

RECENT DEVELOPMENTS

Fag og Aberjide (FOA) v. Kommunernes Landsforening (KL): Will Expanding the Definition of Disability to Include Obesity Lead to an Expanding Waistline in Europe?

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I. OVERVIEW

With the obsession with weight in Europe in recent months, from the recent French law that prohibits models from working if they have an unhealthy Body Mass Index (BMI), to a recent Court of Justice of the European Union (CJEU) decision regarding obesity, one has to wonder, why are governments intruding on the personal aspect of weight to this extent? The European Union (EU) continues to make great strides to prevent discrimination in educational and workplace settings. In 2014, the EU commenced legal action to end discrimination against Roma children in schools, and established that sexual orientation is a protected ground for discrimination, exclusively in the workplace.¹ The EU's protections of both physical and nonphysical attributes that may lead to discrimination reveal that there is significant involvement by the EU in the public lives of their citizens.²

In a recent decision, CJEU issued an opinion that grants further protection against discrimination based on disabilities to certain

1. LILLA FARKAS, EUR. COMM'N, REPORT ON DISCRIMINATION OF ROMA CHILDREN IN EDUCATION (2014), http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf.

2. *Id.*

individuals in the workplace.³ The court's 2014 decision protects and offers reparations to obese individuals who are now considered disabled individuals by the standard set forth in Directive 2000/78 and case precedent.⁴ Karsten Kaltoft worked as a childminder⁵ for fifteen years and was employed by a Danish public administrative authority, the Municipality of Billund.⁶ Both parties agreed to the fact that Kaltoft was considered "obese" in accordance with the definition of obesity provided by the World Health Organization (WHO).⁷ The government paid Kaltoft in an attempt to incentivize his weight loss; however, his successes at losing weight were followed by weight gain.⁸ After Kaltoft took a year of leave, the head of the childminders visited him, during which he observed Kaltoft's seemingly perpetual obesity.⁹ The municipality then experienced a decrease in the number of children requiring childminders, and the Municipality of Billund was required to nominate a childminder for dismissal: Kaltoft was chosen.¹⁰ Kaltoft was told of his dismissal in person, at which time, there was mention of his obesity.¹¹ Later, he was sent a letter explaining that the dismissal was a result of a specific assessment.¹² Kaltoft was unaware of the specific assessment.¹³ This uncertainty initiated Kaltoft to bring an action before the retten i Kolding (District Court of Kolding), claiming that he was discriminated against due to his obesity, that this discrimination led to his dismissal, and that he deserved compensation.¹⁴ This question of law was referred to the CJEU for a preliminary ruling.¹⁵ The European Union Court of Justice *held* that obesity is protected under the meaning of "disability" within the 2000/78 Directive that established the general provisions for equal treatment in employment and occupation in the European Community, despite the fact that it is not a protected ground for anti-discrimination legislation in

3. Case C-354/13, *Fag og Arbejde v. Kommunernes Landsforening*, 2014 EUR-Lex CELEX LEXIS 62013CJ0354 (Dec. 18, 2014).

4. *Id.* at 65.

5. *Childcare Services*, ANGLINFO <http://denmark.angloinfo.com/family/toddlers/childcare-services/> (last visited Apr. 19, 2016). A childminder is someone employed by the Danish government to look after children at a day care center or nursery.

6. Case C-354/13, *Fag og Arbejde*, ¶ 17.

7. *Id.* ¶ 18.

8. Case C-354/13, *Fag og Arbejde*, ¶ 19.

9. *Id.* ¶ 20.

10. *Id.* ¶ 22.

11. *Id.* ¶ 23.

12. *Id.* ¶ 25.

13. *Id.* ¶¶ 24-25.

14. *Id.* ¶ 29.

15. *Id.* ¶ 30.

the European Union. Case C-354/13, Fag og Arbejde (FOA) v. Kommunernes Landsforening (KL), 2014 EUR-Lex CELEX LEXIS 2463 (Dec. 18, 2014).

II. BACKGROUND

The motivation for implementing Directive 2000/78 EC of 27 November 2000—Establishing a General Framework for Equal Treatment in Employment and Occupation, was to provide guidelines for battling discrimination based on the enumerated protected grounds of article 1, and to enable those who did not receive equal treatment in the workplace to seek legal remedies.¹⁶ This Directive was adopted as a result of article 13 EC in the Treaty Establishing the European Community that establishes the inter-mutual effort of the European Community to prevent discrimination.¹⁷

Article 1 establishes that the Directive shall combat cases of discrimination based “on the grounds of religion or belief, disability, age or sexual orientation in regards to employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”¹⁸ Within Directive 2000/78, the EU makes the distinction between direct and indirect¹⁹ discrimination in definition alone and explains that, regardless of which type of discrimination, both are outlawed in order to create equal treatment in the workplace.²⁰ Specifically with disability as a protected ground, the Directive provides for “reasonable” accommodations for disabled persons.²¹ An employer must include mandated accommodations for disabled persons “unless such measures would impose a disproportionate burden on the employer.”²² While these protocols are explicitly stated, there is no definition for the meaning of each protected ground.²³ Since the creation

16. Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 16 (EU).

