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Cover Page Footnote

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2004, Georgetown University. The author would like to thank her parents, James and Alice, for their encouragement and support, and her husband, Matthew, for his unconditional love and patience. She would also like to thank her Catholic University Law Review colleagues who helped prepare this Note for publication.

CLASSIFYING OBESITY AS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT: HOW *SEFF V. BROWARD COUNTY* IS INCONGRUENT WITH RECENT ADA LITIGATION

Maura Flaherty McCoy⁺

“During the past 20 years, there has been a dramatic increase in obesity in the United States and rates remain high. More than one-third of U.S. adults (34.9%) and approximately 17% (or 12.7 million) of children and adolescents aged 2–19 years have obesity.”¹ Largely due to an increase in obesity rates, many employers have adopted corporate wellness programs in an effort to reduce insurance claims and improve the productivity and health of their workforce.² The Patient Protection and Affordable Care Act, or “Obamacare,” contains

⁺ J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2004, Georgetown University. The author would like to thank her parents, James and Alice, for their encouragement and support, and her husband, Matthew, for his unconditional love and patience. She would also like to thank her *Catholic University Law Review* colleagues who helped prepare this Note for publication.

1. *Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/facts.html> (last updated Sept. 3, 2014). Obese individuals are identified by a body mass index outside a certain range, calculated using a person’s weight and height to determine his amount of body fat. *About BMI for Adults*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://m.cdc.gov/en/HealthSafetyTopics/HealthyLiving/HealthyWeight/AssessingYourWeight/BodyMassIndex/AboutBMIAdults> (last visited Feb. 19, 2015). An adult with a BMI between 25 and 29.9 is considered overweight, and anyone with a BMI of 30 or higher is considered obese. *Id.* A 2009 study estimated that the medical cost of obesity in America was \$147 billion annually and that medical costs for obese individuals were \$1,429 higher per year than people of a normal weight. Press Release, CENTERS FOR DISEASE CONTROL & PREVENTION (July 27, 2009), <http://www.cdc.gov/media/presrel/2009/r090727.htm>. In 2009–2010, 35.7 percent of adults in the United States were obese, and 16.9 percent of children and adolescents were obese. Cynthia L. Ogden, Margaret D. Carroll, Brian K. Kit & Katherine M. Flegal, *Prevalence of Obesity in the United States, 2009–2010*, NAT’L CENTER FOR HEALTH STATISTICS 1–2 (2012), available at <http://www.cdc.gov/nchs/data/databriefs/db82.pdf>. During these years there was no significant difference between men and women at any age, though women ages sixty and over were more obese than younger women. *Id.*

2. Laura Anderko, Jason S. Roffenbender, Ron Z. Goetzel, Francois Millard, Kevin Wildenhaus, Charles DeSantis & William Novelli, *Promoting Prevention Through the Affordable Care Act: Workplace Wellness*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 13, 2012), http://www.cdc.gov/pcd/issues/2012/12_0092.htm. In addition:

With the passage of the Affordable Care Act (ACA), worksite wellness programs will become part of a national public health strategy to address the increase in chronic diseases, which are predicted to cost the US health care system an estimated \$4.2 trillion annually by 2023. Evidence suggests that worksite wellness programs are cost-beneficial, saving companies money in health-care expenditures and producing a positive return on investment (ROI).

Id. It is calculated that there is “an average return of \$3.27 in medical costs for every dollar spent on worksite wellness programs.” *Id.*

several provisions that promote and help facilitate the implementation of wellness programs.³ The American Medical Association (AMA) House of Delegates recently joined The World Health Organization, the Food and Drug Administration, and the National Institutes of Health in recognizing obesity as a disease, which means that roughly one-third of Americans will be classified as ill.⁴

Although the AMA's recent decision is not legally enforceable,⁵ and the AMA opposes the classification of obesity as a disability,⁶ the resolution raises the question of how discrimination claims by obese persons will be treated in the context of employer wellness programs. "The Americans with Disabilities Act of 1990 [(ADA)] prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation."⁷ The AMA defines a disease as "an impairment of the normal functioning of some aspect of the body,"⁸ and the ADA defines a disability as "a physical or mental impairment that substantially limits one or more major life activities."⁹ The treatment of obese individuals in employer wellness programs could be grounds for discrimination claims under the ADA, depending on how courts choose to define "disability."¹⁰

Courts' treatment of what is considered a "disability" has evolved over time, especially subsequent to the Americans with Disabilities Act Amendments of

3. *Id.* The Patient Protection and Affordable Care Act was passed by Congress in March 2010, with the goal of improving health care coverage for all Americans. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 588 (2010) (codified at scattered titles and sections).

4. See Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES, June 19, 2013, at B1, B5; *Recognition of Obesity as a Disease*, AM. MED. ASS'N HOUSE OF DELEGATES (May 16, 2013), available at <http://media.npr.org/documents/2013/jun/ama-resolution-obesity.pdf>.

5. Pollack, *supra* note 4, at B1.

6. AM. MED. ASS'N HOUSE OF DELEGATES, *supra* note 4.

7. Department of Justice, *Information and Technical Assistance on the Americans with Disabilities Act*, ADA.GOV, http://www.ada.gov/2010_regs.htm (last visited Sept. 14, 2014); see 42 U.S.C. § 12101 (2012) (providing the purpose of the ADA). The ADA of 1990 was changed by the ADA Amendments Act of 2008. Department of Justice, *supra*.

8. AM. MED. ASS'N HOUSE OF DELEGATES, *supra* note 4. The American Medical Association's Council on Science and Public Health identifies a disease as "1) an impairment of the normal functioning of some aspect of the body; 2) characteristic signs or symptoms; and 3) harm or morbidity." *Id.* The Resolution states that there is significant evidence to show that obesity is "a multi-metabolic and hormonal disease state" that impairs numerous bodily functions and is not merely the result of lifestyle choices. *Id.* The AMA House of Delegates stated, "[t]he suggestion that obesity is not a disease but rather a consequence of a chosen lifestyle exemplified by overeating and/or inactivity is equivalent to suggesting that lung cancer is not a disease because it was brought about by individual choice to smoke cigarettes." *Id.*

9. 42 U.S.C. § 12102(1)(A) (2012).

10. See *infra* Part III.

2008.¹¹ Prior to 2008, the Supreme Court took a limited view of what constituted a disability and had stricter standards for discrimination.¹² The Court considered mitigating circumstances when evaluating the severity of a disability¹³ and interpreted “substantially impairs” and “major life activity” very broadly to disqualify employees who could not perform specific work tasks.¹⁴

Following initial ADA cases, Congress determined that the intent of the ADA was not being fulfilled and passed an Amendments Act to further clarify the standards for discrimination.¹⁵ The Americans with Disabilities Amendments Act of 2008 specifically overturned *Sutton v. United Air Lines*¹⁶ and *Toyota Manufacturing, Kentucky, Inc. v. Williams*¹⁷ to broaden the scope of coverage for disabled employees making discrimination claims.¹⁸ Where courts were once reluctant to classify obesity as a disability except for instances in which obesity was related to an underlying physiological disorder,¹⁹ the 2008 amendments have led courts to broaden their treatment of obesity as a disability.²⁰ The new standards for the ADA have coincided with the advent of employer wellness programs, which are designed to improve employees’ health

11. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12103, 12111–12114, 12201, 12205–12213; 29 U.S.C. § 705 (2012)). The ADA was originally enacted against the backdrop of the finding that “43,000,000 Americans have one or more physical or mental disabilities.” 42 U.S.C. § 12101(a)(1) (1990) (amended 2008). In addition, “historically, society has tended to isolate and segregate individuals with disabilities.” 42 U.S.C. § 12101(a)(2). The ADA sought “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2) (2012). Regardless of whether a person has an actual disability as defined by the court, an employee may sue for being discriminated against because their employer perceives them to be disabled. *See id.* § 12102(1)(C) (including “regarded as having” a disability under the definition of disability).

12. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 187, 200–01 (2002) (deciding that an assembly line worker with carpal tunnel syndrome was not disabled because her daily life activities were not impaired, only certain job-related tasks were affected); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481–82, 490–94 (1999) (holding that United Air Lines correctly applied the ADA when considering whether to hire severely myopic twins who applied to be pilots, by considering that their impairment could be mitigated through corrective lenses, but that United did not discriminate because the vision requirement did not substantially limit the twins).

13. *Sutton*, 527 U.S. at 481–82.

14. *Toyota Motor Mfg.*, 534 U.S. at 200–01.

15. *See supra* note 12 and accompanying text.

16. 527 U.S. 471 (1999).

17. 534 U.S. 184 (2002).

18. *See ADA Amendments Act of 2008*, Pub. L. No. 110-325 §§ 2(b)(2)–(4), 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12103, 12111–12114, 12201, 12205–12213; 29 U.S.C. § 705 (2012)).

19. *See, e.g., Francis v. City of Meridien*, 129 F.3d 281, 286 (2d Cir. 1997).

20. *See BNSF Ry. Co. v. Feit*, 281 P.3d 225, 230 (Mont. 2012) (citing *EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011)) (concluding that obesity itself can be a disability).

and well-being, lower medical claim costs, and encourage disease prevention practices.²¹

Many wellness programs offer incentives in the form of reduced health insurance premiums for employees who participate in the program or meet certain health-related standards.²² Though programs that merely require participation to qualify for an incentive are not subject to federal discrimination laws, such as the Health Insurance Portability and Accountability Act and the ADA,²³ cases are starting to emerge that call into question the viability of wellness programs and how strictly employers may regulate their employees' health.²⁴ For example, in *Seff v. Broward County*,²⁵ the plaintiff challenged the "voluntariness" of Broward County's wellness initiative in the U.S. Court of Appeals for the Eleventh Circuit, following a holding for the defendant in the district court.²⁶ In an effort to stem rising health care costs, Broward County implemented a wellness program that aimed to incentivize employees to take preventative health care measures and to engage in disease management.²⁷ The plaintiff in *Seff* chose not to participate in the wellness program, which required a biometric screening and a health risk assessment, and, as a result, a twenty-dollar surcharge was added to his paycheck each pay period.²⁸

The ADA prohibits employers from requiring medical examinations or making medically-related inquiries of their employees,²⁹ but it also provides an

21. Soeren Mattke, et al., RAND HEALTH, WORKPLACE WELLNESS PROGRAMS STUDY xiii (2013), available at <http://www.dol.gov/ebsa/pdf/workplacewellnessstudyfinal.pdf>. Wellness programs are provided by about half of all employers with fifty or more employees and usually include a health risk assessment and clinical screenings to retrieve biometric data such as height, weight, body mass index, and blood glucose levels. *Id.* at xiv, v. Wellness programs typically consist of "screening activities to identify health risks . . . [,] preventive interventions to address manifest health risks . . . [, and] health promotion activities to further healthy lifestyles." *Id.* at 21.

22. *See id.* at 67.

23. *Id.* at 68.

24. *See, e.g., Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370, 1373–74 (S.D. Fla. 2011) (providing a detailed review of an employee wellness program), *aff'd* 691 F.3d 1221 (11th Cir. 2012).

25. 691 F.3d 1221 (11th Cir. 2012).

26. *Id.* at 1222.

27. *Id.*

28. *Id.*

29. 42 U.S.C. § 12112(d)(4)(A) (2012). Under the ADA, an employer may make varying degrees of inquiry into an employee's disability status or medical conditions depending on if the inquiries are pre-offer, post-offer, or during employment. *Id.* §§ 12112(d)(2)–(3). Prior to employment, the ADA prohibits all medical and disability inquiries regardless of whether or not they are related to the job. *Id.* §§ 12112(d)(2)(A). After an employee is offered a position, the employer may make any inquiries into an employee's medical history, regardless of whether or not they are related to the job, as long as the employer treats all entering employees equally. *Id.* § 12112(d)(3)(A). After employment begins, an employer may make inquiries "only if they are job-related and consistent with business necessity." EEOC NOTICE 915.002, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES

exemption from these prohibitions for voluntary wellness programs that meet certain criteria.³⁰ Mr. Seff argued that the wellness program was not truly voluntary because nonparticipation in the program resulted in a penalty.³¹ However, in granting summary judgment to the defendant, the district court did not address the voluntariness of the program because it found that the county's wellness program met the requirements of the ADA's safe harbor provision.³²

This Note discusses how employer-promoted wellness programs are potential breeding grounds for discrimination claims in light of recent ADA cases relating to obesity and how courts' treatment of the safe harbor provision of the ADA is incongruent with the broadening of ADA claims. It begins with an examination of the ADA and looks at how courts have considered the definition of "disability" in regard to obesity. In addition, it provides a description of the ADA safe harbor provision and continues with a discussion of the development of company wellness programs that led to *Seff v. Broward County*. This is followed by an analysis of how the *Seff* decision, combined with the recent treatment of obesity under the ADA and the safe harbor provision, reveals a disconnect between the judicial system's increasing leniency toward obese individuals and broad allowance of organizations to potentially discriminate against individuals under the guise of corporate wellness programs.

UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000) [hereinafter ENFORCEMENT GUIDANCE], available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

30. See 42 U.S.C. § 12201(c)(2).

31. *Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370, 1373 (S.D. Fla. 2011). According to the Equal Employment Opportunity Commission (EEOC), a wellness program is voluntary if an employer does not require participation and does not penalize employees for not participating. ENFORCEMENT GUIDANCE, *supra* note 29.

32. *Seff*, 778 F. Supp. 2d at 1372 n.3. See Broward County's Motion for Summary Judgment and Supporting Memorandum of Law, *Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370, 1373 (S.D. Fla. 2011) (No. 10-CV-61437), 2011 WL 10795884. The safe harbor provision of the ADA expressly allows an organization to establish, sponsor, observe, or administer "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. § 12201(c)(2). See *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997). In *Parker*, a panel of the court decided that the safe harbor provision of the ADA was ambiguous and looked to legislative history for guidance. *Id.* at 1009. The panel decided that "insurance practices are protected by the 'safe harbor' provision, but only to the extent that they are consistent with 'sound actuarial principles,' 'actual reasonably anticipated experience,' and 'bona fide risk classification.'" *Id.* The safe harbor provision does not provide protection to employers if the insurance plan or program is merely subterfuge, which is prohibited under 42 U.S.C. § 12201(c). The court found that under the ADA an insurance plan qualifies as a subterfuge "if it is 'based on speculation, and not on sound actuarial principles, actual or reasonably anticipated experience, or bona fide risk classification.'" *Parker*, 121 F.3d at 1000.

