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Not “Fit” for Hire: The United States and France on Weight Discrimination in Employment

Michael L. Huggins*

*Fordham University School of Law

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Michael L. Huggins

Abstract

Part I will examine past and present attitudes regarding obesity in US society and will discuss the employment challenges obese individuals face because of weight discrimination. Further, Part I will survey US statutory laws at the federal, state, and local levels that currently protect against particular instances of weight discrimination. In sum, this Part aims to provide the current legal and social landscape in the United States for protecting individuals against employment discrimination based on their weight. Part II will look at France’s cultural bias against obesity and its laws against physical appearance discrimination. Part II then will analyze French statutory law and legislative history. This Part will ground the discussion in cases that have arisen in French media involving physical appearance discrimination based on weight, including an investigation by France’s human rights watch institution, Le Défenseur des droits. Overall, this perspective on French law will form the foundation for analyzing the extent of protection that the United States may feasibly adopt to protect individuals against weight discrimination. Part III juxtaposes France’s laws prohibiting physical appearance discrimination with current US federal law to highlight the ways in which the United States falls short of its promise of equal protection for all by permitting employment discrimination based on an individual’s weight. This Part posits that US law may serve as a tool to catalyze important social change in the public’s perception of obesity, based on a similar shift in public perception that occurred in France following the adoption of its laws prohibiting physical appearance discrimination. Ultimately, this Note argues that the United States must act to eliminate the pervasive discrimination against obese individuals by passing national legislation making employment decisions based on weight unlawful.

NOTE

NOT “FIT” FOR HIRE: THE UNITED STATES AND FRANCE ON WEIGHT DISCRIMINATION IN EMPLOYMENT

*Michael L. Huggins**

“Would I employ you if you were obese? No I would not. You would give the wrong impression to the clients of my business. I need people to look energetic, professional and efficient. If you are obese you look lazy.”

– Katie Hopkins, Former Apprentice Contestant¹

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* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2011, New York University. I would like to thank my wife, Paola, for her love and support, as well as Professor Tanya Hernandez and Sharon Hang for their guidance and advice.

1. Kirsty McCormack, *'If You Are Obese You Look Lazy' Katie Hopkins Says She Won't Employ Overweight People*, EXPRESS.CO.UK, (Jul. 8, 2013, 1:32 PM), <http://www.express.co.uk/news/showbiz/413323/If-you-are-obese-you-look-lazy-Katie-Hopkins-says-she-won-t-employ-overweight-people>.

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INTRODUCTION

A majority of individuals in the United States are obese or overweight, and yet harmful stereotypes about obesity continue to pervade US society.² Common perceptions of obese individuals as

2. See Jane Brody, *Attacking the Obesity Epidemic by First Figuring out Its Cause*, N.Y. TIMES, Sep. 13, 2011, at D7, available at http://www.nytimes.com/2011/09/13/health/13brody.html?pagewanted=all&_r=0 (highlighting pressing concerns over obesity in the United States); see also *Obesity and Overweight*, CTRS. FOR DISEASE CONTROL AND

being lazy, unambitious, and lacking self-control can be an unfair disadvantage in the workplace.³ While these stigmas associated with obesity have existed throughout US history, recent progressive trends in US law, media, and scholarship signal a shift in attitudes concerning equal protection of obese individuals in employment.⁴ Such conditions have created the ideal political and social environment in which to evaluate the pressing equality concern of weight discrimination in employment.

The United States is currently in the midst of a progressive era, largely centered on gay rights and marriage equality.⁵ This focus has turned the spotlight back on the Fourteenth Amendment and fair and equal protection for all.⁶ President Barack Obama, for example,

PREVENTION, <http://www.cdc.gov/nchs/fastats/obesity-overweight.htm> (last updated Jan. 14, 2015) (reporting that between 2011 and 2012 69% of individuals in the United States age 20 and above were overweight or obese).

3. See ANNA KIRKLAND, FAT RIGHTS DILEMMAS OF DIFFERENCE AND PERSONHOOD 9-10 (2009) (positing that people judge obese individuals based on their own experience in dieting and exercise and, therefore, perceive obesity as laziness and inability to care for oneself); Katrin Elisabeth Giel et al., *available at Weight Bias in Work Settings – a Qualitative Review*, EUR. J. OBESITY 35 (Feb. 11, 2010), *available at* <http://www.karger.com/Article/Pdf/276992> (showing results of study in which participants reported believing that fictional obese individuals lacked self-discipline and were lazy and less ambitious, compared with fictional average-weight individuals, and reporting that “[b]ody weight is a salient attribute of physical appearance, and studies have recently identified body weight as a perceived source of discrimination in the American society with a prevalence close to that of perceived racial discrimination”); Mila Gumin, Note, *Ugly on the Inside: An Argument for A Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1773 (2012) (noting that appearance discrimination in the workplace affects job prospects and advancement opportunities).

4. See *infra* Part I (discussing attitudes regarding obesity in the United States and US laws protecting against physical appearance discrimination).

5. See Jennifer Bernstein, *Post-DOMA, Much MO(re) to be Done*, ZEEK (June 28, 2013), <http://zeek.forward.com/articles/117816/> (arguing that the gay rights movement “is the civil rights issue of our generation”); *How the Civil Rights Movement Launched the Fight for LGBT, Women’s Equality*, PBS NEWSHOUR (Sep. 2, 2013, 12:00 PM), http://www.pbs.org/newshour/bb/nation-july-dec13-civilrights_09-02/ (discussing how civil rights movement paved the way for gay rights movement).

6. See Jennifer L. Pomeranz, *A Historical Analysis of Public Health, the Law, and Stigmatized Social Groups: The Need for Both Obesity and Weight Bias Legislation*, 16 OBESITY S93, S96 (Supp. II 2008), (comparing gay individuals to obese individuals as “subject[s] of discrimination in many spheres of daily life” and highlighting that “it is not per se illegal to discriminate against them”); Doug Kendall & Ilya Shapiro, *The Constitutional Case for Marriage Equality*, HUFFINGTON POST BLOG (Feb. 28, 2013), http://www.huffingtonpost.com/doug-kendall/the-constitutional-case-f_b_2781874.html (describing gay rights cases as “a fight for the true meaning of one of America’s most sacred constitutional rights”); Eva Paterson, *Protecting the 14th Amendment*, HUFFINGTON POST BLOG (Mar. 16,

has called for Congress to pass the Employment Nondiscrimination Act (“ENDA”), which would outlaw employment discrimination based on an individual’s sexual orientation.⁷ President Obama’s plea to Congress began by stating the fundamental principle that “we are all created equal and every single American deserves to be treated equally in the eyes of the law.”⁸ Equality has been a pillar in US law from the time of its inclusion in the Declaration of Independence.⁹

2011), http://www.huffingtonpost.com/eva-paterson/protecting-the-14th-amend_b_836544.html (providing historical context of continual social and political battle to keep 14th Amendment “safeguarded both from frontal and stealth attacks”); cf. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (striking down federal legislation that did not recognize same-sex marriage); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding that California voters that had passed State legislation outlawing same-sex marriage did not have standing to challenge the lower court’s determination that the law was unconstitutional). Note, however, that women continue to face social and legal challenges to workplace equality. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2759 (2014) (holding that closely-held corporations may deny women health care coverage for contraceptives based on religious beliefs); ANNA CHU & CHARLES POSNER, CTR. FOR AM. PROGRESS, *THE STATE OF WOMEN IN AMERICA: A 50-STATE ANALYSIS OF HOW WOMEN ARE FARING ACROSS THE NATION* (Sept. 2013) (reporting that despite making up half of the US population, women still receive only seventy-seven cents for every dollar men make and make up the majority of minimum-wage workers).

7. See Barack Obama, *Congress Needs to Pass the Employment Non-Discrimination Act*, HUFFINGTON POST BLOG (Nov. 3, 2013), http://www.huffingtonpost.com/barack-obama/enda-congress_b_4209115.html (urging Congress to pass ENDA and stating that “America is at a turning point. We’re not only becoming more accepting and loving as a people, we’re becoming more just as a nation. But we still have a way to go before our laws are equal to our Founding ideals.”); see also Angie Drobnic Holan, *Senate Moves Ahead on Measure to Stop Job Discrimination Against Gays and Lesbians*, TAMPA BAY TIMES POLITIFACT (Nov. 5, 2013, 12:00 PM), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/291/expand-the-employment-non-discrimination-act-to-in/> (monitoring progress of ENDA legislation). The Age Discrimination in Employment Act (“ADEA”) similarly prohibits employment discrimination based on age. See 29 U.S.C. § 623(a) (2012); *Age Discrimination in Employment Act (ADEA)*, HR HERO, <http://topics.hrhero.com/age-discrimination-in-employment-act-adea/#> (last visited Sept. 24, 2014) (summarizing purpose and effects of ADEA); *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (interpreting ADEA to prohibit actual age discrimination and disparate impact); Pomeranz, *supra* note 6, at S101 (stating that the Supreme Court’s analysis of the ADEA is “instructive of how courts would interpret [a Weight Discrimination Employment Act] because when Congress uses the same language in two statutes with similar purpose, the Court presumes that Congress intended the texts to have the same meaning.”).

8. Obama, *supra* note 7.

9. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); Eric Slauter, *Life, Liberty, and the Pursuit of Happiness*, BOSTON GLOBE (July 3, 2011), http://www.boston.com/bostonglobe/ideas/articles/2011/07/03/life_liberty_and_the_pursuit_of_happiness/ (examining US history from Declaration of Independence).

Nonetheless, an understanding of how equal protection should apply under the Fifth Amendment and the Fourteenth Amendment continues to evolve over time.¹⁰

A majority of people in the United States support national laws prohibiting weight discrimination.¹¹ US federal law, however, prohibits only particular instances of employment discrimination based on weight.¹² Under the Americans with Disabilities Act (“ADA”), for example, an employer may not discriminate against an individual whose obesity qualifies as a disability by substantially impairing a major life function, such as walking or breathing.¹³ Meanwhile, the state of Michigan and six cities across the United States have adopted laws more broadly prohibiting employers from engaging in discriminatory practices on the basis of weight, with more states recently proposing similar laws.¹⁴ These jurisdictions

10. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV (“No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

11. See Jennifer L. Pomeranz & Rebecca M. Puhl, *New Developments in the Law for Obesity Discrimination Protection*, 21 *OBSESITY* 469, 470 (2013), http://www.yaleruddcenter.org/resources/upload/docs/what/law/WeightDiscriminationLaw_Obesity_4.13.pdf (discussing results of study showing that sixty-five (65) percent of men and eighty-one (81) percent of women expressed favorable views toward laws that would prohibit employers from discriminating against obese employees); Rebecca M. Puhl & Chelsea A. Heuer, *Public Opinion About Laws to Prohibit Weight Discrimination in the United States*, *OBSESITY* 7 (2010), available at <http://onlinelibrary.wiley.com/doi/10.1038/oby.2010.126/epdf> (asserting that anti-discrimination legislation with specific provisions to prohibit weight discrimination in employment may receive considerable public support).

12. See *infra* Part I.B.1.

13. Compare 42 U.S.C. § 12102(1)(A) (2012) (defining “disability” as physical or mental impairment that “substantially limits one or more of the major life activities”), with 42 U.S.C. § 12102(2)(A) (2012) (defining but not limiting “major life activities” to include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working), and *Wilkerson v. Shinseki*, 606 F.3d 1256, 1262 (10th Cir. 2010) (providing that impairment's impact must be permanent or long-term).

14. See Deborah L. Rhode, *Why Looks Are the Last Bastion of Discrimination*, *WASHINGTON POST* (May 23, 2010) (highlighting that despite many anti-discrimination laws that the United States has adopted over the past half-century, bias based on appearance remains permissible in all but one state and six cities and counties), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/20/AR2010052002298.html>; cf. Evangeline Gomez, *Should Businesses Worry About Appearance-Based Discrimination in the Workplace?*, *FORBES* (Jan. 31, 2012), <http://www.forbes.com/sites/evangelinegomez/2012/01/31/should-businesses-worry-about-appearance-based-discrimination-in-the-workplace/> (arguing that more businesses will likely face appearance based discrimination

represent a growing concern in the United States for protecting individuals against weight discrimination in employment as obesity rates steadily continue to rise.¹⁵ While these states and municipalities have taken a step in the right direction, the spread of weight anti-discrimination laws in the United States has been slow, and the vast majority of individuals remain unprotected by such laws.¹⁶

The United States would not be the first nation to prohibit discrimination based on physical characteristics such as weight.¹⁷ In 2001, France prohibited all forms of physical appearance discrimination in the workplace.¹⁸ Such an expansive law

issues because research has confirmed bias). On October 28, 2013, the Massachusetts House Committee on Labor and Workforce Development reported that it was on its second reading of a bill that would outlaw weight and height discrimination. See Richard Cohen, *Massachusetts May Ban Height And Weight Discrimination*, FOX ROTHSCHILD, L.L.P. (Oct. 16, 2013), <http://employmentdiscrimination.foxrothschild.com/2013/10/articles/another-category/massachusetts-may-ban-height-and-weight-discrimination/> (discussing Massachusetts' proposed legislation to prohibit weight discrimination). Additionally, Utah has proposed a bill to the same effect. See Richard Cohen, *"Height And Weight" Anti-Discrimination Bill Considered In Utah—Are "Appearance Bias" Laws Far Off?*, FOX ROTHSCHILD, L.L.P. (Mar. 6, 2013), <http://employmentdiscrimination.foxrothschild.com/2013/03/articles/another-category/height-and-weight-antidiscrimination-bill-considered-in-utah-are-appearance-bias-laws-far-off/> (reporting that Utah has considered adopting weight discrimination laws and warning that "[i]f a state as conservative as Utah actually considered a height and weight law, employers should be aware of what's coming down the pike.").

15. See James McIntosh, *American Waistlines Continue to Grow*, MEDICAL NEWS TODAY (Sept. 17, 2014, 12:00 AM), <http://www.medicalnewstoday.com/articles/282599.php> (reporting that obesity rates are rising in the United States, leading to higher rates of heart disease); cf. Juliette Mullin, *The State of Obesity in America*, THE ADVISORY BOARD COMPANY (Feb. 28, 2014, 11:36 AM), <http://www.advisory.com/daily-briefing/blog/2014/02/the-state-of-obesity> (warning that although child obesity rates have recently declined, that fact should not be viewed as "mission accomplished").

16. See *Weight Bias Laws: Tipping the Scales Against Prejudice?*, MINN. DEP'T OF HUMAN RIGHTS, http://mn.gov/mdhr/education/articles/rs10_2weightlaws.html (last visited Sept. 21, 2014) (noting that Urbana, Illinois, for example, has had laws prohibiting weight discrimination since the 1990's); Megan Orciari, *Weight Discrimination: Public Supports Disability and Civil Rights Legal Protection*, YALE NEWS (Apr. 9, 2014), <http://news.yale.edu/2014/04/09/weight-discrimination-public-supports-disability-and-civil-rights-legal-protection> (noting that no US federal laws outlaw weight discrimination); see also Press Release, The Obesity Society, Most in U.S. Support Laws to Crack Down on Weight Discrimination, (May 5, 2014), available at <http://www.obesity.org/news-center/most-in-us-support-laws-to-crack-down-on-weight-discrimination.htm> (reporting that approximately three of four people in the United States would support adding body weight as protected class under Civil Rights Act).

17. See *infra* note 18 (providing French laws prohibiting physical appearance discrimination).

18. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (prohibiting discrimination based on physical appearance); see also France: *Racial Discrimination in the Field of Employment*,

encompasses discrimination not just on the basis of weight but also based on a person's height, attire, and/or small stature, to name a few.¹⁹ In fact, as with all of France's anti-discrimination laws, a finding of physical appearance discrimination carries both civil and criminal liability.²⁰ France's laws thus provide a comparison by which to frame US law against the backdrop of another industrialized nation with a growing obesity rate that prohibits discriminatory employment practices on the basis of an individual's weight.²¹

EQUALRIGHTSTRUST.ORG, at 2, http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20France%20-%20race%20-%20employment%20_Deichert%20Paris_.pdf (last updated Oct. 2006) (providing English translation and background of Article L.122-45). Belgium has also recently adopted laws prohibiting physical appearance-based discrimination. See *New Anti-Discrimination Law Under Fire*, EUROFOUND (July 31, 2003), <http://www.eurofound.europa.eu/eiro/2003/07/feature/be0307303f.htm> (examining Belgium's law against discrimination based on physical characteristics). Spain proposed similar laws in 2012, but has not adopted them. See Inma Zamora, *La Discriminación Por Aspecto Físico, el Nuevo Caballo de Batalla de Igualdad*, ABC.ES (June 13, 2012), <http://www.abc.es/20100713/sociedad/igualdad-201007071536.html> (discussing Equal Treatment Act [La Ley de la Igualdad de Trato], which would expand anti-discrimination laws to physical appearance).

19. See *L'apparence Physique*, LE DÉFENSEUR DES DROITS, <http://www.defenseurdesdroits.fr/connaitre-son-action/la-lutte-contre-les-discriminations/lapparence-physique/critere/lapparence> (last visited Oct. 10, 2014) (describing physical appearance to include all physical traits and physical characteristics of an individual).

20. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (providing that "no person may be excluded from a recruitment procedure or an internship or a training program; no employee may be sanctioned, dismissed or be subject to a direct or indirect discriminatory measure, in particular as regards compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer or contract renewal, as well as measures of profit-sharing and allocation of shares based on his . . . physical appearance."); see also *France: Racial Discrimination in the Field of Employment*, *supra* note 18, at 2 (English translation of article L.122-45); CODE PÉNAL [C. PÉN.] art. 225-1(V) (Fr.) ("Constitue une discrimination toute distinction opérée entre les personnes physiques à raison . . . de leur apparence physique." [Translation: Any distinction made between individuals based on physical appearance constitutes discrimination.]). For an in-depth comparison of employment discrimination remedies in the United States and France, see Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U.L. REV. 1315 (2008).

21. See Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 344 (2007) [hereinafter *Equal By Comparison*] (highlighting value of consulting foreign law irrespective of potential success of modeling domestic reform on foreign examples); Julie C. Suk, *French and American Approaches to Antidiscrimination Law*, FRENCH-AMERICAN FOUNDATION 1 (Mar. 2008), http://equality.frenchamerican.org/sites/default/files/chi-hyesuk_antidiscriminationlaw_brief_en.pdf (comparing US and French anti-discrimination laws, each of which is based on the fundamental constitutional principle of equality). See generally Frederick H. Lawson, *The Approach to French Law*, 34 IND. L.J. 531, 531 (1959), (describing the utility and importance of French law to lawyers around the world).

Part I will examine past and present attitudes regarding obesity in US society and will discuss the employment challenges obese individuals face because of weight discrimination. Further, Part I will survey US statutory laws at the federal, state, and local levels that currently protect against particular instances of weight discrimination. In sum, this Part aims to provide the current legal and social landscape in the United States for protecting individuals against employment discrimination based on their weight.

Part II will look at France's cultural bias against obesity and its laws against physical appearance discrimination. Part II then will analyze French statutory law and legislative history. This Part will ground the discussion in cases that have arisen in French media involving physical appearance discrimination based on weight, including an investigation by France's human rights watch institution, Le Défenseur des droits.²² Overall, this perspective on French law will form the foundation for analyzing the extent of protection that the United States may feasibly adopt to protect individuals against weight discrimination.

Part III juxtaposes France's laws prohibiting physical appearance discrimination with current US federal law to highlight the ways in which the United States falls short of its promise of equal protection for all by permitting employment discrimination based on an individual's weight. This Part posits that US law may serve as a tool to catalyze important social change in the public's perception of obesity, based on a similar shift in public perception that occurred in France following the adoption of its laws prohibiting physical appearance discrimination. Ultimately, this Note argues that the United States must act to eliminate the pervasive discrimination against obese individuals by passing national legislation making employment decisions based on weight unlawful.