17. Consolidated Version of the Treaty Establishing the European Community art. 13, Nov. 10, 1997, 2002 O.J. (C 325) 43 [hereinafter Treaty Establishing the European Community].

18. Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 16, 17 (EU).

19. *Id.* art. 2. Defining “direct discrimination” as when “one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1” and “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.”

20. *Id.*

21. *Id.* art. 5.

22. *Id.*

23. *Id.*

of this Directive, several cases have been brought to the CJEU in order to interpret various provisions.²⁴ The protected grounds listed in article 1 are of recent interest, and although the categories seem straightforward, several disputes on a national level have attempted to expand their meaning to encompass more situations of possible discrimination.²⁵

The CJEU is tasked with the role of maintaining consistency among the countries of the European Union.²⁶ The CJEU is responsible for interpreting treaties and directives of the EU to determine how they are applied within each country party and to reconcile legal clashes between the national governments and EU institutions.²⁷ Directives and other laws of the European Union are transposed to the national law of each member country through their own national laws, as illustrated by Danish law.²⁸ Law No 1417 of 22 December 2004 converted Directive 2000/78 to the national level.²⁹ In the past, the court made preliminary rulings from questions referred from courts or tribunals of first instance.³⁰ In *Eva-Marie Painer v. Standard VerlagsGmbH and Others*, the court held that a question is not admissible for the CJEU if there is no scope for reasonable doubt and emphasized the ability for the CJEU to interpret treaties.³¹ Prior to the Treaty of Lisbon, this was not permitted; however, article 267 of the Treaty on the Functioning of the European Union (TFEU) now provides the general rules for administering preliminary rulings regarding the interpretation of a treaty.³²

Prior court rulings also stipulated that the referral of a case to the CJEU be at the discretion of the national court under article 267 of the TFEU.³³ For instance, in *Aklagaren v. Hans Åkerberg Fransson*, the

24. Cases C-335/11, C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab*, 2013 EUR-Lex CELEX LEXIS 62011CA0335 (Apr. 11, 2013); *see also* Case C-356/12, *Glatzel v. Freistaat Bayern*, 2014 EUR-Lex CELEX LEXIS 62012CJ0356, ¶ 45 (May 22, 2014); Case C-363/12, *Z. v. A Gov't Dep't & the Bd. of Mgmt. of a Cmty. Sch.*, 2014 EUR-Lex CELEX LEXIS 62012CJ0363, ¶¶ 76-77 (Mar. 18, 2014).

25. Cases C-335/11, C-337/11, *HK Danmark*.

26. Treaty Establishing the European Community, *supra* note 17, art. 4.

27. *Id.*

28. Eur. Network of Legal Experts in the Non-Discrimination Field, *News from the EU Member States: Denmark*, 1 EUR. ANTI-DISCRIMINATION L. REV. 44, 44 (2005), http://ec.europa.eu/justice/discrimination/files/lawrev1_en.pdf.

29. *Id.*

30. *See* Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 EUR-Lex CELEX LEXIS 62010CO0145 (Dec. 1, 2011).

31. *Id.* ¶¶ 64-5.

32. *Id.* ¶ 54.

33. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 2013 EUR-Lex CELEX LEXIS 62010CJ0617 (Feb. 26 2013).

CJEU held that when questions are submitted from national courts and involve an interpretation of EU law, the CJEU is bound to provide a ruling.³⁴ Only exceptional cases may be rebutted.³⁵ It is customary that the CJEU make preliminary rulings to maintain EU law within the national governments.³⁶

The TFEU is the amended version of the Treaty establishing the European Community (TEEC) and came into force on December 1, 2009.³⁷ This treaty adds to the social dimensions of the EU and settles the jurisdiction and functioning of the EU.³⁸ Article 267 of this treaty provides the CJEU with the jurisdiction to grant preliminary rulings apropos the interpretation of treaties and “the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”³⁹

The European Union Charter of Fundamental Rights, entered into force alongside the TEEC on December 1, 2009, was established in order to provide another source of cohesiveness among the several countries of the EU and their distinguishable national laws.⁴⁰ This Charter applies when an EU directive is implemented through national laws of the specific EU country.⁴¹ In the preamble of the Charter, the parties explain that, while differing due to cultures and history, all the states must be unified in the universal principles of “human dignity, freedom, equality, and solidarity.”⁴²

In *Sonia Chacón Navas v. Eurest Colectividades SA*, the CJEU explained the general concept of nondiscrimination in relation to disability prior to the court’s ability to hear preliminary questions as established by 267 TFEU.⁴³ In this 2006 case, the court held that sickness could not be regarded as a ground for discrimination in relation to Directive 2000/78.⁴⁴ The term “sickness” is not one of the enumerated grounds; the court determined that the intention of the directive was to

34. *Id.* ¶ 39.

35. *Id.* ¶ 40.

36. *Id.*

37. *EU Charter of Fundamental Rights*, EUR. COMMISSION, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (last visited Apr. 5, 2016).

