not easily fit down the aisle of the plane, much less operate the necessary emergency equipment in the event there was an accident. It is not clear, however, that only a condition of morbid obesity is required for protection under the ADA and reading *Cook* in this narrow way might be an inappropriate interpretation of the court's position.<sup>177</sup>

A second problem with the argument by flight attendants under the ADA is more serious because of the individuals who would still be left unprotected. As the court in *Underwood* noted,

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> In fact, in the amicus brief written by the EEOC in *Cook*, the agency took the position that protection under the ADA should not be limited to conditions of morbid obesity. See *supra* note 118.

the difference between overweight and obesity is not just a matter of semantics<sup>178</sup> and this fact proves problematic for a large group of persons who need protection from airline weight programs and the discrimination that follows: the overweight. If obesity is classified as a handicap, then individuals who suffer from obese conditions can seek redress for employer discrimination under the ADA. No court to date, however, has been willing to classify individuals who are simply overweight as disabled. An odd result, therefore, follows because obese individuals would be allowed to challenge airline weight programs under the ADA but the employer would have strong defenses in many, if not all, of these situations. On the other hand, overweight individuals would be subject to the airline's weight programs because of the lack of statutory protection, they would fail to meet the specified weight goals, and, thus, a large number would continue to suffer from weight discrimination. In short, it is quite possible that the entire argument about obesity as a handicap may have little, if any, practical effect on the weight programs that airlines have in place today.

### C. OBESE PASSENGERS: THE AIR CARRIER ACCESS ACT

#### 1. *History of the ACAA*

The ADA, passed in 1992, is the sweeping, broad based legislation that prohibits discrimination against disabled persons.<sup>179</sup> But, airlines were specifically excluded from the application of the ADA because Congress had already passed legislation to deal with handicapped airline travellers: the Air Carrier Access Act of 1986 (ACAA).<sup>180</sup> This statute was passed in an effort to prohibit commercial air carriers from discriminating against the millions of handicapped individuals who require air transportation every year. Senator Robert Dole, the principal sponsor of the bill, stated that "there should be no restrictions placed upon air travel of handicapped persons. Any restrictions that the procedures may impose must be only for safety reasons found necessary by the Federal Aviation Administration."<sup>181</sup>

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<sup>178</sup> *Underwood*, 710 F. Supp. at 84.

<sup>179</sup> See discussion *supra* part V.B.

<sup>180</sup> 49 U.S.C. § 1374(c) (1994).

<sup>181</sup> See Paul S. Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans with Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 318 (citing 132 CONG. REC. 21,771 (Aug. 15, 1986)).



The ACAA, in part, was enacted in an effort to overturn the Supreme Court decision in *United States Department of Transportation v. Paralyzed Veterans of America*.<sup>182</sup> This case dealt with section 404 of the Federal Aviation Act of 1958,<sup>183</sup> the precursor to the ACAA, and section 504 of the Rehabilitation Act, which required recipients of federal assistance to allow equal access to disabled persons.<sup>184</sup> The issue in *United States Department of Transportation* was whether commercial airlines are the recipients of federal financial assistance and, thus, bound by the non-discriminatory provision of section 504 of the Rehabilitation Act. First, the Court concluded that the airport operations, not the airport users or commercial airlines, were the recipients of federal assistance, which was to be used for airport improvements such as construction of runways and terminals.<sup>185</sup> Next, the Court held that the requirements in section 504 were applicable only to direct recipients and, therefore, the requirements of section 504 did not apply to the airlines.<sup>186</sup> With this reasoning, the Court overturned a lower court ruling and held that commercial air carriers, because they do not receive federal funds, fall outside the scope of section 504 and, therefore, are essentially allowed to discriminate against the disabled.<sup>187</sup> In response to this Supreme Court decision, Congress amended section 404 of the Federal Aviation Act and enacted the ACAA, which covers all air carriers by its provision, regardless of their status as recipients of federal financial assistance.<sup>188</sup>

## 2. Relevant Provisions of the ACAA

The main provision of the ACAA states that "[n]o air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation."<sup>189</sup> With this provision, Congress recognized that everyone deserved to be serviced in air transportation "in a manner appropriate to their abilities."<sup>190</sup> Further, a "qualified

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<sup>182</sup> 477 U.S. 597 (1986).

