

January 1994

Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?

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Recommended Citation

Kimberly B. Dunworth, *Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?*, 24 Golden Gate U. L. Rev. (1994).
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NOTE

CASSISTA v. COMMUNITY FOODS, INC.: DRAWING THE LINE AT OBESITY?

I. INTRODUCTION

In *Cassista v. Community Foods, Inc.*,¹ the California Supreme Court held that the state Fair Employment and Housing Act (FEHA)² does not protect overweight people from employment discrimination on the basis of weight unless they can prove that they are “physically disabled” within the meaning of the FEHA.³ The court reasoned that, while the statute proscribes employers from discriminating against people whom they perceive to have a disability,⁴ if that perceived disability does not fit into one of the statute’s specifically enumerated disorders, then the statute does not proscribe that discrimination.⁵ The court then concluded that obesity alone does not fall into one of the enumerated types of disorder,⁶ and thus the FEHA did not protect Cassista from discrimination on that basis.⁷

This Note will discuss the background of the FEHA, and give a brief overview of the federal statutes upon which the FEHA is modeled, the policy of the FEHA, and obesity discrimination. The overview will be followed by an analysis of the California Supreme Court’s application of the law to the facts in *Cassista*, and a critique of the court’s reasoning.

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1. 856 P.2d 1143 (Cal. 1993).
 2. CAL. GOV’T CODE §§ 12,900-12,996 (West 1980 & Supp. 1993).
 3. See *Cassista*, 856 P.2d at 1144.
 4. See CAL. GOV’T CODE § 12,926(k).
 5. *Cassista*, 856 P.2d at 1153.
 6. *Id.* at 1152-53.
 7. *Id.* at 1154.

II. FACTS

Toni Linda Cassista (plaintiff/appellant) stands five foot four inches tall, and when she applied for a job at Community Foods, a co-operative health food store in Santa Cruz, California, she weighed three hundred and five pounds.⁸ After an initial interview, she was asked to return for a second, more in-depth, interview.⁹ Cassista was neither hired for any of the job vacancies at the store, nor for any of the subsequent openings for which she resubmitted her application.¹⁰ She called defendant/respondent Will Hildeburn, Community Foods' personnel coordinator, to ask what she might do to improve her chances to be hired for a future position.¹¹ Cassista testified that Hildeburn told her the members of the hiring committee were concerned that she could not physically do the work because of her weight.¹² Hildeburn testified he told Cassista they had hired people with more experience; however, he also admitted telling her "there was some concern about your weight."¹³

Cassista filed a complaint with the Department of Fair Employment and Housing (DFEH) alleging that Community Foods discriminated against her on the basis of her weight.¹⁴ After the DFEH decided not to file a complaint, Cassista filed suit against Community Foods under the FEHA, alleging that the store denied her employment in violation of the Act's proscription against discrimination based on physical handicap.¹⁵

8. *Id.* at 1144.

9. *Id.* at 1145.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The facts are disputed by the parties. Hildeburn and the hiring committee met with Cassista to discuss with her the reasons she was not hired. At this meeting, members of the committee gave their views of weight and its effects on job performance. At trial, Community Foods presented an expert witness who testified that the narrow aisles and ladders in the store would constitute a hazardous workplace for an individual of Cassista's weight. Nonetheless, all the members of the hiring committee testified that Cassista's weight played no part in their hiring decision. *Id.* at 1145-46.

14. *Id.* at 1145.

15. *Id.* After she filed her complaint, Community Foods offered her a job, which she declined. Cassista refused the offer in part because she believed it came only because she complained to the DFEH. *Cassista v. Community Foods, Inc.*, 10 Cal. Rptr. 2d 98, 102 (Ct. App. 1992), *rev'd*, 856 P.2d 1143 (Cal. 1993).

Cassista lost in the trial court,¹⁶ but the verdict was overturned on appeal.¹⁷ The Court of Appeal held that the trial court judge issued a prejudicially erroneous jury instruction,¹⁸ and that the evidence showed that the hiring committee at Community Foods viewed Cassista as having a physical disability within the meaning of that term under the FEHA.¹⁹ The supreme court granted review to determine whether Cassista had established disability discrimination under the FEHA.²⁰

III. BACKGROUND OF THE FAIR EMPLOYMENT AND HOUSING ACT²¹

The evolution of the FEHA manifests its reliance upon the Federal Rehabilitation Act and the Federal Americans with Disabilities Act for its major provisions. These federal laws are relevant to an examination of the FEHA because the FEHA and its regulations are modeled on the Rehabilitation Act and the Americans With Disabilities Act.²² Further, the California Supreme Court noted that "interpretations of federal law may be particularly useful 'to guide the construction' of this [the physical disability] provision of California's antidiscrimination act."²³ Finally, the California Legislature declared that the Americans with Disabilities Act's protections, where broader than those of the FEHA, shall prevail.²⁴

16. *Cassista v. Community Foods, Inc.*, 856 P.2d at 1146.

17. *Id.*

18. *Id.* The trial judge told the jury that Cassista had to prove that but for her weight, the hiring committee would have hired her. The California Supreme Court's opinion addressed only the issue of whether obesity fit into one of the enumerated categories of physical disability. However, examination of the briefs filed by the parties and several amici curiae reveals that all of these briefs viewed that issue as tangential, dealing with it in a cursory manner at the end of their briefs. The issues briefed in depth were those involving standards of proof, burdens of proof, and specific lines of analysis developed in previous cases to examine employers' motives when inquiring about an employee's disability. None of these issues were mentioned in the final opinion. See, e.g., Brief of Amicus Curiae Employment Law Ctr., *Cassista v. Community Foods, Inc.*, 856 P.2d 1143 (1993) (No. S028230).

19. *Cassista*, 856 P.2d at 1146.

20. *Id.*

21. The FEHA is codified at CAL. GOV'T CODE §§ 12,900-12,996 (West 1980 & Supp. 1993).

22. *Cassista*, 856 P.2d at 1152.

