

“Weighting” For Protection in Massachusetts: The Myth of Equal Opportunity in Employment

“This is one of the only groups where an employer could say, ‘We don’t want fat people’ and get away with it”¹

I. INTRODUCTION

On January 10, 2007, Massachusetts Representative Byron Rushing introduced legislation to prohibit height and weight discrimination in employment, housing, and real-estate transactions.² The bill represents Representative Rushing’s tenth effort to address height and weight discrimination in the workplace; however, each year the proposed legislation has failed to reach a vote.³ Issues of height and weight discrimination have gained increased attention in recent years, and thus Representative Rushing has expressed confidence in the current bill.⁴

Within the past two decades, obesity rates in the United States have increased significantly.⁵ A 2007 study revealed that in 2005, 56 percent of Massachusetts adults qualified as overweight and 21 percent as obese.⁶

1. Diane E. Lewis, *Overweight Workers Say They’re Often Overlooked Complain Prejudice Remains in Workplace*, BOSTON GLOBE, Sept. 21, 2003, at G1 (quoting Representative Byron Rushing commenting overweight persons victims of discrimination).

2. See H.R. 1844, 185th Gen. Ct., Reg. Sess. (Mass. 2007) (proposing adding weight and height to Massachusetts anti-discrimination statute).

3. See *id.* (illustrating most recent attempt to protect legislatively against weight discrimination); see also H.R. 3752, 184th Gen. Ct., Reg. Sess. (Mass. 2005); H.R. 1054, 183d Gen. Ct., Reg. Sess. (Mass. 2003); H.R. 2118, 182d Gen. Ct., Reg. Sess. (Mass. 2001); H.R. 2857, 181st Gen. Ct., Reg. Sess. (Mass. 1999); H.R. 3972, 181st Gen. Ct., Reg. Sess. (Mass. 1997); H.R. 2702, 179th Gen. Ct., 1st Sess. (Mass. 1995); H.R. 3718, 179th Gen. Ct., Reg. Sess. (Mass. 1994); H.R. 2758, 178th Gen. Ct., Reg. Sess. (Mass. 1993); H.R. 2619, 177th Gen. Ct., Reg. Sess. (Mass. 1992).

4. See *Mass. Weighs Extending Discrimination Law*, MSNBC, May 17, 2007, <http://www.msnbc.msn.com/id/18725638/> [hereinafter *Mass. Weighs Extending Discrimination Law*] (mentioning increased public awareness of weight discrimination and Representative Rushing’s confidence in bill). On March 25, 2008, obesity experts and researchers and Massachusetts residents supporting the legislation testified before the Joint Committee on Labor and Workforce Development. See Catherine Williams, *Activists Pushing Expanding Discrimination Bill Face Questions*, ST. HOUSE NEWS SERVICE, available at <http://www.bostonbar.org/pp/shns0708/shns033108.htm> (reporting on testimony). “There is a growing number of people who think this should happen and an even larger number of people who think we should at least be talking about it.” See Lisa Anderson, *Discrimination Continues Against the Obese*, SEATTLE TIMES, Apr. 28, 2008, available at http://seattletimes.nwsourc.com/html/living/2004378760_zliv28bias.html (quoting Representative Rushing regarding public hearing).

5. See CTR. FOR DISEASE CONTROL, U.S. OBESITY TRENDS 1985-2007 4 (2007), http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/obesity_trends_2007.pdf (illustrating rapid increase in United States obesity rates).

6. See KATHARINE KRANZ LEWIS & LYNNE H. MAN, THE MASSACHUSETTS HEALTH POLICY FORUM,

Although Massachusetts has the second lowest rate of obesity in the United States, the rise in overweight adults in the state represented a 40 percent increase since 1990.⁷

Although neither the Massachusetts Commission Against Discrimination (MCAD) nor the Equal Employment Opportunity Commission catalogs weight discrimination complaints, employment lawyers suggest such complaints have increased in recent years.⁸ As only one state in the United States, Michigan, treats weight as a protected class, size-discrimination plaintiffs must seek relief under existing remedies; however, thus far these efforts have attained minimal success.⁹ For example, in 1994, Gail Gauthier filed a complaint with the MCAD alleging that Saturn of Natick refused to hire her because of her age and weight.¹⁰ Ms. Gauthier, who was fifty-three years old and weighed 250 pounds, alleged that when she arrived for a scheduled interview at Saturn of Natick, she overheard her interviewer expressing his refusal to conduct the interview, which she attributed to her age and appearance.¹¹ Because Massachusetts does not recognize weight as a protected status, Gauthier brought her weight discrimination claim under handicap discrimination.¹² Recognizing Massachusetts's failure to protect against weight discrimination, the MCAD dismissed Gauthier's complaint because she failed to prove her weight constituted a handicap.¹³

This Note will begin by outlining the historic expansion of civil-rights protection in Massachusetts within the employment context.¹⁴ It will then address the increased concern regarding weight discrimination and how

OVERWEIGHT AND OBESITY IN MASSACHUSETTS: EPIDEMIC, HYPE OR POLICY OPPORTUNITY? 2 (2007), <http://masshealthpolicyforum.brandeis.edu/publications/pdfs/30-Jan07/MHPFIssueBrief30FINALWEB.pdf> [hereinafter OVERWEIGHT AND OBESITY IN MASSACHUSETTS] (indicating Massachusetts residents' weight classifications in 2005). Researchers determine obesity and overweight classifications for adults by examining an individual's Body Mass Index (BMI). *Id.* at 5. The BMI calculates an individual's weight to height ratio, with a range of 19 to 25 constituting normal weight, 25 to 30 overweight, and above 30 obese. *Id.*

7. *See id.* at 2-4 (noting percentage increase of overweight individuals in Massachusetts since 1990). While Massachusetts ranks below the national average in terms of weight, the rise in overweight adults within the state parallels similar trends in higher ranking states. *Id.* at 4.

8. *See Lewis, supra* note 1 (discussing likely rise in size-discrimination complaints).

9. *See* Karol V. Mason, Note, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REFORM 337, 353-54 (1982) (evaluating Michigan's protection of overweight individuals against employment discrimination).

10. *See Gauthier v. Saturn of Natick*, No. 94-BEM-0203, 1998 Mass. Comm. Discrim. LEXIS 61, at *2 (Mass. Comm'n Against Discrim. Feb. 27, 1998) (describing complainant's allegations).

11. *See id.* at *6 (providing complainant's allegations).

12. *See id.* at *1 (explaining weight-based discrimination claim brought under chapter 151B of the Massachusetts General Laws). The first paragraph of chapter 151B, section 4 of the Massachusetts General Laws prohibits age discrimination and paragraph sixteen prohibits discrimination based on handicap. *Id.* at *13-*14.

13. *See id.* at *16 (setting forth reason for dismissal). The Commission explained that despite the First Circuit's holding that "morbid obesity" can constitute a disability, Gauthier failed to allege that she was morbidly obese and provide the necessary medical evidence. *Id.* at *17.

14. *See infra* Part II (outlining historical expansion of anti-discrimination legislation in Massachusetts).

existing Massachusetts law fails to provide an adequate avenue for bringing weight-discrimination claims.¹⁵ Moreover, it will examine existing laws in other United States jurisdictions that have addressed similar issues and employ these jurisdictions as tools for comparison in addressing criticism of the pending Massachusetts legislation.¹⁶ Finally, this Note will suggest ways to increase the legislation's probability of enactment and success.¹⁷

II. HISTORY

*"This has been our view in Massachusetts... that employment discrimination will not be ended until the door is opened to provide the remedy."*¹⁸

A. History of Massachusetts Anti-Discrimination Law

Currently, Massachusetts's anti-discrimination statute prohibits employers from discriminating on the basis of race, color, religion, national origin, sex, age, sexual orientation, genetic information, or ancestry, absent a bona fide occupational qualification.¹⁹ While such protections elicit little debate today, the history of civil-rights protection illustrates that throughout the statute's expansion, inclusion met opposition.²⁰ Nonetheless, throughout the country's history, Massachusetts has led in the advancement of anti-discrimination laws.²¹

On May 23, 1946, the Massachusetts legislature enacted An Act Providing For a Fair Employment Practice Law.²² The Fair Employment Practice Act

15. See *infra* Part II (providing studies and testimonials illustrating prevalence of weight discrimination).

16. See *infra* Part II (providing background of weight bias); see also *infra* Part III (evaluating concerns with proposed Massachusetts legislation using jurisdictions with weight-discrimination protection as predictors).

17. See *infra* Part III (providing suggestions for success of legislation).

18. Elwood S. McKenney, *Fair Employment in Massachusetts* (pt. 2), 13 *PHYLON* 2, 152 (1952).

19. See MASS. GEN. LAWS ch. 151B, § 4(1)(1B) (2000) (providing protection against discrimination for specified characteristics). Although chapter 151B of the Massachusetts General Laws does not provide a definition for a "bona fide occupational qualification," the MCAD considers each defense on a case-by-case basis. See Massachusetts Commission Against Discrimination, *Employment Discrimination Guidelines*, <http://www.mass.gov/mcad/forEmployers.html> (last visited Oct. 30, 2008).

20. See LEON H. MAYHEW, *LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION 84* (1968) (discussing business community's opposition to enacting Fair Employment Practice Law); Peter M. Cicchino et al., Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 *HARV. C.R.-C.L. L. REV.* 549, 550 (1991) (discussing legislative opposition to including sexual orientation as protected status).

21. See Massachusetts Commission Against Discrimination, *The History of the MCAD*, <http://www.mass.gov/mcad/history.html> (last visited Oct. 30, 2008) [hereinafter Massachusetts Commission Against Discrimination] (characterizing Massachusetts as pioneer in legislating against discrimination).

22. See MAYHEW, *supra* note 20, at 101 (detailing enactment of anti-discrimination legislation in Massachusetts). Under Sections 2 through 4 of the legislation, the Massachusetts legislature created the Massachusetts Fair Employment Practice Commission, the administrative agency charged with overseeing the new legislation's enforcement. *Id.* In 1950, as the Commission took on broader responsibilities, the legislature

(Act) represented a response to nationwide racial and religious tension, as African-American workers and individuals from certain religious groups combated barriers to equal employment opportunities.²³ The Act established that discrimination based on race, color, religious creed, national origin, or ancestry ran contrary to the rights of the citizens of Massachusetts.²⁴ The statute applied to businesses employing six or more individuals, prohibiting those employers from discriminating against individuals on the basis of the enumerated characteristics in making employment decisions.²⁵ This statute made Massachusetts the third state in the United States to adopt fair-employment legislation.²⁶

Massachusetts Governor Maurice J. Tobin praised the Act as “a milestone in social legislation.”²⁷ While publications hailed the law a “hit,” prior to its enactment, the Act’s supporters met resistance.²⁸ In a Boston Chamber of Commerce poll, members opposed the legislation nine to one.²⁹ Further, at hearings held at the State House on February 18, 1946, the Associated Industries of Massachusetts expressed concern that the proposed legislation would burden business.³⁰ The Governor, however, promised to appoint employer advisors and “good people” to the Commission, and the group

modified its name to the Massachusetts Commission Against Discrimination. *Id.* at 112.