22. France's national human rights institution, Le Défenseur des droits, is an independent authority created under France's Constitution in July 23, 2008 and tasked with protecting individuals' constitutional rights and freedoms and promoting equality. See *S'informer sur le Défenseur des droits*, LE DEFENSEUR DES DROITS, <http://www.defenseurdesdroits.fr/sinformer-sur-le-defenseur-des-droits> (last visited Sept. 21, 2014); see also CONST. DU 4 OCTOBRE 1958, tit. XI A, art. 71-1(1), available at <http://www.assemblee-nationale.fr/english/#XIA> (English version of Constitution of October 4, 1958, establishing France's national human rights institution).

I. WEIGHT DISCRIMINATION IN THE UNITED STATES

Current US law reflects over one hundred years of US history and culture in which a person's weight has served as a legally and socially permissible basis for discrimination.²³ As a result of the progressive social climate, the United States is reevaluating its treatment of disadvantaged members of society.²⁴ In fact, weight anti-discrimination laws have already taken root in a number of state and local jurisdictions across the United States.²⁵

This Part proceeds by way of two main Sections. The first Section focuses on US attitudes regarding obesity, beginning with a brief historical perspective and ending with the effects of weight discrimination in employment. The second Section focuses on current US federal, state, and local laws that prohibit some instances of weight discrimination.

A. Attitudes Regarding Obesity in the United States

Attitudes concerning weight discrimination in the United States today can be traced back over one hundred years.²⁶

1. History of Negative Views of the Obese

The average person in the United States, while unlikely to recall the many achievements of President William Howard Taft (1909-1913) during his presidency, more likely would recount the story of President Taft getting stuck in the White House bathtub.²⁷

23. See *infra* notes 27-29 (discussing media's attention to the obesity of President William Howard Taft in the early Twentieth Century and of New Jersey Governor Chris Christie in recent years).

24. See *supra* notes 7 & 8 (highlighting President Barack Obama's recent urging of Congress to pass the ENDA).

25. See *infra* Part I.B.2 (providing relevant laws of each jurisdiction in the United States that prohibits weight discrimination).

26. See *infra* Part I.A.1 (describing anti-obese views in the United States dating back to the presidency of William Howard Taft in early Twentieth Century).

27. Compare *William Howard Taft*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/williamhowardtaft> (last visited Sept. 21, 2014) (describing Taft's presidency and noting accomplishments in Office), and *William Howard Taft*, HISTORY.COM, <http://www.history.com/topics/us-presidents/william-howard-taft> (last visited Sept. 21, 2014) (providing information, photographs, and videos about Taft's presidency), with Ella Morton, *Delve into Past Presidents' Predilections at these Oddball Destinations*, SLATE (Feb. 17, 2014), http://www.slate.com/blogs/atlas_obscura/2014/02/17/president_s_day_road_trips_see_taft_s_chair_the_lincoln_bullet_and_a_menagerie.html

Taft, who weighed 340 pounds and stood five feet and 11.5 inches tall, was frequently the subject of fat jokes by both the media and even his own White House staff throughout his presidency.²⁸ The story of Taft getting stuck in the bathtub, regardless of its truth, symbolizes a long history in the United States of poking fun at obese individuals, even if that person is the highest elected government official.²⁹

The media's attacks on obese political leaders persist to this day, most evidently in the recent criticism of New Jersey Governor Chris Christie's weight in anticipation of his potential presidential candidacy.³⁰ CNN reports that, "[the Governor's] waistline could become a major factor of a potential 2016 presidential bid."³¹ Some

(noting that "[w]hile the story of him getting stuck in the bathtub on his inauguration day is almost certainly apocryphal — especially the version that involves four strong men and a gallon of butter — Taft did require extra-wide chairs"), and Ashley Killough et al., *Fact or Fiction: Taft Got Stuck in a Tub?*, CNN (Feb. 6, 2013), <http://politicalticker.blogs.cnn.com/2013/02/06/fact-or-fiction-taft-got-stuck-in-a-tub/> (reporting that only written record that Taft actually got stuck in bathtub was mention of it in the diary of a chief White House usher).

28. See Laura Knowlton-Le Roux, *Reading American Fat in France: Obesity and Food Culture*, 2 EUR. J. AM. STUD. 2, 5 (2007), available at <http://ejas.revues.org/1363> (stating that one cartoonist depicted Taft sitting at a gigantic table shaped like the United States entirely covered with dishes of food); *William Howard Taft*, MILLER CENTER, <http://millercenter.org/president/taft/essays/biography/print> (last visited Sept. 21, 2014) (explaining that Taft's size made him the subject of countless jokes, for example, "Taft was the most polite man in Washington. One day he gave up his seat on a streetcar to three women"); cf. *William Howard Taft*, THE WHITE HOUSE, *supra* note 27 (stating that Taft once wrote facetiously that he always had his "plate the right side up when offices were falling").

29. See Knowlton-Le Roux, *supra* note 28, at 5 (arguing that "the fact that even a president in office could be subject to such cruel mockery is illustrative of the great contempt Americans had for the obese, contempt which started well over a century ago. No one is exempt from judgment on the basis of his or her body size and shape."); see also *William Howard Taft*, MILLER CENTER, *supra* note 28 (noting that when Taft became stuck in presidential bath tub, requiring help of six men to pull free, press had a "field day.").

30. See Al Kamen, *Sizing up Gov. Christie's Chances*, WASHINGTON POST (Sep. 29, 2011), http://www.washingtonpost.com/politics/sizing-up-gov-christies-chances/2011/09/29/gIQAfEd87K_story.html (emphasizing that Christie would "certainly be the largest president" since Taft); *Potential Presidential Candidate Challenged Because of Body Weight*, YALE RUDD CTR. FOR FOOD POLICY & OBESITY (Oct. 2011), <http://www.yaleruddcenter.org/newsletter/issue.aspx?id=38> (objecting to recent criticism of New Jersey Governor Chris Christie).

31. Kevin Liptak, *Christie Takes Fat Jokes in Stride (and with a Donut)*, CNN (Feb. 5, 2013), <http://politicalticker.blogs.cnn.com/2013/02/05/christie-takes-fat-jokes-in-stride-and-with-a-donut/> (reporting that Christie was "all laughs" reflecting about his weight when he pulled a donut from pocket and "started nibbling away"); see also Timothy Noah, *Guess Chris Christie's Weight!*, THE NEW REPUBLIC (Sep. 30, 2011), <http://>

have even surmised that Governor Christie’s weight could be used as a political strategy for the Republican party to seem more “in touch” with the average person in the United States due to the growing population of individuals classified as overweight and obese.³² While Governor Christie appeared on a late night talk show poking fun at his own weight, he also recently underwent weight-loss surgery.³³ Moreover, the media continues to report on Christie’s weight loss since the surgery.³⁴ Governor Christie has responded that he is not going to be “overly self-consumed” about his weight and has expressed his belief that voters should only be concerned about his performance in office.³⁵ The similarities in media criticism of Governor Christie and President Taft help to demonstrate the long

www.newrepublic.com/blog/timothy-noah/95589/guess-chris-christies-weight (calling for readers to guess Governor Christie’s weight).

32. See Daniel Allott, *Chris Christie’s Biggest Asset: His Weight*, POLITICO (Dec. 3, 2013), <http://www.politico.com/magazine/story/2013/12/republican-governor-chris-christie-new-jersey-biggest-asset-his-weight-100607.html> (arguing that “[a] fat [presidential] nominee could be exactly what a Republican Party needs to shed its image as out of touch with ordinary Americans”); Editorial, *Our Thin-Skinned Governor*, NJ.COM BLOG (Sept. 4, 2013), http://blog.nj.com/njv_editorial_page/2013/09/christie_ploy_for_the_obese_vo.html (claiming that Chris Christie is making a strategic pitch to capture the obese vote in New Jersey).

33. Compare Liptak, *supra* note 31 (describing Christie’s appearance on Jay Lenno, where Christie joked about his weight while eating a donut), and Killough et al., *supra* note 27 (noting that Christie has poked fun at his own weight), with Jonathan Karl, Jeff Zelen & Z. Byron, *Chris Christie Had Secret Weight-Loss Surgery*, ABC NEWS (May 7, 2013), <http://abcnews.go.com/Politics/OTUS/chris-christie-secretly-lap-band-weight-loss-surgery/story?id=19124435> (reporting that Christie “secretly underwent lap band surgery in February to control his weight”), and Bonnie Rochman, *Gov. Chris Christie’s Weight-Loss Surgery Demystified*, TIME (May 7, 2013), <http://healthland.time.com/2013/05/07/gov-chris-christies-weight-loss-surgery-demystified/> (reporting on the medical safety of Christie’s choice to undergo lap-band surgery).

34. See, e.g., Jonel Aleccia, *Still Not Skinny, Christie Cheered as a Weight-Loss Surgery Success*, NBC NEWS (Feb. 19, 2014), <http://www.nbcnews.com/health/health-news/still-not-skinny-christie-cheered-weight-loss-surgery-success-n33191> (stating that one year after getting “secret” weight-loss surgery, Christie is “reduced in size, but still far from what you’d call thin”); Jake Miller, *Chris Christie “losing Weight Steadily,” Medical Report Says*, CBS NEWS (Oct. 25, 2013), <http://www.cbsnews.com/news/chris-christie-losing-weight-steadily-medical-report-says/> (saying that Christie has been losing weight steadily following lap-band surgery).

35. See Miller, *supra* note 34 (describing Christie’s interview with David Letterman); *Christie Calls Doctor Who Criticized Weight A ‘Hack’ Who Should ‘Shut Up’*, CBS (Feb. 6, 2013), <http://newyork.cbslocal.com/2013/02/06/christie-calls-doctor-who-criticized-weight-a-hack-who-needs-to-shut-up/> (reporting on Christie’s criticism of doctor who expressed trepidation that Christie might die in office because of his weight).

history in the United States of denigrating obese individuals, even at the highest levels of political society.³⁶

2. Anti-Obese Policies

Criticism of obese individuals in the United States does not stop at the media's portrayal of famous individuals.³⁷ A recent example of weight bias that has surfaced in commerce is a new airline policy requiring that obese passengers pay for an additional seat.³⁸ At least one airline, based in Samoa, has decided to change to a "pay-per-pound" rate system for flight tickets.³⁹ This new policy has spurred discussions over whether US-based airlines should adopt similar pricing schemes.⁴⁰ In other instances, three airlines have faced

36. See, e.g., Dan Amira, *What Chris Christie Could Learn From William Howard Taft*, NYMAG (Feb. 7, 2013) (advising that Christie learn from Taft to "embrace[] his ample size with good humor"); Kamen, *supra* note 30 (emphasizing that Christie would "certainly be the largest president" since Taft).

37. See, e.g., Kat Hobza, *10 Celebrities Who've Been Fat-Shamed and How They Got Revenge*, SHEKNOWS.COM (Mar. 1, 2014), <http://www.sheknows.com/entertainment/articles/1031245/10-celebrities-who-have-been-fat-shamed-and-how-they-got-revenge> (reporting on various celebrities' weight gain and loss); Meghan Holohan, *Kirstie Alley Joins Jenny Craig to Lose Weight — Again*, TODAY (Apr. 7, 2014), <http://www.today.com/health/kirstie-alley-joins-jenny-craig-lose-weight-again-2D79492007> (reporting on Alley's return to weight loss program); Stephanie Marcus, *Kirstie Alley Returns To Jenny Craig, Wants To Lose 30 Pounds*, HUFFINGTON POST (Apr. 8, 2014), http://www.huffingtonpost.com/2014/04/07/kirstie-alley-jenny-craig_n_5105513.html (discussing Alley's weight gain due to "combination of 'man troubles' and overeating during the holidays").

38. See Arya M. Sharma, *How "Pay As You Weigh" Shames the Obese*, HUFFINGTON POST BLOG (Apr. 24, 2014), http://www.huffingtonpost.ca/arya-m-sharma-md/pay-as-you-weigh_b_3112315.html (describing shaming effect of new pay-per-pound airline fare policy on obese individuals); N.B., *How Should Airlines Treat Larger Passengers?*, THE ECONOMIST (Nov. 12, 2012), <http://www.economist.com/blogs/gulliver/2012/11/obese-flyers> (comparing Air Canada's policy of giving free second seat to obese passengers who provide doctor's note).

39. See Lucy Craymer, *Weigh More, Pay More on Samoa Air*, WALL STREET J. (Apr. 3, 2013), <http://online.wsj.com/news/articles/SB10001424127887323646604578399943583708244> (explaining reasons for Samoa Air's "weigh more, pay more" pricing scheme); *Pay Your Weight to Fly*, FREAKONOMICS (Apr. 10, 2013), <http://freakonomics.com/2013/04/10/pay-your-weight-to-fly/> (examining Samoa Air's ticket fare pricing based on weight).

40. See *Economist Proposes 'Pay-as-you-weigh' Model for Air Tickets*, FOXNEWS.COM (Mar. 28, 2013), <http://www.foxnews.com/travel/2013/03/28/economist-proposes-pay-as-weigh-model-for-air-tickets/> (pointing out the economic benefits to airlines from charging passengers by weight), Harold Maass, *Should Airlines Charge Passengers by Weight?*, THE WEEK (Apr. 2, 2013), <http://theweek.com/article/index/242156/should-airlines-charge-passengers-by-weight> (highlighting that some airlines require passengers to pay second fare if they cannot fit comfortably in single seat). *But cf.* Mary Jane Credeur & Mary Schlangenstien, *Pay-by-Weight Fares in Samoa Seen Unlikely to Be Copied*, BLOOMBERG (Apr. 3, 2013),

Mississippi bill, and airline policies that use weight as a determinant factor in cost, send the message to obese individuals that they are not entitled to equal rights and privileges.⁴⁵

3. Shaming Obesity

Obesity is a topic of frequent discussion in the United States, where almost daily reports in the news and other media place intense moral pressure on individuals to lose weight.⁴⁶ To further complicate matters, doctors will often make statements intended to make a patient feel bad about her weight as a way to motivate her to lose weight.⁴⁷ Some physicians and other health professionals have self-reported their bias and prejudice against overweight and obese patients.⁴⁸ Negative motivational tools are also popularly used in

/archive.clarionledger.com/article/20080205/NEWS010504/802050377/Lawmaker-Obesity-bill-won-t-make-floor (interviewing state lawmaker who said House Bill 282 would be “dead on arrival at my desk”).

45. See *infra* note 57 (explaining the detrimental emotional and psychological harms on obese persons resulting from differential treatment based on their weight).

46. See Rich Cuccagna, *American Heart Association Urges Heart Health Awareness During National Hispanic Heritage Month*, NJ.COM (Sept. 18, 2014), (noting that heart disease is leading cause of death in the United States); Knowlton-Le Roux, *supra* note 28, at 5 n.14 (arguing that while France and the United States have faced national obesity issues before, France has “never shared . . . the moralizing tone and relentless association of overeating with personal ethical failure” present in the United States); McIntosh, *supra* note 15 (reporting that obesity rates are rising in the United States, leading to higher rates of heart disease); Mullin, *supra* note 15 (warning that although child obesity rates have recently declined, that fact should not be viewed as “mission accomplished”). But see *Americans Are More Accepting of Heavier Bodies*, NBCNEWS, <http://www.nbcnews.com/id/10807526/ns/health-fitness/#.VGBdp77DqfQ> (last updated Jan. 23, 2006) (reporting that a survey found America’s attitudes toward overweight and obese people “are shifting from rejection toward acceptance”).

47. See Joseph J. Gugenheim, *Physician Attitudes and Weight Bias*, AAOS NOW (June 2013), <http://www.aaos.org/news/aaosnow/jun13/clinical7.asp> (“With regard to diseases, including obesity, we physicians like to think that ‘they’ (the patients with the disease) are the problem and ‘we’ (the physicians) are the solution. But our attitudes toward obese patients may make us part of the problem regarding their care. . . . Indeed, antifat bias is as pervasive among physicians as it is in the general population.”); *Preventing Weight Bias, Helping Without Harming In Clinical Practice*, YALE RUDD CENTER (last visited Sept. 21, 2014), http://www.yaleruddcenter.org/resources/bias_toolkit/index.html (noting that physicians and other health professionals self-report bias and prejudice against overweight and obese patients).

48. See Gugenheim, *supra* note 47 (acknowledging that physicians must refrain from weight bias and providing the example that young doctors often think that patients whose afflictions are perceived as a consequence of their own behavior are less worthy of care, and medical students mention obese patients as a main target for derogatory humor); *Preventing Weight Bias*, *supra* note 47 (discussing physicians’ self-reports of weight bias); John Spangler

media and advertising as a way to shame obese people into losing weight.⁴⁹ Such advertisements have included commercials and signs showing images of obese youth with captions reading, "[b]eing fat takes the fun out of being a kid" and "[i]t's hard to be a little girl if you're not."⁵⁰

Negative weight loss advertisements also perpetuate a culture of anti-obese bias and even negatively affect obese individuals' self-perception.⁵¹ For example, in response to one online article describing an airline's announcement that they would begin charging passengers based on their weight, one reader replied that he "avoid[s] situations

et al., *Future Doctors Unaware of Their Obesity Bias*, WAKE FOREST BAPTIST MED. CTR. (May 23, 2013), http://www.wakehealth.edu/News-Releases/2013/Future_Doctors_Unaware_of_Their_Obesity_Bias.htm (reporting that thirty-nine (39%) percent of medical students had a moderate to strong unconscious obese bias); Tara Parker-Pope, *Are Doctors Nicer to Thinner Patients?*, N.Y. TIMES (Apr. 29, 2013), <http://well.blogs.nytimes.com/2013/04/29/overweight-patients-face-bias/> (explaining that physicians were not being overtly negative or harsh but were not engaging patients in rapport-building or making an emotional connection with the patient).

49. See Paul Campos, *Anti-Obesity Ads Won't Work By Telling Fat Kids to Stop Being Fat*, THE DAILY BEAST (Jan. 4, 2012), <http://www.thedailybeast.com/articles/2012/01/04/anti-obesity-ads-won-t-work-by-telling-fat-kids-to-stop-being-fat.html> (arguing that negative weight loss advertisements targeting obese children are ineffective because "fat children are already perfectly and painfully aware" and simple act of telling kids to "stop being fat" will not help them become thin); Rebecca M. Puhl, *Weight Bias in the News Media and Public Health Campaigns: Are we Fighting Obesity or Obese Individuals?*, YALE RUDD CENTER (2013), http://www.yaleruddcenter.org/resources/upload/docs/what/bias/Weight_Stigma_in_News_Media_and_Public_Health_Efforts_to_Address_Obesity_Presentation_2013.pdf (discussing various negative weight loss ads and counterproductive effect they have on obesity).

50. Emanuella Grinberg, *Georgia's Child Obesity Ads Aim To Create Movement Out of Controversy*, CNN (Feb. 7, 2012), <http://www.cnn.com/2012/02/07/health/atlanta-child-obesity-ads/> (discussing controversial advertisement campaign to decrease youth obesity that displays messages); see also Melissa Dahl, *"Fat Shaming" Actually Increases Risk of Becoming or Staying Obese, New Study Says*, TODAY (July 26, 2013), <http://www.nbcnews.com/health/diet-fitness/fat-shaming-actually-increases-risk-becoming-or-staying-obese-new-f8C10751491> (highlighting study showing that "fat shaming" can increase risk of becoming or staying obese).

51. See Nancy Matsumoto, *For Students, Perils of Weight Bias, Anti-Obesity Programs*, PSYCHOLOGY TODAY (Sept. 24, 2013), <http://www.psychologytoday.com/blog/eating-disorders-news/201309/students-perils-weight-bias-anti-obesity-programs-0> (discussing negative effects on obese youth of media cautions concerning "getting rid of" obesity, as stigmatized youth often internalize such warnings and believe themselves are problem); Mark Roehling et al., *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination: The Role of Sex and Race*, 71 J. VOCATIONAL BEHAV. 300, 302-03 (2007), available at <http://web.mit.edu/CME/Public/vtmp.pdf> (arguing that victims of weight bias are more likely to share same bias).

where people have to make allowances for my size” and commented that his weight “deprives me of many things, but it is my struggle. It shouldn't be anyone else's [sic].”⁵² This reader's response exemplifies one author's argument that because some victims of weight bias feel deserving of weight-related mistreatment, they may not view such treatment in the workplace as unjust or discriminatory.⁵³

4. Effects of Obesity Bias in Employment

Weight discrimination is one of the most widespread forms of employment discrimination in the United States.⁵⁴ In recent studies, weight discrimination ranked as the third most prevalent cause of perceived basis for discrimination among women, after gender and age, and the fourth most prevalent form of discrimination among all adults, after gender, age, and race.⁵⁵ Obese candidates are on average

52. See Reader Comment to *How “Pay As You Weigh” Shames the Obese*, HUFFINGTON POST BLOG (Apr. 24, 2014), http://www.huffingtonpost.ca/arya-m-sharma-md/pay-as-you-weigh_b_3112315.html.