I. COURTS TACKLE OBESITY DISCRIMINATION CLAIMS AND THE SAFE HARBOR PROVISION UNDER THE ADA

A. Impairment Must Have an Underlying Physiological Cause

The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”³³ When courts began hearing ADA cases in the early 1990s, the definition of “impairment” was interpreted narrowly and did not encompass any condition that lacked an underlying physiological cause.³⁴ Courts have not defined “physiological” in any certain terms, but instead have referred to the Equal Employment Opportunity Commission’s (EEOC) definition of impairment to determine if a disability has an underlying physiological cause.³⁵ According to the EEOC, impairment is “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems” or “any mental or psychological disorder.”³⁶

For example, in *Andrews v. Ohio*,³⁷ the U.S. Court of Appeals for the Sixth Circuit dismissed a discrimination claim because it did not view obesity as having an underlying physiological cause.³⁸ In *Andrews*, a group of Ohio State Highway Patrol officers sued the State of Ohio when they failed the Highway

33. 42 U.S.C. § 12102(1)(a). This Note focuses on Title I of the ADA as it relates to employment claims. *See id.* §§ 12111–12117. Title II relates to public entities and public transportation. *See id.* §§ 12131–12165. Title III relates to public accommodations. *See id.* §§ 12181–12189. The statute specifies that a disability is not to be “transitory and minor.” *Id.* § 12102(3)(b). The statute also includes a general list of major life activities that the impairment could limit: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(a); *see Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/disability.cfm> (last visited Sept. 24, 2014). In a 2006 case out of the Eastern District of New York, the court held:

In order to make out a prima facie case under the ADA, a plaintiff must establish (1) that the plaintiff’s employer is subject to the ADA; (2) that the plaintiff was disabled within the meaning of the ADA; (3) that the plaintiff was otherwise qualified to perform the essential functions of his or her job, with or without reasonable accommodation; and (4) that the plaintiff suffered an adverse employment action because of his or her disability.

Spiegel v. Schulmann, No. 03-CV-5088, 2006 WL 3483922, at *12 (E.D.N.Y. Nov. 30, 2006).

34. *See EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006); *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997).

35. *See Watkins Motor Lines*, 463 F.3d at 443–44; *Francis*, 129 F.3d at 283; *Andrews*, 104 F.3d at 808. The Merriam-Webster Dictionary defines physiology as “a branch of biology that deals with the functions and activities of life or of living matter (as organs, tissues, or cells) and of the physical and chemical phenomena involved.” MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/physiology> (last visited Feb. 23, 2015).

36. 29 C.F.R. § 1630.2(h)(1)–(2) (2012). The EEOC is the federal agency responsible for enforcing the ADA.

37. 104 F.3d 803 (6th Cir. 1997).

38. *Id.* at 810.

Patrol Fitness Program (HPFP).³⁹ The HPFP established a set of physical endurance and strength criteria for its officers that included maximum weight limits.⁴⁰ The officers argued that the weight limits were unrelated to the job and that enforcement of the limits was discriminatory because of the perceived failure of the officers in the eyes of their supervisors for being overweight.⁴¹

The Sixth Circuit dismissed the officers' claims because even if the officers did in fact face discrimination, they did not properly allege a perceived "impairment."⁴² The court held that "physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either actual or perceived disability."⁴³ The court stated that a commonplace physical characteristic alone does not constitute a physiological disorder, and, consequently, granted the state's motion to dismiss.⁴⁴

In 1997, the U.S. Court of Appeals for the Second Circuit faced a similar situation regarding an employee whose weight exceeded a weight/fitness requirement for city firefighters.⁴⁵ In *Francis v. City of Meridien*,⁴⁶ a firefighter did not meet the height/weight requirement and refused to complete the physical fitness test that was required if the weight requirement was not met.⁴⁷ As a

39. *Id.* at 805–06.

40. *Id.* at 805.

41. *Id.* at 806. It is the responsibility of the plaintiff to show a prima facie case of discrimination. *Id.* at 808. The court compared the situation to *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), in which a prospective flight attendant exceeded the weight-for-height limit not because he was overweight but because he had too much muscle mass. *Andrews*, 104 F.3d at 809. The *Tudyman* court did not find that there was any discrimination because the flight attendant's physique was voluntary and not the result of a physiological disorder. *See Tudyman*, 608 F. Supp. at 746. The *Andrews* court held, "[b]ecause a mere physical characteristic does not, without more, equal a physiological disorder, where an employee's failure to meet the employer's job criteria is based solely on the possession of such a physical characteristic, the employee does not sufficiently allege a cause of action." *Andrews*, 104 F.3d at 810.

42. *Id.* at 810.

43. *Id.* at 808.

44. *Id.* To hold a mere physical characteristic as an impairment would distort the "concept of an impairment [which] implies a characteristic that is not commonplace" and would thereby "debase [the] high purpose [of] the statutory protections available to those truly handicapped." *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (citing *Jasany v. USPS*, 755 F.2d 1244, 1249 (6th Cir. 1985)). The *Forrisi* court stated:

The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.

Id.

45. *Francis v. City of Meridien*, 129 F.3d 281, 282 (2d Cir. 1997).

46. 129 F.3d 281 (2d Cir. 1997).

47. *Id.* at 282. Some argue that the reason courts are reluctant to consider obesity a disability is because society believes that the obese individual is responsible for his/her weight problem. Jane

result, the fire department suspended him.⁴⁸ The firefighter alleged that the city's discipline for his failure to meet the weight requirement was discriminatory because the city perceived that he had a disability.⁴⁹ The court, as in *Andrews*, referred to the definition of "physical impairment" under the ADA and quoted the EEOC regulation that stated:

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder.⁵⁰

The Court of Appeals affirmed the district court's dismissal.⁵¹ The employee's weight was not considered an impairment under the ADA due to the lack of an underlying physiological cause and because the employer did not perceive the employee as suffering from a physiologically-caused condition.⁵²

The U.S. Court of Appeals for the Sixth Circuit's decision in *EEOC v. Watkins Motor Lines, Inc.*⁵³ was similar to the Second Circuit's holding in *Francis* but also signaled a slight shift in the court's interpretation.⁵⁴ In *Watkins Motor Lines*, a driver/dockworker filed a claim alleging discrimination after he was terminated due to his morbid obesity.⁵⁵ The court held that morbid obesity may be considered an ADA impairment if accompanied by an underlying physiological cause, but it refused to acknowledge the EEOC's argument that morbid obesity is more than a commonplace, normal physical characteristic.⁵⁶

Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 211 (2010). The social stigma of being overweight, and the belief that a person's weight is voluntary, hampers the courts' ability to consider obesity as a disability. *Id.* There are differing opinions on the degree of voluntariness involved in obesity, but the problem facing courts often lies in the fact that the cause of any certain individual's obesity is a mixture of multiple factors and often difficult to determine. *Id.* at 224.

48. *Francis*, 129 F.3d at 282.

49. *Id.* at 282–83.

50. *Id.* (alterations in original) (quoting 29 C.F.R. § 1630.2(h) (2012)).

51. *Id.* at 287.

52. *Id.*

53. 463 F.3d 436 (6th Cir. 2006).

54. *Id.*

55. *Id.* at 438–39.