38. *Id.*

39. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 164 [hereinafter TFEU].

40. Charter of Fundamental Rights of the European Union pmbl., Dec. 7, 2000, 2012 O.J. (C 326) 395.

41. *Id.*

42. Charter of Fundamental Rights of the European Union, pmbl.

43. Case C-13/05, *Navas v. Eurest Colectividades SA*, 2006 EUR-Lex CELEX LEXIS 62005CJ0013 (July 11, 2006).

44. *Id.* ¶ 57.

include “disability” as one of the protected grounds and purposefully did not include “sickness.”⁴⁵ The court clearly stated that had Directive 2000/78 wanted to cover sickness as a protected ground, it would have stated sickness instead of disability.⁴⁶ A disability is a hindrance that is not temporary and must be considered long term, although this term was not examined by the court.⁴⁷ The protected grounds in the Directive cannot be extended by analogy.⁴⁸

Years later, the court heard another case relating to the meaning of a disability within the Directive in relation to other international agreements.⁴⁹ In *HK Danmark*, the CJEU once again emphasized the holding in *Navas* and the definition of article 1 of the U.N. convention: a disability must be long-term.⁵⁰ The European Community, in 2009, approved the U.N. Convention on the Rights of Persons with Disabilities.⁵¹ In part E of the preamble, the parties to the convention agreed to the conclusion that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers.”⁵² This case demonstrates the necessary functions of the CJEU to interpret the term “obesity” in order to provide consistency throughout the EU.⁵³

In *HK Danmark*, the CJEU distinguished the concept of disability from the total inability of completing an activity to the “limitation which results in particular from physical, mental or psychological impairments” in exercising such an activity.⁵⁴ The court also explained it would be inconsistent with the purpose of Directive 2000/78 to limit a recovery based on a disability depending on the origin of the disability.⁵⁵ The

45. *Id.* ¶¶ 43-44.

46. *Id.* ¶ 45.

47. *Id.* (explaining that “the importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time”).

48. *Id.* ¶¶ 55-56.

49. Cases C-335/11, C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab*, 2013 EUR-Lex CELEX LEXIS 62011CA0335, ¶¶ 36-37 (Apr. 11, 2013); *see also* Case C-356/12, *Glatzel v. Freistaat Bayern*, 2014 EUR-Lex CELEX LEXIS 62012CJ0356, ¶ 45 (May 22, 2014); Case C-363/12, *Z. v. A Gov't Dep't & the Bd. of Mgmt. of a Cmty. Sch.*, 2014 EUR-Lex CELEX LEXIS 62012CJ0363, ¶¶ 76-77 (Mar. 18, 2014).

50. Cases C-335/11, C-337/11, *HK Danmark*, ¶ 25.

51. *Id.* ¶ 3.

52. Convention on the Rights of Persons with Disabilities pmb., Dec. 13, 2006, 2515 U.N.T.S. 3.

53. Cases C-335/11, C-337/11, *HK Danmark*, ¶ 25.

54. Cases C-335/11, C-337/11, *HK Danmark*, ¶ 38.

55. *Id.* ¶ 40.

court combined the definitions of disability provided by Directive 2000/78 and article 1 of the U.N. Convention in order to remedy the question from the Danish national court.⁵⁶ What constitutes a disability under Directive 2000/78 is still a pressing issue that needs clarification by the CJEU.

Disability has become an international dispute due to issues regarding weight. While the WHO is the leading source on health internationally, the WHO points to the BMI of individuals to determine whether they are obese.⁵⁷ BMI depends on the height and weight of an individual,⁵⁸ but this number on its own does not take into account other factors such as body composition, including muscle.⁵⁹ The WHO explains that the accumulation of fat is also a part of obesity; however, the bright line rule is that a BMI over thirty is what is considered to be obese.⁶⁰ The WHO also uses the International Classification of Disease-10 (ICD) in order to classify diseases internationally.⁶¹ Obesity (and other hyperalimentsations) is classified under Category E-65 to E-68.⁶² Because of the international recognition of obesity as an issue concerning worldwide health, it is a controversial issue as to whether or not obesity or simply being overweight could be covered as a disability.⁶³

III. THE COURT'S DECISION

In the noted case, the CJEU found that there was not a general principle to guide cases of discrimination based on obesity in previous case law, and then extended the concept of disability to include "obesity" when this type of disability limits a worker through physical, mental, or

56. *Id.* ¶ 93.

57. *Obesity and Overweight*, WORLD HEALTH ORGANIZATION [WHO] (Jan. 2015), <http://www.who.int/mediacentre/factsheets/fs311/en/>.

58. *Id.*

59. *About Adult BMI*, CTRES. FOR DISEASE CONTROL & PREVENTION (May 15, 2015), http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/.

60. OBESITY AND OVERWEIGHT, *supra* note 57.

61. *International Classification of Diseases (ICD)*, WORLD HEALTH ORGANIZATION [WHO], <http://www.who.int/classifications/icd/en/> (last visited Apr. 19, 2016).

