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## Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers

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# Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers

Jennifer Bennett Shinall<sup>†</sup>

*Prior empirical work has identified an obesity penalty in the labor market. Obese workers are less likely to be employed than non-obese workers, and even if obese workers find employment, they earn less than non-obese workers. In 2008, Congress amended the Americans with Disabilities Act (“ADA”) by broadening the scope of medical conditions it covers. Since then, legal actors have used these amendments to seek remedies against employers that take adverse employment actions against obese workers because of their weight. They argue that obesity is now a disability under the ADA, and firing workers because of their weight constitutes disability discrimination. This Article questions the recent focus on treating obesity as a disability and presents original data analysis demonstrating that employers prefer not to make obese women the public face of their companies. In fact, a substantial portion of the obesity penalty for women results from employers keeping obese women (but not obese men) out of public-interaction jobs. In contrast, the data indicate that very little of the obesity penalty results from productivity concerns or from concerns about obesity substantially limiting a major life activity. As a result, the obesity penalty is more appropriately viewed as a form of sex discrimination, instead of a form of disability discrimination. Title VII has the potential to help far more obese women in the labor market than the ADA.*

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## INTRODUCTION

Fat is not in the recipe for labor market success, particularly for women. Two decades of social science research have repeatedly demonstrated that obese individuals fare worse in the labor market than their non-obese counterparts. For instance, obese individuals are less likely to be employed than non-obese individuals.<sup>1</sup> And for obese individuals who manage to find employment, their earnings are less than the earnings of non-obese individuals—phenomena commonly referred to by social scientists as the obesity penalty.<sup>2</sup> Compared to obese men, the wage and

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1. See, e.g., Kaan Tunceli, Kemeng Li, & L. Keoki Williams, *The Long-Term Effects of Obesity on Employment and Work Limitations on U.S. Adults, 1986 to 1999*, 14 *OBSIDITY* 1637, 1640-43 (2006). Throughout this paper, weight categories are defined according to body mass index (“BMI”), which is calculated using the following equation:

$$BMI = \frac{\text{weight}(lb) \times 703}{(\text{height}(in))^2}$$

Using BMI, individuals are then classified as underweight if their BMI is less than 18.5, normal weight if their BMI is greater than or equal to 18.5 but less than 25.0, overweight if their BMI is greater than or equal to 25.0 but less than 30.0, obese if their BMI is greater than or equal to 30.0 but less than 40.0, and morbidly obese if their BMI is greater than or equal to 40.0. *Obesity: Symptoms*, MAYO CLINIC ONLINE (June 10, 2015), <http://www.mayoclinic.org/diseases-conditions/obesity/basics/symptoms/con-20014834>.

2. The majority of the prior empirical literature has focused on the negative impact of obesity on wages. See Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 *NEW ENG. J. MED.* 1008, 1009-11 (1993); Susan Averett & Sanders Korenman, *The Economic Reality of the Beauty Myth*, 31 *J. HUM. RESOURCES* 304, 306-09 (1996); Jose A. Pagán & Alberto Dávila, *Obesity, Occupational Attainment, and Earnings*, 8 *SOC. SCI.*

employment penalties experienced by obese women in the labor market are particularly large and persistent, remaining even after researchers take differences in demographics, education, location, and genetic predisposition into account.<sup>3</sup> These findings have led many observers to suggest that employers discriminate against employees and job applicants on the basis of their weight.<sup>4</sup>

For individuals who believe they have been the victims of weight discrimination in the labor market, both the availability and suitability of a legal remedy remain less than clear. Obese individuals in ten local jurisdictions across the United States have a direct legal remedy for weight or personal appearance discrimination in the workplace; the ten jurisdictions that explicitly prohibit such discrimination include the state of Michigan; Washington, DC; Howard, Harford, and Prince George's County, Maryland; Binghamton, New York; Urbana, Illinois; Madison, Wisconsin; and Santa Cruz and San Francisco, California.<sup>5</sup> Obese individuals outside of these jurisdictions lack an explicit remedy for weight-based discrimination in the workplace since neither weight nor personal appearance is a protected class at the federal level.<sup>6</sup>

Thus, obese individuals outside these ten jurisdictions who experience an adverse employment action on the basis of their weight must try to fit their claim within the ambit of existing federal anti-discrimination legislation. In response, most advocates have argued that obesity is a disability under the 1990 Americans with Disabilities Act ("ADA") and the 2008 Americans with Disabilities Amendments Act ("ADAAA"). This approach relies on the common assumption that an obese worker may be more costly (or less profitable) to employ than a non-obese worker, just as a more traditionally disabled worker may be more costly (or less profitable) to employ than a non-disabled worker. Relying upon this assumption about the costs and profits associated with employing obese workers, advocates for protecting the obese under the ADA posit that, in the absence of legal regulation, employers may avoid hiring obese workers or, if they do hire such workers, pay them less than non-obese workers.

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Q. 756, 757-68 (1997); John Cawley, *The Impact of Obesity on Wages*, 39 J. HUM. RESOURCES 451, 456-68 (2004).

3. Cawley, *supra* note 2, at 460-63 (finding that a wage penalty persists for obese women even after controlling for differences in age, race, ethnicity, geographic location, education, experience, skill level, and genetic predisposition).

4. For a discussion of experts in a variety of fields on the effect of obesity on labor market outcomes, see Opinion, *Room for Debate: Should Legislation Protect the Obese*, N.Y. TIMES (Nov. 28, 2011), <http://www.nytimes.com/roomfordebate/2011/11/28/should-legislation-protect-obese-people>; see also Cawley, *supra* note 2; Pagán & Dávila, *supra* note 2; Averett & Korenman, *supra* note 2, at 322-23.

5. Jennifer Bennet Shinall, *Less is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. (forthcoming 2017).

6. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting only race, color, national origin, sex, and religion discrimination in employment).

Curiously, few advocates for legal protection of obese workers have questioned the underlying assumption that obese workers are more costly or less profitable to employ than non-obese workers. Instead, reformers and advocates have largely taken the assumption as a given, focusing their legal response to the obesity penalty by arguing that obesity should be protected in the same manner, and to the same extent, as more traditional disabilities. If this assumption is true, then the ADA is a good fit for protecting obese workers since the language of the statute implicitly assumes that even a traditionally disabled person may be more costly to employ than a non-disabled worker. The statute requires employers to hire and reasonably accommodate qualified disabled individuals,<sup>7</sup> and the ADA's equal pay provision prohibits employers from taking the cost of reasonable accommodation out of a disabled worker's paycheck.<sup>8</sup> Employers can only avoid their obligation to hire and reasonably accommodate disabled individuals when doing so would "impose an undue hardship,"<sup>9</sup> which federal courts have typically defined as imposing a substantial cost on the employer.<sup>10</sup>

But if the underlying assumption that obese workers are more costly or less profitable to employ is incorrect, then the ADA may not provide the most effective means for protecting obese individuals in the workplace. This Article tests this underlying assumption, using an original dataset to determine whether the obesity penalty is largely driven by productivity and cost concerns, or alternatively, by taste-based preferences. I use the term *taste-based preferences* against the obese in the same manner that Gary Becker referred to taste-based discrimination against African Americans in his classic 1957 work, *The Economics of Discrimination*.<sup>11</sup> Here, the term taste-based preferences against the obese signifies anti-fat bias—the desire not to associate with an individual simply because the individual is obese.<sup>12</sup>

Since taste-based preferences against the obese may only exist against certain groups of obese workers, this Article particularly considers whether any taste-based preferences against the obese differ by gender. The conclusions of this empirical analysis are highly suggestive that a form of

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7. 42 U.S.C. § 12112(a)-(b) (2012).

8. 42 U.S.C. § 12112(b)(4)-(5) (2012).

9. 42 U.S.C. § 12112(b)(5)(A) (2012).

10. See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) ("The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (finding an accommodation reasonable if "the costs . . . , facially, do not clearly exceed its benefits).

11. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 14 (2d ed. 1971).

12. Such a desire is distinguishable from a desire not to associate with obese individuals because obesity is correlated with lower productivity.

sex discrimination—and not productivity or cost concerns—is driving the obesity penalty for women in the labor market. Accordingly, this Article argues that obese women who face inferior wage and employment prospects in the workplace may be better served to seek legal protection under Title VII of the 1964 Civil Rights Act, instead of the ADA.

To test the validity of the assumption underlying current legal advocacy for obese workers under the ADA, I compare the occupational characteristics of obese workers to those of non-obese workers. Specifically, I focus on two types of occupations: occupations that emphasize physical activity and occupations that emphasize interaction with the public. If productivity/cost concerns are driving the obesity penalty in the labor market, then these concerns should be particularly salient in physical-activity occupations. The health literature suggests that obesity can take a toll on an individual's musculoskeletal system, and as a result, impede that individual's ability to perform physical tasks.<sup>13</sup> On the other hand, if taste-based preferences against the obese are driving the penalty in the labor market, then these concerns should be particularly salient in public-interaction occupations. For example, employers may be concerned about hiring obese workers for occupations that require selling, negotiating, or persuading external customers if employers sense that their customers harbor taste-based preferences against the obese.

The data presented here indicate that obese workers, on the whole, do quite well in physical-activity occupations. In fact, the heavier a worker becomes, the more likely that worker is to work in a physical-activity job. Moreover, obese workers who work in these physical jobs are paid just as much as non-obese workers who perform similar jobs. Certainly examples exist of obese workers whose size limits their physical abilities, but productivity/cost concerns do not appear to be largely responsible for the obesity penalty in the labor market. The general success of obese workers in physical-activity jobs demonstrates how many obese workers are *not* substantially limited in a major life activity, and it suggests that employers do not necessarily view obese workers as substantially limited. Yet in the absence of a substantial limitation resulting from obesity, or an employer who regards obese workers as substantially limited, the ADA does not provide protection for an obese worker who experiences an adverse employment action on the basis of weight.<sup>14</sup> These findings illuminate the

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13. See, e.g., Andrea L. Hergenroeder et al., *The Influence of Body Mass Index on Self-Report and Performance-Based Measures of Physical Function in Adult Women*, 22 *CARDIOPULMONARY PHYSICAL THERAPY J.* 11 (2011); Dawn E. Alley & Virginia W. Chang, *The Changing Relationship of Obesity and Disability*, 298 *J. AM. MED. ASS'N* 2020 (2007); Kenneth F. Ferraro et al., *Body Mass Index and Disability in Adulthood: A 20-Year Panel Study*, 92 *AM. J. PUB. HEALTH* 834 (2002).

14. 42 U.S.C. § 12102(1) (2012) defines a disability for the purposes of the ADA as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”

weakness of relying on the ADA as the principal solution for remedying the obesity penalty in the labor market.

In contrast to the results from the physical-activity data, the outcomes are quite different for women in public-interaction jobs. As soon as a woman becomes overweight, she becomes increasingly less likely to work in a public-interaction occupation. As she moves from overweight to obese to morbidly obese, she is increasingly less likely to work in a public-interaction occupation. Moreover, the few morbidly obese women who do work in public-interaction occupations earn substantially less than normal-weight women for performing the same job.

The patterns seen in the public-interaction data for obese women are not present in the data for obese men. Obese men are no less likely than non-obese men to work in jobs that emphasize interaction with the public. Nor do obese men working in public-interaction jobs earn less than non-obese men in public-interaction jobs. Consequently, the data suggest not only that taste-based preferences against the obese are principally driving the obesity wage and employment penalty but also that these taste-based preferences are largely confined to obese women. Employers who take adverse employment actions against obese women—but not obese men—are not discriminating on the basis of a disability. They are discriminating on the basis of sex, which is precisely why this Article argues that Title VII, not the ADA, can provide the most appropriate and effective remedy for women who fall victim to the obesity penalty in the labor market.

In making the argument that most obese women would be better served to seek relief under Title VII, instead of the ADA, this Article proceeds as follows: Part I explores the history of weight-related disability discrimination claims under the ADA, particularly focusing on the rise of weight-related litigation since the passage of the ADAAA in 2008. Part II examines the history of weight-related sex discrimination claims under Title VII. Part III presents data on the labor market outcomes of obese men and women in physical-activity and public-interaction jobs. Consistent with prior economics research, I demonstrate that the obesity penalty is a much bigger problem for women than it is for men; the new contribution is the examination of how obese workers fare in physical-activity and public-interaction jobs (and the resulting wage effects). Using the results of this analysis, I conclude in Part IV that a sex-plus-weight theory of discrimination under Title VII provides more comprehensive and appropriate protection for women who experience weight-based discrimination in the workplace than does the ADA.

## I.

## WEIGHT DISCRIMINATION AS DISABILITY DISCRIMINATION

Under the doctrine of employment at will, employers can fire an employee for a good reason, a bad reason, or no reason at all.<sup>15</sup> The great exception to the doctrine of employment at will is employment discrimination law. Because weight is not explicitly protected under federal anti-discrimination laws,<sup>16</sup> obese employees who believe they have been discriminated against on the basis of weight must attempt to frame their claim as a case of another type of prohibited discrimination. This Part focuses on plaintiffs' attempts to frame weight discrimination as a form of disability discrimination, which is prohibited by the ADA. Part I.A explores how obese plaintiffs fared in federal court under the original 1990 version of the ADA, and Part I.B examines how the outcomes of obese plaintiffs have generally improved in federal courts since the 2008 Amendments. Part I.C considers the shortcomings of protecting obese individuals through the framework of disability law.