56. *Id.* at 444–45; *see also* 29 C.F.R. § 1630.2(h)(1) (2012) (defining "physical impairment" as requiring some physiological disorder). The court in *Watkins Motor Lines* stated:

The plaintiffs' conditions were far from constituting an ADA impairment as, not only were the plaintiffs' conditions not physiologically caused, but they were not even abnormally obese. To interpret the above sentence any other way would suggest that we held that any physical abnormality—for example, someone extremely tall or grossly short—may be ADA impairment. We decline to extend ADA protection to all "abnormal" (whatever that term may mean) physical characteristics.

Watkins Motor Lines, 463 F.3d at 442–43.

As a result, the court concluded that the EEOC did not meet its burden of proving the existence of an impairment under the ADA.⁵⁷ Both *Francis* and *Watkins Motor Lines* emphasize the requirement of an underlying physiological cause in order for a disability to be covered under the ADA and demonstrate courts' very narrow interpretation of discriminatory practices.⁵⁸

B. The Expansion of Physical and Mental Impairments

Andrews, *Francis*, and *Watkins Motor Lines* were decided prior to the Americans with Disabilities Act Amendments of 2008 (ADAA).⁵⁹ Cases decided after the passage of the 2008 Amendments reached very different conclusions regarding the need for an underlying physiological cause to qualify as having a disability.⁶⁰ By eliminating the courts' use of mitigating factors in evaluating disabilities and lifting strict limits on what constitutes the substantial impairment of a life activity, the ADAA broadened the definition of disability to cover impairments previously excluded from discriminatory claims.⁶¹

In the 2013 case *Anderson v. Macy's, Inc.*,⁶² a patron of Macy's stores alleged discrimination under Title III of the ADA. The discrimination claim was based on the fact that Macy's had priced plus-size items higher than smaller sizes, placed plus-size clothing in hidden parts of the store, and made plus-size

57. *Id.* at 445.

58. *See id.*; *Francis v. City of Meridien*, 129 F.3d 281, 287 (2d Cir. 1997); *see also Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir. 1997) (relying on the federal definition of impairment when finding law enforcement officers' weight was not an impairment because it was not the result of an underlying physiological condition).

59. *See Watkins Motor Lines*, 463 F.3d at 436 (decided in 2006); *Francis*, 129 F.3d at 281 (decided in 1997); *Andrews*, 104 F.3d at 803 (decided in 1997); *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101–12103, 12111–12114, 12201, 12205–12213; 29 U.S.C. § 705 (2012)) (demonstrating that the Amendments were enacted in 2008, following the previous cases).

60. *Compare Francis*, 129 F.3d at 287 (finding that when a firefighter was disciplined for exceeding weight requirements, his weight was not a disability under the ADA because it lacked an underlying cause), *and Andrews*, 104 F.3d at 810 (holding that law enforcement officers' weight was not an impairment under the ADA because there was no underlying physiological condition), *with BNSF Ry. Co. v. Feit*, 281 P.3d 225, 231 (Mont. 2012) (finding that obesity without an underlying physiological cause could be considered a physical impairment if the weight is outside the normal range), *and EEOC v. Res. of Human Dev., Inc.*, 827 F. Supp. 2d 688, 695 (E.D. La. 2011) (deciding that obesity is considered a disability under the ADA, even if there is no underlying cause).

61. Amendments Act § 4(a), § 2(a)(4)–(7) (explaining that Congress did not intend for the Supreme Court to narrow the definition of individuals with disabilities, and “as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.”). The Amendments Act of 2008 overturned the Supreme Court's holdings in *Sutton v. United Air Lines* and *Toyota Motor Mfg., Ky., Inc. v. Williams*. *See id.* § 2(b).

62. 943 F. Supp. 2d 531 (W.D. Pa. 2013).

clothing aisles narrower than other aisles.⁶³ The U.S. District Court for the Western District of Pennsylvania dismissed the patron's complaints regarding pricing and location within the store, but recognized that narrow aisles may be a valid ADA claim because they were not wide enough to accommodate her.⁶⁴ Though the court acknowledged one of the plaintiff's alleged obesity claims, the *Anderson* case did not go as far as explicitly categorizing obesity as a disability under the ADA.⁶⁵ In 2009, an applicant to the Burlington Northern Santa Fe Railway Company (BNSF) filed a complaint with the Montana Department of Labor and Industry alleging that BNSF refused to hire him because of his obesity.⁶⁶ Following the department's ruling in favor of the applicant, BNSF filed an appeal with the Montana Human Rights Commission, who confirmed the department's decision.⁶⁷ BNSF then petitioned the district court, which certified the question to the Montana Supreme Court to address whether obesity could be categorized as a "physical or mental impairment."⁶⁸

The Montana Supreme Court recognized that the ADA intended "a broad scope of protection to be available" and "the definition of disability . . . shall be construed in favor of broad coverage."⁶⁹ The court considered the EEOC

63. *Id.* at 535–36; *see id.* at 543–45 (explaining that although no other district court had recognized obesity as a disability under the ADA, in light of the 2008 Amendments, the court was unwilling to definitively exclude obesity as a disability); *see also* 42 U.S.C. § 12182(a) (2012) (stating that under Title III of the ADA, which covers public accommodations and commercial facilities, individuals with disabilities must not be denied equal opportunities to enjoy commercial goods and services offered).

64. *Anderson*, 943 F. Supp. 2d at 547–50 (dismissing the entire claim without prejudice to give the plaintiff the opportunity to file an amended complaint better articulating the claim regarding the aisle width).

65. *Compare id.* at 548–50 (dismissing multiple claims made by an obese plaintiff regarding the price and location of plus-sized clothing at Macy's, but acknowledging that she may have an ADA claim regarding the narrow aisles in which the plus-sized clothes were located), *with Feit*, 281 P.3d at 231 (finding that obesity without an underlying physiological cause could be considered a disability when plaintiff alleged he was not hired due to his weight).

66. *Id.* at 227.

67. *Id.*

68. *Id.* at 227–28. BNSF told the conductor trainee applicant that he was not qualified "because of the 'significant health and safety risks associated with extreme obesity.'" *Id.* at 227. In addition, BNSF told the individual that he needed to lose ten percent of his body weight or complete physical exams in order to be considered. *Id.*

69. *Id.* at 228 (omission in original) (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, § 4, 122 Stat. 3553, 3554–55 (2008)). The EEOC noted, prior to the Amendments of 2008, that being overweight was generally not an impairment but that "severe obesity, which has been defined as body weight more than 100% over the norm is clearly an impairment." EEOC COMPLIANCE MANUAL § 902.2(C)(5)(ii) (2011) (internal citations omitted), *available at* <http://www.eeoc.gov/policy/docs/902cm.html> (noting pre-2000 precedent). This section of the compliance manual was removed from the EEOC website on July 25, 2012, because it was superseded by the Amendments Act of 2008. David M. Katz, *Obesity as a Covered Disability Under the ADA*, DAILY LABOR REPORT, BLOOMBERG BUREAU OF NAT'L AFF., INC., Oct. 5, 2012, at 2, *available at* <http://www.employmentmattersblog.com/files/2014/05/obesity-as-a-covered-disability-under-the-ADA-oct.-5-2012.pdf>.