<sup>183</sup> 49 U.S.C. § 1374 (1982).

<sup>184</sup> 29 U.S.C. § 794 (1982).

<sup>185</sup> *Department of Transp.*, 477 U.S. at 605.

<sup>186</sup> *Id.* at 607.

<sup>187</sup> *Id.* at 612.

<sup>188</sup> See Elizabeth E. Tweedie, *The Struggle for Equal Access Includes Commercial Air Transportation: The Need for a Private Right of Action for Disabled Persons to Enforce the Air Carrier Access Act of 1986*, 30 SANTA CLARA L. REV. 1007, 1027 (1990).

<sup>189</sup> 49 U.S.C. § 1374(c)(1).

<sup>190</sup> See Tweedie, *supra* note 188, at 1031 n.153.

handicapped individual" for purposes of the ACAA is defined as an individual who purchases a ticket, meets all reasonable contract requirements for passengers, and presents himself or herself for travel.<sup>191</sup>

There are several requirements that must be met in order for an airline to be in compliance with the ACAA. No airline can refuse transportation to an individual based on a handicap unless allowing the person on the plane would compromise the overall safety of the flight.<sup>192</sup> The air carrier may, however, deny access to a flight or require a medical release from any passenger with a communicable disease that is likely to spread to other passengers.<sup>193</sup> An airline may require an attendant to accompany a person travelling in a stretcher or who has a mobility impairment so severe that the individual would be unable to evacuate the aircraft in the event of an emergency.<sup>194</sup> In general, therefore, air carrier employees must provide assistance to handicapped travellers when they enter and exit the plane and provide transportation between gates.<sup>195</sup> In short, they cannot discriminate against disabled passengers and they must make reasonable accommodations for these individuals.

### 3. *Private Causes of Action Under the ACAA*

"Neither the Air Carrier Access Act of 1986, nor the regulations providing for its implementation, establish a private right of action for disabled individuals to obtain compensation for alleged violations under the Act."<sup>196</sup> Without an express cause of action, it is not clear whether disabled travellers have access to the courts and, if there is no opportunity to file a private cause of action, these persons have no means of ensuring air carriers comply with the statute. An implied cause of action under the ACAA has been suggested as a way to offer disabled persons redress in court<sup>197</sup> and this particular issue has been discussed in two important cases.

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<sup>191</sup> 14 C.F.R. § 382.5 (1995).

<sup>192</sup> *Id.* § 382.31.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* § 382.35(b).

<sup>195</sup> *Id.* § 382.39(a).

<sup>196</sup> See Tweedie, *supra* note 188, at 1033-34.

<sup>197</sup> See Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183 (1992). In her comment, Ms. Eisenhauer argues that Congress intended disabled individuals to have an implied right of action under the ACAA. Using a canon of statutory construction to interpret the ACAA, Ms. Eisenhauer says that it becomes clear

In *Shinault v. American Airlines, Inc.*,<sup>198</sup> the plaintiff, a quadriplegic passenger, brought suit against American Airlines alleging that the airline refused to let him board a flight because he was handicapped. Shinault, a National Easter Seals Adult Representative, was returning to Mississippi after meeting with President Bush in Washington, D.C. earlier in the day. The plaintiff was scheduled to connect with a flight in Nashville, which would fly him to his final destination in Jackson, Mississippi, but his flight from Washington, D.C. was delayed because of bad weather. When the Washington, D.C. flight landed in Nashville, Shinault asked permission to deplane immediately but a flight attendant told him that all of the other passengers had to exit the plane before he would be allowed to leave. Because of this delay and others caused by the airline, Shinault missed his connection to Mississippi.

Realizing that he would have to wait for the next flight to Mississippi, Shinault asked for his personal wheelchair, but the chair had already been placed on the original connecting flight. The airline provided a wheelchair for Shinault which was low-backed and had neither seat belts nor other restraining devices. The plaintiff feared the chair would cause pressure sores, that he might fall out of the chair, or that he would suffer a stroke from an inability to perform his bowel program. None of these fears of Shinault were realized, however.