53. See Roehling et al., *supra* note 51, at 302-03 (arguing that victims of weight bias more likely to accept adverse treatment as their “due”); *Obesity in America: Miss Piggy*, THE ECONOMIST (June 23, 2005), available at <http://www.economist.com/node/4102325> (examining memoir in which an obese woman recounts psychological factors that have contributed to her obesity, writing that “[a]mong the reasons people keep sad stories to themselves is that they do not want anyone to feel sorry for them”). Weight discrimination in the workplace may particularly contribute to negative self-perceptions because of the substantial amount of time the average person in the United States spends at work—roughly one-third of her day. U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY, <http://www.bls.gov/tus/charts/> (last visited Apr. 26, 2014) (providing pie chart of how people in the United States spend hours in day on average); cf. Bryce Covert, *Americans Work So Hard That We're Not Using Our Vacation Time*, THINK PROGRESS (Apr. 3, 2014), <http://thinkprogress.org/economy/2014/04/03/3422725/vacation-unused/> (reporting on lack of vacation time individuals in the United States receive and actually take).

54. See Amy Norton, *Weight Discrimination Common, U.S. Survey Finds*, REUTERS (Apr. 9, 2008), <http://www.reuters.com/article/2008/04/09/us-weight-discrimination-idUSTON97652720080409> (finding that sixty percent (60%) of men and women who reported weight discrimination said they had experienced work-related discrimination); Rebecca M. Puhl, *Weight Discrimination: A Socially Acceptable Injustice*, OBESITY ACTION COALITION, <http://www.obesityaction.org/educational-resources/resource-articles-2/weight-bias/weight-discrimination-a-socially-acceptable-injustice> (last visited Sept. 21, 2014) (arguing that obesity is highly stigmatized in US society, where overweight and obese individuals are vulnerable to negative bias, prejudice and discrimination in many different settings).

55. See R.M. Puhl, T. Andreyeva & K.D. Brownell, *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, 32 INT'L J. OF OBESITY 992, 997 (2008), http://www.pubfacts.com/fulltext_frame.php?PMID=18317471&title=Perceptions%20of%20weight%20discrimination%20prevalence%20and%20comparison%20to%20race%20and%20gender%20discrimination

less likely to be hired, especially for jobs that entail face-to-face interactions.⁵⁶ When it comes to compensation, employers pay obese individuals less than non-obese individuals and promote them less often than their average-weight colleagues.⁵⁷

Obesity bias is deeply rooted in US history and just as prevalent in today's culture. Even in instances where the media and the medical profession seem to have the well-being of obese people at heart, they often resort to negative motivation methods. The following Section shifts from discussing obesity in the societal context and looks at what legal recourse an obese person has in the United States when an employer discriminates against her because of her weight.

B. US Anti-Discrimination Laws

Federal anti-discrimination laws in the United States protect individuals against weight discrimination in narrow circumstances.⁵⁸ Lawmakers at the local and state levels, however, have begun expanding their anti-discrimination laws, which are modeled after Title VII of the Civil Rights Act of 1964 ("Title VII"), to include

%20in%20America (reporting that weight discrimination in the United States is relatively close to reported rates of racial discrimination).

56. See Andrea E. Chernov, *Weight Discrimination: The Effects of Obesity on Employment and Promotion*, 4 HOHONU J. ACADEMIC WRITING 107, 109 (2006), <http://hilo.hawaii.edu/academics/hohonu/documents/Vol04x23WeightDiscrimination.pdf> (describing examples of weight bias in employment); ROBERTA R. FRIEDMAN & REBECCA M. PUHL, YALE RUDD CENTER, WEIGHT BIAS, A SOCIAL JUSTICE ISSUE 4 (2012), http://www.yaleruddcenter.org/resources/upload/docs/what/reports/Rudd_Policy_Brief_Weight_Bias.pdf (discussing consequences of weight bias in employment, such as perception of being unfit for jobs involving face-to-face interactions); Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RESEARCH 788, 789-90 (2001), <http://onlinelibrary.wiley.com/store/10.1038/oby.2001.108/asset/oby.2001.108.pdf?v=1&t=ht4flc22&s=789b909eea3dc1b3657f2b85cb69c63f64c9192b> (finding obese individuals less likely than average-weight individuals to be hired as receptionist, sales person, or physical educator).

57. See FRIEDMAN & PUHL, *supra* note 56 (finding that employers, often viewing obese individuals as lazy, less competent, and lacking self-discipline, pay such individuals less and promote them less frequently); Timothy A. Judge & Daniel M. Cable, *When It Comes to Pay, Do the Thin Win? The Effect of Weight on Pay for Men and Women*, J. APPLIED PSYCHOL. 1, 14-15 (Aug. 20, 2010), available at [http://www.timothy-judge.com/Judge%20and%20Cable%20\(JAP%202010\).pdf](http://www.timothy-judge.com/Judge%20and%20Cable%20(JAP%202010).pdf) (finding a positive correlation between an individual's pay and weight increases to a certain point and a negative correlation thereafter, and explaining that obesity bias is reflected in pay level because pay reflects the value placed on employees' full set of human and social capital).

58. See *infra* Part I.B.1 (describing limitations of US federal law for protecting against weight discrimination).

weight as a protected class.⁵⁹ This Section first surveys US national laws that provide support for some instances of weight discrimination. A discussion of the state and local laws that prohibit weight discrimination follows.

1. National Laws

US federal law provides two potential avenues for individuals to seek remedies for weight discrimination.⁶⁰ An individual may seek relief for employment discrimination under either Title VII or the ADA.⁶¹

i. Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.⁶² Because weight is not a protected class under Title VII, plaintiffs seeking redress for adverse employment actions based on weight must file claims under one of the other protected classes.⁶³ Therefore, if a discriminatory employment act based on a person's weight does not also implicate race, sex or one of the other named classes, the individual will have no remedy under Title VII for a weight discrimination claim.⁶⁴

59. *See infra* Part I.B.2 (laying out anti-discrimination laws of local US jurisdictions).

60. *See infra* note 61 (providing laws under which an individual has a private right of action for discrimination based on weight).

61. *Compare* 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employment discrimination based on certain protected classes), *with* 42 U.S.C. § 12102, *et. seq.* (2012) (prohibiting discrimination based on disability). This discussion groups the Rehabilitation Act ("RA") with the ADA because of their substantial similarity in protecting against disability discrimination. *Compare* 29 U.S.C. § 701, *et seq.* (2012), *with* 42 U.S.C. § 12102, *et. seq.* (2012). The RA applies to federal entities, while the ADA applies to private entities and state and local governments. *See A Guide to Disability Rights Laws*, U.S. DEP'T JUSTICE (Jul. 2009), available at <http://www.ada.gov/cguide.htm>.

62. *See* 42 U.S.C. § 2000e-2(a) (2012) (providing protected classes that may bring an action under Title VII).

63. *See id.* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (concerning maximum security penitentiary weight policy that effectively kept women from becoming correctional officers); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 847 (9th Cir. 2000) (involving airline weight policy for flight attendants that disproportionately impacted women).

64. 42 U.S.C. § 2000e-2 (2014)

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Obese individuals may also challenge discriminatory laws under the Equal Protection Clause of the Fourteenth Amendment.⁶⁵ Under an equal protection claim, the court must determine the level of protection to afford weight as a class.⁶⁶ Courts provide strict protection against discrimination of "suspect" classes, such as race, ethnicity, religion, and national origin.⁶⁷ "Quasi-suspect" classes, such as gender and illegitimacy, receive intermediate protection.⁶⁸ For all other classes, a discriminatory law will be found unconstitutional only if the claimant can show that there was not a rational basis for passing the law.⁶⁹ Some factors that courts have considered in determining whether a group of individuals constitute a suspect class include: (1) whether the group has historically been discriminated against and/or subject to prejudice, hostility, and/or stigma; (2) whether the group possesses an immutable and/or highly visible trait; (3) whether the group is politically powerless, or a "discrete and insular" minority; and (4) whether the group's distinguishing characteristic inhibits it

65. See U.S. CONST. amend. XIV (providing that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws").

66. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (finding that close relatives are not a "suspect" or "quasi-suspect" class because, they have not historically been subjected to discrimination; they do not exhibit "obvious, immutable, or distinguishing" characteristics that define them as a "discrete group," and they are not a minority or politically powerless); *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (concluding that classifications based upon sex are subject to strict scrutiny review based on history of discrimination, immutability, political powerlessness, and because "the sex characteristic frequently bears no relation to ability to perform or contribute to society"). See generally Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, The European Convention, and the Canadian Charter* (1995) (discussing historical discrimination for purposes of suspect class determinations).

67. See *Romer v. Evans*, 517 U.S. 620, 640 (1996) (applying rational basis test to quasi-suspect classes, such as homosexuals and immigrants); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (providing that the Court applies "strict scrutiny" to cases of race discrimination). United States courts afford varying levels of protection to particular classes of people, ranging from the highest level, strict scrutiny, to intermediate scrutiny, to the least amount of protection, rational basis scrutiny. See generally Jeffery M. Shaman, *Cracks in the Structure: The Coming Breakdown of Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (explaining the historical development of levels of judicial scrutiny).

68. See *Romer*, 517 U.S. at 640 (applying rational basis test to quasi-suspect classes); *Adarand Constructors*, 515 U.S. at 247 (providing that the Court applies "intermediate scrutiny" to cases of invidious gender discrimination).

69. See *Romer*, 517 U.S. at 640 (applying rational basis test to quasi-suspect classes); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (applying rational basis to mental handicap).

from contributing meaningfully to society.⁷⁰ In establishing an equal protection claim against a law that discriminates against obese people, a plaintiff would need to apply these factors to argue that the court should consider weight a suspect or quasi-suspect class warranting heightened judicial scrutiny.⁷¹

ii. The ADA

The ADA prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities.⁷² Specifically in the employment context, the ADA prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.⁷³ The US Department of Labor's Office of Disability Employment Policy provides publications and other technical assistance on the basic requirements to which employers must adhere under the ADA.⁷⁴ The Equal Employment Opportunity Commission

70. See *supra* note 66 (providing historical context and catalogue of levels of scrutiny, including factors for strict scrutiny).

71. As discussed in greater detail in Part III, African-Americans and women share a history of discriminatory laws for which there is no comparison with respect to obese individuals. See Felix Chima & William Wharton, *African-Americans and the Workplace: Overview of Persistent Discrimination*, J. INTER-GROUP RELS. 23 (1999), <http://www.wininsights.com/wp-content/uploads/2012/02/African-American.pdf> (providing historical perspective of discrimination against African-Americans and women in US employment); Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994) (discussing common history of discrimination that women and African-Americans share in US history).

72. See *Disability Resources*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/disability/ada.htm> (last visited Oct. 10, 2014) (providing an overview of the ADA and its enforcing administrative agencies); *What is the Americans with Disabilities Act (ADA)*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> (last visited Oct. 10, 2014) (summarizing provisions of ADA).

73. See *Facts About the Americans with Disabilities Act*, EEOC, <http://www.eeoc.gov/eeoc/publications/fs-ada.cfm> (last visited Oct. 10, 2014) (providing overview of ADA provisions regarding employment discrimination based on disability); *Employment (Title I)*, U.S. DEP'T OF JUSTICE, http://www.ada.gov/ada_title_I.htm (last visited Oct. 10, 2014) (detailing how to file discrimination claim).

74. See, e.g., *A Guide to Disability Rights Laws*, *supra* note 61; *Disability Resources*, *supra* note 72 (discussing Department of Labor's role in relation to EEOC with regard to ADA requirements); see also Statement of Labor Secretary Elaine L. Chao on the 13th Anniversary

(“EEOC”), however, an independent administrative agency to which Congress has delegated rulemaking authority for enforcing federal laws against discrimination in employment, is tasked with enforcing the ADA through its authority to investigate claims of discrimination and to pass regulations.⁷⁵

Where a plaintiff can prove that her obesity constitutes a disability, an employer must make reasonable accommodations for her, pursuant to the ADA.⁷⁶ The ADA, however, does not specifically recognize obesity as a disability.⁷⁷ Traditionally, courts have held that to prove disability discrimination under the ADA based on obesity, a plaintiff must (1) show that the obesity substantially limits a major life activity, such as walking or working, and (2) point to a physiological cause for the obesity.⁷⁸ A plaintiff claiming weight discrimination under the ADA would therefore have to show that her

of the Signing of the Americans with Disabilities Act, July 26, 2003 USDL 03-399 (announcing that the Department of Labor has been designated as the lead agency in implementing employment efforts through an initiative by President George W. Bush, called the New Freedom Initiative).

75. See 42 U.S.C. § 2000e-16 (2012) (delegating authority to the EEOC to adjudicate claims involving federal employees); see also *Federal Laws Prohibiting Job Discrimination Questions And Answers*, EEOC, <http://www.eeoc.gov/facts/qanda.html> (describing EEOC’s authority to enforce ADA).

76. See 42 U.S.C. § 12112(b)(5)(A) (2012) (providing that discrimination under ADA includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”); 42 U.S.C. § 12111 (2012) (providing examples of reasonable accommodations, such as making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, modified work schedules, reassignment to vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities).

77. See 42 U.S.C. § 12102, *et. seq.* (2012); see also Julia M. Hodges, *A New Wave of Litigation: Obesity Related Disability Discrimination*, HRHERO.COM BLOG (Nov. 17, 2013), <http://blogs.hrhero.com/diversity/2013/11/17/a-new-wave-of-litigation-obesity-related-disability-discrimination/> (provide parenthetical).

78. See, e.g., *Lescoe v. Penn. Dep’t of Corr.-SCI Frackville*, 464 F. App’x 50, 53 (3d Cir. 2012) (finding that plaintiff’s ADA claim failed to allege that his weight is result of physiological disorder); *E.E.O.C. v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 441 (6th Cir. 2006) (holding that “non-physiological morbid obesity” is not “impairment” under ADA); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (providing that except where obesity relates to physiological disorder, obesity is not “physical impairment” within meaning of ADA); *Torcasio v. Murray*, 57 F.3d 1340, 1354 (4th Cir. 1995) (finding that regulations do not clearly establish that ADA covers obese individual).

obesity was caused by a physiological disorder such as hypertension or a thyroid disorder and that her weight substantially limits one or more major life functions.⁷⁹ A person who cannot demonstrate that her obesity has some other underlying physiological disorder cannot establish a claim for disability discrimination under the ADA.⁸⁰

An employee may be regarded as having an impairment under the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) without having to establish that the employer perceived the employee to be substantially limited in a major life activity.⁸¹ The EEOC, however, has distinguished between different weight ranges for purposes of establishing a discrimination claim under the ADA.⁸² Under its authority, the EEOC regularly issues interpretive guidelines to clarify particular parts of the law for employers and employees, and courts defer to such guidelines based on their persuasiveness.⁸³ In one such guideline, the EEOC has stated that weight is automatically an impairment only if it is not within the normal range—a body mass index that is within 18.5 to 24.9—or is the result of a physiological

79. See 29 C.F.R. § 1630.2(h)-(i) (defining “physical or mental impairment” and “major life activities”); see, e.g., *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011) (finding triable issue of fact as to whether plaintiff was fired for disability, where plaintiff suffered and died from morbid obesity, and where hypertension, diabetes, and congestive heart failure were “significant conditions contributing to death”).

80. See sources *supra* note 78 (providing that an individual must demonstrate an underlying physiological cause for her obesity to establish a claim under the ADA).

81. See 42 U.S.C. § 12102(3) (2012) (stating that individual is “regarded as” having impairment if subjected to discriminatory employment action because of actual or perceived physical or mental impairment, regardless of whether impairment substantially limits, or is perceived to substantially limit, major life activity); ADA Amendments Act of 2008, Pub. L. No. 110-325, 112 Stat. 3553 (Sept. 25, 2008) (establishing ADAAA); see also David Katz, *Obesity as a Covered Disability Under the ADA*, BNA DAILY LABOR REPORT (Oct. 5, 2012), available at <http://www.mintz.com/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=1679&PortalId=0&DownloadMethod=attachment> (explicating ADAA changes).

82. See 42 U.S.C. § 2000e-16 (2012) (delegating authority to adjudicate claims involving federal employees); 42 U.S.C. § 2000e-5 (2012) (providing EEOC with authority to investigate charges of discrimination and initiate civil action in federal court); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (providing that EEOC regulations carry the force of law). See generally *Overview*, EEOC, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 9, 2014) (defining EEOC’s role).

83. See *Christensen*, 529 U.S. at 587 (finding that EEOC guidelines merit judicial deference only insofar as they have power to persuade under *Skidmore* standard); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (articulating the applicable standard of deference, under which “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

disorder.⁸⁴ The EEOC's implementing regulations still specify that a plaintiff whose weight is in the average range must show, as an underlying cause of the plaintiff's obesity, "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems," including neurological, musculoskeletal, and special sense organs.⁸⁵

While this development in disability anti-discrimination laws expands protections for those plaintiffs whose weight is outside the average range, a plaintiff whose weight is within the average range must still point to a physiological cause for her obesity to establish a claim under the ADA.⁸⁶ Thus, a person who falls within the average weight range and does not have an underlying physiological disorder, but who nonetheless faces employment discrimination based on her weight, will not have recourse under the ADA.

A person whose weight falls outside the EEOC's average range determination must also show that her weight impairs a major life function.⁸⁷ Towards that end, the American Medical Association ("AMA") recently enhanced weight disability protections by classifying obesity as a disease.⁸⁸ Some publications have argued that

84. See Regulations to Implement the Equal Employment Provisions of the Americans with Disability Act: Definitions, 29 C.F.R. § 1630.2(h) (2012) (providing that weight is an "impairment" only if outside "normal" weight range or caused by an underlying physiological disorder); see also Katz, *supra* note 81 (outlining the requirements for an individual to establish a disability discrimination claim for weight under the ADA). For the Center for Disease Control's explanation of how to calculate the normal weight range, based on a person's body mass index, see *About BMI for Adults*, CDC, http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html?s_cid=tw_ob064 (last updated July 11, 2014). See also *Normal Weight Ranges: Body Mass Index (BMI)*, AMERICAN CANCER SOCIETY, <http://www.cancer.org/cancer/cancercauses/dietandphysicalactivity/bodyweightandcancerrisk/body-weight-and-cancer-risk-adult-bmi> (last updated Jan. 30, 2013) (providing chart of various weights and heights with corresponding BMI).

85. 29 C.F.R. § 1630.2(h)(1) (2012) (examples also including respiratory and speech organs, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine).

86. See *supra* note 62 (discussing "normal" weight range).

87. See *supra* note 62 (noting ADA's requirement that claimant's obesity impair a major life function).

88. See Liz Neporent, *AMA Declares Obesity a Disease*, ABC NEWS (June 19, 2013), <http://abcnews.go.com/Health/american-medical-association-classifies-obesity-disease/story?id=19439304> (reporting AMA's decision to classify obesity as disease); Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES (June 18, 2013), http://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html?nl=todaysheadlines&emc=edit_th_20130619&r=2& (discussing debate that persists as to AMA's classification of obesity as disease).

such a classification is counterproductive and will exacerbate the stigma obese individuals already face.⁸⁹ Setting aside the merit of that line of reasoning, the new classification could potentially help plaintiffs bring disability discrimination claims on the grounds that obesity is a disability under the ADA by virtue of it being a disease.⁹⁰ Since the AMA's reclassification of obesity, some courts have found that morbid obesity, without more, is a metabolic disability.⁹¹ In other decisions, courts have not required the plaintiff to point to an underlying physiological cause for obesity, and instead have focused exclusively on whether the plaintiff's obesity substantially limits a major life function.⁹²

89. See Geoffrey Kabat, *Why Labeling Obesity As A Disease Is A Big Mistake*, FORBES (July 9, 2013), <http://www.forbes.com/sites/geoffreykabat/2013/07/09/why-labeling-obesity-as-a-disease-is-a-big-mistake/> (arguing that broadly classifying obesity as "disease" will stigmatize obese individuals and in some cases will add to the sense of lack of control over their health); Maia Szalavitz, *Viewpoint: Defining Obesity as a Disease May Do More Harm Than Good*, TIME (June 19, 2013), <http://healthland.time.com/2013/06/19/viewpoint-why-defining-obesity-as-a-disease-may-do-more-harm-than-good/> (warning that studies have shown that "disease" label increases pessimism about recovery and suggesting that people assume that diseases are immutable).