Compliance Manual's statement that "[t]he mere presence of an impairment does not automatically mean that an individual has a disability. Whether severe obesity rises to the level of a disability will turn on whether the obesity substantially limits, has substantially limited, or is regarded as substantially limiting, a major life activity."⁷⁰ In light of the ADA and the EEOC guidelines, the court sided with the job applicant, holding that his obesity qualified as a disability because his weight was outside a normal range and affected one or more body systems.⁷¹

Applying a similar analysis, *EEOC v. Resources for Human Development, Inc.*⁷² recognized severe obesity as a disability.⁷³ The plaintiff was hired as a specialist at a long-term residential treatment facility for drug-dependent women in 1999 and was subsequently terminated eight years later.⁷⁴ She was severely obese throughout her tenure as an employee and had multiple conditions as a result of her obesity, such as diabetes, congestive heart failure, and hypertension.⁷⁵ The EEOC argued, and the court recognized, that neither the EEOC nor any other court "[has] ever required a disabled party to prove the underlying basis of [his] impairment" and "[t]he cause of a condition has no effect on whether that condition is an impairment."⁷⁶ The U.S. District Court for the Eastern District of Louisiana held that summary judgment for the employer was inappropriate because there was a genuine issue of material fact as to how the employer perceived the plaintiff and her ability to perform her essential job functions.⁷⁷ The cases disregarding the need for an underlying physiological impairment and recognizing obesity as a legitimate disability signal a shift in the way courts are interpreting the ADA, and reveal the possible expansion of discrimination claims.⁷⁸

70. *Feit*, 281 P.3d at 230 (alteration in original) (quoting EEOC COMPLIANCE MANUAL § 902.2(c)(5)(ii) n.16).

71. *Id.* at 231; *see also MT Joins Obesity Debate: No Underlying Condition Necessary to Prove a Disability*, 23 ADA COMPLIANCE GUIDE NEWSL., no. 9, Sept. 2012, at 7.

72. 827 F. Supp. 2d 688 (E.D. La. 2011).

73. *Id.* at 695.

74. *Id.* at 690. The plaintiff weighed 527 pounds at the time of her termination and subsequently filed a charge of discrimination with the EEOC. *Id.* at 690. She passed away shortly thereafter, and the EEOC filed the lawsuit on behalf of her estate. *Id.* at 691.

75. *Id.*

76. *Id.* at 694 (quoting EEOC COMPLIANCE MANUAL § 902.2(e) (2011) (internal citations omitted), available at <http://www/eec.gov/policy/docs/902cm.html>). In the case, the plaintiff stated "[t]o require establishment of the underlying cause of the impairment in a morbid obesity [case], but not in any other disability cases, would epitomize the very prejudices and stereotypes which the ADA was passed to address." *Id.* (alteration in original).

77. *Id.* at 700.

78. *See generally supra* notes 71–77 and accompanying text. *Cf. Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir. 1997) (holding that obesity did not qualify as a legitimate disability because there was no physiological impairment).

C. The Safe Harbor Provision and the ADA

The safe harbor provision of the ADA, as enacted in 1990, provides an exemption for employers to avoid discrimination claims by employees.⁷⁹ Under the safe harbor provision, bona fide benefit plans are not subject to state laws regulating insurance, or to ADA claims, unless there is proof of subterfuge and an intent to evade the statute.⁸⁰ In 2008, “Congress created an exception to enable organizations to sponsor or provide bona fide benefit plans not subject to state insurance laws even if they offer different terms to disabled individuals.”⁸¹ There have been numerous cases in which discriminatory benefits practices by an employer would have been subject to the ADA, yet the safe harbor provision shielded the employer from claims by employees.⁸²

Courts have treated the safe harbor provision similarly both before and after the ADA Amendments Act of 2008.⁸³ In a notable case from 2000, *EEOC v. Aramark Corp.*,⁸⁴ a food service manager worked at Aramark for ten years before a mental illness forced her to leave.⁸⁵ She received long-term disability payments through the company’s insurance carrier following her termination.⁸⁶ However, the long-term disability insurance plan provided only twenty-four months of coverage for mental disabilities, but would have continued payments until age sixty-five had the disability been physical.⁸⁷ The employee argued that the plan’s differing benefit terms for mental and physical disabilities constituted discrimination under the ADA.⁸⁸ The court rejected the EEOC’s argument and

79. See 42 U.S.C. § 12201(c)(3) (2012) (noting an exception regarding benefit plans); see also Grant P. H. Shuman, *Escaping the Purpose of the ADA: The “Safe Harbor” Provision and Disability-Based Distinctions in Insurance Policies and Programs*, 36 GONZ. L. REV. 549, 556–58 (2000–01) (recognizing a conflict between the aims of the ADA and legitimate insurance needs).

80. See 42 U.S.C. § 12201(c)(3).

81. *Rouse v. Berry*, 848 F. Supp. 2d 4, 7 (D.D.C. 2012) (holding that the employer’s curtailment of long-term care benefits for a disabled employee was not “subterfuge” to evade the ADA). A bona fide benefit plan is defined as a plan that “exists and pays benefits.” *Id.* (quoting *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 166 (1989)). Courts have interpreted subterfuge to mean “a scheme, plan, stratagem, or artifice of evasion.” *Moddermo v. King*, 82 F.3d 1059, 1064 (D.C. Cir. 1996) (quoting *Betts*, 492 U.S. at 167). Proof of subterfuge must be relatively overt and requires a showing of discriminatory intent and not just a lack of actuarial justification. *EEOC v. Aramark Corp., Inc.*, 208 F.3d 266, 271 (D.C. Cir. 2000).

82. See, e.g., *id.* at 271–73; *Rouse*, 848 F. Supp. 2d at 12–13.

83. See generally *infra* notes 84–96 and accompanying text (comparing a court’s holding in 2008 on the safe harbor provision of the ADA with a post-2008 holding following the enactment of the ADA Amendments).

84. 208 F.3d 266 (D.C. Cir. 2000).

85. *Id.* at 267.

86. *Id.*

87. *Id.*

88. *Id.* The EEOC argued that the twenty-four month limit on benefits for a mental disability violated ADA §§ 12111–17, which prohibit an employer from discriminating “against a qualified individual with a disability because of the disability of such individual in regard to [the] terms,

found that Aramark's long-term disability insurance fell under the safe harbor provision of the ADA as a bona fide benefits plan.⁸⁹ The court asserted that the benefits fell under the safe harbor provision not only because Aramark's plan was adopted before the ADA,⁹⁰ but also because "subterfuge to evade" does not mean there is solely a lack of actuarial data to support the existence of the benefits plan; there must be a more substantial claim of discrimination made by the plaintiff.⁹¹ The decision allowed for an employee with a mental illness to be treated differently than other employees and to be discriminated against only because her employer's insurance fell under the safe harbor provision.⁹²

Similarly, in the post-2008 case *Rouse v. Berry*,⁹³ a paraplegic government employee filed a complaint against the Office of Personnel Management (OPM) when he was denied long-term care insurance due to his use of a wheelchair.⁹⁴ OPM justified its policy by relying on industry experience and underwriting reports from the insurance carriers about the level of risk involved in the plan for the employer.⁹⁵ The court determined that, as in *Aramark*, there must be overt evidence of subterfuge in order to exempt the benefit plan from the safe harbor provision.⁹⁶ These cases provide wide latitude to employers to establish benefit plans that are discriminatory by arguing that treatment of the safe harbor provision by the courts has not changed since the ADA.⁹⁷ The advent of wellness programs has opened the door for potentially discriminatory use of the safe harbor provision, as demonstrated by *Seff v. Broward County*.⁹⁸

conditions, and privileges of employment." *Id.* (alteration in original) (citing 42 U.S.C. § 12112(a) (2012)).

