

THE FRAMING OF FAT: NARRATIVES OF HEALTH AND DISABILITY IN FAT DISCRIMINATION LITIGATION

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Fat discrimination is rampant in education, health care, and employment. Anti-obesity activists claim that it is not only acceptable, but actually desirable to stigmatize fat bodies because this stigmatization shames fat people into better health. In response, the fat acceptance movement turned to science to show that fat bodies can be healthy. As part of this movement, legislative advocacy and litigation strategies have utilized the argument that fat discrimination should not be permitted because fat people can be healthy. I argue that this move undermines the true justice that the fat acceptance community seeks. In the quest towards the fat acceptance movement's ultimate goal of acceptance for all fat bodies, the movement must demand dignity and respect for all bodies, including fat bodies that are unhealthy. In this Note, I will discuss the theoretical problems inherent in the two most frequent arguments employed by fat able-bodied plaintiffs: that they are healthy in comparison with unhealthy or disabled people, and, alternatively, that they are disabled. In addition to being theoretically problematic, as a practical matter, fat discrimination challenges using claims based on the good health and able bodies of fat persons have been mostly unsuccessful. On the other hand, some contemporaneous fat plaintiffs have won cases in which they claimed that fatness is a disability. I argue that fat plaintiffs who use disability claims must work in solidarity with the disability rights movement, which demands respect, self-determination, and access for disabled people. If they do not, fat plaintiffs risk creating precedent that will make it harder for disabled people to prove their own discrimination claims and perpetuating stereotypes about disabled people. In all cases, as an anti-oppression movement within a broader social justice framework, the fat acceptance movement must work in solidarity with the disability justice movement rather than undermining the legal protections disabled people have won.

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INTRODUCTION

The fat acceptance movement seeks to end the discrimination, stigma, and shame based on fatness. In response to fat acceptance, anti-obesity activists have claimed that discrimination against fat bodies is desirable because it shames people into better health.¹ In response, the fat acceptance movement turned to science to show that fat bodies can be healthy. Fat antidiscrimination litigators and legislative advocates have argued that fat people deserve protection against discrimination because they can be healthy.² Unfortunately, that response moved away from policies that demand respect for all bodies

¹ See *infra* notes 43–45 and accompanying text.

² See, e.g., *infra* notes 68–73, 149 (describing activists’ use of health-based arguments as well as one fat plaintiff’s use of her health and able body to support her antidiscrimination case).

and an end to discrimination, and instead claimed that because fat bodies can be healthy, they should not automatically face discrimination.³ As I will demonstrate, this move undermines the true justice that the fat acceptance community seeks: acceptance for all fat bodies. Discrimination is harmful and unacceptable regardless of a person's health. The fat acceptance movement should fight for respect for and celebration of all bodies, whether healthy or not. Instead, the fat acceptance movement has chosen to differentiate between fat people and disabled people by claiming that fat people deserve dignity because they are healthy, in an attempt to distinguish themselves from unhealthy people and/or disabled people. This discourse is hurtful to a segment of fat people who are not or who some day will not be healthy, as well as to an allied social justice movement, the disability justice movement.

My analysis focuses on how arguments about health, disability, and fat are used through the lens of employment discrimination cases.⁴ There are two primary ways to bring challenges to weight-based employment discrimination: through state statutes explicitly prohibiting discrimination based on weight, and through the Americans with Disabilities Act, which prohibits discrimination based on disability.⁵ In this Note, I will discuss the theoretical problems inherent in the two most frequent arguments employed by fat able-bodied plaintiffs: that they are healthy in comparison with unhealthy or disabled people, and, alternatively, that they are disabled. In addition to being theoretically problematic, as a practical matter, fat discrimination challenges using claims based on the good health and able body of the fat person have been mostly unsuccessful. On the other hand, some contemporaneous fat plaintiffs have won cases where they claimed that fatness is a disability. I argue that fat plaintiffs who use disability claims must work in solidarity with the disability rights movement, which demands respect, self-determination, and access for disabled people. If they do not, fat plaintiffs risk creating precedent that will make it harder for disabled people to prove their own discrimination claims and perpetuating stereotypes about disabled people.

The fat acceptance movement must work to avoid the historic pitfall of many social justice movements, namely, that in seeking to end discrimination for an identity group, the movements have either

³ *Id.*

⁴ The critiques I provide can be applied to areas beyond the scope of this Note, including other areas where decisions are made based on health or where able-bodied people use disability claims.

⁵ See *infra* Part II (discussing legal protections).

ignored or actively undermined factions of their own movement or other groups of people who seek similar relief. For example, Barney Frank, an openly gay Congressman, with the support of the Human Rights Campaign (HRC), introduced a version of the Employment Non-Discrimination Act (ENDA) that protects lesbian, gay, and bisexual people, but not transgender people, because he believed it was more likely to pass.⁶ The transgender rights movement has rejected the possibility of using disability rights to gain access to care because they do not want to be seen as disabled, implicitly casting a negative light on disabled people.⁷ The civil rights movement fought for the end to race discrimination but received a theory of colorblindness that strikes down affirmative action policies seeking to repair the damage done to communities of color.⁸ The frame that a movement invokes affects both what is viewed as a social problem as well as what course of action those seeking to mobilize for change should take.⁹ Therefore, the fat acceptance movement must be aware of how its arguments affect unhealthy and disabled people, both fat and thin.

One way for fat plaintiffs to frame their concern solely around fatness and thus avoid relying on arguments about health and/or disability that could marginalize unhealthy and/or disabled people is to advocate for more jurisdictions to pass antidiscrimination statutes that explicitly prohibit weight discrimination. Critical race theorists and

⁶ Paul Schindler, *HRC Alone in Eschewing No-compromise Stand*, GAY CITY NEWS (Oct. 4, 2007), http://www.thetaskforce.org/TF_in_news/07_1009/stories/22_hrc_alone.pdf (describing Frank and the Human Rights Campaign (HRC)'s support for a version of the Employment Non-Discrimination Act (ENDA) that only includes sexual orientation and the backlash from other LGBT organizations); see Press Release, National Gay and Lesbian Task Force, LGBT Community Refuses To Abandon Transgender Inclusion in ENDA (Sept. 27, 2007), available at http://www.thetaskforce.org/press/releases/prENDA_092707 (letter from twelve national LGBT organizations proclaiming support for transgender inclusive ENDA); Marti Abernathey, *Transgender HRC Board Member Resigns*, THE BILERICO PROJECT (Oct. 3, 2007, 2:51 PM), http://www.bilerico.com/2007/10/transgender_hrc_board_member_resigns.php (quoting Donna Rose, a transgender board member of HRC who resigned to protest the HRC's position on the ENDA, "[p]eople in positions of power have decided that . . . the promise of political expediency [is] more important than protecting our entire beautiful community").

⁷ See Eli Clare, *Towards a Disability Politics of Transness*, in TRANSGENER JUSTICE: SELECTED PROCEEDINGS OF THE TRANSGENER POLITICS, SOCIAL CHANGE AND JUSTICE CONFERENCE 45 (Paisley Currah et al. eds., 2007) (explaining the history of the transgender rights movement), available at <http://web.gc.cuny.edu/clags/downloads/publications/TransProceedings.pdf>.

⁸ See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997) (analyzing social organizing and the resulting legal consequences).

⁹ See Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests over Obesity*, 30 J. HEALTH POL. POL'Y & L. 869, 873–74 (2005) (describing the consequences of framing).

critical trans theorists have criticized antidiscrimination statutes as unable to provide meaningful protection against discrimination.¹⁰ While those critiques are true for weight antidiscrimination statutes as well, such targeted statutes are the best option when working within an antidiscrimination framework because they allow plaintiffs to avoid arguments based on health or disability.

Part I explains mainstream attitudes about fatness, the harm and discrimination that results from those attitudes, and the fat acceptance movement that formed in response. Then, it discusses the disability rights movement, its theories of bodies, and its activism that resulted in the Americans with Disabilities Act. Part II turns to fat discrimination cases, focusing on disability cases, and highlights how both plaintiffs and courts portray fatness, disability, and health, and how these concepts intersect and diverge. Through these cases, I explore how fat plaintiffs rely on concepts of health and disability to further their legal arguments, at times to the detriment of unhealthy or disabled people. Part III discusses the legal and theoretical problems with the fat movement's and courts' discussions of health, disability, and fatness. I argue that the health framework—the argument that fat people are deserving of antidiscrimination protection because they are healthy—is harmful to the fat acceptance movement and the disability justice movement because it marginalizes unhealthy and disabled people. Next, I consider whether and how fat plaintiffs should, in the alternative, argue that they are disabled. I conclude that because fatness is not equivalent to disability, fat plaintiffs must ensure not to replicate stereotypes about disabled people that will hurt both movements. My analysis is meant for the fat acceptance movement and its lawyers who seek social justice through the law, but tries to account for the practical limitations that plaintiffs' lawyers face in winning cases for their clients. Finally, I argue that state statutes that prohibit discrimination based on weight may be the most theoretically coherent means for fat plaintiffs to win employment discrimination cases within an anti-discrimination framework because they do not require a plaintiff to use arguments about disability or health. At the same time, I discuss critical race theory and critical trans theory critiques of antidiscrimination statutes and their inability to provide meaningful protection for oppressed groups.

¹⁰ See *infra* Part III.C (discussing critiques of antidiscrimination laws, and emphasizing that such laws, by requiring proof of an individual actor's intentional discrimination, do not provide meaningful protection).

I

THE FRAMING OF FAT: NARRATIVES OF HEALTH AND
DISABILITY IN FAT DISCRIMINATION LITIGATIONA. *Fat*1. *Mainstream Attitudes Towards Fatness*

In American society, it is commonly accepted that a raging “obesity epidemic” threatens the health of our citizens and exacerbates America’s slothful reputation.¹¹ Fat is considered unattractive; magazines and advertisements instruct readers on how to achieve beauty by slimming down or hiding weight with clothes.¹² In popular culture, fat characters are typically portrayed to possess negative personality traits, lack friends, and serve as a frequent target of ridicule.¹³ Moreover, fat people are widely portrayed as unhealthy,¹⁴ both because they do not eat well or exercise and because obesity is tied to many medical conditions.¹⁵ Society encourages fat people to lose

¹¹ See, e.g., *The Obesity Epidemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 22, 2011), www.cdc.gov/CDCTV/ObesityEpidemic/ (“Approximately one in three adults and one in six children are obese. Obesity is epidemic in the United States today”); Jeffrey Kreisberg, *Why Our Nation’s Obesity Epidemic Will Not Be Curbed by Individual Willpower Alone*, CULTURE MAP AUSTIN (May 19, 2012, 11:01 AM), <http://austin.culturemap.com/newsdetail/05-19-12-15-58-our-nations-obesity-problem/> (discussing the obesity epidemic, its impact on health, and willpower’s ineffectiveness at responding to it).

¹² See, e.g., Bruce Blaine & Jennifer McElroy, *Selling Stereotypes: Weight Loss Infomercials, Sexism, and Weightism*, 46 SEX ROLES 351, 355 (2002) (analyzing weight loss advertisements and finding that they portray fat women as unattractive); Annie Daly, *The Five New Ways To Lose Weight*, COSMOPOLITAN, <http://www.cosmopolitan.com/advice/health/new-ways-to-lose-weight-with-technology-apps> (last visited Aug. 26, 2012) (giving examples of ways to lose weight).

¹³ See Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941, 951 (2009) (surveying content analyses of television shows and movies for depictions of fat people and finding frequent ridicule and negative characteristics). Another archetype is the cheerful fat friend who is “everyone’s best friend and no one’s girlfriend.” Beth Bernstein & Matilda St. John, *The Roseanne Benedict Arnolds: How Fat Women Are Betrayed by Their Celebrity Icons*, in THE FAT STUDIES READER 268 (Esther Rothblum & Sondra Solovay eds., 2009).

¹⁴ See *Overweight and Obesity: Causes and Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 27, 2012), <http://www.cdc.gov/obesity/adult/causes/index.html> (listing the health consequences of obesity); *What Are Overweight and Obesity?*, NAT’L HEART, LUNG & BLOOD INST. (Nov. 1, 2010), <http://www.nhlbi.nih.gov/health/health-topics/topics/obe/> (explaining that the more weight a person has, the more at risk they are of suffering from a list of medical conditions).

¹⁵ See, e.g., Judith Graham, *Obesity Fight Needs Ambitious Campaign, Health Leaders Say*, USA TODAY (May 4, 2012), <http://www.usatoday.com/news/health/story/2012-05-05/childhood-obesity-tobacco/54745872/1> (describing a connection between obesity and various diseases); Val Willingham, *Clinton: U.S. Risks ‘Collapse’ Without Obesity Solution*, CNN.COM (Jan. 9, 2008, 4:21 PM), <http://www.cnn.com/2007/HEALTH/diet.fitness/11/15/>

weight. The \$60.9 billion dollar weight-loss industry¹⁶ touts the message that weight loss is achievable with self-control and effort.¹⁷ A common narrative states that fat people are to blame for their situation: Because obesity is controllable and voluntary,¹⁸ fat people must be lazy, sloppy,¹⁹ and lack self-control.²⁰ In summary, mainstream American society views fat bodies as ugly, unacceptable, and evidence of “preventable illness and moral failings,”²¹ and seeks to encourage fat people to change their lifestyles, lose weight, and become healthy.

2. Mainstream Attitudes About Fatness Are Harmful

Mainstream society perceives its view of fat as a positive influence that seeks healthier lives for fat people and an end to the

fit.summit/index.html#cnnSTCText (noting that obesity brings many health problems, that people must eat better and exercise, but that they do not care enough to do so).

¹⁶ John LaRosa, *U.S. Weight Loss Market Worth \$60.9 Billion*, PRWEB.COM (May 9, 2011), <http://www.prweb.com/releases/2011/5/prweb8393658.htm>.

¹⁷ See A. B. Geier, M. B. Schwartz & K. D. Brownell, “*Before and After*” *Diet Advertisements Escalate Weight Stigma*, 8 *EAT WEIGHT DISORDER* 282, 286 (2003) (discussing how weight loss advertisements increase the belief that weight loss is possible and, accordingly, that excess weight is a personal failing); Puhl & Heuer, *supra* note 13, at 951 (discussing weight loss advertising as portraying weight loss as simple and achievable); Elizabeth Leonard, *Kirstie Alley’s New Life 100 Lbs. Lighter!*, PEOPLE (Sept. 21, 2011), <http://www.people.com/people/article/0,,20530210,00.html> (featuring pictures documenting the actress’s 100-pound weight loss and quoting her that “[t]here was nothing positive about being fat”); *Success Stories*, WEIGHT WATCHERS, <http://www.weightwatchers.com/success/index.aspx> (last visited Aug. 26, 2012) (displaying personal stories of individuals who lost weight using Weight Watchers, a diet program); Tiffany Tse, *7 Women Who Kept Their Weight-Loss Resolutions*, SHAPE.COM, www.shape.com/print/15206 (last visited Aug. 26, 2012) (portraying weight loss stories as permanent and successful).