23. *Id.*

24. CAL. GOV'T CODE § 12,926(p):

Notwithstanding subdivisions (i) and (k), if the definition of

A. HISTORY OF THE STATUTE AND AMENDMENTS

California's statutory proscription against employment discrimination was first enacted in 1959 as the Fair Employment Practices Act.²⁵ The Act proscribed employment discrimination on the bases of race, creed, color, national origin, and ancestry.²⁶ In 1973, the Legislature amended the Act to include physical handicap as a prohibited ground of employment discrimination.²⁷ Later amendments combined the Fair Employment Practices Act with the Fair Housing Act into the current Fair Employment and Housing Act.²⁸

In 1980, the Fair Employment and Housing Commission (FEHC), the administrative agency charged with the rulemaking and quasi-judicial functions involved in enforcing the FEHA,²⁹ promulgated a regulation defining "handicapped individual." That regulation tracks the federal Rehabilitation Act of 1973,³⁰ which proscribes discrimination on the basis of physical handicap by federal contractors and recipients of federal funds.³¹

In 1990, the federal government enacted the Americans with Disabilities Act (ADA),³² which adopted the Rehabilitation Act's definition of "physical handicap."³³ In 1992, the California Legislature amended the FEHA, changing the term "handicap" to

"disability" used in the Americans With Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability . . . then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

25. See Marjorie Gelb & JoAnne Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055, 1057-58 (1983).

26. *Id.* at 1058.

27. *Id.* at 1059.

28. *Id.* at 1061.

29. *Id.* at 1060-61.

30. 29 U.S.C. §§ 701-794 (1993).

31. *Cassista*, 856 P.2d at 1149-50.

32. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101-213 (West Supp. 1991) & 47 U.S.C. §§ 225, 611 (1991)); see *infra* notes 46-56 and accompanying text.

33. *Cassista*, 856 P.2d at 1150.

“disability” and modeling its definition of “physical disability”³⁴ on that of the Americans with Disabilities Act.³⁵ The result is that the FEHA and its regulations are in harmony, tracking the Americans with Disabilities Act, which in turn tracks the Rehabilitation Act’s definition of “physical disability.”³⁶

Although *Cassista* arose prior to the 1992 amendment, the court analyzed it under the amended law. The Legislature mandated that the definition of “physical disability” remain the same as previously defined, to maintain continuity in the law,³⁷ so the analysis would be the same under either version of the statute.

The present FEHA proscribes discrimination in employment and housing on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age.³⁸ The prohibition against discrimination based on physical disability is subject to two exceptions: where the disability prevents the employee from performing the required duties,³⁹ and where the disability prevents the employee from performing his or her duties safely.⁴⁰

The California Legislature declared that the FEHA was enacted because:

It is recognized that the practice of denying employment opportunity and discriminating in the

34. See *infra* part V. for a discussion of the definition of “physical disability.”

35. *Cassista*, 856 P.2d at 1149-50.

36. *Id.*

37. *Id.* at 1149.

38. CAL. GOV'T CODE § 12,920. The FEHA applies to all employers who regularly employ five or more people. The scope of the federal statute on which the FEHA is modeled, the Rehabilitation Act of 1973, applies only to federal contractors and employers who receive federal assistance. *Cassista*, 856 P.2d at 1149.

39. Some courts call this exception the “business necessity” exception. See, e.g., *Greene v. Union Pacific R.R.*, 548 F. Supp. 3 (W.D. Wash. 1981).

40. CAL. GOV'T CODE § 12,940(a)(1):

Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.⁴¹

Further, the Legislature has mandated that the FEHA be “construed liberally for the accomplishment of the purposes thereof.”⁴²

California Government Code section 12,926 controls the issue of whether obesity is a physical disability. The California Supreme Court’s opinion in *Cassista* is devoted in large part to the analysis of this section, which reads:

- (k) “physical disability” includes, but is not limited to, all of the following:
 - (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
 - (A) Affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
 - (B) Limits an individual’s ability to participate in major life activities.
 - (2) Any other health impairment not described in paragraph (1) that requires special education or related services.
 - (3) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).
 - (4) Being regarded as having, or having had, a disease [sic] disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).⁴³

41. CAL. GOV’T CODE § 12,920.
42. CAL. GOV’T CODE § 12,993.
43. CAL. GOV’T CODE § 12,926.

Cassista brought her suit under the “being regarded as having” subsection (3).⁴⁴

B. THE RELATED FEDERAL STATUTES

1. *The Rehabilitation Act of 1973*

Congress enacted the Rehabilitation Act of 1973 to equalize the employment opportunities of the disabled.⁴⁵ Section 504 of the Act mandates that “no otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”⁴⁶

Amendments enacted in 1974⁴⁷ defined “handicapped individual” as someone who “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”⁴⁸ A major life activity is one such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁴⁹

Congress added the phrase “is regarded as having such an

44. *Cassista*, 856 P.2d at 1153 (citing CAL. GOV’T CODE § 12,926(k)(3)).

45. 29 U.S.C. § 701 (1993). See also Paula B. Stolker, *Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 223 (1992) (discussing weight- and appearance-based discrimination, primarily by airlines against flight attendants).

46. 29 U.S.C. § 794 (1993).

47. See, e.g., Thomas Edward Seguire, *What’s A Handicap Anyway? Analyzing Handicap Claims Under the Rehabilitation Act of 1973 and Analogous State Statutes*, 22 WILLAMETTE L. REV. 529, 531 (1986) (discussing the history of the Rehabilitation Act and giving an in-depth analysis of the statute, and several case studies involving analogous state statutes).

48. 29 U.S.C. § 706(8)(B) (1993).