89. *See id.* at 268.

90. *Id.* at 269.

91. *Id.* at 271. The court cited *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), which stated, "[w]e will not construe section 501(c) to require a seismic shift in the insurance business, namely requiring insurers to justify their coverage plans in court after a mere allegation by a plaintiff." *Aramark*, 208 F.3d at 271 (quoting *Ford*, 145 F.3d at 612).

92. *See Aramark*, 208 F.3d at 267–68 (discussing the differences between insurance coverage).

93. 848 F. Supp. 2d 4 (D.D.C. 2012).

94. *Id.* at 5.

95. *See id.* at 6–7. This use of actuarial data is consistent with the requirements outlined in the safe harbor provision of the ADA. *See* 42 U.S.C. § 12201(c) (2012).

96. *Rouse*, 848 F. Supp. 2d at 13; *see* *Moddero v. King*, 82 F.3d 1059, 1064–65 (D.C. Cir. 1996) (providing a detailed discussion of subterfuge).

97. *See Aramark*, 208 F.3d at 267; *Rouse*, 848 F. Supp. 2d at 12.

98. *See Seff v. Broward Cnty.*, 691 F.3d 1221, 1224 (11th Cir. 2012).

II. SEFF V. BROWARD COUNTY: SETTING THE STAGE FOR ADA OBESITY CLAIMS

The ADA Amendments of 2008 were successful in persuading courts to broaden the scope of coverage for obese individuals.⁹⁹ The Amendments coincided with a rise in employer wellness programs in the workplace and employers' goal of improving the health of their employees, including reducing their weight.¹⁰⁰ Employers have adopted wellness programs to encourage disease prevention and, ultimately, to lower medical insurance costs and improve productivity.¹⁰¹ Wellness programs utilize a variety of incentives to motivate employees to participate, such as reduced health insurance premium payments with no penalties for non-participation.¹⁰²

Employers must be careful not to run afoul of several federal regulations when offering incentives or imposing penalties.¹⁰³ The nondiscrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA) make it illegal to deny eligibility for benefits or to charge more for group health coverage based on a health factor, although certain exceptions allow wellness programs to offer incentives when particular requirements are met.¹⁰⁴ HIPAA will generally not apply if a wellness program is structured so that conditions for obtaining an incentive are not based on an employee meeting a certain health standard, participation in the program is voluntary, and the plan is made available to all similarly-situated individuals.¹⁰⁵

99. See ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2–4, 122 Stat. 3553–56 (2008); *Anderson v. Macy's, Inc.*, 943 F. Supp. 2d 531, 543–45 (W.D. Pa. 2013); *BNSF Ry. Co. v. Feit*, 281 P.3d 225, 231 (Mont. 2012); see also *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523, at *8 (N.D. Miss. Dec. 16, 2010) (holding that a plaintiff whose obesity caused her inability to walk from the regular company parking lot may be able to prove she was terminated due to her impairment). In *Lowe*, despite the defendant's assertion that "obesity is not a disabling impairment," "the Court is unable to say that obesity can never be a disability under the ADA, especially given that on September 25, 2008, the ADA was amended by the Americans with Disabilities Act Amendments Act of 2008." *Id.* at *6.

100. See *Mattke*, *supra* note 21, at 1–3.

101. See *id.* at 3. The RAND study found that results-based incentives in wellness programs are usually administered through the employer rather than the employer's health plan. See *id.* at xxi. Researchers caution that long-term studies are necessary to demonstrate the cost-benefits of wellness programs. See *id.* at 3 (noting that those programs are relatively new). A recent review found that the return on investment is 3:1 for direct medical cost and absenteeism, but stated that these results may not be typical. *Id.*; see also Katerine Baicker, et al., *Workplace Wellness Programs Can Generate Savings*, 29:2 HEALTH AFFS. (2010) (discussing the benefits of wellness programs).

102. *Mattke*, *supra* note 21, at xxi. Employers most often reported using incentives rather than penalties in the administration of wellness programs. For example, common incentives may come in the form of cash or health insurance premium surcharges, gym discounts, and novelty items such as t-shirts. *Id.*

103. See *id.* at 66 (providing the basic provisions that govern incentive programs).

104. *Id.* at 66–67.

105. *Id.* at 67. The Affordable Care Act incorporates the HIPAA nondiscrimination rules but permits the value of wellness program incentives up to thirty percent of the cost of coverage in

Similarly, the ADA prohibits employers from penalizing, or having a reward withheld from, individuals with health conditions that qualify as a disability.¹⁰⁶ *Seff v. Broward County* is the first federal case that addressed employer wellness programs and the limits that employers may set to incentivize and penalize their employees for engaging in a wellness program.¹⁰⁷ A public employee brought a class action suit against Broward County, Florida, alleging that the government's wellness program violated the ADA.¹⁰⁸ The employee claimed that the employer violated the ADA by requiring that employees undergo a medical examination and disclose certain medical conditions as part of a voluntary wellness program.¹⁰⁹

Employees who fit into any of five disease categories identified by the employer were encouraged to participate in a disease management coaching program.¹¹⁰ Though participation in the county's wellness program was not required to enroll in the group health plan, in 2010, the county attempted to encourage more participation by levying a twenty-dollar surcharge on each

2014 as opposed to HIPAA's twenty percent. *Id.* The statute also gives discretion to federal department secretaries to increase the reward to up to fifty percent of the cost of coverage. *Id.* A wellness program may not be discriminatory under HIPAA if it meets HIPAA's requirements, but the same program may be discriminatory under the ADA. HIPAA outlines five requirements for wellness programs:

- (1) The total reward for all the plan's wellness programs that require satisfaction of a standard related to a health factor must not exceed 20 percent of the cost of employee-only coverage under the plan. If dependents (such as spouses and/or dependent children) may participate in the wellness program, the reward must not exceed 20 percent of the cost of the coverage in which an employee and any dependents are enrolled.
- (2) The program must be reasonably designed to promote health and prevent disease.
- (3) The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
- (4) The reward must be available to all similarly situated individuals The program must allow a reasonable alternative standard (or waiver of the initial standard) for obtaining the reward to any individual for whom it is unreasonably difficult because of a medical condition, or medically inadvisable, to satisfy the initial standard.
- (5) The plan must disclose in all materials describing the terms of the program and the availability of a reasonable alternative standard (or the possibility of a waiver of the initial standard).

Id.

106. *Id.* at 68.

107. *Seff v. Broward Cnty.*, 691 F.3d 1221, 1222–23 (11th Cir. 2012).

108. *Id.* at 1222.

