MODRALL SPERLING

LAWYERS

Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Are New Mexico Employers Required to Accommodate Obesity Under the ADA?

Between 25% and 30% of all adults in New Mexico are obese.[1] With such a significant percentage of New Mexicans being affected by obesity, employers are increasingly faced with issues regarding whether or not they must accommodate employees for impairments relating to their weight and whether obesity itself qualifies as a disability under the Americans with Disabilities Act ("ADA"). The ADA makes it unlawful for a covered employer to discriminate against any "qualified individual on the basis of disability".[2] The purpose of this article is to explain the current state of the law affecting New Mexico employers who are faced with employees claiming obesity as a disability.

The ADA defines the term "disability" to mean any of the following: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. Although the Tenth Circuit Court of Appeals (which sets precedent with respect to New Mexico federal cases) has not directly addressed whether obesity itself qualifies as a disability in any published decision, it has indicated that it is not discriminatory for an employer to reassign an employee to a lower paying position where the employee failed an annual fitness exam due to obesity and diabetes because the job's physical fitness requirements were job-related, uniformly enforced and necessary for safe operation of the facility.[3] Earlier this month, however, another Circuit Court provided guidance on whether obesity qualifies as a disability under the ADA.

On April 5, 2016, the United States Court of Appeals for the Eighth Circuit, in *Morriss v. BNSF Railway Company* [4], issued an opinion determining that obesity was not a covered condition under the Americans with Disabilities Act. The Court ruled that obesity only qualifies as a protected category if it is both abnormal and caused by an underlying condition such as cardiac disease, sleep apnea, hypertension or diabetes.

The Plaintiff applicant in *Morriss* alleged that he passed all the required tests to earn a position as a machinist, but that BNSF revoked its conditional job offer after Plaintiff underwent a required medical review which revealed that he was obese. Plaintiff was five feet ten inches tall, weighed between 281 and 285 pounds and had a body mass index just above 40. BNSF's company policy was not to hire anyone with a BMI of 40 or greater for positions that were "safety sensitive" due to the risk that the worker might develop impairments in the future. The applicant sued under the ADA, seeking protection on the basis of having an actual disability and on the basis of his obesity being regarded as a disability. Plaintiff failed on both theories, however, because he could not show that his obesity was a threshold "physical impairment," or that BNSF regarded him as having a physical impairment.

The Eighth Circuit determined that BNSF had the right to deny employment to the otherwise qualified obese job applicant because his weight was not the result of another physiological impairment. Based on the EEOC's regulations, the Court stated that "obesity is not a physical impairment unless it is a physiological disorder or condition and it affects a major body system." The Court also noted that the EEOC's interpretive guidance on the ADA indicates that impairments do not include physical characteristics, including weight, that are both within the normal range and not the result of a physiological disorder. The Eighth Circuit stated "[a]n individual's weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal

range and it occurs as the result of a physiological disorder." The Court explained that "[b]oth requirements must be satisfied before a physical impairment can be found. In other words, even weight outside the normal range — no matter how far outside that range — must be the result of an underlying physiological disorder to qualify as a physical impairment under the ADA."

Plaintiff attempted to rebut the argument that his obesity was simply a physical characteristic by claiming that his obesity, in and of itself, is a physical impairment because it has been labeled as "severe", "morbid" or "Class III" obesity. Plaintiff also argued that he should be given ADA protections because BNSF perceived him as having a physical impairment. The Court rejected these arguments and determined that the ADA only applies to current physical impairments, and that the denial of employment based on the finding that someone was likely to develop impairments in the future was permitted under the law.

While we do not have direct published guidance on how this issue would be decided by the Court of Appeals for the Tenth Circuit or by New Mexico Courts, the *Morriss* case suggests that obesity alone does not provide protection under the ADA. It is important for employers to note, however, that the Eighth Circuit's decision does not mean that obesity can never be a disability. Rather, if an employee's obesity is a result of another physiological impairment, an obese employee may be found to have a "disability" and accommodations may need to be considered. Thus, an employer should always be cautious when dealing with obesity and employment decisions and should be aware that a more detailed analysis of an employee's condition may be necessary. It should also be noted that the EEOC filed an amicus brief on behalf of the Plaintiff in this matter and took the position that after the enactment of the ADA Amendments Acts of 2008, EEOC guidance should be read to mean that to prove an impairment, an employee is only required to show an underlying physiological disorder if his weight is within "normal" range. Accordingly, an employer needs to remember that the law is always changing and that this issue will likely continue to be highly contested.

