1982

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EMPLOYMENT DISCRIMINATION AGAINST THE OVERWEIGHT

Obesity—a chronic, almost incurable, disease of modern society—afflicts an ever-increasing number of individuals. Though the health problems of the overweight have been the subject of numerous studies and the focus of a national conference, the

1. The terms obese and overweight will be used interchangeably throughout this Note to refer to individuals who are 20% or more above their ideal weight. The diagnosis of obesity is generally made by comparing an individual's weight with an ideal or standard weight; weight greater than 20% above the ideal represents a significant amount of obesity. See Berkowitz, Obesity: Etiologic Mechanisms, in OBESITY: CAUSES, CONSEQUENCES AND TREATMENT 3, 3 (L. Lasagna ed. 1974); Diet Related to Killer Diseases, pt. II: Obesity: Hearings Before the Senate Select Comm. on Nutrition and Human Needs, 95th Cong., 1st Sess. 47-48 (1977) (statement of Dr. Theodore Van Itallie) [hereinafter cited as Senate Hearings]; see also infra note 104 and accompanying text; cf. Bray, Obesity in America: An Overview, in OBESITY IN AMERICA 1, 2 (NIH Publication No. 79-359, G. Bray ed. 1979) (in most situations obese and overweight are used synonymously, though obese "refers to a surplus in body fat," while overweight "refers to an excess in body weight relative to standards for height").


Professor Stunkard writes:

[T]he treatment of obesity leaves much to be desired. While our understanding of nutrition has improved, the most promising new dietary measure—the protein sparing modified fast—has encountered unexpected problems with respect to safety and must be viewed with caution. The effectiveness of exercise is still limited by the small numbers of persons who undertake it. The renewed hope for pharmacological treatments has been dimmed by patients' difficulty in maintaining the weight lost with such assistance. Despite the improvement in treatment brought about by behavior modification, it too, has its limitations. Thus, weight losses produced by behavior modification have been modest at best, and the early expectation that these weight losses would be maintained has not been realized. Behavioral modification may yield somewhat better maintenance of weight loss than is achieved by traditional measures, but we are not sure.


4. The percentage of American women and men ages 25-44 who are 20% or more overweight was higher in 1971-1974 than in 1961-1962. Bray, supra note 1, at 4-5. See also Senate Hearings, supra note 1, at 48 (statement of Dr. Theodore Van Itallie).

5. See, e.g., OBESITY (A. Stunkard ed. 1980) (essays describing the current status of
Employment problems of the overweight have been sorely neglected. Viewed as less desirable colleagues by coworkers and as less motivated by personnel managers, overweight individuals suffer from employment discrimination. Further complicating the problem is the fact that poor and black women comprise a disproportionate percentage of these victims.

Employment discrimination is not the only form of weight-based discrimination. The overweight must also face discrimination in accommodations and education, as well as biased treatment by the medical profession, life insurance companies, and retailers. The significance of employment discrimination, however, exceeds these other forms of discrimination. By enacting laws prohibiting employment discrimination against certain protected classes, Congress and state legislatures have sought to

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6. In October, 1977, a conference on obesity in America, held at the National Institute of Health, focused on nine reports that dealt with obesity. Bray, supra note 1, at 1.
8. See infra pt. I A.

Several congressional supporters of Title VII eloquently stated:
The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

eliminate arbitrary discrimination in employment\textsuperscript{13} and to promote and expand employment opportunities for individuals unnecessarily barred from working because of their membership in certain protected classes.\textsuperscript{14} Compared to these protected classes—race, color, religion, sex, national origin, age, and handicap—weight constitutes as significant a class in terms of size, correlation between the class and socioeconomic level, and effective immutability of the relevant characteristic.\textsuperscript{15} Adding weight to the list of impermissible classifications used as barriers to employment would thus promote hiring based on ability and complement existing employment discrimination legislation.

Part I of the Note discusses the existence of employment discrimination against the overweight and the significance of the problem it poses. Part II examines existing employment discrimination legislation to discern what protection is currently available to the overweight. Finally, part III concludes that present laws are inadequate to protect overweight persons from employment discrimination. The Note argues for the passage of legislation designating weight as a classification protected from employment discrimination, and prohibiting the use of weight standards unrelated to job performance. Such legislation is necessary to allow the growing number of overweight Americans the opportunity to compete equally in the job market.

I. Discrimination Against the Overweight

A. Establishing the Existence of Employment Discrimination

Two recent studies, designed to examine reactions to overweight job applicants, substantiate the existence of employment discrimination against the overweight.\textsuperscript{16} The first study sought to determine whether a work-related stereotype is associated with overweight people.\textsuperscript{17} The study revealed that “overweight

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15. See infra pt. I B.
16. The procedure and results of these two studies are summarized in Larkin & Pines, No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preference, 6 SOC. WORK & OCCUPATIONS 312 (1979).
17. Forty subjects (20 males, 20 females), aged 17-31, volunteered to take part in a study of “social perception.” The subjects were asked to give their impression of three
persons are seen as significantly . . . less desirable employees who, compared with others, are less competent, less productive, not industrious, disorganized, indecisive, inactive, and less successful." In addition, compared to the average-weight or underweight, the overweight emerged as the least desirable on traits most clearly denoting positive employee behavior. These negative attitudes associated with excess weight indicate that overweight job applicants or employees may have difficulty proving they are qualified for a position, causing them to experience a greater frequency of rejection in the job market.

The second study sought to determine whether overweight job applicants would encounter discrimination solely because of their weight. In the study, a simulated personnel-selection process showed that overweight applicants received significantly fewer recommendations for hiring than did persons of average weight. This reluctance to hire the overweight was credited more to perceived inadequacies of personality and motivational criteria rather than to objective evaluation of each applicant's performance on task-related selection tests.

Though additional scientific studies are rare, other surveys of weight-based employment discrimination confirm these findings of discriminatory stereotypes and bias in job hiring. Thus, employment agencies in a Maryland survey confirmed the existence

persons about whom they knew only the weight and sex. A booklet containing 38 rating scales presented verbal descriptions of an overweight male (female), average-weight male (female), and underweight male (female) and described the characteristics of ideal employees, effective top managers, and motivated workers. The subjects were asked to give their first impressions of the three persons. Half the subjects responded to male targets, the other half responded to female targets. Id. at 314-15.