¹⁸ See Kathleen Parker, Opinion, *Health Reform and Obesity: Eat, Drink and Watch Out*, WASH. POST, May 20, 2011, at A19 (arguing that the solution to obesity is “more personal responsibility”); see also Maura Kelly, *Should “Fatties” Get a Room? (Even on TV?)*, MARIE CLAIRE (Oct. 25, 2010, 9:00 AM), <http://www.marieclaire.com/sex-love/dating-blog/overweight-couples-on-television> (discussing obesity as something that people have control over and can change “if only they put their minds to it”).

¹⁹ Puhl & Heuer, *supra* note 13, at 941 (summarizing studies that find that fat people are perceived as “lazy, unmotivated, lacking in self-discipline, less competent, non-compliant, and sloppy”); *Hidden Costs of Obesity Bring Yearly Total to \$73 Billion*, FOX NEWS (Oct. 8, 2010), <http://www.foxnews.com/health/2010/10/08/hidden-costs-obesity-bring-yearly-total-billion/#ixzz1pRhA11xe> (stating that obese employees are less productive).

²⁰ See *Bad Eating Habits to Blame for Obesity in Puerto Rico*, FOXNEWS (Apr. 19, 2011), <http://latino.foxnews.com/latino/health/2011/04/19/bad-eating-habits-blame-obesity-puerto-rico/#ixzz1pRgXNfpn> (discussing cause of obesity as a sedentary lifestyle, eating fast food, and not exercising); Marilisa Kinney Sachteleben, *Qnexa Anti-obesity Drug a Poor Substitute for Diet, Exercise*, YAHOO NEWS! (Feb. 26, 2012), <http://news.yahoo.com/qnexa-anti-obesity-drug-poor-substitute-diet-exercise-162300500.html> (citing lack of portion control as a cause of obesity).

²¹ See Saguy & Riley, *supra* note 9, at 885 (discussing the common framing of obesity as a result of risky behavior).

“obesity epidemic.” Yet these stereotypes cause identifiable harm in the lives of fat people. People generally do not realize that the harms resulting from this narrative are real, in part because of dominant stereotypes and in part because of a belief that the mainstream attitude is altruistic and helps fat people. However, although the asserted purpose of many negative conceptions of fat is to improve health, stigmatization leads to poor treatment of fat people.

Stigmatization pervades almost every aspect of a fat person’s life. Children who are classified as “obese”²² are sixty percent more likely to be bullied.²³ The combination of bullying and the stereotypes that teachers hold about fat people²⁴ has serious effects on fat students’ rates of higher education and career paths. Fat students receive lower grades, are denied letters of recommendation, and are regarded as possessing fewer leadership abilities than thin students.²⁵ Girls classified as “obese” are less likely to attend college than “non-obese” female students.²⁶

Fat adults make considerably less money than their thin counterparts.²⁷ In employment, discrimination is present not only in pay, but also in hiring, promotions, and terminations.²⁸ These differences are likely due to employers’ views of fat people as disagreeable, less emotionally stable, less self-disciplined, less extroverted, and less

²² “Obese” and “obesity” are terms created by the medical establishment to describe people who have a body-mass index (BMI) over a certain number. I reject both the medicalization of fat bodies and the use of the BMI as an accurate signifier.

²³ Julie C. Lumeng et al., *Weight Status as a Predictor of Being Bullied in Third Through Sixth Grades*, 125 *PEDIATRICS* 1301, 1302 (2010) (reaching this conclusion while controlling for race, class, social skills, grades, and percentage of fat children at the school).

²⁴ See Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 *OBESITY RES.* 788, 797 (2001) (surveying studies showing that teachers believe stereotypes about fat students, including one that found that twenty-eight percent of teachers believed that obesity was the worst thing that could happen to a person).

²⁵ SONDRA SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 56 (2000).

²⁶ Robert Crosnoe, *Gender, Obesity, and Education*, 80 *SOC. EDUC.* 241, 251 (2007) (reaching this conclusion while controlling for race, class, family structure, parental education, school type, academic ability, and social relationships).

²⁷ Timothy A. Judge & Daniel M. Cable, *When It Comes to Pay, Do the Thin Win? The Effect of Weight on Pay for Men and Women*, 96 *J. APPLIED PSYCHOL.* 95, 105–09 (2011) (controlling for race, class, age, education, self-esteem, and other confounding factors, and finding that, for American women, a gain of twenty-five pounds produces an average predicted decrease in salary of \$15,572 per year).

²⁸ Mark V. Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 *PERSONNEL PSYCHOL.* 969, 982 (1999) (reviewing studies and finding evidence of discrimination across stages of employment).

competent than thin people.²⁹ One study found that weight alone explained 34.6% of variance in hiring decisions.³⁰

Holistically, the presence of stigma and discrimination puts great stress on a fat person's emotional, mental, and physical health.³¹ Emerging research supports a link between fat stigma and depression and other mood and anxiety disorders.³² Not surprisingly, increased frequency of fat stigma is linked to a decline in self-esteem and body image satisfaction.³³

This discrimination has different, and perhaps more serious, effects on people who are burdened not only by fat discrimination but also by other forms of oppression. It is important to look to those who are burdened by multiple oppressions to fully understand how discrimination functions for different people.³⁴ For example, women experience weight discrimination differently—arguably more severely—than men do.³⁵ Fatness also intersects with class, race, and

²⁹ *Id.* at 983–84 (compiling the results of several methodologically sound studies and finding that “[t]he consistency with which evidence of weight-based inferences is found in studies . . . suggests that there are widely held, negative stereotypical views about the overweight”).

³⁰ Regina Pingitore et al., *Bias Against Overweight Job Applicants in a Simulated Employment Interview*, 79 J. APPLIED PSYCHOL. 909, 912 (1994) (using the same actor appearing as normal weight or made up to be overweight to control for confounding factors and finding weight discrimination).

³¹ Janet L. Dolgin & Katherine R. Dieterich, *Weighing Status: Obesity, Class, and Health Reform*, 89 OR. L. REV. 1113, 1164 (2011) (“[O]ne of the major health risks of being obese in the United States is the stigmatization of obesity itself.”).

³² See Rebecca M. Puhl & Janet D. Latner, *Stigma, Obesity, and the Health of the Nation's Children*, 133 PSYCHOL. BULLETIN 557, 567–71 (2007) (surveying recent research on weight stigma against children and adolescents, as well as negative psychosocial and physical health consequences of this stigma).

³³ See Puhl & Heuer, *supra* note 13, at 954.

³⁴ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (“[A] focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination.”).

³⁵ For example, women make less money with every pound of weight increased from being “very thin.” Judge & Cable, *supra* note 27, at 108–09. Men, however, make more money as they increase weight from “thin,” up until “obesity.” *Id.* at 109. This may be because women are held to more rigorous standards of beauty that result in thin as the only acceptable body size, while men can be larger and remain well within normative beauty ideals. See S. Bear Bergman, *Part Time Fatso*, in THE FAT STUDIES READER, *supra* note 13, at 139, 139 (explaining that, as a transgender man, the author experiences being perceived as fat only when his viewer sees him as female); Hannele Harjunen, *Exploring Obesity Through the Social Model of Disability*, in GENDER AND DISABILITY RESEARCH IN THE NORDIC COUNTRIES (Kristjana Kristiansen & Rannveig Traustadóttir eds., 2004) (discussing the intersection of weight discrimination and standards of beauty); Christy M. Glass et al., *Heavy in School, Burdened for Life*, N.Y. TIMES, June 3, 2011, at A23 (explaining that studies have found that female, but not male, attractiveness is judged primarily based on body size).

disability. Higher weights are associated with lower class in wealthy societies,³⁶ and Mexican-American and Black women are more likely to be fat.³⁷ Because poor people and people of color already face severe oppression, some scholars theorize that blame for fatness is a tool to enforce social inequalities³⁸ and to reject the responsibility of providing aid.³⁹ Finally, fat disabled people experience discrimination at the complex intersection of fat and disability; for example, they face particular stigmas regarding the causal relationship between disability and fat.⁴⁰

Despite the harm and the prevalence, some justify fat discrimination. Fat is viewed as a negative and controllable condition.⁴¹ Stigmatization is claimed to be good because it encourages people to lose weight.⁴² People who defend the stigma focus on health in particular.⁴³ Health provides an acceptable logical backing for the normative judgment that fat is bad. One anti-obesity activist exemplified this

³⁶ Saguy & Riley, *supra* note 9, at 871.

³⁷ *Id.*; see also ANDREA ELIZABETH SHAW, *THE EMBODIMENT OF DISOBEDIENCE: FAT BLACK WOMEN'S UNRULY POLITICAL BODIES* (2006) (discussing the oppression and experience of fat black women, who are at the intersection of gender, weight, and class discriminations); Jamilah Lemieux, *Your Blackness Ain't Like Mine*, *EBONY* (May 7, 2012), <http://www.ebony.com/news-views/your-blackness-aint-like-mine> (discussing the complex relationship between race and fat).

³⁸ See Saguy & Riley, *supra* note 9, at 871 (explaining that because poor people and people of color are more likely to be fat, blaming fat people for their weight becomes a tool to justify class- and race-based oppression).

³⁹ See *id.* at 887 (explaining that placing responsibility for illness on an individual "allows one to blame them for their misfortune").

⁴⁰ See S. E. Smith, *Further Conversations on Body Image: Examining Health at Every Size (HAES)*, *DISABLED FEMINISTS* (Oct. 11, 2010), <http://disabledfeminists.com/2010/10/11/further-conversations-on-body-image-examining-health-at-every-size-haes/> (discussing how people who cannot or do not want to exercise because of disability are stigmatized as lazy fat people); *How Can Fatties Be at Peace in this World if/when We Be at Peace on the Backs of Other Fatties?*, *BUILDING RADICAL ACCESSIBLE COMMUNITIES* (Sept. 6, 2010), <http://buildingradicalaccessiblecommunities.blogspot.com/2010/09/how-can-fatties-be-at-peace-in-this.html> (discussing personal experiences as a disabled person where everything that went wrong with his body was blamed on his weight).

⁴¹ See *supra* notes 16–21 (summarizing common wisdom that suggests fat people can lose weight if they try hard enough).

⁴² See *id.* Others claim concern about fat stigma but argue that the solution is to eliminate fat people through diets and stomach amputations. Lucy Wang, Note, *Weight Discrimination: One Size Fits All Remedy?*, 117 *YALE L.J.* 1900, 1935 (2008) (arguing that weight discrimination can be solved through increased insurance coverage for "obesity treatments"). However, "[t]here is no nice, unstigmatizing way to wish that fat people did not eat or exist." Marilyn Wann, *Foreword* to *THE FAT STUDIES READER*, *supra* note 13, at ix, xvii.

⁴³ See, e.g., Adam R. Pulver, *An Imperfect Fit: Obesity, Public Health, and Disability Antidiscrimination Law*, 41 *COLUM. J.L. & SOC. PROBS.* 365, 405 (2008) (arguing against antidiscrimination successes based on weight because "[e]liminating discrimination gets rid of a 'cost' of obesity" and therefore promotes health); Saguy & Riley, *supra* note 9, at 885 (explaining the use of health as a justification for fat stigma).

argument when he said: “[Fat discrimination is] a helpful and healthful prejudice for society to have.”⁴⁴ Promoting health provides an easy excuse for fat stigma, masking underlying prejudice.⁴⁵

3. *The Fat Acceptance Movement and Its Responses*

In response to the stigmatization of fatness, the fat acceptance movement began as an attempt to subvert societal perceptions of fat and end discrimination against fat people. The fat acceptance movement in its current form began in the late 1960s. The National Association to Advance Fat Acceptance (NAAFA), a national civil rights organization that seeks to end size discrimination, was founded in 1969 and continues to play a major role in U.S. fat activism.⁴⁶ In 1973, a group of fat women with radical politics founded The Fat Underground, which demanded respect for fat people⁴⁷ and challenged attempts by the diet industry and medical profession to eliminate fat people.⁴⁸ The fat acceptance movement has grown and expanded since then.⁴⁹ The movement is extremely active on the internet, including academics listservs, blogs, and online forums.⁵⁰ Fat acceptance advocates work from many disciplines: Doctors, scientists, and

⁴⁴ Saguy & Riley, *supra* note 9, at 885.

⁴⁵ For a discussion of how “health” is used to mask prejudice, see Jonathan M. Metzler, *Introduction, Why Against Health?* to *AGAINST HEALTH: HOW HEALTH BECAME THE NEW MORALITY* 2–4 (Jonathan M. Metzler & Anna Kirkland eds., 2010), suggesting that “health” provides a façade for sizeism.

⁴⁶ See Sondra Solovay & Esther Rothblum, *Introduction* to *THE FAT STUDIES READER*, *supra* note 13, at 1, 4 (discussing the founding of the organization); National Association to Advance Fat Acceptance (NAAFA), <http://www.naafa.org/> (last visited Mar. 14, 2012) (summarizing NAAFA’s mission).

⁴⁷ Judy Freespirit & Aldebaran, *Fat Liberation Manifesto, November 1973*, in *THE FAT STUDIES READER*, *supra* note 13, at 341, 341–42 (“W[e] believe that fat people are fully entitled to human respect and recognition.”).

⁴⁸ *Id.*; see Solovay & Rothblum, *supra* note 46, at 4 (describing the founding and work of the Fat Underground).

⁴⁹ See Charlotte Cooper, *A Queer and Trans Fat Activist Timeline* (Apr. 2011), http://www.charlottecooper.net/downloads/timelinezine/cooper_queertransfatactivisttimeline_zine_0411.pdf (providing a timeline of fat activism, with a focus on queer and transgender fat activists, from 1967 to 2010).

⁵⁰ See, e.g., FATSHIONISTA, <http://fatshionista.livejournal.com/profile> (last visited Aug. 26, 2012) (“[F]atshionista was founded and is maintained by people with a size-positive activist mindset, and was originally envisioned as a place to discuss the intersections of fat politics and fat fashion.”); *Fat Studies*, YAHOO!GROUPS, <http://groups.yahoo.com/group/fatstudies/> (last visited Aug. 26, 2012) (describing its mission, since being founded in 2004, as “a discussion forum for people engaged in academic work on this topic and for people who seek to create social change around weight oppression”); Marianne Kirby, *THE ROTUND*, <http://www.therotund.com/> (last visited Aug. 26, 2012); Margitte Leah, *MARGITTELEAH.COM*, <http://margittleah.com/> (last visited Aug. 26, 2012); Tiffany Tucker, *FAT SHOPAHOLIC*, <http://www.fatshopaholic.com/> (last visited Aug. 26, 2012).

psychologists have studied the ineffectiveness of dieting,⁵¹ the effect of fat discrimination on the body and mind,⁵² and the correlation between health and fat.⁵³ Lawyers have brought fat discrimination cases in an attempt to create social change through the legal system.⁵⁴ Activists and community organizers have created communities, coordinated protests,⁵⁵ organized conferences,⁵⁶ and challenged mainstream perceptions of fat.⁵⁷

The fat acceptance movement has theorized several frameworks to argue for an end to fat discrimination. One view frames fatness as part of the diversity of bodies.⁵⁸ Marilyn Wann, a well-known fat activist, argues “people are supposed to come in all sizes, so it’s not okay to mistreat the fat ones.”⁵⁹ Some use health and biology research to strengthen this argument by asserting that because research shows that fat people cannot become thin, fatness must be one aspect of natural human diversity.⁶⁰ However, it is not necessary to require or believe that body diversity has a scientific basis. Fat

⁵¹ See Belinda Goldsmith, *Dieters Put on Weight in the Long Run: A Study*, REUTERS (Apr. 2, 2007), <http://www.reuters.com/article/2007/04/02/us-dieting-idUSN3036700020070402?pageNumber=1> (discussing a study that found that diets are unsuccessful).

