

One Minute Memo®



Failure to Investigate and Fat-Shaming Permit Employment Claims to Proceed

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Seyfarth Synopsis: Under California law, obesity can qualify as a disability if it has a physiological cause and limits a major life activity. Proving such a claim has been difficult. The First District Court of Appeal's decision in *Cornell v. Berkeley Tennis Club*, however, may have made the claim easier to prove, while making it harder for employers to win summary judgment.

The Alleged Facts

Ketryn Cornell was severely obese, weighing over 350 pounds at just five feet, five inches, tall. She had been obese since childhood. In 1997, while in college, she began working at the Berkeley Tennis Club as a lifeguard and pool manager. She continued working there as a manager after college. During her employment, the Club gave her positive performance reviews, raises, and bonuses.

In 2012, the Club hired a new manager, who instituted a new uniform requirement (shirts). Cornell told the manager she would need a specially ordered shirt to fit her size. In response, the manager mocked her, asked her about weight-loss surgery, and then ordered a shirt that was five sizes too small for her. Cornell, humiliated, eventually bought her own specially ordered shirt. The manager refused to provide Cornell extra shifts, refused to consider her for promotions, and paid her less than newly hired employees. Cornell complained about this treatment.

In 2013, the Club held a board meeting to discuss personnel issues. Cornell had helped set up the room. Before the meeting, her manager found a tape recorder placed in a cleaning cart that had been recording. Another employee hid in the room after the meeting and saw Cornell go to the cart. The Club fired Cornell for trying to surreptitiously record the board meeting.

Cornell sued the Club under the Fair Employment and Housing Act (FEHA), alleging that the Club discriminated against her because of her disability (obesity), failed to accommodate her disability, harassed her because of her disability, and retaliated against her for requesting an accommodation. The trial court granted the Club's motion for summary judgment, holding that Cornell had failed to produce evidence that her obesity qualified as a disability. Cornell appealed.

The Court of Appeal's Decision

The Court of Appeal reversed the rulings as to the discrimination and harassment claims, while affirming the rulings as to the accommodation and retaliation claims.

As to the discrimination claim, the Court of Appeal observed that the California Supreme Court, in *Cassista v. Community Foods, Inc.*, recognized that obesity can be a disability if it results from a physiological condition affecting a basic bodily system, and limits a major life activity. The Court of Appeal noted that some developments under the ADA had eased the burden associated with meeting this requirement under the ADA and, by extension, FEHA. Next, the Court of Appeal held that the Club failed to show that Cornell could not establish that her obesity had a physiological cause. The Court of Appeal also concluded that the Club's failure to conduct a follow-up investigation of the recorder incident and her manager's discriminatory comments were sufficient evidence to defeat summary judgment.

As to the harassment claim, the Court of Appeal found a triable issue as to whether the alleged harassment was sufficiently severe and pervasive. The Court of Appeal indicated that the manager's inappropriate comments about Cornell's weight themselves were too isolated to preclude summary judgment. But the manager had also reduced Cornell's hours, passed her over for internal jobs, and paid her less. This combination of evidence precluded summary judgment on the harassment claim.

As to the accommodation claim, the Court of Appeal held that there was insufficient evidence to show that the Club was aware that Cornell's obesity constituted a disability. Under *Cassista*, the Club needed to be aware that Cornell's obesity stemmed from a physiological cause in order to have a duty to accommodate her. The Court of Appeal held that the Club, absent that awareness, had no duty to accommodate Cornell and, thus, affirmed the summary adjudication against her.

Lastly, as to the retaliation claim, the Court of Appeal affirmed the trial court because, under the then-current law, requesting an accommodation was not an activity protected from retaliation. (Under a later FEHA amendment, requesting an accommodation for a disability is now a protected activity. But that amendment did not apply retroactively.)

What *Cornell* Means For Employers

Cornell has several potential implications for employers with respect to obesity-based disability claims. While it remains the law that obesity is a disability only if it results from a physiological cause, a plaintiff's proof seems easier in light of ADA developments construing the term "disability" in favor of finding coverage. Thus, employers should avoid being dismissive of complaints about obesity discrimination or requests for accommodations based on obesity. Employers seeking summary judgment on these claims must make a significant evidentiary showing and conduct thorough discovery. Given *Cornell's* rulings on the discrimination claim, employers should ensure that they investigate any alleged employee misconduct that forms the basis of discipline or termination. Finally, employers should remember that accommodation requests are now protected against retaliation.

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