23. *See id.* at 77-78 (discussing racial tensions prompting enactment of Fair Employment Practice Act). In response, Governor Saltonstall established the Commission on the Employment Problems of Negroes, which reported that racial barriers to employment existed and resulted in economic hardship. *Id.* at 78. Further, in 1943, Governor Saltonstall established the Massachusetts Committee on Racial and Religious Understanding, charged with investigating reported instances of discrimination and combating such discrimination through education. *Id.* at 78-79.

24. *See id.* at 101 (articulating Massachusetts Fair Employment Practice Act’s coverage). The statute qualified its enumerated protections, as an employer could use one of the protected classes as a criterion for an employment decision, provided the employer showed sufficient evidence that such criteria constituted a bona fide occupational qualification for the position. *Id.* at 104.

25. *See* Elwood S. McKenney, *Fair Employment in Massachusetts* (pt. 1), 13 *PHYLON* 1, 50 (1952) (delineating application of Massachusetts Fair Employment Practice Act). The statute applied to both labor unions and employment agencies; however, it excluded certain non-profit organizations as well as employers’ family members and domestic servants. *See* MAYHEW, *supra* note 20, at 103; McKenney, *supra*.

26. *See* William J. Collins, *The Labor Market Impact of State-Level Anti-Discrimination Laws, 1940-1960*, 56 *INDUS. & LAB. REL. REV.* 2, 245 (2003) (outlining adoption of fair employment laws by state). New York and New Jersey preceded Massachusetts in adopting fair-employment legislation, both passing legislation in 1945. *Id.* Massachusetts adopted anti-discrimination legislation eighteen years before the federal government passed the 1964 Civil Rights Act. *Id.*

27. William M. Blair, *Fair Employment Law Hit as It Goes into Effect*, *N.Y. TIMES*, May 26, 1946, at E8. (quoting reaction of Massachusetts Governor).

28. *See id.* (declaring Massachusetts law well-received). *But see* MAYHEW, *supra* note 20, at 84 (explaining discontent of Massachusetts business community).

29. *See* MAYHEW, *supra* note 20, at 84 (citing Boston Chamber of Commerce survey results).

30. *See id.* at 83 (presenting group’s stance on legislation at hearings). One industry lobbyist explained,

We were afraid of the law. It gave anybody the right to claim he had been discriminated and on that basis a business could get a lot of bad publicity Minority groups could use the law to make trouble for people and bad publicity. That’s a hefty thing. In the abstract, it’s frightening.

Id. at 125.

discontinued its opposition.³¹

Over the years, the Massachusetts legislature expanded the anti-discrimination statute, granting protection to a greater number of individuals.³² In 1965, the legislature amended the statute to protect against gender discrimination.³³ Subsequently, in 1975, the legislature extended protection to prohibit age discrimination.³⁴ In 1984, the legislature prohibited discrimination on the basis of an individual's disability.³⁵ On November 7, 1989, after seventeen years of opposition and defeat, Massachusetts passed legislation to protect individuals against employment discrimination on the basis of sexual orientation, thereby becoming only the second state with such protection in the country.³⁶ In July 2000, the Massachusetts legislature amended chapter 151B of the Massachusetts General Laws to prohibit discrimination in employment on the basis of genetics.³⁷ The MCAD last expanded the scope of employment protections in 2001, interpreting prohibitions against sex discrimination to include discrimination against transsexual individuals.³⁸

B. Rising Problem of Weight-Based Discrimination

Overweight individuals face discrimination on a daily basis in nearly every aspect of their lives, causing significant financial, social, and professional

31. See *id.* at 124-25 (describing compromise between governor and opposition). Responding to concerns regarding the legislation, the Governor equipped the Commission with minimal resources, few employees, and limited power for the first few years. See *id.*; Massachusetts Commission Against Discrimination, *supra* note 21. According to its 1948 Annual Report, the Commission recognized the Fair Employment Practice Act represented an educational tool to "substitute understanding for intolerance." See MAYHEW, *supra* note 20, at 120.

32. See Massachusetts Commission Against Discrimination, *supra* note 21 (highlighting Massachusetts anti-discrimination law's expansion).

33. See *id.* (noting inclusion of gender in Massachusetts anti-discrimination law).

34. See *id.* (asserting protection against age-discrimination).

35. See *id.* (noting inclusion of handicap as protected status in Massachusetts). The Massachusetts legislature modeled this amendment after the Federal Rehabilitation Act and adopted its definition of a handicapped individual. See Kevin J. Romano, Comment, *Dahill v. Police Department of Boston: How the Massachusetts Supreme Judicial Court Provided Handicap Discrimination Protection to Half of the State's Population*, 37 NEW ENG. L. REV. 1157, 1161-62 (2003).

36. See *Development in the Law—Employment Discrimination, Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1626 (1996) (discussing Massachusetts's protection against sexual-orientation-based discrimination); see also Cicchino, *supra* note 20, at 549 (highlighting seventeen-year battle for legislation). From 1973, when Massachusetts Representative Barney Frank introduced the bill, until 1983, the bill failed even to achieve preliminary approval from either the Massachusetts House or Senate. See Cicchino, *supra* note 20, at 564.

37. See MASS. GEN. LAWS ch. 151B, § 4(1) (2000) (indicating statutory language prohibiting genetic discrimination). This clause in Massachusetts's anti-discrimination statute prohibits employers from requiring genetic testing as part of an employee's application and proscribes discrimination on the basis of genetic information, even if the applicant voluntarily provides such test results. See Patricia A. Roche, *The Genetic Revolution at Work: Legislative Efforts to Protect Employees*, 28 AM. J.L. & MED. 271, 273 (2002).

38. See *Millett v. Lutco, Inc.*, No. 98-BEM-3695, 2001 Mass. Comm. Discrim. LEXIS 212, at *9 (Mass. Comm'n Against Discrim. Oct. 10, 2001) (interpreting sex discrimination to include transsexual discrimination).

harm.³⁹ Researchers indicate that societal norms, the media, and even health-care professionals perpetuate weight bias.⁴⁰ Studies suggest that the media reinforces negative perceptions of overweight individuals, particularly women.⁴¹ As for health care professionals' attitudes, studies have reported that 50 percent of primary-care physician respondents agreed that obese patients were unattractive, lazy, and noncompliant.⁴²

1. *Weight Bias Learned Early*

Studies indicate that weight discrimination begins at an early age.⁴³ Research shows that weight bias may begin as early as three years of age.⁴⁴ Researchers suggest that young children learn weight bias through both parental and media transmissions.⁴⁵ In one of the earliest studies on children

39. See SONDRÁ SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION 25-26 (2000) (documenting weight-discrimination in variety of activities); Carol A. Johnson, *Personal Reflections on Bias, Stigma, Discrimination, and Obesity*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES 175, 175-83 (Kelly D. Brownell et al. eds., 2005) (offering testimonials of weight-based discrimination). One woman recalls weight discrimination from an early age, recounting memories of being teased in grade school for being overweight, as well as fear and embarrassment when teachers conducted regular "weigh-ins" at school, which resulted in increased ridicule and rejection from the junior high cheerleading squad. *Id.* at 177-78.

40. See Anthony N. Fabricatore et al., *Bias in Health Care Settings*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 39, at 30 (suggesting weight bias in medical profession); J. Kevin Thompson et al., *Effects of Weight-Related Teasing in Adults*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 39, at 137 (suggesting weight bias promoted through societal perceptions of attractiveness); Bradley S. Greenberg et al., *Portrayals of Overweight and Obese Individuals on Commercial Television*, 93 AM. J. PUB. HEALTH 8, 1342-47 (2003) (examining overweight and obese individuals unrepresented on television).

41. See Thompson, *supra* note 40, at 145 (describing studies of media and overweight portrayals). One study, which evaluated ten prime-time series on each of six networks with the largest ratings, found that although one-fourth of women in the United States are obese, obese female television characters represent only three in one hundred. See Greenberg, *supra* note 40, at 1343. Further, one in three female characters were underweight. *Id.* Additionally, the evaluated television programs utilized overweight female characters twice as often as thinner counterparts as objects of humor. *Id.* at 1345. The study found that overweight characters were generally less likely to have social or romantic interactions, whereas they were more likely to be shown eating and providing comic relief. *Id.* at 1347.

42. See Fabricatore, *supra* note 40, at 31 (stating findings of 2003 survey of 620 primary-care physicians).

43. See Esther D. Rothblum, *The Stigma of Women's Weight: Social Economic Realities*, 2 FEMINISM PSYCHOL. 61, 62 (1992), available at <http://fap.sagepub.com/cgi/reprint/2/1/61> (discussing studies showing children exhibit social bias against overweight at early age).

44. See Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 12, 795-96 (2001) (presenting findings of anti-fat bias at early age). In another study, researchers read child participants a story about a mean child and requested they select the character from a number of provided pictures depicting individuals of various body weights. See Janet D. Latner & Marlene B. Schwartz, *Weight Bias in a Child's World*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 39, at 57. The majority of age-three participants selected the overweight child, and age-four participants explained weight dictated their decision. *Id.*

45. See Latner & Schwartz, *supra* note 44, at 62-66 (describing parents transmitting weight bias to children and media's negative portrayal of overweight). An excerpt from the bestselling novel *Harry Potter and the Sorcerer's Stone*, describing Harry's mean and selfish cousin Dudley provides an example of media transmission: "Exactly why Dudley wanted a racing bike was a mystery to Harry, as Dudley was very fat and

and weight bias, researchers asked children ages ten to eleven from differing cultural backgrounds to rank six drawings depicting children with different physical characteristics according to likability.⁴⁶ Four of the drawings portrayed children suffering from various disabilities, the fifth showed an overweight child, and the sixth picture represented a “normal weight” child with no disability.⁴⁷ Overwhelmingly, the participants found the overweight child as the least likable.⁴⁸ In 2003, researchers replicated this study, yielding results indicating an even greater level of prejudice.⁴⁹ The disparity in likability between pictures of the “normal weight” child and the overweight child had increased by 41 percent in the new study.⁵⁰ Another study, in which child participants described three silhouettes portraying children of differing body sizes, reported that the participants described the overweight child’s silhouette as “*lazy, sloppy, dirty, naughty, cheats, lies, argues, mean, ugly, and stupid.*”⁵¹

Children’s negative perceptions of overweight children stigmatize their overweight peers.⁵² Such consequences include fewer friends, fewer social invitations, and victimization.⁵³ In addition, researchers suggest that overweight children’s self-perception suffers because of their peers’ weight bias.⁵⁴ Further, children who believed they bore responsibility for their body size reasoned that their weight accounted for their lack of friends and exclusion from social interaction.⁵⁵ Ninety-one percent of the child participants expressed feelings of shame for their size, and 90 percent believed peer disparagement would cease if they lost weight.⁵⁶ Additionally, research indicates that peers’ weight-related criticism results in decreased enjoyment in

hated to exercise – unless it involved punching somebody.” *Id.* at 63 (providing examples in children’s literature of overweight characters portrayed as selfish).

