



## Is Obesity the Next Pivotal Employment Discrimination Issue Within the European Union?

### Introduction

Obesity is one of the greatest health challenges worldwide. During the last decade, the population that is overweight in the European Union (EU) Member States has increased significantly, which has resulted in more than half of the EU population being overweight or obese.<sup>1</sup> According to a recent study published in *The Lancet*, more than one-third of the population worldwide is overweight or obese, of which 36.9 percent are men and 38 percent are women.<sup>2</sup> The aforementioned development has led to a growing discussion on how to deal with obese (severe overweight) employees in the workplace. That discussion includes the question whether obesity is a ground for unlawful discrimination.

In 2013, the European Court of Justice (ECJ) was asked in a preliminary ruling in a Danish case - for the first time - which provisions of EU law, if any, apply to discrimination based on obesity. The ruling of the ECJ is expected at the end of 2014. Meanwhile the Advocate General (AG) delivered his opinion on the matter on 17 July 2014.<sup>3</sup> The AG's opinion basically revolved around two questions:

- > can obesity be considered as a self-standing ground of unlawful discrimination under EU law?

<sup>1</sup> According to: Eurostat, *Statistics Explained: Overweight and obesity – BMI statistics* (data from November 2011) <http://epp.eurostat.ec.europa.eu/statistics>.

<sup>2</sup> Global, regional, and national prevalence of overweight and obesity in children and adults during 1980-2013: a systematic analysis for the Global Burden of Disease Study 2013, *The Lancet*, Vol. 384, Iss. 9945, pages 766 – 781 ([http://dx.doi.org/10.1016/S0140-6736\(14\)60460-8](http://dx.doi.org/10.1016/S0140-6736(14)60460-8)).

<sup>3</sup> *Karsten Kaltoft v. Municipality of Billund*, Opinion of Advocate General Jääskinen 17 July 2014, Case C-354/13.

- > does obesity fall within the scope of the notion of disability as referred to in the Equal Treatment Framework Directive (Directive)?<sup>4</sup>

The aforementioned Directive has the objective of creating a level playing field, where equality in employment and occupation in both the public and the private sectors are concerned.<sup>5</sup> Based on recent case law, the ECJ appears to have adopted, following the approach of the UN Convention, a social and not a (purely) medical model of disability.<sup>6</sup>

In this respect, it is important to understand that the Directive provides for minimum rules to be implemented by EU Member States with regard to their national laws. Member States are free to implement and execute provisions more favorable than the Directive so long as they are in line with the Directive, specifically and and EU law, in general. As a result, there are a variety of laws in place in the respective EU Member States regarding this topic, among many others, in combination with general EU law.

Given these developments, the topic of obesity in the context of employment discrimination is receiving greater scrutiny, and thus, the Danish case being closely watched by the employment law community in Europe. Indeed, obesity might be the next frontier in employment discrimination law.

This article is intended to highlight the most relevant aspects of the Danish case. It is likely that some of the issues will seem surprising to readers in the United States, inasmuch as, since the 2008 amendments to the Americans with Disabilities Act, the Equal Employment Opportunity Commission and the courts have already begun to rule that severe or morbid obesity is a disability regardless of whether or not it was caused by a psychological disorder.<sup>7</sup>

## Facts

An employee, Mr. Kaltoft, has been employed since 1996 as a childminder (taking care of other peoples' children in their own homes) in the Municipality of Billund, Denmark. Mr. Kaltoft has been obese during the entirety of his employment. Although he performed his job to everyone's satisfaction, he was dismissed in 2010. According to the notice of dismissal, the termination was due to a decline in the number of children to be taken care of.

The dismissal followed an internal hearing in which the obesity of Mr. Kaltoft was discussed. The parties disagree as to whether and if so, how, his obesity constituted part of the basis for the dismissal. Mr. Kaltoft argued that his employment was terminated due to his obesity, and that this amounted to discrimination based on obesity.

## Obesity as a self-standing ground of unlawful discrimination?

Mr. Kaltoft basically argued that the open-ended nature of certain provisions in the European Charter of Human Rights (ECHR), Protocol 12 of the ECHR and the EU Charter of Fundamental Rights of the

<sup>4</sup> Directive 2000/78/EC of 27 November 2000.

<sup>5</sup> ECJ 17 July 2008, Case C-303/06 (*Coleman*), EU:C:2008:415, par. 38 and 47.

<sup>6</sup> ECJ 18 March 2014, Case C-363/12 (*Z*), EU:C:2014:159, par. 83-85.

<sup>7</sup> Federal district courts in Louisiana and Mississippi and the Montana Supreme Court had already held that *severe* obesity not based on a physiological disorder can be deemed a protected disability (see *EEOC v. Resources for Human Development, Inc.*, 827 F. Supp. 2d 688 (E.D.La. 2011); *Lowe v. American Eurocopter, LLC*, 2010 U.S. Dist. LEXIS 133345 (N.D. Miss. Dec. 16, 2010); *Feit v. BNSF Ry. Co.*, Op. 11-0436 (Mont. July 6, 2012).