90. Joe Palazzolo, *Is Obesity a Disability?*, WALL ST. J. BLOG (Jul. 8, 2013), <http://blogs.wsj.com/law/2013/07/08/is-obesity-a-disability/> (noting that EEOC since 2010 has recognized obesity as disability); see also Hodges, *supra* note 77 (noting that AMA's labeling obesity as "disease" gives employees new highly respected supporting source to help them establish that obesity is disability under ADA).

91. See, e.g., *Budzban v. DuPage Cnty. Reg'l Office of Educ., Addison Sch. Dist. 4*, 12 C 900, 2013 WL 147628, at *5-6 (N.D. Ill. Jan. 14, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim based on obesity but reminding plaintiff of burden to show that reasonable accommodations existed); *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 693 (E.D. La. 2011) (holding that severe obesity, defined as body weight more than 100% over the norm, is disability under ADA and does not require proof of physiological basis); *Pennington v. Wagner's Pharmacy, Inc.*, 2012-CA-000573-MR, 2013 WL 3480307, at *3 (Ky. Ct. App. July 12, 2013) (overturning trial court's finding that plaintiff's obesity did not have underlying physiological cause on grounds that obesity is metabolic disease). A person qualifies as "morbidly obese" if she either is one hundred pounds over her ideal body weight, has a BMI of 40 or more, or has a BMI of 35 or more and is experiencing obesity-related health conditions, such as high blood pressure or diabetes. See *What is Morbid Obesity? Morbid Obesity is a Serious Health Condition*, UNIV. OF ROCHESTER, <http://www.urmc.rochester.edu/highland/departments-centers/bariatrics/right-for-you/morbid-obesity.aspx> (last visited Nov. 10, 2014).

92. See, e.g., *Powell v. Gentiva Health Servs., Inc.*, CIV.A. 13-0007-WS-C, 2014 WL 554155, at *5 (S.D. Ala. Feb. 12, 2014) (limiting disability inquiry to whether plaintiff's obesity substantially limits one or more major life activities); *Sacks v. Gandhi Eng'g, Inc.*, 999 F. Supp. 2d 629, 648 (S.D.N.Y. Feb. 27, 2014) (finding disability discrimination based on obesity, where defendant had perception that plaintiff could not meet physical demands of job).

The AMA's decision to classify obesity as a disease may influence some courts to begin recognizing broader protections under the ADA for individuals facing weight discrimination.⁹³ Even these broader protections, however, extend only to cases in which the plaintiff is morbidly obese and can show substantial impairment of a major life function.⁹⁴ Employees who are obese and face discriminatory employment actions on that basis, but whose weight does not impair a major life function, will still find themselves unable to state a cause of action under the ADA.⁹⁵

Under US federal law, an employee who has experienced weight discrimination at work thus has two options for legal recourse against her employer: she may bring a claim under Title VII, in which case she will have to show that obese persons are a protected class or point to another protected class under the statute, and/or she may bring a claim under the ADA which will require her to demonstrate that her obesity, at the very least, impairs one of her major life functions.⁹⁶

2. State and Local Jurisdictions

Seven jurisdictions in the United States prohibit weight discrimination in employment, each of which may be classified under one of two categories with respect to statutory language.⁹⁷ The first category consists of jurisdictions that prohibit discrimination based on physical appearance.⁹⁸ The second category encompasses jurisdictions

93. See Christine Moyer, *What's Next Now That the AMA Has Declared Obesity a Disease?*, AM. MED. NEWS (July 1, 2013), <http://www.amednews.com/article/20130701/house/130709952/1/> (noting that AMA's role as nation's leading physician organization means its policies often carry more clout with industry, insurers and lawmakers than do statements by other groups); Peter Page, *AMA's Obesity Declaration Could Open Door for Coverage, Treatment*, AJMC.COM (Sept. 27, 2013), <http://www.ajmc.com/publications/evidence-based-diabetes-management/2013/2013-1-vol19-sp7/amas-obesity-declaration-could-open-door-for-coverage-treatment/2> (comparing AMA's classification of obesity to 1956 recognition of alcoholism as disease or Surgeon General's warning on cigarettes in 1964).

94. See *supra* note 85 (involving claims under which the plaintiff must show an impaired major life function because of her weight).

95. See *supra* notes 71-73 (providing that a plaintiff must show an impaired life function to establish an ADA claim).

96. See *infra* Part I.B.1.a. (discussing the elements of a Title claim); *infra* Part I.B.1.b. (examining what a plaintiff must prove to be successful on her ADA claim).

97. See *infra* notes 101 & 120 (listing the local US jurisdictions that prohibit weight discrimination in one form or another).

98. See *infra* Parts I.B.2.a., b., and c. (providing statutes of local US jurisdictions prohibiting physical appearance discrimination).

that expressly prohibit weight-based discrimination.⁹⁹ While the potential ramifications of these varying statutory terms is a topic left to future research, this discussion makes the linguistic distinction to provide a clear catalogue of the current span of jurisdictions prohibiting weight discrimination.¹⁰⁰ Further, this distinction may help federal lawmakers select the statutory language that will best effectuate the goal of eliminating weight discrimination in employment.

Three US jurisdictions, Washington, D.C.; Madison, Wisconsin; and Urbana, Illinois, proscribe appearance-based employment discrimination.¹⁰¹ This prohibition protects individuals against employment disparities based on an individual's physical appearance.¹⁰² This Section proceeds by discussing each jurisdiction respectively.

i. Washington, D.C.

The District of Columbia Municipal Code ("D.C. Code") provides that it is unlawful discrimination to base employment decisions upon the actual or perceived personal appearance of any individual.¹⁰³ While the D.C. Code makes no reference to weight in

99. See *infra* Parts I.B.2.d., e., f., and g. (providing statutes of local US jurisdictions explicitly prohibiting weight discrimination).

100. Compare *infra* Parts I.B.2.a., b., and c. (discussing US local jurisdictions prohibiting physical appearance discrimination); with *infra* Parts I.B.2.d., e., f., and g. (examining US local jurisdictions that explicitly prohibit weight discrimination).

101. See D.C. CODE § 2-1402.11(a) (2014) (declaring unlawful discriminatory practice to discriminate based on "personal appearance"); MADISON, WIS. CODE ORDINANCES § 39.03(1) (2014) (prohibiting discrimination in housing, employment, public accommodations, and City facilities on the bases of "physical appearance"); URBANA, ILL. CODE ORDINANCES § 12.37 (2014) (proscribing discrimination based on "personal appearance").

102. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987) (emphasizing that "appearance, like race and gender, is almost always an illegitimate employment criterion" but is frequently used to make employment decisions); see also *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972) (stating that individuals in US society too often form opinions of people on the basis of "superficial features" and that in adopting the Civil Rights Act of 1964, Congress intended to attack stereotyped characterizations so that people would be judged by their intrinsic worth).

103. D.C. CODE § 2-1402.11(a) (2014) states:

It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, *personal appearance*,

its prohibited acts or definitions sections, it defines "personal appearance" as the "outward appearance" of any person with regard to bodily condition or characteristics.¹⁰⁴ The majority of personal appearance discrimination cases that have thus far come before Washington, D.C. courts under the D.C. Code have centered on claims involving race, gender, religion, and disability.¹⁰⁵

In *Flecha De Lima v. International Medical Group, Inc.*, however, the plaintiff alleged that defendant insurance company engaged in personal appearance discrimination on the basis of weight by denying the plaintiff coverage for weight reduction services.¹⁰⁶ While the D.C. Superior Court ultimately denied the plaintiff's claim, the court assumed, for purposes of its summary judgment analysis, that the plaintiff's morbid obesity was a distinctive personal appearance that could have been the target of unlawful discrimination.¹⁰⁷ *Flecha* shows that D.C. courts are willing to read "personal appearance" discrimination to include instances of weight discrimination.¹⁰⁸

sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual:

(1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee.) (emphasis added).

104. See D.C. CODE § 2-1402.02(22) (2014) (defining "personal appearance" as "the outward appearance of any person").

105. See, e.g., *McManus v. MCI Commc'ns Corp.*, 748 A.2d 949, 951 (D.C. 2000) (denying race and personal appearance discrimination claims of African-American employee who wore African-styled attire and dreadlocks and cornrows hairstyles to work); *Marshall v. Dist. Unemployment Comp. Bd.*, 377 A.2d 429, 430 (D.C. 1977) (denying religious and personal appearance discrimination claims of probationary police officer who refused to trim hair and shave beard in conformity with regulations).

106. See No. 01CA6866, 2004 WL 2745654, at *1 (D.C. Super. Nov. 29, 2004) (holding that the defendant health care insurance denied the plaintiff coverage for gastric bypass surgery based on the type of treatment he sought, and not based on his personal appearance or disability).

107. See *id.* at *7 (assuming for purposes of analysis that plaintiff's morbid obesity condition was manifested in distinctive personal appearance that could have been the target of discrimination prohibited).

108. See *id.* (equating discrimination against the plaintiff's obesity to personal appearance discrimination).

ii. Madison, Wisconsin

Under the Code of Ordinances of Madison, Wisconsin, an employer is prohibited from engaging in discriminatory employment practices based on a person's physical appearance.¹⁰⁹ "Physical appearance," under the Madison Code, means the "outward appearance" of any person, irrespective of weight or other aspects of appearance.¹¹⁰

In *State ex rel. Badger Produce Company v. Equal Opportunity Commission*, a prospective employee lodged a complaint with the City of Madison Equal Opportunity Commission alleging, *inter alia*, physical appearance discrimination based on her "small stature" when the employer produce company refused to hire her as a delivery driver.¹¹¹ In the interview, the employer expressed doubt that

109. See MADISON, WIS. CODE ORDINANCES § 39.03(1) (2014) (establishing equal opportunities in housing, employment, public accommodations and City facilities to individuals without regard to, among others, physical appearance). Section 39.03(8)(a) states that:

It shall be an unfair discrimination practice and unlawful and hereby prohibited:

(a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to her/his compensation, terms, conditions, or privileges of employment, because of such individual's protected class membership, unemployment or credit history or the fact that a person declines to disclose their Social Security Number when such disclosure is not compelled by state or federal law. Provided, that an employer who is discriminating with respect to compensation in violation of this subsection, shall not, in order to comply with this subsection, reduce the wage rate of any employee.

MADISON, WIS. CODE ORDINANCES § 39.03(8)(a) (2014). Further, Section 39.03(2)(mm) defines "protected class membership" as:

[A] group of natural persons, or a natural person, who may be categorized because of their ability to satisfy the definition of one or more of the following groups or classes: sex, race, religion, color, national origin or ancestry, citizenship status, age, handicap/disability, marital status, source of income, arrest record or conviction record, less than honorable discharge, *physical appearance*, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student, domestic partner, or receipt of rental assistance.

MADISON, WIS. CODE ORDINANCES § 39.03(2)(mm) (2014) (emphasis added).

110. See MADISON, WIS. CODE ORDINANCES § 39.03(2)(bb) (2014) (providing that an employer may require cleanliness or uniforms, or prescribe attire, if uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose).

111. See No. 79-CV-4405, 1980 WL 4645, at *1 (Wis. Cir. Ct. Sept. 2, 1980) (noting that plaintiff was four (4) feet eleven (11) and a half (1/2) inches tall and weighed about one-hundred-ten (110) pounds).

the prospective employee could lift the boxes, as the position required, and requested that she lift some boxes to “prove a point.”¹¹² When the prospective employee refused to perform the exercise, which no other interviewee was asked to perform, the employer refused to hire her.¹¹³ The Circuit Court of Wisconsin affirmed the Commission’s finding that the employer had discriminated on the basis of physical appearance in refusing to hire the prospective employee in this instance.¹¹⁴ *Badger Produce* is an example of an instance in which the Madison Code would prohibit physical appearance discrimination based on size because the statute prohibited the employer from refusing to hire an individual simply because she appeared too petite to perform the job.¹¹⁵

iii. Urbana, Illinois

An employer is prohibited, under the Urbana, Illinois Code of Ordinances (“Urbana Code”), from discriminating against an individual on the basis of “personal appearance . . . or [engaging in] any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity in housing [or] employment.”¹¹⁶ The Urbana Code defines the term “personal appearance” as the “outward appearance” of any person with regard to bodily condition or characteristics, such as “weight . . . or other aspects of appearance.”¹¹⁷ Moreover, the ordinance includes a catchall provision purporting to protect against

112. *See id.* at *2 (manager testifying that prospective employee would have had the job if she had lifted boxes).

113. *See id.* at *8-*9 (noting that the prospective employee asked the employer if anyone else was asked to lift boxes, to which the response was “no,” and thus finding the employee’s refusal to lift the boxes reasonable; noting also that the prospective employee had performed similar tasks at a previous job).

114. *See id.* at *9-*10 (granting EEOC’s motion to quash the plaintiff’s writ of certiorari).

115. *See id.* at *1 (noting that the plaintiff was 4 feet 11 and 1/2 inches tall and weighed about 110 pounds, and that her employer “said you can’t do it, the boxes weigh 150 pounds”).

116. *See* URBANA, ILL. CODE ORDINANCES §§ 12.37, 12.62 (2014) (prohibiting “personal appearance” discrimination or “any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity in housing, employment, credit or access to public accommodations”).

117. URBANA, ILL. CODE ORDINANCES § 12.39 (2014).

any discriminatory employment actions taken based on grounds other than a person's "unique" and "relevant" qualifications.¹¹⁸

The above jurisdictions cast a broader net of protection by prohibiting physical appearance discrimination, including discrimination based on weight and other physical characteristics.¹¹⁹ Four other US jurisdictions, the state of Michigan; San Francisco, California; Santa Cruz, California; and Binghamton, New York, specifically prohibit weight-based employment discrimination.¹²⁰

iv. The State of Michigan

Michigan is the only state in the United States thus far to have successfully passed laws specifically prohibiting discrimination based on weight.¹²¹ In 1976, Michigan passed the Elliot-Larsen Civil Rights Act ("ELCRA"), which provides that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against

118. *See* URBANA, ILL. CODE ORDINANCES 12.62 (2014). Section 12.37 states that: It is the intent of the City of Urbana in adopting this article, to secure an end, in the city, to discrimination, including, but not limited to, discrimination by reason of race, color, creed, class, national origin, religion, sex, age, marital status, physical and mental disability, personal appearance, sexual preference, family responsibilities, matriculation, political affiliation, prior arrest or conviction record or source of income, or *any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity* in housing, employment, credit or access to public accommodations.

URBANA, ILL. CODE ORDINANCES § 12.37 (emphasis added).

119. *See supra* Parts I.B.2.a., b., and c. (providing examples of the breadth of laws that prohibit physical appearance discrimination).

120. *See* MICH. COMP. LAWS § 37.2202(1) (2014) (prohibiting discrimination based on weight); S.F., CAL. POLICE CODE art. 33, § 3303(a) (2014) (proscribing weight discrimination); SANTA CRUZ, CAL. CODE § 9.83.010 (2014) (prohibiting discrimination based on "weight or physical characteristic"); BINGHAMTON, N.Y. CODE ORDINANCES § 45-3 (2014) (proscribing weight discrimination and defining "weight" to mean numerical measurement or perceived weight).

121. *See* Evangeline Gomez, *Should Businesses Worry About Appearance-Based Discrimination in the Workplace?*, FORBES (Jan. 31, 2012), <http://www.forbes.com/sites/evangelinomez/2012/01/31/should-businesses-worry-about-appearance-based-discrimination-in-the-workplace/> (noting Michigan's role as the first state to explicitly prohibit discrimination based on weight and height and comparing its laws to those more recently adopted by various municipalities); Orciari, *supra* note 16 (highlighting that Michigan is the only state with laws prohibiting weight discrimination). The State of Massachusetts is also close to passing a bill that would also prohibit employment discrimination. *See* MASS. H.B. 1758, 188th Gen. Ct. (Mass. 2013-2014), available at <https://malegislature.gov/Bills/188/House/H1758>.

an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, *weight*, or marital status."¹²²

In *Smith v. Hooters of America, LLC*, a relevant Michigan case of notoriety, the plaintiff, Cassie Smith, a former waitress in the Detroit area, brought an action under ELCRA for weight discrimination against the restaurant chain, Hooters of America.¹²³ Smith alleged that her supervisors required her to sign an agreement placing her on a thirty-day "weight probation" as a condition of retaining her employment, advised her to join a gym to improve her looks and fit into her required uniform, disclosed these details to her coworkers, and subsequently fired her for failing to comply with the conditions of the weight probation.¹²⁴ After a county court judge dismissed the defendant's motion to dismiss the case, the parties ultimately agreed to arbitrate and the outcome was not reported to the media.¹²⁵ Nevertheless, the facts of this case represent one type of weight discrimination in the workplace for which Michigan's laws are needed.

122. MICH. COMP. LAWS. § 37.2202(1) (2014) (emphasis added), available at [http://www.legislature.mi.gov/\(S\(hs5dob555i21vkjicwj0lgui\)\)/mileg.aspx?page=getObject&objectname=mcl-37-2202](http://www.legislature.mi.gov/(S(hs5dob555i21vkjicwj0lgui))/mileg.aspx?page=getObject&objectname=mcl-37-2202) (prohibiting employment decisions based on weight).

123. See Joanne Deschenaux, *Hooters Sued for Weight Discrimination*, SOC'Y FOR HUMAN RES. MGMT. (June 17, 2010), <http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/HootersSued.aspx> (explaining that plaintiff claims Hooters's actions amounted to constructive discharge); Dionne Searcey, *Weight Discrimination Suit at Hooters Proceeds*, WALL ST. J. LAW BLOG (Aug. 25, 2010), <http://blogs.wsj.com/law/2010/08/25/weight-discrimination-suit-at-hooters-proceeds/> (noting that Hooters claims plaintiff signed arbitration agreement).

124. See Erin Daly, *Hooters Can't Escape Ex-Servers' Weight Bias Suits*, LAW360 (Aug. 25, 2010), <http://www.law360.com/articles/189199/hooters-can-t-escape-ex-servers-weight-bias-suits> (reporting that county circuit court denied Hooters's motions to dismiss on grounds of arbitration clause); Jonathan Stempel, *Hooters Sued by Ex-Worker for Weight Bias*, REUTERS (May 24, 2010), <http://www.reuters.com/article/2010/05/24/us-hooters-bias-lawsuit-us-idUSTR64N5RQ20100524> (citing Hooters as saying that it occasionally "challenge[s] employees about their image," but that this happens "no more than a few dozen times" each year).

125. See Sarah Cormier, *Hooters Weight-Discrimination Case Moves to Arbitration*, C & G NEWS (July 13, 2011), <http://www.candgnews.com/news/hooters-weight-discrimination-case-moves-arbitration> (reporting that plaintiff agreed to arbitrate); *Arbitrator to Decide Hooters Weight Cases*, ASSOCIATED PRESS (June 17, 2011), available at http://www.mlive.com/news/detroit/index.ssf/2011/06/arbitrator_to_decide_hooters_w.html (citing Hooters attorney as saying that arbitration will greatly reduce legal costs and lead to a quick decision).

v. San Francisco, California

The San Francisco Police Code (“S.F. Code”) expressly prohibits adverse employment actions based on an individual’s weight.¹²⁶ The San Francisco Human Rights Commission (the “SFHRC”) has defined “weight,” for the purposes of the S.F. Code, to include a numerical measurement of a person’s total body weight, the ratio of a person’s weight in relation to height, or an individual’s unique physical composition of weight through body size, shape, and proportions.¹²⁷ The SFHRC’s “weight” definition also extends beyond the person’s numerical weight to discriminatory actions an employer takes based on the perception of an individual as obese or thin, based on body size, shape, proportions, or composition.¹²⁸

vi. Santa Cruz, California

The Santa Cruz Municipal Code (“Santa Cruz Code”) prohibits “any act, policy or practice which, regardless of intent, has the effect of subjecting any person to differential treatment as a result of that person’s race, color, creed, religion, national origin, ancestry, disability, marital status, sex, gender, sexual orientation, height, weight or physical characteristic.”¹²⁹ More specifically, the ordinance provides that an employer may not base an employment action on an

126. *See* S.F., CAL. POLICE CODE art. 33, § 3303(a)(1) (2014). Section 3303 provides that:

It shall be unlawful for any person to do any of the following acts wholly or partially because of an employee's, independent contractor's or an applicant for employment's actual or perceived race, color, ancestry, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, *weight* or height:

(1) By an employer: To fail or refuse to hire, or to discharge any individual; to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, including promotion; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his/her status as an employee.