*A. Limited Remedy: Obesity under the 1990 ADA*

In passing the original version of the ADA on July 26, 1990, Congress's stated intent was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" throughout their lives, including in the labor market.<sup>17</sup> The employment provisions in Title I of the ADA prohibit discrimination against the disabled with regard to the "terms, conditions, and privileges of employment" and require employers to provide "reasonable accommodation"<sup>18</sup> to disabled employees who are capable of "perform[ing] the essential functions of the employment position."<sup>19</sup> An individual is disabled for the purposes of the ADA if she "(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [is] regarded as having such an impairment."<sup>20</sup>

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15. For a recent case restating the American default rule of employment, see *Swindol v. Aurora Flight Sci. Corp.*, No. 14-60799, 2015 WL 5090578, at \*4 (5th Cir. Aug. 28, 2015).

16. Recall from the introduction that weight and/or personal appearance discrimination is prohibited in the state of Michigan as well as Washington, DC; Howard County, MD; Harford County, MD; Prince George's County, MD; Binghamton, NY; Urbana, IL; Madison, WI; Santa Cruz, CA; and San Francisco, CA. Shinall, *supra* note 5, at 2. Thus, obese individuals living in these ten jurisdictions have an explicit remedy for weight discrimination available to them and do not necessarily need to reframe any weight-based discrimination they experience as another form of discrimination in order to obtain relief.

17. 42 U.S.C. § 12101(b)(1) (2012).

18. 42 U.S.C. § 12112(a), (b)(5) (2012).

19. 42 U.S.C. § 12111(8) (2012).

20. 42 U.S.C. § 12102(1) (2012).

Congress avoided listing specific conditions or diseases when defining disability in the 1990 Act.<sup>21</sup> Instead, Congress left the courts to decide whether an individual was disabled on a case-by-case basis. Using the definition in the 1990 Act, one morbidly obese individual was able to convince a federal court that obesity was a disability under federal law. In *Cook v. Department of Mental Health, Retardation, & Hospitals*,<sup>22</sup> the First Circuit upheld a jury award of \$100,000 to a job applicant after the Rhode Island Department of Mental Health refused to rehire the plaintiff, Bonnie Cook, as an institutional attendant because she was morbidly obese. Cook had held this position twice previously, voluntarily leaving both times with a good employment record, and she had always been morbidly obese.<sup>23</sup> In reaching its decision, the First Circuit placed particular importance on the fact that Cook's obesity arose from an underlying physiological condition. The court emphasized the evidence presented at trial indicating that Cook would have to deal with a dysfunctional metabolism for the rest of her life, no matter how much weight she lost.<sup>24</sup> Cook could not "simply lose weight and rid herself of any concomitant disability"; therefore, the jury had appropriately concluded that Cook was disabled under federal law.<sup>25</sup>

*Cook* might have opened the door for coverage of obese workers, and morbidly obese workers in particular, under federal disability law. But the approach towards obesity in *Cook* proved to be the exception, not the rule, in the years following the First Circuit's decision. Over the next decade, the Second, Sixth, and Eleventh Circuits distinguished or disagreed with *Cook*. For example, in *Andrews v. State of Ohio*,<sup>26</sup> the Sixth Circuit found that Ohio State Highway Patrol officers who failed to meet the weight limits set by the Highway Patrol Fitness Program were not disabled for the purposes of the ADA. The court pointed to the appendix of the Code of Federal Regulations, 29 C.F.R. § 1630.2(h), which states that the "definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are

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21. *See id.*

22. 10 F.3d 17, 20-21 (1st Cir. 1993). Note that *Cook* is a Rehabilitation Act case since Cook's employer was a public, not a private, employer. ADA and Rehabilitation Act case law is interchangeable for the purposes of determining the existence of a disability, a reasonable accommodation, and an adverse employment action, as Congress expressly wrote the ADA in 1990 and amended the Rehabilitation Act in 1992 to make the two acts interchangeable. *See* 29 U.S.C. § 794(d) (2012) ("The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . ."); *see also* Schrader v. Fred A. May, M.D., P.C., 296 F.3d 968, 969 (10th Cir. 2002) ("[T]he Rehabilitation Act . . . incorporates the standards of the Americans with Disabilities Act").

23. *Cook*, 10 F.3d at 20-21.

24. *Id.* at 23-25.

25. *Id.* at 23.

26. 104 F.3d 803, 805, 808-09 (6th Cir. 1997).

within ‘normal’ range and are not the result of a physiological disorder.”<sup>27</sup> Under this regulation, the court asserted that “a mere physical characteristic does not, without more, equal a physiological disorder” and concluded that holding otherwise “would . . . ‘debase [the] high purpose [of] the statutory protections available to those truly handicapped.’”<sup>28</sup> The Sixth Circuit distinguished their holding from *Cook* by noting that the plaintiff in *Cook* had presented expert testimony that her morbid obesity arose from a physiological impairment of the metabolism.<sup>29</sup> Nine years later, the Sixth Circuit reaffirmed the *Andrews* decision in *E.E.O.C. v. Watkins Motor Lines*.<sup>30</sup>

The Second and Eleventh Circuits were also less generous to the obese than the First Circuit. In *Francis v. City of Meriden*,<sup>31</sup> the Second Circuit declined to recognize a firefighter who failed to meet the department weight standard and refused to take a body fat or fitness test as disabled for the purposes of the ADA. The Second Circuit agreed with the Sixth Circuit’s holding that physical characteristics not arising from a physiological condition were not impairments under the statute.<sup>32</sup> Even the case of *Greenberg v. Bellsouth Telecommunications, Inc.*,<sup>33</sup> brought by an obese telephone lineman who suffered from additional physiological conditions—including diabetes, hypertension, and hypothyroidism—did not end well for the plaintiff. There, the Eleventh Circuit held that the plaintiff was not disabled for the purposes of the ADA because, in spite of the evidence demonstrating his poor health, the plaintiff had failed to demonstrate that he was “unable to work in a broad class of jobs.”<sup>34</sup>

The restrictive stance taken by the Second, Sixth, and Eleventh Circuits towards obese workers was indicative of the generally restrictive stance taken by federal appeals courts towards all workers seeking relief for disability discrimination in the late 1990s and early 2000s. Appeals courts’ reluctance to recognize a worker as disabled for the purposes of the ADA was in no small part due to four U.S. Supreme Court decisions at the turn of the millennium. The first three decisions, nicknamed the *Sutton trilogy*, consisted of *Sutton v. United Air Lines*,<sup>35</sup> *Murphy v. United Parcel Service*,

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27. *Id.* at 808.

28. *Id.* at 810 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

29. *Id.* at 808-09.

30. 463 F.3d 436, 441, 443 (6th Cir. 2006) (holding that “to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition,” as in the case of *Bonnie Cook*).

31. 129 F.3d 281, 282 (2d Cir. 1997).

32. *Id.* at 284-85.

33. 498 F.3d 1258, 1264 (11th Cir. 2007).

34. *Id.* (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999)).

35. 527 U.S. 471 (1999).

*Inc.*,<sup>36</sup> and *Albertson's, Inc. v. Kirkingburg*.<sup>37</sup> Decided together on June 22, 1999, the three cases severely limited the definition of disability under the original version of the ADA by holding that an individual was not disabled if corrective measures could ameliorate the individual's condition. The fourth case, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>38</sup> decided in 2002, even more severely limited the definition of disability under the original ADA. There, the court held that "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."<sup>39</sup> Thus, even if an ADA plaintiff's impairment substantially limited her ability to do her job, she would not be disabled under the ADA unless her impairment also substantially limited her ability to function in daily life.

### *B. An Expanded Remedy: Obesity under the 2008 ADA Amendments*

Six years after *Toyota*, in 2008, Congress responded to the Supreme Court's restrictive ADA decisions with the passage of the ADAAA.<sup>40</sup> Although the ADAAA did not alter the three-prong statutory definition of disability in the 1990 Act,<sup>41</sup> the ADAAA clarified Congress's intent to courts by defining many of the terms within the statutory definition. Terms such as "substantially limits," "major life activities," and "regarded as"—key elements of § 12102(1) that had not been defined in the original version of the ADA—were now defined in the revised statute.<sup>42</sup> More significantly, Congress added rules of construction to § 12102, instructing courts to err henceforth on the side of disability coverage.<sup>43</sup>

In response to the amendments, which went into effect at the beginning of 2009, the Equal Employment Opportunity Commission ("EEOC")—the agency charged with enforcing the ADA—has noticeably altered its position on ADA coverage of many health conditions. Most relevant here,

36. 527 U.S. 516 (1999).

37. 527 U.S. 555 (1999).

38. 534 U.S. 184 (2002).

39. *Id.* at 200-01.

40. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)-(5), 122 Stat 3553 ("[T]he holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; . . . the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA. . . .").

41. Compare *id.* § 3(1) (codified at 42 U.S.C. § 12102(1) (2012)) with Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat 327 (1990) (codified at 42 U.S.C. § 12102(2) (1994)).

42. See 42 U.S.C. §§ 12102(2)-(4) (2012).

43. See 42 U.S.C. § 12102(4)(A) (2012) (instructing courts to construe the definition of disability "in favor of broad coverage of individuals under this chapter, to the maximum extent permitted").

the EEOC has altered its position with respect to obesity. The agency's prior guidance stated that obesity would only be covered under the ADA in "rare circumstances."<sup>44</sup> Its current guidance now states that "severe obesity, which has been defined as body weight more than 100% over the norm . . . is clearly an impairment."<sup>45</sup> The EEOC's definition of severe obesity roughly equates to the medical definition of morbid obesity, which is a body mass index ("BMI") of 40 or more.<sup>46</sup>

Since the passage of the ADAAA, the EEOC has not only revised its compliance guidelines, but also has filed two ADA lawsuits involving morbidly obese plaintiffs. In September 2010, the EEOC filed its first public-interest suit, *EEOC v. Resources for Human Development, Inc.*<sup>47</sup> The plaintiff, Lisa Harrison, who was morbidly obese, had been terminated from her job at a New Orleans residential treatment facility despite an excellent performance record. Even though Harrison had already weighed over 400 pounds at the time of her hiring, she weighed 527 pounds at the time of her termination.<sup>48</sup> In contrast to the pre-ADAAA decisions, here the district court denied the employer's motion for summary judgment, finding that Harrison's "severe obesity . . . [wa]s clearly an impairment."<sup>49</sup> Reflecting a change in judicial attitude towards coverage of obesity that extended beyond the EEOC, the court held that the agency need not prove the underlying physiological basis of Harrison's obesity in order to gain the protection of the ADA.<sup>50</sup> Before the case could go to trial, Harrison's employer settled with the EEOC for \$125,000.<sup>51</sup>

In September 2011, the EEOC filed a second public interest suit, *EEOC v. BAE Systems, Inc.*, involving a morbidly obese worker.<sup>52</sup> The suit arose after BAE Systems, the employer, fired Ronald Kratz, a plant employee, because of his weight.<sup>53</sup> Kratz weighed approximately 450 pounds at hiring and 680 pounds at termination. Still, Kratz was able to

44. For a discussion of the policy change, see *Whittaker v. Am.'s Car Mart, Inc.*, No. 1:13CV108 SNLJ, 2014 WL 1648816, at \*2 (E.D. Mo. Apr. 24, 2014) (quoting U.S. EQUAL EMP'T OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT COMPLIANCE MANUAL, § 902.2(c)(5)(ii)).

45. *Id.*

46. In contrast, the BMI of a normal-weight person ranges from 18.5 to less than 25. See *Obesity: Symptoms*, *supra* note 1.

47. 827 F. Supp. 2d 688, 691 (E.D. La. 2011).

48. *Id.* at 690.

49. *Id.* at 694.

50. *Id.* at 693.

51. Press Release, U.S. Equal Emp't Opportunity Comm'n, Resources for Human Development Settles EEOC Disability Suit for \$125,000 (Apr. 10, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/4-10-12a.cfm>.

52. Press Release, U.S. Equal Emp't Opportunity Comm'n, BAE Systems Subsidiary to Pay \$55,000 to Settle EEOC Disability Discrimination Suit (July 24, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm>.

