

A Case Law Update on the Status of Obesity as a Disability under the NJLAD – *Dickson v. Community Bus Lines, Inc.*

by Michelle N. Michael

In an April 4, 2019 decision, the New Jersey Appellate Division held that obesity – standing alone – does not qualify as a disability under the New Jersey Law Against Discrimination (NJLAD).¹ The court in *Dickson v. Community Bus Lines, Inc.* held that plaintiff’s weight did not constitute an impairment warranting protection under the NJLAD.² Specifically, the appellate court affirmed that obesity alone is not a protected characteristic under the NJLAD unless caused by an underlying medical condition.³

Although this decision is consistent with prior decisions in New Jersey courts, *Dickson* more squarely addresses the issue that only obesity caused by an underlying medical condition constitutes a disability under the NJLAD. This holding is a stark contrast from a Supreme Court of Washington case, *Taylor v. Burlington N. R.R. Holdings, Inc.*,⁴ decided just three months later. In *Taylor*, the Washington court established a *per se* rule that obesity always constitutes a disability under the Washington Law Against Discrimination (WLAD).⁵ The factors considered and implications of each are discussed in this article.

The NJLAD

The NJLAD provides that it is an “unlawful employment practice” for employers to discriminate against employees on the basis of, among other things, disability.⁶

Under the NJLAD, disability is defined as “physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness....”⁷ Notably, while the statute lists numerous physical conditions that constitute a disability, obesity is not explicitly listed, thus leaving the status of obesity as a protected class open to judicial interpretation.

Background Consideration of Obesity Under the NJLAD

New Jersey courts have considered obesity to be a disability under the NJLAD when derived from an

underlying medical condition. For example, in *Gimello v. Agency Rent-A-Car Sys.*,⁸ the plaintiff contended he was terminated from his job as a manager at a car rental agency because of his obesity in violation of the NJLAD.⁹ Plaintiff sought treatment for his weight, and presented medical testimony from his treating physician, who opined that plaintiff had “had been obese for the majority of his life,” but that this condition had “no bearing on his ability to perform his [job] duties.”¹⁰ In finding a violation of the NJLAD, the court noted plaintiff’s obesity was “a recognized medical condition for which he sought legitimate treatment with but modest success.”¹¹ As such, the court found plaintiff’s obesity constituted a disability under the NJLAD because it was “demonstrated by unrefuted medical evidence.”¹²

Similarly, in *Viscik v. Fowler Equip. Co.*,¹³ the court addressed whether obesity constituted a handicap under the NJLAD.¹⁴ The plaintiff in *Viscik* was terminated from her position as a billing clerk a mere four days after being hired.¹⁵ The plaintiff thereafter filed suit contending she was terminated due to her obesity, arguing that same constituted a violation of the NJLAD.¹⁶ The plaintiff in *Viscik* was morbidly obese and her obesity claim was supported by the testimony of her long time treating physician, who opined that her obesity was due to an underlying genetic condition, and that she had several obesity-related illnesses.¹⁷ On this basis, the Court determined plaintiff’s obesity constituted a disability under the NJLAD, holding “testimony, medical history, and her expert’s opinion fully support the finding that she established a physical handicap within the meaning of LAD.”¹⁸

By contrast, New Jersey courts have found that weight alone is not encompassed by the NJLAD.¹⁹ For instance, in *Schiavo v. Marina Dist. Development Co.*, the court examined whether an employer’s “personal appearance standards,” which contained a weight requirement, constituted gender discrimination in violation of the NJLAD.²⁰ Unlike *Viscik* and *Gimello*, *Schiavo*

did not involve a claim of handicap discrimination in violation of the NJLAD.²¹ The *Schiavo* court recognized “there is no protected class based solely on one’s weight[,]”²² and found “the LAD does not encompass allegations of discrimination based on weight[.]”²³ While not in the handicap context, the *Schiavo* court nonetheless noted that employees “whose lack of compliance [with the personal appearance standards, including a weight requirement] resulted from documented medical conditions or post-pregnancy conditions, have presented a material dispute of facts regarding defendant’s application of the [personal appearance standards] weight standard resulting in harassment because of gender.”²⁴

Against this backdrop came the court’s decision in *Dickson*.