18. Id. at 315-16.
19. See id. at 317.
20. The selection process was structured to attribute differences in hiring recommendations solely to an applicant's weight. Overweight and normal individuals performing identically on two employee selection tests were videotaped. The film lacked an audio tract and did not show the applicant's face, to minimize influences caused by facial gestures and intonations. Subjects were told this would preserve the job applicant's anonymity.

To deal with the problem of alerting subjects that weight was an independent variable, a between-group experimental design was employed, in which subjects viewed either an overweight or a normal weight person, but not both. In addition, the apparent interest in weight was minimized by having the camera focus on the applicant briefly enough for the viewer to perceive the size, but not enough to make the intention obvious. Through these procedures, the researchers controlled or held constant numerous secondary variables. Id. at 317-18.

22. See WEIGHT AND SIZE DISCRIMINATION, supra note 7, at 52; G. BRAY, supra note 10, at 246.
of discrimination against the overweight. Similarly, small-to-medium business employers acknowledged such discrimination. Complaints filed under Michigan's antidiscrimination law, and in other jurisdictions, along with popular accounts, also confirm the existence of weight-based discrimination.

The problem many overweight people encounter when they enter the job market is illustrated by the case of Joyce English. Ms. English, who stands 5 feet, 8 inches, and weighs 341 pounds, has a college degree in law enforcement and social work. Unable to find a job in either field, she applied for a clerical position with the Philadelphia Electric Company ("PECO"). Thirteen openings existed, Ms. English was qualified, and PECO admitted that her obesity would not substantially interfere with the performance of essential functions of the job. Yet PECO refused to hire Ms. English because she was overweight. The evidence demonstrates that many people like Ms. English "are pe-

23. See Weight and Size Discrimination, supra note 7, at 41-44; cf. G. Bray, supra note 10, at 246-47, (employment agency reported overweight men received lower salaries).

24. See Weight and Size Discrimination, supra note 7, at 53-54. Such acknowledgments are, understandably, given on condition of anonymity. Large employers, who usually hold federal contracts and therefore are subject to stricter antidiscrimination policies, would not confirm any formal discriminatory policies. Id.

25. See infra notes 97-98.


28. Additionally, the stigma of obesity leads some people to regard it as socially deviant, or even sinful, behavior. See Weight and Size Discrimination, supra note 7, at 29-38; Allon, The Stigma of Overweight in Everyday Life, in 2 Obesity in Perspective pt. 2, at 83, 85-87 (DHEW Publication No. (NIH) 75-708 G. Bray ed. 1973).

29. See Philadelphia Elec. Co. v. Pennsylvania Human Relations Comm'n, No. 1033 C.D. 1980 (Pa. Commw. Ct. filed April 25, 1980). Philadelphia Electric Company ("PECO") petitioned for review of a Pennsylvania Human Relations Commission finding that obesity was a handicap within the meaning of the state's human relations act, that PECO had violated this Act by refusing to hire Ms. English, and that Ms. English should be employed and awarded $20,000 backpay. The case is still pending. See also Langley, supra note 27.

nalized by lower pay, inequitable hiring standards, relegation to non-contact public positions, and other distinctive treatment, based on non-job related criteria.”

B. Significance of the Problem

Congressional and state antidiscrimination legislation establishes a statutory framework for protecting certain classifications of employees or job applicants from employment discrimination. Title VII of the Civil Rights Act of 1964, the first in the series of federal employment discrimination legislation, declared that all persons within the United States have a right to employment free of discrimination based on race, color, religion, sex, or national origin. Congress intended to remove all “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” Congress did not require that persons be hired because they belonged to a protected minority; rather, Congress made “job qualifications . . . the controlling factor [so that] any tests used must measure the person for the job and not the person in the abstract.”

The Age Discrimination in Employment Act of 1967 (“ADEA”), which extended protection to older workers, was prompted by congressional findings of widespread discrimination against older workers, a significantly higher incidence of unemployment among older workers, and a resulting burden on commerce and the free flow of goods. The purpose of ADEA is “to promote employment of older persons based on ability rather than age; to prohibit arbitrary age discrimination in em-

31. WEIGHT AND SIZE DISCRIMINATION, supra note 7, executive summary at 1.

Besides the work-related stereotypes of the overweight and the bias in personnel selection process against them, the high unemployment rate of the overweight supports the evidence of weight-based employment discrimination. A survey of 1000 overweight patients found that 14.2% were unable to find jobs because of their weight. The national unemployment rate at the time of the survey was 8.2%. See Stix, supra note 27. This comparison does not establish conclusively that all nonhiring of the overweight is weight-based, but it does suggest that weight-based discrimination is commonplace in American society. Cf. H.R. Rep. No. 805, 90th Cong., 1st Sess. 2, 7, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214, 2220 (citing persistently higher unemployment rate among people over age 45 as a basis for enactment of ADEA).


34. Id. at 436.

ployment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employ­
ment." The Rehabilitation Act of 1973 continued this trend to­
ward protecting victims of arbitrary or unnecessary discrimina­
tion by using federal spending powers to prohibit discrimination
against qualified handicapped individuals. The intent of this
Act is to give "full and fair consideration" in employment to an
individual who is handicapped but otherwise qualified. A simi­
lar trend is also apparent in the growing number of state laws
banning employment discrimination.

Designating weight a protected category and thereby barring
discrimination against the overweight constitutes a necessary
continuation of this trend. The factors which compelled Con­
gress and the states to enact protective legislation for the aging
and the handicapped also exist for the overweight. First, is the
substantial and growing size of the affected class. Second, is the
correlation between race, sex, lower socioeconomic status and
weight. Third, is the loss to society and to the individual when
hiring decisions are based on weight rather than qualifications.
Finally, the immutability of weight as a physical characteristic
highlights the inequity of such discrimination.

1. Size of the affected class— A surprisingly great number of
Americans are overweight, and studies indicate that this number
is increasing. Any quantification of the prevalence of obesity
depends on the definition of overweight used, the sex and age of
the subjects studied, and potential discrepancies in the measure­
ment process. Thus, one study found 14% of men and 24% of
women aged 20 to 74 to be overweight; another found 32%
of men and 40% of women to be at least 20% above their desirable
weight; a third estimated that 25% of men and slightly more

Ad. News 2076, 2123 [hereinafter cited as SENATE REPORT].
39. See CAL. Gov't CODE §§ 12920, 12921 (West 1980) (declaring "the right and op­
portunity of all persons to seek, obtain, and hold employment without discrimination" to
be a civil right and public policy); CAL. ADMIN. CODE tit. 2, R. 7286.3 (1981) ("Employ­
ment practices should treat all individuals equally, evaluating each on the basis of indi­
vidual skills, knowledge and abilities and not on the basis of characteristics generally
attributed to a group enumerated in the Act."); D.C. CODE ANN. § 1-2501 (1981) (prohib­
iting employment discrimination based on certain categories, aiming to end discrimina­
tion for any reason other than individual merit).
40. See supra note 4.
41. See Bray, supra note 1, at 4.
42. See Senate Hearings, supra note 1, at 48 (statement of Dr. Theodore Van Itallie).
women are overweight.\textsuperscript{43} By any estimate, obesity—"the No. 1 malnutrition problem in the United States"\textsuperscript{44}—affects a substantial proportion of the population.