Id. (emphasis added).

127. *See* COMPLIANCE GUIDELINES TO PROHIBIT WEIGHT AND HEIGHT DISCRIMINATION, CITY AND CNTY. OF S.F. HUMAN RIGHTS COMM’N 3 (July 26, 2001), <http://www.sf-hrc.org/Modules/ShowDocument.aspx?documentid=159> (providing “weight” definition).

128. *See id.* (highlighting San Francisco’s definition of “weight”).

129. *See* SANTA CRUZ, CAL. CODE §§ 9.83.020(5), 9.83.030 (2014) (prohibiting employment discrimination based on weight or physical characteristic).

assumption about an individual's weight or on the individual's actual weight.¹³⁰

The Santa Cruz Code goes even further to proscribe discrimination that is based on a person's physical characteristics. A "physical characteristic" is any bodily condition or characteristic that resulted from birth, accident, disease, natural physical development, or any event beyond the individual's control.¹³¹ This provision prohibits the same type of weight discrimination that the ADA proscribes, namely, cases in which an employer discriminates against an individual based on obesity.

vii. Binghamton, New York

The Binghamton Human Rights Law, or Chapter 45 of the Binghamton Code of Ordinances ("Binghamton Code"), provides that an employer may not engage in employment practices that effectually discriminate based on a person's weight.¹³² The Binghamton Code defines weight to include both the numerical measurement of an individual's total body weight and the visual impression of an individual as obese or skinny, regardless of the numerical measurement.¹³³ The Binghamton Human Rights Law therefore protects individuals against weight discrimination in both the numerical sense and the broader physical appearance sense.

130. See SANTA CRUZ, CAL. CODE § 9.83.020(18) (2014) (providing that "weight" shall mean "actual or assumed" weight of individual).

131. See SANTA CRUZ, CAL. CODE § 9.83.020(13) (2014) ("[P]hysical characteristic" shall mean bodily condition or characteristic from birth, accident, disease, natural physical development, or any other event outside person's control, including physical mannerisms").

132. See BINGHAMTON, N.Y. CODE ORDINANCES § 45-2 (2014) (providing that statute shall protect and safeguard right and opportunity of all individuals to be free from discrimination based on weight). Section 45-3 specifically states that:

Discriminate, Discrimination or Discriminatory" shall mean any act, policy, advertisement or practice which, regardless of intent, has the effect of subjecting any person to differential treatment in and as a result of that person's actual or perceived age, race, color, creed, religion, national origin, ancestry, disability, marital status, sex, sexual orientation, gender identity or expression, *weight* or height. Discrimination also includes any differential treatment because of one's association with a person or group of people identified herein.

BINGHAMTON, N.Y. CODE ORDINANCES § 45-3(2014).

133. See § 45-2 (2014) § 45-3 (2014) (providing "weight" definition).

Historical stigmas regarding obesity in US society persist today.¹³⁴ Such stigmas translate into negative weight bias against obese individuals in the workplace.¹³⁵ As it stands, US federal and local anti-discrimination laws provide individuals varying degrees of legal recourse against weight discrimination in employment.¹³⁶ In Part II, the discussion shifts the focus to France's employment anti-discrimination laws for comparison.

II. *WEIGHT DISCRIMINATION IN FRANCE*

The challenges of obesity and weight discrimination are not unique to the United States.¹³⁷ Research regarding the relationship between weight and career-related outcomes, such as wages, outside the United States suggest that weight discrimination in employment is likely to be a growing international concern.¹³⁸ Such is the case in France, for example, which has recognized its growing population of individuals who are obese.¹³⁹ France is one of the few countries in the world to have adopted both criminal and civil national laws to ensure

134. See *supra* Part I.A. (comparing historical and present day examples of obesity bias in US society).

135. See *supra* Part I.A.4. (explaining the negative effects of obesity bias in employment).

136. See *supra* Part I.B. (surveying US federal and local laws prohibiting weight discrimination in diverse contexts).

137. See Meredith Melnick, *Global Spread: More People Think 'Fat People Are Lazy'*, TIME (Mar. 31, 2011), <http://healthland.time.com/2011/03/31/global-spread-more-people-think-fat-people-are-lazy/> (stating that “[n]egative attitudes toward fat people have taken root in several other cultures around the world, even in countries where chubbiness was once considered attractive”); Stephanie Pappas, *Slim Is in As Fat Stigma Goes Global*, LIVE SCIENCE (Mar. 30, 2011, 12:43 PM), <http://www.livescience.com/13478-fat-stigma-spreads.html> (reporting a global upward trend in obesity bias in a 2011 study of city-dwellers in the Western countries of the United States, England and Iceland as well as American Samoa, Argentina, Mexico, Paraguay, Puerto Rico and Tanzania).

138. See Vanessa J. Ding & Jennifer A. Stillman, *An Empirical Investigation of Discrimination against Overweight Female Job Applicants in New Zealand*, 34 N.Z. J. PSY. 139, 139 (2005) (discussing increasing obesity in New Zealand and increasing weight discrimination in employment as result); Roehling et al., *supra* note 51, at 301 (positing that rising obesity rates outside the United States indicate growing international concern over weight discrimination).

139. See FRANCE OBESITY PLAN 2010-2013, MINISTÈRE DES AFFAIRES SOCIALES ET DE LA SANTÉ 5 (July 20, 2011), http://www.sante.gouv.fr/IMG/pdf/PO_UK_INDD.pdf (highlighting that fifteen percent (15%) of adults in France are obese); Eleanor Beardsley, *The French Are Getting Fatter, Too*, NPR (Aug. 6, 2011), <http://www.npr.org/2011/08/06/139042221/the-french-are-getting-fatter-too> (comparing France's obesity rates to those in the United States).

that individuals do not face discrimination in the workplace on the basis of their physical appearance.¹⁴⁰ France’s physical appearance anti-discrimination laws, therefore, are an example to US lawmakers of an instance in which an industrialized nation with anti-obese bias and a growing population of obese individuals has adopted laws prohibiting weight discrimination.

A. Attitudes Regarding Obesity in France

A complete understanding of France’s law against physical appearance discrimination as it pertains to weight discrimination begins with a look at French culture and ideals regarding obesity.¹⁴¹

1. The French Paradox

What popular literature has nicknamed the “French Paradox” refers to the French’s seeming ability to break every rule in the health and nutrition books and yet still maintain slender figures and low cholesterol.¹⁴² Indeed, the public in the United States has long marveled at the French Paradox, with a number of scholars attempting to discover ways that people in the United States can become healthier by “eating like the French.”¹⁴³ At the same time, however,

140. See CODE DU TRAVAIL [C. TRAV.] art. L122-45 (Fr.) (creating a civil private right of action on the basis of physical appearance discrimination, including because of an individual’s weight); CODE PÉNAL [C. PÉN.] art. 225-1 (Fr.) (making physical appearance discrimination, including based on weight, criminal conduct punishable by sanction).

141. See Julie Suk, *Equal By Comparison*, *supra* note 21, at 308-19 (providing comprehensive discussion on reasons behind France’s uniquely broad anti-discrimination measures); see also *Education in France and America: How Do They Compare?*, UNIV. OF MICH., http://sitemaker.umich.edu/ericksen.356/section_4_-_discrimination_and_education (last visited Sept. 22, 2014) (comparing discrimination in France and the United States in the education context).

142. See Jean Ferrières, *The French Paradox: Lessons for Other Countries*, PUBMED CENTRAL (2004), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1768013/> (proposing alternative theories for why France has low coronary heart disease death rates); James Raiswell, *Eat Like The French*, ASKMEN.COM, http://www.askmen.com/sports/foodcourt_150/180_eating_well.html (last visited Mar. 16, 2014) (comparing France and US obesity rates and recommending tips for “eating like the French and staying healthy”).

143. See *The French Paradox*, 60 MINUTES (CBS Television Broadcast Nov. 17, 1991), available at <http://www.cbsnews.com/videos/the-french-paradox/> (explaining 1991 studies that purport to show how France’s high-fat diet does not result in weight gain); Josh Friedland, *The French Paradox*, MORNING NEWS (Mar. 28, 2005), <http://www.themorningnews.org/article/roundtable-the-french-paradox> (reporting “common-sense dietary prescriptions” of French cuisine, which include “eating in moderation, following dining rituals, cooking with fresh ingredients, shunning processed foods, drinking lots of water, and walking as exercise”).

France is popularly a society with “zero tolerance for fat,” a place where the so-called “tyranny of the silhouette” determines a person’s personal and professional success.¹⁴⁴ Moreover, studies suggest that even medical physicians’ perceptions in France regarding obesity, like in the United States, take root in a model that blames the victim.¹⁴⁵ The high value placed on thinness in French culture can foster anti-obese attitudes that can result in discrimination against obese individuals.¹⁴⁶

The resulting discrimination against obese individuals in employment has been quantified. In a report by Le Défenseur des Droits, 29% of job seekers who reported having experienced discrimination further indicated that they were discriminated against on the basis of physical appearance, including weight.¹⁴⁷ In another report on perceptions of employment discrimination, 22% of public sector workers reported that they had experienced discrimination based on physical appearance, while 19% of those in the private sector reported being the subject of similar discrimination.¹⁴⁸ Nearly

144. See Joanna Robertson, *The Perils of Being Fat, Female and French*, BBC (Dec. 24, 2013) [hereinafter “The Perils of Being Fat”], <http://www.bbc.com/news/magazine-25215641> (describing constant pressure on females in France to lose weight); Phoenix Tso, *French Women and Thinness: 'If You Are Fat, You Won't Get That Job'*, JEZEBEL (Dec. 26, 2013) [hereinafter *French Women and Thinness*] <http://jezebel.com/thinness-and-french-women-if-you-are-fat-you-wont-g-1489937623> (noting that women in the United States may be comforted by French women’s difficulty staying thin).

145. See Aurélie Bocquier et al., *Overweight and Obesity: Knowledge, Attitudes, and Practices of General Practitioners in France*, 13 OBESITY RESEARCH, Apr. 2005, 787, 792, available at <http://onlinelibrary.wiley.com/store/10.1038/oby.2005.89/asset/oby.2005.89.pdf> (showing results of study that thirty percent (30%) of general practitioners, internists, and cardiologists held anti-obese attitudes); Tara Parker-Pope, *Are Doctors Nicer to Thinner Patients?*, N.Y. TIMES BLOG (Apr. 29, 2013), http://well.blogs.nytimes.com/2013/04/29/overweight-patients-face-bias/?_php=true&_type=blogs&_r=0 (reporting that new study suggests that thin patients are treated with more “warmth and empathy” than those who are overweight or obese).

146. See *Bias, Discrimination, and Obesity*, supra note 56, at 800 (explaining that “[t]here is a clear and consistent scientific literature showing pervasive bias against overweight people. It is logical that the bias begets discrimination. There is now sufficient evidence of discrimination to suggest it may be powerful and occurs across important areas of living”); Gugenheim, supra note 47 (noting that “[a]ntifat bias begets more antifat bias”).

147. See *Enquête sur la perception des discriminations par les demandeurs d'emploi*, LE DÉFENSEUR DES DROITS 1, 5 (2013), <http://www.defenseurdesdroits.fr/sites/default/files/upload/oit-synthese.pdf> (showing that physical appearance discrimination reported by twenty-nine percent (29%) of job-seekers, thirty-five percent (35%) of which were women and eleven percent (11%) of which were men).

148. See *Les Discriminations sur le physique progressent, malgré les apparences*, 20MINUTES.FR (Feb. 3, 2014), <http://www.20minutes.fr/societe/1287510-20140202->

one-third of employees who witnessed discrimination in the workplace highlighted physical appearance discrimination, making physical appearance the second most discriminated against criterion for employees in the public sector.¹⁴⁹ Specifically, women were more likely to report instances of weight discrimination at work.¹⁵⁰

Le Défenseur des droits further found that physical appearance discrimination was more frequently reported in January 2014 than in December 2012 in the public sector, indicating an increase in reported cases.¹⁵¹ The public sector is often looked at as the model of better equality practices in other contexts and, thus, the public sector’s higher rate of reported discrimination might indicate a better reporting system.¹⁵² For example, a survey in France by the

discriminations-l'apparence-progressent (explaining that physical appearance among top three reported types of employment discrimination in France); see also *Baromètre sur la perception des discriminations au travail*, LE DÉFENSEUR DES DROITS 1, 3 (2014) [hereinafter *Perception Report Executive Summary*], <http://www.defenseurdesdroits.fr/sites/default/files/upload/ifop-ddd-note-de-synthese-2014-02-03.pdf> (comparing public sector and private sector reports of discrimination).

149. See *Perception Report Executive Summary*, *supra* note 148, at 10 (comparing male and female reports of discrimination).

150. See *Baromètre sur la Perception des discriminations au travail*, LE DÉFENSEUR DES DROITS 3 (2014), <http://www.defenseurdesdroits.fr/sites/default/files/upload/barometre-discrim-travail-principaux-enseignements.pdf>; Roehling et al., *supra* note 51, at 311 (reporting that women are sixteen (16) times more likely than men to report weight-related employment discrimination).

151. See *Perception Report Executive Summary*, *supra* note 148, at 9 (analyzing reporting trends over time). Moreover, reports of discrimination in the public sector were higher than in the public sector across the board, not just in the case of physical appearance discrimination.

152. See Clémence Berson, *Private vs. Public Sector: Discrimination Against Second-Generation Immigrants in France*, (Centre d’Economie de la Sorbonne, Working Paper No. 59, 2009), available at <ftp://mse.univ-paris1.fr/pub/mse/CES2009/09059.pdf> (arguing that France’s public sector is reputed to integrate minorities better than private sector because of entrance exams and pay-scales); DAMIAN GRIMSHAW, JILL RUBERY & STEFANIA MARINO, PUBLIC SECTOR PAY AND PROCUREMENT IN EUROPE DURING THE CRISIS: THE CHALLENGES FACING LOCAL GOVERNMENT AND THE PROSPECTS FOR SEGMENTATION, INEQUALITIES AND SOCIAL DIALOGUE 50 (2012) (arguing that the public sector in EU is more likely than the private sector to adopt gender equality policies and noting that France’s public sector has taken steps towards gender equality that private sector has not, such as introducing general requirement for gender parity in recruitment committees and adopting charter for gender equality); SOPHIE LATRAVERSE, MIGRATION POLICY GROUP, ANNUAL SURVEY OF THE DEFENDER OF RIGHTS AND ILO FOR 2013, 1, 2 (Feb. 4, 2014), <http://www.non-discrimination.net/content/media/FR-116-DDD%20ILO%202013%20Barometer.pdf> (reporting that thirty-two percent (32%) of individuals surveyed thought that public employees were less likely to be discriminated against than private employees in France; and thirty-six

Migration Policy Group, an independent European non-profit organization, indicated that more victims of discrimination chose not to undertake any action to address the situation in the private sector than in the public sector.¹⁵³

2. Addressing Obesity Statistics

Against the backdrop of France's anti-obese attitudes is the rising rate of obesity.¹⁵⁴ Some in the media have blamed France's obesity rates on the US fast food industry for "Americanizing" France's dietary choices, increasing sedentariness among young adults and the poor, and medical causes such as bacteria.¹⁵⁵ Whatever the cause, France's growing population of obese individuals means increasingly more opportunities for cases of weight discrimination to arise. France has begun seeking various ways to reduce these obesity statistics, such as requiring food advertisements to warn viewers to "stop snacking, exercise and eat more fruits and vegetables," implementing school exercise programs, banning ketchup in school cafeterias, proposing a tax on sodas, and proposing a so-called

percent (36%) of private sector employees and only thirty-one percent (31%) of public sector employees thought that they would likely face discrimination at some point in future).

153. See LATRAVERSE, *supra* note 152, at 1 (showing that thirty-seven percent (37%) in public sector and forty percent (40%) in private sector reported not taking action to address employment discrimination against them).

154. See Beardsley, *supra* note 139 (reporting that nearly fourteen percent (14%) of French adult population now obese, compared with eight percent (8%) just ten years ago); Kate Taylor, *French Women Do Too Get Fat, What the Best Seller Neglects to Mention*, SLATE, http://www.slate.com/articles/life/food/2005/02/french_women_do_too_get_fat.html (last updated Feb. 25, 2005) (reporting that France has same or higher rates of anorexia, bulimia, and compulsive eating disorders as in the United States).

155. See Knowlton-Le Roux, *supra* note 28, at 4 (describing "Americanization" of food as including drinking sodas, overusing ketchup, eating between meals, and eating fast food); Elisabeth Rosenthal, *Even the French are Fighting Obesity*, N.Y. TIMES (May 4, 2005), http://www.nytimes.com/2005/05/03/world/europe/03iht-obese.html?pagewanted=all&_r=0 (highlighting that food companies looking to France as one of most promising international markets for prepared items such as frozen pizza and for outlets such as McDonald's and Kentucky Fried Chicken); Henry Samuel, *Number of Obese People in France Doubles to Seven Million*, TELEGRAPH (Oct. 16, 2012), <http://www.telegraph.co.uk/news/worldnews/europe/france/9612225/Number-of-obese-people-in-France-doubles-to-seven-million.html> (proposing various possible contributing factors to France's rising obesity rates); see also Naomi Firsht, *Obesity Could Be Caused by Bacteria: French Study*, THE LOCAL (Aug. 29, 2013), <http://www.thelocal.fr/20130829/bacteria-could-be-cause-of-obesity-report> (highlighting bacteria as alternative cause of obesity).

“Nutella amendment” to quadruple taxes on palm oil.¹⁵⁶ Negative advertising has also been used to try to motivate obese individuals to lose weight.¹⁵⁷ For example, some advertising campaigns included signs with captions stating “[o]besity starts at a young age” and “[o]besity kills.”¹⁵⁸

In recent years, nevertheless, French culture has shown signs of shedding the stigmas that have traditionally been associated with obesity.¹⁵⁹ Prior to being shamed in the media for making anti-Semitic slurs, French designer John Galliano surprised audiences by putting overweight women on the runway alongside thinner models.¹⁶⁰ More

156. See *Fearing a Fattening Populace, France Orders Warnings on Food Ads*, USA TODAY (Mar. 1, 2007), http://usatoday30.usatoday.com/news/health/2007-03-01-france-ads_x.htm (warning viewers to “stop snacking, exercise and eat more fruits and vegetables”); see also Mildrade Cherfils, *French Schools on Front Line of Obesity Fight*, GLOBAL POST (Sep. 8, 2010), <http://www.globalpost.com/dispatch/france/100827/obesity-france-paris-food> (discussing implementing school exercise programs); see also *French War on Obesity Targets Ketchup, Soda*, N.Y. DAILY NEWS (Oct. 10, 2011), <http://www.nydailynews.com/life-style/health/french-war-obesity-targets-ketchup-soda-article-1.960754> (reporting school plans to ban ketchup in school cafeterias and tax sodas); see also Kim Willsher, *France's 'Nutella Amendment' Causes Big Fat International Row*, THE GUARDIAN (Nov. 12, 2012), <http://www.theguardian.com/world/2012/nov/12/france-nutella-amendment-international-row> (examining proposed “Nutella amendment” to quadruple taxes on palm oil).