⁵² See *supra* Part I.A.2 (discussing discrimination and its effects).

⁵³ See *infra* notes 61–73 and accompanying text (describing the Health At Every Size movement).

⁵⁴ See *infra* Part II (describing litigation occurring at the intersection of the fat acceptance and disability rights movements, in which fat plaintiffs argue that they deserve protection from discrimination either because they are healthy and able-bodied or because they are disabled by their fatness).

⁵⁵ See, e.g., John M. Glionna, *S.F. Again on Cutting Edge with Bid to Ban Weight Bias*, L.A. TIMES, May 14, 2000, at A32 (describing protests leading to a San Francisco ordinance protecting against fat discrimination); Erin Browner, *S.F. Fat Activists Oppose Atlanta’s Anti-obesity Campaign*, SF WEEKLY (Feb. 3, 2012, 12:05 PM), http://blogs.sfweekly.com/exhibitionist/2012/02/fat_activists_chew_out_atlanta.php (describing a fat activist campaign against discriminatory billboards).

⁵⁶ See, e.g., NAAFA, *supra* note 46 (advertising yearly conference for NAAFA, a national civil rights organization working against sizeism); NOLOSE, <http://www.nolose.org/> (last visited Sept. 1, 2012) (advertising yearly conference on fat acceptance for queers and their allies).

⁵⁷ See, e.g., ADIPOSITIVITY, <http://adipositivity.com/> (last visited Sept. 1, 2012) (“The Adipositivity Project aims to promote size acceptance, not by listing the merits of big people, or detailing examples of excellence (these things are easily seen all around us), but rather, through a visual display of fat physicality.”).

⁵⁸ Many fat activists have used this argument. See, e.g., Marianne Kirby, *Response to a Specific Comment; In Which I Continue To Be Ranty*, THE ROTUND (Aug. 10, 2011), <http://www.therotund.com/?p=1221> (discussing fat acceptance as accepting fat bodies); *About Us*, NAAFA (last visited Aug. 26, 2012), <http://www.naafaonline.com/dev2/about/index.html> (“We Come in All Sizes. . . . Understand it. Support it. Accept it.”).

⁵⁹ MARILYN WANN, *FAT! SO? BECAUSE YOU DON’T HAVE TO APOLOGIZE FOR YOUR SIZE* 12 (1998).

⁶⁰ See Saguy & Riley, *supra* note 9, at 883 (explaining arguments made by several researchers and fat activists).

bodies are simply different, diverse bodies of people who should be accepted, not stigmatized.

The Health At Every Size® (HAES) movement argues that fat is not unhealthy and that health is possible at every size.⁶¹ The HAES movement uses scientific research to prove this concept.⁶² Some studies found that health is impacted not by weight, but instead by poor nutrition and sedentary lifestyles.⁶³ Furthermore, people have long-lasting positive health results when they enhance their nutrition and level of activity instead of attempting to lose weight.⁶⁴ Other studies show that it is unclear whether health is negatively impacted by weight.⁶⁵ Dieting, especially weight cycling, has been found to be unhealthy.⁶⁶ Using these findings, the HAES approach

⁶¹ Health At Every Size and HAES are registered trademarks of the Association for Size Diversity and Health and used with permission. See LINDA BACON, *HEALTH AT EVERY SIZE: THE SURPRISING TRUTH ABOUT YOUR WEIGHT* (2008); see also Deb Burgard, *What is "Health at Every Size,"* in *THE FAT STUDIES READER*, *supra* note 13, at 41, 41 (describing HAES and its relationship to fat acceptance). The term Health At Every Size (HAES) was propelled into the fat acceptance discourse by Linda Bacon's book, although the argument has been used since at least the 1970s. Freespirit & Aldebaran, *supra* note 47, at 341 ("W[e] repudiate the mystified 'science' which falsely claims that we are unfit.").

⁶² See BACON, *supra* note 61 (surveying studies finding that people can be healthy at every size).

⁶³ See *id.*

⁶⁴ HEALTH AT EVERY SIZE FACT SHEET, ASS'N FOR SIZE DIVERSITY AND HEALTH (Oct. 20, 2011), <http://www.sizediversityandhealth.org/images/uploaded/HAES%20FACT%20SHEET%20R%2010.20.pdf> (discussing studies that found that people who follow HAES principles sustained long term health improvements).

⁶⁵ See Jerome P. Kassirer & Marcia Angell, *Losing Weight—An Ill-Fated New Year's Resolution*, 338 *NEW ENG. J. MED.* 52 (1998) (reviewing studies on weight and health and finding disagreement); June Stevens et al., *The Effect of Age on the Association Between Body-Mass Index and Mortality*, 338 *NEW ENG. J. MED.* 1 (1998). Legal scholars have used these studies to argue against public health regulation to combat obesity. See, e.g., Richard A. Epstein, *What (Not) To Do About Obesity: A Moderate Aristotelian Answer*, 93 *GEO. L.J.* 1361 (2005) (arguing that scientific evidence concerning the relationship among diet, obesity, and health is not persuasive enough to overcome a presumption against government intervention).

⁶⁶ See Linda Bacon & Lucy Aphramor, *Weight Science: Evaluating the Evidence for a Paradigm Shift*, 10 *NUTRITION J.*, no. 9, 2011, at 1 (finding that while dieting induces short term weight loss, most people are unable to maintain the weight loss, and that dieting causes "food and body preoccupation, repeated cycles of weight loss and regain, distraction from other personal health goals and wider health determinants, reduced self-esteem, eating disorders, other health decrement, and weight stigmatization and discrimination"); Kassirer & Angell, *supra* note 65, at 52 ("We simply do not know whether a person who loses 20 lbs will thereby acquire the same reduced risk as a person who started out 20 lbs lighter. The few studies of mortality among people who voluntarily lost weight produced inconsistent results; some even suggested that weight loss increased mortality."); Goldsmith, *supra* note 51 (quoting obesity researchers saying that most people would be better off not dieting because of the "wear and tear" of losing and then regaining weight).

argues that ealth should be considered through a weight-neutral lens.⁶⁷

Many modern fat acceptance books⁶⁸ and blogs⁶⁹ use the HAES theory as a central part of their arguments against fat discrimination.⁷⁰ The HAES approach—and the manner in which the fat acceptance community employs the HAES principles—is a direct response to the anti-obesity argument that stigma and discrimination are acceptable because they shame fat people into becoming healthy.⁷¹ Furthermore, the HAES theory provides proof for the argument that fat is neither mutable nor a choice, as research shows that people who do lose weight through dieting are almost always unable to maintain weight loss.⁷² Fat-as-healthy also distances fat from disability—at times explicitly identifying disability as stigmatizing—which negatively impacts fat disabled people, the disabled community, and the disability rights movement.⁷³

⁶⁷ See Bacon & Aphramor, *supra* note 66, at 9 (explaining how health can be understood using a weight-neutral paradigm).

⁶⁸ See, e.g., WANN, *supra* note 59, at 35; Deb Burgard, *What Is “Health at Every Size”?*, in *THE FAT STUDIES READER*, *supra* note 13, at 42, 42 (describing HAES and its relationship to fat acceptance).

⁶⁹ See, e.g., Kate Harding, *Don’t You Realize Fat Is Unhealthy?*, SHAPELY PROSE, <http://kateharding.net/faq/but-dont-you-realize-fat-is-unhealthy/> (last visited Aug. 13, 2012) (setting out an explanation of HAES and providing links to scientific studies, as part of an argument for fat acceptance); Frances Lockie, “Aren’t You Worried About Your Health?,” *COSMOPOLITAN* (Apr. 13, 2011), http://www.cosmopolitan.com.au/health-lifestyle/lifestyle/2011/4/%E2%80%99Caren%E2%80%99t-you-worried-about-your-health%E2%80%9D/#UInnFsXA_ng (describing a dialogue where a person who speaks against fat discrimination is confronted with “but what about your health?” to which the author responds with HAES); Michelle, *Health at Every Size: Choice or Coercion?*, *THE FAT NUTRITIONIST* (Apr. 20, 2006), <http://www.fatnutritionist.com/index.php/health-at-every-size-choice-or-coercion/> (describing the fat acceptance movement as dependent on HAES); *Acceptance Is Not ‘Giving Up,’* *SPLT MILK* (Aug. 24, 2010, 3:57 PM), <http://mymilkspilt.wordpress.com/2010/08/24/acceptance-is-not-giving-up/> (discussing the importance of health in the fat acceptance movement).

⁷⁰ Some commentators confine HAES to arguments over health. See *HEALTH AT EVERY SIZE FACT SHEET*, ASS’N FOR SIZE DIVERSITY AND HEALTH (Oct. 20, 2011), <http://www.sizediversityandhealth.org/images/uploaded/HAES%20FACT%20SHEET%20R%2010.20.pdf> (confining arguments to public health). My analysis of HAES focuses on the argument against the stigmatization of fat people.

⁷¹ See Saguy & Riley, *supra* note 9, at 870–72 (analyzing frameworks that fat activists and anti-obesity activists use and how they relate to each other).

⁷² See *supra* notes 51, 66 (discussing studies on the maintenance of weight loss).

⁷³ See Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 *LAW & SOC’Y REV.* 397, 420 (2008) (describing interviews with several fat people who were “sharply negative about being considered disabled”); MARY JOHNSON, *MAKE THEM GO AWAY* 64 (2003) (noting that some fat activists viewed fat discrimination successes based on disability negatively because they required calling fat a disability); see also *infra* Part II.B.1 (discussing plaintiff Cassista’s assertion that she was healthy and her adamant denial of any disability).

B. Disability

1. Defining Disability (and Health)

Understanding the definitions of disability and health, and who defines them, is necessary to understanding how fatness intersects, overlaps, or diverges with those concepts and identities. Modern disability theory rests on the distinction between the “medical model” of disability and the “social model.”⁷⁴ The dominant conception of disability is the medical model, which considers disability “a personal problem, curable and/or treatable by the medical establishment.”⁷⁵ This view of disability “casts human variation as deviance from the norm, as pathological condition, as deficit, and, significantly, as an individual burden and personal tragedy.”⁷⁶ The medical model views the medical establishment as the expert on disability. It considers disability an individual problem, deflecting any analysis of the societal systems and structures that limit the lives of disabled people.⁷⁷

The disability rights movement instead prefers the “social model” of disability. While acknowledging that at times, medical involvement in the lives of disabled people is appropriate,⁷⁸ the social model calls for a move away from the individualization and medicalization of disability. Instead, the social model focuses on the ways that society creates disability by disadvantaging, limiting, and creating inaccessibility for disabled people.⁷⁹ The social model challenges classifications of “abnormal” and questions the “normal,” particularly as these refer to bodies.⁸⁰ Disability rights advocates argue that disabled people do not need pity.⁸¹ The primary goal of the disability rights movement is

⁷⁴ See ELI CLARE, *EXILE AND PRIDE: DISABILITY, QUEERNESS AND LIBERATION* 96 (2009) (describing and noting the dominance of the medical model); MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990) (describing the social model and contrasting it with the medical view of disability).

⁷⁵ CLARE, *supra* note 74, at 96.

⁷⁶ SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 11 (1998).

⁷⁷ *Id.* at 11 (criticizing the medical model for focusing on the personal at the expense of the societal).

⁷⁸ CLARE, *supra* note 74, at 96–97 (noting the benefits and costs of medical intervention in the lives of disabled people); LINTON, *supra* note 76, at 11.

⁷⁹ See OLIVER, *supra* note 74, at 11 (describing the social model). The social model focuses on the ways that disability is socially produced, thus “shifting debates about disability from biomedically dominated agendas to discourses about politics and citizenship.” Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 *DISABILITY & SOC.* 325, 325 (1997). While the social model has been the primary theoretical tool used by the disability rights movement, scholars have also expanded upon the social model. See *id.* (criticizing the social model for ignoring the body).

⁸⁰ LINTON, *supra* note 76, at 22–25.

⁸¹ CLARE, *supra* note 74, at 125, 127 (discussing the author’s experiences with pity as a limiting force); David, *Telethons and Pity (Repost)*, *GROWING UP WITH A DISABILITY*

to fight ableism,⁸² which refers to discrimination against disabled people, the domination of nondisabled experience and views, and the idea that “a person’s abilities or characteristics are determined by disability or that people with disabilities as a group are inferior to nondisabled people.”⁸³

The social model guides definitions of disability as created by the disability rights movement. Disability theorist Michael Oliver defined disability as “the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical [and/or cognitive/intellectual] impairments and thus excludes them from the mainstream of social activities,”⁸⁴ in contrast to impairment, which is defined as “lacking part of or all of a limb, or having a defective limb, organism or mechanism of the body.”⁸⁵ These definitions are based on the social model, whose definition of disability focuses on the barriers disabled people face as a result of how society is structured. In contrast, the medical model focuses on what is “wrong” with a body and how it can be “cured.”⁸⁶ Disability is also a culture, a community, and an identity.⁸⁷ Disability is an identity that encompasses people with “impairments, people with behavioral or anatomical characteristics marked as deviant, and people who have or are suspected of having conditions, such as AIDS or emotional illness that makes them targets of discrimination.”⁸⁸ It is a self-identification, but is based on a societal distinction marked by marginalization, discrimination, and devaluation.⁸⁹ People who do not

(Aug. 31, 2008), <http://growingupwithadisability.blogspot.com/2008/08/telethons-and-pity-repost.html> (laying out the problems with pity for disabled people).

⁸² See CLARE, *supra* note 74, at 122 (stating that the disability rights movement targets ableism as a system of oppression).

⁸³ LINTON, *supra* note 76, at 9.

⁸⁴ OLIVER, *supra* note 74, at 11 (quoting UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION, FUNDAMENTAL PRINCIPLES OF DISABILITY: BEING A SUMMARY OF THE DISCUSSION HELD ON 22ND NOVEMBER, 1975 AND CONTAINING COMMENTARIES FROM EACH ORGANISATION 14 (1976) [hereinafter UPIAS], available at <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf>).

⁸⁵ *Id.* (quoting UPIAS, *supra* note 84, at 14); see also CLARE, *supra* note 74, at 6–7 (discussing the author’s experiences with impairment and disability).

⁸⁶ Disability activist and writer Eli Clare argues that “[t]o neatly divide disability from impairment doesn’t feel right” because both “center on my body. . . . I decided that Oliver’s model of disability makes theoretical and political sense but misses important emotional realities.” CLARE, *supra* note 74, at 7–8.

⁸⁷ See LINTON, *supra* note 76, at 5 (discussing group identity among disabled people). “We are all bound together, not by this list of our collective symptoms but by the social and political circumstances that have forged us as a group.” *Id.* at 4.