53. *Id.*

perform the essential functions of his job throughout his employment.<sup>54</sup> Before the district court could rule on any motions (but after the favorable *Resources for Human Development* decision and settlement), BAE Systems settled the suit with the EEOC for \$55,000.<sup>55</sup>

As illustrated by the summary judgment outcome of the *Resources for Human Development* case, federal courts have been less hostile to ADA claims brought by obese workers since the 2008 amendments. Indeed, the increased success of obese plaintiffs claiming disability discrimination under the ADAAA has extended beyond cases brought by the EEOC to cases brought by private plaintiffs. In *Lowe v. American Eurocopter, LLC*,<sup>56</sup> a Mississippi district court denied summary judgment to an employer who argued that obesity could never be a disability under the ADA, concluding, “Based on the substantial expansion of the ADA by the ADAAA, Defendant’s assertion that Plaintiff’s weight cannot be considered a disability is misplaced.” A district court in Louisiana similarly found that a plaintiff’s obesity was a disability because it substantially limited her breathing, which is a major life activity.<sup>57</sup> Moreover, a recent case out of a Missouri district court has agreed that obesity claims under the ADA will fare much better in the post-ADAAA regime.<sup>58</sup> The district court in *Whittaker v. America’s Car Mart, Inc.* agreed that the pre-ADAAA case law requiring “obesity [to be] related to an underlying physiological disorder or condition . . . [was] based on the more restrictive approach that was applied before Congress passed the Americans with Disabilities Amendments Act of 2008.”<sup>59</sup> Like the district court in *Lowe*, the *Whittaker* court rejected the employer’s argument that obesity qualified as a disability under the ADA only in “rare circumstances . . . [because] that language has been omitted [from the EEOC Compliance Guidelines] following the ADAAA.”<sup>60</sup>

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54. *Id.*; see also L.M. Sixel, *Fired Obese Worker Will Get \$55,000*, HOUSTON CHRON. (July 24, 2012), <http://www.chron.com/default/article/Fired-obese-worker-will-get-55-000-3732044.php>; L.M. Sixel, *Man Fired at 680 Pounds Says Weight Didn’t Hurt His Work*, HOUSTON CHRON. (Sept. 28, 2011), <http://www.chron.com/default/article/Man-fired-at-680-pounds-says-weight-didn-t-hurt-2193407.php>; L.M. Sixel, *Feds Sue Company for Firing 600 Pound Worker*, HOUSTON CHRON. (Sept. 27, 2011), <http://www.chron.com/default/article/Feds-sue-company-for-firing-600-pound-worker-2191655.php>.

55. *Fired Obese Worker Will Get \$55,000*, *supra* note 54.

56. No. 1:10CV24-A-D, 2010 WL 5232523, at \*8 (N.D. Miss. Dec. 16, 2010).

57. *Melson v. Chetofield*, No. 08-3683, 2009 WL 537457, at \*3 (E.D. La. Mar. 4, 2009). In spite of the district court’s finding that the plaintiff was disabled for the purposes of the ADA, the court ultimately dismissed the plaintiff’s case for failure to state a claim because she failed to demonstrate in her pleading that she had either experienced an adverse employment action or endured a hostile work environment due to her disability. *Id.* at \*3-7.

58. *Whittaker v. Am.’s Car Mart, Inc.*, No. 1:13CV108 SNLJ, 2014 WL 1648816, at \*2 (E.D. Mo. Apr. 24, 2014).

59. *Id.*

60. *Id.*

Although the post-ADAAA case law has been largely consistent in finding that obesity can be a disability under the ADA—even without the presence of an underlying physiological condition—currently absent from the post-ADAAA case law on obesity is an opinion from a federal court of appeals. That absence should disappear soon, however, as the issue is currently under consideration by the Eighth Circuit in the case of *Morriss v. BNSF Ry. Co.*<sup>61</sup> In spite of the absence of a federal appeals court decision, the existing positive post-ADAAA developments have already led to a substantial number of obese plaintiffs filing suit under the amended ADA. A 2012 estimate reported that forty-eight obesity-related ADA cases had already been filed since the amendments went into effect.<sup>62</sup> Although only a few of these cases have resulted in publicly available decisions or settlements, a perceptible shift has occurred in how attorneys view obesity claims under the ADA since the 2008 amendments. Employment defense firms across the country have published numerous articles warning employers of the regime change with regard to obesity since passage of the Amendments.<sup>63</sup> Although post-ADAAA case law is still developing, their advice is largely the same: “Employers should assume that, post-ADAAA, obese employees are protected, and focus on providing reasonable accommodations.”<sup>64</sup>

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61. See *Morriss v. BNSF Ry. Co.*, No. 8:13CV24, 2014 WL 6612604, at \*2-3 (D. Neb. Nov. 20, 2014) (citing pre-ADAAA case law to conclude that obesity is not a disability for the purposes of the ADA in the absence of an underlying physiological condition), *appeal filed*, No. 14-3858 (8th Cir. Dec. 22, 2014). The EEOC has filed an amicus brief with the Eighth Circuit on behalf of the plaintiff employee. Brief for EEOC as Amici Curiae Supporting Appellant, *Morriss v. BNSF Ry. Co.*, No. 14-3858 (8th Cir. filed Mar. 23, 2015), <http://www.eeoc.gov/eeoc/litigation/briefs/bnsf3.html>. The U.S. Chamber of Commerce has filed an amicus brief with the Eighth Circuit on behalf of the defendant employer. Brief for U.S. Chamber of Commerce et al. as Amici Curiae Supporting Defendant-Appellee, *Morriss v. BNSF Ry. Co.*, No. 14-3858 (8th Cir. filed May 22, 2015), <http://www.eeoc.org/briefs/MorrissvBNSF.pdf>.

62. *Employers Beware: Obesity as a Disability Under the ADA*, GORDON REES SCULLY MANSUKHANI (Oct. 2012), <http://www.gordonrees.com/publications/2012/employers-beware-obesity-as-a-disability-under-the-ada>.

63. See, e.g., Ashley Z. Hager & Patrick J. Schwedler, *Obesity and the Americans with Disabilities Act: Are One-Third of Americans Disabled?*, TROUTMAN SANDERS (Dec. 19, 2013), <http://www.troutmansanders.com/obesity-and-the-americans-with-disabilities-act-are-one-third-of-americans-disabled-12-19-2013/>; Rebecca G. Gottsegen, *Assume Disability, Always Attempt Accommodation*, LAW360 (Oct. 29, 2008), <http://www.law360.com/articles/74798/assume-disability-always-attempt-accommodation>; Gillian Egan, *Employers, Check Your Weight-Bias: Obesity, Disability, and the Broadened Coverage of the ADAAA*, BURR FORMAN (Jan. 8, 2014), <http://www.burr.com/NewsResources/Resources/Employers-Check-Your-Weight-Bias-Obesity-Disability-and-the-Broadened-Coverage-of-the-ADAAA.aspx> (linking to full article).

64. Mekesha Montgomery, *Is Obesity a Disability? The Effect of the 2008 Amendments to the ADA*, FROST BROWN TODD (July 2012), <http://www.frostbrowntodd.com/resources-1431.html>.

### C. Limitations of the Disability Discrimination Framework

As a result of the 2008 amendments, the ADA has become an increasingly promising mechanism through which obese workers can seek protection for weight-based discrimination in the workplace. Assuming that this pattern of positive case law continues—and assuming that federal appeals courts agree with district courts that obesity can be a disability under the ADA, even in the absence of an underlying physiological condition—it is important to recognize the limitations inherent in the statute. Recall that the ADA only protects workers who are substantially limited in a major life activity, who are regarded as substantially limited, or who have a record of such a limiting impairment.<sup>65</sup> If an obese individual experiences an adverse employment action for any other reason, then the ADA does not provide a remedy. Consequently, even though the ADA has thus far provided increased protections for some obese workers, it may not do much to ameliorate the wage and employment penalties endured by most obese workers in the labor market.

A recent case from the Southern District of Alabama, *Powell v. Gentiva Health Services*,<sup>66</sup> illustrates why the ADA's limited protections may provide little comfort to some obese individuals in the labor market. The plaintiff, Gina Powell, had been an account executive for Gentiva, a hospice provider.<sup>67</sup> Powell's position required her to function as a "field salesperson," calling on both hospitals and physicians to solicit new referrals to Gentiva.<sup>68</sup> According to Powell, her supervisor called her into a meeting after almost a year with the company. There, the supervisor told Powell that "not only was . . . [her performance] not up to par, but [her] dress and [her] appropriateness was not up to par, and that she wasn't even going to discuss the weight issue at this time."<sup>69</sup> At the meeting's conclusion, the supervisor placed Powell on a thirty-day performance plan but terminated Powell before the end of the plan period.<sup>70</sup>

Throughout her yearlong employment with Gentiva, Powell was morbidly obese, with a BMI slightly over forty.<sup>71</sup> Powell's weight did not interfere with her job performance, however; according to her own deposition testimony, her obesity "[a]bsolutely [did] not" impact her ability

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65. 42 U.S.C. § 12102(1) (2012).

66. No. 13-0007-WS-C, 2014 WL 554155 (S.D. Ala. Feb. 12, 2014), *appeal dismissed*, No. 14-11120 (11th Cir. May 19, 2014).

67. *Id.* at \*1.

68. *Id.*

69. *Id.* at \*3 (second and third alterations in original).

70. *Id.* at \*4.

71. According to the facts in the district court record, Powell stood 5'3" tall and weighed approximately 230 pounds. *Id.* at \*1.

to perform her former account executive position.<sup>72</sup> Powell did not have any health conditions or limitations as a result of her obesity; in fact, she exercised regularly.<sup>73</sup> Thus, in spite of her supervisor's comments, Powell failed to prove that she was substantially limited in a major life activity or that her employer regarded her as substantially limited.<sup>74</sup> Accordingly, the district court granted summary judgment to Gentiva, stating that Powell had "improperly equate[d] a physical characteristic (i.e., overweight status) with an impairment."<sup>75</sup> The court went on to note that the ADA only protected impaired individuals, and "plenty of people with an 'undesirable' physical characteristic are not impaired in any sense of the word."<sup>76</sup>

*Gentiva* illustrates precisely why the protections provided by the ADA to obese workers are limited. If a worker's obesity substantially interferes with her job performance, the ADA may provide a remedy. Similarly, if there is a record showing that the worker's obesity has substantially interfered with her job performance, the ADA may provide a remedy. Finally, if an employer believes that a worker's obesity substantially interferes with her job performance, the ADA may provide a remedy. But without a substantial limitation, a record of a substantial limitation, or an employer's belief regarding the existence of a substantial limitation, the ADA does not provide obese workers with a remedy. In other words, if an employer takes an adverse employment action against an obese worker because the employer believes that the worker's weight will interfere with the worker's productivity or will increase operating costs (regardless of the validity of the employer's belief), then the ADA can potentially provide a remedy for the worker in the post-2008 regime. But absent evidence that an employer's productivity/cost concerns motivated the adverse employment action, obese workers do not have a remedy for weight-based discrimination in the workplace under the ADA.

This limitation in the ADA's protection becomes particularly salient for obese individuals who may work for employers with taste-based preferences against obese employees. Employers taking adverse employment actions against obese workers because they think obese workers are less productive or more costly may violate the ADA in the post-amendments legal regime. But employers who simply do not like having obese individuals on their payroll do not necessarily violate the ADA, even in the post-Amendments legal regime. To the extent that employers have taste-based preferences against employing the obese, these preferences may be particularly strong in occupations like Powell's—that

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72. *Id.*

73. *Id.*

74. *Id.* at \*7.

75. *Id.*

76. *Id.*

is, in sales and other public-interaction occupations, where workers are required to be the face of the employer's company.

In the absence of a federal prohibition against weight-based discrimination in the labor market, the ADA may now offer a viable remedy for some victims of the obesity wage and employment penalty. But to the extent that the penalty is driven by employer taste-based preferences, the ADA will always come up short. Because prior economics research and prior litigation have both indicated that the obesity penalty may be particularly large and persistent for women,<sup>77</sup> the next Part considers an alternative legal framework for protecting obese women in the labor market: Title VII's prohibitions against sex discrimination. When weight discrimination is based on employer tastes, and not productivity/cost concerns, framing the discrimination as a form of sex discrimination has the potential to avoid the limitations inherent in the ADA.

## II.

### WEIGHT DISCRIMINATION AS SEX DISCRIMINATION

The remedy provided by the ADA for workers who experience weight-based discrimination in the labor market is incomplete. Yet in situations where adverse employment actions are based on employer taste-based preferences for thinness, another federal anti-discrimination statute could provide a more complete, alternative remedy to the ADA. If employer taste-based preferences for thinness are linked with other employer taste-based preferences explicitly prohibited by federal law—such as employer preferences for race or sex—then the preferences for thinness may also violate federal law under the plus-theory of discrimination. For example, if employers treat weight in female employees differently from weight in male employees, such disparate treatment may violate Title VII of the 1964 Civil Rights Act under the sex-plus-weight theory of liability.

As noted in the introduction, previous empirical research has suggested that many employers may behave in precisely this manner, and such behavior could be driving the obesity penalty for women. Differences in demographics, education, and location can largely explain the gap between the wage and employment outcomes of obese and non-obese men, but the same is not true for women. Economists have found that gaps in wage and employment still exist between obese and non-obese women even after controlling for demographic, educational, and geographic disparities.<sup>78</sup>

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77. See, e.g., Averett & Korenman, *supra* note 2, at 306, 314-19; Pagán & Dávila, *supra* note 2, at 763; Cawley, *supra* note 2, at 460-63; see also *infra* Part II.A.

78. See Gortmaker et al., *supra* note 2, at 1010; Averett & Korenman, *supra* note 2, at 314-19; Pagán & Dávila, *supra* note 2; Cawley, *supra* note 2, at 763-65.

Consequently, this Part considers an alternative mechanism through which female obese workers who encounter the effects of the obesity penalty in the labor market may seek a legal remedy. The sex-plus-weight theory of discrimination under Title VII is a viable theory of liability available to women whose employers respond more negatively to weight in women than to weight in men.<sup>79</sup> In Part II.A, I discuss the sex-plus-weight theory of liability under Title VII, which women have successfully used in the past to defeat explicit employer policies that regulated the weight of women, but not men, in the workplace. Part II.B considers the potential limitations of the sex-plus-weight theory.