49. 45 C.F.R. § 84.3(j)(2)(ii) (1993). The regulations promulgated under the statute by the Department of Health and Human Services provide in part:

(iv) “Is regarded as having an impairment” means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment

. . . .

impairment” “to protect people who are denied employment because of an employer’s perceptions, whether or not those perceptions are accurate. It is of little solace to a person denied employment to know that the employer’s view of his or her condition is erroneous.”⁵⁰

2. *The Americans with Disabilities Act*

The Americans with Disabilities Act of 1990⁵¹ extended the protections of the Rehabilitation Act to the private sector.⁵² Until July 25, 1994, the ADA’s proscriptions against disability discrimination apply to all private employers with twenty-five or more employees.⁵³ After that date, the ADA extends to private employers with fifteen or more employees. The ADA applies immediately to all governmental and public entities.⁵⁴

Congress enacted the ADA upon finding that some 43,000,000 Americans have some form of physical or mental disability,⁵⁵ are continually subjected to discrimination in a variety of contexts including employment,⁵⁶ and are severely disadvantaged socially, vocationally, economically, and educationally.⁵⁷ Further, people with disabilities are:

[A] discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society⁵⁸

“Qualified individuals with disabilities” are protected by Ti-

50. *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Haw. 1980).

51. *See supra* note 32.

52. *See Nancy Lee Jones, Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 475 (1991).

53. 42 U.S.C. § 12,111(5)(A) (1991).

54. 28 C.F.R. § 35.140 app. A (1992).

55. 42 U.S.C. § 12,101(a)(1).

56. *Id.* § 12,101(a)(5).

57. *Id.* § 12,101(a)(6).

58. *Id.* § 12,101(a)(7).

tle I of the ADA,⁵⁹ which defines “physical disability” by the same definition as that of the Rehabilitation Act of 1973.⁶⁰ Employers may raise the same two defenses to a charge of discrimination under the ADA as under the Rehabilitation Act: business necessity and safety concerns.⁶¹

IV. OBESITY DISCRIMINATION DECISIONS IN THE UNITED STATES

Case law in the area of obesity discrimination in the state and federal courts reveals that the courts are split among three predominant holdings: Obesity is not a disability; weight standards are related to safety concerns and thus are legal; or obesity is a disability.

A. OBESITY IS NOT A DISABILITY

Most courts considering the issue of obesity discrimination have held that obesity, without more, is not a physical disability.⁶² For example, in *Krein v. Marian Manor Nursing Home*,⁶³ a nurse’s aide brought suit alleging in part that she was discharged because of her obesity in violation of state law prohibiting discrimination on the basis of physical disability. The employee testified that she suffered from no medical condition in connection with her obesity, and that her weight did not impair her abilities.⁶⁴ The court stated without analysis that obesity alone does not constitute a physical disability.⁶⁵

In *Tudyman v. United Airlines*,⁶⁶ a male bodybuilder

59. *Id.* § 12,112(a).

60. *See supra* notes 47-50 and accompanying text.

61. Jones, *supra* note 52, at 482 (analyzing in depth the provisions of the ADA). In addition, a third defense under the ADA allows religious entities to give hiring preference to people of a certain religion. *Id.*

62. *See, e.g.,* Donald L. Bierman, Jr., *Employment Discrimination Against Overweight Individuals: Should Obesity Be A Protected Classification?*, 30 SANTA CLARA L. REV. 951, 961 (1990) (discussing what obesity means, what constitutes a handicap, and obesity discrimination case law).

63. 415 N.W.2d 793 (N.D. 1987).

64. *Krein*, 415 N.W.2d at 796. Krein testified that her weight aggravated her asthma and made her more susceptible to colds and flu. The court stated that these common ailments did not constitute a disability. *Id.*

65. *See id.*

66. 608 F. Supp. 739 (D. Cal. 1984).

brought suit under the Rehabilitation Act alleging discrimination on the basis of physical handicap. He was terminated and his subsequent petition for reinstatement was denied because his weight exceeded the airline's height-weight guidelines.⁶⁷ The court held the "inability to obtain a single job does not render one 'handicapped'."⁶⁸ The court observed that the plaintiff's weight was "self-imposed and voluntary," a fact the court considered important.⁶⁹

In a holding substantially identical to that of *Cassista*, and resulting from a similar analysis, the Pennsylvania Supreme Court held that in order for obesity to constitute a physical disability, a claimant must show that his or her obesity was caused by, or caused, a type of disorder within the meaning of Pennsylvania's statute.⁷⁰ In that case, a city laborer failed to lose enough weight to meet height-weight standards promulgated for city laborers, and the city suspended him without pay.⁷¹

Courts have thus used either dissimilar analyses, or assertion unaccompanied by analysis, to reach the holding that obesity is not a protected disability.

67. *Tudyman*, 608 F. Supp. at 741. The opinion noted that the bodybuilder was not overweight or in poor shape; in fact, his low percentage of fat and high percentage of muscle resulted in his weight exceeding the airline's standards.

68. *Id.* at 745; see *supra* note 49 and accompanying text.

69. *Id.* at 746. The court analogized the bodybuilder's weight to the "voluntary" conditions of drug addiction and alcoholism, and noted that amendments to the Rehabilitation Act in 1978 specifically excepted some present addicts and alcoholics from inclusion as protected handicapped individuals under the Act. *Id.*

70. *Civil Serv. Comm'n v. Pennsylvania Human Relations Comm'n*, 591 A.2d 281 (Pa. 1991) (holding that an employee's requested job transfer to a park laborer position could be predicated on his losing weight, since obesity was not a protected handicap). The pertinent Pennsylvania statute tracks the Rehabilitation Act of 1973. See *id.* at 282-83. See also Robin Chodak, *Civil Rights-Handicap Discrimination Law-Pennsylvania Excludes Obesity From Protection Under the Pennsylvania Human Relations Act*, 65 TEMP. L. REV. 623 (1992) (analyzing this decision in detail and discussing handicap discrimination in general); *Greene v. Union Pac. R.R.*, 548 F. Supp. 3, 5 (W.D. Wa. 1981) (holding that obesity is not a physical handicap within the contemplation of Washington law because it is "not an immutable condition such as blindness or lameness"); *Missouri Comm'n on Human Rights v. Southwestern Bell Tel. Co.*, 699 S.W.2d 75 (Mo. Ct. App. 1985) (noting in dicta that obesity, without more, was probably not a handicap).

71. *Civil Serv. Comm'n v. Pennsylvania Human Relations Comm'n*, 591 A.2d 281, 281-82 (Pa. 1991).

