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Weight and Fitness Requirements

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"The sedentary and stressful nature of police work tends to erode good health if no physical conditioning program is maintained. It has been documented that police officers, as an occupational class, develop health risk problems in terms of cardiovascular disease, lower back disorder, and weight gain leading to varying degrees of obesity.

"Individuals in poor physical condition, or who are in unhealthy emotional states, may be less able to endure the physical and emotional demand of the job, especially in the long term. It is believed that a healthy and fit workforce is vital to effectively carry out the Department's mission. Attention to physical fitness over an officer's career can minimize these known health risks." *Kansas City, KS, Police Dept. General Order No. 20.12-II-A* (*11/05/2004*).

A. Is obesity an ADA impairment?

A federal appeals court rejected a suit by Ohio state troopers who challenged weight and fitness regulations as discriminatory. They were neither disabled nor "regarded" as impaired.

Various officers claimed they were subject to discipline, deprivation of incentive payments, or passed over for promotions because the State Patrol perceives them to have an impairment. The ADA prohibits discrimination against persons who are "regarded" as having a disabling impairment. The 1973 Rehabilitation Act prohibits an employer from treating an employee as having an impairment.

A three-judge federal appeals panel noted that while morbid obesity is a recognized ADA impairment, simple obesity is not. These officers exceeded the Patrol's weight requirement or failed to meet other fitness criteria. The court said:

> "... a mere physical characteristic does not, without more, equal a physiological disorder... * * * It would debase [the] high purpose [of the law] if the statutory protections... could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. * * *
>
> The officers herein do not allege that their weights or their cardiovascular fitness are beyond a normal range, nor have they alleged that they suffer from a physiological disorder..."

It was true the plaintiffs have physical characteristics that management believed were undesirable. However, these were not disabling conditions or impairments within the meaning of federal law, nor was there any evidence that the Patrol regarded them as impaired. Andrews v. Ohio, #95-3447, 104 F.3d 803, 1997 U.S. App. Lexis 457 (6th Cir.).

The EEOC has long maintained that a morbidly obese person is disabled. (2) Morbid obesity is body weight more than 100% over the norm. A postal employee was morbidly obese with a body weight of 456.8 pounds, which was 268 percent of his ideal body weight. He also had hypertension, sleep apnea, gout, and degenerative arthritis of both knees.

The EEOC concluded that a supervisor's order that a morbidly obese employee lose weight constituted "blatant and unjustified disparate treatment" in violation of Sec. 501 of the Rehabilitation Act of 1973. Kellus v. Runyon, #01933281, 1994 EEOPUB Lexis 438 & 1994 EEOPUB Lexis 439 (EEOC 1994).

The Virginia State Police hired a 219 lb. woman as a trooper, on condition she lose weight. After repeated warnings she was ordered to lose 3 lbs. a month. When she failed to achieve that goal, she was reclassified as a dispatcher, with a pay reduction.

A federal court dismissed her disability discrimination claims. She failed to prove her obesity substantially limits her ability to hold any job, or that the State Police "regarded"

her as incapacitated. She therefore was not "handicapped" or "disabled" within the meaning of federal law. Smaw v. Va. State Police, 862 F.Supp. 1469 (D.Va 1994).

In a more recent private sector case, the EEOC failed to prove that an employee's morbid obesity was the result of a physiological condition. To qualify as an ADA impairment, a physical characteristic must relate to a physiological disorder. EEOC v. Watkins, #05-3218, 2006 U.S. App. Lexis 23177, 2006 FED App. 0351P, 18 AD Cases (BNA) 641 (6th Cir. 2006).

B. Is obesity an impairment under state law?

In Michigan, a rejected 300 lb. firefighter applicant lost a discrimination suit. Although Michigan law protects overweight persons, the city lawfully declined employment due to his inability to deal with stress. Howard v. City of Southfield, #95-1014, 1996 U.S. App. Lexis 25290 (Unpub. 6th Cir.). Michigan is the only state to prohibit weight discrimination; Mich. Comp. Laws §37.2202(1)(a).

Writing in the case of a 400 lb., 5'9" woman employee, the New Jersey Supreme Court concluded that morbid obesity is a protected handicap under New Jersey disability discrimination laws. The plaintiff suffered from disease or pathology as a result of her obesity, resulting in limited mobility as well as other infirmities." Viscik v. Fowler Equip. Co., #A-38 Sept. Term 2001, 173 N.J. 1, 800 A.2d 826, 2002 N.J. Lexis 360 (N.J. 2002).