#### *A. Sex-Plus-Weight Liability under Title VII*

Title VII appears to be a more viable alternative to the ADA for obese women who experience weight discrimination in the labor market—given the prior empirical evidence suggesting that weight discrimination may be intertwined with sex discrimination, and given that the ADA cannot provide a remedy for employer taste-based preferences for thinness in their employees. Although the idea of tying weight discrimination to underlying sex discrimination may seem like a stretch, a legal theory has already been used successfully to make this connection under Title VII. The sex-plus theory of liability under Title VII alleges that the employer treats a certain characteristic better in one sex than the employer treats the same characteristic in the opposite sex. Recognition of this theory of Title VII liability dates back to the 1971 Supreme Court decision, *Phillips v. Martin Marietta Corp.*<sup>80</sup>

In *Phillips*, the employer-defendant, Martin Marietta, had a policy against hiring women with preschool-aged children, but not men with preschool-aged children. The plaintiff, Ida Phillips, had preschool-aged children and had applied, but had been rejected, for a position in which approximately three-quarters of all applicants hired were women.<sup>81</sup> Thus, Phillips would have had a difficult time bringing a traditional disparate treatment or disparate impact case under Title VII since Martin Marietta was obviously willing to hire women (just not women with preschool-aged children). Phillips, as a result, brought the case under the theory that by treating women with preschool-aged children differently than men with

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79. Because Title VII prohibits sex discrimination against both men and women, this sex-plus-weight theory of liability would conversely be available to men whose employers treated weight in men more negatively than weight in women. Nonetheless, since prior empirical research, *see* sources cited *supra* note 2, and the empirical research presented in Part III all strongly indicate that the opposite is true, this Part will focus on using Title VII to protect obese female workers who endure harsher treatment from employers than do their obese male coworkers.

80. 400 U.S. 542, 544 (1971).

81. *Id.* at 543.

preschool-aged children, Martin Marietta was discriminating on the basis of sex.<sup>82</sup> The Supreme Court agreed and endorsed the sex-plus theory of liability, at least with respect to the right to have children.<sup>83</sup>

Using the logic of *Phillips*, a sex-plus-weight case would take the same sex-plus theory and allege that an employer who treats weight in women differently than weight in men violates Title VII. Yet extending the theory from sex-plus-reproduction all the way to sex-plus-weight is not necessarily straightforward. The Court has consistently regarded the right to have children as a fundamental right,<sup>84</sup> and once a person has a child, being a parent becomes virtually an immutable characteristic.<sup>85</sup> In contrast, weight is at least somewhat mutable, and the right to weigh a certain amount is by no means a fundamental right.

Nonetheless, federal courts have extended the sex-plus theory to weight cases. The viability of the sex-plus-weight theory under Title VII has been tested several times in the context of airline weight restrictions for female flight attendants. The first case that challenged airline weight restrictions for female flight attendants was against Northwest Airlines in the early 1970s.<sup>86</sup> The plaintiffs in *Laffey v. Northwest Airlines, Inc.* objected to the airline's imposition of severe weight restrictions on female flight attendants, without imposing any weight restrictions on male flight attendants.<sup>87</sup> According to the plaintiffs' evidence, female flight attendants had to sign a contract at the beginning of their employment stating, "I understand that among the qualifications and requirements of a stewardesses' position [is] . . . weight in proportion to height, [and] that failure to maintain such qualification[] . . . will be cause for termination of my employment."<sup>88</sup> Male flight attendants did not have to sign an appearance- or weight-related contract.<sup>89</sup> In addition, Northwest weighed the female flight attendants at least twice per year and grounded or terminated any female flight attendants who failed to meet required weight

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82. *Id.* at 544.

83. *Id.*

84. *See* *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) ("[T]he Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential'" (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (White, J., concurring))).

85. *Cf.* *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."). For a recent article questioning the usefulness of the immutability standard in the employment discrimination context, see Jessica A. Clarke, *Against Immutability*, 125 *YALE L. J.* 2 (2015).

86. *See* *Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973).

87. *Id.* at 773.

88. *Id.*

89. *Id.*

standards.<sup>90</sup> In analyzing the plaintiffs' proof, the district court did not engage in any analysis about the mutability of weight; instead the court focused on Northwest's failure to "require equal skill, effort and responsibility" from male and female flight attendants.<sup>91</sup> The imposition of unequal requirements on men and women with the same job, according to the court, was sufficient to violate Title VII.<sup>92</sup>

A similar case arose in the Ninth Circuit during the latter half of the 1970s. In *Gerdom v. Continental Airlines, Inc.*,<sup>93</sup> the plaintiffs challenged Continental Airlines's imposition of weight requirements solely on female flight attendants. In response, Continental argued that imposing weight requirements on women did not violate Title VII for two reasons. First, Continental argued that weight requirements were akin to grooming requirements (such as employer-required business attire or hairstyle), and thus, outside the purview of Title VII's regulations.<sup>94</sup> Second, Continental asserted that its business model relied on having thin, female flight attendants to target its principal customers, travelling businessmen.<sup>95</sup> In rejecting both arguments, the Ninth Circuit held that even grooming requirements would violate Title VII if they failed an equal burdens analysis—that is, if grooming requirements were not "even-handedly applied to employees of both sexes."<sup>96</sup> The Ninth Circuit also reminded Continental that flight attendants' primary purpose was ensuring safety and "serving passengers on airplanes," not being thin and attractive.<sup>97</sup> Continental, as a result, had violated Title VII.<sup>98</sup>

The early airline cases provide the most blatant examples of differential treatment by gender on the basis of weight: a strict weight policy for women and no policy for men. The more recent airline cases have involved more subtle distinctions between the weights of women and men. For example, in *Frank v. United Airlines*,<sup>99</sup> the weight policy challenged by the female flight attendant plaintiffs required women to maintain a weight consistent with a medium-size frame, while men only had to maintain a weight consistent with a large-size frame. Even though United imposed weight requirements on both sexes, the Ninth Circuit concluded that the requirements "applie[d] less favorably to one gender," failed an equal

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90. *Id.* at 773-74.

91. *Id.* at 789-90.

92. *Id.* Note that the airline conceded on appeal that the imposition of a weight policy solely on women violated Title VII. *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 444 (D.C. Cir. 1976).

93. 692 F.2d 602, 603 (9th Cir. 1982).

94. *Id.* at 605.

95. *Id.* at 609.

96. *Id.* at 605-06.

97. *Id.* at 609.

98. *Id.* at 609-10.

99. 216 F.3d 845, 848, 854 (9th Cir. 2000).

burdens analysis, and, consequently, violated Title VII.<sup>100</sup> Federal district courts have also taken an unfavorable view of similar weight requirements by gender imposed by Pan American Airlines and Delta Airlines.<sup>101</sup>

Even for airlines with more equitable weight policies for men and women, federal courts have found airlines that enforce these policies differentially by gender liable under Title VII. In another case against United Airlines, *Airline Pilots Association, International v. United Airlines, Inc.*,<sup>102</sup> a federal district court held that enforcing weight standards more harshly against female flight attendants than against male flight attendants violated Title VII, even if the weight standards, on their face, were relatively equal. Outside the airline context, plaintiffs have likewise succeeded in demonstrating that differential enforcement of weight standards by gender violates Title VII. For example, in *Donoghue v. Orange County*,<sup>103</sup> the Ninth Circuit held, *inter alia*, that the trial court had erred by entering a directed verdict dismissing the plaintiff's Title VII disparate treatment claim and remanded for a new trial, where the plaintiff had presented evidence that the sheriff's department applied its gender-neutral weight guidelines for the training program more strictly to female officers than to male officers.

Considered together, these cases stand for the proposition that employers who impose weight-based policies that burden one gender more than the other run afoul of Title VII. Weight-based policies need not be facially disparate to violate Title VII; facially neutral policies that are enforced differentially by gender also violate Title VII. If the implications of prior empirical research are correct—and employers are disparately penalizing obese female workers—the Title VII sex-plus-weight theory of liability may provide these female workers with a more complete legal remedy than the ADA.

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100. *Id.* at 854 (quoting *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 608 (9th Cir. 1982)).

101. *See* *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, No. C 84-4600 TEH, 1987 WL 246612, at \*1 (N.D. Cal. Apr. 30, 1987) (finding that Pan American violated Title VII by “adopting, administering and enforcing a weight policy which discriminates against female flight attendants” and “condemn[ing] sexually discriminatory work conditions which have historically saddled the position of female flight attendants in the airline industry”); *Horton v. Delta Airlines, Inc.*, No. C-93-0225-VRW, 1993 WL 356894, at \*3 (N.D. Cal. Sept. 3, 1993) (“admonish[ing]” Delta for maintaining different weight standards by gender even after the *Pan American* ruling based on an almost identical weight policy for flight attendants). The plaintiff in *Horton* ultimately lost her Title VII claim against Delta because she failed to demonstrate that she would have met Delta's weight standards even if the airline had allowed her to maintain a weight in accordance with a large body frame (the standard imposed on male flight attendants). *Id.* at \*3.

102. 480 F. Supp. 1107, 1109-10 (E.D.N.Y. 1979).

103. 848 F.2d 926, 928-29, 932-33 (9th Cir. 1987).

### *B. Limitations of the Sex Discrimination Framework*

Like the ADA, Title VII does not overtly prohibit weight discrimination in the labor market. Accordingly, the sex-plus-weight theory has some limits in its ability to help obese workers who encounter labor market discrimination. The first potential limitation of the sex-plus-weight liability framework is that the previous successful sex-plus-weight cases center on *explicit* employer weight policies. Explicit weight restrictions are difficult to find outside the context of airline and law enforcement jobs, where weight arguably has some safety implications.<sup>104</sup> But presumably, employers may impose *implicit* weight restrictions as well. In other words, employers who do not hire, promote, or give raises to obese women may not have any documentation or written policies regarding their negative attitudes towards weight in women. Nor do employers necessarily reveal to obese women that they decided not to hire or promote them because of their weight. In the aftermath of the airline and law enforcement cases discussed in Part II.A, the disparate treatment of women's weight by employers is now more likely *implicit*. Proving Title VII liability based on an employer's unstated, implicit weight policy is undoubtedly more difficult than proving Title VII liability based on an explicit weight policy.

The second, more critical limitation of the Title VII sex-plus-weight liability framework is that it only works if employers in fact treat women's weight differently than men's weight. If employers exhibit similar taste-based preferences for thinness regardless of gender, then the Title VII sex-plus framework cannot provide a viable remedy for obese workers who fall victim to the weight-based wage and employment penalty in the labor market. Only if employers treat obesity in women more negatively than they treat obesity in men (or vice versa)<sup>105</sup> can Title VII provide a remedy.

Considering the limitations of the sex discrimination framework, as well as the limitations of the disability discrimination framework discussed in Part I.C, the question arises whether either legal framework is capable of meaningfully improving wage and employment outcomes of the obese. Outside the jurisdictions that explicitly prohibit weight discrimination in the labor market, should obese workers who experience an adverse employment action based on their weight attempt to pursue a legal remedy under the ADA? Title VII? Both? These questions highlight the importance of taking a step back and developing a better understanding of exactly what is happening to obese workers in the labor market. Analyzing labor market data may provide a clearer picture of the demographic and occupational

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104. Indeed, explicit weight restrictions may become even rarer in the post-ADAAA world since the EEOC has successfully taken the position in court that severe obesity can be a covered disability under the ADA. See Part I.B.

105. See sources cited *supra* note 2.

characteristics of workers who fall victim to the obesity penalty, which in turn, should better equip legal scholars to answer questions about what types of legal remedies are most appropriate for obese workers who encounter weight discrimination in the labor market, whether a new legal remedy is needed for such workers, and whether current legal remedies are adequate. The next Part takes up precisely this task.

### III.

#### PRODUCTIVITY OR PREFERENCES? AN EMPIRICAL ANALYSIS

Determining the principal source(s) of the obesity wage and employment penalty is difficult from previous economics research. Only a handful of U.S. datasets collect labor market, demographic, and health status information.<sup>106</sup> Even in these datasets, obtaining direct measures of productivity is difficult; obtaining measures of employer tastes for thinness is impossible. Using the limited available data, perhaps the most careful and thorough evaluation of the hardships endured by obese workers heretofore came a decade ago from economist John Cawley.<sup>107</sup> Cawley demonstrated that even after taking differences in education, skill level, family background, and demographics into account, a large wage penalty existed for obese women in the labor market.<sup>108</sup> His results indicated that something besides employer productivity/cost concerns might be responsible for at least some of the hardships faced by obese workers; his results also suggested that these hardships might have a gender component.<sup>109</sup>

Beyond these suggestive observations, neither Cawley nor other economists have been able to say much else definitively about what drives the obesity penalty in the labor market. This Part utilizes a new empirical approach to get around the lack of data on employee productivity and employer tastes, focusing on two types of occupations in which employer concerns about obese workers are likely to be most acute: public-interaction occupations and physical-activity occupations. Furthermore, the empirical analysis presented here separately considers men and women, which allows for exploration of any differential effects of obesity by gender. Part III.A discusses the theory behind focusing on these two types of occupations,

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106. The three most notable datasets that collect both health and labor market information are the Bureau of Labor Statistics' National Longitudinal Survey of Youth, <http://www.bls.gov/nls/home.htm>; the Center for Disease Control's Behavioral Risk Factor Surveillance System, <http://www.cdc.gov/brfss/>; and the U.S. Department of Agriculture's 2006-2008 Eating and Health Module (once merged with the Current Population Survey), [http://www.ers.usda.gov/data-products/eating-and-health-module-\(atus\).aspx](http://www.ers.usda.gov/data-products/eating-and-health-module-(atus).aspx).