B. WEIGHT STANDARDS ARE RELATED TO SAFETY CONCERNS

In some cases courts have held that weight standards are legal if they constitute a “bona fide occupational qualification” (BFOQ).⁷² For example, in *Lipton v. New York State Human Rights Appeal Board*,⁷³ the court held without analysis that the complainant’s obesity and high blood pressure diminished her ability to perform her job. The court added that the Appeal Board should “restrict its intervention to cases in which the alleged discrimination is unrelated to the nature of the employment.”⁷⁴

In *Velger v. Williams*,⁷⁵ an obese man was discharged from his probationary position as a hazardous waste investigator. He alleged that he was dismissed in part because of his weight.⁷⁶ The court held that “an employer is not guilty of unlawful discrimination against a person with a physical impairment if that person’s condition is ‘in any way related to the duties the person was required to perform in connection with [his] position.’”⁷⁷

Another case that involved weight and the ability to adequately perform job duties is *McMillen v. Civil Service Commission*.⁷⁸ A fire department ambulance driver charged the Los Angeles City Fire Department with discriminating against him on the basis of physical disability when the Department disciplined him for failing to meet body weight standards.⁷⁹ The court reasoned that because ambulance drivers are required to possess strength, agility, and the ability to lift and climb,⁸⁰ the depart-

72. See CAL. GOV'T CODE § 12,940; *Sterling Transit Co. v. Fair Employment Practice Comm'n*, 175 Cal. Rptr. 548 (Ct. App. 1981) (holding a trucking company’s blanket policy of excluding all persons with back anomalies from employment violated the Fair Employment Practice Act (now the FEHA)). In a discussion of the BFOQ defense raised by the trucking company, the court noted that the defense “relates to whether handicapped persons are unable to presently safely and efficiently perform the job duties.” *Id.* at 550.

73. 413 N.Y.S.2d 233 (1979).

74. *Lipton*, 413 N.Y.S.2d at 234.

75. 500 N.Y.S.2d 411, 412 (App. Div. 1986).

76. *Id.* Petitioner was also Jewish, and alleged that his religion provided another basis for his dismissal. The court noted that among the reasons for the petitioner’s dismissal were “his weight, his poor personal hygiene and his bad attitude.”

77. *Id.* at 412 (citing *Miller v. Ravitch*, 60 N.Y.2d 527 (1983)) (emphasis added).

78. 8 Cal. Rptr. 2d 548 (Ct. App. 1992).

79. *Id.* at 550.

80. *Id.* at 551.

ment's weight standards were reasonable "as a means of ensuring the safety of its employees and members of the public."⁸¹ The court held, "[e]mployee height and weight limitations may be prescribed by an employer where there is a rational basis for such limitations, as shown by supportive analytical factual data rather than stereotypical generalizations."⁸²

C. OBESITY IS A DISABILITY

Few cases dealing with obesity discrimination have held that obesity without more constitutes a physical disability.⁸³ In *State Division of Human Rights v. Xerox Corp.*,⁸⁴ Xerox Corporation refused to hire Catherine McDermott because she was obese. She failed the preemployment medical examination solely because of her obesity, and the examining physician concluded that she was "not medically acceptable" for employment.⁸⁵ The State Division of Human Rights filed a complaint against Xerox on McDermott's behalf, alleging that she was discriminated against on the basis of a disability in violation of New York's Human Rights Law.⁸⁶ That statute defines "disability" more broadly than statutes which track the Rehabilitation Act.⁸⁷ Under the Human Rights Law, disabilities "are not limited to physical or mental impairments, but may also include 'medical' impairments. . . . [T]o qualify as a disability, the condition may manifest itself . . . by being 'demonstrable by medically accepted clinical or laboratory diagnostic techniques'."⁸⁸ The court held that McDermott's obesity fell into that definition of disability because it was clinically diagnosed, and rejected the argument that the statute should apply only to immutable disabili-

81. *Id.* McMillen (the ambulance driver) did not feel his weight compromised his ability to perform his duties. *Id.* at 550.

82. *Id.*; see also *Hegwer v. Board of Civil Serv. Comm'rs*, 7 Cal. Rptr. 2d 389 (Ct. App. 1992) (upholding the suspension of an obese paramedic who suffered from a thyroid condition in part because the Department's weight standards were based upon a bona fide occupational qualification).

83. Michigan is the only state that explicitly includes weight as a protected classification. See, e.g., *Karol V. Mason, Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REF. 337, 354 (1982).

84. 480 N.E.2d 695 (N.Y. 1985).

85. *Xerox*, 480 N.E.2d at 696. The medical examination revealed no other conditions except obesity.

86. *Id.*

87. *Id.* at 698.

88. *Id.*

ties: “[T]he statute protects all persons with disabilities and not just those with hopeless conditions.”⁸⁹

New Jersey’s statutory prohibition against discrimination against disabled people is substantially similar to the New York statute.⁹⁰ In *Gimello v. Agency Rent-A-Car Systems*,⁹¹ an office manager for a car rental company claimed he was fired because he was obese.⁹² The court affirmed the conclusion of the administrative law judge that Gimello, in part because he had sought medical treatment for his obesity, had shown that his obesity constituted a physical “handicap” within the meaning of the statute.⁹³ The court limited its holding to the facts, noting that the lower court did not address the issue of whether obesity was a disability in every case.⁹⁴

In a recent decision, the First Circuit Court of Appeals affirmed a lower court’s ruling granting damages and equitable relief to a woman denied reemployment because of her obesity.⁹⁵ Bonnie Cook had two separate periods of employment as an institutional attendant for the mentally retarded at the Department of Mental Health, Retardation, and Hospitals (MHRH); both times she maintained a spotless performance record.⁹⁶ When she sought reemployment, MHRH refused to rehire her in part because it claimed her obesity impaired her ability to evacuate patients in an emergency.⁹⁷ Cook brought suit against MHRH under section 504 of the Rehabilitation Act.⁹⁸ The jury returned a verdict for Cook, which the First Circuit affirmed on

89. *Id.*

90. See *Gimello v. Agency Rent-A-Car Sys.*, 594 A.2d 264, 276 (N.J. Super. Ct. App. Div. 1991).

91. 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991).