109. *Id.* Broward County offered its employees a group health insurance plan and, in 2009, began enrolling employees in its wellness program sponsored by the health insurer, Coventry Healthcare. *Id.* Participation in the wellness program required a biometric screening and an online health-risk assessment questionnaire, and Coventry used the results to identify employees who fit into categories of "five disease states: asthma, hypertension, diabetes, congestive heart failure, or kidney disease." *Id.* A biometric screening consisted of a finger prick to draw blood and measure glucose and cholesterol. *Id.*

110. *Id.* at 1222.

paycheck of employees who did not enroll.¹¹¹ The plaintiff filed a class action suit alleging that the biometric screening and health risk assessment violated the ADA's prohibition on "non-voluntary medical examinations and disability-related inquiries."¹¹² The Eleventh Circuit affirmed the lower court's grant of summary judgment, finding that the county's wellness program constituted a "term" of the group health insurance plan and therefore fell within the safe harbor provision of the ADA.¹¹³ The court ruled that the ADA did not apply to the group health insurance plan, but did not reach the question of whether the twenty-dollar charge for failure to participate in the wellness program made the program involuntary, and, therefore, in violation of the ADA.¹¹⁴

The plaintiff's amended motion for class action certification and incorporated memorandum of law began with the premise that Broward County's "voluntary" wellness program was, in reality, not truly voluntary.¹¹⁵ Mr. Seff alleged that the county's required participation in a biometric screening and health risk assessment was in violation of ADA § 12112 because of the required disclosure of personal medical information.¹¹⁶ He argued that because he was charged twenty dollars per paycheck for not participating in the allegedly "voluntary"

111. *Id.* The plaintiff incurred the twenty-dollar charge on his paychecks for a period of roughly six months. *Id.*

112. *Id.*

113. *Id.* at 1224. The ADA contains a safe harbor provision that says the ADA "shall not be construed" as prohibiting a covered entity "from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." *Id.* at 1223 (quoting 42 U.S.C. § 12201(c)(2) (2012)). The ADA provides a safe harbor provision that protects a defendant from discrimination claims if the difference in treatment of employees is justified by sound actuarial principles. *Id.* These disability-based distinctions may be made if the health plan meets the requirements of a bona fide benefit plan even if the disparate treatment has an adverse effect on disabled employees. *Id.* In addition, "[t]he ADA permits an employer to establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting, classifying, or administering such risks." *ADA Exception for Certain Health Insurance Plans*, 6 EMP. COORD. EMPLOYMENT PRACTICES § 46:9, 1 (2013). It is up to the plaintiff to prove subterfuge, or knowing evasion by the defendant of ADA requirements. *See id.* at 2. "The subterfuge exception to the safe harbor provision requires that a plaintiff show that the employer specifically intended to discriminate based on a disability, whether the discrimination was aimed at fringe-benefit or non-fringe-benefit aspects of the employment relationship." *Id.*

114. *Seff*, 691 F.3d at 1224.

115. Plaintiff's Amended Motion for Class Action Certification & Incorporated Memorandum of Law at 2, *Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), ECF No. 17.

116. *See id.* at 4 (citing 42 U.S.C. § 12112 (2012)). Section 12112 prohibits an employer from inquiring about medical information and does not allow an employer to require employees to complete medical exams unless the inquiries and exam are job-related and necessary for the particular position of the employee, or the medical examinations are "part of an employee health program" and are voluntary. § 12112(d)(4)(A)-(B); *see* 29 C.F.R. § 1630.13(b) (2013); *see generally* ENFORCEMENT GUIDANCE, *supra* note 29 (providing explanations of what constitutes "medical examination" and "job-related").

wellness program, the program was not voluntary by definition.¹¹⁷ Broward County opposed the plaintiff's claim that he was discriminated against under the ADA, arguing that the twenty-dollar surcharge was needed to encourage employees to make healthy choices and to reduce the county's health care costs.¹¹⁸ Though relying primarily on the safe harbor provision of the ADA to rebut the contention that § 12112, the clause that prohibits medical examinations and medical inquiries, was violated,¹¹⁹ the county also contested the alleged involuntariness of the program.¹²⁰ Broward County noted that the EEOC's administrative guidance is not binding on the court and that the EEOC itself has issued conflicting opinions on what "voluntary" really means.¹²¹ The EEOC urged the court to hold that "incentive-based wellness programs which do not exceed HIP[A]A's 20% financial threshold are 'voluntary' and permissible under the ADA."¹²²

The district court in *Seff*, while avoiding the issue of voluntariness in its decision to find for Broward County, relied on an expansive interpretation of the ADA's safe harbor provision to validate the employer's use of a twenty-dollar penalty for nonparticipation.¹²³ The district court, in granting summary

117. See Plaintiff's Amended Motion for Class Action Certification & Incorporated Memorandum of Law, *supra* note 115, at 4. The EEOC has defined a "voluntary" wellness program as one where an employer does not require participation and does not penalize employees for not participating. ENFORCEMENT GUIDANCE, *supra* note 29, at Q. 22.

118. Broward County's Motion for Summary Judgment & Supporting Memorandum of Law at 1–2, *Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370 (S.D. Fla. 2011), ECF No. 35. The county implemented the program to increase early disease detection and improve risk mitigation after receiving counseling from a healthcare consultant about stemming rising healthcare costs. *Id.* at 3. Broward County argued that the wellness program "properly accommodates the need of the County to provide adequate financial incentives to encourage successful program participation while ensuring that such financial incentives do not become unduly coercive." *Id.* at 2. Broward County implemented the wellness program in an effort to stem rising health care costs associated with the county's "older, sicker" workforce. See *id.* at 2–3.

119. See *id.* at 1, 8–12; 42 U.S.C. § 12201(c)(2) (2012) ("This Act shall not be construed to prohibit or restrict . . . [covered entities] from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.").

120. Broward County's Motion for Summary Judgment & Supporting Memorandum of Law, *supra* note 118, at 12.

121. See *id.* at 13–14 (citing several EEOC opinions from 2004). In early 2009, the EEOC stated that wellness programs with a financial fringe not exceeding twenty percent of the cost of health care coverage are considered voluntary; however, the EEOC later rescinded this statement and stated that it is continuing to examine the scope of voluntariness under the ADA. *Id.*

122. *Id.* at 15.

123. See *Seff v. Broward Cnty.*, 778 F. Supp. 2d 1370, 1373–75 (S.D. Fla. 2011), *aff'd*, 691 F.3d 1221 (11th Cir. 2012). The ADA lays out four elements of the insurance safe harbor provision that must be met for employers to legally make medical inquiries: the wellness program must be a term of a bona fide benefit plan; the purpose of the program must be "based on underwriting risks, classifying risks, or administering such risks"; the program must not be inconsistent with state law; and the wellness program must not be used as a "subterfuge" to evade the ADA. Broward County's Motion for Summary Judgment & Supporting Memorandum of Law, *supra* note 118, at 9. The

judgment to Broward County, went through each element of the safe harbor provision to determine that the county's wellness program met the exemption requirements to override § 12112 of the ADA.¹²⁴ The most contested element, and the one on which Mr. Seff focused his appeal, was the requirement that the wellness program be a "term" of a bona fide benefit plan.¹²⁵ The court reasoned that the program was a term of the health plan because the employer's insurer, Coventry, paid for and administered the program and the only people eligible to participate were those individuals enrolled in the county's health plan.¹²⁶ The plaintiff argued that the program was not a term of the health plan because an employee could have enrolled in the health plan without participating in the wellness program.¹²⁷ In addition, the wellness program offered its own benefits, such as disease coaching and medication cost waivers, which were independent from the health plan.¹²⁸ These distinctions were tenuous at best. The *Seff* decision is the first significant case to be litigated over the intersection of wellness programs and the ADA.¹²⁹ The case leaves many questions unanswered regarding the definition of "voluntary" and how employers must structure their programs to fall within the ADA's safe harbor provision.