The sheer number of obese Americans provides a compelling reason to provide the overweight with protection from employment discrimination. The affected class is actually greater than other protected classes. The 1980 census indicates that approximately 11.7\% of the population is black and 6.4\% Hispanic, a total of 18.1\%\textsuperscript{45} Thus, based on the estimates of the number of overweight Americans, more people potentially suffer from weight discrimination than from racial discrimination. Similarly, the overweight class exceeds the number of individuals estimated to be affected by the Rehabilitation Act of 1973 when it was passed.\textsuperscript{46}

The substantial number of people affected by racial, age, and handicapped discrimination was a significant factor in the enactment of the Civil Rights Act of 1964,\textsuperscript{47} ADEA,\textsuperscript{48} and the Rehabilitation Act of 1973.\textsuperscript{49} The large number of Americans who are being prevented from competing freely in the job market merely because of their weight similarly compels the extension of antidiscrimination protection to the overweight.

2. Race, sex, socioeconomic status and weight—Obesity does not afflict all societal groups equally. Researchers have identified a correlation between an individual's weight and that person's race, sex, and socioeconomic status. Most obese Americans are women,\textsuperscript{50} and even more troubling, most of these women are black. Black women, regardless of age or income level, are more

\textsuperscript{43} See WEIGHT AND SIZE DISCRIMINATION, supra note 7, at 8 (citing various studies); Osanca & Hejda, supra note 2, at 67 (reporting 30\% estimate); Stix, supra note 27 (estimating one-third of the population). See generally Christakis, The Prevalence of Adult Obesity, in OBESITY IN PERSPECTIVE pt. 2, at 209 (DHEW Publication No. (NIH) 75-708, G. Bray ed. 1973).

\textsuperscript{44} Senate Hearings, supra note 1, at 1 (statement of Sen. McGovern).


\textsuperscript{46} Compare Senate Report, supra note 38, at 18 (7 to 12 million people were estimated to benefit from the Rehabilitation Act of 1973), with Senate Hearings, supra note 1, at 1 (statement of Sen. McGovern) (30 million Americans are overweight and 15 million are obese to a degree that actually shortens their lives).

\textsuperscript{47} See HOUSE REPORT, supra note 11, at 27 (additional views of Reps. McCulloch, Lindsay, Cahil, Shriver, MacGregor, Mathias, Bromwell) (discussing the overwhelmingly high unemployment rate among nonwhites as a factor demonstrating the need for employment discrimination legislation).


\textsuperscript{49} See Senate Report, supra note 38, at 18.

\textsuperscript{50} See Bray, supra note 1, at 2.
likely to be obese than white women. Studies reveal that among individuals aged 45 to 64 with incomes below poverty level, 49% of black women and 26% of white women are obese. Among people in this same age group with incomes above poverty level, 40% of black women and 28% of white women are obese.

Studies have also established "a striking association between socioeconomic status and the prevalence of obesity, particularly among women." The earliest study, of 110,000 adults in Manhattan, revealed that, among females, 30% in the lower socioeconomic status were obese, 16% in the middle, and 5% in the upper status group. Though the difference among men was not so striking, it was still significant. Later studies have confirmed the correlation of socioeconomic status and weight.

The disturbing phenomenon revealed by these studies adds a greater urgency to the problem of weight-based discrimination. Employment discrimination against the overweight further victimizes the poor, blacks, and women, who are already the victims of employment discrimination. Thus, weight-based discrimination threatens to nullify, to some extent, the gains that have been made in the battle to end racial and sexual discrimination. In this sense, prohibition of weight-based discrimination would complement existing antidiscrimination statutes.

51. See id. at 3; Senate Hearings, supra note 1, at 50 (statement of Dr. Theodore Van Itallie).
52. Bray, supra note 1, at 3.
53. Id. at 3-4.
55. See id; Goldblatt & Stunkard, Social Factors in Obesity, 192 J. AM. MED. A. 1039, 1040 (1965); Senate Hearings, supra note 1, at 50, 77, 81 (statements of Drs. Theodore Van Itallie & Stunkard); Osancova & Hejda, supra note 2, at 67-68.
56. Among men of lower socioeconomic status, 32% were obese, compared to 16% in the upper group. See Goldblatt & Stunkard, supra note 55, at 1042; Senate Hearings, supra note 1, at 50, 82 (statements of Drs. Theodore Van Itallie & Stunkard). Oddly enough, a correlation was also found between weight and national origin or religion. Protestants (ranging from Episcopalians, Presbyterians, and Methodists through Baptists) are the thinnest, Catholics are next, and Jews are the fattest. Similarly, Americans of English origin are the thinnest, those of Russian origin the fattest, with a range of Germans, Italians, Hungarians, Czechs, and Poles in between. See Goldblatt & Stunkard, supra note 55, at 1043; Senate Hearing, supra note 1, at 50, 82 (statements of Drs. Van Itallie & Stunkard); WEIGHT AND SIZE DISCRIMINATION, supra note 7, at 12.
57. See, e.g., Garn, Bailey & Higgins, Effects of Socioeconomic Status, Family Line, and Living Together on Fatness and Obesity, in CHILDHOOD PREVENTION OF ATHEROSCLEROSIS AND HYPERTENSION, 187, 189-90 (R. Lauer & R. Shekelle eds. 1980); Garn & Clark, Trends in Fatness and the Origins of Obesity, 57 PEDIATRICS 443, 447 (1976) (noting that poorer girls are leaner but poorer women are fatter); Senate Hearing, supra note 1, at 50 (statement of Dr. Theodore Van Itallie); cf. id. at 226 (sedentary poor more likely to be obese than laboring poor).
3. Loss to society and to the individual—The high incidence of obesity among individuals in the lower socioeconomic classes suggests a strong economic incentive for prohibiting weight-based discrimination. If the overweight are arbitrarily or unnecessarily denied the opportunity to work, they are less likely than wealthier individuals to have the resources necessary to support themselves. Consequently, they will be more likely to turn to public assistance or charity for support. The resulting financial burden on the public would be lightened if weight-based discrimination were prohibited.