For questions about any of the issues raised in this article, please contact Tiffany Roach Martin by emailing her at Tiffany.Martin@modrall.com or calling (505) 848-1800 for further information.

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[1] United States Centers for Disease Control and Prevention

[2] 42 U.S.C. § 12112(a)

[3] *Wilkerson v. Shinseki*, 606 F.3d 1256 (10th Cir. 2010)

[4] *Melvin A. Morriss, III v. BNSF Railway Company*, No. 14-3858 (April 5, 2016, 8th Cir.)

HIPAA for New Mexico Covered Entity Employers: Avoiding Penalties

The complexity of the Health Insurance Portability and Accounting Act (HIPPA) makes it difficult for well-intentioned employers to ensure compliance with its provisions. We often field calls from New Mexico employers asking if HIPAA applies in certain situations and what steps they need to take to make sure they do not violate it. In light of HIPAA's significant penalties (ranging from $100 to $50,000 per violation), it is important for employers to understand its provisions and applicability. HIPAA specifies how protected health information (PHI) may be used and how it must be protected. This article explains some of the most common areas where employers with a health plan may run afoul of the law and best practices for avoiding violations.

If you are an employer with a self-insured health plan, including a Health Reimbursement Account (HRA) or Health Flexible Spending Account (Health FSA), your health plan is considered a covered entity and you must comply with the Health Insurance Portability and Accountability Act (HIPAA). (Please note that an employer may have some medical information about employees in personnel files, such as doctors' notes or FMLA paperwork. Simply having medical information in an employee's personnel file does not make an employer a covered entity under HIPAA.)

First and foremost, health plan documents must specify that PHI will not be used for employment-related actions. In other words, an employer may not use an employee's PHI to make hiring, firing, promotion, or demotion decisions. Not only is this a HIPAA violation, it may also expose the employer to a wrongful termination suit. Employers should avoid even the appearance that PHI was used in making any employment-related decision. The easiest way to accomplish this is to set up a firewall between the health plan and employer, and ensure that the employees responsible for making employment-related decisions are not privy to any individual employee's PHI from the health plans. To the extent information about the health plan needs to be shared with the employer, such as financial information, it is best to remove any individually identifiable information and limit it to the minimum necessary to meet the employer's need.

It is imperative that employers encrypt laptops and mobile devices that may store, access, or transmit PHI. While all computers should be encrypted, portable electronic devices are a priority as they are especially vulnerable to theft and loss. When an unencrypted device that contains PHI is lost or stolen, it is almost always a HIPAA breach. Depending on the size and circumstances of the breach, fines can be in the millions of dollars (and criminal penalties can apply). When the Office of Civil Rights (OCR) assesses penalties, it does not matter that the theft occurred through no fault of the employer. What matters is that the employer could have encrypted the device and did not.

Employers with a self-insured health plan often fail to adequately train their workforce on how to handle and maintain PHI. Employees may not realize that PHI receives special protection and should not be discussed with coworkers or left lying about where it is visible to people passing by. Employers should have policies and procedures in place that explain what PHI is; how it is to be maintained, shared, and protected; and set forth the protocols to follow in the event there is a breach. Employees that may view PHI as part of their job should participate in a training that explains the key aspects of the policies and procedures and the employer should document that this training took place.

If an employer contracts with another entity, such as a copy repair company, IT services, or accounting or legal services, and that entity may view or use PHI to carry out its job responsibilities, then the employer needs to have a signed business associate agreement in place with that entity. The business associate agreement sets forth how PHI must be used and protected. This has been a robust area of enforcement for OCR lately. One recent settlement resulted in a $1.5 million dollar fine to a health system, partly for not having a business associate agreement in place with one of its contractors.

In case the huge penalties (including the possibility of jail time) under HIPAA are not enough of an incentive to comply with the law, OCR announced on March 16, 2016 that the second round of HIPAA audits are underway. OCR will audit at least 200 covered entities and business

associates, including some onsite audits. While the audits are not intended to be punitive, information gleaned from the audits may be used in a compliance action against the entity.

For questions about HIPAA compliance, please contact Meghan Mead at 505.983.2020 or meghan.mead@modrall.com.