92. *Id.* at 265. The court’s detailed summary of the facts showed that during his five-year employment with the car rental company, Gimello received many commendations for his superior performance. Two upper-level officers of the company objected to Gimello because of his obesity, and were the source of the discriminatory treatment of Gimello. *Id.* at 266-72.

93. *Id.* at 273.

94. *Id.*

95. *Cook v. Rhode Island*, 10 F.3d 17, 20-21 (1st Cir. 1993).

96. *Id.* at 20.

97. *Id.* at 21. MHRH also claimed that Cook’s obesity put her at risk of contracting more serious ailments, which would result in absenteeism and workers’ compensation claims. *Id.*

98. *Cook*, 10 F.3d at 21.

appeal.⁹⁹

Cassista was decided while *Cook* was on appeal.¹⁰⁰ The California Supreme Court discussed with approval the portion of the lower court opinion in *Cook* that stated, "to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap."¹⁰¹ The First Circuit Court of Appeals rejected the lower court's ruling on this point, noting the Rehabilitation Act:

contains no language suggesting that its protection is linked to . . . whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, [and] cancer resulting from cigarette smoking. . . .¹⁰²

Bonnie Cook claimed that MHRH discriminated against her because it perceived her obesity to be a disability.¹⁰³ The First Circuit analyzed the interpretive regulations of the Rehabilitation Act,¹⁰⁴ and noted that the enumerated disorders in the regulations "are open-ended; they do not purport to set forth [an exclusive] list of specific diseases and conditions . . . because of the difficulty of ensuring the comprehensiveness of any such list."¹⁰⁵ MHRH's own expert physician gave his opinion that "obesity affects 'virtually every [body] system,' including the cardiovascular, immune, musculoskeletal, and sensory

99. *Id.*

100. See Plaintiff-Appellant's Petition for Rehearing at 5, *Cassista v. Community Foods, Inc.*, 856 P.2d 1143 (Cal. 1993) (No. S028230) (arguing that the California Supreme Court's favorable discussion of the reasoning of *Cook* was a violation of the California Rules of Court, which disallow citation of the lower court opinion where the case is on appeal).

101. See *Cassista*, 856 P.2d at 1152 (citing *Cook v. Rhode Island*, 783 F. Supp. 1569, 1573 (D.R.I. 1992), *aff'd*, 10 F.3d 17 (1st Cir. 1993)).

102. *Cook*, 10 F.3d at 24.

103. *Cook*, 10 F.3d at 22.

104. These regulations and the FEHA are substantially identical. See *supra* note 43 and accompanying text.

105. *Cook*, 10 F.3d at 22-23 (citing 45 C.F.R. § 84.3(j)(2)(i)(A) (1992)); see also CAL. GOV'T CODE § 12,926(k)(1)(B).

systems.”¹⁰⁶

The court proceeded to analyze whether Cook’s obesity limited one or more of her major life activities.¹⁰⁷ MHRH’s physician refused to hire Cook because he believed that her obesity hampered her ability to walk, lift, bend, stoop, kneel, and thus work; the court held that MHRH perceived Cook as being unable to function in major life activities on this basis.¹⁰⁸ Noting that “in a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good’ . . . obesity can present formidable barriers to employment,” the court held that the record presented ample evidence for the jury to conclude MHRH discriminated against Cook because it perceived her to be disabled.¹⁰⁹

Like the cases rejecting obesity as a disability, the cases which include obesity within statutory protections of the disabled do not present a common pattern of reasoning. The Rhode Island court analyzed the same statute as did California and Pennsylvania,¹¹⁰ and reached the opposite conclusion. The other cases discussed in this section involved antidiscrimination statutes that differ from the Rehabilitation Act and those state statutes which track it.¹¹¹ Obesity discrimination remains a fluctuating and non-cohesive area of law.

V. THE CALIFORNIA SUPREME COURT’S ANALYSIS

The California Supreme Court began its analysis by undertaking to determine the parameters of the phrase “physical disability,” beginning with an examination of the statutory language of the FEHA. The court next discussed the standard of “physical disability” formulated in *American National Insurance Co. v. Fair Employment & Housing Commission*,¹¹² because the Legislature expressly included that standard in the statutory definition.¹¹³ After a brief survey of case law involving obesity

106. *Cook*, 10 F.3d at 23 n.6.

107. *See id.* at 25 (applying 45 C.F.R. § 84.3(j)(2)(ii)).

108. *Id.*

109. *Id.* at 28.

110. *See supra* note 70 and accompanying text.

111. *See supra* notes 84-94 and accompanying text.

112. 651 P.2d 1151 (Cal. 1982).

113. CAL. GOV’T CODE § 12,926(k) (West Supp. 1993).

discrimination, the court concluded that Cassista failed to present a prima facie case of physical disability discrimination:

[I]t is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight. The applicant must be "regarded as having or having had" a condition "*described in paragraph (1) or (2),*" to wit, a physiological disease or disorder affecting one or more of the bodily systems.¹¹⁴

A. DEFINING "PHYSICAL DISABILITY"

1. *The Statutory Definition*

The court stated at the outset of the opinion that its task on review was a narrow one: to determine whether Cassista's weight fit into the definition of "physical handicap" in the statute.¹¹⁵ The court stressed that it would not itself define "physical handicap," but only determine the parameters of the term as deduced from the language and legislative history of section 12,926 of the FEHA.¹¹⁶

After providing a brief history of section 12,926, the court discussed in great detail the disorders enumerated in the statute, i.e., explicating the phrases "impairment of sight, hearing [sic] or speech", "amputation", and "loss of coordination."¹¹⁷ The court then addressed the holding in *American National Insurance Co. v. Fair Employment & Housing Commission*.¹¹⁸

2. *The Definition of "Physical Disability" in American National*

The statutory standard for "physical disability" includes the court's previous construction of the term "physical

114. *Cassista*, 856 P.2d at 1153.

115. *Id.* at 1146-47.

116. *Id.* This suit arose under the pre-1992 version of the statute, but the court analyzed it under the amended language, pursuant to the Legislature's declared intention that the standard of "physical disability" remain the same. *Id.* at 1149.