The California Supreme Court has recognized obesity as a handicap, but only when the condition is caused by a "physiological disorder affecting one or more bodily systems." The plaintiff, who was 5'4" and weighed 305 lbs., filed a state fair employment complaint when she was denied a position at a health food store.

However, the plaintiff failed to prove her obesity was an actual or perceived physiological disorder. It is not enough to show that an employer perceives an applicant or employee as unqualified due to his or her weight. The statute requires proof the employee must "be regarded as having or having had a... physiological disease or disorder..." Cassista v. Community Foods, Inc., #S028230, 856 P.2d 1050, 5 Cal. 4th 1050, 22 Cal.Rptr.2d 287, 2 AD Cases (BNA) 1188 (Cal. 1993).

C. Gender bias

It is sometimes claimed that women and minorities are singled out for overweight status. In Massachusetts, a newly-appointed woman police officer agreed to abide by state physical fitness standards, but gained 15 lbs. shortly after being hired. The chief of police ordered a body-fat test, allegedly threatened to terminate her and extended her

probationary period. A male officer purportedly gained 35 lbs. during the same period but was not questioned.

She filed a gender bias lawsuit in state court. The jury awarded her $150,000 in compensatory damages for emotional distress and $500,000 in punitive relief. Hart v. City of Peabody, #93-2252-A, 34 (1558) G.E.R.R. (BNA) 427, 5 Mass. L. Rptr. No.10, 221 and 223 n.2 (Mass. Super.Ct. 1996).

The Ninth Circuit held that the use of height-weight tables for men and women, taken from different sources, was gender discrimination. Frank v. United Airlines, #98-15638, 216 F.3d 845, 83 FEP Cases (BNA) 1, 2000 U.S. App. Lexis 14336 (9th Cir.).

D. Disciplinary issues

Several agencies have disciplined or terminated a police officer, firefighter or corrections officer because of obesity. One such case was in suburban Minneapolis, involving a firefighter who was unable to lose weight.

He was unable to buckle the belt on his SCBA and had difficulty climbing ladders. When new "extra large" gear arrived, he had gained more weight and was unable to use it. He weighed between 350 and 400 lbs. at various times, an increase over the 307 he weighed when he was ordered to reduce to 240 lbs.

Management fired him, and he appealed. A three-judge appellate panel wrote that "a high level of physical fitness is required to work safely as a firefighter." The panel noted that obesity adversely affects flexibility, agility and cardiovascular functioning. They wrote:

> "The record here more than adequately supports the council's decision to terminate [his] employment. Evidence in the record establishes that a high level of physical fitness is required to work safely as a firefighter. The safety concerns relate not only to the individual firefighter, but also to other firefighters and to the citizens they protect. Flexibility, agility, and high cardio-vascular functioning are all crucial to the job."

The firefighter claimed the city unlawfully imposed new requirements on him after he attained civil service status. The panel disagreed, and said he "was terminated not for failing to take or pass any tests, but rather because his weight makes it unsafe for him to work as a firefighter..." Senior v. City of Edina, 547 N.W.2d 411 (Minn. App. 1996).

E. Duty to bargain

After signing a bargaining agreement with the police union, a Pennsylvania city adopted an ordinance that required all current and new employees of the police, fire and public works departments to take and pass a physical examination administered by the city's physician as a "condition for continued employment."

The ordinance further provided that refusal to take such examination shall be reason for a ten-day suspension and continued refusal shall be reason for discharge.

The FOP challenged the ordinance because the city failed to bargain the new requirements. A lower court agreed. On appeal, the majority reversed, 5-to-2, writing:

> "There is nothing more fundamental to the interests and safety of the public than the good health and physical fitness of those charged with the responsibility of enforcing the laws.
>
> "More specifically, the special hazards to which policemen's duties expose them and the greater physical fitness which policemen need to adequately discharge their duties lead us to conclude that the Legislature was well within the bounds of reasonable and constitutionally permissible classification in allowing police to become eligible for retirement allowances at an age five years younger than that of other Allegheny County employees."

City of Sharon v. Rose of Sharon Lodge #3, 11 Pa. Commw. 277, 315 A.2d 355, 1973 Pa. Commw. Lexis 478 (1973).