62. WORLD HEALTH ORGANIZATION [WHO], INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS E-65-E68 (10th ed. 2016), <http://apps.who.int/classifications/icd10/browse/2016/en#/E65-E68> [hereinafter ICD-10].

63. Ian Drury, *Obesity Is a Disability, Rules Highest EU Court After 25st Danish Childminder Was 'Sacked for Being Too Fat To Perform His Job Properly'*, DAILY MAIL (Dec. 19, 2014), <http://www.dailymail.co.uk/health/article-2878792/Obesity-DISABILITY-rules-highest-EU-court-25st-Danish-childminder-sacked-fat-perform-job-properly.html>.

psychological impairments.⁶⁴ The Court was presented with four questions to answer through this preliminary ruling.⁶⁵ Of the four questions, the court only answered two, due to the applicability of EU law to national law.⁶⁶ The first question initiated the analysis of equality in the workplace and asked whether obesity is a protected ground under Directive 2000/78.⁶⁷

Initially, the court revisited the preamble of Directive 2000/78 and Article 1 in order to understand the motivation behind the guidelines of the provision: to create equality in the workplace in Europe.⁶⁸ The court commenced its analysis of whether or not obesity is a disability by looking at the general guidelines the Court already had in place with regards to protecting individuals from differentiation and looked to specific grounds of the basis of discrimination.⁶⁹ Article 10 of the TFEU explains that when the EU is defining and executing its decisions and policies, “the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁷⁰ This list does not mention obesity, or any sort of discrimination based on weight, proving that obesity is not a specific category in which the court aims to protect.⁷¹

The court then turned to article 19 of the TFEU, which enumerates more classifications of protected characteristics and allows the court to support initiatives by member countries that contribute to the protection of these groups.⁷² Because of the listing of characteristics, “obesity,” the court concluded, was not a protected basis on its own.⁷³ This prompted the court to look to Directive 2000/78.⁷⁴

The court continued to find that the scope of this directive and case law did not provide obesity as a basis of discrimination.⁷⁵ The court specifically cited a previous holding by the CJEU from a 2006 case, *Sonia Chacón Navas v. Eurest Colectividades SA*, explaining that the

64. Case C-354/13, *Fag og Arbejde v. Kommunernes Landsforening*, 2014 EUR-Lex CELEX LEXIS 62013CJ0354, ¶ 58 (Dec. 18, 2014).

65. *Id.* ¶ 30.

66. *Id.* ¶ 41.

67. *Id.* ¶ 30.

68. *Id.* ¶¶ 3-4.

69. *Id.* ¶¶ 32-33.

70. *Id.* ¶ 33 (citing *TFEU*, supra note 39, art. 10).

71. Case C-354/13, *Fag og Arbejde*, ¶ 33.

72. *Id.* ¶ 34.

73. *Id.*

74. *Id.* ¶¶ 35-37.

75. *Id.* ¶ 36.

scope of Directive 2000/78 is not to be extended by analogy with the listed grounds of discrimination, as there is an exhaustive list in Article 1 of the Directive.⁷⁶ The court explained that the policies of the Charter of Fundamental Rights of the European Union are then also inapplicable to the four questions presented to the court.⁷⁷ A 2013 decision by the court, *Åklagaren v. Hans Åkerberg Fransson*, explained that when an EU law is applicable to a case at hand, then the Charter becomes applicable.⁷⁸ The court did not find that the concept of obesity as a ground for discrimination is protected under EU law.⁷⁹ Because there are several policies in the EU that point to a particular list of grounds of discrimination, the court did not extend obesity as a ground for discrimination as it would upset court precedent as well as undermine the enumerated grounds drafted by the EU.⁸⁰

The court then determined that it did not need to answer the second and third questions raised by the complaint.⁸¹ The second question asked whether the ability of the EU to prohibit discrimination based on obesity is applicable to a Danish citizen and his employer, a government entity.⁸² Because the court determined that obesity is not a protected ground, they declined to answer this question.⁸³ The CJEU could not extend this question to the national level because it was not applicable to EU law in the first place.

Following this, the third question discussed the burden of proof concerning public authority as an employer.⁸⁴ The third question asked the court whether or not obesity, as a protected characteristic, would only be secured in public-sector employment or if this would expand to the labor market in Europe in general regardless of the occupation.⁸⁵ Because the court determined in the first and second question that obesity is not a protected ground, the court also declined to answer this question.⁸⁶

76. *Id.* ¶¶ 36-37 (citing Case C-13/05, *Navas v. Eures Colectividades SA*, 2006 EUR-Lex CELEX LEXIS 62005CJ0013, ¶ 56 (July 11, 2006)).

77. Case C-354/13, *Fag og Arbejde*, ¶ 39.

78. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 2013 EUR-Lex CELEX LEXIS 62010CJ0617 (Feb. 26 2013) ¶¶ 21-22.

79. Case C-354/13, *Fag og Arbejde*, ¶ 39.

80. *Id.*

81. *Id.* ¶ 41.

82. *Id.* ¶ 30.

83. *Id.* ¶ 41.

84. *Id.* ¶ 30.