⁸⁸ *Id.* at 12.

⁸⁹ See *id.* at 12–13 (describing the process of determining who “qualifies” as disabled).

share this oppression and identity are nondisabled, able-bodied, or temporarily able-bodied.⁹⁰

Disability as a concept and an identity overlaps, intersects, and connects with perceptions of health, healthiness, and unhealthiness. Healthy and unhealthy are difficult concepts to define and can mean many different things depending on the context and the person or institution doing the defining.⁹¹ Being “unhealthy” can refer to chronic illness,⁹² sickness, or to not eating well or not being in shape.⁹³ Fat people are sometimes labeled unhealthy because they are assumed to not eat healthily or exercise, and other times because they have an illness, like diabetes or heart disease, that is associated with weight. In the context of litigation, whether someone is unhealthy is ultimately defined by a court and not by the person being scrutinized.

Health, as described above, is different from disability. But the two are deeply intertwined, at times because they intersect, but more often because they are conflated in common discourse. Not all disabled people are unhealthy,⁹⁴ and not all unhealthy people fall into the definition of disability discussed above.⁹⁵ Disability and unhealthiness do intersect, and some disabled people are unhealthy: Some disability is caused by illness or unhealthiness, some illness or unhealthiness is caused by disability, and some illness or unhealthiness is unrelated to disability.⁹⁶ Chronic illness is one example of the intersection of disability and unhealthiness. Bodies with chronic illness are often viewed as unhealthy. At the same time, many people understand societal reaction to people with chronic illness as a form of disability, along with but distinct from physical, intellectual, sensory, or

⁹⁰ Temporarily able-bodied emphasizes that nondisabled people can and do become disabled during their lifetimes. See Michael Bérubé, *Foreword to SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY*, at vii, viii (1998).

⁹¹ Part of the reason that “health” is so difficult to succinctly and neatly define is because it changes frequently with society’s understanding of health and medicine. For a discussion of how the concept of health is culturally constructed and heavily influenced by public health and large industries, see generally *AGAINST HEALTH*, *supra* note 45.

⁹² SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 20–21 (1996) (discussing people with chronic illness as different from “healthy disabled” people).

⁹³ See, e.g., Rebecca Smith, *An Unhealthy Lifestyle Makes You ‘12 Years Older,’* TELEGRAPH (Apr. 27, 2010), <http://www.telegraph.co.uk/health/healthnews/7634178/An-unhealthy-lifestyle-makes-you-12-years-older.html> (listing poor diet and lack of exercise as factors of an unhealthy lifestyle).

⁹⁴ See, e.g., WENDELL, *supra* note 92, at 20 (describing disabilities that one could have and remain healthy, including blindness).

⁹⁵ See *supra* notes 84–90 and accompanying text (defining disability in part as a condition created by a society that fails to include people with impairments).

⁹⁶ See WENDELL, *supra* note 92, at 20 (describing the intersection of health, illness, and disability).

psychiatric disability.⁹⁷ Disabled people and unhealthy people sometimes face similar stigmatization and experiences. “Healthy” disabled people are pathologized and have treatments pushed on them.⁹⁸ Both disability and unhealthiness are stigmatized based on having a body that is “imperfect.”⁹⁹ Moreover, valuing health, or healthism, implicitly devalues disability and reinforces the “moral and ableist binary of the *good body* and the *bad body*.”¹⁰⁰ Even though unhealthiness and disability are different, they are commonly discussed interchangeably or as if they are always co-existent. Another common narrative about health and disability is that illness or poor health will lead to disability—using the perceived threat of becoming disabled and imperfect to coerce behavioral modifications. The relationship between health and disability is complex; it is further complicated by the way that society views and defines the two concepts. This complicated relationship links discourse that values health with ableism.

2. *The Disability Rights Movement and Organizing for the Americans with Disabilities Act*

The modern disability rights movement¹⁰¹ seeks access, deinstitutionalization, an end to discrimination, and a mainstream understanding of disability that no longer views disabled people as inferior to nondisabled people.¹⁰² Ed Roberts is often called the father of the disability rights movement because of his activism around accessibility and independence that began at University of California Berkeley in 1969 and grew into a national movement for Independent Living Centers.¹⁰³ Since then, disability activists have led protests calling for

⁹⁷ See *id.* at 20–21 (noting that chronic illness is not always disabling but that some people with chronic illness need accommodations and access, among other commonalities of disability).

⁹⁸ CLARE, *supra* note 74, at 97.

⁹⁹ See WENDELL, *supra* note 92, at 20 (discussing shared stigmatization based on having an “‘imperfect’ or devalued bod[y]”).

¹⁰⁰ Eunjung Kim, *How Much Sex Is Healthy?: The Pleasures of Asexuality*, in *AGAINST HEALTH*, *supra* note 45, at 157, 160 (discussing the implications for asexuality).

¹⁰¹ Like within any other identity group and any group that works for social justice with a focus on one type of oppression, within the disability community there are many views, analyses, and theories of social change.

¹⁰² See DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 48 (2011) (discussing the goals of the modern movement).

¹⁰³ CLARE, *supra* note 74, at 138–40 (discussing Roberts’s work and the activism that grew from his organizing). Note that 1969 was the year of the signing of NAAFA’s constitution, and that Berkeley was the birthplace of the Fat Underground a few years later. Cooper, *supra* note 49, at 18 (discussing the founding of the Fat Underground); NAAFA, <http://www.naafaonline.com/dev2/> (last visited Aug. 13, 2012) (discussing the signing of NAAFA’s constitution).

legal protections for disabled people,¹⁰⁴ founded many disability rights organizations,¹⁰⁵ and fought for accessible public transportation, personal attendant programs, and an end to nursing homes.¹⁰⁶

The passage of the Americans with Disabilities Act of 1990 (ADA)¹⁰⁷ is one of the disability rights movement's major successes. Because some fat people have sued under the ADA,¹⁰⁸ understanding it is critical. The ADA provides the primary antidiscrimination protection for disabled people. The 1990 law resulted from many years of work by disability activists, lawyers, lobbyists, and politicians.¹⁰⁹ In addition to key disabled advocates who served on commissions whose work led to the ADA's passage,¹¹⁰ the disability community forcefully supported the bill by, for example, sending thousands of messages to Congress¹¹¹ and organizing protests at the Capitol.¹¹²

II

THE DOCTRINE: FAT DISCRIMINATION AND HEALTH AND DISABILITY

The fat acceptance movement and the disability rights movement have much in common. They are both part of a larger movement for social justice. As a part of the larger movement, each group should work to end other oppressions, and at a minimum, to avoid basing their own successes on the oppression of other people.¹¹³ Both groups

¹⁰⁴ FLEISCHER & ZAMES, *supra* note 102, at 49 (describing the work that led to the passage of the Rehabilitation Act of 1973).

¹⁰⁵ *Id.* at 71–77, 82–87 (discussing Disabled in Action, New York Lawyers for the Public Interest, ADAPT, and Justice for All).

¹⁰⁶ *See id.* at 82–84. *See also* LINTON, *supra* note 76, at 4 (“We have found one another and found a voice to express not despair at our fate but outrage at our social positioning.”).

¹⁰⁷ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2009).

¹⁰⁸ *See infra* Part II.B (discussing cases brought under the ADA).

¹⁰⁹ *See, e.g.*, CLARE, *supra* note 74, at 106 (discussing the contributions of disabled people to the passage of the ADA).

¹¹⁰ For example, Justin Dart, an activist who used a wheelchair, known as the “father of the ADA,” was an appointee to the National Council on Disability, which proposed the ADA. FLEISCHER & ZAMES, *supra* note 102, at 88–90, 93.

¹¹¹ *Id.* at 91–92.

¹¹² Michael Winters, *I Was There . . . Michael Winters, Washington, DC 1990*, ADAPT HISTORY PROJECT, <http://www.adapt.org/freeourpeople/adapt25/narratives/15adapt.htm> (last visited Aug. 13, 2012) (describing protest to pass the ADA where people using wheelchairs chained themselves together in the Capitol). The disability rights movement has a history of using direct action to achieve policy changes. *See, e.g.*, CLARE, *supra* note 74, at 105 (“In 1977, disabled people occupied the HEW (Department of Health, Education, and Welfare) offices in San Francisco for 25 days, successfully pressuring politicians into signing Section 504 of the Rehabilitation Act, the first civil rights legislation in the United States for disabled people.”).

¹¹³ Many fat activists center their roles as fat activists within a larger anti-oppression framework. *See, e.g.*, Marianne Kirby, *Dear White Fat People*, THE ROTUND (Mar. 21,

fight against the normalization and medicalization of bodies, standards of beauty, the medical model, and subordination more generally.¹¹⁴ Because these two groups share goals, including a broad anti-oppression ideology, each group should be sure not to undermine the other in its work, including in the courts. The way that plaintiffs portray health, fat, and disability can deeply influence both the fat acceptance movement and the disability rights movement. Therefore, theories underlying litigation must further the goals of both movements. Fat plaintiffs who argue that they are healthy to distinguish themselves from disabled and unhealthy people, as well as fat able-bodied plaintiffs who argue they are disabled, risk creating case law that could harm future unhealthy or disabled plaintiffs. Harming unhealthy or disabled people to gain legal successes for fat people is counter to an ideology that seeks to end discrimination, stigma, and oppression broadly and that centers intersectionality. Furthermore, by undermining the rights or adding to the stigmatization of disabled or unhealthy people, the fat acceptance movement does the same to *fat* disabled or unhealthy people, and actively prevents the formation of an inclusive fat acceptance community.

This Part addresses how the courts have dealt with the juncture of the fat acceptance and disability rights movements. In this Part, I will explore how courts and litigants discuss health, disability, and fat by focusing on a few seminal and representative employment disability discrimination cases. The cases demonstrate two approaches. First, fat discrimination plaintiffs sometimes argue that they deserve protection against discrimination because they are healthy and able-bodied, an argument deriving from the HAES movement. I will demonstrate that cases and litigation strategies focusing on health depend on an argument that harms unhealthy people. Second, fat discrimination plaintiffs sometimes argue that they are disabled by their fatness. These cases have been the most successful, and therefore common, cases by

2012), <http://www.therotund.com/?p=1242> (describing fat activism as working in solidarity with people of color, centering on fat people of color, and not creating a “safe haven for racism in the name of solidarity”); *Who We Are*, NOLOSE, <http://www.nolose.org/about/who.php> (last visited Sept. 1, 2012) (describing the goals of organization as including “fighting fat phobia . . . as integrally linked to other social justice issues such as . . . anti-racist and anti-imperialist struggles of people of color at home and around the world, . . . disability rights movements and more”). Many disability activists adopt the same approach. See Mia Mingus, *Moving Toward the Ugly: A Politic Beyond Desirability*, LEAVING EVIDENCE (Aug. 22, 2011, 7:45 AM), <http://leavingevidence.wordpress.com/2011/08/22/moving-toward-the-ugly-a-politic-beyond-desirability/> (“Ableism cuts across all of our movements because ableism dictates how bodies should function against a mythical norm—an able-bodied standard of white supremacy, heterosexism, sexism, economic exploitation, moral/religious beliefs, age and ability.”).

¹¹⁴ See *infra* Part III.B (discussing both movements).

fat plaintiffs. Because fat plaintiffs are using disability claims with increasing frequency, some arguably able-bodied fat people benefit from a legal protection created for disabled people. This Part concludes that, because fat discrimination litigation relies on concepts of both health and disability, further examination of the underlying theories of fat, health, and disability is necessary so that the fat acceptance movement can advance theories that are both the most advantageous for its goals and the least harmful to the goals of disability rights advocates and unhealthy people.

The two primary ways for fat plaintiffs to challenge weight discrimination are (1) through state and municipal laws that explicitly protect against discrimination based on weight, and (2) through the ADA or comparable state disability employment discrimination statutes.¹¹⁵ Statutes that prohibit discrimination because of weight¹¹⁶ or disability¹¹⁷ provide the employer an affirmative defense if the employee is unable to perform the job.

A. *Weight Discrimination Statutes*

Some state statutes and local ordinances allow people to bring weight discrimination suits without discussing weight in terms of disability or health, provided that these terms are unnecessary to their claims.¹¹⁸ Weight discrimination statutory protection exists in the state

¹¹⁵ See Dylan Vade & Sondra Solovay, *No Apology: Shared Struggles in Fat and Transgender Law*, in THE FAT STUDIES READER, *supra* note 13, at 167, 169–70 (describing legal options for fat people). While those are the two primary options, there are other ways to bring employment discrimination cases, such as Title VII. See, e.g., *Gerdomb v. Cont'l Airlines, Inc.*, 692 F.2d 602, 608–09 (9th Cir. 1982) (finding weight limits to be in violation of Title VII because they only applied to women); see also SOLOVAY, *supra* note 25, at 115–17 (discussing successful fat discrimination employment cases).

¹¹⁶ See, e.g., Elliot-Larson Civil Rights Act, MICH. COMP. LAWS § 37.2208 (2001) (exempting employers if weight is a “bona fide occupational qualification” that is “reasonably necessary to the normal operation of the business”). For an analysis of statute-based protections, see *infra* Part III.C.

¹¹⁷ See, e.g., 42 U.S.C. § 12112(a) (2006 & Supp. II 2009) (“No covered entity shall discriminate against a *qualified individual* on the basis of disability”) (emphasis added); 42 U.S.C. § 12113(a) (2006) (creating a defense for qualification standards that discriminate against disabled people that are “job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation,” which may include “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace”). In-depth analysis of the fact finding required to determine whether someone is capable of doing a job is beyond the scope of this Note.

¹¹⁸ See, e.g., *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115, 1124–25 (E.D. Mich. 1988) (reversing a jury verdict in favor of plaintiff’s disability claim, but declining to reverse with respect to plaintiff’s weight discrimination claim); *Lamoria v. Health Care & Ret. Corp.*, 584 N.W.2d 589, 594–95 (Mich. Ct. App. 1998) (per curiam) (finding that plaintiff made a prima facie case of weight discrimination by producing evidence that defendant had

of Michigan;¹¹⁹ the cities of San Francisco, California;¹²⁰ Santa Cruz, California;¹²¹ Madison, Wisconsin;¹²² Urbana, Illinois;¹²³ Binghamton, New York;¹²⁴ and the District of Columbia.¹²⁵ Other municipalities and states have considered adding weight to their antidiscrimination protections. For example, Massachusetts,¹²⁶ Nevada,¹²⁷ and Oregon¹²⁸ introduced legislation that would prohibit weight-based discrimination in employment. Statutes remain one promising route for protection against fat discrimination.¹²⁹ Currently, this form of protection is not available to most plaintiffs because it does not exist in most jurisdictions.