Society also suffers from the loss of potential contributions the overweight would make through their jobs, if given the opportunity to use their skills. For example, Joyce English,58 holder of a college degree in social work and law enforcement, worked as a babysitter, adult-bookstore cashier, plantation field hand, and tomato peeler at a canning factory.59 Wasting her college study deprives society of the expertise she developed in counseling, simply because employers are permitted to discriminate on the basis of weight. This is a loss society can ill afford.

Conversely, an individual's well-being is benefited when he or she is challenged by his or her work, and when skills or training can be utilized and developed on the job.60 Although existing discrimination law does not require that employment decisions be based on merit, these statutes certainly encourage merit-based hiring by barring employment decisions based on certain factors considered "artificial, arbitrary, and unnecessary."61 Achieving the societal goal of hiring based on ability62 would be enhanced by ending discrimination based on weight.

4. Weight as an immutable characteristic—Losing weight is possible but, if done too rapidly or improperly, is unsafe. In most cases, losses are only short term, despite the claims of weight-loss clinics, diet books, and drug producers. Physicians still do not know what causes obesity, much less how to prevent or cure it. In fact, recent studies show that obesity might have physiological causes wholly apart from overeating. The consequence is that weight is not a fleeting physical characteristic, such as the length of one's hair, but an immutable trait.

58. See supra notes 29-30 and accompanying text.
59. See Langley, supra note 27.
60. See Bayh, Foreword to the Symposium Issue on Employment Rights of the Handicapped, 27 DePaul L. Rev. 943, 943 (1978); Older Workers, supra note 35, at 19.
Rapid weight loss is unnecessary and undesirable. It will invariably be accompanied by fatigue, nervousness, inability to concentrate, psychological side-effects, and the possibility of sudden death. Thus, even if an overweight applicant could lose weight quickly enough to comply with an employer's weight standards, the side effects of such a weight loss would make it difficult or impossible for him or her to perform the essential functions of the job. While scientists continue basic research to determine the cause of obesity, clinicians and physicians practice several methods—diets, exercise, suppressant drugs, behavior modification, and surgery—in attempts to control obesity. At present, the long-term results of all are bleak: seventy-five to ninety-five percent of the overweight regain some or all of the weight they lose while on a weight-reduction program. The psychological change required, the societal and family pressures to eat, and the possible inherited anatomical or biochemical defects involved combine to make permanent weight loss an

63. See J. Mayer, Human Nutrition, Its Physiological, Medical and Social Aspects 370 (1972).

64. See id. at 370-71. Starvation therapy produces the most dramatic weight reductions, but is so dangerous that it requires continual hospitalization. See Howard, Dietary Treatment of Obesity, in Obesity: Its Pathogenesis and Management 123, 125-30 (T. Silverstone ed. 1975).

65. See Van Itallie, Dietary Approaches to the Treatment of Obesity, in Obesity 249, 258-59 (A. Stunkard ed. 1980) (reporting that a study “of 17 obese individuals who died suddenly of ventricular arrhythmia following the prolonged use of supplemental fasting regimes” was unable to identify the factor causing death and recommending “great caution” in use of supplemental fasts).


67. See Cohen, The Internist's Approach, in Obesity: Causes, Consequences and Treatment 29 (L. Lasagna ed. 1974); Weight and Size Discrimination, supra note 7, at 15-23; Senate Hearings, supra note 1, at 101-04 (statement of Dr. George Bray).

68. See Bray, supra note 1, at 12. One commentary states:

Whether the treatment involves diets, drugs, starvation, psychotherapy, self-help groups, exercise programmes, or hormones, therapists have been unable to cause many persons to lose weight. In a review of the medical management of obesity, Stunkard and McLaren-Hume reported that all programmes were equally ineffective in their treatment of obesity. Attrition rates in the programmes reviewed ranged from 20-80% and only 25% who stayed in therapy lost 20 lb[s]. Furthermore, only 5% lost as much as 40 lb[s].

Even more disturbing than the difficulty in producing an initial weight loss are the long-term results. Of the small proportion of patients who do lose weight, almost none maintain their weight loss for more than a year.


69. See Jordan & Levitz, supra note 68, at 162.

70. See Berkowitz, supra note 1, at 3.
impossibility for most overweight individuals.\textsuperscript{71}

Just as age, race, sex, or national origin are immutable characteristics for individuals in these protected categories, so weight constitutes an immutable trait for the overweight. Weight standards thus bear no relation to an employer's grooming standards, which may be adopted at an employer's discretion.\textsuperscript{72} While researchers seek to develop successful methods to treat obesity,\textsuperscript{73} the victims of this disease should not be denied access to the job market on the basis of a trait for which they are not responsible.\textsuperscript{74} Weight discrimination should not be allowed to bar the obese from the opportunity to be gainfully employed if they are otherwise qualified to perform the essential functions of the job.

\section*{II. Current Measures of Protection}

The preceding section demonstrates that weight-based em-

\textsuperscript{71} Senator Robert Dole has acknowledged:

Although it is relatively easy for us to determine the nutritional cause of obesity, it is much more difficult to find a satisfactory cure. In most instances, when a person loses weight, sooner or later—and usually sooner—he regains it. Weight loss is rarely permanent in our society—that's why the success stories are so spectacular.

\textsuperscript{72} Senate Hearings, supra note 1, at 206.

The immutability of obesity is further demonstrated by the timing of any weight loss. A weight loss of two pounds per week is the most reasonable weight loss, according to clinicians in the field. See J. Mayer, supra note 63, at 371. Thus, if someone is 20 pounds overweight, it would take him or her at least 10 weeks to lose the weight necessary to comply with an employer's weight standards. During this 10-week period, the overweight individual is deprived of the opportunity to compete equally in the job market. No guarantee exists that the position an overweight applicant is seeking or one a present employee is trying to retain will be available once he or she has lost the required weight.

\textsuperscript{73} See Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (distinctions in employment practices between men and women on the basis of something other than immutable characteristics or legally protected rights do not violate Title VII; grooming codes which require different hair lengths for male and female applicants and employees upheld under Title VII); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974) (employer may require male employees to comply with different modes of dress and grooming that those required of women without violating Title VII); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973) (under Title VII, employer may permissibly require males to wear short hair and require women with long hair to secure it); Katz, Personal Appearance Regulations in Public Contact Jobs Under Title VII of the Civil Rights Act of 1964, 1976 Ariz. St. L.J. 1.