85. *Id.*

86. *Id.* ¶ 41.

The discussion then returned to Directive 2000/78 when the Court addressed the final question raised by the complaint: whether obesity constitutes a disability, and if so, what are the elements of the disability that would allow an obese employee to avail himself of the protections of EU law.⁸⁷ At first, the court established the admissibility of the issue, which was formerly in dispute by the Danish Government as they considered this issue hypothetical and therefore inadmissible.⁸⁸ The Danish Court explained that Kaltoft was able to complete his job duties and it was unlikely that he was suffering from a disability as described in Directive 2000/78.⁸⁹ The national court also brought up the idea of reasonable doubt and cited *HK Danmark* when explaining that this final question is deduced from case law.⁹⁰ In *HK Denmark* the court previously held that the term “disability” in Directive 2000/78:

must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.⁹¹

The national court determined that there was a need for a preliminary ruling and that the subject matter of the case is relevant to the court.⁹² The court may only rebut questions referred from national courts in exceptional cases.⁹³ The court determined the fourth question of this case needed an interpretation by the Court of Justice as to what “disability” means within Directive 2000/78.⁹⁴ This final question is considered admissible due to these rulings and the judgment in *Eva-Marie Painer v. Standard Verlags GmbH*, which explained that a court can refer to the

87. *Id.* ¶ 42.

88. *Id.* ¶ 43.

89. *Id.*

90. *Id.* ¶ 44.

91. Cases C-335/11, C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab*, 2013 EUR-Lex CELEX LEXIS 62011CA0335, ¶ 47 (Apr. 11, 2013).

92. Case C-354/13, *Fag og Arbejde*, ¶ 45.

93. *Id.* (citing Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 2013 EUR-Lex CELEX LEXIS 62010CO0145 (Feb. 26, 2013) (explaining what constitutes an exceptional case: the interpretation of EU law bears no relation to the actual fact of the main action, where the problem is hypothetical, or where the court does not have factual or legal material to give a useful answer)).

94. Case C-354/13, *Fag og Arbejde*, ¶¶ 46-47.

EUCJ a preliminary ruling question of which there is no room for reasonable doubt.⁹⁵

After establishing the admissibility of the fourth and final question, the court stated that the overall purpose of Directive 2000/78, as listed in article 1, is to serve as the general guidelines for preventing and opposing discrimination and continues to set the tone of the court's decision.⁹⁶ The court laid out the applicability of Directive 2000/78 by explaining direct discrimination and the scope of the Directive, specifically mentioning the applicability to dismissal of employment.⁹⁷ The court then mentioned the applicability of the United Nations Convention on the Rights of Persons with Disabilities to EU court decisions, with the ratification of this convention.⁹⁸ In doing so, the concept of "disability" must be understood in accordance with the *HK Danmark* definition, which includes a long-term duration and that the impairment must hinder participation in the workplace that would place the employee at a disadvantage in relation to other coworkers.⁹⁹

The court clearly articulated that a disability is not just the inability to complete a specific task in the workplace, but includes the obstacles put in place by the disability. In deciding this, the court determined that any other understanding would not be compatible with the purpose of the Directive.¹⁰⁰ In order to emphasize this point, the court cites to the Directive.¹⁰¹ Following this, the court explicitly states that a disability is not dependent "on the extent to which the person may or may not have contributed to the onset of his disability."¹⁰² It also does not make a difference whether or not there have been accommodations to those who have disabilities when determining whether one is disabled, as this is a

95. *Id.* ¶¶ 48-49 (citing Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 EUR-Lex CELEX LEXIS 62010CO0145, ¶ 64 (Dec. 1, 2011)).

96. Case C-354/13, *Fag og Arbejde*, ¶ 50.

97. *Id.* ¶¶ 51-52. *See also* Directive 2000/78, art. 2(2)(a), 2000 O.J. (L 303) 16, 17 ("[D]irect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any grounds referred to in Article 1."); *id.* art. 3(1)(c) ("Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: employment and working conditions, including dismissals and pay.").

98. Case C-354/13, *Fag og Arbejde*, ¶ 53.

99. *Id.*

100. *Id.* ¶ 54.

101. *Id.* ¶ 55.

102. *Id.* ¶ 56.

consequence of a physical or mental barrier and does not merely take away impairment.¹⁰³

The idea that obesity is a disability on its own is then discussed.¹⁰⁴ The court does not extend disability to meaning obesity in all cases, as obesity does not always mean that there is a hindrance in the workplace.¹⁰⁵ Obesity would be considered a “disability” within the framework of Directive 2000/78 if there were a limitation in accordance with case precedent including physical, mental or psychological impairments that would negatively affect one’s professional life in the long run.¹⁰⁶ This would not enable the employee to perform the same tasks as coworkers leading to inequality in the workplace, in both opportunities and abilities. It counters the purpose of the Directive.¹⁰⁷ Applying this interpretation to Kaltoft’s experience, the court remanded the case to the referring court to determine whether Kaltoft’s obesity was a hindrance enough on his work that it would constitute a disability.¹⁰⁸ The court grants the discretion to national courts to determine whether a worker meets the disability criteria through obesity.¹⁰⁹

IV. ANALYSIS

A. *When Is Someone Obese?*

The court cites the WHO’s definition of obesity, and this points to the concept that the court does not actually understand what constitutes obesity. Because of this definition of obesity, the CJEU’s ruling did not discuss what makes a person obese.¹¹⁰ In this decision, the court explained that both parties did not dispute that Kaltoft was obese during his employment with the state.¹¹¹

The court did not substantially address what obese means, although they did place obesity under the definition of a disability.¹¹² It must be determined, on a case-by-case basis, whether the person is obese in order to bring a discrimination claim under disability; somebody who is

103. *Id.* ¶ 57.