117. *Cassista*, 856 P.2d at 1147.

118. 651 P.2d 1151 (Cal. 1982).

handicap"¹¹⁹ in *American National Insurance Co. v. Fair Employment & Housing Commission*.¹²⁰ In that case, the court examined whether high blood pressure, in the circumstances of that case, fit into the category of physical handicap for purposes of Labor Code section 1420,¹²¹ the predecessor statute to the FEHA.¹²² The defendant insurance company, as a matter of policy, did not hire people with high blood pressure for jobs as sales and debit agents, because it regarded that position as a stressful one.¹²³ It terminated Dale Rivard from his position as a sales and debit agent because he had high blood pressure, and Rivard filed a complaint against the company, alleging that it discriminated against him on the basis of physical handicap.¹²⁴

The court examined section 12,926(h),¹²⁵ which provided a definition of "physical handicap" that "*includes* [impairment of sight, hearing, etc.]." The court analyzed the statute's use of the word "includes" and determined that the word was not intended by the legislature to endorse a restrictive definition, because a specifically restrictive term, such as "means," could have been chosen.¹²⁶ Noting the legislative mandate that the provisions of the FEHA be liberally construed to accomplish the purposes of the statute, the court held that high blood pressure, since "[it] is physical, and often it is handicapping," was a physical handicap protected by the FEHA.¹²⁷ Turning to Webster's dictionary for an ordinary definition of "handicap," the court found that a handicap is "a disadvantage that makes achievement unusually difficult," and held that a condition of the body which has that disabling effect is a physical handicap.¹²⁸

Although the Legislature expressly mandated that the amended definition retain the *American National*

119. *Cassista*, 856 P.2d at 1149.

120. 651 P.2d 1151 (1982).

121. *Id.* at 1153-54.

122. See Gelb & Frankfurt, *supra* note 25, at 1059 n.23.

123. *American Nat'l*, 651 P.2d at 1153.

124. *Id.*

125. The amended version of subsection (h) is subsection (k). See, e.g., *Cassista*, 856 P.2d at 1149.

126. *American Nat'l*, 651 P.2d at 1154.

127. *Id.* at 1155-56.

128. *Id.* at 1155. The court noted a report from the World Health Organization that defined handicap as a "loss or limitation on the individual's ability to participate in the life of the community on an equal basis with others." *Id.* at 1155 n.5.

construction,¹²⁹ the court in *Cassista* redefined the term “physical disability,” holding that it means “an actual or perceived physiological disorder which affects a major body system and limits the individual’s ability to participate in one or more major life activities.”¹³⁰ This new standard does not in fact retain the *American National* standard: “a disadvantage that makes achievement unusually difficult.”¹³¹ The new standard is more stringent than that enunciated in *American National*, because the new standard adds the requirement that the perceived disability must be in fact a “physiological disorder which affects a major body system.”¹³²

B. CASSISTA’S OBESITY AS A PHYSICAL DISABILITY

With the standard of “physical disability” established, the court then analyzed whether Cassista’s excess weight was a physical disability. A brief survey of the limited case law in the area of weight discrimination revealed decisions that either allowed weight to be a factor of employment qualification under the “bona fide occupational qualification” exception,¹³³ or rejected excess weight as a handicap because it is a “self-imposed and voluntary” condition.¹³⁴ In most of the cases examined by the court, excess weight, without a “related medical condition or other impairment, is not a handicap.”¹³⁵ The court distinguished the cases in which excess weight was held to constitute a physical disability on the ground that “local antidiscrimination laws have widely varying texts and historical antecedents.”¹³⁶

129. CAL. GOV’T CODE § 12,926.

130. *Cassista*, 856 P.2d at 1150.

131. *See id.*

132. *See id.*

133. *See, e.g.,* *Hegwer v. Board of Civil Service Comm’rs*, 7 Cal. Rptr. 2d 389, 397-98 (Ct. App. 1992); *supra* note 82.

134. *Cassista*, 856 P.2d at 1152 (citing *Tudyman v. United Airlines*, 608 F. Supp. 739 (D. Cal. 1984); *Cook v. Rhode Island*, 783 F. Supp. 1569 (D.R.I. 1992)). The court focused on these cases which rejected weight discrimination claims where the courts viewed the claimant’s excess weight as a voluntary condition in the absence of medical evidence asserting a physiological cause. *Contra* *Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993) (specifically disapproving the relevance of voluntariness to whether the condition is protected).

135. *Cassista*, 856 P.2d at 1153 (citing Bruce I. Shapiro, *The Heavy Burden of Establishing Weight as a Handicap Under Anti-Discrimination Statutes*, 18 W. ST. U. L. REV. 565, 569 (1991)).

136. *Cassista*, 856 P.2d at 1150-51 n.11 (citing *State Div. of Human Rights v. Xerox*

Cassista did not suffer from any medical conditions caused by, nor impairments related to, her excess weight.¹³⁷ Consequently, the court concluded that her weight was not a physical disability within the meaning of the FEHA.¹³⁸

Cassista contended that even though an individual does not have an *actual* disability, he or she may still come within the purview of the statute if that individual is *regarded* as having a disability by the prospective employer.¹³⁹ Her argument was based on the section of the statute that provides that physical disability includes "being regarded as having or having had . . . a disorder."¹⁴⁰

The court found Cassista's argument unavailing,¹⁴¹ stating that the plain language of the statute required a claimant to show that the disability the employer perceived her to have must fall into one of the enumerated categories of disorders.¹⁴² "In other words, the condition, as perceived by the employer, must still be in the nature of a physiological disorder within the meaning of the FEHA, even if it is not in fact disabling."¹⁴³ Because Cassista failed to present evidence that her excess weight was caused by, or in turn caused, a physiological disorder within the meaning of the FEHA, she failed to establish a *prima facie* case of employment discrimination.¹⁴⁴

VI. CRITIQUE

The court's analysis is incomplete. First, its "plain language" approach omits some of the plain language of the statute.¹⁴⁵ Second, the court implicitly rejects the policy of liberal

Corp., 480 N.E.2d 695 (N.Y. 1985); *Gimello v. Agency Rent-A-Car Systems*, 594 A.2d 264 (N.J. Super. Ct. App. Div. 1991)).