Weight-based employment discrimination exists and constitutes a significant problem in American society. This section examines existing legislation, specifically Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and state statutes, to determine the degree to which the overweight are currently protected from employment discrimination.

A. Title VII of the Civil Rights Act of 1964

Although Title VII protects nearly all employees and job applicants, it only does so with respect to certain specified types of employment discrimination. Individuals are protected from being deprived of employment opportunities or discriminated against with respect to the terms, conditions, and privileges of employment because of their race, sex, color, religion, or national origin. Weight is notably absent from this list of protected classifications and therefore not protected by Title VII. Thus, in most cases, an employer would be free to deny employment to an overweight person without subjecting himself to Title VII proscriptions. In two potential situations, however, the application of weight standards would violate Title VII.

First, differentially applying weight standards to members of protected classes would violate Title VII. For example, an employer would violate Title VII by requiring female employees to maintain their weight within certain limits yet imposing no similar weight restrictions on men. Differentially applying the weight standards, as in the illustration above, discriminates against women with respect to the terms and conditions of their employment, thereby violating Title VII. Most employers today have had sufficient experience with Title VII to realize that any employment requirements must be similarly applied to all protected categories of applicants or employees. Therefore, it is unlikely that this situation would arise with respect to weight standards.

76. Cf. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (differing standards of conduct based on race of employee constituted illegal discrimination); Phillips v. Martin Marietta Corp. 400 U.S. 542 (1971) (because all persons of like qualifications must be given employment opportunities irrespective of their sex, one hiring policy for women and another for men held impermissible); Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) (discriminatory to prohibit women from marrying while allowing men to marry).
An employer might also theoretically violate Title VII by adopting weight standards which, though neutral on their face, have an adverse impact on a protected class.\textsuperscript{78} Thus, if the employee or applicant can establish that the weight restrictions affect a disproportionate number of employees or applicants belonging to a protected class, this might suffice to show adverse impact.\textsuperscript{79} However, data establishing that approximately 23.8\% of women, but only 14\% of men, are obese\textsuperscript{80} might not suffice to establish that weight standards have an adverse impact against women. The percentage difference might not be great enough, or the courts might require additional proof that these 23.8\% of women would not otherwise be unqualified for the position or have not received successful assistance in finding jobs with other employers.\textsuperscript{81}

Title VII protection of the overweight, indirect and uncertain at best, also carries with it the additional risk of inconsistent court decisions resulting in nonuniform protection of the overweight.\textsuperscript{82} Title VII thus provides limited protection for the over-

\textsuperscript{78}. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requiring applicant to have a high school diploma and a successful score on two professionally recognized tests disproportionately disqualified blacks and was impermissible unless relation to job performance could be shown).

\textsuperscript{79}. Cf. Dothard v. Rawlinson, 433 U.S. 321 (1977) (adverse impact of height and weight minima upon potential women applicants established by census data showing that 99.76\% of all men would meet the minima while only 58.87\% of women would qualify); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (showing that only 12\% of the blacks in North Carolina have high school diplomas sufficient to establish that a diploma requirement has adverse impact on blacks); Green v. Missouri Pacific R.R., 549 F.2d 1158 (8th Cir. 1977) (disqualification of persons with criminal records had an adverse impact on blacks because 36\% of all blacks in an urban area were convicted of crimes compared with only 12\% of all whites).

\textsuperscript{80}. According to one study, in 1971-1974, 14\% of men aged 20-74 were 20\% above their desirable weight, while 23.8\% of women in the same age group were 20\% above their desirable weight. See Bray, supra note 1, at 4.

\textsuperscript{81}. A recent case, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), suggests that a greater burden of precision is being imposed by the Court than that required in Griggs and Dothard. The employer's rule in this case prohibited employment of persons on methadone maintenance treatments. A showing that 63\% of all persons in public methadone programs were black or Hispanic, compared to the area's population of which 36\% were black or Hispanic, was insufficient for a prima facie case. The Court determined that a substantial number of the 63\% may have been unqualified for other reasons or may have been successful in finding other jobs. The Court also cited the lack of data regarding the racial composition of methadone users in private programs, leaving open the possibility that the percentage of minority methadone users might actually reflect the percentage in the general population.

In Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975), the employer's rule required that employees pay their just debts as a prerequisite to employment. The court found proof that blacks are more likely to be poor insufficient to establish a prima facie case of discrimination.

\textsuperscript{82}. Even if an overweight individual found him or herself protected by virtue of com-
weight and fails to resolve their employment dilemma.83

B. The Rehabilitation Act of 1973

Through the Rehabilitation Act of 1973, Congress sought to equalize the employment opportunities of the handicapped.84 If an overweight person can establish that he or she is handicapped within the meaning of this Act, then that individual can benefit from this limited protection against discrimination.

The Act defines a handicapped individual as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”85 Thus, the overweight are protected if exceed-

83. A similar analysis could be made under the Age Discrimination in Employment Act. It is not clear, however, whether the principle of adverse impact discrimination rules applies to ADEA. See 29 C.F.R. § 1607.2D (1980); see also Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977) (violations of ADEA cannot be established by statistical evidence).

If an adverse impact claim is recognized under ADEA, it might present a viable option for some of the overweight. Studies have revealed that obesity is more frequent with advancing age, peaking in the 50-60 year-old range. See Osancova & Hejda, supra note 2, at 72 (prevalence of obesity among men 20-29 years old was 18%, while in men 50-59 years old it amounted to 48%). The same trend is apparent among women. Id. Thus, weight standards could potentially have an adverse impact on the aged in violation of ADEA, unless these standards were justified by business necessity. The same possibility exists, however, that an employer could adjust weight standards to eliminate any adverse impact, thereby avoiding the reach of the Act. The potential for inconsistent results in the resolution of these claims also exists. Therefore, this adverse impact procedure under ADEA is similarly ineffective in addressing the employment problems of the overweight.


(i) “Physical or mental impairment” means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) “Major life activities” means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) “Has a record of such an impairment” means has a history of, or has been misclassified as having a mental or physical impairment that substantially limits
sive weight results in or produces a record of a physical or mental impairment which substantially limits a major life activity.