46. *See id.* at 55 (discussing early study investigating weight bias in children).

47. *See id.* (explaining details of study).

48. *See id.* (providing study results).

49. *See Latner & Schwartz, supra* note 44, at 55 (detailing recent study results).

50. *See id.* (comparing recent study result to study conducted forty-two years prior).

51. *See id.* (describing study finding children assign negative characteristics to overweight image).

52. *See id.* at 54 (discussing overweight children victims of ostracism and discrimination). One study showed school-aged children were less likely to label overweight classmates as “best friends” than their “normal weight” counterparts. *See Rothblum, supra* note 43, at 63.

53. *See Latner & Schwartz, supra* note 44, at 58-59 (summarizing findings demonstrating negative consequences of weight bias on children).

54. *See Puhl & Brownell, supra* note 44, at 796 (recapitulating study findings and literature discussing psychological consequences of weight bias in children). One study showed overweight children, age nine to eleven, exhibit significantly lower self-esteem than their “normal weight” counterparts. *See id.*; *see also* Latner & Schwartz, *supra* note 44, at 60 (suggesting weight bias yields negative psychological consequences in children). One study reported overweight female child participants exhibited low self-esteem as to their physical appearance and cognitive abilities. *See id.* at 59.

55. *See Puhl & Brownell, supra* note 44, at 796 (detailing study findings of those children believing they were responsible for weight).

56. *See id.* (relating study findings of participants’ beliefs about consequences of their weight). Sixty-nine percent of the participants believed their number of friends would increase if they lost weight. *Id.*

sports and physical activities among overweight children.⁵⁷ Furthermore, the childhood effects of weight bias continue to plague overweight adolescents and adults in all aspects of life.⁵⁸

2. Obesity: Causes and Treatment

In recent years, the weight-loss industry has grown significantly, generating an annual profit of over \$30 billion.⁵⁹ Despite tens of millions of Americans undertaking dieting regimes at any one time in the United States, weight loss success rates among obese individuals are nonexistent.⁶⁰ Rather, studies indicate that diets fail 90 to 98 percent of the time.⁶¹ These figures support the theory that overweight individuals' failure to lose weight does not necessarily correlate with a lack of effort or discipline on the part of the dieter.⁶² Achieving a desired weight for most overweight and obese adults represents an unrealistic objective.⁶³ Accordingly, obesity researchers advocate that improved health through a combination of healthy diet and exercise should be the primary goal.⁶⁴ Even if overweight individuals could continually maintain a diet, studies link serious health risks with perpetual dieting.⁶⁵ Such risks include an increased likelihood of developing an eating disorder, anemia, stroke, cardiac and liver problems, and death.⁶⁶ Other weight-loss alternatives include surgery and lifestyle modification coupled with prescription drug

57. See Latner & Schwartz, *supra* note 44, at 60 (indicating other effects of weight criticism and bias).

58. See Dianne Neumark-Sztainer & Marla Eisenberg, *Weight Bias in a Teen's World*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 39, at 68-76 (examining negative repercussions of weight bias in adolescents); Thompson, *supra* note 40, at 138-39 (describing low self-esteem, dissatisfied body image, and eating disorders in adults associated with childhood weight teasing).

59. See SOLOVAY, *supra* note 39, at 171 (providing diet industry statistics).

60. See PAUL R. THOMAS, WEIGHING THE OPTIONS: CRITERIA FOR EVALUATING WEIGHT-MANAGEMENT PROGRAMS 1 (1995) (providing statistics on Americans' dieting habits); Traci Mann et al., *Medicare's Search for Effective Obesity Treatments: Diets Are Not the Answer*, 62 AM. PSYCHOL. 3, 223 (2007) (concluding studies indicate inefficacy of diets for long-term weight loss).

61. See SOLOVAY, *supra* note 39, at 190-91 (relaying various studies on weight loss among obese participants). A National Institute of Health study found dieting among obese failed 90 percent of the time, whereas a study published in the International Journal of Obesity reported a 95 percent failure rate. *Id.*

62. See Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 69 (2002) (noting dieting inefficient and often unhealthy).

63. See Jennifer A. Linde et al., *Are Unrealistic Weight Loss Goals Associated with Outcomes for Overweight Women?*, 12 OBESITY RES. 3, 569 (2004) (stating individuals rarely reach weight-loss goals); ROBERT F. KUSHNER, ROADMAPS FOR CLINICAL PRACTICE: CASE STUDIES IN DISEASE PREVENTION AND HEALTH PROMOTION – ASSESSMENT AND MANAGEMENT OF ADULT OBESITY: A PRIMER FOR PHYSICIANS 2 (2003) available at <http://www.ama-assn.org/ama1/pub/upload/mm/433/booklet1.pdf> (cautioning unrealistic for overweight and obese to reach "healthy weight").

64. See KUSHNER, *supra* note 63, at 2 (describing "improved health" as ideal goal for overweight and obese).

65. See Kristen, *supra* note 62, at 70 (providing research shows dieting associated with risks).

66. See *id.* (detailing risks associated with dieting and weight fluctuation); see also SOLOVAY, *supra* note 39, at 199 (listing risks of weight fluctuations as a result of dieting).

treatments.⁶⁷ Both surgery and lifestyle modification carry risks, and weight-loss surgeries typically cost between twenty to thirty thousand dollars, thus placing this option out of the reach of many surgical candidates.⁶⁸

Research shows that the causes of obesity are multifaceted, comprising an interaction of genetics, environment, and lifestyle choices.⁶⁹ Evidence suggests that one's genetic makeup influences all components of weight regulation.⁷⁰ A 2003 study reported that individuals with genetic predispositions to obesity exhibited difficulty controlling their food intake in their efforts to lose or maintain weight loss.⁷¹ Accordingly, although lifestyle and environment contribute to obesity, researchers advocate for further study of genes linked to obesity and their interaction with environmental factors in order to craft more effective prevention and treatment plans for obese individuals.⁷²

C. Growing Problem of Weight-Based Discrimination in Employment Decisions

The experience of overweight individuals in the employment context exemplifies the discrimination facing the overweight and obese and its negative consequences.⁷³ In the past thirty years, researchers across disciplines have found weight-based discrimination at every stage of employment decisions.⁷⁴

67. See SOLOVAY, *supra* note 39, at 199-200 (discussing weight-loss alternatives to dieting).

68. See *id.* at 199-202 (listing risks of surgery and medications). Risks associated with weight-loss surgery include intense vomiting, digestion complications, infection, stomach perforation, malnutrition, and liver failure. *Id.* at 200.

69. See Astrid Newell et al., *Addressing the Obesity Epidemic: A Genomics Perspective*, in 4 PREVENTING CHRONIC DISEASE 1, 1-3 (2007) http://www.cdc.gov/pcd/issues/2007/apr/pdf/06_0068.pdf (describing causes of obesity); Tuomo Rankinen et al., *The Human Obesity Gene Map: The 2005 Update*, 14 OBESITY 4, 584 (2006) (indicating 135 gene candidates associated with obesity). Although research has demonstrated gene candidates associated with obesity, a study shows that primary-care physicians rated lack of physical activity as the primary contributor to obesity, whereas obesity experts have emphasized genetics as the central cause. See Fabricatore, *supra* note 40, at 31 (stressing disconnect between health-care professionals' and obesity experts' understanding of obesity causes).

70. See Newell, *supra* note 69, at 2 (suggesting genetics affects food intake, energy expenditure, eating behavior, appetite, and metabolism).

71. See *id.* at 3 (offering study results on eating habits of those genetically predisposed to obesity).

72. See *id.* at 4 (urging incorporation of genomics in obesity treatment); Rankinen, *supra* note 69, at 584-95 (discussing goal of identifying interaction of genes and environment in relation to obesity).

73. See Janna Fikkan & Esther Rothblum, *Weight Bias in Employment*, in WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES, *supra* note 39, at 15-25 (discussing weight-based discrimination in employment).

74. See Mark V. Roehling, *Weight Discrimination in the American Workplace: Ethical Issues and Analysis*, J. BUS. ETHICS 40, 177 (2002) [hereinafter Roehling, *Weight Discrimination in the American Workplace*] (summarizing studies showing weight-based employment discrimination); see also Fikkan & Rothblum, *supra* note 73, at 15 (discussing literature reporting weight discrimination in hiring, assignments, compensation, promotion, and discharge); Mark V. Roehling et. al., *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination: The Role of Sex and Race*, THE J. VOCATIONAL BEHAV. 71, 301 (2007) [hereinafter Roehling, *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination*] (describing experimental studies showing evidence of weight-based discrimination in employment decisions).

1. Definitions

Although sometimes used interchangeably, “overweight” and “obesity” have different meanings.⁷⁵ An individual meets the definition of “overweight” when his or her Body Mass Index (BMI) is between 25 to 29.9 and “obesity” when it is 30 or greater.⁷⁶

2. Discrimination in Hiring

Since the late 1970s, researchers have reported findings of weight-based discrimination in the context of employee hiring.⁷⁷ These studies suggest that overweight employees experience prejudice prior to even answering the employer’s initial interview questions.⁷⁸ An early study illustrated respondents negatively perceiving hypothetical overweight job candidates, describing them as less ambitious, energetic, attractive, disciplined, and self-motivating than “normal weight” applicants.⁷⁹ Researchers explained that these negative generalizations are a result of the “halo effect,” which occurs when an interviewer applies an impression in one area to other criteria in evaluating an individual, resulting in rating errors.⁸⁰ For example, respondents in a 1990 study believed that a “normal weight” candidate would prove more effective in selling a hypothetical company’s product than an overweight applicant.⁸¹

75. See Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 4, 970 (1999) (submitting researchers sometimes interchange terminology); see also KELLY D. BROWNELL, *Introduction to WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES*, *supra* note 39, at 1, 9 (suggesting terminology more significant in health context as employers do not calculate Body Mass Index); Kate Sablosky, *Probative “Weight”: Rethinking Evidentiary Standards in Title VII Sex Discrimination Cases*, 30 N.Y.U. REV. L. & SOC. CHANGE 325, 328 (proposing employer visual assessment and internal stereotypes more significant than BMI calculations). Although employers do not perform BMI calculations prior to engaging in discrimination, when divided into technical groupings of overweight and obese, the difference shows obese employees report greater instances of weight-based discrimination. See Roehling, *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination*, *supra* note 74, at 311. A recent study shows overweight respondents reported weight-related employment discrimination twelve times more often than “normal weight” respondents, whereas obese and severely obese respondents reported that they were thirty-seven and over one hundred times, respectively, more likely to experience such discrimination. *Id.*

76. See Sablosky, *supra* note 75, at 328 (defining BMI).

77. See Fikkan & Rothblum, *supra* note 73, at 16 (citing 1979 study evaluating both hypothetical “normal weight” and overweight job candidates).