157. See Knowlton-Le Roux, *supra* note 28, at 2 (“Obese Americans have become the media icons of the ‘shameful’ side of life in the United States.”); see also sources *supra* note 151 (providing examples of French obesity shaming advertisements). See, e.g., Patrick McGeehan, *Model in Anti-Obesity Ad Criticizes the Campaign*, N.Y. TIMES (Jan. 31, 2012), http://cityroom.blogs.nytimes.com/2012/01/31/model-in-anti-obesity-ad-criticizes-the-campaign/?_r=0 (noting that one advertisement edited off the model’s limb –huh?-).

158. See Michael Freeman, *This Anti-Obesity Poster from France is Totally Unforgettable*, MSN NEWS (Mar. 26, 2014), <http://www.news.msn.ie/france-anti-obesity-poster-1381863-Mar2014/> (discussing campaign ad featuring obese child’s photograph with caption reading, “Obesity starts at a young age”); Elaine Sciolino, *France Battles a Problem That Grows and Grows: Fat*, N.Y. TIMES (Jan. 25, 2006), <http://www.nytimes.com/2006/01/25/international/europe/25obese.html> (discussing campaign ad featuring obese child’s photograph with caption reading, “Obesity kills”).

159. See *infra* notes 154-57 (providing examples in French media of more accepting views of obesity).

160. Compare Sciolino, *supra* note 158 (discussing Galliano’s decision to put overweight models in fashion show), with Ellie Krupnick, *John Galliano's Vanity Fair Interview Finally Addresses Hitler Comments*, HUFFINGTON POST (June 4, 2013), http://www.huffingtonpost.com/2013/06/04/john-galliano-vanity-fair-interview_n_3384653.html (reporting that Galliano publicly apologized for anti-Semitic rant, blaming prior alcoholism), and Vera Chinese & Ginger Adams Otis, *Ex-Dior Designer John Galliano, Fired for Anti-Semitic Comment, Will Teach Master Class at Parsons*, N.Y. DAILY NEWS (Apr. 23, 2013), <http://www.nydailynews.com/new-york/john-galliano-fired-anti-semitic-comment-teaches-parsons-article-1.1325315> (reporting that Galliano teaching design after being fired for anti-Semitic rant).

recently, French *Elle* magazine featured “plus-size” model Tara Lynn on its cover.¹⁶¹ Even more celebrated by the media was when 11.4 million French television viewers voted and chose 19-year-old Magalie Bonneau, who is 5 feet 1 inch tall and weighs 165 pounds, as the winner of the hit talent and reality show called “Star Academy.”¹⁶² Bonneau was featured on the cover of a magazine and was quoted as saying that audiences are getting used to seeing “plump girls” and that a barrier has been crossed.¹⁶³ It was the first time that a girl with above average weight had won the show, which Bonneau took as “proof” that physical appearance was no longer critical to success.¹⁶⁴ While it is unclear precisely how much this change might be attributed to France’s anti-discrimination laws, these examples indicate a social shift towards acceptance of obese individuals in French society.¹⁶⁵

161. See Tracy McVeigh, *Elle Magazine Breaks Fashion's Last Taboo: Plus-Size Models on the Cover*, THE GUARDIAN (Mar. 27, 2010), <http://www.theguardian.com/lifeandstyle/2010/mar/28/elle-models-france-plus-size> (describing Lynn’s magazine appearance as “plus-size model who sports . . . ‘adorable belly fat’ and inside appears with three other larger models for 32 pages of a ‘special edition’ dedicated to plus-size fashion”); Jessica Misener, *French Elle Dubs Plus Size Model Tara Lynn 'The Body' On February Cover*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/02/13/tara-lynn-elle-france_n_1273589.html (last updated Feb. 13, 2012) (noting that *Elle* magazine gave *Elle* Macpherson’s nickname, “The Body,” to plus-size model, Tara Lynn).

162. Sciolino, *supra* note 158 (reporting on winning of “Rising Star” talent show by non-thin girl); *cf.* *Gross National Product*, THE ECONOMIST (Dec. 20, 2005), available at <http://www.economist.com/node/5328398> (reporting that contrary to popular thought in the United States, French people also sometimes struggle with obesity).

163. See Sciolino, *supra* note 158 (interviewing Bonneau on success on television talent show); *Gross National Product*, *supra* note 162 (stating that Bonneau’s “voluptuous curves” were “all over the papers” after winning talent show).

164. See *Gross National Product*, *supra* note 162 (quoting Bonneau as saying it was first time that “plump girl” has won). *But cf.* Sciolino, *supra* note 158 (noting that Bonneau lost twenty-nine (29) pounds over course of competition).

165. See *supra* notes 160-62 (showing obese individuals in a positive light in French media). *But see* Alice Pfeiffer, *What Happens When French Women Do Get Fat*, *Elle* (Jan. 2, 2014), <http://www.elle.com/beauty/health-fitness/french-women-dieting> (asserting that overweight French woman cannot secure jobs and that French families “secretly deprive themselves at dinner,” but claiming that “[t]his isn’t necessarily specific to France, but to any major city where a premium is placed upon looks (New York included)”).

B. France’s Physical Appearance Anti-Discrimination Laws

France’s legal promise of non-discrimination traces far back in the country’s history.¹⁶⁶ The broad scope of anti-discrimination legal protections France has adopted includes laws against discrimination based on an individual’s physical appearance.¹⁶⁷ These laws protect individuals against a type of discrimination that the United States has thus far failed to address.¹⁶⁸ Therefore, an examination of France’s laws can help expose an area in which US law falls short of providing equal protection for all individuals.¹⁶⁹

1. Expansive Anti-Discrimination Laws

The history of France’s broad protections against discrimination are rooted in the first article of the Declaration of the Rights of Man in 1789 (“Declaration”), which provides that “[m]en are born and remain free and equal in rights” and “[s]ocial distinctions may be founded only upon the general good.”¹⁷⁰ Article Six of the Declaration further provides that “[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.”¹⁷¹ For over 200 years, France’s Declaration has molded the country’s laws to protect individuals against arbitrary social distinctions, including

166. See *infra* Part II.B.1 (examining France’s Constitution, which prohibits social distinctions not founded upon general good).

167. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (civil right of action against physical appearance discrimination); CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (criminal code prohibiting physical appearance discrimination).

168. See *supra* Part I.B.1. (describing US federal laws as protecting only particular instances of weight discrimination).

169. Compare *supra* Part I.B.1. (providing US federal laws prohibiting disability discrimination and employment discrimination for particular protected classes, not including weight), with *supra* Part I.B.2. (examining certain local US jurisdictions prohibiting physical appearance discrimination or weight discrimination).

170. Déclaration des droits de l’Homme et du Citoyen [Declaration of the Rights of Man of and of Citizens], art. 1 (France 1789); see also *Equal By Comparison*, *supra* note 21, at 7 (noting that article one of Declaration defined equality as absence of arbitrary social distinctions).

171. Déclaration des droits de l’Homme et du Citoyen [Declaration of the Rights of Man of and of Citizens], art. 6 (France 1789); see also *Equal By Comparison*, *supra* note 21, at 7 (highlighting that Declaration “[did] away with the inequalities that resulted from the pre-Revolutionary inherited social distinctions of nobility”).

prohibiting employment decisions that are not based on a person's "virtues and talents."¹⁷²

Another factor that has shaped France's legal protections is an embedded sense of unity and nationalism that is evident in Article Two of the 1958 Constitution (the "Constitution"), which is still in effect, and opens with "France is an indivisible, secular, democratic, and social republic."¹⁷³ French law contemplates the various different individuals and groups of people that make up a nation and conceptualizes them as being one cohesive body.¹⁷⁴ For that reason, French law expressly bans a wide range of discrimination.¹⁷⁵

France's expansive anti-discrimination regime has also been attributed to its sordid past with the Nazis in World War II.¹⁷⁶ Cardozo Law Professor Julie Suk first introduced this view in the context of comparing race anti-discrimination laws in the United

172. See Cynthia A. Vroom, *Equal Protection Versus the Principle of Equality: American and French Views on Equality in the Law*, 21 *CAP. U. L. REV.* 199, 219 (1992) (noting that equal access to public employment and equal treatment of public employees in the advancement of their career are guaranteed by article 6 of the Declaration of the Rights of Man and providing the example that even a system that would have assigned a grade and rank to ambassadors corresponding to the level they had obtained in their position was stuck down as an impermissible career advantage); see also *Equal by Comparison*, *supra* note 21, at 7 (explaining that French employment has for over two hundred years maintained a "close nexus to the principle of individual merit" based on the text of the Declaration of the Rights of Man, which explicitly guarantees individuals that they will be judged, at least for "public positions and occupations," according to ability).

173. 1958 CONST. art. 1 (Fr.) ("La France est une République indivisible, laïque, démocratique, et sociale."); see also *Equal By Comparison*, *supra* note 21, at 8 (arguing that "[t]his idea of France as a nation, one and indivisible, has endured").

174. See *Equal By Comparison*, *supra* note 21, at 8 (explaining that saying republic indivisible means prohibiting any differentiation between citizens).

175. See 1958 CONST. art. 1 (Fr.) (recognizing "equality of all citizens before the law, without distinction of origin, race or religion"); CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (prohibiting employment discrimination based on origin, sex, practices, sexual orientation, age, family situation, genetic characteristics, actual or presumed belonging to an ethnic group, nation or race, political opinions, union or labor activities, religious convictions, physical appearance, family name, state of health or handicap); see also CODE PÉNAL [C. PÉN.] art. 225-1(V) (Fr.) (making it a crime to discriminate in any context based on origin, sex, marital status, pregnancy, physical appearance, name, place of residence, health status, disability, genetic characteristics, habits, sexual orientation or identity, age, political opinions, trade union activities, membership or non-membership, true or supposed, ethnic group, nation, race or religion).

176. See *Vichy France, the Nazis and the Holocaust: An introduction*, FRENCH HISTORY ONLINE, <http://frenchhistoryonline.com/vichy-france-and-the-second-world-war/vichy-france-the-nazis-and-the-holocaust-an-introduction/> (last visited Sept. 19, 2014) (providing rich historical context regarding relations between Vichy France and Nazi Germany).

States and France, explaining that France's tendency to adopt wide-ranging anti-discrimination legislation is linked to its universalistic conception of citizenship.¹⁷⁷ These ideals developed in the aftermath of Vichy France's ties to Germany during the Holocaust, when French police fined and imprisoned illegal immigrants and sent illegal immigrants who were Jewish back to Germany.¹⁷⁸ Following this period, France developed a strict model of race-blindness and, as a related consequence, expansive anti-discrimination laws to protect individuals from arbitrary unequal treatment as individuals, rather than solely on the basis of membership in racial or other groups.¹⁷⁹ Under this view, France's broad anti-discrimination doctrine is grounded in the nation's historical experience of discrimination at its worst and the resulting goal of eliminating discrimination in its many forms.

2. The Right to Protection Against Physical Appearance Discrimination

This Section begins by looking at France's statutes prohibiting physical appearance discrimination.¹⁸⁰ It then looks at the legislative history behind the statute prohibiting such discrimination particularly in the employment context.¹⁸¹ Lastly, the discussion turns

177. See *Equal By Comparison*, *supra* note 21, at 8 (describing France's broad conception of citizenship and race-blindness); see also Pascal Lokiec, *Discrimination Law In France*, in *NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW*, 95 (Roger Blanpain ed., 2008) (describing anti-discrimination as "core aspect" of French labor law).

178. See *Equal By Comparison*, *supra* note 21, at 16 (examining French legal landscape following World War II); see also *Vichy France*, *supra* note 176 (discussing France's ties to Nazi Germany).

179. See *Equal By Comparison*, *supra* note 21, at 8 (highlighting difference in discrimination laws by noting that "French race-blindness leaves no room for race-conscious affirmative action, unlike the US strict scrutiny framework, which allows affirmative action for compelling reasons"); Erik Bleich, *Race Policy in France*, BROOKINGS INST. (May 1, 2005), <http://www.brookings.edu/research/articles/2001/05/france-bleich> (explaining that under race-blindness policy, France uses geographic or class criteria to address issues of social inequalities).

180. See *infra* Part II.B.2.a. (highlighting French statutes prohibiting, *inter alia*, discrimination based on physical appearance).

181. See *infra* Part II.B.2.b. (discussing the legislative history behind Article L.122-5 of France's Labor Code).

to cases involving physical appearance discrimination in France that have generated recent media attention.¹⁸²

i. Statutory law

France adopted Article L. 122-45 into its Labor Code in 1982 to prohibit employment discrimination based on sex, religion, national origin, opinion, age, family, or disability.¹⁸³ In 2001, France expanded its anti-discrimination laws to include, among others, laws prohibiting discrimination based on physical appearance.¹⁸⁴ In so doing, the Anti-discrimination Act of 16 November 2001 (“Act”) broadened Article L.122-45 of France’s Labor Code (“Article L.122-45”) beyond that required under the EU Framework Directive on Equal Treatment (the “EU Directive”).¹⁸⁵ The European Commission, the EU’s executive body, enforces EU legislation by issuing directives with which EU Member States are bound to comply, thus fixing the lower bounds on which Member States may build their own national legislation.¹⁸⁶

182. See *infra* Part II.B.2.c. (examining recent investigations by France’s national human rights institution based on allegations of physical appearance discrimination).

183. See Pascale Bloch, *Diversity and Labor Law in France*, VT. L. REV. 717, 720 (2006) (providing bases of discrimination Article L.122-45 prohibited prior to 2001); Malcolm Sargeant, *The Law on Age Discrimination in the EU*, 55-56 (2008) (describing historical development of section L.122-45).

184. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (prohibiting discrimination based on physical appearance); see also Sargeant, *supra* note 183, at 55 (explaining development of Article L 122-45). Article L.122-45 provides that:

[N]o person may be excluded from a recruitment procedure or an internship or a training program; no employee may be sanctioned, dismissed or be subject to a direct or indirect discriminatory measure, in particular as regards compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer or contract renewal, as well as measures of profit-sharing and allocation of shares based on his origin, sex, practices, sexual orientation, age, family situation, genetic characteristics, or based on his/her actual or presumed belonging to an ethnic group, a nation or a race, or based on his/her political opinions, his/her union or labor activities, his/her religious convictions, his/her *physical appearance*, his/her family name or based on his/her state of health or his/her handicap.

France: Racial Discrimination in the Field of Employment, *supra* note 18, at 2 (English translation of Article L.122-45) (emphasis added).

185. See Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 200 O.J. L 303 [hereinafter “EU Directive,”] (prohibiting discrimination based on religion or belief, disability, age, or sexual orientation); see also Sargeant, *supra* note 183, at 55 (explaining development of Article L.122-45).

186. See *About the European Commission*, EUROPEAN COMM’N, http://ec.europa.eu/about/index_en.htm (last updated March 10, 2014) (describing European Commission’s

While the EU Directive prohibits employment discrimination based on religion or belief, disability, age, or sexual orientation, France's Article L.122-45 goes further to provide that no person may be discriminated against on the basis of her physical appearance.¹⁸⁷ Under Article L.122-45, therefore, all agreements or actions causing prejudice based on physical appearance discrimination are null and void.¹⁸⁸

In France, anti-discrimination laws carry criminal sanctions pursuant to Article 225-1 of France's Penal Code ("Article 225-1").¹⁸⁹

functions); *What Are EU directives?*, EUROPEAN COMM'N, http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (last updated June 25, 2012) (defining EU directives).

187. *Compare EU Directive*, *supra* note 186 (proscribing discrimination based on religion or belief, disability, age, or sexual orientation), with CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (prohibiting discrimination based on origin, sex, practices, sexual orientation, age, family situation, genetic characteristics, actual or presumed belonging to an ethnic group, a nation or a race, political opinions, union or labor activities, religion, physical appearance, family name, state of health, or handicap). *See also France: Racial Discrimination in the Field of Employment*, *supra* note 18, at 2 (English translation of Article L.122-45).

188. *See Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws*, BAKER & MCKENZIE 1, 143 (2009), http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Featured%20Services/qr_global_terminationdiscriminationharassmentguide_2009.pdf (providing summary of French employment laws); Sargeant, *supra* note 183, at 61, (explaining that all discriminatory actions by employers regarded as null and void as of right, and employee retains all previously-held rights). Article L.122-45-2 provides that:

The dismissal of an employee following a lawsuit brought by the employee or on his behalf on the basis of the provisions of this code relating to discrimination is null and void if it is established that the dismissal has no real and serious cause and in fact constitutes an action taken by the employer because of the lawsuit. In this case, reinstatement is appropriate, and the employee is regarded as never having ceased to be employed.

CODE DU TRAVAIL [C. TRAV.] art. L.122-45-2 (Fr.); *see also Cross-Border: Global Workplace Law Perspectives, A Comparative Guide to Terminating the Employment Relationship in the U.S. and France*, JACKSON LEWIS (2012), available at <http://www.jacksonlewis.com/media/pnc/9/media.2089.pdf> (explaining that French case law has clarified "real and serious cause" to mean that the cause of the dismissal must be based on objective facts that can be proven and that are sufficiently serious to justify the termination).

189. *See* CODE PÉNAL [C. PÉN.] art. 225-1(V) (Fr.), available at <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417831&cidTexte=LEGITEXT000006070719> (making physical appearance discrimination sanctionable conduct); *see also* John Rason, *Penal Code*, UNIV. OF CAMBRIDGE (Dec. 10, 2005), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.legifrance.gouv.fr%2Fcontent%2Fdownload%2F1957%2F13715%2Fversion%2F4%2Ffile%2FCode_33.pdf&ei=Yr8SU7rPDsqB0AH08IGwBg&usq=AFQjCNFxDWGkWak-ZMcE8hXuNQGTD4y8sQ&sig2=qE5D85k_YWauUzTnYeeJmg&bvm=bv.62286460,d.dmQ (providing an English translation of the Penal Code) Article 225-1 provides that it is a crime, punishable by sanction, to:

France first defined discrimination as a criminal offense under the Criminal Code in 1972, by virtue of the Pleven Act.¹⁹⁰ The penalty for an employer who discriminates on the basis of a person's physical appearance, where the defendant is a company, is a sanction of up to EU€225,000 (approximately US\$280,000) or, where the defendant is the company's chief executive officer, a maximum of three years' imprisonment and a sanction of up to EU€45,000 (approximately US\$56,000).¹⁹¹

ii. Legislative history

The first step to understanding Articles L.122-45 and 225-1 is examining the motivations French legislators had in adopting these laws. In arguing for the adoption of Article L.122-45, the National Assembly's First Report states, "[i]t seems appropriate to extend the list of grounds of . . . physical appearance" because "[t]he recent dispute with United Airlines opposite some of its hostesses reflects the often ignored or denied existence of discrimination based on this criterion."¹⁹² Assemblyman Maxime Gremetz highlighted job

[Make] any distinction between individuals because of their origin, sex, marital status, pregnancy, *physical appearance*, their name, place of residence, health status, disability, genetic characteristics, their habits, their sexual orientation or identity, age, political opinions, trade union activities, membership or non-membership, true or supposed, an ethnic group, nation, race or religion.

CODE PÉNAL [C. PÉN.] art. 225-1(V) (Fr.) (emphasis added).

190. See E. Cediey & F. Foroni, International Migration Programme, *Discrimination in Access To Employment on Grounds of Foreign Origin in France* 3, 13 (2008), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201429.pdf (detailing expansion of France's labor laws and criminal laws to prohibit discrimination); Raffi Wartanian, *Memory Laws in France and their Implications: Institutionalizing Social Harmony*, Humanity in Action (2008), <http://www.humanityinaction.org/knowledgebase/117-memory-laws-in-france-and-their-implications-institutionalizing-social-harmony> (explaining that Pleven law outlawed racist speech and writing against individuals and banned provocations of hatred, racial violence, and discrimination).

191. See C. PÉN. art. 225-2, 225-4 (providing amounts employer may be sanctioned for finding of discrimination); Joël Grangé, *Employment and Employee Benefits in France: overview*, FLICHY GRANGÉ AVOCATS, <http://us.practicallaw.com/0-503-0054?q=&qp=&qo=&qe=#a374705> (last updated Nov. 1, 2013) (providing overview of France's employment laws); Rason, *supra* note 20 (translating Article 225-1, *et. seq.*, to English). For an updated currency conversion, see <http://www.oanda.com/currency/converter/> (1 USD to 0.80 EUR as of November 7, 2014).