Many major life activities of the obese may be limited by medical conditions associated with obesity, such as coronary heart disease, diabetes, and pulmonary and hepatic dysfunction. Overweight people often must work abnormally hard at breathing; they are less agile than normal-weight individuals and are prone to accidents; and they are more likely to die prematurely. The overweight who can establish the existence of any of these conditions should be classified as handicapped and thereby come within the protective coverage of the statute. Many overweight people, however, will be unable to establish an impairment of a major life activity. Although the obese in general have a higher mortality rate and a higher incidence of cardiovascular disease, respiratory ailments, diabetes, and liver dysfunctions, these medical conditions are most prevalent among the grossly obese. Consequently, the lesser incidence of such conditions among the moderately obese might make it difficult for them to establish that they are “handicapped.”

Similarly, if an employer were to perceive an overweight person as being handicapped to the extent of being impaired in a major life activity, that person would be protected by the Act. A grossly obese individual is likely to be refused employment because an employer perceived him or her to be “handicapped” by his or her excessive weight. In contrast, a moderately obese

one or more major life activities.


86. See G. Bray, supra note 10, at 215-43.

87. See Rimm & White, supra note 2, at 120; S. Davidson, R. Passmore, J. Brock & A. Truswell, Human Nutrition and Dietetics 248-49 (7th ed. 1979); Gubner, Overweight and Health: Prognostic Realities and Therapeutic Possibilities, in Obesity: Causes, Consequences and Treatment 7 (L. Lasagna ed. 1974). See generally Obesity Symposium, supra note 5.

88. See 45 C.F.R. § 84.3(j)(2) (1981), quoted at supra note 85; U.S. News & World Rep., May 19, 1980, at 82 (discussing overweight persons who were found to be handicapped by the Department of Labor).

89. The percentage above desired weight one must be in order to be defined as grossly obese (also referred to as morbidly or markedly obese) has not been established. The pulmonary function of the “grossly” overweight is significantly impaired. See Gubner, supra note 87, at 12. The “markedly” overweight have a much higher mortality rate, chiefly due to cardiovascular disease. Id. at 11-12. The somatic surfeit syndrome is associated with “marked or gross” obesity. Id. at 13. See also Brief of Amicus Curiae, supra note 30, at 17-21 (quoting testimony of Dr. Theodore Van Itallie).

90. See supra notes 85-86 and accompanying text.

91. It is not necessary that the individual actually suffer any of the medical conditions associated with obesity, it is only necessary that he or she be regarded or treated as having such a condition:
individual is likely to be subjected to employment discrimination merely because of his or her weight, not because the employer regarded the individual as "handicapped." Thus, it would be easier for a grossly obese person to be classified as handicapped than a moderately obese person, leaving a substantial number of the obese without any protection against employment discrimination.

Even those obese persons categorized as handicapped are not fully protected against arbitrary employment discrimination. The Rehabilitation Act only extends protection to jobs with the federal government or to those businesses which receive federal funds, such as public school systems, hospitals, nursing homes, colleges, universities, day care centers, and public welfare offices. The Act's limited protection does not extend to the private business sector, unlike Title VII and ADEA. Therefore, even if an overweight person does qualify as handicapped, he or she may still find him or herself subject, without protection, to arbitrary employment discrimination.

C. State Protection for the Overweight

State statutes fail to fill the gap in federal legislation protecting the overweight from employment discrimination. Several states with handicap or disability statutes have adopted the Rehabilitation Act's definition of handicapped. Thus, in these states only the grossly obese are likely to benefit from the protection of these statutes. Alternatively, a few state human rela-

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

45 C.F.R. § 84.3(j)(2) (1981). See Notification of Results of Investigation, Suzanne H. Vance, (OFCCP/ESA, Region IV, July 10, 1978) (complainant had a history of morbid obesity and was regarded as handicapped within the meaning of § 503) (on file with the Journal of Law Reform).

92. The Maryland Commission on Human Relations surveyed the human relations commissions of all other states to determine whether overweight people were designated a protected class by the respective state employment discrimination statutes. Of the 19 states that replied, 6 accepted such complaints as a physical or mental handicap, 4 as a sex-based complaint or as a handicap, 1 as a weight-based complaint, and 8 did not accept such complaints. Those states which protected the obese as handicapped essentially used the federal definition of handicapped. See Weight and Size Discrimination, supra note 7, at 66.

93. See supra notes 90-91 and accompanying text.
tions commissions will accept weight-based discrimination complaints on the grounds of sex-based discrimination. 94

Only one state—Michigan—explicitly provides protection for the overweight in the area of employment, by making weight a protected class in its employment discrimination statute. 95 The statute provides that an employer may not "[f]ail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of . . . weight." 96 Until now, the Michigan civil rights department has resolved weight-based complaints without resort to adversarial proceedings, 97 by securing a commitment from the employer to eliminate the weight-based employment restrictions. 98 There-

94. See supra notes 76-81 and accompanying text.
98. The following are illustrative of how cases under this statute have been resolved:

A man who weighs about 195 pounds alleged he was denied hire by a security service because of weight. Subsequent to conciliation, the respondent agreed to compensate the claimant $900, and revise its employment application to comply with state law. The claimant was satisfied.


A black woman who is five feet, three inches tall, 174 pounds, and has an unconvicted felony arrest record, alleged she was denied hire by a state department because of height, weight, arrest record and race. Following a conciliation conference, the respondent eliminated its height and weight standard for employment and hired the claimant as a correction officer. The claimant was satisfied with the adjustment.


A 180-pound woman alleged she was denied hire at a corporation because of weight. Following a conciliation conference, the respondent agreed to pay the claimant $500, revise its pre-employment application to include only lawful inquiries, and fully subscribe to a policy of equal employment opportunity. The claimant was satisfied.

fore, the circumstances under which a Michigan employer's weight standards would be valid have yet to be determined.

III. PROPOSED LEGISLATION TO PROTECT THE OVERWEIGHT FROM EMPLOYMENT DISCRIMINATION

Existing employment discrimination against the overweight constitutes so significant a problem in our society that weight deserves to be made a classification statutorily protected from employment discrimination. The same considerations that prompted Congress to enact ADEA—the disadvantage certain workers face in finding and retaining jobs, the widespread discrimination against those workers, and the higher incidence of unemployment among them—apply equally to weight-based discrimination. Current federal and state laws fail to protect the overweight from employment discrimination. Therefore, this Note proposes that Congress or the states enact legislation to prohibit the use of weight criteria unrelated to the potential for job performance.