104. *Id.* ¶ 58.

105. *Id.* ¶ 58.

106. *Id.* ¶ 59.

107. *Id.* ¶ 60.

108. *Id.* ¶ 62.

109. *Id.* ¶ 65.

110. *Id.*

111. *Id.* ¶ 18.

112. *Id.* ¶ 64.

overweight cannot bring this claim.¹¹³ The WHO's definition of an obese person is someone with a BMI of 30 or greater;¹¹⁴ a person with a BMI of 29.9 could not bring a discrimination claim based on obesity because they are technically not obese considering this standard.¹¹⁵ The court clearly mentions obesity in this case, not just the condition of being overweight.¹¹⁶ This would seemingly limit a disability to only obese individuals; however, the court does focus on the broad interpretation of a disability as something that hinders the day-to-day employment of an individual over a long period, illustrating that perhaps this distinction between overweight and obese may not completely alter the case.¹¹⁷

The WHO mentions the definition of obesity in relation to a person's BMI.¹¹⁸ It is particularly interesting that in certain instances the WHO alludes to other ways to determine whether someone is obese.¹¹⁹ Waist circumference (WC) is another mode to establish obesity, one that measures a portion of the body's composition.¹²⁰ The WHO used people's WC in order to look into the body's composition in relation to non-communicable diseases in a 2008 report explaining the WC measurements in regard to obesity.¹²¹ WC looks at the fat that carried on the body, rather than just the BMI of an individual.¹²² For instance, an individual may technically be obese under the BMI standard if they have a lot of muscle mass. With WC, however, the WHO would look to the fat carried around this individual's waist, and it would likely not be enough to identify that person as obese.¹²³ WC is more of an accurate determination of obesity in individuals.

International health sources rarely mention WC and even the official stance of the WHO is to use BMI.¹²⁴ However, it is notable that there seems to be only one way to determine whether or not someone is obese;¹²⁵ a measurement that does not look into fat carried by an

113. *Id.*

114. OBESITY AND OVERWEIGHT, *supra* note 57.

115. *Id.*

116. Case C-354/13, *Fag og Arbejde*, ¶ 60-63.

117. *Id.*

118. OBESITY AND OVERWEIGHT, *supra* note 57.

119. WORLD HEALTH ORGANIZATION [WHO], WAIST CIRCUMFERENCE AND WAIST-HIP RATIO: REPORT OF A WHO EXPERT CONSULTATION 1 (2008), http://apps.who.int/iris/bitstream/10665/44583/1/9789241501491_eng.pdf.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. OBESITY AND OVERWEIGHT, *supra* note 57.

125. *Id.*

individual but is determined by dividing a person's weight by their height, not taking into account muscle weight versus weight from fat.¹²⁶ This simple mode of determining whether someone is obese illustrates the idea that there are still many unknowns about obesity.

B. Is Obesity a Sickness or a Disease?

The *Navas* court held that sickness is not a protected ground for workplace discrimination cases because the court established that, in Directive 2000/78, there is a list of the protected grounds and one cannot add more protected grounds by analogy.¹²⁷ The CJEU explained that obesity is a disability under the condition that the individual was unable to perform job duties due to their weight.¹²⁸ Nevertheless, the question becomes: is obesity a sickness? If obesity is considered a sickness, this would put this Danish case in conflict with former case precedent.¹²⁹

In the United States, the American Medical Association determined that obesity is a disease.¹³⁰ The EU has not gone as far to determine say that obesity is a disease, but since 2008, the WHO reported that over 50% of the EU population is overweight.¹³¹ Obesity is categorized under ICD-1-Volume 1 within the category "Obesity and Other Hyperalimantation," which the court cites when mentioning obesity.¹³² However, there is not much else said about this epidemic by the court.¹³³ Under the WHO's definition of obesity (one who has a BMI of equal to or greater than thirty), 23% of women and 20% of men in Europe are obese.¹³⁴ Had this court decision determined that obesity is a disability without any qualifying statements, then nearly a quarter of the European population is disabled in definition alone.¹³⁵

126. ABOUT ADULT BMI, *supra* note 59.

127. Case C-13/05, *Navas v. Euresst Colectividades SA*, 2006 EUR-Lex CELEX LEXIS 62005CJ0013, *Id.* Form number C:2006:456 ¶¶ 55-56 (July 11, 2006).