107. See Cawley, *supra* note 2, at 460-63.

108. *Id.*

109. See *id.* at 468.

Part III.B considers the necessary empirical methodology, Part III.C examines the data, and Part III.D presents the results.

*A. Focusing on Physical-Activity and Public-Interaction Occupations: A Theory*

Obesity has the potential to affect an individual's health and an individual's appearance, which may both be relevant in the workplace. With regard to obesity's impact on health, researchers have linked obesity to higher risks of developing coronary heart disease, type 2 diabetes, high blood pressure, high cholesterol, osteoarthritis, gynecological problems, sleep apnea, and other respiratory problems.<sup>110</sup> These diseases could interfere with an individual's performance at work by, for instance, increasing absenteeism or limiting an individual's ability to perform certain tasks. Yet beyond increasing an individual's likelihood of developing certain diseases, obesity may also cause individuals to develop functional limitations in their ability to perform physical tasks, which in turn, could affect both their ability and their willingness to perform physical tasks at work.

Health researchers Ferraro et al., for example, found in a twenty-year panel study of adults ages twenty-five to seventy-seven that obesity increased an individual's self-reported likelihood of developing limitations of both upper-body functions (including dressing oneself, reaching for a five-pound object, and gripping) and lower-body functions (including standing up from an armless chair, climbing at least two stairs, getting into a car, running errands, and doing light chores).<sup>111</sup> Health researchers Alley and Chang reached similar conclusions in their study of adults ages sixty and older, finding that obesity increased an individual's likelihood of developing at least one functional limitation (defined in the study as a self-reported difficulty or inability to walk a quarter mile, walk up ten stairs without resting, kneel, lift ten pounds, walk between rooms on the same floor, or stand from an armless chair).<sup>112</sup> Although all levels of obesity increased an individual's likelihood of developing a functional limitation, the increase was especially dramatic for morbid obesity. According to Alley and Chang, a morbidly obese individual was more than five times as likely to develop a functional limitation as a normal-weight individual.<sup>113</sup> Similarly, a health research study of women ages forty-five to fifty-six by

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110. NAT'L INSTS. OF HEALTH, *Foreword to CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS*, No. 98-4083, at vii (1998), [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.pdf](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf). These guidelines represent the earliest and most comprehensive summary of the medical research on the health consequences of obesity.

111. Ferraro et al., *supra* note 13, at 834-36.

112. Alley & Chang, *supra* note 13, at 2020-22.

113. *Id.* at 2020.

Hergenroeder et al. found that obese women not only self-reported lower rates of physical function than normal-weight women but also performed worse than normal-weight women at physical tasks assigned to them by the researchers.<sup>114</sup> The obese women—and particularly the morbidly obese women—in this study exhibited slower speeds when asked to walk for six minutes and when asked to stand up from a chair.<sup>115</sup>

All of these health studies indicate that obese individuals, and especially morbidly obese individuals, might be less likely than normal-weight individuals to work in occupations that emphasize physical activity. Any functional limitations resulting from obesity could lower an obese worker's productivity in occupations emphasizing physical activity, thus lowering employer demand for obese workers in such occupations. At the same time, any functional limitations resulting from obesity could cause an obese worker pain or discomfort in performing physical tasks, thus lowering an obese worker's willingness to work in occupations emphasizing physical activity. Whether driven by employers, obese workers, or both, the prediction based on these health studies is the same: obese individuals should be less likely to work in physical-activity occupations.

In addition to its effects on health, obesity has the potential to impact an individual's appearance. Within the economics literature, Rooth has demonstrated that photos of white males and females who had been previously rated as attractive in a survey were later rated as unattractive after the photos had been manipulated to make these individuals appear obese.<sup>116</sup> Similarly, Hersch has shown that for white females, black females, and white males surveyed in the Detroit Area Study, obesity had a negative impact on how observers rated their attractiveness.<sup>117</sup> Obesity's impact on personal appearance may have further negative repercussions in the workplace, particularly in public-interaction jobs.

Prior economics research on the impact of beauty in the labor market indicates that less attractive individuals are less likely to work in occupations that emphasize public interaction. Biddle and Hamermesh, for instance, demonstrated that attractive people were more likely to work in occupations requiring a high degree of interaction between employees and customers—such as sales, receptionist, cashier, and restaurant occupations.<sup>118</sup> Biddle and Hamermesh also showed that attractive

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114. See Hergenroeder et al., *supra* note 13, at 11-20.

115. *Id.* at 16-17.

116. Dan-Olof Rooth, *Obesity, Attractiveness, and Differential Treatment in Hiring*, 44 J. HUM. RESOURCES 710, 711-12, 714-16 (2009).

117. Joni Hersch, *Skin Color, Physical Appearance, and Perceived Discriminatory Treatment*, 40 J. SOCIO-ECON. 671, 674-77 (2011).

118. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1190-91 (1994).

attorneys were more likely to work in the private sector, where attorneys must attract their own clients, than in the public sector, where the client population is given.<sup>119</sup> Likewise, the previously mentioned experiment by Rooth, which tested the impact of unattractiveness and obesity on interview callback rates, demonstrated that both had a particularly negative impact on callback rates for jobs requiring a high degree of communication with the public, including sales occupations.<sup>120</sup>

The results of all three studies led their authors to conclude that rewards to beauty may be driven at least in part by customer discrimination against the unattractive. If customers prefer to deal with non-obese individuals (and reflect these preferences in their purchases), then over time, employers will avoid hiring obese individuals for public-interaction occupations. The result will be fewer obese workers in public-interaction jobs. Of course, if it is true that relatively fewer obese individuals work in public-interaction jobs, another possible mechanism is that obese workers themselves (and not employers) are avoiding public-interaction occupations. One possible hypothesis is that obesity's negative effects on personal appearance may cause an obese worker embarrassment or discomfort in communicating with others, thus lowering an obese worker's willingness to work in public-interaction jobs. Regardless of who is driving the outcomes, the prediction based on the beauty literature is the same: obese individuals should be less likely to work in public-interaction occupations.

Parts III.B, III.C, and III.D present data testing these predictions. First, I test the veracity of the prediction above, examining whether obese workers are in fact less likely to work in public-interaction and physical-activity occupations. Second, I consider the wage implications of any differences in the occupational characteristics of obese workers seen in the data. The purpose of the data analysis presented in Parts III.B, III.C, and III.D is to gain insight into whether the penalty endured by the obese in the labor market is primarily productivity-based or taste-based. Determining the source of the obesity penalty will provide greater clarity as to whether a legal remedy is needed, and if so, what kind of remedy is most appropriate.

### *B. Methodology*

Part III.A hypothesized that obese workers should be relatively underrepresented in physical-activity and public-interaction occupations. Testing these hypotheses requires comparing how important physical activity and public interaction are, on average, in jobs held by workers of

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119. Daniel S. Hamermesh & Jeff E. Biddle, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. LAB. ECON. 172, 190-96 (1998).

120. Rooth, *supra* note 116, at 718-19.

different BMI classifications. To make such comparisons requires objective ratings of how important physical activity and public interaction are to every job in the economy.

Let  $j_1$  be such a rating, indicating the importance of physical activity to a particular job; let  $j_2$  indicate the importance of public interaction to a particular job. To test the hypotheses, I will separately average the occupational importance of physical activity ( $j_1$ ) for normal-weight workers, overweight workers, obese workers, and morbidly obese workers. I will then test whether the average  $j_1$  for overweight workers, obese workers, and morbidly obese workers is statistically different from the average  $j_1$  for normal-weight workers. I will repeat this comparison for the occupational importance of public interaction ( $j_2$ ). The hypotheses presented in Part III.A predict that the average  $j_1$  and  $j_2$  for normal-weight workers will be greater than the average  $j_1$  and  $j_2$  for overweight, obese, and morbidly obese workers.

If either hypothesis is correct, and the average  $j_1$  or  $j_2$  statistically differs between obese and non-obese workers, then two questions arise. First, why do the differences in the occupational characteristics of obese and non-obese workers exist—is it because of employer preferences, worker preferences, or both? Second, how (if at all) do differences in occupational characteristics contribute to the obesity penalty? To answer both of these questions requires estimating a standard hedonic wage regression:

$$(1) \ln W = X\beta + J\gamma + \delta O + (O \cdot J)\mu + \varepsilon.$$

In this regression, the dependent variable,  $\ln W$ , is the natural logarithm of real wages.  $O$  is an indicator variable equal to one if the individual is obese.<sup>121</sup>  $X$  is a vector of individual characteristics that commonly play a role in wage determination, such as education, age, race, marital status, presence of a child, and geographical region. I include  $X$  in regression (1) to control for observable differences in worker productivity so that the analysis compares how wages differ between obese and non-obese workers who are otherwise similar.  $J$  is a vector composed of the physical-activity ( $j_1$ ) and public-interaction ( $j_2$ ) ratings of interest, and  $O \cdot J$  is a vector of interaction terms that interacts whether the individual is obese with each occupational characteristic rating.

If the occupational characteristics of obese workers are systematically different from those of non-obese workers, the value of the estimated coefficient  $\gamma$  in regression (1) will reveal whether these differences are contributing to the wage gap between obese and non-obese workers. A positive  $\gamma$  in regression (1) will indicate jobs that emphasize an

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121. Note that in the above model, I assume for simplicity that only two BMI groups, obese and non-obese, exist. In the empirical analysis presented in Part III.D, I will consider all five medical classifications of BMI (underweight, normal weight, overweight, obese, and morbidly obese).

occupational characteristic of interest pay more than jobs that do not emphasize the characteristic; a negative  $\gamma$  will indicate that such jobs pay less. If obese workers are less likely than non-obese workers to hold jobs with positive- $\gamma$  occupational characteristics, then these differences in occupational characteristics will contribute to the wage gap between the obese and the non-obese.<sup>122</sup> The sign of the estimated coefficient  $\mu$  also has a useful interpretation. A positive  $\mu$  indicates that obese workers are paid more than other weight groups for performing the same job. Conversely, a negative  $\mu$  indicates that obese workers are paid less than other weight groups for performing the same job.

The sign of coefficient  $\mu$  in equation (1) will shed light on whether employers or obese workers are driving any observed differences between obese and non-obese workers in physical-activity and public-interaction occupations. Any differences in the occupational characteristics of obese and non-obese workers must be the result of pressures from the labor-supply side (i.e., employers), the labor-demand side (i.e., workers), or both. Employers will be more willing to hire obese workers for jobs in which their weight makes them less costly or more productive than non-obese workers; employers will be less willing to hire obese workers for jobs in which their weight makes them more costly or less productive than non-obese workers. Obese workers will be more willing than non-obese workers to perform job tasks made more pleasant by heavier weight; in contrast, obese workers will be less willing than non-obese workers to perform job tasks made less pleasant by heavier weight.

The sign of  $\mu$  can reveal whether labor supply or labor demand is driving observed differences in the occupational characteristics of obese workers. To understand why, suppose obese workers are less likely to work in jobs that emphasize occupational characteristic  $j_i$ . A positive  $\mu$  (the coefficient on interaction term  $O \cdot j_i$ ) indicates that obese workers demand a higher rate of pay, or a compensating differential, for jobs with occupational characteristic  $j_i$ , presumably because their weight makes that occupational characteristic less pleasant. In this case, employers prefer to hire non-obese workers for such jobs because non-obese workers do not demand a compensating differential and, thus, are cheaper to employ than obese workers. The result would be consistent with a labor-supply-side explanation: fewer obese workers in jobs with characteristic  $j_i$ , and higher rates of pay for the few obese workers in these jobs.

On the other hand, a negative  $\mu$  indicates that employers are not willing to pay obese workers as much as non-obese workers for performing jobs with occupational characteristic  $j_i$ , presumably because obese workers are

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122. Conversely, if obese workers are more likely than non-obese workers to hold jobs with negative- $\gamma$  occupational characteristics, then these differences in occupational characteristics will also contribute to the wage gap between the obese and the non-obese.

less productive or more costly to employ than non-obese workers. In this case, employers would prefer to hire non-obese workers because they generate more profit than obese workers. The result would be consistent with a labor-demand-side explanation: fewer obese workers in jobs with characteristic  $j_i$ , and lower rates of pay for the few obese workers in these jobs.

In sum, the analysis described in this Part will reveal (1) how the occupational characteristics of obese and non-obese workers differ, (2) whether occupational characteristics differ because obese workers keep themselves out of certain types of jobs, or alternatively, because employers keep obese workers out of certain types of jobs, and (3) how differences in occupational characteristics between the obese and non-obese contribute to the obesity penalty. I describe the data necessary to carry out this analysis in the next Part.

### *C. Data*

In order to conduct the analysis above, I match together three publicly available datasets: the 2006-2008 Current Population Survey (“CPS”), the 2006-2008 American Time Use Survey’s Eating and Health Module (“ATUS-EHM”), and the Occupational Information Network (“O\*NET”).<sup>123</sup> The CPS is a widely used labor dataset collected by the Bureau of Labor Statistics (“BLS”), which provides information on participants’ employment characteristics (including wages, employment status, occupation, and industry), their demographic characteristics (including age, sex, race, ethnicity, marital status, presence of children, and education), and geographic characteristics. Participants in the CPS take a monthly labor survey for four months, exit the survey for eight months, then rejoin the monthly survey for a final four months.