The purpose of the proposed act is to eliminate arbitrary discrimination against the overweight in the workplace and to encourage employment of workers based on merit rather than weight. Following the pattern of existing law, it should prohibit an employer from failing or refusing to hire or from discharging any individual, or otherwise discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's weight. It should also prohibit an employer from limiting, segregating or classifying employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of

100. See supra pt. I A.
101. In order to provide full and complete protection for the overweight, federal as well as state legislation should be enacted. On the federal level, a separate statute, rather than amendment of Title VII, is warranted because the overweight have not experienced the history of purposeful, unequal treatment that typifies those classes protected by Title VII. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976). Therefore, in order not to diminish the historical significance of Title VII, separate legislation should be enacted to protect the overweight.

On the state level, employment discrimination statutes may be amended by adding weight to the list of protected classifications. See, e.g., MICH. COMP. LAWS § 37.2202(a) (1979).
such individual's weight. These prohibitions should apply to employment agencies and labor organizations as well as employers.

The proposed act should incorporate three additional points to encourage its use and to remedy the deficiencies of existing legislation. First, it should specifically define the protected class to include all people who exceed their ideal weight by twenty percent or more. Second, to establish a valid claim by an overweight person, it should utilize the same criteria for determining a prima facie case under Title VII. Third, it should provide for the legitimation of weight standards when they are based on bona fide occupational qualifications.

A. Defining the Protected Class

A precise definition of the protected class is crucial to assuring that the essential purposes of the legislation—to eliminate arbitrary discrimination against the overweight and to encourage employment of workers based on merit rather than weight—are carried out. Thus, the definition of overweight must not be so narrow that it fails to protect those whose weight is excessive enough to affect their employment opportunities. Additionally, the definition must be sufficiently precise to enable employers to (1) amend their employment practices to comply with the proposed act, and (2) identify clearly those who are protected.

A comparison of an individual's actual weight with his or her ideal or desirable weight as determined by standard height-weight tables,\(^{103}\) best achieves these goals and should be used to identify individuals in the protected class. Weight greater than twenty percent above the ideal represents a significant level of

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103. The Fogarty International Center Conference on Obesity's recommended-weight-in-relation-to-height table should be the standard table used in determining whether an individual is a member of the protected class under the statute. This table was adapted from the Metropolitan Life Insurance Company table and is more accurate in identifying the obese. See Senate Hearings, supra note 1, at 48 (statement of Dr. Theodore Van Itallie). In determining whether an individual is a member of the protected class, his actual weight should be compared to the average weight for that person's sex and height. The height should be measured without shoes and the weight without clothes. The table reads:
obesity" and therefore represents the minimum excess weight one should establish in order to be classified as overweight. The definition also should provide a safety net to catch some of the overweight persons who fall outside the scope of the statute, but who should receive the benefit of the proposed statute's protection. Thus, if an overweight person were to establish that an employer perceived that he or she was overweight within the

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<th>Height</th>
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<td>6 ft 4 in</td>
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Id. at 57.

104. See supra note 1. For clinicians' purposes, identifying the obese by use of standard height-weight charts alone is not sufficient. See, e.g., Osancova & Hejda, supra note 2, at 57-58. Two types of people are inaccurately classified by this system. First, a person who is not overweight, but has a high percentage of body fat, is not classified as obese under height-weight chart analysis. This person is obese by medical standards, but is not one of the persons this legislation is designed to protect, unless he or she is regarded as overweight by the employer. Therefore, the inaccuracy of the height-weight tables in this case is not a problem with respect to identifying the protected class under the proposed legislation.

The second type of person who is inaccurately classified through the use of height-weight tables is the athlete who is overweight due to excess muscle, not fat. This person would qualify as a member of the protected class even though physicians would not classify him as obese. This person, however, is a proper member of the protected class because his weight is excessive and the potential for resulting discrimination exists. Thus, although clinicians prefer a skinfold test, the correlation between weight and fat suffices for the purposes of this legislation. Height-weight tables are also more familiar and few technical skills would be needed to determine properly whether an individual is obese within the meaning of the legislation.

105. See 29 U.S.C. § 706(7)(B) (Supp. III 1979) (including people regarded as handicapped within the definition of handicapped, even if they are not in fact handicapped).
statutory meaning, that individual should be protected.\textsuperscript{106}

\textbf{B. Establishing a Prima Facie Case of Weight-Based Discrimination}

The elements of establishing an employment discrimination claim, regardless of the plaintiff's protected class, have been standardized through the use of similar statutory language and the application of relevant Supreme Court holdings. To facilitate use of the proposed act, it should follow these models. The following discussion explains how a plaintiff would establish a weight-based discrimination claim.

First, a plaintiff could establish that weight was a "but for" cause of the employment decision—that is, the plaintiff would have been hired but for his or her weight.\textsuperscript{107} If an employer has publicized weight standards which must be met as a prerequisite to employment, an otherwise-qualified protected applicant would have a valid claim if denied employment.\textsuperscript{108} Relatively few cases, however, would be so easily resolved, because most employers are unlikely to use such prohibited standards.

Absent direct evidence of improper weight discrimination, a plaintiff would state a proper claim if he or she were to establish a prima facie case of weight-based discrimination.\textsuperscript{109} Plaintiffs would establish such a prima facie case if they were to show that they are members of the protected class and that they were rejected for job vacancies or fired from positions for which they were qualified.\textsuperscript{110} Once a prima facie case of weight discrimina-

\textsuperscript{106} This narrow exception to the 20\% test is designed to reach those individuals who barely missed the 20\% limit, yet can demonstrate that the employer thought they were members of the protected class. For example, the employer may have made notations on the individual's application that "he or she appears to be medically obese" or that "his or her weight would probably be a health risk." These comments would be sufficient to create an inference that the employer thought the plaintiff was at least 20\% above his ideal weight, because the term medically obese and health complications are generally associated with being 20\% above one's ideal weight.


\textsuperscript{108} Cf. Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972) (strong prima facie case of age discrimination made where the notation "too old" was made on an employer's interview notes regarding a 47-year-old job applicant).