European Union (EU Charter) as well as other general EU law principles, requires the conclusion that any form of discrimination should be protected.

The AG disagrees. In his analysis, he asserts that EU legislation prohibiting discrimination addresses specific grounds of discrimination within specific subject areas without an existing general prohibition on discrimination. Thus, since obesity is not specifically mentioned as a prohibited ground of discrimination in the EU treaties, nor in any EU legislation, it cannot be seen as a self-standing ground of unlawful discrimination. If at all, according to the AG, obesity discrimination could only be grounded on Article 21 of the EU Charter, which prohibits ‘discrimination based on any ground such as (...)’ On this particular wording (such as) it might be argued that there is a general principle of non-discrimination in EU law covering grounds of discrimination not explicitly mentioned in the Charter. In this respect, the AG refers to an ECJ ruling in a previous case where the ECJ ruled that the discrimination within the scope of Directive 2000/78 should not be extended by analogy beyond those grounds listed-exhaustively-in Article 1 of the Directive.<sup>8</sup> Therefore, the AG concludes that there is no general principle of EU law prohibiting discrimination in the labor market that would cover discrimination on grounds of obesity as a self-standing ground of unlawful discrimination.

### **Disability under Directive 2000/78**

According to Article 1 of the Directive, discrimination on the grounds of disability is prohibited. The term ‘disability’ is not defined by the Directive, but a ‘notion’ of disability is being developed via case-law. This case-law is consistent with the concept of disability as laid down in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (U.N. Convention), which is an evolving concept, and the U.N. Convention’s case-law. The U.N. Convention has been approved by the EU in its Decision 2010/48 and as a result the provisions of the U.N. Convention are an integral part of the European Union legal order.<sup>9</sup> This means that EU legislation, such as directives, have to be interpreted, as far as possible, in a manner that is consistent with the U.N. Convention.

According to the ECJ, this notion of disability must be understood as referring to a limitation which results, in particular, from (i) long-term (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers.<sup>10</sup>

As to the scope of the term “disability,” the ECJ has held that disability cannot be defined by reference to the source of the impairment, because that would run against the very aim of the Directive, which is to implement equal treatment.<sup>11</sup> Therefore, the notion of disability does not depend on whether the disability is self-inflicted or not. Disability can also include an illness, if the illness entails a limitation as described in the foregoing paragraph.<sup>12</sup> In this respect it should be noted that an illness requiring particular attention, continuous medication and control may be a psychological or psychosocial burden to the person concerned, but that in itself does not necessarily hinder participation on an equal basis in professional life in general.<sup>13</sup> Moreover, the protected disability may even be that not of the employee,

<sup>8</sup> ECJ 11 July 2006, Case C-13/05 (*Chacón Navas*), EU:C2006:456, par. 56.

<sup>9</sup> Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC).

<sup>10</sup> ECJ 11 April 2013, Joined Cases C-335/11 and C-337/11 (HK *Danmark*), EU:C:2013:222, par. 38 and 39.

<sup>11</sup> HK *Danmark*, par. 41.

<sup>12</sup> *Kaltoft*, par. 58.

<sup>13</sup> *Z*, par 79 and 80.

but of a person in the care of the employee who seeks to rely on the Directive.<sup>14</sup> The latter situation is described as ‘associative discrimination.’

According to the AG, it is sufficient that a long term condition causes limitations in full and effective participation in professional life in general on equal terms with persons not having that condition. No link has to be made between the specific work concerned and the disability in issue as a precondition to application of the Directive.

With regard to the Danish case at issue here, one should note that the Municipality of Billund argued that it cannot be contended that Mr. Kaltoft’s obesity entails a limitation that may hinder his full and effective participation in professional life on an equal basis with other workers because he had already worked for 15 years as a childminder with the Municipality, and had participated in professional life on an equal footing with other childminders in the Municipality’s employ. In other words, the Municipality asserts, Mr. Kaltoft’s obesity cannot be deemed to have impeded his work as a childminder. On the other hand, in light of the AG’s position, as set forth above, an employee such as Mr. Kaltoft could assert that it does not matter whether he could carry on his work as a childminder before he asserts a claim under the Directive; rather, if the disability, here obesity, causes limitations on his ability to participate in professional life generally, he can assert a claim of disability discrimination pursuant to the Directive. Further, the notion of disability must be understood as referring to a *hindrance* to the exercise of professional activity, not only the impossibility of exercising such activity.<sup>15</sup>