The BLS then selects a subset of CPS participants who have completed all eight labor surveys to participate in the ATUS. The primary goal of the ATUS is to document participants’ time use. Nonetheless, ATUS participants between 2006 and 2008 also completed the EHM, which was designed to collect information on participants’ eating habits, meal preparation, and health indicators—including participants’ height and weight. This height and weight information from the ATUS-EHM data can in turn be matched to participants’ labor market responses in the CPS. Thus, the combined CPS-ATUS-EHM data contains information on each participant’s weight, height, demographic characteristics, location, employment status, real hourly wages,<sup>124</sup> industry, and occupation. This

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123. The 2006-2008 CPS data are available at <http://www.bls.gov/cps/>. The 2006-2008 ATUS-EHM data are available at <http://www.bls.gov/tus/ehdatafiles.htm>. The O\*NET data are available at <https://www.onetonline.org/>.

124. Calculating real hourly wages requires several steps. For workers paid by the hour who do not receive overtime, tips, and commissions, hourly wage data are directly available from the CPS. For all

combined data only reveals the name of each participant's occupation, however; it says nothing about the skills and tasks required to perform the occupation. For this kind of occupational characteristic information, additional data are necessary from O\*NET.

O\*NET provides objective ratings of a wide variety of occupational characteristics and skill requirements for all occupations. As the successor to the Dictionary of Occupational Titles ("DOT"), O\*NET provides more comprehensive, nuanced measures of occupational characteristics than the DOT. This analysis uses O\*NET 13.0, which was released in June 2008.<sup>125</sup> O\*NET contains over 400 occupational characteristics, although approximately half of these ratings are duplicative because they examine the same characteristic on different scales. This study uses only the O\*NET characteristics rated on the importance and context rating scales, which both range from 1 (not important) to 5 (essential).

The physical-activity characteristics from O\*NET examined here include the importance of general physical activity, dynamic strength, explosive strength, static strength, trunk strength, kneeling, standing, walking, moving objects, reaction time, speed of limb movement, and stamina. The public-interaction characteristics from O\*NET examined here include the importance of communicating with persons outside the organization, dealing with external customers, performing or working directly with the public, providing consultation and advice, selling or influencing others, negotiation, and persuasion. Furthermore, the estimates of wage regression (1) also include controls for a wide range of other occupational characteristics, including the importance of coworker/supervisor interaction, general interaction, mental skill, physical skill, and work conditions.<sup>126</sup>

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other workers with reported weekly earnings, I divide reported weekly earnings by usual hours worked to obtain hourly wages. I then multiply all top-coded weekly earnings using Barry Hirsch & David Macpherson, Pareto Estimates of Mean Earnings above CPS Weekly Earnings Top-Code Caps (2015), <http://www.unionstats.com>. For details on the database's construction, see Barry Hirsch & David Macpherson, *Union Membership and Coverage Database from the Current Population Survey: Note*, 56 INDUS. & LAB. REL. REV. 349 (2003). Finally, I used the Consumer Price Index for all goods and services purchased by urban households in order to convert the hourly wages of 2006 and 2007 respondents into 2008 dollars. The Consumer Price Index data are available at <http://www.bls.gov/cpi/>.

125. O\*NET 13.0 was last updated in June 2009. Although the O\*NET database is frequently revised and updated, the version of O\*NET used does not appear to affect the results presented here. An earlier version of this study used O\*NET 4.0, and the results were virtually identical.

126. I control for these characteristics by constructing principal component factors in the same manner as Barry T. Hirsch & Julia Manzella, *Who Cares—and Does it Matter? Measuring Wage Penalties for Caring Work*, in 41 GENDER CONVERGENCE IN THE LABOR MARKET 213 (Solomon W. Polacheck et al. eds., 2015), and Barry T. Hirsch & Edward J. Schumacher, *Underpaid or Overpaid? Wage Analysis for Nurses Using Job Versus Worker Attributes*, 78 S. ECON. J. 1096 (2012). I then include the resulting factors as controls in the wage regressions. The characteristics that make up the coworker/supervisor interaction factors include the importance of coaching and developing others; communicating with supervisors, peers, or subordinates; cooperating; developing and building teams; guiding, directing, and motivating subordinates; social orientation; working in close physical proximity to others; and working with a team. The characteristics that make up the general interaction factor

Matching the O\*NET characteristics to the CPS-ATUS-EHM data requires a two-step matching procedure. First, I match O\*NET's occupational codes to the closely related Standard Occupational Classification System ("SOC") codes, and second, I match the SOC codes to the U.S. Census Codes used by the CPS-ATUS-EHM. This process results in a one-to-one match for most CPS occupations; however, some CPS occupations map onto two or more O\*NET occupations. For these CPS occupations, the occupational characteristics are the weighted average of the O\*NET occupational characteristics, using the same weighting procedure described by Hirsch and Schumacher,<sup>127</sup> and using the BLS's 2008 occupational employment statistics as weights. This procedure matches virtually all CPS occupations to O\*NET occupations; the few remaining occupations are manually matched and weighted in the same manner as Hirsch and Schumacher's data.<sup>128</sup>

Together, the matched CPS-ATUS-EHM-O\*NET dataset contains everything necessary to carry out the analysis described in Section III.B. I restrict the final dataset to respondents between ages eighteen and sixty-five (inclusive) who are not currently pregnant. This restriction leaves 10,861 observations for men and 11,324 observations for women.<sup>129</sup> Using this combined data, the next Part examines the results from the empirical methodology described above.

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include the importance of contact with others, face-to-face discussions, interpersonal relationships, oral expression, social occupation, and speaking. The characteristics that make up the mental skill factors include the importance of category flexibility, deductive reasoning, flexibility of closure, fluency of ideas, inductive reasoning, information ordering, mathematical reasoning, memorization, number facility, originality, perceptual speed, problem sensitivity, selective attention, speed of closure, time sharing, written comprehension, and written expression. The characteristics that make up the physical skill factors include the importance of arm-hand steadiness, auditory attention, control precision, depth perception, dynamic flexibility, extent flexibility, far vision, finger dexterity, glare sensitivity, gross body coordination, gross body equilibrium, hearing sensitivity, manual dexterity, multilimb coordination, near vision, night vision, peripheral vision, rate control, response orientation, sound localization, speech clarity, speech recognition, visual color discrimination, and wrist-finger speed. Finally, the O\*NET characteristics that make up the unpleasant work condition factors include the importance of working in a cramped space; dealing with physically aggressive people; dealing with unpleasant or angry people; distracting or uncomfortable noise levels; exposure to contaminants; exposure to disease; exposure to hazardous conditions; exposure to hazardous equipment; exposure to high places; exposure to minor burns, cuts, bites, or stings; exposure to radiation; exposure to whole body vibration; extremely bright or inadequate lighting; frequency of conflict situations; exposure to outdoors and weather; very hot or cold temperatures; wearing common safety equipment; and wearing specialized safety equipment.

127. See Hirsch & Schumacher, *supra* note 126.

128. Footnote 15 of Hirsch & Schumacher, *supra* note 126 provides an excellent description of the matching process; the data here are matched in precisely the same manner. Note, however, that the results of this study are not sensitive to the use of weights in mapping two or more O\*NET occupations onto one CPS occupation. Using simple averages, instead of weighted averages, produces very similar results to the ones presented in Tables 1, 2, and 3.

129. The number of observations with real hourly wage information is slightly smaller: 9,285 men and 10,162 women.

#### *D. Results*

Table 1 presents the summary statistics by BMI classification for men, and Table 2 presents the summary statistics for women. Turning first to men, obese men appear somewhat distinguishable from normal-weight men: they are older, have slightly less education, have lower hourly wages, are more likely to be married with children, and are more likely to work in jobs that emphasize all types of physical activity. Obese men are also slightly more likely than normal-weight men to work in jobs that require dealing with external customers, whereas normal-weight men are slightly more likely than obese men to work in jobs that require public speaking. Otherwise, obese and normal-weight men are equally likely to work in jobs that require other types of interaction with the public. Moreover, morbidly obese men appear almost indistinguishable from normal-weight men; morbidly obese men are only statistically distinguishable from normal-weight men in age. Although the lack of statistical difference may be partially due to the small sample of morbidly obese men (N=282), the point estimates for characteristics like education, being married, and presence of children are comparable between normal-weight and morbidly obese men. Most importantly for the present study, morbidly obese men appear just as likely as normal-weight men to work in jobs that emphasize both physical activity and public interaction.

In contrast to the lack of a pattern in the men's data, a very clear pattern emerges by BMI classification for the women's data presented in Table 2. In comparison to normal-weight women, overweight women have attended fewer years of school and earn lower wages, but they are more likely to be married, have children, and be members of a minority group. Most relevant for the present study, overweight women are more likely than normal-weight women to work in jobs that require physical activity of all kinds, including strength, movement, and stamina. But overweight women are less likely than normal-weight women to work in jobs that require all kinds of public interaction, including communicating with people outside the organization, negotiating, and selling. These patterns in the data become more pronounced as women increase in BMI classification from overweight to obese to morbidly obese. Thus, morbidly obese women are the most likely to work in physically demanding jobs, and are the least likely to work in public-interaction jobs.

These summary statistics indicate that systematic differences exist between the occupational characteristics of obese and non-obese women, but not entirely in the manner hypothesized. As predicted, the heavier a woman becomes, the less likely she is to work in a public-interaction job. But contrary to prediction, the heavier a woman becomes, the *more* likely she is to work in a physical-activity job. Given the health literature discussed in Part III.A, this surprising result raises two questions: first, what types of physical jobs are held by the heaviest women in the labor market;

and second, why are they working in such jobs? The data demonstrates that the physically demanding jobs held by morbidly obese women in the sample largely consist of healthcare support (such as nurse's aides and home health aides), healthcare practitioners (including registered nurses), food preparation, and childcare.

Table 3, which presents the estimates of equation (1), clarifies the wage implications of the different occupational characteristics of obese workers, and in particular, female obese workers. Columns (1) and (3) control only for the BMI classification and demographic characteristics of men and women, respectively. Columns (2) and (4) add a public-interaction rating, the importance of communicating with persons outside the organization, and a physical-activity rating, the importance of general physical activity.<sup>130</sup> Columns (2) and (4) also report coefficients on the interactions between BMI classification and the physical-activity and public-interaction ratings.

Looking first at the wage regressions for men (columns (1) and (2)), notice that without controlling for occupational characteristics (column (1)), being morbidly obese is associated with an 8.7 percent wage penalty relative to normal-weight men.<sup>131</sup> Simply being obese is not associated with any wage penalty for men, and being overweight is actually associated with a 3 percent wage premium for men. Nonetheless, introducing controls for occupational characteristics in column (2) completely explains the wage penalties and premiums for men seen in column (1): after controlling for occupational characteristics, the estimated coefficients on the overweight and morbidly obese indicator variables are no longer statistically significant. More importantly, working in a physical-activity job is associated with lower wages (relative to other types of jobs), while working in a public-interaction job is associated with higher wages. Finally, note that none of the interaction terms between obesity and occupational characteristic ratings are statistically significant for men. This lack of statistical significance means that obese and morbidly obese men who work in physical-activity jobs and public-interaction jobs are paid just as much as normal-weight men who work in the same jobs.

Turning next to the wage regressions for women (columns (3) and (4)), notice that without the occupational characteristic controls (column (3)), being heavier than normal weight is associated with a wage penalty that is

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130. Controlling for all physical-activity ratings at once is not possible because these ratings are highly correlated. (Similarly, controlling for all public-interaction ratings at once is not possible because these ratings are also highly correlated.) When alternative physical-activity and public-interaction ratings are used, however, the wage results are identical.

131. This percent was calculated from the relevant coefficient (-0.091) in column 1 of Table 3 using the method outlined in Robert Halvorsen & Raymond Palmquist, *The Interpretation of Dummy Variables in Semilogarithmic Equations*, 70 AM. ECON. REV. 474 (1980). All percent interpretations of the coefficients on indicator variables that are mentioned subsequently in the discussion of Table 3 are also calculated in this manner.

at least double the wage penalty experienced by equally heavy men. For women, being overweight is associated with a 3.9 percent wage penalty relative to normal-weight women. Being obese is associated with a 7.1 percent wage penalty, and being morbidly obese is associated with an incredible 16.8 percent wage penalty. As with men, introducing controls for occupational characteristics in column (4) makes the estimated coefficients on overweight, obese, and morbidly obese statistically insignificant. In other words, the obesity wage penalty for women appears to be completely explained by (1) differences in occupational characteristics, and (2) differences in how obese and non-obese women are remunerated for certain occupational characteristics. Also similar to men, working in a physical-activity job is associated with lower wages for women (relative to other types of jobs), while working in a public-interaction job is associated with higher wages. Together, the wage results in Table 3, combined with the prior occupational characteristic figures from Table 2, reveal bleak news for overweight, obese, and morbidly obese women. As a woman gets heavier, she is more likely to work in a low-paying physical-activity job, and she is less likely to work in a high-paying public-interaction job.