128. Case C-354/13, *Fag og Arbejde v. Kommunernes Landsforening*, 2014 EUR-Lex CELEX LEXIS 62013CJ0354, ¶¶ 58-59 (Dec. 18, 2014).

129. Case C-13/05, *Navas* ¶ 55-56.

130. Richard Gunderman, *Is Obesity Really a Disease?*, ATLANTIC (June 24, 2013), <http://www.theatlantic.com/health/archive/2013/06/is-obesity-really-a-disease/277148/>.

131. OBESITY AND OVERWEIGHT, *supra* note 57.

132. ICD-10, *supra* note 61.

133. Case C-354/13, *Fag og Arbejde*, ¶ 18.

134. *Obesity: Data and Statistics*, WORLD HEALTH ORGANIZATION [WHO], <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/obesity/data-and-statistics> (last visited Apr. 19, 2016).

135. *Id.*

However, the CJEU did set the precedent within national courts that the origin of obesity is immaterial to whether or not obesity is a disability.¹³⁶ The court avoided defining obesity as a sickness due to this nuanced requirement. In this decision, the court could have determined that obesity is only protected when it is the result of a physiological condition, as was the holding in certain U.S. cases.¹³⁷ The cause of the individual's obesity, whether from a physiological condition or due to personal or economic choices, did not matter to this court.¹³⁸

Perhaps this is in line with the reasoning that one can cause their disability. Should a person acquire some sort of physical impairment due to a car accident that was their fault, it would be against public policy to prevent this person from seeking protection from discrimination in the workplace due to this handicap. Such was the ideology behind the *HK Danmark* decision.¹³⁹ However, this does tie into the idea of obesity as a sickness. One who loses the ability to use a limb in an accident may be unable to regain the use of that extremity, while an obese person could lose weight and potentially rid himself or herself of this disability. Depending on the situation, there is the idea that, like sickness, obesity may not be permanent. However, this disability does have the ability to lead to other diseases that would go beyond the meaning of sickness, such as type 2 diabetes, mental disorders, and orthopedic problems.¹⁴⁰

Regardless of whether or not obesity is actually considered a sickness, the court did not play the role of doctor; the CJEU instead limited its decision to the public policy of preventing discrimination due to physical or mental limitations in the European Union.¹⁴¹ While this demonstrates the lack of public knowledge about obesity, this decision has numerous consequences that may affect the health of the population of the European Union. There is the apprehension that this decision could take away the government's impetus for enacting preventative measures to decrease the number of overweight individuals in Europe,

136. Case C-354/13, *Fag og Arbejde*, ¶ 55; see also Cases C-335/11, C-337/11, *HK Danmark v. Dansk almennyttigt Boligselskab*, 2013 EUR-Lex CELEX LEXIS 62011CA0335, ¶ 40 (Apr. 11, 2013).

137. *Equal Emp't Opportunity Comm'n v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006).

138. Case C-354/13, *Fag og Arbejde*, ¶ 55.

139. Cases 335/11, 337/11, *HK Danmark*, ¶ 40.

140. *Obesity: Data and Statistics*, supra note 134, at 16.

141. Case C-354/13, *Fag og Arbejde*, ¶ 57.

such as increasing access to healthier foods, physically and economically.¹⁴²

C. Will This Decision Contribute to a Rise in Obesity in Europe?

The court in this case seemed to be in a dilemma. On the one hand, it is established by the CJEU that it is imperative that there is equal treatment for everyone in the workplace, regardless of the cause of the disability, and this is established in the Directive 2000/78.¹⁴³ On the other hand, there is the fear that this decision may incentivize unhealthy choices.¹⁴⁴ In this decision, the CJEU explained that the cause of obesity is irrelevant as to whether or not it is considered a disability.¹⁴⁵

Because nearly a quarter of the European population is considered obese, this decision will likely lead to greater accommodations in the workplace for overweight individuals.¹⁴⁶ Accommodations may include larger office furniture, closer parking spaces, or the availability of nutritionists to staff.¹⁴⁷ Aside from providing nutritionists to employees, is this holding promoting an unhealthy lifestyle? Europe is known for its universal healthcare.¹⁴⁸ This could result in an increase in the workload of medical professionals. There are costs, of time and money, for those who ultimately have to treat this condition.¹⁴⁹ The CJEU may just be shifting the blame onto healthcare professionals.

However, while feared by some, this decision may actually help with “weight bias.” The phenomenon of “weight bias” is explained as the psychological and health impacts that occur due to the stigma associated with being overweight.¹⁵⁰ Because of this bias in the workplace and by the public in general, a study by the Yale Rudd Center explains that overweight individuals are more reluctant to seek medical

142. CTRS. FOR DISEASE CONTROL & PREVENTION, RECOMMENDED COMMUNITY STRATEGIES AND MEASUREMENTS TO PREVENT OBESITY IN THE UNITED STATES: IMPLEMENTATION AND MEASUREMENT GUIDE (2009), http://www.cdc.gov/obesity/downloads/community_strategies_guide.pdf.