Dickson v. Community Bus Lines- Case Background and Dismissal

The plaintiff in *Dickson* appealed from a New Jersey Law Division decision granting summary judgment in favor of the defendant, dismissing the plaintiff’s hostile work environment claim.²⁵ The plaintiff was employed as a bus driver and held a commercial driver’s license (CDL) as a requirement of his job.²⁶ During his 10-year employment tenure, the plaintiff’s weight remained between 500 and 600 pounds and he received positive performance evaluations, including awards for his performance.²⁷

Pursuant to the Department of Transportation (DOT) guidelines, the plaintiff was required to undergo a bi-annual physical examination as a requirement of holding his CDL license.²⁸ While the plaintiff passed the medical examinations in prior years, in 2015 the physician performing the exam observed that the plaintiff “could not bend over to take off his shoes, and had ‘a massive pedal edema and venous stasis.’”²⁹ The physician temporarily disqualified the plaintiff pending further testing, and suggested an echocardiogram, sleep apnea study, and mobility test.³⁰ The plaintiff failed to submit to this suggested medical testing and, as a result, was placed on out-of-service status pending the completion of same and receipt of the required medical certification card.³¹ The defendant then sent the plaintiff for a second opinion, but that physician also concluded that additional medical testing was required to establish the plaintiff’s fitness to drive a bus.³² The plaintiff once again failed to undergo the required medical testing to maintain his CDL license.³³ Notably, neither physician determined that plaintiff suffered from any underlying disability.³⁴

Not limited to the DOT physicians, the plaintiff’s own physician agreed with the need for the plaintiff to undergo additional medical testing.³⁵ The plaintiff never obtained the required medical testing.³⁶ As a result, he remained on a leave of absence from his job.³⁷

The plaintiff thereafter filed suit contending that he was subjected to a hostile work environment on the basis of his weight in violation of the LAD.³⁸ During the course of litigation, he testified that he was the subject of “rude comments” regarding his weight made by his colleagues.³⁹ Notably, however, the plaintiff also testified that he engaged in self-deprecating banter with his colleagues, referring to himself as “fat boy,” for example.⁴⁰ Despite claiming that he complained to his supervisors about the comments by his colleagues, the plaintiff never produced any documentary evidence supporting this assertion.⁴¹

Also of note, the plaintiff was sent for an independent medical evaluation (IME) during the course of the underlying litigation, approximately 17 months after commencing the lawsuit.⁴² During same, the plaintiff “was diagnosed with obstructive sleep apnea[,] and just [t]wo days later, he suffered a stroke.”⁴³

The Law Division Dismisses the Plaintiff’s Claim

The trial court granted summary judgment dismissing the plaintiff’s claim, finding that the plaintiff had not established a *prima facie* claim of disability discrimination under the NJLAD on the basis of his obesity, nor a hostile work environment based solely upon his weight.⁴⁴ The court relied upon the appellate decision in *Schiavo v. Marina District Developmental Co., LLC*, finding that “there is no protected class [under the NJLAD] based solely on one’s weight.”⁴⁵ The court then determined that, consistent with *Viscik v. Fowler Equipment*,⁴⁶ obesity constitutes a disability only when it is “caused by bodily injury, birth defect, or illness.”⁴⁷

Applying the above to the plaintiff’s case, the court found that the plaintiff failed to establish that his disability was caused by an underlying medical condition and, therefore, did not establish a claim of disability discrimination under the NJLAD.⁴⁸ In making this determination, the court reasoned:

There is no evidence in the record that [p]laintiff’s weight in 2015 had an underlying medical basis. Plaintiff testified that he had never

been diagnosed with any medical condition that caused him to gain weight or been prescribed a medication which caused weight gain. He therefore does not have a prima facie disability discrimination claim under the [NJLAD].⁴⁹

This appeal followed.

The Appellate Division “Weighs In”

On appeal, the plaintiff shifted his argument: not that he suffered from an *actual* disability, but rather, that he suffered from a *perceived* disability – obesity.⁵⁰ The plaintiff contended the defendant subjected him to a hostile work environment in violation of the NJLAD on the basis of this perceived disability.⁵¹

The appellate court affirmed the trial court’s holding and found that obesity alone does not constitute a protected class under the NJLAD.⁵² That is, a plaintiff’s obesity must be caused by “a bodily injury, birth defect, or illness.”⁵³

The court’s rationale for rejecting the plaintiff’s appeal was twofold. First, the court reiterated that the plaintiff did not establish that obesity was a protected class under the NJLAD because “his obesity was not a disability caused by a bodily injury, birth defect, or illness.”⁵⁴

Next, the court found that the plaintiff failed to establish even a perceived disability.⁵⁵ The court noted that, in order to establish discrimination on the basis of a perceived disability, the plaintiff must show “a perceived characteristic that, if genuine, would qualify a person for the protections of the [NJLAD].”⁵⁶ “[A] perceived disability claim based on obesity must be grounded upon direct or circumstantial evidence that defendants perceived the plaintiff to be disabled due to a medical condition that caused him or her to be overweight.”⁵⁷ Here, the court noted, the “plaintiff did not establish that defendants viewed him as anything other than obese, which is not a protected class under the [NJLAD].”⁵⁸