78. See Puhl & Brownell, *supra* note 44, at 789 (indicating studies show stereotypes disadvantage overweight applicant prior to interview).

79. See Fikkan & Rothblum, *supra* note 73, at 16-17 (citing 1979 study regarding attitudes of employers toward overweight candidates); see also Kristen, *supra* note 62, at 66 (summarizing study indicating people associate overweight with decreased intelligence and competency).

80. See Eugene J. Kutcher & Jennifer DeNicolis Bragger, *Selection Interviews of Overweight Job Applicants: Can Structure Reduce the Bias?*, 34 J. APPLIED SOC. PSYCHOL. 1993, 1994 (2004) (defining “halo effect” and “what is beautiful is good” concept).

81. See Fikkan & Rothblum, *supra* note 73, at 17 (describing study findings). This study found respondents preferred to work with “normal weight” individuals. *Id.* Another 1990 study, which played videotapes of equally qualified job applicants to participants, confirmed that individuals are biased in favor of

Another study showed that employers find overweight candidates less desirable than applicants with felony convictions and those with a history of mental illness.⁸² One study reported that a job candidate's weight contributed to 35 percent of discrepancies in hiring decisions.⁸³

3. *Discrimination During the Course of Employment*

Similar to those studies focused on hiring, studies contrasting "normal" and overweight employees report that weight bias disadvantages overweight employees during the course of employment.⁸⁴ One study showed that supervisors were more likely to recommend more severe disciplinary actions against overweight employees exhibiting negative characteristics stereotypically associated with overweight individuals because supervisors believed that these negative traits were more likely to reoccur in overweight employees.⁸⁵ Additionally, supervisors tend to assign overweight employees to noncontact positions, which are less desirable.⁸⁶ Frequently, they also pass over overweight employees for promotions, despite the employees' qualifications.⁸⁷

4. *Compensation Inequality*

The compensation differential represents yet another form of weight-based employment discrimination, as studies reveal that overweight employees earn less than their "normal weight" counterparts.⁸⁸ One study announced that

working with "normal weight" individuals. *Id.* Respondents perceived overweight individuals as plagued by the same negative stereotypes found in earlier studies. *Id.*

82. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 177 (describing study findings).

83. See Fikkan & Rothblum, *supra* note 73, at 18 (providing study statistics). This study controlled the variables of facial attractiveness and qualifications. *Id.*

84. See *id.* (describing negative stereotyping occurring during employment of overweight employees). Negative perceptions of overweight employees often result in harassment, which can affect the overweight individual's job performance, tending to reinforce the negative stereotype. See Kristen, *supra* note 62, at 65-66.

85. See Fikkan & Rothblum, *supra* note 73, at 18 (relating study depicting comparison of disciplinary actions between "normal" and overweight employees exhibiting same characteristics). Additional studies indicate supervisors take greater disciplinary actions against overweight employees for violating company policies, recommending verbal and written warnings or even termination, as opposed to recommendations for counseling. *Id.* at 19.

86. See Kristen, *supra* note 62, at 64 (pointing to overweight employees' assignments in less favorable jobs); see also Fikkan & Rothblum, *supra* note 73, at 19 (providing example of disfavored treatment of overweight employees). One study reported that sales managers were more likely to assign an employee perceived as "extremely overweight" to an undesirable sales region and often refused to assign the employee to any portion of the supervisor's territory. See Fikkan & Rothblum, *supra* note 73, at 19.

87. See Lewis, *supra* note 1 (quoting president of Minneapolis diversity consulting firm). Myrna Marofsky, president of a Minneapolis diversity consulting firm, stated, "You might hear, 'If she would just lose 25 pounds, she would have a better chance at that promotion.'" *Id.*

88. See Fikkan & Rothblum, *supra* note 73, at 20 (detailing studies showing wage inequality).

overweight women earn an average of 12 percent less than their “normal weight” equivalents; however, this disparity only applied to men whose weight exceeded 100 percent of the standard for their ideal weight.⁸⁹ Another study reported that the average wage differential for white, overweight women is 7 percent.⁹⁰ Such disparity generally corresponds with a three-year work differential, two years of job tenure, or one year of additional education.⁹¹

5. Race, Gender, Age, and Weight

The existing research and literature suggest women suffer weight-based discrimination more often than their male counterparts.⁹² For example, research shows overweight and obese women face greater discrimination than overweight and obese men in hiring, compensation, promotion, and termination decisions.⁹³ In addition, employees express greater reluctance to work with overweight females than overweight male coworkers.⁹⁴ Although some scholars attribute female obesity to low socioeconomic status, other scholars maintain that women face economic hardships as a result of being overweight.⁹⁵ Furthermore, race inserts an additional dimension in analyzing the issue of weight-based employment discrimination that women experience, as overweight women express difficulty in distinguishing whether they are the victims of gender, race, or weight discrimination, or a combination.⁹⁶ According to Attorney Roszella Canty-Letsome, describing her personal experience of uncertainty as to sources of employment discrimination,

89. See *id.* (reporting study finding gender dimension of wage gap). The study controlled those variables associated with income disparity, including education and geographical location. *Id.* The New England Journal of Medicine reported overweight women earn \$6,710 less annually than their “normal weight” female counterparts. See SOLOVAY, *supra* note 39, at 106 (noting discrepancies in earning power between “normal” and overweight employees).

90. See Fikkan & Rothblum, *supra* note 73, at 20 (providing statistic for wage penalty imposed on overweight white women).

91. See *id.* (comparing wage disparity).

92. See Roehling, *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination*, *supra* note 74, at 311 (presenting study findings showing women sixteen times more likely to allege weight-related employment discrimination); Alexandra W. Griffin, Note, *Women and Weight-Based Discrimination*, 13 CARDOZO J.L. & GENDER 631, 631-33 (2007) (citing 60 percent of women and 40 percent of men reporting weight-based employment discrimination). Literature often associates this differential with the slender female ideal portrayed in American society. See Sablosky, *supra* note 75, at 329-30.

93. See Sablosky, *supra* note 75, at 333-34 (highlighting overweight women face greater discrimination in all facets of employment decisions).

94. See Fikkan & Rothblum, *supra* note 73, at 18-19 (discussing women as victims of weight discrimination). A recent study showed 27.7 percent of “very obese” women reported weight-related employment discrimination compared to only 12.1 percent of their male equivalents. See Roehling, *The Relationship Between Body Weight and Perceived Weight-Related Employment Discrimination*, *supra* note 74, at 309.

95. See SOLOVAY, *supra* note 39, at 106 (attributing poverty to obesity).

96. See Griffin, *supra* note 92, at 635 (asserting African-American and Mexican-American women exhibit highest rates of obesity).

I don't know for sure why I didn't get those jobs because I'm a 'FBW.' I'm a fat, black woman. I don't know if it's size; I don't know if it's race; I don't know if it's sex; or a combination of all three why it was I didn't get the job.⁹⁷

Research indicates that overweight and obesity are more prevalent in certain groups, including African Americans, Mexican Americans, and white women.⁹⁸ Further, age contributes an additional facet to the issue, for weight generally increases with age.⁹⁹ Consequently, researchers suggest that weight discrimination may represent concealment of employers discriminating on the basis of age.¹⁰⁰

D. Existing Legal Recourse for Weight-Based Discrimination

1. Federal Law

Title VII of the Civil Rights Act of 1964 (Civil Rights Act), the 1990 Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 (RHA) provide federal protection for equal opportunity in the context of employment.¹⁰¹ The Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, fails specifically to protect overweight individuals from employment discrimination.¹⁰² Accordingly, a plaintiff may invalidate an employer's use of weight as a criterion for employment decisions only if the employer's use of such criterion also coincides with discrimination against a status protected under the Civil Rights Act.¹⁰³

97. See SOLOVAY, *supra* note 39, at 126 (quoting attorney on weight-discrimination experiences).

98. See *id.* at 26 (noting groups with higher prevalence of obesity); Youfa Wang & May A. Beydoun, *The Obesity Epidemic in the United States – Gender, Age, Socioeconomic, Racial/Ethnic, and Geographical Characteristics: A Systematic Review and Meta-Regression Analysis*, 29 EPIDEMIOLOGIC REV. 6, 8 (2007) (reporting prevalence of obesity ten percent higher in African Americans and Mexican Americans than Whites). Additionally, extreme obesity affects African-American women at least twice as often as White and Mexican-American women. Wang & Beydoun, *supra*. Massachusetts parallels nationwide trends, in that African-American residents exhibit higher percentages of overweight and obesity than White, Hispanic, and Asian residents. See OVERWEIGHT AND OBESITY IN MASSACHUSETTS, *supra* note 6, at 4 fig.2.

99. See Charles L. Baum II & William F. Ford, *The Wage Effects of Obesity: A Longitudinal Study*, 13 HEALTH ECON. 885, 886 (2004) (stating age associated with weight gain); Robert J. Paul & James B. Townsend, *Shape Up or Ship Out? Employment Discrimination Against the Overweight*, 8 EMP. RESP. & RTS. J. 21, 138 (1995) (asserting weight gain with age results in discrimination against older employees).

100. See Baum & Ford, *supra* note 99, at 886 (suggesting weight discrimination concealing age discrimination against older employees).

101. See SOLOVAY, *supra* note 39, at 111 (explaining existing federal employment law); Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 179 (discussing Rehabilitation Act of 1973).