B. Disability Statutes

The other primary way that plaintiffs can bring weight discrimination cases is under disability statutes, including the ADA and state disability antidiscrimination regimes. The ADA prohibits employment discrimination on the basis of disability.¹³⁰ “Disability” covers people

expressed hostile views about fat people), *opinion reinstated in part*, 593 N.W.2d 699 (Mich. Ct. App. 1999); *Dep’t of Civil Rights v. Horizon Tube Fabricating, Inc.*, 385 N.W.2d 685, 687 (Mich. Ct. App. 1986) (upholding a weight discrimination claim on appeal without discussing plaintiff’s health or disability status). Note that an affirmative defense to a weight-based discrimination claim is ability to perform the job, so some discussion of performance may arise. *See infra* note 206 (arguing that plaintiffs, rather than raising health issues, should focus on how weight is unrelated to the job requirements and on their ability to perform the job while fat).

¹¹⁹ Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2202(1)(a) (2012). Weight was added to the statute in 1975. SOLOVAY, *supra* note 25, at 245.

¹²⁰ S.F., CAL., ADMIN. CODE ch. 12A–C (2012), available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca.

¹²¹ SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5) (2012), available at <http://www.codepublishing.com/CA/SantaCruz/>.

¹²² MADISON, WIS., GEN. ORDINANCES § 39.03(2)(bb) (2012), available at <http://library.municode.com/index.aspx?clientId=50000>.

¹²³ URBANA, ILL., CODE OF ORDINANCES ch. 12, art. 3 (1998), available at <http://www.urbanaininois.us/citycode/TOC016>.

¹²⁴ CODE OF CITY OF BINGHAMTON, N.Y., § 1 ch. 45 (2008), available at <http://cityofbinghamton.com/departement.asp?zone=dept-city-council&pid=77&pm=page>.

¹²⁵ The District of Columbia prohibits discrimination based on appearance. D.C. CODE § 2-1402.11(a) (2001).

¹²⁶ *See* H.B. 1844, 185th Gen. Court (Mass. 2007), available at <http://www.mass.gov/legis/bills/house/185/ht01pdf/ht01844.pdf> (bill introduced in House); *see also* *Testify!*, BIG FAT BLOG (Jan. 11, 2010), <http://www.bigfatblog.com/testify> (discussing a hearing on the bill in 2010).

¹²⁷ *See* A.B. 166, 75th Leg. (Nev. 2009), available at <http://www.leg.state.nv.us/75th2009/Bills/AB/AB166.pdf>.

¹²⁸ YALE RUDD CENTER, WEIGHT BIAS: A SOCIAL JUSTICE ISSUE 7 (2012), http://www.yaleruddcenter.org/resources/upload/docs/what/reports/Rudd_Policy_Brief_Weight_Bias.pdf (noting that Oregon legislators filed a weight bias bill in 2009).

¹²⁹ For an analysis of the protection these statutes provide, *see infra* Part III.C.

¹³⁰ 42 U.S.C. § 12112 (2006 & Supp. II 2009).

with “a physical or mental impairment that substantially limits one or more major life activities of such individual”; people who have a record of such an impairment; and people who are regarded as having such an impairment.¹³¹ The ADA does not define impairment, but regulations describe impairment as: “Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . ; or [a]ny mental or psychological disorder, such as an intellectual disability . . . , organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹³² This non-exhaustive list is meant to provide examples of potential impairments.¹³³ The 2008 ADA Amendments Act¹³⁴ clarifies that the “perceived disability” protection covers people who are discriminated against because they are perceived to have an impairment whether or not the “impairment limits or is perceived to limit a major life activity.”¹³⁵ Overall, Congress meant disability to be interpreted broadly, covering more people rather than fewer.¹³⁶

The ADA does not require employers to hire a person with a disability if she is unable to perform the job.¹³⁷ Rather, the ADA is intended to protect disabled people against stereotypes regarding

¹³¹ 42 U.S.C. § 12102(1) (2006 & Supp. II 2009).

¹³² 29 C.F.R. § 1630.2(h) (2011) (listing example “body systems” as “neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine”).

¹³³ See Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,980 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630); see *supra* note 132 and accompanying text (discussing the regulation’s definition of impairment as non-exhaustive examples).

¹³⁴ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.). Congress amended the ADA in 2008 in order to bring it back in line with Congress’s original intent after the Supreme Court limited ADA protection in the *Sutton* trilogy. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). For a discussion of how the *Sutton* trilogy reduced coverage under the ADA and a detailed look into the passage of the amendment, see Chai R. Feldblum, Kevin Berry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 *TEX. J. C.L. & C.R.* 187, 192–93, 206, 234–35 (2008).

¹³⁵ 42 U.S.C. § 12102(3)(A) (Supp. II 2009).

¹³⁶ “The definition of disability in this chapter shall be construed in favor of broad coverage of individuals” 42 U.S.C. § 12102(4)(A) (Supp. II 2009).

¹³⁷ 42 U.S.C. § 12112(a) (2006 & Supp. II 2009) (“No covered entity shall discriminate against a qualified individual”); 42 U.S.C. § 12113 (2006 & Supp. II 2009) (describing defenses related to qualification); 29 C.F.R. § 1630.2 (2011) (defining qualified as able to “perform the *essential* functions of such position”) (emphasis added).

what they are and are not able to do.¹³⁸ The ADA requires reasonable accommodations for qualified people, as long as the accommodations do not impose an “undue hardship.”¹³⁹

The majority of weight discrimination cases are argued on the basis of disability discrimination or perceived disability discrimination.¹⁴⁰ In fact, courts have been more receptive to fat discrimination claims brought on disability grounds than through other discrimination regimes, like Title VII.¹⁴¹ Courts have even turned non-disability fat cases into disability cases.¹⁴² Unfortunately, disability claims are not often successful for any type of plaintiff—in 2010, employers won these cases 98.2% of the time.¹⁴³ At best, the outcomes of disability cases for fat plaintiffs are unpredictable.¹⁴⁴

1. *Cassista and Civil Service Commission: Plaintiff Denies Disability*

In *Cassista v. Community Foods, Inc.*, two levels of California state courts closely analyzed fat, disability, and health.¹⁴⁵ Plaintiff Toni Cassista, a person with anti-fat discrimination politics, applied and was rejected for a job at Community Foods.¹⁴⁶ When she inquired into why she was not chosen, she was told that “there was some concern about [her] weight,” and in particular, about whether she would be able to physically perform the job due to her weight.¹⁴⁷ Cassista brought a disability discrimination suit under a state statute, claiming that she was not hired because Community Foods perceived her as

¹³⁸ The ADA focuses on limitations and stereotypes created by society. Accordingly, Congress, in the 2008 amendment, highlighted that mitigating measures should not be considered when deciding if one has a disability. 42 U.S.C. § 12102(4)(E)(i) (Supp. II 2009) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . .”).

¹³⁹ 42 U.S.C. § 12112(5)(A) (2006).

¹⁴⁰ There has been no Supreme Court decision regarding whether weight is a disability under the ADA.

¹⁴¹ See Teri Morris, Note, *Civil Rights/Employment Law—States Carry Weight of Employment Discrimination Protection: Resolving the Growing Problem of Weight Bias in the Workplace*, 32 W. NEW ENG. L. REV. 173, 190 (2010) (discussing losses in weight discrimination cases brought under Title VII).

¹⁴² See SOLOVAY, *supra* note 25, at 133 (describing one such case, Civil Service Commission of Pittsburgh v. Pennsylvania, 591 A.2d 281 (Pa. 1991)).

¹⁴³ Amy L. Allbright, *2010 Employment Decisions Under the ADA Titles I and V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394, 395 (2011) (describing the findings of a survey of disability employment discrimination cases).

¹⁴⁴ SOLOVAY, *supra* note 25, at 114 (describing various outcomes for disability lawsuits by fat plaintiffs).

¹⁴⁵ *Cassista v. Cmty. Foods (Cassista I)*, 10 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1992), *rev'd*, *Cassista v. Cmty. Foods, Inc. (Cassista II)*, 856 P.2d 1143 (Cal. 1993).

¹⁴⁶ *Cassista II*, 856 P.2d at 1144–45.

¹⁴⁷ *Id.* at 1145.

having a disability.¹⁴⁸ She made no claim in the alternative that she was actually disabled, but instead argued affirmatively that she was healthy, able-bodied,¹⁴⁹ and needed no accommodations to be able to do the job.¹⁵⁰ The California Supreme Court held in *Cassista II* that obesity, when not caused by a physiological disorder,¹⁵¹ was not a disability. The court found that to succeed on a “regarded as disability” claim, the perceived disability must satisfy the statutory definition of disability.¹⁵² Because obesity did not, and because Cassista argued that she was able-bodied other than her weight, the court found that she was not perceived to have a disability under the statute.¹⁵³

Arguably, the employer saw that Cassista was fat and assumed that she was unhealthy, out of shape, and unable to satisfy job requirements such as standing for eight hours and lifting fifty-pound boxes.¹⁵⁴ Cassista could have included an argument that the employer should not be able to discriminate against fat people who are able to do the job even if they *are* unhealthy,¹⁵⁵ but instead she argued that she deserved to win her discrimination case because she *was* healthy and able-bodied.

The California Appeals Court’s opinion, *Cassista I*, overturned by the California Supreme Court, contains interesting analysis of disability that indicates what law could have been made if she won. The appeals court found that Community Foods had discriminated against Cassista based on a perceived disability.¹⁵⁶ Community Foods had asserted an affirmative defense based on “health and safety”

¹⁴⁸ *Id.* The state statute mirrors the ADA. *Id.* at 1150.

¹⁴⁹ She “vigorously denie[d]” that she was “physically handicapped.” *Cassista I*, 10 Cal. Rptr. 2d at 105. Cassista also denied proof of back problems. Answer Brief of Respondent-Appellant at 13–14 n.4, *Cassista v. Cmty. Foods*, 856 P.2d 1143 (Cal. 1993) (No. S028230), 1993 WL 13021027, at *13. “[A]ctivist Cassista[] [had a] ‘capable and proud’ attitude which reflected her offense at being presumed disabled.” SOLOVAY, *supra* note 25, at 154 (comparing Cassista’s claim positively to another case where plaintiff claimed actual disability).

¹⁵⁰ Answer Brief of Respondent-Appellant, *supra* note 149, at 9 (stating that she had no physical limitations that would impede her ability to do the job).

¹⁵¹ *Cassista II*, 856 P.2d at 1153. The court interpreted “disability” as requiring a physiological disorder.

¹⁵² *Id.*

¹⁵³ *Id.* at 1151.

¹⁵⁴ Answer Brief of Respondent-Appellant, *supra* note 149, at 6–7 (describing defendant’s concerns about plaintiff’s ability to lift and stand).

¹⁵⁵ An interpretation of the disability statute that included protection for all fat people could easily include fat unhealthy people who are able to do the job.

¹⁵⁶ *Cassista v. Cmty. Foods (Cassista I)*, 10 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1992), *rev’d*, *Cassista v. Cmty. Foods, Inc. (Cassista II)*, 856 P.2d 1143 (Cal. 1993).

concerns.¹⁵⁷ Under the statute, if an employee's health causes her to be unable to do the job, given reasonable accommodations, the employer is exempt from liability under the ADA if the employer chooses not to hire her.¹⁵⁸ The court determined that Community Foods was not concerned about Cassista's health, but rather about her ability to keep up with the "pace" of the work, which the court deemed unrelated to health.¹⁵⁹ The court implied that if the defendant had been concerned about her health, its affirmative defense would have been successful.¹⁶⁰ This discussion of health would create a possibility that employers in future cases could succeed on an affirmative defense in which unhealthiness creates an irrebuttable presumption of inability to do a job.¹⁶¹ The court implied only two possible outcomes: either a healthy fat person is discriminated against because she is able to do the job, or an unhealthy fat person is not discriminated against because she is unable to do the job. However, there is a third option provided in the statute but ignored by the court: an unhealthy fat person who is entirely able to do the job, and should therefore win her employment discrimination case.¹⁶²

In *Civil Service Commission of Pittsburgh v. Pennsylvania*,¹⁶³ the Supreme Court of Pennsylvania was so unreceptive to a weight-discrimination plaintiff's testimony that he was healthy and his choice not to argue that he was disabled that it turned a disability-neutral claim into a disability case. The plaintiff argued that the Department of Parks and Recreation's weight limits, which he exceeded, were not job-related,¹⁶⁴ but the court decided on disability grounds.¹⁶⁵ Because

¹⁵⁷ *Id.* (describing the health and safety concerns defense to employment discrimination laws).

¹⁵⁸ *Id.* at 105.

¹⁵⁹ *Id.* at 102.

¹⁶⁰ *See id.* at 109–10 (explaining that with evidence that the hiring committee had considered Cassista's health, defendant could have had a valid defense).

¹⁶¹ For an example of a similarly problematic irrebuttable presumption, see *McMillen v. Civil Serv. Commission*, 6 Cal. App. 4th 125 (Cal. Ct. App. 1992). There, as affirmative defense for punishing an ambulance driver for exceeding a weight limit, the employer introduced studies showing that fat was correlated with health concerns without looking into how those health concerns affected plaintiff's performance. *Id.* at 130. In this situation, once an employer introduces evidence of unhealthiness or a correlation between weight and unhealthiness, a court will find the employer justified in its decision that the employee was unable to do the job, as in *McMillen*.

¹⁶² *See Cassista I*, 10 Cal. Rptr. 2d at 109–10 (stating that the law is capable of protecting a fat, unhealthy plaintiff who is able to perform the job).

¹⁶³ 591 A.2d 281 (Pa. 1991).

¹⁶⁴ *Id.* at 285 (Papadakos, J., dissenting) (explaining that plaintiff had never intended the case to be a disability case).

¹⁶⁵ *Id.* at 284.

he argued that he was healthy,¹⁶⁶ the court found that he was not disabled and decided in favor of his employer.¹⁶⁷ The court's rejection of the plaintiff's health-based argument and unwillingness to consider fat discrimination without disability highlights the importance of analyzing fat plaintiffs' use of disability claims alongside their use of health claims.

2. *Cook and Watkins: Plaintiffs Argue Fat Is a Disability*

When fat plaintiffs have argued that fat is a disability, they have found greater success. In the First Circuit case *Cook v. Rhode Island Department of Mental Health, Retardation & Hospitals*,¹⁶⁸ a fat plaintiff won an employment discrimination case where she argued that she was disabled, or alternatively, perceived as disabled because of her weight. Bonnie Cook worked for several years as an institutional attendant at a Rhode Island state residential facility, where she had a spotless record.¹⁶⁹ When she reapplied for the same job, she was not hired explicitly because of her "morbid obesity."¹⁷⁰ Cook then filed a disability discrimination suit under the Rehabilitation Act, which prohibits the federal government from discriminating on the basis of disability in certain circumstances,¹⁷¹ claiming both disability and perceived disability discrimination.¹⁷² The state argued that "morbid obesity" could never constitute a "handicap,"¹⁷³ in part because obesity is voluntary¹⁷⁴ and mutable.¹⁷⁵

¹⁶⁶ See *id.* (quoting plaintiff's testimony that he did not have problems breathing or walking up stairs due to his weight and that he did not have high blood pressure, diabetes, or thyroid conditions).

¹⁶⁷ *Id.*

¹⁶⁸ *Cook v. R.I. Dep't. of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹⁶⁹ *Id.* at 20–21.

