

August 13, 2013

Mr. Sam Livingston
Operations Manager
City of Hohenwald
118 Linden Avenue
Hohenwald, Tennessee 38462

Dear Mr. Livingston:

With respect to your question regarding an obese employee that was unable to perform the major functions of the job, please be advised that the EEOC now considers “morbid” obesity to be a protectable disability under the Americans with Disabilities Act. Approximately two years ago, the EEOC filed its’ first-ever lawsuit asserting that “severe” obesity was a protected disability under the Americans with Disabilities Act. Unfortunately that case, EEOC v. Resources for Human Development, Inc., provided little guidance to employers about where the EEOC would draw the line on when obesity is “severe” enough to constitute an ADA-protected disability. As part of the settlement of that lawsuit, the fired employee received \$55,000 and six months of outplacement services.

So although it remains uncertain where that line can be drawn, it is now clear that the EEOC considers “morbid” obesity” to be a protectable disability under the ADA.

The leading case in the 6th Circuit on the treatment of morbid obesity under the ADA is EEOC v. Watkins Motor Lines (2006), which concluded that morbid obesity must be the result of a physiological condition to qualify as an ADA-protected disability. Later cases, decided under the 2008 ADA Amendments Act (ADAAA), have called that decision into question. For example, Lowe v. American Eurocopter, LLC (N.D. Miss. 2010) concluded that because of how broadly the ADAAA defines both major life activities for purposes of an actual disability, and “regarded as having” a disability, the ADAAA covers morbid obesity irrespective of whether it is caused by a physiological condition.

So with that as a backdrop, it is best to take documentable steps to provide a reasonable accommodation for the employee. Reasonable accommodation may include such activities as job restructuring; reassignment to a vacant position; acquiring or modifying equipment; or modifying the work schedule. Hopefully there is an accommodation that will work in this situation.

Please also be mindful that the city does not have to provide a reasonable accommodation that would cause an “undue hardship” to it. The undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable

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accommodation would cause significant difficulty or expense to the city. A determination of undue hardship should be based on several factors, including but not limited to:

- the nature and cost of the accommodation needed;
- the overall financial resources of the employer making the reasonable accommodation; the number of persons employed; the effect on expenses and resources on the organization; and
- the impact of the accommodation on operations.

The ADA's legislative history indicates that Congress desired employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly. Undue hardship is determined based on the net cost to the employer. Thus, you should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, you should ask the individual with a disability if he will pay the difference.

It is also prudent to send the employee to the Employee Assistance Program or other program that the city may offer to help employees cope with personal situations such as this.

Since morbid obesity—and perhaps even obesity—may be considered a “disability” under the law, you should move carefully when making an employment decision based on the employee's weight. Please consult with your City Attorney when determining a course of action.

Very truly yours,



Jeffrey J. Broughton
Municipal Management Consultant

Cc: Richard L. Stokes