102. See 42 U.S.C. § 2000e-2(a) (2006) (indicating absence of weight as protected class).

103. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 178 (discussing weight and disparate-treatment discrimination). Disparate-treatment discrimination results when an employer treats an employee in an inferior manner because of a protected characteristic. *Id.* For example, in *Frank v. United Airlines*, the Ninth Circuit held that the defendant's weight-restriction requirements for employees held female employees to a more stringent and restrictive weight standard than male employees, resulting in sex

Like Title VII of the Civil Rights Act, neither the ADA nor the RHA provide protection against weight-based employment discrimination for the majority of overweight Americans.¹⁰⁴ To establish a claim under either act, the plaintiff must show that he or she has a disability as defined by the act yet can perform the requisite functions of the position.¹⁰⁵ Although neither statute mentions weight, a plaintiff may claim that their weight constitutes either an actual or perceived disability; however, neither act provides overweight individuals, excluding morbidly obese plaintiffs, much chance of success.¹⁰⁶

2. State Law and City Ordinances

Currently, Michigan is the only state that prohibits weight-based employment discrimination.¹⁰⁷ The Michigan law, the Elliott-Larsen Civil Rights Act, prohibits discrimination on the basis of “religion, race, color, national origin, age, sex, height, weight, or marital status,” unless exempted by a bona fide occupational qualification.¹⁰⁸ Accordingly, under the Michigan

discrimination. See *Frank v. United Airlines*, 216 F.3d 845, 855 (9th Cir. 2000). A plaintiff may also invalidate an employer’s weight standards through a disparate-impact discrimination action, proving that although the same weight standard applies to all groups, it has the effect of discriminating against a protected group. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 179.

104. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 180 (explaining most authorities find overweight and obesity insufficient to constitute disability). The Rehabilitation Act of 1973 applies to the federal government, government contractors, and federally funded programs, whereas the Americans with Disabilities Act applies to private employers and state and local governments. See Elizabeth E. Theran, *Legal Theory on Weight Discrimination*, in *WEIGHT BIAS: NATURE, CONSEQUENCES, AND REMEDIES*, *supra* note 39, at 196 (defining scope of federal laws).

105. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 179 (explaining necessary elements of proper disability claim).

106. See *id.* at 180 (presenting actual and perceived disabilities protected under statutes). To establish an actual disability claim, a plaintiff must establish that he or she meets the definition of morbid obesity, defined as one-hundred percent over the individual’s ideal weight, or alternatively, that he or she suffers from obesity as a manifestation of a physiological condition that has “substantially limited [the plaintiff] in one or more major life activities.” *Id.* In contrast, with respect to weight, a plaintiff establishes a perceived disability claim upon demonstrating that the employer perceived the plaintiff as morbidly obese or having a weight condition resulting from a psychological disorder, causing the plaintiff to be limited in a “major life activity.” *Id.*; see also *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 31 (1st Cir. 1993) (exemplifying successful claim of perceived disability due to weight under Rehabilitation Act). *Cook* represents the first case by a circuit court to hold an employer in violation of federal law for denying employment to an obese applicant. See Carolyn May McDermott, Note, *Should Employers Be Allowed to Weigh Obesity in Their Employment Decisions?*, 44 KAN. L. REV. 199, 199 (1995); see also Mark V. Roehling, *Obesity-Related “Perceived Disability” Claims: Legal Standards and Human Resource Implications*, 32 EMP. REL. L.J. 4, 37 (2007) (noting only one of eleven plaintiffs asserting obesity-related perceived-disability claims avoided summary disposition).

107. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 181 (highlighting Michigan as only state providing weight-discrimination protection).

108. MICH. COMP. LAWS § 37.2202(1)(a) (2007) (providing protection for enumerated characteristics). The Michigan legislature enacted the Act in 1975. See Kristen, *supra* note 62, at 101. The statute does not specify that any certain weight is granted protection. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 181. In Michigan, a plaintiff can establish a weight-based discrimination claim either by direct evidence or under the U.S. Supreme Court’s *McDonnell Douglas Corp. v. Green* burden-

law, if an employer considers weight as a factor in an employment decision, such decision is unlawful absent a bona fide occupational qualification for the position.¹⁰⁹ In 1999, Ombudsman Art Stine explained the passage of the law:

Our tradition here in Michigan is that civil rights are vital for all groups of people, that we want to include everyone in the system. . . . In Michigan, we don't track the costs of compliance with any civil rights law because, frankly, we don't want to give any credence to the notion that expense might ever be a reason not to include all types of people as participants in our society. . . . Michigan added height and weight to the Civil Rights Act in 1975, and its passage was very easy. Given that certain . . . weight characteristics tend to be linked to certain ethnic groups or to women, state legislators decided it was all the more appropriate to include body size as part of a comprehensive antidiscrimination policy. There wasn't even much debate about it. Since then, I'd estimate that eight or ten weight-related cases have come before our commission for a decision. Overall, employers haven't had to do radical accommodations in the workplace and people simply haven't had a big problem with it.¹¹⁰

In addition to Michigan, Santa Cruz and San Francisco, California, and the District of Columbia all have municipal ordinances or resolutions prohibiting weight discrimination.¹¹¹ The District of Columbia ordinance protects against

shifting framework. *See* *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 488-89 (6th Cir. 2000) (describing two approaches to weight-discrimination claim). Under the direct-evidence approach, the plaintiff establishes a prima facie case of intentional weight discrimination by demonstrating the employer's discriminatory predisposition and a causal connection between the predisposition and the employment decision that negatively affected the plaintiff. *Id.* Proof must be precise and not "based on rumors, conclusory allegations, or subjective beliefs." *Id.* at 488. Under the burden-shifting approach, the plaintiff must establish that he or she "was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position from which he [or she] was rejected or terminated, and (4) either replaced by a person from outside the protected class, or treated differently than a similarly situated employee from outside the protected class." *Id.* at 489. Under this second approach, if the plaintiff establishes a prima facie case, the burden shifts to the employer, who must demonstrate a nondiscriminatory explanation for its action. *Id.* If the employer succeeds, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that such explanation represents an attempt to conceal discrimination. *Id.*; *see also* *Lamoria v. Health Care & Ret. Corp.*, 584 N.W. 2d 589, 595 (Mich. Ct. App. 1998) (illustrating successful direct evidence case). In *Lamoria*, the plaintiff presented direct evidence in the form of affidavits, showing that her employer had expressed hostility toward and an intention of firing overweight employees. *Id.* at 810; *see also* *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286 (E.D. Mich. 1993) (demonstrating plaintiff's failure to establish causal connection between employer's alleged obesity hostility and plaintiff's termination). In *Byrnes*, the court held that the plaintiff's claim lacked factual support, for his evidence consisted only of one remark by his supervisor recommending that the plaintiff lose weight coupled with speculation. 811 F. Supp. at 293.

109. *See* Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 181 (contrasting Michigan law with existing federal laws).

110. SOLOVAY, *supra* note 39, at 245, 245 n.2.

111. *See id.* at 243-44 (describing local ordinances prohibiting weight discrimination). In both Santa Cruz and San Francisco, certain events galvanized residents to seek weight-protection ordinances. *See* Kristen, *supra* note 62, at 105 (discussing passage of San Francisco ordinance); *see also* SOLOVAY, *supra* note 39, at 233-34 (describing adoption of Santa Cruz ordinance). In 1999, in response to a fitness company's advertisements, which stated, "When the aliens come, they will eat the fat ones first," San Francisco residents implored the San Francisco Board of Supervisors to pass legislation prohibiting weight discrimination. *See*

appearance discrimination generally, which includes weight, whereas the other ordinances specifically prohibit weight and size discrimination.¹¹² Although the ordinances have resulted in minimal litigation, they have led to successful mediations and negotiations for weight-discrimination complainants.¹¹³ The Santa Cruz ordinance has resulted in individuals relocating to the city to ensure protection against weight discrimination.¹¹⁴ Notwithstanding this fact, Santa Cruz City Attorney John Barisone explained that as of 1999, the city had not incurred additional expenses as a result of the inclusion of weight protection.¹¹⁵ Moreover, he stated that the residents and businesses have positively accepted the ordinance, which as of 1999, had not to his knowledge resulted in any litigation.¹¹⁶

E. Massachusetts and Weight Bias

1. Massachusetts Initiatives to Counter Obesity

Massachusetts legislators have recognized the necessity of addressing the increasing rates of obesity in the state.¹¹⁷ During the 2005-2006 legislative session, legislators introduced thirty-eight bills aimed at combating obesity.¹¹⁸ The majority of these bills focused on public education, providing for mandatory nutrition courses, physical education requirements, and nutritional and labeling standards for food served in schools.¹¹⁹ One existing program, the

Kristen, *supra* note 62, at 105. As a result of the residents' efforts, the Board approved the ordinance in May 2000, and in July 2001, the San Francisco Human Rights Commission published guidelines to educate the public and employers about weight discrimination and to assist in the ordinance's enforcement. *Id.* at 105-06. Similarly, in Santa Cruz, residents' advocacy resulted in the adoption of a citywide civil-rights ordinance in 1992, which included weight as a protected status. *See* SOLOVAY, *supra* note 39, at 233-34. In 1987, Ms. Toni Cassita sought employment at a health-food store in Santa Cruz; however, the employer denied her a position due to her weight. *See* Kristen, *supra* note 62, at 59. In response, Ms. Cassita filed an employment discrimination suit against the store, and prior to her court date, Santa Cruz residents, including Ms. Cassita, worked to form a coalition with other groups in the city urging the adoption of a civil rights ordinance. *See* SOLOVAY, *supra* note 39, at 233.

112. *See* SOLOVAY, *supra* note 39, at 244-46 (providing language of ordinances). The District of Columbia ordinance provides broader protection than the proposed Massachusetts legislation, for even with the passage of Representative Rushing's bill, a Massachusetts employer could use appearance generally as a criterion for employment decisions. *See* H.R. 1844, 185th Gen. Ct., Reg. Sess. (Mass. 2007) (indicating absence of appearance in proposed legislation).

113. *See* Theran, *supra* note 104, at 205 (discussing mediation and negotiation successes resulting from ordinances). In San Francisco, an aerobics instructor filed a weight-discrimination complaint when Jazzercise refused to hire the woman due to her unfit appearance. *Id.* After mediation, Jazzercise changed its company policy. *Id.*

114. *See* SOLOVAY, *supra* note 39, at 234 (describing ordinance drawing relocation).

115. *See id.* at 243-44 (outlining consequences of Santa Cruz ordinance).

116. *See id.* at 244 (explaining reaction to and consequences of Santa Cruz ordinance).

117. *See* OVERWEIGHT AND OBESITY IN MASSACHUSETTS, *supra* note 6, at 19 (describing legislators' proposed obesity-related initiatives).

118. *See id.* (explaining proposed obesity related legislation).

119. *See id.* (offering specific mandates of proposed legislation).