¹⁷⁰ *Id.*

¹⁷¹ 29 U.S.C. § 794 (2006). The Rehabilitation Act applied because the facility was federally funded. Rehabilitation Act cases are relevant both because they discuss disability, health, and fat, and because "the definition of 'disability' under the Rehabilitation Act [was] identical to that under the ADA, [decisions in Rehabilitation Act cases] will affect . . . both the ADA and § 501 of the Rehabilitation Act." Brief of the Equal Emp't Opportunity Comm'n as Amicus Curiae at 1–2, *Cook v. R.I. Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093).

¹⁷² Brief of the Plaintiff-Appellee at 16, *Cook v. R.I. Dep't. of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093) ("[P]laintiff does have, and was regarded by the State as having, the condition of morbid obesity, . . . that plaintiff was regarded by the State as 'substantially limited' by morbid obesity in performing major life activities, and that plaintiff was 'otherwise qualified,' *i.e.*, qualified for the position . . . notwithstanding morbid obesity.").

¹⁷³ 10 F.3d at 21.

¹⁷⁴ *Id.* at 24.

¹⁷⁵ *Id.* at 23.

The plaintiff's brief presented obesity as a disease and a chronic illness.¹⁷⁶ Obesity is a disability, the plaintiff argued, because it involves a "malfunction of the body's weight-regulating mechanism," there is no cure, and people suffering from obesity have difficulty managing the disease through weight loss.¹⁷⁷ The plaintiff also argued that fatness is not voluntary or mutable.¹⁷⁸ The brief focused on the plaintiff's ability to do the job, but also discussed her good health in order to counter testimony by a doctor who concluded that Cook was unable to work based on a belief that all fat people are unhealthy.¹⁷⁹ The brief accused the defendant of failing to test for particular ailments, "such as back injuries, . . . osteoarthritis, stroke, gall bladder disease, hypertension and heart disease (cardiomyopathy)," as if discovery of those ailments would have justified a refusal to hire.¹⁸⁰ The brief then highlighted that the plaintiff was free of "heart disease, diabetes, [and] high blood pressure" and was "physically fit and without limitations,"¹⁸¹ implying that ailments or unfitness would similarly justify a refusal to hire. While in some instances, the presence and severity of the listed conditions could justify a failure to hire under the ADA when compared with the requirements of the job, the mere presence of an ailment or unfitness, without further analysis, should not justify failure to hire under the ADA.

The court upheld the jury finding in favor of Cook. Noting that impairment is defined broadly under the statute, the court found that the jury could have reasonably found either that her "morbid obesity" was a disability or that while she was not disabled, the defendant perceived her as disabled and refused to hire her based on that disability.¹⁸² In favor of viewing obesity as a disability, the court noted that "she admittedly suffered from morbid obesity, and she presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular

¹⁷⁶ Brief for Plaintiff-Appellee, *supra* note 172, at 4 n.5.

¹⁷⁷ *Id.* at 26.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 13 (stating that Dr. O'Brien believed that "plaintiff was already in poor health" and that "[i]n reaching his conclusions, Dr. O'Brien did not consider information specific to plaintiff or [institutional attendants], but only his understanding based on general population statistics"); Brief of Amicus Curiae, *supra* note 171, at 6 ("O'Brien testified that he believed Cook's obesity placed her at high risk for other ailments.").

¹⁸⁰ Brief for Plaintiff-Appellee, *supra* note 172, at 13.

¹⁸¹ *Id.* at 15.

¹⁸² 10 F.3d at 23.

systems.”¹⁸³ Both the court’s explanation of the law¹⁸⁴ and the plaintiff’s brief¹⁸⁵ depended on science to define disability and discuss it as suffering.

The court implied that immutability and involuntariness are not required for a condition to qualify as a disability,¹⁸⁶ but did note that the jury was not unreasonable to find that obesity is neither mutable nor voluntary.¹⁸⁷ The court implied that it understood the Rehabilitation Act to protect fat people regardless of whether their fat can be shown to be mutable or voluntary.

The First Circuit revealed that its main goal in finding obesity within the definition of disability was to protect fat employees against stereotypes about fat people rather than to protect disabled people in the typical sense of the Rehabilitation Act or the ADA. In finding the state liable, it said that the state based its decision on “generalizations regarding an obese person’s capabilities.”¹⁸⁸ It emphasized the importance of anti-weight discrimination protection: “In a society that all too often confuses ‘slim’ with ‘beautiful’ or ‘good,’ morbid obesity can present formidable barriers to employment.”¹⁸⁹

In an important case denying a weight disability discrimination claim, *EEOC v. Watkins Motor Lines, Inc.*,¹⁹⁰ the Sixth Circuit held that obesity is not covered under the ADA unless it is caused by a physiological condition. Stephen Grindle was fired from his job as a driver and dockworker.¹⁹¹ He was fired explicitly because of his weight, and in particular because of an assumption that he was unhealthy due to his weight.¹⁹² This case provides another example of

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 23 (applying 45 C.F.R. § 84.3 (1992)).

¹⁸⁵ See Brief of the Plaintiff-Appellee, *supra* note 172, at 4–8 (citing medical studies and expert witness testimony on the scientific basis for obesity).

¹⁸⁶ 10 F.3d at 24 (noting that the Rehabilitation Act does not require an investigation into how one became disabled and that it covers disabilities that could be said to be “voluntary,” like AIDS, certain cancers, and diabetes).

¹⁸⁷ *Id.* at 23.

¹⁸⁸ *Id.* at 27.

¹⁸⁹ *Id.* at 28.

¹⁹⁰ 463 F.3d 436 (6th Cir. 2006). Note that the court did rely on the Supreme Court’s decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which has since been abrogated by the ADAAA. *EEOC v. Watkins Motor*, 463 F.3d at 440; see also ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–54. The Eleventh and Second Circuits have also denied weight-based disability discrimination claims. See, e.g., *Greenberg v. Bellsouth Telecomm., Inc.*, 498 F.3d 1258, 1264–65 (11th Cir. 2007); *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997).

¹⁹¹ 463 F.3d at 439.

¹⁹² Brief of the Petitioner-Appellant at 11, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006) (No. 2005-3218) (quoting the doctor who decided Grindle should be fired as saying that doing the job “has to place an increased cardiovascular burden on this patient, as well as the stress which may precipitate diabetes in a patient this size”).

an employer discriminating against an unhealthy employee. While Grindle did have a knee injury, he did not argue that he was disabled by anything but his weight.¹⁹³ The EEOC, on behalf of Grindle, argued that morbid obesity alone was an impairment requiring no other physiological cause to be covered by the ADA.¹⁹⁴ Accordingly, it introduced no evidence of a physiological cause of fat.¹⁹⁵ By doing so, the EEOC conceded that body weights less than morbid obesity cannot be an impairment.¹⁹⁶ The court disagreed that morbid obesity, without evidence of a physiological cause, was an impairment.¹⁹⁷ The court distinguished *Cook* because evidence of a physiological disorder was introduced in that case.¹⁹⁸ A concurring opinion emphasized that morbid obesity, but not merely being overweight, could qualify as an impairment if it was caused by a physiological condition.¹⁹⁹ This insistence on physiological causes creates a regime whereby two plaintiffs who are the same size and are affected by their fatness equally, both in health and in discrimination, can have different outcomes if one person has an expert testify that their fatness is caused by, for example, a metabolic deficiency. Such a regime does not provide meaningful antidiscrimination protection to fat people.

III

LEGAL AND THEORETICAL PROBLEMS WITH THE CURRENT APPROACH AND PROPOSED SOLUTIONS

In Part III, I argue that the framework that fat people deserve protection against discrimination because they can be healthy harms the fat acceptance movement, unhealthy fat people, and unhealthy non-fat people. I then address fat plaintiffs' use of disability discrimination claims. First, I conclude that fat is not a disability. I suggest that, in contrast to instances where fat people claim to be healthy in order to distance themselves from disabled people, fat people claim to be disabled in disability discrimination cases because they believe such

¹⁹³ 463 F.3d at 438.

¹⁹⁴ *Id.* at 440.

¹⁹⁵ *Id.* at 438. The EEOC did, however, emphasize the "severity" of Grindle's weight, likely because it was arguing that weight was a disability. Reply Brief for the Petitioner-Appellant at 1, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006), 2005 WL 5966033, at *1.

¹⁹⁶ 463 F.3d at 441.

¹⁹⁷ *Id.* at 442.

¹⁹⁸ *Id.*; *see also id.* at 444 (Gibbons, J., concurring) (discussing the expert testimony in *Cook* that plaintiff's morbid obesity was "a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems").

¹⁹⁹ *Id.* at 444–45.

claim will benefit them. I then conclude that fat people must work in solidarity with the disability justice movement through bringing disability claims in a way that will not harm, but will hopefully benefit, both movements. Finally, I discuss weight-specific antidiscrimination statutes and argue that, where available, they are plaintiffs' best option within the antidiscrimination framework because they do not require fat plaintiffs to make arguments based on disability or health.

A. *Health: Problems with Arguments That Rely on Good Health*

The argument that fat people deserve protection against discrimination because they are healthy causes multiple harms. First, it hurts the fat acceptance movement because it does not promote a theory of acceptance of diversity of bodies. It hurts unhealthy fat people because it devalues them, presents them as unworthy of protection, and creates antidiscrimination case law that may not protect them. Finally, it hurts disabled people because, by distancing fat people from disabled people, it suggests that disability is a negative quality.

The HAES approach and its promotion of health are prominent in fat acceptance discourse.²⁰⁰ That fat people can be healthy at every size is most fat activists' immediate response to any challenge to fat acceptance based on concern for health.²⁰¹ In litigation challenging fat discrimination, some plaintiffs "vigorously den[y]" an association with disability and unhealthiness.²⁰² Fat activists frequently argue that discrimination against fat people justified by weight-based health concerns is unacceptable because research shows that fat people can be healthy. This argument, however, creates a dichotomy between "good" fat people who are healthy, fit, non-disabled, and therefore deserving of protection, and undeserving "bad" fat people who are unhealthy, disabled, or unfit, especially if those conditions are considered preventable.²⁰³ Disabled fat activists have discussed and

²⁰⁰ See, e.g., WANN, *supra* note 59, at 35 ("What about your health?" is "a reasonable question").

²⁰¹ See, e.g., Julia Horel, *Size Acceptance 101*, SHAMELESS (Nov. 1, 2009), <http://www.shamelessmag.com/blog/2009/11/size-acceptance-101/> (giving HAES as a response to fat stigma); Kate Harding, *Don't You Realize Fat is Unhealthy?*, SHAPELY PROSE, <http://kateharding.net/faq/but-dont-you-realize-fat-is-unhealthy/> (last visited Aug. 17, 2012) (explaining HAES as a response to the question "[D]on't you realize fat is unhealthy?"). For a discussion of HAES, see generally *supra* notes 61–73 and accompanying text.

²⁰² See, e.g., *Cassista v. Cmty. Foods (Cassista I)*, 10 Cal. Rptr. 2d 98, 105 (Cal. Ct. App. 1992), *rev'd*, *Cassista v. Cmty. Foods, Inc. (Cassista II)*, 856 P.2d 1143 (Cal. 1993); see generally *supra* Part II (discussing legal challenges to fat discrimination).

²⁰³ See Tasha Fierce, *As Fat as I Wanna Be*, JEZEBEL (May 14, 2010), <http://jezebel.com/Red-vinyl-shoes/> (discussing how HAES may not promote fat acceptance for unhealthy fat people); *Good Fatty, Bad Fatty, Who Cares?*, FAT LOT OF GOOD (Mar. 18, 2008), <http://www.fatlotofgood.org.au/?p=90> (discussing the healthy versus unhealthy fat person

organized around the way that the health paradigm excludes and marginalizes them.²⁰⁴ Even if it is true that fat people can be healthy at every size, there are also unhealthy and/or disabled fat people.

Had the California Supreme Court affirmed *Cassista I*,²⁰⁵ the court's analysis could have protected the plaintiff against fat discrimination because she was healthy and able-bodied. Such an opinion would have hurt both unhealthy fat people and disabled people by foreclosing avenues of protection.²⁰⁶ In addition to harming some types of fat people, basing discrimination protection on healthiness impacts the future claims of all unhealthy people. If successful, a HAES-based legal strategy could create case law where only healthy people can be protected against discrimination.

The best way for the fat acceptance movement to achieve its goals²⁰⁷ is to strive for a world in which all bodies are considered acceptable bodies. For the fat acceptance movement's goals to be attained, people must be permitted to live outside of the parameters that society views as healthy without facing stigma, shame, or hatred.

dichotomy and concluding that fat acceptance should focus on acceptance, not health); Heidi, *I Hate WLS – Here's Why I'm Having It*, SHAPELY PROSE (Sept. 18, 2007), <http://kateharding.net/2007/09/18/guest-blogger-heidi-i-hate-wls-heres-why-im-having-it/> (discussing the author's experiences that undergoing weight loss surgery (WLS) caused her to feel alienated by the size-acceptance community).

²⁰⁴ See, e.g., Smith, *supra* note 40 (discussing how the author's illness provoked the realization that the HAES framework no longer applied, but erased disabled people and unhealthy people).

²⁰⁵ See *supra* Part II (discussing *Cassista I* and *Cassista II*).

²⁰⁶ Plaintiffs should also avoid raising health when confronted with an employer's affirmative defense that a low weight is a bona fide occupational qualification or that the plaintiff is unable to do the job. See, e.g., Elliot-Larson Civil Rights Act, MICH. COMP. LAWS § 37.2208 (2001) (exempting employers from a Michian discrimination statute that protects employees on the basis of weight if weight is a "bona fide occupational qualification" that is "reasonably necessary to the normal operation of the business or enterprise"); see also Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2006 & Supp. II 2009) ("No covered entity shall discriminate against a *qualified individual* on the basis of disability . . .") (emphasis added); *id.* § 12113(a)–(b) (creating a defense for qualification standards that discriminate against disabled people that are "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation," which may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace"). The arguments that plaintiffs can use against these defenses vary greatly depending on the job in question. Generally, fat plaintiffs should avoid the argument that they are "healthy" and instead focus on their ability to perform the job requirements in concrete terms. They should focus on how weight is unrelated to the job requirements and on the fact that they are able to do the job while fat. For example, in *Cassista II*, the plaintiff could have focused on her ability to stand on her feet for eight hours, or lift the required weight, without claiming to be "healthy." *Id.* at 1144, 1154. In depth analysis of the fact finding required to determine whether someone is capable of doing a job is beyond the scope of this Note.

²⁰⁷ See *supra* notes 49–53 and accompanying text (discussing the goals of the fat acceptance movement).

Proponents of the HAES approach can lose sight of that vision by basing the worth of fat people on their ability to be healthy. Instead, litigation must focus on protecting all fat people, healthy and unhealthy alike. A strategy that only protects healthy fat people promotes a theory that does not result in acceptance of body diversity.