#### **Does obesity amount to a disability?**

In addressing the question of whether obesity amounts to a disability, the AG refers to the Body Mass Index (BMI) classification of the World Health Organization.<sup>16</sup> According to that measurement, persons can be divided in three categories: Obese class I (BMI of 30.00-34.99), Obese class II (BMI of 35.00 to 39.99) and Obese class III (BMI over 40.00). The latter category is also called ‘morbid obesity.’<sup>17</sup> Although obesity is classified as an illness by the WHO, as set out above, an illness does not per se amount to a ‘disability’ as described in the Directive.<sup>18</sup> With these categories in mind, the AG is of the opinion that most probably only WHO class III obesity (referred to by the AG as severe obesity) will create limitations that amount to a disability under the Directive and only when the situation fulfils all of the criteria set out in the ECJ’s case-law on the notion of disability. It is for the national Court to verify whether this is the case with respect to Mr. Kaltoft.<sup>19</sup>

#### **Will the outcome matter for the Netherlands and the other EU Member States?**

##### *The Netherlands*

The Directive was implemented in the Netherlands via the Equal Treatment Handicapped and Chronically Ill People Act (Act). According to this Act, discrimination on the grounds of handicap or chronic illness is prohibited. The terms ‘handicap’ and ‘chronical illness’ are not defined in the Act, and review of the legislative documents suggests that this omission was intentional, so as to be consistent with the

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<sup>14</sup> Coleman, par. 56.

<sup>15</sup> Z, par. 159.

<sup>16</sup> Kaltoft, par. 50.

<sup>17</sup> <http://apps.who.int/bmi/index>.

<sup>18</sup> HK Danmark, par. 44.

<sup>19</sup> Kaltoft, par. 56 and 60.

Directive, which does not provide for a definition of ‘disability.’ Having said this, a handicap is considered to be irreversible and a chronic disease a long-term affliction.

As to the Dutch legal practice, it seems that the Act and the practice developed in the Netherlands are not completely in line with the ‘notion of disability’ in the sense of the Directive. There are elements that point in the direction of a wider scope, but there are also elements that seem to be narrower. The first (that is, a more expansive view) would be, as discussed earlier, permissible, while the latter (a narrower construct) would not. As an example, there are cases that seem to take the underlying (medical) cause into the equation in assessing whether the situation falls within the scope of a handicap or a chronic disease, which would seem to provide for analysis based on the source of the impairment, which, as described above, runs counter to the aim of the Directive.

Severe obesity is being interpreted as a chronic disease under Dutch case-law, by the Netherlands Institute for Human Rights (NIHR) as well as by the few courts that have rendered rulings on this topic so far. They all (directly or indirectly) refer to the aforementioned WHO classification regarding obesity and conclude that because morbid obesity is regarded as a chronic disease by the WHO it also qualifies as a handicap or chronic disease under the Act.<sup>20</sup> Having said this, whether the outcome of the Danish case before the ECJ will change current practice will have to be seen, and may well depend on specific wording. If the ECJ rules in line with the AG’s opinion, the Dutch practice with regard to morbid obesity will not be affected; however, if the ECJ goes further, the ruling could broaden the nature of the protection.

#### *Elsewhere in the EU*

As described above, the EU Member States all have their own national legislation and in case of ECJ developments in this area, each will need to assess whether or not they fulfil the obligations that arise from the Directive and its case-law. By way of example, in the UK ‘disability’ is one of the protected characteristics under the Equality Act. There has been case-law, which held that while obesity is not a disability in itself, it may lead to an impairment which, if it meets the ‘disability’ test, would amount to a disability. If the ECJ rules that obesity per se amounts to a disability under the Directive, the UK courts may have to interpret ‘disability’ as including obesity or consider whether any changes to legislation are required.

#### **Practical considerations**

Just to be clear, the Directive does not impose an obligation to maintain in employment an individual who is not competent to perform the essential functions of the position concerned, notwithstanding the obligation for the employer, as laid down in Article 5 of the Directive, to provide reasonable measures where needed in a particular case to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures result in the imposition of a disproportionate burden on the employer.<sup>21</sup> This also applies to impairments such as alcoholism and drug addiction where these conditions amount to an illness. An employer may expect employees suffering from obesity to take reasonable steps themselves to ensure that they carry out their work properly. If that is or might become a problem, both the employer and the employee should address this in a timely and adequate manner to improve the situation, which will be a joint responsibility. In this context, looking at EU case-law as it currently stands, it is advisable for employers to consider reasonable adjustments (e.g., ergonomics of

<sup>20</sup> See for example NIHR 13 May 2011, 2011-78 (regarding a hiring and selection process).

<sup>21</sup> Chacón Navas, par. 49 and 50.

the workplace) where obesity leads to an impairment having an impact on an individual's ability to perform their job. Furthermore, employers may also want to ensure a safe environment, addressing (in)appropriate behaviors toward those who are obese, not only because harassment based on obesity may in the future qualify as discrimination on the grounds of a "disability," but more importantly to ensure that the employees feel good about themselves and their working environment, which will enhance their commitment to their colleagues and their employer and hence will create better results for all involved. With the latter, and the previously cited statistics in mind, employers might want to consider creating a healthy working environment that goes further than the regular health and safety regulations by, for example providing for healthy (lunch) food, health club arrangements, awareness programs and well-being programs among their workforces.

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