The court similarly rejected the plaintiff’s hostile work environment claim, determining there was no evidence in the record to suggest “the conduct complained of... was severe and pervasive enough to make a reasonable person in the employee’s shoes believe that the conditions of employment had been altered and the working environment became hostile and abusive.”⁵⁹ Indeed, the plaintiff had received nothing but positive performance evaluations and his supervisor’s testimony suggested that he was a “valued” member of the company. The court

also cited that the plaintiff’s successful record at the company undermined his assertion that he experienced a hostile work environment due to his weight.⁶⁰

Prior New Jersey decisions recognizing obesity as a disability under the NJLAD (such as *Viscik*⁶¹ and *Gimello*⁶²) dealt with situations in which the plaintiff’s obesity was linked to an underlying medical condition. *Dickson* further supports the legal standard by establishing that obesity alone, without proof that it stems from an underlying medical condition, is insufficient to establish a discrimination claim under the NJLAD.

Dickson’s Implications

The Appellate Division’s holding in *Dickson* squarely addresses that in order to constitute a claim of disability discrimination under the NJLAD, a plaintiff’s obesity must be linked to an underlying medical condition. From a practical standpoint, *Dickson* makes clear that an allegation of discrimination on the basis of obesity, absent documentary medical evidence of an actual or perceived underlying medical condition, is unlikely to prevail. *Dickson* also highlights the importance of documentary evidence establishing that a plaintiff’s disability arose from an underlying medical condition and/or that an employer perceived the plaintiff to be suffering from a disability. Interestingly, while the plaintiff in *Dickson* was ultimately diagnosed with sleep apnea, it was not until *after* filing suit. This is an important consideration for those both defending and bringing these claims.

Furthermore, the court’s holding also sheds light on the surrounding factual circumstances considered by the court in determining whether a plaintiff has successfully established a hostile work environment claim based upon a perceived disability. As seen in *Dickson*, the totality of the circumstances play an important role in determining whether a defendant perceived a plaintiff as having an underlying disability sufficient to establish a claim of discrimination under the NJLAD.

Taylor v. Burlington Northern Railroad Holdings, Inc.

Shortly after the New Jersey court decided the appeal in *Dickson*, the Washington State Supreme Court came out on the opposite side of the scale in considering whether obesity constitutes a disability.⁶³ In *Taylor v. Burlington Northern Railroad Holdings*, the Washington court held that obesity “always qualifies as an impairment...”⁶⁴ under the plain language of the Washington

Law Against Discrimination.⁶⁵ While not binding in New Jersey, this case provides an interesting comparator.

Factual Background in Taylor

The plaintiff in *Taylor* received a conditional offer of employment for a position as an electronic technician.⁶⁶ However, due to the plaintiff's body-mass index, under which he was considered obese, the plaintiff was asked to undergo medical examinations to assure his fitness for the job.⁶⁷ The plaintiff was unemployed at the time, could not afford this testing, and never went.⁶⁸ After the offer of conditional employment was withdrawn for failure to undergo this testing, the plaintiff filed suit, contending that the employer "failed to hire him because of a perceived disability – obesity."⁶⁹

The Washington Supreme Court Takes a Broader View of Obesity as a Disability

The Washington Supreme Court was asked to consider the specific question: "Under what circumstances, if any, does obesity qualify as an 'impairment' under the WLAD."⁷⁰ After engaging in a significant analysis of statutory interpretation, the court drew a bright-line rule, holding that obesity "always qualifies as an impairment under the plain language of [the WLAD] because the medical evidence shows that it is a 'physiological disorder, or condition' that affects many of the listed body systems."⁷¹

As such, the court held that obesity qualifies as a disability in and of itself.⁷² Rather than requiring a link to a separate physiological discovery or condition, the Washington court determined that "obesity itself is a physiological disorder or condition under the statute."⁷³

The Taylor Dissent

While recognizing that obesity has been considered a disease by the medical community, the dissent in *Taylor* warned against the adoption of such a *per se* rule definitively establishing that obesity is always a disability

under the WLAD.⁷⁴ Specifically, the dissent, suggested a more case-by-case approach for considering "under what circumstances, if any, obesity is a disability for purposes of the [WLAD]."⁷⁵ The dissent suggested evaluating an individual's obesity through an approach more akin to the New Jersey standard. The dissent argued that, under the plain language of the WLAD: "obesity is a disability if (i) the plaintiff's obesity is medically cognizable, medically diagnosable, exists as a record or history, or is perceived to exist whether or not it actually does, ...and (ii) ... impairs one or more body systems ..." as articulated in the statute.⁷⁶

Conclusion

While of no binding precedential value in New Jersey, *Taylor* is an interesting comparator. The dissent in *Taylor* was more closely aligned with the New Jersey appellate court in *Dickson*, finding that obesity must be linked to a medical diagnosis to be considered a disability. By contrast, the Washington court's majority took a very broad view by determining that obesity is a disability regardless of its underlying cause. Practitioners should keep apprised of the differences in the treatment of this issue if they practice in more than one jurisdiction.