Furthermore, a litigation strategy based on a good-health framework also harms the fat acceptance movement and fat people by relying on the medical establishment to prove the acceptability of fat.²⁰⁸ Many fat activists voice complaints about the medical establishment that are similar to disability rights activists' complaints about the medical model:²⁰⁹ They argue that the medical establishment adds to stigmatization,²¹⁰ that the diagnosis and treatment is often unnecessary and an attempt to "cure" a culturally disfavored trait,²¹¹ and that medicine alone cannot provide a full and coherent discussion of fatness.²¹² If medicine does play a role in the stigmatization of fatness, responding to fat stigma with even more medical evidence and attention is problematic. Fat acceptance activists and lawyers should be working along with disability rights activists to challenge the medical model and the way the medical establishment treats and defines difference. Counterproductively, the HAES movement has instead attempted to use medical studies to prove that weight is not a medical issue.²¹³

Additionally, arguing that fat people are healthy and therefore deserving of protection is rooted in bias against disabled people. This argument is used to distance fat people from another marginalized community to gain more respect.²¹⁴ It also denies the experiences of

²⁰⁸ See *supra* notes 74–77 and accompanying text (discussing the medical model and medical establishment).

²⁰⁹ See *supra* Part I.B.1 (discussing the disability rights movement's criticisms of the medical model).

²¹⁰ See, e.g., SOLOVAY, *supra* note 25, at 210–15 (discussing the medical establishment's involvement in the diet industry, which results in the "perpetuation of social dangers, like stigma and discrimination against fat people").

²¹¹ See Kassirer & Angell, *supra* note 65, at 53 (suggesting that weight is medicalized because society disapproves of it); Mary Atkins, *Get Off My Body*, UPPITY WOMEN, <http://www.labyris.com/Uppity/getoff.html> (last visited Aug. 17, 2012) (discussing how the medical establishment seeks to eliminate fat people).

²¹² See Wann, *supra* note 42, at ix, xiv–xv (discussing problems inherent with the medical definitions of fat).

²¹³ See BACON, *supra* note 61 (surveying studies finding that people can be healthy at every size).

²¹⁴ See SOLOVAY, *supra* note 25, at 130 ("[Some fat people] simply want to distance themselves as much as possible from yet another already marginalized group . . .").

fat people who are unhealthy and/or disabled by relying on a narrative about fat that ignores their existence.²¹⁵

B. *Disability: How Fat People Can Use Disability Claims*

In the previous section, I argued against bringing weight discrimination claims based on the theory that a plaintiff should win a weight discrimination claim because the plaintiff is healthy. However, bringing claims based on fatness as a disability instead is not necessarily the right solution. If fat plaintiffs should not use health arguments for the reasons laid out above, whether they should instead argue that fat is a disability requires a thorough analysis. Like claims based on good health, claims based on disability require caution. Claims based on disability have the potential to reinforce negative stereotypes and harm the disabled community. In this Section, I discuss ways that fat able-bodied plaintiffs can bring disability claims while avoiding arguments that depend on the medical model of disability, portray disabilities as tragedies, and are likely to yield precedent that will make it harder for disabled people to prove their own discrimination claims.

1. *Fat as a Disability Is an Imperfect Analogy*

Courts disagree over whether fat is a disability.²¹⁶ Some commentators argue that fat is not a disability because it does not fall under the ADA's definition of disability²¹⁷ or because the harms that fat people face cannot be primarily attributed to disability discrimination.²¹⁸ Others argue that fat is a disability because it meets medical criteria,²¹⁹ or because it falls under the ADA's classification of

²¹⁵ See, e.g., Renee Martin, *Fat and Disability: What Few of You Want to Hear*, GLOBALCOMMENT (May 6, 2010), <http://globalcomment.com/2010/fat-and-disability-what-few-of-you-want-to-hear> (noting that the author feels excluded by HAES because, as a fat disabled woman, she will never be able to be healthy and fat). For a similar argument used in the context of asexuality, see Kim, *supra* note 100, at 160 (arguing that the claim that asexual people are not sick erases asexual people with illnesses and disabilities).

²¹⁶ See *supra* Part II.B (explaining that some courts have accepted disability claims brought by fat plaintiffs while others have not).

²¹⁷ See, e.g., Wang, *supra* note 42 (arguing that most fat people are not disabled as defined by the ADA or the Rehabilitation Act).

²¹⁸ See *id.* (arguing that fat people face discrimination based on stereotypes about weight, not disability); see also Morris, *supra* note 141, at 174–75, 180–81 (explaining that courts sometimes acknowledge discrimination that employees face due to weight, but decline to view it as disability discrimination and instead describe it as weight-based discrimination in the workplace).

²¹⁹ See SOLOVAY, *supra* note 25, at 147–48 (laying out scientific studies that lend support to mainstream science's view that obesity is a "dangerous condition"); Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH

disability.²²⁰ On both sides of the argument, legal commentators have focused on medical definitions of “obesity” and disability²²¹ and the statutory definition of disability in the ADA. I argue that, instead, the analysis should be viewed through the lens of the disability rights movement, that movement’s perceptions of disability, and the origins, manner, and degree of discrimination against fat and disabled people.²²²

Deciding whether fat is a disability requires an analysis of similarities and differences between fatness, disability, and their stigmas and histories. Fat people and disabled people share many similarities. For example, both fat people and disabled people experience the policing²²³ and shaming of bodies.²²⁴ Some members of both groups view society, rather than their bodies, as the root of the limitations and discrimination that they face,²²⁵ including the lack of accommoda-

L. & POL’Y 563, 568 (1996) (“[M]orbid obesity should, and moderate and mild obesity can, be entitled to disability status under the ADA.”).

²²⁰ See, e.g., SOLOVAY, *supra* note 25, at 145 (“[E]ven slight ‘overweight,’ when it forms the basis for disparate treatment in employment . . . , meets the expressed statutory definition of disability.”); Kuss, *supra* note 219, at 568 (arguing that obesity can and should be classified as a disability under the ADA); Shannon Liu, Note, *Obesity As an “Impairment” for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 166 (2010) (“[T]he [ADA Amendments Act] expands protection from employment discrimination and will likely lead to the classification of obesity, particularly morbid obesity, as an impairment.”).

²²¹ See, e.g., Kuss, *supra* note 219, at 569–80, 604 (discussing medical explanations of “obesity” and disability).

²²² I reject the consideration of statutory definitions as neutral and somehow separated from social movements and theories. See Paula E. Berg, *Illegal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL’Y REV. 1, 4 (1999) (“[T]he category of disability, like legal categories generally, is a social construct that performs specific functions within the broader context of the law’s legitimizing and naturalizing effect.”).

²²³ See, e.g., Margaret B. Hoppin, Note, *Overly Intimate Surveillance: Why Emergent Public Health Surveillance Programs Deserve Strict Scrutiny Under the Fourteenth Amendment*, 87 N.Y.U. L. REV. 1950 (2012) (describing government surveillance of “obesity” and other non-communicable “diseases” and arguing for strict scrutiny of such programs).

²²⁴ See Margitte Leah, *Super Quick: Thoughts on Fat & Disability*, MARGITTELEAH.COM (Mar. 23, 2011), <http://www.margittleah.com/super-quick-thoughts-on-fat-disability/> (“[F]at people—just like all people with devalued, non-normative bodies—are disabled.”); Mia Mingus, *Moving Toward the Ugly: A Politic Beyond Desirability*, LEAVING EVIDENCE (Aug. 22, 2011, 7:45 AM), <http://leavingevidence.wordpress.com/2011/08/22/moving-toward-the-ugly-a-politic-beyond-desirability/> (discussing how ableism creates a “mythical norm” against which all bodies must be measured).

²²⁵ See SOLOVAY, *supra* note 25, at 138 (“Many fat people do not feel that they are substantially limited because of their weight, but rather because of society’s feelings about their weight. This is a common feeling in the disability community.”).

tion of different kinds of bodies.²²⁶ Additionally, as discussed above, both groups have had their differences medicalized.²²⁷

On the other hand, disabled people and fat people have different histories and face different manners and degrees of oppression. There is a long history of medicalization of disabled people that includes segregation, isolation, and sterilization²²⁸ that is unlike anything fat people, as a group, have faced. Fat people experience discrimination based on the view that they are able to control their fatness, while disabled people are often viewed as having no control over whether they are disabled. Disabled people are often viewed as childlike and worthy of pity,²²⁹ which is not a common stereotype of fat people.

It is also important to acknowledge the existence and experiences of fat disabled people. In addition to coincidental overlap between disabled people and fat people, there is also some correlation between membership in these two groups. For example, societal fat discrimination can cause impairments or illness, causing some fat people to identify as disabled. Illness or impairments can also result from the effects of stigma, complications from weight-loss drugs, or surgery.²³⁰ People who identify as both fat and disabled have unique experiences of these identities at their intersection.²³¹

2. *Responsible Use of Disability Claims by Nondisabled Fat People*

If fat is not a disability, then fat people making discrimination claims based on disability are co-opting a movement that they did not create and of which they are not members for their own benefit.²³²

²²⁶ *Id.* at 148 (“A certain segment of the fat population currently encounters an endless barrage of insurmountable physical barriers as real as any uncut curb or stairway.”).

²²⁷ See *supra* notes 78–83 and accompanying text (discussing the medicalization of disability). Ableism also created a foundation for the institutionalization of other marginalized groups as mentally disabled. See Mingus, *supra* note 224 (discussing ableism’s role in oppression of other marginalized groups).

²²⁸ See FLEISCHER & ZAMES, *supra* note 102, at 11–12.

²²⁹ See, e.g., CLARE, *supra* note 74, at 125 (“I struggle daily against the stereotype of the child-like cripple . . .”).

²³⁰ For example, the widespread use of fen-phen, a diet drug, led to heart disease for many users. See Kate Cohen, *Fen Phen Nation*, PBS.ORG (Nov. 13, 2003), <http://www.pbs.org/wgbh/pages/frontline/shows/prescription/hazard/fenphen.html> (describing the history and health consequences of fen-phen).

²³¹ See *supra* notes 34–40 and accompanying text.

²³² For example, some black people have criticized the gay rights movement’s claim that its struggles are equivalent to those of the civil rights movement. See, e.g., Kenyon Farrow, *Is Gay Marriage Anti-Black???*, CHICKEN BONES: A JOURNAL (Sept. 29, 2007), <http://www.nathanielturner.com/isgaymarriageantiblack.htm> (“Black non-heteros share this anger of having our blackness and black political rhetoric and struggle stolen for other people’s gains.”); Renee Martin, *Dear White LGBT People Stop Appropriating from Black People*,

The achievements of the disability rights movement, including the passage of the ADA,²³³ were meant to create protections primarily for disabled people. Therefore, when taking advantage of the disability rights movement's work by bringing disability claims, fat people must be cognizant of the history and background of the disabled. When fat people co-opt the disability rights movement, they risk erasing the work of the movement, distorting disability rights successes into something less useful for disabled people, and devaluing the oppression that disabled people face by analogizing the experiences of fat people to those of disabled people, when that analogy is not completely accurate.

While the ADA is merely a legal regime that can be used by a variety of people to get recourse for inequalities in the workplace, those who use it must do so responsibly and with the goal of expressing solidarity with disabled people.²³⁴ First and foremost, acting with solidarity in mind requires plaintiffs to avoid creating precedent that will make it harder for disabled people to prove their own discrimination claims,²³⁵ and to avoid the tragedy narrative so often used about disabled people.²³⁶

Fat plaintiffs can avoid ableist arguments by focusing on the changes made to the ADA by the 2008 ADA Amendments Act (ADAAA). In the years since the ADA was passed, the Supreme Court's interpretation of the ADA had decreased the number of people who would be covered under disability and "perceived disability."²³⁷ The Court limited the scope of the ADA by relying on the

WOMANIST MUSINGS (May 2, 2011), <http://www.womanist-musings.com/2011/04/dear-white-lgbt-people-stop.html> ("[T]he gay marriage/civil union debate is not now, or ever will be the same as the fight for racial equality or separate drinking fountains.").

²³³ See *supra* Part I.B.2.

²³⁴ But see SOLOVAY, *supra* note 25, at 132 ("[Some activists] support using the ADA . . . regardless of the social and moral implications because it is the most expedient, if not the only, current solution to the widespread discrimination faced by fat people.").

²³⁵ Some have argued that fat discrimination cases can create such bad law. See, e.g., Matthew A. Glover, Note, *Employment & Disability Law—Americans with Disabilities Act of 1990—The Weight of Personal Responsibility: Obesity, Causation, and Protected Physical Impairments*, 30 U. ARK. LITTLE ROCK L. REV. 381, 407 (2008) ("The relatively recent decisions in obesity litigation mark a disturbing jurisprudential trend of [considering] a claimant's personal responsibility, [which] . . . could negatively impact the protection of other disabilities covered by the ADA.").

²³⁶ See *supra* Part I.B.1 (describing problems with the tragedy narrative).

²³⁷ Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 209–10 (2008) (describing the Supreme Court's pre-ADAAA disability jurisprudence which was dominated by the medical model); Berg, *supra* note 222, at 39–40 (describing pre-ADAAA disability litigation as classifying disability "far less by how the plaintiff describes the impairment's effect on his or her life than by how it is understood by others—in particular by medical and vocational experts").

medical model of disability, despite Congress's intent to employ the social model instead.²³⁸ In 2008, Congress passed the ADAAA to refocus the law on the ADA's original intent: to employ the social model.²³⁹ To do this, the ADAAA broadens the definition of disability.²⁴⁰ It also expands the scope of the "regarded as" prong of the Act in an attempt to change the focus from individuals' impairments—a form of the medical model—to the ways that "others [limit] them because of their impairments"—a form of the social model.²⁴¹ If courts interpret the ADAAA to codify the social model and expand disability discrimination protection as Congress intended, fat plaintiffs should be successful in making disability claims based on the social model.²⁴²

To argue that fatness is an actual disability, a plaintiff must prove that fat is "a physical or mental impairment that substantially limits one or more major life activities" ²⁴³ Regulations describe an impairment as: "Any physiological disorder or condition . . . affecting one or more body systems" ²⁴⁴ Fat plaintiffs can argue that fat is a physiological condition because of the storage of fat in the body.²⁴⁵ In this analysis, fat plaintiffs should merely describe the fat body rather than portraying it as wrong, bad, tragic, or in need of a cure, to avoid

²³⁸ Berg, *supra* note 222, at 12–13; see also Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 241–46 (2010) (discussing the Court's narrow interpretation of the ADA in the face of congressional intent to the contrary).

²³⁹ See Areheart, *supra* note 237, at 190–91 (describing the ADA as a "conceptual departure from the medical model of disability").

²⁴⁰ See *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 861 (9th Cir. 2009) (noting that the ADAAA "significantly expands the scope of the term 'disability'"); Barry, *supra* note 238, at 206 (discussing the expanded definition of disability).

²⁴¹ Barry, *supra* note 238, at 208.

²⁴² See Abigail Kozel, *Large and In Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disabilities Amendments Act of 2008*, 31 HAMLIN J. PUB. L. & POL'Y 273, 274, 327 (2009) (arguing that more fat plaintiffs may be successful under the ADAAA than under the ADA). Of course, courts may continue to apply the medical model as they did pre-ADAAA.

²⁴³ 42 U.S.C. § 12102(1)(A) (Supp. II 2009).

²⁴⁴ See 29 C.F.R. § 1630.2(h) (2011) (listing example "body systems" as "neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine").