137. Cassista maintained throughout the trial that she is "a healthy, fit individual." *Id.* at 1154.

138. *Id.*

139. *Id.* at 1153.

140. *Id.* (citing CAL. GOV'T CODE § 12,926(k)(3)).

141. *Id.*; see also *supra* note 114 and accompanying text.

142. *Cassista*, 856 P.2d at 1153.

143. *Id.*

144. *Id.* at 1154.

145. See *supra* note 43 and accompanying text for the full text of § 12,926(k).

construction set forth in *American National*,¹⁴⁶ while purporting to follow that case in accordance with the express legislative mandate.¹⁴⁷

A. CONSTRUCTION OF THE STATUTE

In holding that a perceived disability must be one that falls within the purview of the statute, the court relies on specific language in the pertinent paragraph: “[b]eing regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).”¹⁴⁸ That paragraph includes within the term “physical disability” the employer’s *perception* of the individual as disabled by a disorder described in the previous paragraphs.¹⁴⁹ Thus the court concluded that the disability the employer perceives must be one of the disabilities specifically enumerated in paragraph (1) or (2); if the perceived disability is not one of the disorders listed, then discrimination on that ground is not proscribed by the FEHA.¹⁵⁰

In reaching this conclusion, the court purports to construe the plain language of the statute.¹⁵¹ However, the court ignores the opening words of the section it undertakes to construe: “‘physical disability’ includes, *but is not limited to*, all of the following”¹⁵² The plain language of the statute in full states that the description of “physical disability” given is not the exclusive one.¹⁵³

146. *American Nat’l Ins. Co. v. Fair Employment & Hous. Comm’n*, 651 P.2d 1151, 1155-56 (1982).

147. See CAL. GOV’T CODE § 12,926.

148. *Cassista*, 856 P.2d at 1148 (citing CAL. GOV’T CODE § 12,926(k) (West Supp. 1993)).

149. See CAL. GOV’T CODE § 12,926(k).

150. *Cassista*, 856 P.2d at 1153-54. See also Plaintiff-Appellant’s Petition for Rehearing at 5, *Cassista v. Community Foods, Inc.*, 856 P.2d 1143 (1993) (No. SO28230), in which *Cassista*’s attorney observes that the portion of the supreme court’s opinion analyzing “Perception of Handicap or Disability” is “lacking in analysis. Instead of interpreting and applying the existing law . . . this Court . . . eviscerates the prohibition against discrimination based on perceived handicap that is articulated by the Legislature” *Id.* at 5.

151. *Cassista*, 856 P.2d at 1153.

152. CAL. GOV’T CODE § 12,926(k) (emphasis added).

153. See *id.*

The court has previously construed the word “includes” in a statutory definition. In *People v. Western Air Lines, Inc.*¹⁵⁴ the court construed two Public Utilities Code sections which defined “public utilities” and “common carriers” and gave a list of “inclu[ded]” entities.¹⁵⁵ The court held that the lists were not exclusive, noting “[t]he term ‘includes’ is ordinarily a word of enlargement and not of limitation. The statutory definition of a thing as ‘including’ certain things does not necessarily place thereon a meaning limited to the inclusions.”¹⁵⁶ In the instant case, the statutory language is even more explicit. Section 12,926(k) states that the definition of “physical disability” “includes, *but is not limited to*” a list of disorders.¹⁵⁷

The court disregarded this, and provided instead an unnecessary analysis of the different types of enumerated physiological disorders. That analysis was unnecessary because Cassista did not contend that she had any disease, anatomical loss, or health impairment.¹⁵⁸ She averred that she was actually healthy and fit,¹⁵⁹ and that Community Foods *regarded* her as having a physical disability she did not in fact possess.¹⁶⁰

The court’s analysis of the statute violated two of its own rules of statutory construction. First, the court disregarded the canon it recognized in *Klarfeld v. Berg*:¹⁶¹ “In analyzing the text of these enactments, we are bound by the fundamental rule that

154. 268 P.2d 723 (Cal. 1954).

155. *Id.* at 733.

156. *Id.* at 733; *accord*, *People v. Horner*, 87 Cal. Rptr. 917, 920 (Ct. App. 1970) (construing a statutory definition of tear gas “inclu[ding]” an illustrative but not exclusive list).

157. CAL. GOV’T CODE § 12,926(k) (emphasis added).

A considerable portion of the court’s opinion in *Cassista* reviewed with approval Justice Mosk’s dissent in *American National*, in which he criticized the majority’s construction of the term “includes.” When *American National* was decided, section 12,926 contained only the word “includes” at the beginning of the definition of physical disability. In dissent, Justice Mosk noted that “the Legislature makes it clear that it is using ‘includes’ as a term of enlargement by adding the phrase, ‘including, *but not limited to*” *American Nat’l*, 651 P.2d at 1156. The amended version of the statute now contains the phrase “includes, *but is not limited to*”; it is interesting that the *Cassista* court discussed with approval some excerpts of Justice Mosk’s dissent in *American National* but omitted that part and did not adopt his construction of that phrase.

158. *See Cassista*, 856 P.2d at 1147-49.

159. *Cassista*, 856 P.2d at 1154.

160. *Id.* at 1153.

161. 633 P.2d 204 (Cal. 1981).

it is our duty to adopt a construction which will effectuate the purpose which the legislative body sought to promote in enacting the statute or ordinance."¹⁶² The Legislature did not leave its intentions in doubt: "The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof."¹⁶³ One of the purposes of the FEHA is to eliminate discrimination in employment;¹⁶⁴ the court's conservative construction of the statute has the opposite effect.