Shinault sued American Airlines for injunctive relief, compensatory damages, emotional distress damages, and punitive damages under the ACAA, alleging that the airline discriminated against him because he was handicapped. This discrimination, Shinault alleged, was demonstrated by the airline refusing to let him deplane his original flight and refusing to allow him to board his connecting flight. The trial court granted American Airline's motion for summary judgment because: (1) the ACAA does not provide for recovery of emotional distress damages; (2) the ACAA does not allow for punitive damages; and (3) the district court cannot issue injunctive relief because the Secretary of Transportation is charged with enforcing the ACAA.<sup>199</sup>

Shinault immediately appealed the district court's decision to the Fifth Circuit. The Fifth Circuit noted, at the outset, that

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that a private right of action and emotional distress damages are embodied in the Act, but not punitive damages. *Id.* at 1207.

<sup>198</sup> 936 F.2d 796 (5th Cir. 1991).

<sup>199</sup> *Id.* at 799.

since this was an appeal of the granting of a summary judgment motion, they would apply a *de novo* standard of review and view all evidence and reasonable inferences in the light most favorable to Shinault.<sup>200</sup> Next, the court determined that, although the ACAA does not expressly provide for private causes of action, it is appropriate to imply a cause of action under a *Cort v. Ash*<sup>201</sup> analysis.<sup>202</sup> The court held that a genuine issue of fact existed in this case, considering the admissions by American Airlines<sup>203</sup> and the testimony given by Shinault, both in his answers to interrogatories and in his deposition.<sup>204</sup>

Next, the court turned to an analysis of the remedies available under the ACAA.<sup>205</sup> Since there is no express remedial language in the statute, the Fifth Circuit turned to the legislative history of the ACAA to determine the remedies that Congress intended to provide under the ACAA.<sup>206</sup> After examining a history of earlier efforts by Congress to prohibit discrimination by airlines (section 404 of the Federal Aviation Act of 1958 and section 504 of the Rehabilitation Act of 1973, for example), the court decided that there was "no significant evidence in the legislative history and in the circumstances surrounding the passage of the ACAA to indicate what types of remedies Congress intended to provide for private litigants."<sup>207</sup> Since there was no persuasive legislative history on the issue of remedies, the court looked to an established canon of statutory construction which allows a court to apply "all necessary and appropriate remedies."<sup>208</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> 422 U.S. 66 (1975).

<sup>202</sup> *Shinault*, 936 F.2d at 800.

<sup>203</sup> American conceded that other passengers who were on Shinault's flight from Washington, D.C. made the connecting flight to Jackson but Shinault did not. *Id.* Also, American admitted that one of its ticket agents twice extended the jetbridge after the door to the airplane destined for Jackson was closed. *Id.* Once it was extended to board additional late passengers. *Id.* The other instance was to deliver additional paperwork to the captain. *Id.* Finally, American admitted that the plane did not pull away from the gate until 3:00 p.m. (this time is significant because Shinault, in his deposition, testified that he arrived at the gate at 2:50 p.m. but was not allowed to board). *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 801.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 804.

<sup>208</sup> *Id.* (citing the Supreme Court decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)).

Finally, the court analyzed the four remedies sought by Shinault: injunctive relief, compensatory damages, emotional distress damages, and punitive damages.<sup>209</sup> The Fifth Circuit concluded that the ACAA did not provide for injunctive relief in Shinault's case because this relief is available through the Department of Transportation.<sup>210</sup> The court determined that compensatory and emotional distress damages are appropriate remedies under the ACAA and the trial court was reversed on not allowing for recovery of these damages.<sup>211</sup> No decision was reached as to whether punitive damages are available because Shinault did not allege wanton or malicious conduct in his complaint.<sup>212</sup>

In *Tallarico v. Trans World Airlines, Inc.*,<sup>213</sup> the plaintiff was a handicapped minor (14 years old) with cerebral palsy that impeded her ability to walk and talk. The plaintiff intended to fly, unaccompanied, from her school in Texas to her home in St. Louis, Missouri for the Thanksgiving holiday. The airline, however, would not allow her to fly home without an escort because the ticket agent concluded that the plaintiff could not take care of herself in an emergency and could not exit the plane quickly. Due to this decision, the plaintiff's father was required to travel to Houston and accompany his daughter back to St. Louis. The father alleged that TWA violated the ACAA because TWA had denied his daughter the right to board the airplane because of her handicap status.<sup>214</sup> The district court concluded that the ACAA does imply a private cause of action and the jury awarded damages in the amount of \$80,000.<sup>215</sup> The district court, however, granted the defendant's motion for judgment notwithstanding the verdict, reducing the damage award to \$1350, which was the equivalent of the plaintiff's out-of-pocket expenses.<sup>216</sup> The plaintiff appealed this ruling to the Eighth Circuit.<sup>217</sup>

The Eighth Circuit determined that Tallarico, a handicapped individual, was a member of the class of persons Congress in-

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 805.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> 881 F.2d 566 (8th Cir. 1989).