“Overweight-Obesity Prevention and Control Initiative,” establishes and implements state and local programs encouraging enhanced nutrition and physical activity.¹²⁰ Related initiatives include wellness programs for police and fire departments, school programming, and collaboration with Elder Services to improve nutrition among elderly residents.¹²¹ Similar in objective, the “Women, Infant and Children Special Nutrition Program,” provides nutrition for low-to-moderate income pregnant or breastfeeding mothers, and children under the age of five.¹²² This program analyzes overweight and obesity trends among children in order to better address the growing problem of childhood obesity.¹²³ Other existing programs include “The Massachusetts Partnership for Healthy Weight,” “The Massachusetts Public Health Association,” and “The Massachusetts Coalition on Obesity and Education,” which all aim to increase knowledge of adult and childhood obesity in Massachusetts and promote healthy living for all residents.¹²⁴

2. Weight-Based Employment Discrimination in Massachusetts

In Massachusetts, testimonials and case law highlight weight-based discrimination in employment.¹²⁵ Over the years, Massachusetts plaintiffs have presented claims before the MCAD, alleging employment discrimination on the basis of weight.¹²⁶ Nevertheless, the majority of these plaintiffs’ claims have

120. See *id.* (describing existing Massachusetts initiative).

121. See OVERWEIGHT AND OBESITY IN MASSACHUSETTS, *supra* note 6, at 19. (providing examples of initiative’s accomplishments).

122. See *id.* at 20 (elaborating on nutritional programs in Massachusetts).

123. See *id.* (describing specifics of program).

124. See *id.* at 20-22 (outlining various programs in Massachusetts aimed at combating overweight and obesity). The Massachusetts Partnership for Healthy Weight promotes reducing overweight and obesity by making environmental, health care, and policy changes to increase physical activity and to promote nutrition and healthy lifestyles. *Id.* at 20-21. The Massachusetts Public Health Association addresses childhood obesity through school programming and helps school districts implement wellness programs to prevent obesity. *Id.* at 21. The Massachusetts Coalition on Obesity Prevention and Education aims to utilize research on childhood obesity to inspire action, holding an annual session to educate legislators on nutrition and physical education. *Id.* at 22.

125. See Mary Carmichael, *Do We Really Need a Law to Protect Fat Workers?*, BOSTON GLOBE, Aug. 5, 2007, at 26 (reporting testimonial of weight-based employment discrimination). Dr. Sheldon Randall, Director of the Weight Management Program at MetroWest Medical Center in Framingham, Massachusetts, witnessed overweight patients undergoing gastric bypass surgery, returning to work, and receiving a pay increase or promotion. See Dan Loeterman, *State House Considers Anti-Discrimination Bill*, METROWEST DAILY NEWS, May 21, 2007, available at <http://www.metrowestdailynews.com/homepage/x1820530063>. He stated, “I see a lot of promotions after they’ve lost the weight. It’s the same person, but they never would have gotten the promotion if they hadn’t.” *Id.* See generally *Gauthier v. Saturn of Natick*, No. 94-BEM-0203, 1998 Mass. Comm. Discrim. LEXIS 61, (Mass. Comm’n Against Discrim. Feb. 27, 1998); *Blanchard v. Salvation Army*, No. 93-BEM-1270, 1997 Mass. Comm. Discrim. LEXIS 27 (Mass. Comm’n Against Discrim. June 27, 1997); *Capadanno v. Medford Police Dep’t.*, No. 88-BEM-0846, 1996 Mass. Comm. Discrim. LEXIS 95 (Mass. Comm’n Against Discrim. Jan. 11, 1996) (exemplifying Massachusetts plaintiffs’ attempts to seek remedy to weight-based employment discrimination).

126. See *Gauthier*, 1998 Mass. Comm. Discrim. LEXIS 61, at *1 (alleging employer failed to hire complainant for being “overweight, or obese”); *Blanchard*, 1997 Mass. Comm. Discrim. LEXIS 27, at *6-*7

failed, as they have attempted to bring weight-based employment discrimination complaints under the rubric of handicap discrimination contained in chapter 151B, section 4 of the Massachusetts General Laws.¹²⁷

*Freire v. First National*¹²⁸ illustrates the difficulty facing plaintiffs asserting weight-discrimination claims under the present legal framework.¹²⁹ In this case, the plaintiff, Mary Freire, filed a handicap-discrimination complaint with the court, alleging that an employer discriminated against her on the basis of her weight.¹³⁰ Ms. Freire worked at A & P Supermarket in Fairhaven, Massachusetts, for five years before Edwards Super Food Stores acquired the store.¹³¹ Upon acquisition, Edwards Super Food Stores required all A & P employees seeking to retain their positions to reapply.¹³² Two Edwards officials interviewed Ms. Freire for a period of twenty minutes, asking her sixteen standard questions.¹³³ Although Ms. Freire believed the interview had been successful, the officials assigned her a rating of three out of a possible five points for “enthusiasm, verbal communication, customer orientation, supermarket experience, and general appearance.”¹³⁴ Ms. Freire received a two out of five for “judgment, time management, willingness to learn, adaptability, integrity, team player, acceptance of authority, and emotional stability.”¹³⁵ The officials recommended against offering Ms. Freire a position.¹³⁶ Ms. Freire, who weighed 220 pounds, alleged that her supervisor at A & P, who then held a position at Edwards, told her that he did not want a “stupid, fat broad running his bakery.”¹³⁷ The court held that Ms. Freire failed to demonstrate that her weight constituted a handicap under the statute, and although her supervisor’s remark evidenced hostility toward her weight, the remark did not show that the supervisor considered her physically unable to perform her position as a result

(alleging coworkers and supervisors harassed complainant about being obese; *Capadanno*, 1996 Mass. Comm. Discrim. LEXIS 95, at *1 (alleging denial of employment based on complainant’s weight). *See generally* *Freire v. First Nat’l*, No. 964620, 1998 WL 1181751 (Mass. Super. Ct. July 22, 1998) (providing example supporting need for including weight in anti-discrimination statute in Massachusetts).

127. *See Freire*, 1998 WL 1181751, at *7 (illustrating plaintiff seeking weight-based discrimination remedy under claim of handicap discrimination); *Gauthier*, 1998 Mass. Comm. Discrim. LEXIS 61, at *17-*18 (failing to establish weight-based discrimination as handicap); *Capadanno*, 1996 Mass. Comm. Discrim. LEXIS 95, at *14 (announcing plaintiff failed to demonstrate handicap). *But see Blanchard*, 1997 Mass. Comm. Discrim. LEXIS 27, at *16-*17 (providing example of successful weight-as-handicap case). In *Blanchard*, the plaintiff met the definition of morbid obesity. *Id.* at *1.

128. 1998 WL 1181751.

129. *See id.* at *7 (demonstrating difficulty for plaintiffs alleging weight discrimination).

130. *See id.* at *1 (setting forth complainant’s allegations).

131. *See id.* (providing Ms. Freire successfully maintained her job for five years). Prior to working at A & P Supermarket, Ms. Freire had twelve years of experience working at the bakery of another supermarket. *Id.*

132. *See Freire v. First Nat’l*, No. 964620, 1998 WL 1181751, at *1 (Mass. Super. Ct. July 22, 1998) (elaborating on factual details).

133. *See id.* at *2 (setting forth procedure of interview).

134. *See id.* (describing complainant’s ratings at interview).

135. *See id.* (detailing interviewer’s perceptions of complainant).

136. *See Freire*, 1998 WL 1181751, at *3 (stating interviewers recommended against hiring complainant).

137. *See id.* (outlining complainant’s allegations).

of her weight.¹³⁸ Accordingly, the court granted the defendant judgment as a matter of law.¹³⁹

3. *The Debate over Weight as a Protected Class*

Representative Rushing's proposed legislation has evoked debate as to whether weight deserves protected-class status.¹⁴⁰ Those opposed to the legislation express concern that the inclusion of weight would deter prospective businesses from locating to Massachusetts.¹⁴¹ These opponents argue that weight protection will lead to increased litigation, higher costs for employers, and presumably, unwanted publicity.¹⁴² Others argue that protecting against weight discrimination would divert resources aimed at remedying race and gender discrimination.¹⁴³ Often, an interrelated argument follows that unlike the existing protected classes, overweight and obesity represent mutable, voluntary characteristics.¹⁴⁴ Conversely, Representative Rushing describes the bill as a civil-rights issue.¹⁴⁵ He explains that his constituents, employed in a variety of fields, have alleged that employers refuse to hire them because of their weight, thus providing testimonial evidence of weight bias.¹⁴⁶ Responding to opponents' fears of increased meritless litigation, proponents draw comparisons with similar unwarranted concerns regarding previous expansions, such as with the inclusion of race as a protected class.¹⁴⁷

138. Freire v. First Nat'l, No. 964620, 1998 WL 1181751, at *7 (Mass. Super. Ct. July 22, 1998) (setting forth court's holding).

139. See *id.* (ruling for defendant).

140. See Ken Maguire, *Legislation Would Expand Law to Protect Short, Fat People*, ASSOCIATED PRESS, May 17, 2007, available at http://www.boston.com/news/local/massachusetts/articles/2007/05/17/legislation_would_expand_law_to_protect_short_fat_people/ (quoting opinions about proposed legislation).

141. See *Mass. Weighs Extending Discrimination Law*, *supra* note 4 (providing expressed concerns regarding legislation).

142. See Carmichael, *supra* note 125 (suggesting each time expansion was proposed, increased, meritless litigation was expressed as fear); see also Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 183 (describing recurring fear of expected higher costs). According to the argument, employers avoid hiring overweight employees for fear that doing so would result in higher costs in insurance premiums and increased absenteeism. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 183.

143. See Maguire, *supra* note 140 (discussing criticism of including weight as protected class). Those opposing the legislation do not believe that weight should rise to the level of gender and race. *Id.*

144. See *id.* (describing mistaken belief of weight loss as voluntary). The argument states that weight does not represent an immutable characteristic and that overweight individuals could lose weight if they possessed the requisite willpower. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 183.

145. See Maguire, *supra* note 140 (quoting Representative Rushing).

146. See Carmichael, *supra* note 125 (relating discussion with Representative Rushing regarding constituents complaining of weight bias). Representative Rushing explained that employers tell his overweight constituents that they would be unable to perform the job, yet fail to give the applicants the opportunity to prove otherwise. *Id.*

147. See *id.* (comparing expressed concern to previous "doomsday predictions" for anti-discrimination laws).

Moreover, proponents of the legislation view the bill's aim as educational, encouraging individuals to recognize the existing weight bias and discrimination in society.¹⁴⁸ Those in favor of the legislation reject the argument that weight loss is voluntary and provide testimonials of failed life-long battles with weight loss.¹⁴⁹ Although proponents recognize that those genetically predisposed to be overweight and obese can employ exercise and nutritional avenues to achieve a healthier weight, they highlight that most overweight individuals never achieve "normal weight."¹⁵⁰ Accordingly, proponents argue that if weight represents an immutable characteristic, then like race and gender, it deserves protection.¹⁵¹

III. ANALYSIS

A. *Weight and Anti-Discrimination Framework*

In considering the ideology underlying anti-discrimination law, a legislature generally considers the following factors: objection to discrimination on the basis of an immutable characteristic; history of discrimination against individuals possessing the characteristic; and the immateriality of the characteristic to satisfactory job performance.¹⁵² Based on those factors, weight should receive protected-class status.¹⁵³ First, evidence suggests that weight constitutes an immutable characteristic.¹⁵⁴ Although research indicates that environment and lifestyle choices contribute to being overweight or obese, scientists have identified 135 potential genes associated with obesity.¹⁵⁵ Further, statistics show that the vast majority of diets fail, and despite achieving improved health through nutrition and exercise, many overweight and obese

148. See *id.* (analogizing proposed bill's educational dimension to earlier legislation prohibiting racial discrimination).