143. Case C-354/13, *Fag og Arbejde*, ¶ 57.

144. Drury, *supra* note 63.

145. Case C-354/13, *Fag og Arbejde*, ¶ 55.

146. *Obesity: Data and Statistics*, *supra* note 134, at 16.

147. Drury, *supra* note 63.

148. *Id.*

149. *Id.*

150. ROBERTA R. FRIEDMAN & REBECCA M. PUHL, YALE RUDD CTR., WEIGHT BIAS: A SOCIAL JUSTICE ISSUE (2012), http://www.uconnruddcenter.org/resources/upload/docs/what/reports/Rudd_Policy_Brief_Weight_Bias.pdf.

care.¹⁵¹ The CJEU in the noted case is prohibiting “weight bias” in the workplace by making obesity a protected ground and therefore encouraging obese individuals to speak up about this commonly accepted form of discrimination.¹⁵²

The lack of resources for low-income individuals can lead to poor dietary decisions due to the inability to afford healthy options.¹⁵³ Without preventative measures to thwart “weight bias” and “body shaming” in the workplace, overweight individuals will not perform to their best ability, both physically and mentally, due to these types of negative environments.¹⁵⁴ Making weight discrimination unlawful in the workplace could foster a safe place for overweight individuals leading to more employment potential, instead of the current negative weight-biased workplace that inhibits career growth.¹⁵⁵ This may increase the ability of an obese individual to be promoted, instilling the idea that they can excel similarly to their coworkers. The directive’s main purpose was to put European citizens on the same playing field, and perhaps this decision will lead to such an ideal.¹⁵⁶

D. How Will This Impact Discrimination Cases?

By protecting obesity as a disability and providing national courts the discretion to determine when obesity is a disability, the CJEU opened the door for case-by-case decisions.¹⁵⁷ As previously discussed, half of the European Union is determined to be obese under the WHO’s definition composed of BMI alone.¹⁵⁸ Considering the number of obese people in Europe and that there is no exact rule for determining whether an individual’s weight is considered a disability, there is a possibility of increased litigation.

This decision is also criticized for its impact on the burden of proof with employment discrimination cases.¹⁵⁹ Attorneys in Denmark are concerned over the impact of this case because it shifts the burden of

151. *Id.* at 5.

152. *Id.* at 2.

153. *Id.*

154. *Id.*

155. *Id.* at 4.

156. Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 16, 17.

157. Drury, *supra* note 63, at 23.

158. *Obesity: Data and Statistics*, *supra* note 134, at 10.

159. Julia Fioretti, *Obesity Can Be Deemed a Disability at Work: EU Court*, REUTERS (Dec. 18, 2014), <http://www.reuters.com/article/us-eu-courts-obesity-idUSKBN0JW11620141218>.

proof to the employees to show that there was discrimination.¹⁶⁰ Additionally, the nuanced decision of this case makes it unclear to employers whether or not they are providing a workplace that prevents discrimination due to obesity.¹⁶¹ Some fear that this decision will leave employers more vulnerable to discrimination lawsuits without actually providing guidelines for making a workplace accommodating to obese individuals.¹⁶²

V. CONCLUSION

Obesity, for the most part, is an epidemic that can be prevented. Because of this, there seems to be an insensitivity of modern culture regarding this disability. Articles citing this CJEU case included the terms “fat” and “lazy” in an understanding of the disability that lacks a proper focus: empathy.¹⁶³ While there are cases of obesity that originated from former health issues, people tend to believe that obese people are causing their own disability.¹⁶⁴ There should be a common desire by the European and international communities to address these issues in a way that can prevent them for future generations, not just to criticize them. To accept obesity as unchangeable is ignorant and lacks human understanding. This court’s decision, while not perfect, is a step in the right direction for tackling this health initiative.¹⁶⁵

Short term, we should protect obesity as a disability, but long term we need different options that prevent this disability from leading to other health issues. This decision may add more patients to a doctor’s or judge’s schedule, but perhaps such an influx of individuals talking about dealing with this disability will bring to light the numerous causes of obesity: low income, food deserts, previous health issues, etc. The concept behind Directive 2000/78 was consistently stated by the court as a guideline to promote workplace equality,¹⁶⁶ yet people are afraid of the accommodations that the government will provide.¹⁶⁷ While the court has set up measures to protect obese individuals from discrimination in the

160. *Id.*

161. *Id.*

162. *Id.*

163. Drury, *supra* note 63, at 23.

164. *Id.*

165. FRIEDMAN & PUHL, *supra* note 150, at 24.

166. Case C-354/13, *Fag og Arbejde v. Kommunernes Landsforening*, 2014 EUR-Lex CELEX LEXIS 62013CJ0354, ¶ 57 (Dec. 18, 2014).

167. Drury, *supra* note 63, at 23.

workplace,¹⁶⁸ there needs to be preventative measures such as nutritional education and increased access to clean foods.¹⁶⁹ It is important to understand that this court ruling should not be a mask that the government can hide behind and there needs to be real changes in health policies worldwide.

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168. Case C-354/13, *Fag og Arbejde*, ¶ 57.

169. Center for Disease Control, *supra* note 142, at 23.

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