More recently, the Federal Labor Relations Authority concluded that management, in creating a physical fitness program for Pentagon police officers, was not required to bargain over a grandfather exemption clause or the creation of a medical review and physical fitness board.

The FOP claimed that that the DoD failed to bargain in good faith and unilaterally implemented a fitness program for Pentagon police officers. Management and the union had engaged in negotiations and came to an agreement, but the proposals that were not included in the agreement had been declared as non-negotiable by management.

The FLRA agreed with that determination, saying that "the intrusion on the exercise of management's right to determine particular qualifications and skills needed to perform the work of a particular position and whether employees meet those qualifications outweighs any benefits the [union's] proposal might afford unit employees."

The FLRA dismissed the unfair practice charge. Pentagon Force Protection Agency and Frat. Order of Police DPS Labor Committee, FLRA Case #WA-CA-04-0251 (Wash. Region, 2004).

- A state labor board might rule differently, as was the case in Michigan. Management had a duty to bargain with the firefighters' union before implementing a mandatory agility test, where discipline could be imposed on those who declined to participate. Twp. of Meridian and Fire Fighters Assn. of Mich., MERC #C95-H-174, 9 MPER (LRP) ¶27,057, 1996 MPER (LRP) Lexis 38.

- The New Hampshire Public Employee Labor Relations Board has ruled that the creation of a mandatory physical fitness program was a managerial prerogative. However, an amended opinion provided that the *implementation* of the program was a mandatory subject for negotiations. Local 1312, IAFF v. City of Dover Fire Dept., Case #F-0102:1, Decision #79021 (NH PELRB, 1979).

F. Fitness incentives

One way around a challenge that management failed to reach an agreement with the unions is to create a voluntary fitness program, perhaps with financial incentives.

The Ohio State Employment Relations Board denied an unfair labor practice charge that management unilaterally implemented a fitness evaluation for deputy sheriffs. The Board found that the evaluation program was voluntary and was not a requirement for promotion. FOP L-101 and Butler Co. Sheriff, #05-ULP-09-0509, 23 OPER 30, 2006 OPER (LRP) Lexis 31 (Ohio SERB 2006).

An earlier Ohio court decision held that public safety agencies could require promotional candidates to meet physical fitness standards, and that employees were not entitled to compensation to maintain their physical fitness. State FOP L-1 v. State of Ohio, 4 Ohio St. 3d 23, 446 N.E.2d 157 (1983).

G. EEOC definition

The U.S. Equal Employment Opportunity Commission

Definition of the Term Disability

"Being overweight, in and of itself, generally is not an impairment. See 29 C.F.R. pt. 1630 app. §1630.2(h)(noting that weight that is "within 'normal' range and not the result of a physiological disorder" is not an impairment); see also id. § 1630.2(j) (noting that, "except in rare circumstances, obesity is not considered a disabling impairment"). ...

"On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm,* is clearly an impairment. See Cook v. Rhode Island Dept. of Mental Health, Retardation and Hosp., 10 F.3d 17, 2 AD Cases (BNA) 1476 (1st Cir. 1993).

"In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment. See 29 C.F.R. §1630.2(h)."

* The Merck Manual of Diagnosis and Therapy 981 (Robert Berkow ed., 16th ed. 1992)

H. Specimen regulations:

Weight
• Baltimore City, MD, Police

Fitness and testing
• Craig, CO, Police
• Illinois State Police
• Rolling Meadows, IL, Police

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Looking Back - Looking Forward: Obesity and the Americans with Disabilities Act, by Carol R. Buxton, 4 Barry L. Rev. 109 (Fall 2003).

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Physical Fitness – Exercise Programs, IACP Training Key # 266, IACP Net doc. 562869 (2002).

Law Enforcement Physical Fitness Standards and Title VII, 70 (5) FBI Law Enf. Bull.26-31 (May 2001); IACP Net doc. #554598; NCJ #188589.

Spotlight on Physical Fitness, 62 (8) The Police Chief 84-90 (Aug. 1995); IACP Net doc. #55707; NCJ #156910.

Grooming and Weight Standards for Law Enforcement: The Legal Issues," 63 (7) FBI Law Enf. Bull. 27-32 (Jul. 1994); IACP Net doc. #57545; NCJ #149381.

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