Takeaway

In the wake of the court's holding in *Dickson*, New Jersey practitioners asserting claims of disability discrimination under the NJLAD stemming from an individual's obesity should be mindful of the requisite medical support to sustain that the plaintiff's obesity derives from an underlying medical condition. By contrast, those defending these claims should be mindful of the sufficiency and existence of these submissions.

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Endnotes

1. *Dickson v. Community Bus Lines, Inc.*, 458 N.J. Super. 522, 525 (App. Div. 2019).
2. *Id.* at 525.
3. *Id.* at 532 (citing *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 17 (2002)).
4. *Taylor v. Burlington N. R.R. Holdings, Inc.*, 193 Wn.2d 611, 614, 444 P.3d 606 (2019).
5. *Id.* at 615.
6. N.J.S.A. 10:5-12(a).

7. N.J.S.A. 10:5-5(q).
8. *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 338 (App. Div. 1991).
9. *Id.* at 340.
10. *Id.* at 346.
11. *Id.* at 355.
12. *Id.* at 365.
13. *Viscik v. Fowler Equip. Co.*, 173 N.J. 1 (2002).
14. *Id.* at 5.
15. *Id.*
16. *Id.*
17. *Id.* at 10.
18. *Id.* at 17.
19. *Schiavo v. Marina Dist. Development Co.* 442 N.J. Super. 346, 357 (App. Div. 2015).
20. *Id.* at 357.
21. *Schiavo*, *supra* note 8, at 375.
22. *Id.* at 375.
23. *Id.* at 359.
24. *Id.* at 358-59.
25. *Dickson*, *supra* note 1, at 525.
26. *Id.* at 525-26.
27. *Id.* at 526.
28. *Id.* at 525-26.
29. *Id.* at 527.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 527-28.
34. *Id.*
35. *Id.* at 528.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 526.
40. *Id.*
41. *Id.*
42. *Id.* at 528.
43. *Id.*
44. *Id.*
45. *Id.* (quoting *Schiavo*, *supra* at 375 (alterations in original)).
46. *Viscik*, *supra* note 3 (recognizing a plaintiff's "medical complications arising from her obesity clearly qualified her obesity as a 'physical disability' resulting from a 'psychological condition' ...").
47. *Dickson*, *supra* note 1, at 528 (quoting *Viscik*, *supra* note 3, at 17).
48. *Id.* at 529.
49. *Id.* at 529.
50. *Id.* at 531 (emphasis added).
51. *Id.*
52. *Id.* at 531 (citing *Viscik*, *supra* note 3, at 17; *Schaivo*, *supra* note 29; and *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 338 (App. Div. 1991)).
53. *Id.*
54. *Id.* at 531 (citing *Viscik*, *supra* note 3, at 17).
55. *Id.* at 532.
56. *Id.* (citing *Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 296 (2012)).
57. *Id.* at 525.
58. *Id.*
59. *Id.* at 534 (quoting *Leonard v. Metro. Life Ins. Co.*, 318 N.J. Super. 337, 344 (App. Div. 1999)).
60. *Id.* at 532-33.
61. *Viscik*, *supra* note 3, at 17.
62. *Gimello*, *supra* at 338.
63. *Taylor*, *supra* note 4, at 614-15.
64. *Id.* at 632.
65. The *Taylor* court outlined that: "The WLAD makes it 'an unfair practice for any employer... [t]o refuse to hire any person because of...the presence of any sensory, mental, or physical disability...unless based upon a bona fide occupational qualification.'" *Id.* at 618. Under the statute, disability, "is defined as 'a sensory, mental, or physical impairment that: (i) [i]s medically cognizable or diagnosable; or (ii) [e]xists as a record or history; or (iii) [i]s perceived to exist whether or not it exists in fact.'" *Id.*
66. *Id.* at 615.
67. *Id.*
68. *Id.* at 616.
69. *Id.*
70. *Id.* at 614.
71. *Id.* at 617,
72. *Id.*
73. *Id.*
74. *Id.* at 633.
75. *Id.*
76. *Id.*