²⁴⁵ Fat plaintiffs could also argue that because the statute leaves open the definition of impairment, fat is sufficiently similar to the items in this list to be covered. See Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 17,006–07 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630) (describing definition of impairment as non-exhaustive).

stigmatizing disability.²⁴⁶ Fat plaintiffs can also emphasize the social conditions that make fat into a disability in order to resist the medicalization of bodies. This argument also avoids a classification of the impairment as healthy or unhealthy. Alternatively, some have argued that the ADAAA clarifies that the cause of impairment is irrelevant, which would prevent courts from dismissing weight discrimination cases because fat is voluntary or controllable.²⁴⁷

The implementing regulations for the ADA also assist fat plaintiffs by shifting the focus from the plaintiff's disability to the employer's actions. The regulations emphasize that "[t]he primary object of attention . . . should be whether [employers] have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity."²⁴⁸ Therefore, the bar that fat plaintiffs must meet to satisfy the "substantially limits" and "major life activity" prongs is a low one. Thus, a fat plaintiff can describe his or her experiences with fatness realistically and focus on exposing how societal structures create limitations for fat people. For example, some chairs with arms and narrow passageways are inaccessible to some fat people. Fat plaintiffs can also satisfy the "major life activity" prong through candid descriptions of their lives. The ADAAA provides a non-exhaustive list of major life activities that includes a broad range of activities and major bodily functions. Moreover, this list includes "cell growth,"²⁴⁹ which arguably includes fat.

In addition to allowing fat plaintiffs to bring claims based on the social model and an authentic description of their experiences, the ADAAA's more expansive definition of disability may mean that courts will find fat within ADA protection.²⁵⁰ In fact, one federal district court denied an employer's motion to dismiss because it was

²⁴⁶ See *supra* Part I.B (describing the goals of the social model). *But see* *Cook v. State of R.I., Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 23–24 (1st Cir. 1993) (noting that the plaintiff expert's testimony characterized morbid obesity as a physiological disorder and named possible treatments for obesity).

²⁴⁷ See *Kozel, supra* note 242, at 321–22 (discussing old dismissed cases and the new standard under the ADAAA).

²⁴⁸ 29 C.F.R. § 1630.2 (2012) (describing the impact of the ADAAA). "Substantially limits" is "not meant to be a demanding standard." *Id.*; see *Regulations To Implement the Equal Employment Provisions of the ADA, as Amended*, 76 Fed. Reg. at 17,008 (discussing that impairments need not significantly or severely restrict the individual); see also 42 U.S.C. § 12102(4)(B) (Supp. II 2009) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.").

²⁴⁹ 42 U.S.C. § 12102(2)(B) (Supp. II 2009).

²⁵⁰ *But see* *Barry, supra* note 238, at 208 ("The ADAAA is not the sea change in American law that many disability rights advocates and scholars may have hoped for.").

“unable to say that obesity can never be a disability under the ADA, especially given [the ADAAA].”²⁵¹

The ADA also provides an avenue for protection for employees who are regarded as being disabled.²⁵² This protection attempts to combat negative attitudes about disabled people and to challenge social structures that create barriers for disabled people; therefore, it protects even non-disabled plaintiffs.²⁵³ A fat plaintiff can argue both that the employer perceived weight as a disability²⁵⁴ and that the employer regarded her as having various weight-associated health conditions that fit in the definition of impairment. While courts previously denied claims based on both of those arguments, the ADAAA and its regulations opened the door for them once again.²⁵⁵ Plaintiffs who make these arguments can therefore avoid stigmatizing or distancing disabled people by focusing on the problematic nature of the employer’s negative attitudes about disabled people instead of arguing that the plaintiff deserved the job because she was able-bodied. In this statutory scheme, consideration of limitations due to a plaintiff’s weight or allegedly weight-related health conditions would be limited to the part of the analysis regarding whether the individual is capable of doing the job.²⁵⁶ Additionally, the concepts of substantial limitation and major life activities are irrelevant for this analysis.²⁵⁷

C. *A More Theoretically Coherent Option: Statutes*

The options that require plaintiffs to argue that they are either healthy or disabled can be problematic and accordingly are difficult for a fat plaintiff to navigate. Of the currently available avenues for obtaining protection against employment discrimination, state statutes that explicitly prohibit weight discrimination are the only venue that

²⁵¹ *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010).

²⁵² 42 U.S.C. § 12102(1)(C), (4)(B) (Supp. II 2009).

²⁵³ *See* Feldblum, *supra* note 134, at 205 (2008) (describing the purpose of the “regarded as” prong).

²⁵⁴ *See* H.R. REP. NO. 101-485, pt. 3, at 30 (1990) (describing the possibility for success under this test “whether or not the person’s physical or mental condition would be considered a disability under the first or second part of the definition”).

²⁵⁵ *See* 29 C.F.R. § 1630.2 (2011) (explaining the “regarded as” prong); Kozel, *supra* note 242, at 325 (arguing that the ADAAA may cover fat plaintiffs under this prong, which he refers to as the “perceived as” prong).

²⁵⁶ *See* 42 U.S.C. § 12112 (2009) (“No covered entity shall discriminate against a qualified individual . . .”).

²⁵⁷ *See* 29 C.F.R. § 1630.2 (2011) (explaining that a plaintiff does not need to show evidence of a substantial limitation of a major life activity in order to argue that she was regarded as disabled).

actually name the true stigma that fat people face²⁵⁸ and do not force fat people to make arguments based on health or disability.²⁵⁹ Weight-based discrimination statutes could be used to protect fat people against sizeism while not playing into ableism.

Such statutes currently exist in six municipalities and one state.²⁶⁰ In Santa Cruz, California in 1992, a group including Toni Cassista organized a coalition that successfully added weight and sexual orientation to a city-level antidiscrimination ordinance.²⁶¹ In San Francisco in 1999, in direct response to a fat activist demonstration, the San Francisco Human Rights Commission held a hearing on fat discrimination and, after an outpouring of organizing and educating done by activists, attorneys, and politicians, the Commission voted unanimously in favor of the weight-based antidiscrimination proposal, which went on to become law.²⁶² Legislators in Massachusetts, Nevada, and Oregon have recently considered adding weight-based protection, but have been unable to pass the statutes.²⁶³

Michigan's statute, which has existed since 1975,²⁶⁴ as the only state-wide protection, provides an example of how weight-based

²⁵⁸ Many activists in the fat acceptance movement and others who seek antidiscrimination protection for fat people believe that statutes are the best option. *See, e.g.*, Morris, *supra* note 141, at 197 (arguing that state antidiscrimination statutes are the best legal protection available); *NAAFA Policy Recommendations*, NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE (2011), <http://www.naafaonline.com/dev2/education/index.html> (recommending statutory antidiscrimination protection).

²⁵⁹ State statutes also provide more protection for fat people from employers' arguments that weight discrimination is excused due to concern about increased health insurance costs for fat employees. *See* Daniel Engber, *The Fat Premium*, SLATE (Oct. 29, 2009, 4:14 PM), http://www.slate.com/articles/health_and_science/science/2009/10/the_fat_premium.html (arguing against employers' fat taxes). If weight is protected under an antidiscrimination statute, an employer's blanket assumption that all fat people will have higher insurance costs than thin people will be prohibited. Instead, employers would be required to make individualized assessments based on real medical information and actuarial data about insurance costs to show that an employee indeed incurs higher insurance costs.

²⁶⁰ *See supra* notes 119–25 and accompanying text (Michigan; San Francisco, California; Santa Cruz, California; Madison, Wisconsin; Urbana, Illinois; Binghamton, New York; and the District of Columbia).

²⁶¹ *See* SANTA CRUZ, CAL., MUN. CODE § 9.83.020(5) (1995), available at <http://www.codepublishing.com/CA/SantaCruz/html/santacruz09/santacruz0983.html>; SOLOVAY, *supra* note 25, at 233–34 (describing the lobbying process).

²⁶² *See* SOLOVAY, *supra* note 25, at 236–37 (describing the demonstration organized in response to an ad for a gym that “picture[s] a space alien and read[s], ‘When they come they’ll eat the fat ones first.’”).

²⁶³ YALE RUDD CENTER, *supra* note 128, at 7.

²⁶⁴ *See* Elliot-Larson Civil Rights Act, MICH. COMP. LAWS § 37.2202(1)(a) (2001). Michigan's statute passed easily, without much debate, because legislators believed that weight was necessary for a comprehensive antidiscrimination statute, particularly because weight was linked to gender and race. *See* SOLOVAY, *supra* note 25, at 245.

antidiscrimination statutes function.²⁶⁵ Michigan courts use Title VII cases as guidance for applying the state statute.²⁶⁶ In three cases, plaintiffs brought discrimination claims without arguing either that they were healthy or that they had a disability related to weight. In *Lamoria v. Health Care & Retirement Corp.*, the Michigan Court of Appeals found that an employer's negative comments about fat people and suggestion that fat people were going to be fired "presented enough direct evidence to support a conclusion that [the plaintiff] was discharged on the basis of her weight."²⁶⁷ In *Ross v. Beaumont Hospital*, a federal court remanded as potentially successful a weight discrimination claim brought by a plaintiff who was fired in part due to her "failure to provide a monthly letter from the physician treating [her] obesity."²⁶⁸ However, in *Byrnes v. Frito-Lay*, a court found that a plaintiff's weight discrimination case alleged insufficient facts despite his superiors having constantly expressed concern about his weight, telling him to diet, and once threatening to fire him if he did not lose weight.²⁶⁹ While arguments alleging either that the plaintiff is healthy or that the plaintiff's weight is a disability are not present in any of these cases, the result in *Byrnes* is concerning because of the court's rejection of his claims.

This brief survey of Michigan cases demonstrates that antidiscrimination statutes may never provide complete legal protection for

²⁶⁵ There are differences among the statutes that affect how they are used in reality. For example, the District of Columbia prohibits discrimination based on "personal appearance." See D.C. CODE § 2-1402.11 (2012). Enforcement mechanisms also vary among the statutes. For an analysis of the effects of enforcement mechanisms on fat employees, see Jennifer Bennett Shinall, *Legal Largesse or Big, Fat Failure: Do Weight-Discrimination Laws Improve Employment Outcomes for the Obese?* 1, 5, 32-34 (Vanderbilt Univ. Law Sch. Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985371.

²⁶⁶ See *Dep't of Civil Rights v. Horizon Tube Fabricating, Inc.*, 385 N.W.2d 685, 687 (Mich. Ct. App. 1986) (describing the use of Title VII). Plaintiffs must first either prove a prima facie case of weight discrimination or provide direct evidence of discriminatory animus. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (describing the requirements for a prima facie case); *Lamoria v. Health Care & Ret. Corp.*, 584 N.W.2d 589, 593 (Mich. Ct. App. 1998) (per curiam) (describing the use of direct evidence), *opinion reinstated in part*, 593 N.W.2d 699 (Mich. Ct. App. 1999). Then, the employer may provide affirmative defenses, e.g., that other reasons motivated the decision, or that weight was a bona fide occupational qualification. See, e.g., *Elliot-Larson Civil Rights Act*, MICH. COMP. LAWS § 37.2208 (2001) (exempting employers from a Michigan discrimination statute that protects employees on the basis of weight if weight is a "bona fide occupational qualification" that is "reasonably necessary to the normal operation of the business or enterprise").

²⁶⁷ *Lamoria*, 584 N.W.2d at 595.

²⁶⁸ *Ross v. Beaumont Hosp.*, 687 F. Supp. 1115, 1124 (E.D. Mich. 1988) (internal quotation marks omitted).

²⁶⁹ *Byrnes v. Frito-Lay, Inc.*, 811 F. Supp. 286, 292 (E.D. Mich. 1993).

fat people.²⁷⁰ Therefore, while weight antidiscrimination statutes may be the best theoretical option within the antidiscrimination framework, that framework is still insufficient to provide full protection against employment discrimination for fat people. Discrimination laws require evidence of an individual bad actor's intentional discrimination.²⁷¹ This "perpetrator perspective" obscures structural or systemic conditions that create or perpetuate oppression based on fatness.²⁷² As a result of the limitations of this framework, the majority of employment discrimination claims are unsuccessful,²⁷³ and groups protected by employment discrimination statutes remain under- and unemployed.²⁷⁴ Antidiscrimination laws create formal legal equality that presents the appearance of equality but does little to change people's lives.²⁷⁵ Furthermore, these laws can legitimize the structure of employment by appearing to provide remedies to mistreated employees, even though in reality only the few plaintiffs who meet the high bar of sufficient evidence of intentional discrimination are successful.²⁷⁶ Weight antidiscrimination statutes may not create the broad social change that the fat acceptance movement seeks. Therefore, while weight discrimination statutes may be the best option within the antidiscrimination framework that was discussed in this Note, additional social change work²⁷⁷ must be done to truly move towards fat acceptance.

²⁷⁰ See Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 290–93 (2009) (critiquing antidiscrimination law and explaining how it fails to provide meaningful protection).

²⁷¹ *Id.* at 291.

²⁷² See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29, 29–31 (Kimberlé Crenshaw et al. eds., 1995) (defining the perpetrator perspective and explaining how it fails to challenge structural oppression).

²⁷³ See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117 (2009) (demonstrating the low rates of success for plaintiffs in employment discrimination cases).

²⁷⁴ See Spade, *supra* note 270, at 298 (arguing that antidiscrimination laws have done little to change "the ongoing presence of an underclass of low-wage workers and unemployed people who are disproportionately people of color, trans people, immigrants, people with disabilities, and others who supposedly have been declared equal by law").

²⁷⁵ See *id.* at 297 (explaining that "antidiscrimination legislation [is a] . . . formal legal equality measure[]").

²⁷⁶ See *id.* at 298 ("[A]nti-discrimination laws declare that conditions of employment are now fair . . ."); see also *supra* note 269 and accompanying text (discussing *Byrnes*, 811 F. Supp. 286, where an employee lost his case despite evidence that his employer constantly told him to lose weight).

²⁷⁷ For a discussion of social justice work that can avoid the downfalls of antidiscrimination statutes, see Spade, *supra* note 270, at 310–13. See also Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative*

CONCLUSION

The fat acceptance movement seeks legal remedies for fat discrimination. In doing so, it has used arguments based on health and disability. When fat discrimination litigators argue that a fat person is healthy or able-bodied and therefore deserves to be employed, like in *Cassista I* and *Cassista II*, they risk creating harmful precedent that leaves out unhealthy people and disabled people. When fat discrimination litigators instead argue that a fat able-bodied person is disabled, they risk appropriating the disability rights movement's achievements, marginalizing disabled people, and creating harmful precedent for disabled people, including fat disabled people. Weight-based antidiscrimination statutes can allow plaintiffs to avoid arguments based on health or disability, which is the ideal when working within a flawed antidiscrimination legal structure. When litigators are aware of the risks accompanying health and disability arguments, they can avoid them and still win cases for fat plaintiffs. With a responsible theory of fat, the law of fat discrimination can benefit both the fat acceptance movement and the disability justice movement, thus creating a stronger overall movement for social change.

Movement for Social Change, 8 SEATTLE J. FOR SOC. JUST. 579 (2010) (discussing how approaches based in community organizing can achieve results for social movements beyond traditional lawyering).