Even worse for obese and morbidly obese women is what the interaction terms in column (4) of Table 3 reveal. Neither of the interactions between BMI classification and the physical-activity rating is statistically significant, but both of the interactions between BMI classification and the public-interaction rating are statistically significant and negative. In other words, obese and morbidly obese women working in public-interaction jobs are paid less than normal-weight women working in precisely the same jobs. These estimates already control for other potentially important factors (such as geographic location, demographics and education), so the wage differences appear to be driven solely by differences in weight. Indeed, Tables 2 and 3 indicate that the labor market prospects for obese and morbidly obese women are particularly grim. According to these tables, heavier women are less likely to work in high-paying public-interaction jobs, and even when they manage to secure such jobs, they are paid less than their normal-weight counterparts.

Considering these results in context, the estimates are inconsistent with the hypothesis that productivity effects (whether actual or perceived) are behind the obesity penalty in the labor market. In spite of obesity's potential to negatively impact the musculoskeletal system, obese and morbidly obese men are at least as likely as normal-weight men to work in physically strenuous jobs, while obese and morbidly obese women are *more* likely than normal-weight women to work in physically strenuous jobs. Nor do obese and morbidly obese workers in physical-activity jobs earn less than non-obese workers in physical-activity jobs.

In contrast, the estimates strongly support the hypothesis that taste-based preferences drive the tremendous obesity penalty endured by women in the labor market. Obese women are less likely to work in occupations

that require frequent interaction with customers and members of the public, and the obese women who do work in these public-interaction jobs earn less than normal-weight women in the same jobs. Relating these results back to the theory outlined in Section III.B, the estimates also indicate that the lower numbers of obese women in public-interaction occupations are caused by lower labor demand for obese women (that is, a lower willingness of employers to hire and pay obese women for public-interaction positions). Why employers are less willing to hire and pay obese women for public-interaction positions is not entirely clear, but employers may be reacting to the perceived preferences of their customers to interact with normal-weight women.

#### IV.

##### BIAS INTERTWINED: WEIGHT DISCRIMINATION AS A FORM OF SEX DISCRIMINATION

The results presented in Part III indicate that weight has very different occupational repercussions for women than it does for men. As a woman moves up in BMI classification, she becomes more likely to work in a low-paying physical-activity job, but she becomes less likely to work in a high-paying public-interaction job. Moreover, the few morbidly obese women who manage to secure a public-interaction job are paid significantly less than normal-weight women with exactly the same job characteristics.

These results cast the obesity wage and employment penalty in a light that favors the taste-based preference explanation over the productivity/cost explanation. Employers' taste for thinness in workers seems to extend to women only. Certainly there are employers who are concerned about obesity's effect on their workers' productivity, and certainly there are employees whose obesity reduces their workplace productivity. Yet the data in Part III indicate that obesity does not create the widespread productivity problems in the workplace that anecdotal evidence might suggest. In spite of the medical evidence documenting the negative effect of obesity on the musculoskeletal system, obese workers of both sexes are actually more likely to work in physical-activity occupations than non-obese workers. Moreover, the wage evidence indicates that obese workers are paid just as much for physical-activity jobs as non-obese workers.

In the jobs where obese workers are most likely to be substantially limited or to be regarded as substantially limited by their employers, these workers appear to be doing quite well. Thus, the results in Part III indicate that the 2008 amendments to the ADA (and the accompanying legal developments described in Part I) may not be a tremendous boon to obese workers. Even with courts now interpreting the ADA definition of disability "in favor of broad coverage of individuals under this chapter, to the

maximum extent permitted,”<sup>132</sup> the Act solely protects individuals who are substantially limited or regarded as substantially limited in a major life activity. Yet, the empirical evidence indicates that employer perceptions regarding obesity-related limitations are not driving the obesity wage and employment penalty.

Instead, the bulk of the weight discrimination occurring in the labor market appears to be another form of sex discrimination against women. The discrimination does not extend to all women, just women with an above-normal-weight BMI. And the discrimination appears to be particularly acute for women in jobs that require interaction with customers and the public, suggesting that employers’ tastes for thinness in women may be principally driven by their perceptions that customers prefer to deal with thinner women. Weight discrimination itself is not illegal at the federal level; neither weight nor personal appearance is a federally protected class. Thus, employers can theoretically appease their customers’ and their own taste-based preferences for thinner employees without running afoul of federal law.<sup>133</sup> Yet, as soon as employer taste-based preferences for thinness become inextricably intertwined with other employer taste-based preferences that *are* explicitly prohibited by federal law—such as employer preferences for sex—then the preferences for thinness violate Title VII.

In the face of a Title VII sex-plus-weight claim brought by a woman, an employer could attempt to raise a defense, arguing that customers’ preferences to interact with thinner women are so strong that failure to accommodate these preferences would be disastrous for the business. But even assuming it is true that having thinner women as the face of the company helps an employer’s bottom line, customer preferences and increasing profit are quite tenuous defenses to a Title VII sex discrimination claim. Recall the airline cases discussed in Section II.A, in which the airlines made this argument in an attempt to justify the disparate weight standards they imposed on male and female flight attendants. The airlines argued that their most important customers were male business travelers who preferred thin, female flight attendants.<sup>134</sup> Staying in business, they explained, required keeping these male business travelers happy. As a result, the airlines argued that imposing weight requirements on female

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132. 42 U.S.C. § 12102(4)(A) (2012).

133. Of course, with morbid obesity now increasingly recognized by courts as a disability under the ADA, employers with taste-based preferences for thinness in their employees need to be cautious that their preferences will not be perceived as regarding heavier employees as substantially limited in a major life activity.

134. See, e.g., *Gerdom v. Cont’l Airlines*, 692 F.2d 602, 609 (9th Cir. 1982) (“Continental’s policy would be defensible if Continental could show that being a thin female was a bona fide occupational qualification for serving passengers on airplanes. . . . Continental does not argue that only thin females can do the job, however. . . . It has long been established in the airline industry that passengers’ preference for attendants who conform to a traditional image cannot justify discriminatory airline hiring policies.”).

flight attendants was a business necessity, or alternatively, thinness was a bona fide occupational qualification (“BFOQ”) for female employees.<sup>135</sup>

Nonetheless, federal courts repeatedly rejected airlines’ attempts to raise the business necessity and BFOQ defenses in the sex-plus-weight cases. In *Gerdom*, for instance, the Ninth Circuit concluded that “[t]o the extent [Continental Airlines] suggests a justification based on customer preference . . . such a justification must fail. . . . [G]ender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job.”<sup>136</sup> In another case against Southwest Airlines, a federal district court similarly rejected the airlines’ profit-based defenses, holding, “[S]ex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability.”<sup>137</sup> Indeed, in virtually every airline case, courts highlighted that flight attendants’ real job was to tend to passengers’ needs and keep passengers safe in flight. Neither of these tasks required thinness, let alone the kind of thinness that the airlines were requiring of their female flight attendants. Thus, in spite of the employers’ BFOQ and business necessity defenses, the female flight attendants consistently prevailed on their sex-plus-weight discrimination claims under Title VII.<sup>138</sup>

Given that prior, similar cases have been successfully litigated, and given the strong tie in the data between weight and sex, the best and most appropriate legal remedy for workers who fall victim to the obesity penalty appears to be already in existence and readily available for enforcement. Elimination of the obesity penalty does not necessarily require a new legal remedy, such as protecting weight or personal appearance at the federal level. Yet, despite being the best and most appropriate existing legal remedy for obese workers, Title VII has not received the most attention in recent years.<sup>139</sup> The recent emphasis on using the ADA to remedy weight discrimination in the labor market illustrates the pervasive assumption that an obese worker may be more costly or less profitable than a non-obese worker, just as a more traditionally disabled worker can be more costly or less profitable than a non-disabled worker. And yet the labor market data belies this common assumption, as obese workers are actually more likely to work in jobs where the health literature suggests their weight would most likely interfere with productivity.

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135. *See id.*

136. *Id.*

137. *Wilson v. Sw. Airlines*, 517 F. Supp. 292, 303 (N.D. Tex. 1981).

138. *See, e.g., Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763, 789-90 (D.D.C. 1973); *Gerdom*, 692 F.2d at 605-10; *Frank v. United Airlines*, 216 F.3d 845, 854 (9th Cir. 2000); *Horton v. Delta Airlines, Inc.*, No. C-93-0225-VRW, 1993 WL 356894, at \*3 (N.D. Cal. Sept. 3, 1993); *Airline Pilots Ass’n, Int’l v. United Airlines*, 480 F. Supp. 1107, 1109-10 (E.D.N.Y. 1979).

139. *See sources cited supra* notes 62-64.

Moreover, relying on the amended version of the ADA to remedy the obesity penalty could actually undermine broader efforts to combat the stigmatization of obese individuals. Even though some advocates against anti-fat bias have championed the EEOC's post-ADAAA litigation efforts and have celebrated the increasing number of federal courts recognizing obesity as a disability, others are concerned with the future repercussions of ADA litigation.<sup>140</sup> As stated by Peggy Howell, a board member of the National Association to Advance Fat Acceptance, "There is a lot of conflict in the size acceptance community" over the recent ADA litigation successes.<sup>141</sup> She continued, "I don't consider myself disabled, and some people don't like 'fat' being considered a disability."<sup>142</sup> The concern is that continuing to publicly push obesity as a disability in ADA litigation will solidify obese individuals' status as outsiders. Even worse, it may fuel increased anti-fat bias as well as the common (but as shown here, erroneous) assumption that obesity necessarily reduces an individual's productivity.

With its definitional limitations and possible provocation of further anti-fat bias, the ADA is incapable of fully remedying this latest iteration of sex discrimination in the labor market against women. Title VII offers a more complete solution for obese women—not surprising since a fundamental purpose of the statute is to remedy sex discrimination. In theory, all obese women should need in order to combat weight discrimination and the obesity penalty in the labor market is Title VII and the sex-plus-weight theory of employer liability. And yet, proving sex-plus-weight discrimination under Title VII may not be quite so simple given the practical realities of proof.

Indeed, the implicitness of most discrimination against obese women represents the biggest challenge to women who attempt to prove that employers have violated Title VII by placing unequal weight burdens on male and female employees. It would be difficult to find a receptionist, sales, or consulting job with weight requirements explicitly listed in the job description.<sup>143</sup> More common are verbal comments by employers about an

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140. See Christina Wilkie, *Obesity Discrimination on the Job Provokes Dispute Over Best Remedy*, HUFFINGTON POST (Oct. 4, 2012), [http://www.huffingtonpost.com/2012/10/04/obesity-discrimination\\_n\\_1939385.html](http://www.huffingtonpost.com/2012/10/04/obesity-discrimination_n_1939385.html).

141. *Id.*

142. *Id.*

143. In the past, one notable exception to this statement has been a job at Abercrombie & Fitch. The company maintains a notorious employee "Look Book" dictating everything from hairstyle to fingernail length. As early as the interview stage, applicants are rated on attractiveness, and employees who fail to make the grade in monthly attractiveness audits may be moved from the floor to the stockroom. Even the former CEO of Abercrombie, Mike Jeffries, has acknowledged, "[W]e hire good-looking people in our stores. Because good-looking people attract other good-looking people, and we want to market to cool, good-looking people." And a key element to good looks, Jeffries insists, is thinness; he seems proud of the fact that "kids [are] starving themselves so they can be the 'Abercrombie girl.'" Benoit Denizet-Lewis, *The Man Behind Abercrombie & Fitch*, SALON (Jan. 24,

employee's weight,<sup>144</sup> or thinly veiled discussions about an employer's expectations for the employee's appearance.<sup>145</sup> Despite the scarcity of direct evidence of weight discrimination against women in the labor market, the data in Part III indicate that a substantial number of employers maintain unspoken policies against hiring heavier women to be the face of their company to customers and to other members of the public. But the policies are not as overt or as explicit as they were at the time of the airline cases.

So how can women who experience sex-plus-weight discrimination in the workplace enforce their rights under Title VII, if faced with the reality of little to no direct evidence? For such women, proving disparate treatment on the basis of weight and sex will be as challenging as proving any Title VII disparate treatment claim that lacks smoking gun or direct evidence of discriminatory intent. These women must prove their case using indirect evidence, likely using the *McDonnell Douglas*<sup>146</sup> framework. Certainly, labor market data analysis, such as the empirical evidence presented in Part III, will be helpful in carrying their burden of proof.

Still, perhaps the easiest way for an obese woman to prove that her employer had an implicit policy against women's weight would be through the use of a male similarly situated comparator. Recall that the sex-plus

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2006, 3:16 AM), <http://www.salon.com/2006/01/24/jeffries/>. The brand's explicit appearance-based policies may soon be on the way out since Jeffries stepped down as CEO in December 2014, see Jena McGregor, *Abercrombie & Fitch CEO Mike Jeffries steps down*, WASHINGTON POST (Dec. 9, 2014), <https://www.washingtonpost.com/news/on-leadership/wp/2014/12/09/abercrombie-fitch-ceo-mike-jeffries-steps-down/>, and since the policies have embroiled the company in a costly and very public religious discrimination suit, see *U.S. Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

144. See, e.g., *Powell v. Gentiva Health Servs.*, No. 13-0007-WS-C, 2014 WL 554155, at \*3 (S.D. Ala. Feb. 12, 2014) (describing the supervisor's underhanded criticism of the plaintiff's "weight issue"), *appeal dismissed*, No. 14-11120 (11th Cir. May 19, 2014); see also Lis Wiehl, *The Skinny on Job Discrimination*, FOX NEWS (June 20, 2007), <http://www.foxnews.com/story/2007/06/20/skinny-on-job-discrimination> (describing the story of Annette McConnell, a sales representative with a good employment record who was laid off, according to her boss, "because people don't like buying from fat people").