149. See Maguire, *supra* note 140 (quoting National Association to Advance Fat Acceptance board member describing unsuccessful twenty-five-year weight-loss battle).

150. See Carmichael, *supra* note 125 (quoting Massachusetts General Hospital Weight Center director explaining being overweight not a choice).

151. See *id.* (quoting Dr. Lee Kaplan, director of Massachusetts General Hospital Weight Center). Dr. Kaplan contends that if an individual cannot always remedy obesity, then laws should not permit discrimination on that basis. *Id.*

152. See William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 171 (2007) (listing circumstances generally leading to passage of anti-discrimination law).

153. See Rankinen, *supra* note 69, at 584 (affirming 135 gene candidates associated with obesity, thus suggesting immutability); see also *Freire v. First Nat'l*, No. 964620, 1998 WL 1181751, at *1 (Mass. Super. Ct. July 22, 1998) (indicating weight often unrelated to job performance as evidenced by employee's twelve-year work history); *supra* note 79 and accompanying text (illustrating weight bias history).

154. See Newell, *supra* note 69, at 2 (suggesting genetics related to food intake, eating behavior, and metabolic rate); Rankinen, *supra* note 69, 584 (noting gene candidates associated with obesity). All of these factors correlate with weight regulation. Newell, *supra* note 69, at 2.

155. See Rankinen, *supra* note 69, at 584 (providing results of genomics and obesity studies).

individuals remain in these weight categories.¹⁵⁶ Thus, failure to include weight as a protected class may result in discrimination on the basis of an immutable characteristic.¹⁵⁷

As for the second factor, studies ranging over a fifty year period illustrate a history of weight bias and discrimination in the United States.¹⁵⁸ These studies demonstrate that weight bias appears in children as young as three years of age, continues through adulthood, and consequently affects all aspects of overweight and obese individuals' lives.¹⁵⁹ Finally, being overweight or obese does not always correlate with inability to perform job functions.¹⁶⁰ If such correlation does exist, it occurs in a limited number of circumstances, such as when an individual is morbidly obese or when the job specifically requires fitness.¹⁶¹

*B. Danger of Weight Discrimination Concealing Race, Age,
or Gender Discrimination*

A second justification supporting adoption of the proposed legislation relates to the close connection between weight and other protected characteristics.¹⁶² Existing legal remedies may provide inadequate avenues for those experiencing discrimination, as employers may be able to conceal legally impermissible discrimination as discrimination on the basis of weight.¹⁶³ Research shows women suffer weight-based discrimination in all facets of employment with

156. See SOLOVAY, *supra* note 39, at 190-91 (providing dieting failure statistics); Mann, *supra* note 60, at 223 (summarizing studies indicating diets ineffective for long-term weight loss).

157. See KUSHNER, *supra* note 63, at 2 (explaining unrealistic for overweight and obese adults to reach "healthy weight"); see also Carmichael, *supra* note 125 (asserting many obese individuals cannot lose weight despite effort).

158. See, e.g., Fikkan & Rothblum, *supra* note 73, at 17 (describing study reporting co-workers prefer working with "normal weight" individuals); Latner & Schwartz, *supra* note 44, at 55 (citing early study finding weight bias in children); Puhl & Brownell, *supra* note 44, at 798 (discussing studies finding weight bias disadvantaging overweight applicants).

159. See Fikkan & Rothblum, *supra* note 73, at 19 (citing study showing sales manager likely to assign employees perceived as overweight to undesired territory); Latner & Schwartz, *supra* note 44, at 54 (highlighting studies illustrating ostracism and discrimination of overweight children at school); Kristen, *supra* note 62, at 66 (citing study where participants perceived overweight individuals as possessing decreased intelligence and competence); Lewis, *supra* note 1 (indicating weight loss correlated with increased probability of promotion).

160. See Freire v. First Nat'l, No. 964620, 1998 WL 1181751, at *1 (Mass. Super. Ct. July 22, 1998) (noting overweight plaintiff worked as bakery manager without complaint for twelve years).

161. See Blanchard v. Salvation Army, No. 93-BEM-1270, 1997 Mass. Comm. Discrim. LEXIS 27, at *14-*15 (Mass. Comm'n Against Discrim. June 27, 1997) (holding morbidly obese plaintiff not qualified handicap person due to inability to perform essential job functions); see also Capadanno v. Medford Police Dep't, No. 88-BEM-0846, 1996 Mass. Comm. Discrim. LEXIS 95, at *12 (Mass. Comm'n Against Discrim. Jan. 11, 1996) (highlighting unique qualifications of police officers requiring physical standards for hiring).

162. See *infra* note 165 and accompanying text (describing connection between weight and other immutable characteristics).

163. See Griffin, *supra* note 92, at 636 (suggesting that holding employer accountable under existing frameworks more difficult because race, weight, and gender intersect).

greater frequency than their male counterparts, suggesting a gender dimension to weight discrimination.¹⁶⁴ Further, statistics reveal African Americans exhibit the highest rates of obesity, adding a racial component to this issue.¹⁶⁵ Massachusetts's statistics parallel these national findings, reporting the highest prevalence of obesity among African-American residents, with Latino residents following closely behind.¹⁶⁶ Due to the connection between weight, race, and gender, Michigan correctly recognized that the protection of race and gender necessitated the inclusion of weight to maintain a comprehensive civil-rights policy.¹⁶⁷ Moreover, as weight tends to increase with age, employers may be able to conceal age discrimination against older employees under the guise of weight discrimination.¹⁶⁸

C. Existing State Law and City Ordinances as Predictors

Michigan has prohibited employment discrimination on the basis of weight since 1975, thus providing a vehicle to forecast the long-term effects of the proposed legislation in the Commonwealth.¹⁶⁹ Similar to the proposed legislation, the Michigan statute neither defines weight nor places any limitations on those permitted to bring a cause of action for weight discrimination.¹⁷⁰ Also, like the proposed legislation, Michigan's law provides for bona fide occupational qualifications as permissible exceptions to weight discrimination.¹⁷¹ Michigan's approach to its legislation should allay opponents' fears that the proposed legislation would result in increased, meritless litigation, for as of 1999, plaintiffs have brought only eight to ten cases under the statute.¹⁷² Similarly, neither San Francisco nor Santa Cruz have experienced increased litigation as a result of their protection of weight.¹⁷³ Rather, the ordinances have resulted in successful mediation and negotiation

164. See Sablosky, *supra* note 75, at 333-34 (pointing out number of incidences of weight-based employment discrimination higher for women than men).

165. See SOLOVAY, *supra* note 39, at 26 (providing statistics of groups with highest obesity).

166. See OVERWEIGHT AND OBESITY IN MASSACHUSETTS, *supra* note 6, at 4 fig. 2 (showing graph of obesity rates in Massachusetts).

167. See *supra* note 108 and accompanying text (evidencing rationale for inclusion of weight in Michigan statute).

168. See Baum & Ford, *supra* note 99, at 886 (suggesting weight discrimination concealing age discrimination).

169. See Kristen, *supra* note 62, at 101 (reporting date Michigan included weight protection).

170. See Roehling, *Weight Discrimination in the American Workplace*, *supra* note 74, at 181 (describing lack of specificity in Michigan statute). Compare MICH. COMP. LAWS § 37.2202(1)(a) (2007) (failing to define weight in statute), with H.R. 1844, 185th Gen. Ct., Reg. Sess. (Mass. 2007) (failing to define weight in proposed legislation).

171. See MICH. COMP. LAWS § 37.2202 (providing exception for bona fide occupational qualifications).

172. See SOLOVAY, *supra* note 39, at 245 (quoting Michigan Ombudsman Stein describing effect of weight protection).

173. See *supra* note 113 and accompanying text (discussing effect of weight inclusion in city ordinances).

opportunities.¹⁷⁴ Further, while Michigan does not track the cost of compliance with its civil rights law, as of 1999, Santa Cruz had incurred no additional expenses as a result of including weight protection.¹⁷⁵

Moreover, in Michigan, to establish a prima facie case of weight discrimination, plaintiffs cannot rely merely on rumors or subjective beliefs, but rather must demonstrate that the employer was predisposed to act in a discriminatory manner and the employer's prejudice against overweight employees was sufficiently connected to the employment decision adversely affecting the plaintiff.¹⁷⁶ Further, under Michigan's burden-shifting approach, even after a plaintiff has established a prima facie case, the employer has the opportunity to explain a nondiscriminatory motive for its action, thereby requiring the plaintiff to prove that the employer's explanation represents an attempt to conceal discrimination.¹⁷⁷

D. Massachusetts Cases Re-Analyzed Under Proposed Legislation

Two Massachusetts cases, in which complainants unsuccessfully claimed weight discrimination under the rubric of handicap discrimination, provide further indication that the proposed legislation would be unlikely either to result in meritless litigation or to deter potential business investment.¹⁷⁸ The first example, *Freire v. First National*, confirms the validity of proponents' concerns regarding the existence of weight-based discrimination in Massachusetts.¹⁷⁹ Under the proposed legislation, the plaintiff in this case would have had the opportunity to show that her supervisor's comment that he did not want a "stupid, fat broad running his bakery" represented direct evidence of weight-based employment discrimination.¹⁸⁰ Additionally, the plaintiff could have presented evidence that despite her twelve years of prior,

174. See *supra* note 113 and accompanying text (describing successful negotiation and mediation results in San Francisco and Santa Cruz).

175. See SOLOVAY, *supra* note 39, at 243-44 (providing information on effect of ordinance in Santa Cruz).

176. See *supra* note 108 (describing ways in which weight discrimination plaintiff establishes prima facie case under Michigan law).