<sup>214</sup> *Id.* at 568.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

tended to protect by passing the ACAA.<sup>218</sup> The court agreed with the district court that allowing a private cause of action was consistent with the underlying purposes of the ACAA by utilizing the same four factor analysis from *Cort* that was applied in *Shinault*.<sup>219</sup> The Eighth Circuit, however, determined that the district court erred in determining that emotional distress damages are not available under the ACAA.<sup>220</sup> On the issue of punitive damages, the Eighth Circuit agreed with the district court that the plaintiffs failed to present any evidence that would support an award of punitives.<sup>221</sup> Similar to the *Shinault* holding, the court did not decide the issue of whether punitive damages are available under the ACAA.<sup>222</sup> After determining that there was no reversible error in the district court's exclusion of certain testimony, the Eighth Circuit held that Tallarico had stated a claim under the ACAA and that there was sufficient evidence to support the jury's award of compensatory damages in the amount of \$80,000.<sup>223</sup>

#### 4. *Argument for Obese Passengers Under the ACAA*

Again, assuming that the courts will find an obese condition qualifies as a valid disability, obese passengers could seek protection from airline weight discrimination under the ACAA. It seems logical to conclude, given *Shinault* and *Tallarico*, that these passengers would have a private cause of action to assert the protection of this disability statute. If a court is willing to imply a private action under the ACAA, compensatory and emotional distress damages are available and punitive damages are a possibility as well, although neither *Shinault* nor *Tallarico* decided this particular issue. The ACAA would become an excellent vehicle to end the weight discrimination that faces many obese passengers and airlines would be less likely to trivialize the rights of these passengers if they knew they could be subject to expensive litigation and possibly large jury verdicts. As seen in the area of flight attendants and the ADA, however, this protection would not cover overweight passengers (since an overweight condition would not qualify as a handicap), although it seems plausible that these passengers would not need the statu-

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<sup>218</sup> *Id.* at 570.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 571.

<sup>221</sup> *Id.* at 572.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 571.

tory protection that obese passengers require. If a line is to be drawn for the ACAA, it seems appropriate that it should be drawn by affording protection to the obese and not to the overweight passenger, since most, if not all, overweight passengers do not need accommodation.

## VI. CONCLUSION

Weight discrimination, whether conscious or not, is prevalent in today's society. This Comment has attempted to demonstrate the discrimination that overweight and obese<sup>224</sup> individuals face in the airline industry. Title VII, the statute most often recognized as prohibiting discrimination in the employment context, does not adequately protect flight attendants from the mandatory weight requirements of employer airlines and there is not a statute which directly protects obese passengers. It is, therefore, necessary to investigate novel avenues, rather than specific, on-point statutes, which might afford protection to individuals who are subject to the biases and prejudices that others have about overweight and obesity. The argument that seems most logical in affording this protection is to classify obesity as a handicap, thus affording protection under either the ADA (flight attendants) or the ACAA (passengers).

There is a problem, however, with defining overweight and obesity as a handicap: it stretches the definition of handicap to its outer limits.<sup>225</sup> It would be unfortunate to lessen the effect and importance of disability protection by affording protection to untraditional handicaps because the statutes and definitions have been stretched almost beyond recognition.<sup>226</sup> Because of the struggle to afford protection to individuals who are subject to weight-based discrimination, it is necessary to have a clear

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<sup>224</sup> As evidenced by this Comment, treating overweight and obese conditions in the same category is troublesome because there are real differences between these groups, the most important difference being that an overweight condition appears more likely to be mutable than does an obese condition.