145. For example, interviews with former employees of fitness apparel company Lululemon have revealed that "the culture that . . . skinniness is the paramount feature of health" permeates the workplace environment. Kim Bhasin, *Shunning Plus-Size Shoppers is Key to Lululemon's Strategy*, *Insiders Say*, HUFFINGTON POST (July 31, 2013), [http://www.huffingtonpost.com/2013/07/31/lululemon-plus-size\\_n\\_3675605.html](http://www.huffingtonpost.com/2013/07/31/lululemon-plus-size_n_3675605.html); see also Elizabeth Licorish, *Lululemon's Cult Culture: Get Fit or Die Trying*, HUFFINGTON POST (Aug. 2, 2013), [http://www.huffingtonpost.com/elizabeth-licorish/lululemon-cult-culture\\_b\\_3690378.html](http://www.huffingtonpost.com/elizabeth-licorish/lululemon-cult-culture_b_3690378.html). Allegedly, Lululemon's employees are encouraged by their supervisors and co-workers to "get fit or die trying," Licorish, *supra* note 145, carefully monitor their diets, Bhasin, *supra* note 145, and even hide larger size clothing in the back of the store, Licorish, *supra* note 145. Additionally, the pharmaceutical industry notoriously recruits female sales representatives from college cheerleading squads, which has led to a common "saying [among health care professionals] that you'll never meet an ugly drug rep." Stephanie Saul, *Gimme an Rx! Cheerleaders Pep Up Drug Sales*, N.Y. TIMES (Nov. 28, 2005), <http://www.nytimes.com/2005/11/28/business/gimme-an-rx-cheerleaders-pep-up-drug-sales.html#>.

146. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973), the Supreme Court famously laid out standards for employment discrimination plaintiffs to present their cases in the absence of direct evidence of discrimination.

theory alleges that an employer treats a characteristic (here, weight) differently in one gender than in the other. Thus, to allege sex-plus-weight discrimination under Title VII, an obese female plaintiff would need an obese man as a similarly situated comparator. That is, the plaintiff would need to find an obese man who was (1) similar to her in all relevant respects except gender, and (2) treated better by the employer.

The use of comparators to prove discrimination can be problematic, particularly for employees of small companies (since few other employees can serve as potential comparators) and employees with unique job titles (since arguably no other employee is similarly situated).<sup>147</sup> Yet, under the current proof framework of Title VII cases, all plaintiffs who lack direct evidence of discrimination face these same issues. Whether the current Title VII proof framework needs to be reformed is outside the scope of this article, and indeed, has been the subject of many prior articles.<sup>148</sup> The point is that obese women who are the victim of implicit employer policies that disfavor obese women, but not obese men, *can* bring a successful sex-plus-weight case under the current Title VII proof framework—particularly if they can identify a similarly situated obese man who received better treatment from the employer.

Acknowledging the potential proof problems associated with the statute, Title VII nonetheless offers a powerful, viable, and available legal mechanism to combat the obesity penalty in the labor market. Because women disproportionately bear the negative effects of obesity on labor market outcomes, women have a viable sex-plus claim under Title VII if they can demonstrate that their employers treat men's weight more favorably than women's weight. It is up to such women to begin enforcing their claims. In the past, female flight attendants successfully challenged *explicit* employer weight policies targeted at women by using Title VII. It is time for others to begin challenging *implicit* employer weight policies targeted at women. In the absence of federal prohibition of weight and personal appearance discrimination in the workplace, only then can we ever hope to see real improvement in the labor market outcomes of obese women nationwide.

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147. See generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L. J. 728 (2011); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002).

148. See, e.g., sources cited *supra* note 147.

Table 1. CPS-ATUS-EHM-O\*NET Summary Statistics for Men by BMI Classification

|   | (1)           | (2)        | (3)     | (4)            |
|---|---------------|------------|---------|----------------|
|   | Normal Weight | Overweight | Obese   | Morbidly Obese |
| <i>Demographics</i>                     |               |            |         |                |
| Black                                   | 0.096         | 0.093      | 0.114   | 0.128          |
| Hispanic                                | 0.120         | 0.143*     | 0.142   | 0.121          |
| Years of Education                      | 14.447        | 14.258*    | 13.840* | 14.012         |
| Age                                     | 39.451        | 42.155*    | 42.258* | 41.596*        |
| Married                                 | 0.551         | 0.651*     | 0.671*  | 0.613          |
| Children Present                        | 0.537         | 0.568*     | 0.582*  | 0.493          |
| Real Hourly Wages<br>(\$2008)           | 27.266        | 27.426     | 24.904* | 23.892         |
| <i>Physical Activity</i>                |               |            |         |                |
| Physical Activity                       | 0.452         | 0.469*     | 0.490*  | 0.466          |
| Dynamic Strength                        | 0.187         | 0.197      | 0.210*  | 0.192          |
| Explosive Strength                      | 0.042         | 0.051*     | 0.050*  | 0.049          |
| Static Strength                         | 0.275         | 0.290*     | 0.310*  | 0.291          |
| Trunk Strength                          | 0.337         | 0.342      | 0.355*  | 0.332          |
| Moving Objects                          | 0.444         | 0.453      | 0.476*  | 0.443          |
| Reaction Time                           | 0.221         | 0.243*     | 0.269*  | 0.245          |
| Speed of Limb<br>Movement               | 0.183         | 0.197*     | 0.211*  | 0.202          |
| Stamina                                 | 0.238         | 0.248      | 0.263*  | 0.250          |
| Kneeling                                | 0.221         | 0.222      | 0.229   | 0.213          |
| Standing                                | 0.568         | 0.564      | 0.569   | 0.551          |
| Walking                                 | 0.412         | 0.415      | 0.426*  | 0.410          |
| <i>Public Interaction</i>               |               |            |         |                |
| Communication<br>with Outside           |               |            |         |                |
| Persons Deal with External<br>Customers | 0.578         | 0.589      | 0.581   | 0.588          |
| Negotiation                             | 0.625         | 0.633      | 0.640*  | 0.634          |
| Persuasion                              | 0.479         | 0.487      | 0.475   | 0.480          |
| Consulting                              | 0.488         | 0.493      | 0.479   | 0.489          |
| Selling                                 | 0.431         | 0.432      | 0.421   | 0.444          |
| Performing for the<br>Public            | 0.405         | 0.407      | 0.399   | 0.392          |
| Public Speaking                         | 0.487         | 0.486      | 0.494   | 0.488          |
|   | 0.272         | 0.274      | 0.257*  | 0.285          |
| N                                       | 2,759         | 4,782      | 2,751   | 282            |

Notes: Reported estimates are the means of respondents ages 18 to 65 from the combined 2006-2008 CPS, ATUS, and EHM, and O\*NET data. The men's data contain 10,861 total observations (including 287 underweight men not reported here). The real hourly wage summary statistics contain 9,285 total observations. An asterisk (\*) indicates a significant difference in the sample mean at the 10 percent level between the normal-weight group and the BMI classification group of interest, according to a Bonferroni multiple comparison test.

Table 2. CPS-ATUS-EHM-O\*NET Summary Statistics for Women by BMI Classification

|                                    | (1)           | (2)        | (3)     | (4)            |
|------------------------------------|---------------|------------|---------|----------------|
|                                    | Normal Weight | Overweight | Obese   | Morbidly Obese |
| <i>Demographics</i>                |               |            |         |                |
| Black                              | 0.080         | 0.173*     | 0.228*  | 0.277*         |
| Hispanic                           | 0.097         | 0.119*     | 0.133*  | 0.104          |
| Years of Education                 | 14.703        | 13.995*    | 13.699* | 13.604*        |
| Age                                | 40.193        | 42.977*    | 43.248* | 43.042*        |
| Married                            | 0.550         | 0.552      | 0.488*  | 0.376*         |
| Children Present                   | 0.605         | 0.568*     | 0.557*  | 0.534*         |
| Real Hourly Wages (\$2008)         | 23.528        | 20.100*    | 18.284* | 15.405*        |
| <i>Physical Activity</i>           |               |            |         |                |
| Physical Activity                  | 0.378         | 0.398*     | 0.398*  | 0.416*         |
| Dynamic Strength                   | 0.130         | 0.144*     | 0.144*  | 0.159*         |
| Explosive Strength                 | 0.031         | 0.037*     | 0.039*  | 0.044*         |
| Static Strength                    | 0.205         | 0.224*     | 0.228*  | 0.247*         |
| Trunk Strength                     | 0.294         | 0.308*     | 0.311*  | 0.314          |
| Moving Objects                     | 0.367         | 0.383*     | 0.386*  | 0.402*         |
| Reaction Time                      | 0.112         | 0.127*     | 0.136*  | 0.156*         |
| Speed of Limb Movement             | 0.138         | 0.149*     | 0.151*  | 0.161*         |
| Stamina                            | 0.200         | 0.216*     | 0.216*  | 0.226*         |
| Kneeling                           | 0.178         | 0.193*     | 0.196*  | 0.202*         |
| Standing                           | 0.534         | 0.556*     | 0.551*  | 0.556          |
| Walking                            | 0.395         | 0.415*     | 0.416*  | 0.421          |
| <i>Public Interaction</i>          |               |            |         |                |
| Communication with Outside Persons | 0.596         | 0.573*     | 0.563*  | 0.554*         |
| Deal with External Customers       | 0.690         | 0.680      | 0.674*  | 0.667          |
| Negotiation                        | 0.490         | 0.475*     | 0.466*  | 0.448*         |
| Persuasion                         | 0.502         | 0.484*     | 0.474*  | 0.460*         |
| Consulting                         | 0.413         | 0.394*     | 0.383*  | 0.378*         |
| Selling                            | 0.393         | 0.372*     | 0.359*  | 0.343*         |
| Performing for the Public          | 0.560         | 0.555      | 0.545*  | 0.536          |
| Public Speaking                    | 0.300         | 0.277*     | 0.267*  | 0.253*         |
| N                                  | 4,664         | 3,021      | 2,228   | 404            |

Notes: Reported estimates are the means of respondents ages 18 to 65 from the combined 2006-2008 CPS, ATUS, and EHM, and O\*NET data. The women's data contain 11,324 total observations (including 1,007 underweight women not reported here). Sample excludes pregnant women. The real hourly wage summary statistics contain 9,285 total observations. An asterisk (\*) indicates a significant difference in the sample mean at the 10 percent level between the normal-weight group and the BMI classification group of interest, according to a Bonferroni multiple comparison test.

Table 3. The Effect of BMI Classification and Occupational Characteristics on Real Hourly Wages

|                                    | Dependent Variable: ln(Real Hourly Wage (\$2008)) |           |           |           |
|------------------------------------|---|-----------|-----------|-----------|
|                                    | Men   |           | Women     |           |
|                                    | (1)   | (2)       | (3)       | (4)       |
| Overweight                         | 0.030*  | 0.079     | -0.040*** | 0.068     |
|                                    | (0.017)   | (0.067)   | (0.014)   | (0.065)   |
| Obese                              | -0.002  | -0.011    | -0.074*** | 0.051     |
|                                    | (0.038)   | (0.070)   | (0.015)   | (0.063)   |
| Morbidly Obese                     | -0.091**  | 0.097     | -0.184*** | 0.011     |
|                                    | (0.038)   | (0.151)   | (0.028)   | (0.109)   |
| Physical Activity                  | ---   | -0.362*** | ---       | -0.311*** |
|                                    |   | (0.098)   |           | (0.076)   |
| Communication with Outside Persons | ---   | 0.241***  | ---       | 0.431***  |
|                                    |   | (0.082)   |           | (0.071)   |
| Obese*Physical                     | ---   | 0.080     | ---       | -0.108    |
|                                    |   | (0.075)   |           | (0.074)   |
| Morbid*Physical                    | ---   | -0.065    | ---       | -0.058    |
|                                    |   | (0.160)   |           | 0.131     |
| Obese*Communication                | ---   | -0.040    | ---       | -0.129*   |
|                                    |   | (0.085)   |           | (0.078)   |
| Morbid*Communication               | ---   | -0.284    | ---       | -0.291**  |
|                                    |   | (0.181)   |           | (0.141)   |
| R <sup>2</sup>                     | 0.285   | 0.363     | 0.292     | 0.394     |
| N                                  | 9,285   | 9,285     | 10,162    | 10,162    |

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Notes: Reported estimates are from OLS regressions analyzing respondents ages 18 to 65 from the combined 2006-2008 CPS, ATUS, EHM, and O\*NET data. All regressions include controls for underweight, government sector, union status, married, presence of a child, black, Hispanic, geographic region (South, Midwest, and West), urban area, years of education, age, and age squared. Regressions (2) and (4) include controls (in the form of principal factor components) for the importance of coworker/supervisor interaction, general interaction, physical skill, mental skill, and unpleasant work conditions to an individual's job. Regressions (2) and (4) also include broad occupational indicator variables and broad industry indicator variables. The BMI classification-occupational characteristic interactions in regressions (2) and (4) also include interactions between underweight and overweight BMI classifications, which are not reported here.