Also, in *Fields v. Eu*,¹⁶⁵ the court noted that "[s]trained interpretation, or construction leading to unreasonable or impractical results, is to be avoided."¹⁶⁶ The result of the holding in *Cassista* is unreasonable. An employer who discriminates against an obese employee will have broken the law if it turns out that the employee also suffers from a disorder listed in the statute, such as a thyroid problem, even though the employer was unaware of that condition. However, if it turns out that the employee does not have one of the listed disorders, the employer may legally discriminate against the employee on that same basis: obesity. Such a holding, which distinguishes between actual and perceived disabilities, "makes no sense . . . since that interpretation would only protect against discrimination in cases where the wrongdoer accurately perceived the discriminatee's 'classification'."¹⁶⁷

B. FINAL COMMENTS

The court may well have been influenced by the same stereotypical views of overweight people as the personnel director at Community Foods,¹⁶⁸ citing as "particularly noteworthy" cases which view excess weight as a self-imposed or voluntary condition.¹⁶⁹ This view is shortsighted; a number of factors, including heredity, socioeconomic status, gender, and race, influence an

162. *Klarfeld*, 633 P.2d at 208.

163. CAL. GOV'T CODE § 12,993(a).

164. See CAL. GOV'T CODE § 12,920.

165. 556 P.2d 729 (Cal. 1976).

166. *Fields*, 556 P.2d at 733.

167. *Gimello v. Agency Rent-A-Car Sys.*, 594 A.2d 264 (citing *Poff v. Caro*, 549 A.2d 900 (N.J. Super. Ct. Law Div. 1987)); see *supra* note 91.

168. See *Cassista*, 856 P.2d at 1145-46.

169. *Cassista*, 856 P.2d at 1152.

individual's body weight.¹⁷⁰ Obesity researchers consistently find that obese people cannot control their weight.¹⁷¹

Obese people pay a serious price for their conditions. The stigma of obesity results in social and economic hardship: overweight people complete fewer years of school, have lower household incomes, and have higher rates of household poverty.¹⁷² Economic and social disability are listed among the seven major medical and social risks of obesity in a 1982 study.¹⁷³ Race and gender are implicated in obesity discrimination as well: a disproportionate number of obese people are African-American women.¹⁷⁴

Many courts, including the California Supreme Court, either explicitly or implicitly reject obesity as a protected category because they view it as a voluntary state.¹⁷⁵ One argument against including obesity as a protected category is the concern that such a holding would open the floodgates to all manner of "voluntary" condition discrimination claims, such as alcoholism and drug addiction.

170. Steven L. Gortmaker, Aviva Must, James M. Perrin, Arthur M. Sobol, & William H. Dietz, *Social and Economic Consequences of Overweight In Adolescence and Young Adulthood*, 329 *NEW ENG. J. MED.* 1008-12 (1993); see also Jane Osborne Baker, *The Rehabilitation Act of 1973: Protection For Victims of Weight Discrimination?*, 29 *UCLA L. REV.* 947 (1982) (discussing the stigma and discrimination suffered by obese people).

171. See, e.g., Gina Kolata, *Old Beliefs About Obesity Wear Thin*, *DET. FREE PRESS*, Nov. 30, 1992, at 1E; Michael S. Wilkes, M.D. & Miriam Shuchman, M.D., *The Tyranny of Size: Weight, Like Height, Is Inherited, but No One Expects a Tall Person to Cut Off His Legs*, *L.A. TIMES*, Jan. 13, 1991, at 26; Albert J. Stunkard & Thorkild Sorensen, I.A., *Obesity and Socioeconomic Status — A Complex Relation*, 329 *NEW ENG. J. MED.* 1036, (1993) (finding in part that adopted children's weight mirrors that of their birth parents, not their adopted parents).

172. Stunkard & Thorkild, *supra* note 171, at 1036. The doctors who conducted this study concluded that discrimination may be responsible for the economic detriment suffered by overweight people, and suggested that "overweight" be included as a protected category in antidiscrimination laws. *Id.* at 1037. See also Karol V. Mason, *Employment Discrimination Against the Overweight*, 15 *U. MICH. J.L. REF.* 337 (1982) (discussing in depth the employment discrimination often encountered by the overweight and examining medical efforts to find the causes of obesity).

173. Baker, *supra* note 170, at 951 n.39 (1992) (citing *Obesity in America*, *INT'L. J. OBESITY* 363, 368 (1979) (G. Bray ed.)).

174. Mason, *Employment Discrimination Against the Overweight*, *supra* note 83, at 344-45 (presenting in detail statistical analyses of race, gender, and socioeconomic status in relation to obesity).

175. See, e.g., *Cassista*, 856 P.2d at 1152 (discussing with approval *Tudyman* and *Cook*, both of which stress that the plaintiffs' weight was voluntarily self-imposed).

This concern is unwarranted. The Americans with Disabilities Act includes under its shield such conditions as alcoholism and drug addiction,¹⁷⁶ and excludes other “voluntary” conditions such as compulsive gambling, pedophilia, and transvestitism.¹⁷⁷ The limits are already substantially delineated. To protect alcoholism and drug addiction while excluding obesity “raises significant questions of fairness. To exclude obese persons implies a judgment that they are less seriously impaired or stigmatized, or less deserving of legal protection for some other reason.”¹⁷⁸

VII. CONCLUSION

Private employers may now, with impunity, freely discriminate against overweight but otherwise healthy people. This unreasonable result follows from a narrow and incomplete analysis of the FEHA, and implicitly rejects the Legislature’s express mandate that the statute be liberally construed. The court’s analysis also violates its own rules of statutory construction.

The holding of *Cassista* directly contravenes the purpose of the FEHA to “protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination.”¹⁷⁹

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176. See 28 C.F.R. § 35.104. Both drug addiction and alcoholism are also protected disorders in the Rehabilitation Act. 45 C.F.R. pt. 84 app. A, ¶ 4 (1981).

177. See 28 C.F.R. § 35.104 (1992); see also Brent E. Kidwell, *The Americans with Disabilities Act of 1990: Overview and Analysis*, 26 IND. L. REV. 707 (1993).

178. Baker, *Protection for Victims of Weight Discrimination?* *supra* note 170, at 967 (arguing that obesity, like alcoholism and drug addiction, is popularly viewed as a voluntary condition while medically classified as a disease, and should be accorded the same legal protections).

179. *Brown v. Superior Court*, 691 P.2d 272, 277 (Cal. 1984) (citing CAL. GOV’T CODE § 12,920).

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