\textsuperscript{109} See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (landmark case establishing the elements of a prima facie case under Title VII and also providing precedent for a prima facie case under ADEA).

tion is established, the plaintiff will prevail unless the defend­
dant-employer can articulate a legitimate and nondiscriminatory
reason for rejecting or firing the plaintiff.111

C. Employer's Defenses

The proposed act should enable the employer to retain sub­
stantial discretion in his hiring policies while also protecting the
employment opportunities of the overweight. For example, an
employer might legitimately refuse to hire an overweight appli­
cant because another applicant was more qualified, or because of
the applicant's past work record or letters of recommendation.
The only requirement would be that the employment decision
be reasonably related to a legitimate employer interest.112 Once

The first element will be satisfied if plaintiffs can establish that they weighed 20% or
more than their desirable weight when they filed their job applications or received notifi­
cation of denial. Plaintiffs who were fired may establish that they are members of the
protected class by demonstrating that they were 20% above their desired weight at the
time they were terminated. If plaintiffs are unable to establish a record of their weight at
the time they were fired or rejected, a showing that they were overweight at the time the
claim was filed would be sufficient proof.

As a second element, plaintiffs must prove they were applying for an available position
or that they were employed in a position which the employer was not planning to termi­
nate in the near future. See Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir.
1977) (requiring plaintiff to show that he was satisfying the normal job requirements,
was discharged, and that nonminority persons were assigned to perform the same work).

The third and most crucial element requires that plaintiffs establish that they were
qualified to perform the essential functions of the job. Plaintiffs need not show that they
have superior, competitive qualifications. See, e.g., id. at 1283-84. Proof that plaintiffs
have performed this function for the defendant-employer or another employer should suf­
fice to establish plaintiffs' qualifications.

The case of Joyce English illustrates how a prima facie case could be established under
the proposal. See supra notes 29-30 and accompanying text. At 5' 8" and 341 pounds,
Ms. English's weight exceeds 20% of her ideal weight, and she is clearly a member of the
protected class. When Ms. English applied for the position of customer service clerk, 13
positions were available, thereby satisfying the second element. See Brief of Amicus Curiae,
supra note 30, at 3. Ms. English also passed a battery of tests for ability, knowledge,
skill, and met the other requirements for the position. PECO also admitted that Ms.
English's weight would not have interfered with her ability to perform the essential func­
tions of the job. See id. at 3-4. Thus, Ms. English could establish a prima facie case of
weight discrimination under the proposed statute.

does not violate Title VII by preferring to hire someone with previous experience with
the employer, though no proof existed that this would improve job performance); Peters
v. Jefferson Chem. Co., 516 F.2d 447 (5th Cir. 1975) (accepting employer's belief that lab
skill of female laboratory chemist who had not worked in lab for several years would
diminish with time); Brennan v. Reynolds & Co., 367 F. Supp. 440 (N.D. Ill. 1973) (ac­
cepting employer's grounds for discharging an older employee because of excessive tardi­
ness); Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970) (justifying dis­
missal of older employees based on job performance following reduction in operations).
the employer articulates a legitimate reason for his employment decision, he would have to present evidence that establishes its existence in fact. Thus, if an employee was discharged for absenteeism, poor work, or misconduct, the employer would have to present evidence that the employees retained did not have similarly poor work records.118 Once an employer has established a nondiscriminatory basis for his or her employment decision, the plaintiff must demonstrate that this reason is a pretext for an underlying discriminatory motive in order to prevail.114

The proposed statute should also give an employer discretion to refuse to hire an overweight person if the employer can establish that ideal weight is a bona fide occupational qualification ("BFOQ"). This should be a narrow exception to the prohibition against weight discrimination. Thus, the employer would have the burden of proving that the weight standards it invokes are reasonably necessary to the essence of the business,118 and that the employer has a factual basis for believing that all persons within the class would be unable to perform safely and efficiently the duties of the job involved.116 Alternatively, the employer could prove that it is impossible or impractical to deal with persons over the weight limit on an individualized basis.117

Gray v. City of Florissant118 illustrates weight restrictions which rise to the level of a BFOQ under the proposal. In that case, police officers were not permitted to exceed the maximum weight for their height and sex by more than ten percent. The plaintiff was disciplined for failing to comply with the weight restrictions. As a result, plaintiff filed an action alleging that the weight restrictions violated his due process rights. In upholding the weight standards, the court found that the weight standard was a BFOQ: "the risk of danger in the line of duty to an officer who is physically overweight would be too great and . . . some

113. Cf. Flowers v. Crouch-Walker Corp., 552 F.2d at 1284 (rebuttal of a prima facie case of employment discrimination must rest on comparative evidence indicating how plaintiff's work compared to the work of others).

114. Cf. McDonnell Douglas Corp. v. Green, 411 U.S. at 804-05 (plaintiff must be afforded a full and fair opportunity to show that employer's stated reason was in fact pretext); Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981) (plaintiff must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by employer were a pretext for discrimination).

115. Cf. Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (holding that sex-based discrimination is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively).


117. Cf. id.

118. 588 S.W.2d 722 (Mo. Ct. App. 1979).
regulation would be required, therefore, to insure a measure of safety for the officer's own protection." Additionally, the weight restrictions were necessary to further the police force's law enforcement function. In order to foster public confidence in the capability of the police force and to alert potential violators of the law that the force was capable of protecting the public against such violations, the court found that the city had a particular interest in maintaining a certain appearance for its police force.

The BFOQ defense should also be accepted where weight is necessary for authenticity of actors or persons promoting products directed to a particular weight group. Thus, it would be permissible for an employer who runs a weight reduction spa to require that its employees be within a certain weight range; a weight reduction clinic staffed by overweight persons would not give the appearance of a legitimate operation. Weight restrictions could also be applied, for instance, in the case of fashion models; a dress designed for a petite person but modeled by an overweight person will not appeal to a petite customer. Only in such extreme cases would appearance requirements legitimate an employer's weight standards; otherwise, prejudice based on customer preference would undermine the purpose of the act. Thus, only in cases of great danger to the employee, maintenance of public confidence in governmental services, and very narrow areas of customer preference would an employer be able to establish a BFOQ. Arguments based on relative economic costs of hiring, training, or retaining the overweight would not qualify as BFOQ's under this proposed statute.

CONCLUSION

Title VII, the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, and corresponding state statutes were all designed to eliminate certain factors deemed irrelevant in making employment decisions and to encourage merit as the guiding basis for employment decisions. Weight is frequently an irrelevant factor which adversely affects employment decisions and denies the overweight the chance to utilize

119. Id. at 725.
120. Id.
their skills. Because existing legislation does not adequately protect the overweight from employment discrimination, legislators should make weight a protected classification. Such legislation would balance the interests of the overweight in obtaining reasonable access to the job market with the interests of the employer in preserving his right to operate a successful business in the manner he chooses. The overweight are asking only for an opportunity to compete fairly within the job market.

—Karol V. Mason