192. See THE COMMISSION ON CULTURAL, FAMILY, AND SOCIAL AFFAIRS, NATIONAL ASSEMBLY REPORT NO. 2609 (Oct. 4, 2000) [hereinafter the NATIONAL ASSEMBLY REPORT], available at <http://www.assemblee-nationale.fr/11/rapports/r2609.asp> (describing motivations

profiling as one purpose for having laws prohibiting physical appearance discrimination.¹⁹³ The National Assembly thus acknowledged that France's laws failed to prohibit discrimination based on an individual's physical appearance in situations where existing laws prohibiting race and gender discrimination fall short. Namely, based on legislators' comments, the National Assembly seems to have had in mind the type of situation in which an employer requires employees to meet a weight requirement.¹⁹⁴

Support for this conclusion lies in the National Assembly's repeated reference in the legislative record to the case involving United Airlines.¹⁹⁵ In favor of expanding France's laws to protect against physical appearance discrimination, the National Assembly's First Report stated that the dispute between United Airlines and its hostesses reflects the "often ignored or denied existence of" discrimination based on physical appearance.¹⁹⁶ In addition, Assemblyman Philippe Vuilque, in the floor debates, further echoed the motivation for prohibiting physical appearance discrimination based on the "recent dispute" between an airline and its hostesses, where the company wished to impose restrictions on its employees' physical appearance.¹⁹⁷

While the record does not further specify the case to which the National Assembly was referring, the US Court of Appeals for the Ninth Circuit heard a case matching the recited facts just months prior

for passing a new bill prohibiting additional forms of discrimination, including that based on physical appearance).

193. *Discussion of a Bill in the First Against Discrimination*, NATIONAL ASSEMBLY, FIRST SESSION (Oct. 12, 2000) (Mr. Maxime Gremetz) [hereinafter the NATIONAL ASSEMBLY DISCRIMINATION BILL], available at <http://www.assemblee-nationale.fr/11/cr/html/20010013.asp> ("[P]hysical appearance—which resulted too often a 'job profiling'—age, surname and sexual orientation are all grounds of discrimination should be prevented and punished.").

194. See *supra* notes 182 & 183 (highlighting certain types of discrimination not covered under then-existing law and focusing particularly on a case involving claims of weight discrimination by flight attendants against United Airlines).

195. See GRIMSHAW ET AL., *supra* note 152 (citing legislators' references to United Airlines case in floor debates).

196. See NATIONAL ASSEMBLY REPORT, *supra* note 192, at 12 (reporting Philippe Vuilque's comments in floor debates).

197. See NATIONAL ASSEMBLY DISCRIMINATION BILL, *supra* note 193, at 12 (reporting Vuilque's comments in floor debates).

to the references made by France's National Assembly.¹⁹⁸ In *Frank v. United Airlines, Inc.*, flight attendants brought a class action against United Airlines for its employment policy requiring flight attendants to comply with maximum weight requirements or else face various forms of discipline, including suspension without pay and termination.¹⁹⁹ The weight requirement varied based on a flight attendant's gender and age, setting the maximum weight for men based on a large male body-frame and basing the maximum weight for women on a medium female body-frame.²⁰⁰ The Ninth Circuit found the United Airlines policy unconstitutional on the basis of sex discrimination, holding that United Airlines impermissibly imposed "different and more burdensome" weight standards without justifying the policy as a bona fide occupational qualification ("BFOQ").²⁰¹

To the extent that the National Assembly was referring to *Frank*, one reason that the case may have drawn attention from legislators is that the United Airlines weight policy represented an instance in which race and gender anti-discrimination laws were underinclusive.²⁰² United Airlines' policy restricting the physical appearance of its female flight attendants in the first instance implicated sex discrimination.²⁰³ That case, however, also implicated

198. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 847 (9th Cir. 2000) (challenging a United Airlines policy, where the plaintiffs argued that by adopting a discriminatory weight policy and enforcing that policy in a discriminatory manner, United Airlines discriminated against women and older flight attendants in violation of Title VII).

199. See *id.* at 855-56 (holding that United Airlines' weight policy for flight attendants violated Title VII).

200. See *id.* at 855 (detailing United Airlines' weight policy); cf. SAMUEL LUCAS, *THEORIZING DISCRIMINATION IN AN ERA OF CONTESTED PREJUDICE: DISCRIMINATION IN THE UNITED STATES* 91-92 (2008) (discussing disparate treatment under United Airlines' policy in *Frank*).

201. See *Frank*, 216 F.3d at 855 (providing that United Airlines' policy targeted female flight attendants); see also *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (highlighting that United Airlines' policy in *Frank* was facially unequal).

202. See, e.g., *Frank*, 216 F.3d at 853 (providing that a plaintiff may challenge a weight requirement under a Title VII disparate impact theory only if the employer's policy treats men and women differently on its face); *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (stating that a policy is "inherently suspect and presumptively invalid" if it treats a person differently on account of race or ethnic origin).

203. See Rhaéa E. Jabbour, *La Discrimination à Raison de l'Apparence Physique (Lookisme) en droit du Travail Français et Américain, Approche Comparatiste*, PARIS-SORBONNE UNIV. 233 (Oct. 28, 2013), <http://www.theses.fr/2013PA010310> (discussing *Frank* in the context of sex discrimination based on weight); see also Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 46-47 (NORTHWESTERN UNIV. SCH. OF LAW, Working Paper), available at <http://scholarlycommons.law.northwestern.edu/cgi/>

physical appearance discrimination, an area of discrimination against which no then-existing laws protected.²⁰⁴ The French National Assembly thus determined that employment actions based on physical appearance should be prohibited.²⁰⁵ France's physical appearance anti-discrimination law would likely have invalidated the United Airlines weight requirement even if the policy had not been different or more burdensome for one sex than the other.²⁰⁶

iii. Case law and allegations in the media

The Cour de Cassation, France's Supreme Court, has thus far reviewed two cases involving physical appearance discrimination, including the issues of whether an employer may terminate a male waiter for wearing earrings at work and whether an employer may terminate a delivery service employee for refusing to wear protective

viewcontent.cgi?article=1182&context=facultyworkingpapers (explaining that the weight requirements at issue in *Frank* were a holdover from earlier days when United Airlines employed only women as flight attendants and required them to be slim, remain unmarried, refrain from having children, satisfy general appearance criteria, and retire by age thirty-five).

204. See *Frank*, 216 F.3d at 855 (limiting the inquiry to whether a rule or regulation that compels individuals to simply present themselves in a "neat or acceptable manner," as opposed to one requiring that they change or modify their physical structure or composition, qualifies as an appearance standard); see also NATIONAL ASSEMBLY DISCRIMINATION BILL, *supra* note 193. Assemblyman Vuilque, referring to *Frank*, states:

Is our legal arsenal powerful enough today to fight against these forms of discrimination? With Article L. 122-45 of the Labour Code and Articles 225-1 and 225-2 of the Criminal Code, this legislation is important. However, it is incomplete in that it responds only partially to the extent of discriminatory phenomenon. And lacking in the French legislation certain grounds of discrimination, such as sexual orientation, *physical appearance* or surname and, more importantly, certain forms of discrimination. (emphasis added).

Id.

205. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (prohibiting physical appearance discrimination in employment); see also NATIONAL ASSEMBLY REPORT, *supra* note 192; NATIONAL ASSEMBLY DISCRIMINATION BILL, *supra* note 193 (providing legislators' comments concerning banning physical appearance discrimination under Article L.122-45).

206. See Cour de cassation [Cass.] [supreme court for judicial matters] soc., Jan. 11, 2012, Bull. civ. V, No. 12 (Fr.) (finding a restaurant liable for physical appearance discrimination against a male waiter for wearing earrings at work); see also Katell Berthou, *New Hopes for French Anti-Discrimination Law*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 109, 124 (2003) (noting that Article L.122-45 "also covers discrimination on the ground of physical appearance, i.e. on account of size, weight, etc., in order to fight what is often termed 'lookism'").

gear.²⁰⁷ High profile allegations of physical appearance based on weight, however, have recently made their way into French media.²⁰⁸ In 2013, for example, “Belle, Ronde, Sexy et je m’assume” (*Beautiful, Round, Sexy, and Okay with it*), a French plus-size women’s group that hosts the Miss Round France beauty pageant, filed a complaint against Chanel designer Karl Lagerfeld for “defamation and discrimination” based on his televised comments blaming France’s failing healthcare system on “diseases caught by people who are too fat” and stating that “[n]obody wants to see round women on the catwalk.”²⁰⁹ The group’s President, Betty Aubrière, expressed frustration over the comments and noted that young, insecure girls should not be subjected to such insults.²¹⁰ The group purported not to be seeking money damages and instead sought to publicize the issue.²¹¹ The group’s petition against Lagerfeld’s

207. See Cour de cassation [Cass.] [supreme court for judicial matters] soc., Jan. 11, 2012, Bull. civ. V, No. 12 (Fr.) (finding a restaurant liable for physical appearance discrimination against a male waiter for wearing earrings at work); Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 27, 2012, Bull. civ. V, No. 201 (Fr.) (holding that the employer was not liable for physical appearance discrimination based on requiring the employee to wear company and safety accessories at work).

208. See *Frank*, 216 F.3d (highlighting a recent high-profile claim of physical appearance discrimination based on weight).

209. Marcy Cruz, *French Plus Size Women’s Group Files Legal Complaint Against Chanel Designer Karl Lagerfeld*, PLUS MODEL BLOG, 2 (Oct. 30, 2013), <http://www.plus-model-mag.com/2013/10/french-plus-size-womens-group-files-legal-complaint-against-chanel-designer-karl-lagerfeld/> (recording Lagerfeld’s comments that formed basis for lawsuit). While not specified by media discussing the complaint, the discrimination claim is likely for physical appearance discrimination based on weight. If so, the group’s success on such a claim would seem unlikely because the group would likely lack standing to bring such action. Nonetheless, Betty Aubrière’s comments indicate that the group cares more about making a statement and publicizing weight discrimination than about actually winning their case. See *Une Association de Femmes Rondes Porte Plainte Contre Karl Lagerfeld*, L’EXPRESS (Oct. 29, 2013), http://www.lexpress.fr/styles/mode/une-association-de-femmes-rondes-porte-plainte-contre-karl-lagerfeld_1295278.html (describing complaint on grounds of “defamation and discrimination”); see also *L’association Belle, Ronde, Sexy et je m’assume Porte Plainte Contre Karl Lagerfeld*, 20MINUTES.FR (Oct. 29, 2013), <http://www.20minutes.fr/mode/1243285-20131029-association-belle-ronde-sexy-assume-porte-plainte-contre-karl-lagerfeld> (describing complaint on grounds of “defamation”).

210. See Allison P. Davis, *Curvy Women File Lawsuit Against Karl Lagerfeld*, NYMAG.COM (Oct. 30, 2013), <http://nymag.com/thecut/2013/10/curvy-women-file-lawsuit-against-karl-lagerfeld.html> (reporting on group’s decision to sue Lagerfeld); see also *Une Association de femmes rondes porte plainte contre Karl Lagerfeld*, *supra* note 209 (providing details on lawsuit against Lagerfeld).

211. See Davis, *supra* note 210 (highlighting that group wants chance to “respond to and confront” Lagerfeld); *Une association de femmes rondes porte plainte contre Karl Lagerfeld*,

comments generated five hundred signatures and inspired a number of girls to write messages about their experiences with weight discrimination in school.²¹² This case demonstrates how France’s physical appearance anti-discrimination laws, at least through cases of high visibility such as this, have opened the door to positive social influence on weight discrimination issues.²¹³

In 2013, a physical appearance discrimination case involving apparel retailer Abercrombie & Fitch received considerable media attention when the company came under investigation by Le Défenseur des droits.²¹⁴ The agency suspected that Abercrombie & Fitch was discriminating against its sales staff based on weight and other physical appearances under the guise that the staff members were models.²¹⁵ If sales staff were in fact classified as models,

supra note 209 (noting that group had petition of 500 signatures signed in protest of Lagerfeld’s comments).

212. See *Une association de femmes rondes porte plainte contre Karl Lagerfeld*, *supra* note 209 (noting that many of petition’s signatures came from girls who experienced discrimination and harassment at school); *Karl Lagerfeld Sued For Comment About Curvy Women On Catwalks*, BUSINESS INSIDER (Oct. 29, 2013), <http://www.businessinsider.com/karl-lagerfeld-sued-for-comment-about-curvy-women-on-catwalks-2013-10> (reporting group’s comments that “curves” are often not result of poor diet).

213. See, e.g., Morgan Fortier, *Karl Lagerfeld Slammed with Defamation Lawsuit*, CHAOS MAGAZINE (Nov. 4, 2013), available at <http://www.chaos-mag.com/karl-lagerfeld-slammed-with-defamation-lawsuit/> (discussing Lagerfeld’s logic that France’s social security deficit is the direct result of France wastefully spending its tax revenue on treating the afflictions of overweight and obese citizens); *5 Thoughts on the Curvy Women vs Karl Lagerfeld Lawsuit*, SEARCHING FOR STYLE BLOG, <http://searchingforstyle.com/2013/11/5-thoughts-on-the-curvy-women-vs-karl-lagerfeld-lawsuit/> (analyzing Lagerfeld’s comments and opining that “[t]he health vs. weight issue should be discussed”).

214. See Sarah Karmali, *Abercrombie & Fitch Under Investigation*, VOGUE (July 25, 2013), <http://www.vogue.co.uk/news/2013/07/25/abercrombie-and-fitch-investigated-for-discrimination-against-staff> (stating that Défenseur des droits will investigate and make relevant recommendations to the company, and that only individuals claiming to be victim of discrimination will have standing to bring a lawsuit); *Abercrombie & Fitch Faces French Inquiry over ‘Models’*, BBC (July 25, 2013), <http://www.bbc.com/news/world-europe-23450486> (noting investigation over discriminatory hiring practices based on physical appearance).

215. See Chine Labbe, *Abercrombie & Fitch Accused Of Hiring Based On Appearance In France*, HUFFINGTON POST (July 25, 2013), http://www.huffingtonpost.com/2013/07/25/abercrombie-discrimination-france_n_3653357.html (discussing Défenseur des droits’ suspicion that Abercrombie’s models are also being used as sales staff); Leigh Thomas, *French Watchdog Probes Abercrombie for Discrimination*, REUTERS (Jul. 24, 2013), <http://www.reuters.com/article/2013/07/24/us-france-abercrombie-idUSBRE96N1A720130724> (quoting head of Le Défenseur des droits, Dominique Baudis, as saying that “[t]hough physical appearance may legitimately be a key and determining professional factor for models, that’s not so for sales staff”).

discriminatory practices based on the physical appearance of those staff members would likely be permissible as a BFOQ under France's anti-discrimination laws.²¹⁶ This case highlights the difficulty in some instances of determining the circumstances under which weight or physical appearance discrimination should be legally permissible, even when there are anti-discrimination laws in place to protect against most forms of weight or physical appearance discrimination.²¹⁷

The Abercrombie investigation, though admittedly one of the few instances found in which weight discrimination was the subject of an investigation, points to how France's law prohibiting physical appearance discrimination has spurred the public into thinking about these issues.²¹⁸ Through these types of complaints and investigations,

216. See Thomas, *supra* note 215 (quoting Baudis's comment that physical appearance may legitimately be key in hiring models, but not in hiring sales staff); Frederic Calinaud, *Abercrombie & Fitch discrimine les moches: choquant mais pas forcément illegal*, LE PLUS (Feb. 28, 2014), <http://leplus.nouvelobs.com/contribution/914765-abercrombie-fitch-accuse-de-discriminer-les-moches-ce-n-est-pas-forcement-illegal.html> (noting that Abercrombie must argue there is a BFOQ for sales staff because physical appearance of sales staff is essential to maintaining company's brand). A BFOQ is an affirmative defense that allows what would otherwise be unlawful discrimination to exist so long as the discrimination is essential to the job duties in question. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] soc., June 27, 2012, Bull. civ. V, No. 201 (Fr.) (holding that the employer was not liable for physical appearance discrimination based on requiring the employee to wear company and safety accessories at work); *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206–07 (1991) (finding no “factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved”); *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (holding that employer may only consider woman's ability to perform her job safely and efficiently with respect to those aspects of job that fall within the ‘essence’ of the particular business); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000), (providing that discrimination pursuant to BFOQ must be “reasonably necessary” to the “normal operation” of the employer's particular business and must concern “job-related skills and aptitudes”).

217. See *Frank*, 216 F.3d at 855 (discussing the difference between prohibited discrimination and discrimination that falls within a BFOQ exception).

218. See, e.g., Shahzad Abdul, *Le Défenseur des droits va enquêter sur la politique de recrutement d'Abercrombie & Fitch*, LE MONDE (July 24, 2013), http://www.lemonde.fr/economie/article/2013/07/24/le-defenseur-des-droits-va-enqueter-sur-la-politique-de-recrutement-d-abercrombie-fitch_3452821_3234.html (noting that Abercrombie was subject to similar litigation in 2005 for which it was found liable); Ben McPartland, *We Have to Question Abercrombie's Policy*, THE LOCAL (July 25, 2013), <http://www.thelocal.fr/20130725/recruitment-based-on-looks-is-against-french-law> (quoting Silmane Laoufi, from *Le Défenseur des droits*, on this issue as saying, “[y]ou cannot only look at appearances and not any other criteria. Discriminating against someone's looks is just the same as discriminating against someone on the grounds of health or whether they are handicapped. They are all forbidden.”).

French media has begun shining the spotlight on the ways in which weight, and looks more generally, should not be a determinant factor in employment decisions.²¹⁹

III. ADOPTING FEDERAL LAWS PROHIBITING WEIGHT DISCRIMINATION IN THE UNITED STATES

France’s laws against physical appearance discrimination recognize that employers should not be legally permitted to discriminate on the basis of weight.²²⁰ As the rates of obesity rise in France, individuals have legal recourse in any instance where an employer bases a decision on obesity, rather than on a person’s “virtues and talents.”²²¹ By comparison, obesity rates in the United States are twice those in France, but the US Congress has failed to propose any laws that would provide equal protection for all individuals in the workplace, regardless of their weight or physical appearance.²²²

219. See Ruben Curiel, *Enquête sur le recrutement chez abercrombie*, LE FIGARO (July 25, 2013), <http://www.lefigaro.fr/societes/2013/07/25/20005-20130725ARTFIG00266-enquete-sur-le-recrutement-chez-bercrombie.php> (discussing physical appearance discrimination and race discrimination); see also Calinaud, *supra* note 216 (discussing the subjective element of establishing a claim for physical appearance discrimination). By contrast, Dove’s inclusion of “real women” in its commercials as part of its “Real Beauty” campaign in the United States was met with backlash from skeptics. See Nina Bahadur, *Dove ‘Real Beauty’ Campaign Turns 10: How A Brand Tried To Change The Conversation About Female Beauty*, HUFFINGTON POST (Jan. 21, 2014), http://www.huffingtonpost.com/2014/01/21/dove-real-beauty-campaign-turns-10_n_4575940.html (describing the purpose and methodology of Dove’s “Real Beauty” campaign and the resulting backlash); Seth Stevenson, *When Tush Comes to Dove, Real Women. Real Curves. Really Smart Ad Campaign*, SLATE (Aug. 1, 2005), http://www.slate.com/articles/business/ad_report_card/2005/08/when_tush_comes_to_dove.html (questioning effectiveness of Dove’s campaign in long term). Some critics have argued that Dove was not doing enough and was still focusing too much on beauty. See Bahadur, *supra*. Others have also argued that such commercials would not last because women would “come to think of Dove as the brand for fat girls” and would not buy beauty products if they already “thought they looked perfect.” Stevenson, *supra*.

220. See NATIONAL ASSEMBLY DISCRIMINATION BILL, *supra* note 193 (arguing that physical appearance is not a legitimate basis for employment decisions); NATIONAL ASSEMBLY REPORT, *supra* note 192 (arguing for state protection against physical appearance discrimination).

221. See Beardsley *supra* note 139 (stating that French obesity rates rising); see also Taylor *supra* note 154 (comparing eating disorder statistics between the United States and France). See generally *supra* Part II.B.2. (examining France’s laws prohibiting physical appearance discrimination).