<sup>225</sup> At least one scholar, Donald L. Bierman, seems to agree with this conclusion about the "damage" that can be done to the definition of handicap if obesity is included. "Attacking the problem through litigation based on handicap laws has proven ineffective and is not appropriate since obesity, unaccompanied by other physical or medical conditions, fails to satisfy the usual definitions of handicap or disability." Bierman, *supra* note 7, at 975-76.

<sup>226</sup> See Petersen, *supra* note 18, at 133 ("Recognizing obesity as a handicap may also lead to challenges of handicap law since feasibly, almost any condition may constitute a handicap").

statute that forbids considering weight as a factor in employment decisions or in providing equal service.

The easiest way to accomplish this task, at least in the employment relationship between flight attendants and airlines, is to add one word to the language of Title VII, "weight," which would afford protection to both the overweight and obese.<sup>227</sup> The Congressional purpose in the passing of Title VII was to eliminate discrimination in areas where there were prejudicial stereotypes. By adding weight to the protected characteristics of Title VII, Congress would keep with the overall purpose of the statute and afford the necessary protection to employees like flight attendants who are still subject to airline weight programs.<sup>228</sup>

For obese passengers, the best way to handle discrimination against these individuals is to add an explicit section in the Air Carrier Access Act that would address the treatment of obese passengers.<sup>229</sup> This addition eliminates the difficulty an airline

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<sup>227</sup> Several other commentators have advocated a similar addition to the language of Title VII. See, e.g., Stolker, *supra* note 19, at 250 ("Employment decisions should be based on an individual's merits, competency, and skills, and not on his or her appearance."); McEvoy, *supra* note 115, at 31 ("Obesity should join sex, age, race, national origin, and religion as impermissible reasons for job bias. In a society of many races, cultures, shapes, and sizes, how a person works not looks should be the only criterion for employment."); Ronkin, *supra* note 84, at 669 ("In the employment context, it seems plausible that overweight individuals should be afforded legal redress, because employers specifically cite weight and appearance as the reason for refusing to hire or terminating employees."); Hartnett, *supra* note 3, at 845 ("Our size and appearance, our habits and flaws, and our choice of private pleasures have no place on our employment applications."); Bierman, *supra* note 7, at 976 ("Obesity is analogous to other protected classes and as such should be protected. This comment recommends that the appropriate response to the problem is for state and federal legislative bodies to expand current civil rights laws to include weight or obesity as protected from discrimination.").

<sup>228</sup> The revised text of Title VII might read something like the following: "It shall be unlawful employment practice for an employer to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual in any other employment practice, because of an individual's race, color, religion, sex, national origin, or weight." Weight would be defined as the current body weight of an employee at the time the alleged discriminatory conduct occurred. It should be noted that by adding "weight" to Title VII, Congress would simply be saying that an individual's weight cannot be considered when an employer makes an employment decision. Obviously, employers would still have valid defenses for the decision, such as business necessity, BFOQ, and non-discriminatory rationale.

<sup>229</sup> The additional section of the Air Carrier Access Act might read something like the following: "In addition to protecting against discrimination of any otherwise qualified handicapped individual, by reason of such handicap, in the provi-



might face in trying to draw a fine line between who qualifies as obese and who is simply overweight. The problem with this suggestion, however, is that it is not clear what an airline has to do in order to reasonably accommodate the overweight or obese passenger. Situations could develop where passengers use this provision to require accommodations that might not be needed, thus taking the attention and focus away from the passengers who truly need accommodation. Maybe the best way for passengers to deal with weight discrimination, as opposed to the suggested addition to the ACAA, is to boycott the airlines who do not treat overweight and obese passengers with the respect and accommodations that they deserve as paying customers.

The notion of weight discrimination is a troubling situation and options must be explored to eliminate the problem. This Comment has outlined several possibilities to address discrimination in the airline industry but there are inherent weaknesses to these suggestions. By continuing to discuss alternatives, however, an answer to end this discrimination can surely be formulated, since it has been said that "[o]n the lips of the intelligent is found wisdom."<sup>230</sup>

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sion of air transportation, this Act prohibits any air carrier from discriminating against any otherwise qualified individual on the basis of the individual's weight." A qualified individual would be defined as one who purchases a ticket, presents himself or herself for travel, and meets the reasonable requirements expected of all passengers.

<sup>230</sup> *Proverbs* 11:13 (New American Catholic).