177. See *supra* note 108 (describing burden-shifting approach in weight discrimination case).

178. See generally *Freire v. First Nat'l*, No. 964620, 1998 WL 1181751 (Mass. Super. Ct. July 22, 1998) (exemplifying potentially valid weight-discrimination claim); *Capadanno v. Medford Police Dep't*, No. 88-BEM-0846, 1996 Mass. Comm. Discrim. LEXIS 95 (Mass. Comm'n Against Discrim. Jan. 11, 1996) (demonstrating example of potential bona fide occupational qualification). Much as the Governor's promise to appoint "good people" to the Commission allayed the business community's concern with the Fair Employment Practice Act, an understanding that courts will recognize that bona fide occupational qualifications have a place in weight-discrimination cases may work to disarm the concerns of businesses. See MAYHEW, *supra* note 20, at 124-25 (indicating governor allayed businesses' fear over Fair Employment Practice Act).

179. See *Freire*, 1998 WL 1181751, at *3 (suggesting existence of weight bias in employment in Massachusetts).

180. *Id.* (quoting supervisor's comment to plaintiff). The court noted such comment signified "disdain for Freire's weight." *Id.* at *7.

related, positive work experience, her interview results, in which her interviewers provided her with low ratings in categories such as “judgment, time management, willingness to learn, integrity, [and] team player,” correspond with studies reporting similar results as typical of weight bias.¹⁸¹ With additional fact-finding, the interviewers’ ratings may confirm the “halo effect” in hiring decisions in the Commonwealth.¹⁸² Provided that Massachusetts chooses to follow Michigan’s approach, even if Freire could present a prima facie case, the defendant could rebut the plaintiff’s evidence, showing that the supervisor’s comment did not relate to the decision not to hire the plaintiff.¹⁸³ Alternatively, the defendant could show that the interviewers’ ratings were not a result of the “halo effect,” but perhaps were justified as a result of evaluations of Freire’s performance or her response to interview questions.¹⁸⁴

The second example, *Capadanno v. City of Medford Police Department*,¹⁸⁵ provides a contrast to *Freire* to demonstrate that even if weight were included as a protected status, certain limitations would exist in weight-discrimination cases.¹⁸⁶ In this case, the complainant alleged that the Medford Police Department discriminated against him by denying him employment as a police officer because of his weight.¹⁸⁷ Although the complainant had passed the police examination, he failed the physical examination because he was thirty-seven pounds over the Police Department’s maximum weight requirements.¹⁸⁸ Although no one disputed that the complainant’s weight resulted in his rejection, it remains unlikely that the complainant would succeed under the proposed legislation.¹⁸⁹ The MCAD Commissioner asserted, “It cannot be disputed that the job of a police officer is one which requires unique

181. See *id.* at *2 (describing interviewers’ rankings); see also Fikkan & Rothblum, *supra* note 73, at 16-17 (indicating study results demonstrate overweight candidates perceived as possessing negative characteristics); Latner & Schwartz, *supra* note 44, at 55 (providing findings of children assigning negative characteristics to overweight).

182. Compare *Freire*, 1998 WL 1181751, at *2, (offering interviewers’ ratings of plaintiff), with Fikkan & Rothblum, *supra* note 73, at 16-17 (citing studies finding overweight applicants perceived as possessing negative characteristics).

183. See 6 LEXSTAT *Civil Rights* § 202 (2007) (providing Michigan’s approach to establishing prima facie case for weight-discrimination under direct-evidence approach).

184. See *id.* (providing Michigan’s approach to establishing prima facie case for weight-discrimination under burden-shifting approach).

185. 88-BEM-0846, 1996 Mass. Comm. Discrim. LEXIS 95, at *12 (Mass. Comm’n Against Discrim. Jan. 11, 1996).

186. See *Capadanno v. Medford Police Dep’t.*, 88-BEM-0846, 1996 Mass. Comm. Discrim. LEXIS 95, at *12 (Mass. Comm’n Against Discrim. Jan. 11, 1996) (discussing unique qualifications required for police officer). This case suggests MCAD may consider weight a bona fide occupational qualification for public safety occupations. *Id.*

187. See *id.* at *1 (setting forth allegations).

188. See *id.* at *2-*3 (setting forth facts). The Department’s guidelines required the maximum weight for the complainant’s height and age to be 153 lbs. *Id.* at *4.

189. See *id.* at *12 (restating previous holding).

qualification. MCAD has previously held, ‘It is undeniable that an agency charged with ensuring public safety should have exacting physical standards for job applicants seeking to become police officers.’¹⁹⁰ Accordingly, even under the proposed legislation, the MCAD would likely find that weight constituted a bona fide occupational qualification in certain occupations, especially in those responsible for protecting the public.¹⁹¹

E. Massachusetts Civil-Rights History as Indicator of Successful Inclusion of Weight

In Massachusetts’s civil-rights history, inclusion met opposition.¹⁹² In fact, opposition to the current proposal parallels much of that expressed prior to the enactment of the Fair Employment Practice Act in 1946.¹⁹³ In 1946, people feared that the law would burden business, as protected groups could utilize it to create bad publicity for business, thereby making Massachusetts an undesirable business setting.¹⁹⁴ Despite concerns, during the early years of the Act, it represented an educational tool aimed at achieving understanding and tolerance.¹⁹⁵ Similarly, like the Fair Employment Practice Act, the proposed legislation would serve an educational function, informing the public about the nature and causes of overweight and obesity, countering the popular assumption that all overweight and obesity is voluntary, and would work to breakdown the existing weight bias pervading society.¹⁹⁶ Through a comprehensive anti-discrimination statute serving an educational function, Massachusetts can maintain its leadership in the advancement of civil rights.¹⁹⁷

F. Proposal

Due to the existing weight bias pervading society, the legislation’s proponents face difficult opposition.¹⁹⁸ To enhance the probability for success, proponents should employ tactics used in Massachusetts’s civil-rights history

190. See *Capadanno*, 1996 Mass. Comm. Discrim. LEXIS 95, at *12 (quoting previous holding).

191. See *id.* (providing indication of potential bona fide occupational qualifications if weight received protective-class status).

192. See MAYHEW, *supra* note 20, at 84 (laying out opposition to enactment of Fair Employment Practice Law).

193. Compare *id.* at 83-84 (describing Massachusetts’s businesses dissatisfaction with Fair Employment Practice Law), with Carmichael, *supra* note 125 (articulating fears of increased litigation for business).

194. See MAYHEW, *supra* note 20, at 125 (quoting industry lobbyist’s fear about proposed legislation).

195. See *id.* at 120 (quoting 1948 MCAD Annual Report).

196. See Carmichael, *supra* note 125 (comparing legislation’s educational dimension with earlier civil-rights legislation).

197. See Massachusetts Commission Against Discrimination, *supra* note 21 (portraying Massachusetts as “pioneer” in civil rights).

198. See *Mass. Weighs Extending Discrimination Law*, *supra* note 4 (providing opposition concerns regarding litigation).

and in other jurisdictions that have adopted weight protection.¹⁹⁹ Like anti-weight-discrimination advocates in Santa Cruz, who formed a successful coalition with other groups to advocate for a civil-rights statute, in Massachusetts, proponents of the legislation could seek support from groups already protected under the statute by demonstrating how permissible weight discrimination endangers existing protected statuses, such as race, gender, and age.²⁰⁰ Further, although the proposed legislation would provide a remedy for those experiencing weight-based discrimination, to fulfill the objective of educating the public, the legislation should be coupled with state-sponsored education programs to counter weight bias.²⁰¹ The state should aim these programs at elementary schools throughout the state, because research shows weight bias begins at an early age.²⁰²

IV. CONCLUSION

Weight bias represents a significant issue pervading American society. The experience of overweight individuals in the employment context illustrates the troubling consequences of such bias. Both studies and testimonials highlight that employer discrimination against the overweight exists in all aspects of employment decisions, including hiring, advancement, compensation, and disciplinary actions. Further, research shows that employers' discrimination on the basis of weight may represent concealment of other forms of impermissible discrimination, such as discrimination on the basis of race, gender, age, or a combination. Accordingly, classification of weight as a protected class may be necessary for states to ensure a comprehensive anti-discrimination statute.

Due to the lack of existing legal recourse for weight-discrimination victims, Massachusetts should expand its legislation to include weight as a protected status. Although Massachusetts remains one of the least obese states, testimonials and case law highlight the existence of weight-discrimination in employment in the Commonwealth. While Representative Rushing's bill represents his tenth effort to combat weight discrimination, increased media attention on rising nationwide obesity rates coupled with recent legislative

199. See MAYHEW, *supra* note 20, at 120 (explaining Fair Employment Practice Act initially emphasized as an educational tool); see also SOLOVAY, *supra* note 39, at 233-44 (discussing Santa Cruz residents' coalition as catalyst for civil-rights ordinance); Kristen, *supra* note 62, at 105 (describing San Francisco residents' efforts to galvanize passage of weight-discrimination ordinance).

200. See SOLOVAY, *supra* note 39, at 233 (discussing Santa Cruz coalition seeking adoption of city civil-rights ordinance); see *supra* Part II.B.5 (proposing weight discrimination may conceal race, gender, or age discrimination). Additionally, the general issue of weight bias may gain greater media attention if advocates of weight protection utilize a clearly outrageous example of weight bias within the Commonwealth, as was done in San Francisco, to illuminate the existing problem, which is often more subtle. See Kristen, *supra* note 62, at 105 (quoting fitness club's weight-bias advertisement that galvanized residents' advocacy for weight protection).

201. See Carmichael, *supra* note 125 (noting educational dimension of proposed legislation).

202. See Rothblum, *supra* note 43 (discussing weight bias learned at early age).

initiatives in the Commonwealth to counter obesity may provide a ripe environment for the passage of such legislation. Further, the March 25, 2008, hearing on the legislation before the Committee on Labor and Workforce Development demonstrates that the legislation's supporters have organized and garnered attention. Through the combination of testimony from weight-bias victims in Massachusetts, obesity experts, and researchers, the hearing highlighted the significance of the issue within the Commonwealth, and provided statistical evidence to counter the opposition's arguments that obesity is merely voluntary. Representative Rushing explained that the public hearing demonstrated the increasing support for the legislation. Proponents of the legislation must continue to keep the dialogue alive and educate Massachusetts residents about the issue of weight discrimination. Moreover, proponents must actively seek the support of those groups already protected under the statute in order to strengthen the demand for a comprehensive anti-discrimination policy.

Throughout its history, Massachusetts has led in the advancement of equal opportunity in employment; however, in order to continue such a commendable tradition, the legislature must provide a remedy for weight-discrimination. If Massachusetts provides such a remedy, the MCAD should look to Michigan case law for guidance on the inclusion of weight as a protected class. Similar to the Governor's actions in relation to the Fair Employment Practice Act, Massachusetts could appoint employer advisors to the MCAD. Such advisors could act as liaisons to the business community, providing educational sessions for employers on the new law and its ramifications. Further, upon passage of the legislation, Massachusetts should promote alternative dispute resolution mechanisms for addressing weight discrimination claims.

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