222. See *supra* Part I.B.1. (providing existing US federal law prohibiting particular instances of weight discrimination).

France and the United States view rights from a fundamentally different perspective in that, while France views anti-discrimination rights as individual rights, the United States views them as group rights.²²³ Therefore, “[a]s compared to French anti-discrimination law, which protects individuals from discrimination on individual traits like physical appearance including size, US anti-discrimination law tends to limit the protection from discrimination to traits associated with membership in social groups like races, ethnicities, religions and genders.”²²⁴ “Physical appearance” is an individual right; it covers a multitude of classes but is not a class in itself.²²⁵ “Weight,” by contrast, covers a class of individuals that are discriminated against based on outward appearance or weight and can thus be conceptualized as a group right.²²⁶ Because of the group-rights framework of US anti-discrimination laws, Congress is more likely to adopt legislation narrowly tailored to prohibiting weight discrimination than broader laws concerning physical appearance. Nevertheless, Congress has three legislative options for providing adequate legal protections to obese individuals in the workplace.

A. To Provide the Fullest Extent of Protections to Obese Individuals, Congress Should Make Weight A Protected Class

The ideal scenario for eliminating weight discrimination would be for Congress to make weight a protected class under the Civil Rights Act.²²⁷ As members of a protected class, obese individuals would enjoy protections against weight discrimination in

223. See *Equal By Comparison*, *supra* note 21, at 47 (contrasting US and French views of rights as individual and group-based, respectively); *supra* Part II.B.1 (describing how French history contributes to the view of rights as group-based).

224. *Equal By Comparison*, *supra* note 21, at 47.

225. Compare 42 U.S.C. § 2000e-2 (2014) (prohibiting discrimination in the United States based on particular protected classes, such as race, gender, and national origin), with CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (Fr.) (prohibiting discrimination in France based on all forms of physical appearance).

226. See *supra* Part I.B.2. (comparing municipal US jurisdictions, some of which prohibit appearance-based discrimination and others that prohibit weight-based discrimination).

227. See Pomeranz, *supra* note 6, at S98-S102 (providing statutory solutions for weight discrimination); Rebecca Puhl, *Do Americans Support Laws to Prohibit Weight Discrimination?*, MEDSCAPE (June 2, 2010), <http://boards.medscape.com/forums/?128@@.29fea36a!comment=1> (providing a survey of options Congress has for adopting weight anti-discrimination laws).

virtually every context.²²⁸ Such classification would provide obese individuals in the United States similarly broad opportunities to take legal action against weight discrimination as would be available to them under French laws prohibiting physical appearance discrimination.²²⁹

Congress, however, likely will not add weight as a protected class under the Civil Rights Act. Some reasons for this can be understood by analyzing weight in the common law framework of an equal protection claim. If an obese individual were to challenge the constitutionality of a state law that treats obese people unequally, the court would need to assess the level of scrutiny to afford to weight-based discrimination claims.²³⁰ The likely result would be that weight would not receive the same level of scrutiny under common law as classes such as race or sex. Courts typically reserve the highest level of protection—strict scrutiny—for “suspect classes,” like race or ethnicity.²³¹ When evaluating discrimination based on “quasi-suspect”

228. See 42 U.S.C. § 2000e-2 (2012) (prohibiting employment discrimination in the United States). It should also be noted, however, that Congress’s power to regulate discrimination exists under the Commerce Clause of the US Constitution and, therefore, Congress would only be able to regulate instances of discrimination that also affect interstate commerce. See Jack M. Balkin, *History Lesson*, LEGAL AFFAIRS, July/Aug. 2002, http://www.legalaffairs.org/issues/July-August-2002/review_balkin_julaug2002.msp (discussing the Civil Rights Act in relation to the Commerce Clause). Nevertheless, Congress’s Commerce Clause powers are increasingly broad. See *Commerce Clause – The Commerce Power of Congress*, Lawnix, <http://www.lawnix.com/cases/commerce-clause.html> (last visited Oct. 13, 2014) (cataloguing United States Supreme Court cases interpreting Congress’s Commerce Clause powers broadly).

229. See CODE DU TRAVAIL [C. TRAV.] art. L.122-45 (prohibiting discrimination in France); CODE PÉNAL [C. PÉN.] art. 225-1 (making discrimination against individuals a crime); cf. EUR. COMM’N, *National Protection Beyond the Two EU Anti-discrimination Directives*, 20 (2013), available at http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf (explaining that French penal law prohibits direct discrimination based on physical appearance in relation to, inter alia, refusal to supply goods or services; obstructing the normal exercise of any given economic activity; and subjecting the supply of goods or services to a condition based on one of the regulated factors).

230. Compare U.S. CONST. amend. XIV, § 1 (providing that “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws”), with DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN OF AND OF CITIZENS], art. 6 (France 1789) (establishing that “[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents”).

231. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to cases of race discrimination); see also *Romer v. Evans*, 517 U.S. 620, 635 (1996) (applying rational basis test to quasi-suspect classes).

classes, such as gender and illegitimacy, courts apply intermediate scrutiny.²³² Further, for all other classes, courts apply the lowest level of protection—rational basis review—such as where a discriminatory act is based on a person’s age or mental handicap.²³³ Based on the factors courts use to determine whether a class is suspect, weight-related claims likely would not receive strict scrutiny. Though weight discrimination has long persisted in employment, there has not been a long history of discriminatory laws against obesity as there has been against African-Americans and women.²³⁴ Further, while obesity may be an immutable characteristic for those who have an underlying physiological cause for it, individuals who do not have such an underlying cause would not likely meet the immutability requirement.²³⁵ Moreover, it is doubtful that obese people can reasonably be considered politically powerless or “vastly underrepresented in this Nation’s decision-making councils,” given that even US presidents, governors, and others at the highest rungs of US society are or have been obese.²³⁶ Lastly, though obesity quite often does not inhibit a person’s ability to contribute meaningfully to society, it may sometimes inhibit a person’s ability to perform certain

232. See *Adarand Constructors*, 515 U.S. at 247 (Stevens J., dissenting) (providing that Court will apply “intermediate scrutiny” to cases of invidious gender discrimination and “strict scrutiny” to cases of invidious race discrimination). *But cf.* *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (concluding that classifications based upon sex are subject to strict scrutiny review based on history of discrimination, immutability, political powerlessness, and because “the sex characteristic frequently bears no relation to ability to perform or contribute to society”).

233. See *Romer*, 517 U.S. 640 (applying rational basis test to quasi-suspect classes, such as homosexuals and immigrants); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985) (applying rational basis to mental handicap).

234. See Chima & Wharton, *supra* note 71, at 23 (providing historical perspective of discrimination against African-Americans and women in US employment); Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL’Y 89 (1994) (discussing common history of discrimination that women and African-Americans share in US history).

235. See Part I.B.1.b., *supra* (examining differences between weight discrimination where an underlying physiological cause exists and other instances where there is no such underlying cause).

236. Compare *Frontiero*, 411 U.S. at 686 n.17 (1973) (explaining that women make up a discrete and insular minority because they have historically been vastly underrepresented in politics, pointing out that the United States has never had a female president), with *supra* Part I.A.1. (discussing obese condition of former US presidents and current governor for the state of New Jersey).

job functions.²³⁷ These factors, which courts use to evaluate claims for equal protection, provide some insight as to why Congress likely would not place weight among the existing protected classes under the Civil Rights Act of 1964.

B. Alternatively, Congress Should Recognize Obesity as A Disability under The ADA

Congress has a second option that would protect individuals against weight discrimination in the contexts of employment, transportation, public accommodation, communications, and governmental activities. Namely, Congress could add obesity to the types of disabilities protected under the ADA. In comparison to obese people in France who may seek legal recourse for discriminatory conduct based on their physical appearance, obese individuals in the United States must show that their obesity substantially impairs a major life activity to bring a claim for disability discrimination based on weight under the ADA.²³⁸ The ADA thus protects only a subset of individuals who might experience weight discrimination, excluding individuals whose weight does not impair a major life function.²³⁹ Therefore, France’s appearance-based anti-discrimination laws, which are not expressly limited to individuals whose weight impairs a major life function, extend more broadly than the ADA’s weight-based disability protections.²⁴⁰ Under French law, for example, Abercrombie & Fitch cannot hire only physically fit employees; but the store could do so under the ADA, so long as none of the rejected candidates could show that her weight impairs a major life function.²⁴¹

237. See Giel, *supra* note 3 (reporting that research has consistently shown that physical appearance bears on employment prospects, even in professions which do not deal with physical appearance themselves and where performance is unrelated to bodily characteristics). *But cf.* Kirkland, *supra* note 3, at 44-45 (analyzing case in which school bus driver could not fit behind steering wheel).

238. See *supra* Part I.B.1.b. (discussing weight discrimination protections under ADA).

239. Compare *supra* Part I.B.1.b. (discussing protections under ADA), with *supra* Part II.B.2. (describing French laws against physical appearance discrimination).

240. Compare *supra* Part I.B.1.b. (providing that the ADA prohibits disability discrimination based on obesity that impairs a major life function and has an underlying physiological cause), with *supra* Part II.B.2. (explaining that France’s criminal statute prohibits all forms of physical appearance discrimination in virtually every context).

241. Compare *supra* Part II.B.2.c. (highlighting Le Défenseur des droits investigation into Abercrombie & Fitch for discriminatory hiring practices based on physical appearance),

Recognizing obesity as a disability under the ADA would not only be a step in the right direction but would provide obese individuals the fair and equal protection they deserve. With the AMA's recent classification of obesity as a disease, members of Congress might fail to address this issue and instead take the view that weight discrimination is already prohibited under the ADA.²⁴² This is an incorrect conclusion to draw and raises two concerns. The first concern is that Congress has not yet actually classified obesity as a disability under the ADA, and there may be less incentive to do so now that courts are permitting disability discrimination claims based on obesity in certain instances.²⁴³ The problem with such an *ad hoc* approach is the high likelihood that different jurisdictions will reach opposite conclusions as to whether obesity is a disability under the ADA. Thus, individuals will not be guaranteed a legal remedy for weight-based discrimination under the ADA, even where the plaintiff can show that her weight impairs a major life function, until it is adopted by statute.²⁴⁴

The second concern is that individuals remain unprotected in instances where their weight does not substantially impair a major life activity.²⁴⁵ The US Supreme Court has found that “[w]hat differentiates sex from such non-suspect statuses as intelligence or physical disability is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”²⁴⁶ Though obesity may sometimes inhibit a person's ability to perform her job,

with supra Part I.B.1.b. (explaining that to bring a claim for disability discrimination on the basis of obesity under the ADA, a plaintiff must show that her obesity impairs a major life function and, in addition, must be able to point to an underlying physiological cause for her obesity).

242. *See supra* Part I.B.1.b. (discussing AMA's classification of obesity as disease).

243. *See supra* Part I.B.1.b. (discussing recent cases in which US courts adopted more relaxed standard for finding obesity to be disability under ADA).

244. *See supra* Part I.B.1.b. (explaining that to bring a claim under the ADA, an individual must demonstrate that her obesity substantially limits a major life activity and point to an underlying physiological cause for her obesity).

245. *See supra* Part I.B.1.b. (highlighting the limited context in which obese individuals may bring an ADA claim based on weight discrimination).

246. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (internal quotation marks and ellipses omitted) (discussing appropriate levels of scrutiny for protected classes).

in many cases it does not.²⁴⁷ The ADA should therefore prohibit employers from treating obesity as a *per se* inability to perform a job.

C. At Minimum, Congress Should Adopt Legislation Protecting Obese Individuals from Weight Discrimination in the Workplace

The third, and perhaps most pragmatic, option by which Congress can eliminate weight discrimination is to pass an act that would proscribe weight discrimination specifically within the employment context, albeit permitting a BFOQ.²⁴⁸ This option would be the narrowest sense in which Congress could prohibit weight discrimination and the furthest from France’s sweeping protections against physical appearance discrimination.²⁴⁹ Nevertheless, adopting a Weight Discrimination in Employment Act (“WDEA”) is a reasonable solution, particularly given that employment is not considered a “fundamental right” under the US Constitution or Bill of Rights.²⁵⁰

Congress has already adopted the Age Discrimination in Employment Act (“ADEA”) on which to model the WDEA.²⁵¹ The ADEA, which Congress adopted in 1967, protects certain applicants and employees of the age forty and older from age discrimination in

247. *See Study: Obese Job Seekers Have Less Chance of Finding Work*, CORE PERFORMANCE, LIVE BETTER BLOG (Aug. 15, 2012), <http://www.coreperformance.com/daily/live-better/study-obese-job-seekers-have-less-chance-of-finding-work.html> (noting that even when obesity does not impact a person’s job performance, appearance might factor into employment decisions). *But cf.* Amanda Gardner, *Does Obesity Affect School Performance?*, CNN (June 14, 2012), <http://www.cnn.com/2012/06/14/health/obesity-affect-school-performance/> (reporting that growing body of research has suggested that obesity is associated with poorer academic performance beginning as early as kindergarten).

248. Under the ADEA, an employer may justify age discrimination where it can show (1) that the age requirement is reasonably necessary to the “essence of its business,” and (2) that “a tailored attempt to accomplish the same thing by assessment of individual capabilities would either be pointless or impractical.” LEX K. LARSON, *The BFOQ Defense*, in LARSON ON EMPLOYMENT DISCRIMINATION 8-131 (2014). *See also* Smith v. City of Jackson, 544 U.S. 228, 233 n.3 (2005) (noting that ADEA provides affirmative defense to liability where age is a BFOQ reasonably necessary to normal operation of particular business).

249. *See supra* Part II.B.

250. *See* U.S. CONST. amend. I-X (constituting the US Bill of Rights). *But cf.* UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217 (III) A, art. 23, U.N. Doc. A/RES/217(III), art. 23 (Dec. 10, 1948) (United Nations declaring that employment is human right).

251. *See* 29 U.S.C. § 623(a) (2012) (prohibiting age discrimination); *Age Discrimination in Employment Act (ADEA)*, HR HERO, *supra* note (summarizing purpose and effects of ADEA).

hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment.²⁵² If modeled on the ADEA, the proposed WDEA would make it unlawful for any employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's actual or perceived weight;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's actual or perceived weight; or
- (3) to reduce the wage rate of any employee in order to comply with this Act.²⁵³

As with other similar legislation, an employer would not be liable for weight discrimination under the WDEA if it could show that the adverse employment action was attributable to a reasonable factor other than weight.²⁵⁴ Employers would also have a liability exception under the WDEA where they could show that a discriminatory act based on weight falls within a BFOQ exception.²⁵⁵ To qualify for such an exception, the defendant would have to prove either (1) that weight was a necessary basis for the employment action for the success of the business; or (2) that the individual's weight places her in a definable group or class of employees who would be unable to perform the job safely and efficiently, or for which considering the

252. See ADEA, 29 U.S.C. § 623 (2012); *Age Discrimination*, U.S. DEP'T OF LABOR, <http://www.dol.gov/dol/topic/discrimination/agedisc.htm> (last visited Oct. 11, 2014) (describing ADEA and associated administrative agencies).

253. This language mirrors that used in the ADEA to prohibit age discrimination in employment. See ADEA, 29 U.S.C. § 623.

254. See *Smith v. City of Jackson*, 544 U.S. 228, 239 (finding that employer was not liable for age discrimination, where adverse employment action was attributable to reasonable non-age factor); Pomeranz, *supra* note 6, at S101 (noting that courts will not find adverse impact if weight discrimination attributable to reasonable non-weight factor).

255. Compare *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2002) (discussing ADEA's BFOQ liability exception for employers), with *supra* note 253 and accompanying text (proposing WDEA language which closely resembles the existing ADEA).

qualifications of each member of that class would be impossible or highly impractical.²⁵⁶

The problem of weight discrimination clearly goes beyond the law—it is a societal issue. Thus, in addition to the legal reasons for adopting a WDEA, Congress should also consider the potential social benefits of such legislation. Evidence of positive social changes in French culture regarding obesity has followed the adoption of France’s physical appearance anti-discrimination laws in 2001. For example, larger models have been promoted in France’s fashion and magazine industries; the French public has voted an obese entertainer as the winner of a talent-search reality television show; and the French media has begun reporting on high-profile cases involving weight discrimination, such as the Abercrombie & Fitch investigation and the case raised by Belle, Ronde, Sexy et je M’assume.²⁵⁷ Similar to what has happened in France, passing laws in the United States prohibiting weight discrimination in employment could create a positive social impact concerning obesity in other contexts of US society.²⁵⁸

The need for such positive social and legal changes regarding obesity continues to grow in the United States, where weight discrimination has become one of the top three most reported forms of discrimination in employment.²⁵⁹ US legislators should also consider the degree to which repeated and sustained weight discrimination at work can affect the average employee in the United States, who spends more than a third of her day at work.²⁶⁰ The

256. See *W. Airlines, Inc. v. Criswell*, 472 U.S. 400, 413-17 (1985) (holding that employer may only consider woman’s ability to perform her job safely and efficiently with respect to those aspects of job that fall within the ‘essence’ of the particular business); see also *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206–07 (1991) (finding no “factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved”); *Frank*, 216 F.3d at 855 (providing that discrimination pursuant to BFOQ must be “reasonably necessary” to the “normal operation” of the employer’s particular business and must concern “job-related skills and aptitudes”).

257. See *supra* Parts II.A.2. and II.B.1-2. (examining positive social effects on weight bias following France’s adoption of laws prohibiting physical appearance discrimination and providing examples).

258. Compare *supra* Part II.A.2. (discussing positive social effects of anti-discrimination laws in France), with Part III (arguing for adoption of similar laws in the United States).

259. See *supra* Part I.A.4. (discussing these statistics in context of highlighting that obesity is highly stigmatized in US society).

260. See U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, *supra* note 53 (providing pie chart of how people in the United States spend hours in day on average); cf.

makings of a broad social impact by passing the WDEA are present in the state and local US jurisdictions that have already begun adopting laws to provide broad protections for individuals facing weight discrimination. Passing the WDEA would provide additional force to the otherwise slow-moving weight anti-discrimination movement that is taking shape in these jurisdictions.

CONCLUSION

For decades now, the United States has worried about what to do about the rising obesity rates the country is facing. France, which faces this problem to a lesser degree than the United States, has passed legislation that protects individuals against an employer's discriminatory actions based on appearance. Meanwhile, the United States has adopted no federal laws ensuring that obese individuals may enjoy the same rights and privileges as every other person with respect to employment. France's laws prohibiting physical appearance discrimination, while perhaps broader than the United States might be willing to go in terms of establishing weight anti-discrimination laws, provides an example of the highest level of protection a country can afford obese individuals and the level of protection to which US legislators should aspire in adopting laws prohibiting weight discrimination.

Others have implored Congress to extend equal protection in employment to those facing discrimination based on their weight, noting the pervasive anti-obese bias in the United States and its translation into weight discrimination in employment. It is important, however, to recognize Congress' tendency to see rights as group-based, as opposed to the individual-based view France takes, and to propose a solution that is appropriately tailored to address weight discrimination as a group rights issue. Weight discrimination harms an entire class of individuals who find themselves able to perform a job, but who have been wrongly judged as incapable by an employer on the basis of weight. By eliminating such discrimination in the workplace, Congress may initiate a broader social impact that stifles weight discrimination in other aspects of society. Hints of a broader social shift following the passing of France's physical appearance

Covert, *supra* note 53 (reporting on lack of vacation time Individuals in the United States receive and actually take).

anti-discrimination laws provide hopeful optimism that a similar scenario is possible in the United States.

The current political climate in the United States is ripe for Congress to propose the WDEA. Recent positive views toward LGBT-friendly laws by the Supreme Court, President Barack Obama, and a number of states represent the current willingness of US lawmakers to reevaluate the extent to which the United States is in fact providing all individuals equal protection. The United States must not continue to ignore its failure to protect the majority of overweight and obese individuals who make up over one-third of the US population. Failure to address this injustice perpetuates stigmas surrounding obesity and allows capable individuals to be denied employment opportunities because an employer arbitrarily decides that their weight disqualifies them. Instead, the United States must recognize, as France has, that a free and democratic society needs to protect individuals against weight discrimination in employment.