III. SEFF'S BROAD ENCOMPASSMENT OF THE ADA'S SAFE HARBOR PROVISION AND UNRESOLVED ISSUE OF VOLUNTARINESS LEAVE THE DOOR OPEN FOR OBESITY CLAIMS

A. *The Broad Interpretation of the Safe Harbor Provision is in Discord with Recent ADA Obesity Litigation*

The *Seff* court's decision to ignore the issue of a wellness program's potential violation of the ADA makes it difficult for employees to challenge wellness program requirements.¹³⁰ Through the ADA's safe harbor provision, the decision paints a broad stroke of coverage for almost all types of wellness

county argued that the wellness program was implemented to assess the risks of insuring their employees and to help the county better administer its benefit plan. *Id.* at 12. It also argued that participation in the wellness program was not a condition to enroll in the group health plan, which, if it was, would be a clear penalty and preclude the program from being categorized as voluntary. *Id.* The court in *Seff* agreed. *See Seff*, 778 F. Supp. 2d at 1373–75.

124. *See id.*

125. *See id.* at 1373 (noting that the plaintiff's memorandum focused primarily on this issue).

126. *Id.* at 1372–73.

127. *Id.* at 1373.

128. *Id.* at 1372. The court cited the inclusion of wellness program language in the county's benefits plan handout as demonstrating that the program was a term of the group health plan. *Id.* at 1373.

129. *See* Heather Baird, Note, *Healthy Compromise: Reconciling Wellness Program Financial Incentives with Health Reform*, 97 MINN. L. REV. 1474, 1487 (2013).

130. *See Seff*, 778 F. Supp. 2d at 1374–75.

programs, especially for those supposedly categorized as “voluntary.”¹³¹ The *Seff* case brings to light the practical application of the ADA to company wellness programs, and highlights two major issues: the breadth of the safe harbor provision and the stringency and standard by which wellness programs are deemed to be voluntary.¹³² Following the ADA Amendments of 2008, an increasing number of courts recognized obesity as a legitimate disability, regardless of the existence of an underlying physiological cause.¹³³ This expansion of coverage for previously excluded conditions—particularly obesity, which continues to rise in the United States¹³⁴—is in contrast with the *Seff* court’s disregard for ADA prohibitions when a wellness program meets the criteria to fit within the ADA’s safe harbor provision.¹³⁵

The *Seff* court addressed the five factors necessary to exempt the county’s wellness program from ADA prohibitions on medical exams and inquiries, but did not analyze the factors in depth, leaving room for argument regarding what kind of wellness programs are actually exempted from ADA regulations.¹³⁶ The first requirement is that the wellness program be a term of a bona fide health benefit plan.¹³⁷ The court explained that Broward County’s wellness program was a term of the health plan because it was mentioned in a health plan document, the insurer sponsored the program, and the program was only available to health plan participants.¹³⁸ According to the court, the mere mention of a wellness program in a health plan document results in the program automatically being considered a term of the health plan, making it seemingly easy for an employer to prove that a wellness program is a bona fide term.¹³⁹

Another prong, consistency with state law, was interpreted by the *Seff* court in favor of Broward County because Florida law authorized employers to offer

131. See John L. Utz, *Wellness and the ADA*, 20 no. 4 ERISA LITIG. REP. (NEWSL.) 1, 5–6 (2012).

132. *Seff*, 778 F. Supp. 2d at 1373–74.

133. See EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 694 (E.D. La. 2011); BNSF Ry. Co. v. Feit, 281 P.3d 225, 231 (Mont. 2012).

134. CENTERS FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

135. See Utz, *supra* note 131, at 4–5 (discussing *Seff*).

136. See *id.* at 4–6; *Seff*, 778 F. Supp. 2d at 1373–75.

137. See 42 U.S.C. § 12201(c)(2) (2012).

138. *Seff*, 778 F. Supp. 2d at 1373.

139. See *id.* There is no precedent about what constitutes a term of a bona fide health plan in reference to wellness programs:

The court did not, it appears, look directly at the terms of the health plan document to determine whether the wellness program was a term of the health plan. In fact, it appears the health plan document was not even included in the record before the court. But the court identified three facts as being sufficient in the aggregate to establish that the wellness program was a term of a bona fide benefit plan (the health plan), so as to enjoy the ADA exemption.

Utz, *supra* note 131, at 4.

discounts on insurance in return for meeting health promotion requirements.¹⁴⁰ Although the plaintiff argued that the discount to participating employees was in fact also a penalty for non-participating employees, the court dismissed that argument and did not analyze the state law in depth.¹⁴¹ Concerning the exemption requirement that a wellness program be “based on underwriting risks, classifying risks, or administering such risks,”¹⁴² the *Seff* court relied on the county’s assertion that the wellness program was implemented after discussions with a health consultant.¹⁴³ The health consultant provided research showing that wellness programs lower insurance premiums and that the county could use the aggregate health data collected in the biometric screenings and health risk assessments to shape future health plans.¹⁴⁴ Though there is little research regarding the financial connection between wellness programs and lower health insurance costs for employers,¹⁴⁵ the court seemed willing to take the assumption at face-value that the county would use the wellness program data to underwrite and classify risks.¹⁴⁶ In addition, the court did not find evidence of subterfuge, as was necessary to dismiss earlier safe harbor provision cases,¹⁴⁷ but instead made a blanket statement about the importance of the program to employees, whether they were disabled or not.¹⁴⁸

140. See *Utz*, *supra* note 131, at 4; see also *Seff*, 778 F. Supp. 2d at 1375 (noting no contrary Florida law).

141. See *Seff*, 778 F. Supp. 2d at 1373–75; *Utz*, *supra* note 131, at 4.

142. 42 U.S.C. § 12201(c)(2) (2012).

143. See *Seff*, 778 F. Supp. 2d at 1371, 1373–74.

144. *Id.* at 1371–72, 1374; *Utz*, *supra* note 131, at 5.

145. See *Matcke*, *supra* note 21, at xxvi, 53, 107.

146. *Utz*, *supra* note 131, at 5. Broward County cited a decision in the Third Circuit, *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), to support its stance that their wellness program need not be justified by actuarial data. *Utz*, *supra* note 131, at 5; *Ford*, 145 F.3d at 611–12. However, the EEOC’s 1993 interim guidance suggests that this data should be considered. See EEOC NOTICE, No. 915.002, §§ III(C), V(1) (June 8, 1993), available at <http://www.eeoc.gov/policy/docs/health.html>. For a discussion on the safe harbor provision and its interplay with the insurance industry, see *Shuman*, *supra* note 79, at 558–59. *Shuman* discussed the legislative history of the safe harbor provision and the tension between affording rights to disabled individuals and bowing to the insurance industry:

[T]he statute appears to be purposefully vague in order to satisfy contending interest groups. Unable to decide on exactly what it intended to legislate, Congress inserted language which looks in two directions. One provision attempts to appease the insurance industry; the other provisions attempt to help the large group of disabled people.

Id. at 556 (quoting *Parker v. Metro. Life Ins. Co.*, 99 F.3d 181, 190 (6th Cir. 1996), *vacated*, 107 F.3d 359 (1997)). See also Rachel Schneller Ziegler, *Safe, But Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act*, 101 MICH. L. REV. 840 (2002).

147. See *supra* Part I.C.

148. See *Seff*, 778 F. Supp. 2d at 1375 (claiming that the program is “enormously beneficial” but not detailing how); Nina G. Stillman & Andy R. Anderson, *Wellness Program Falls Within ADA Safe Harbor*, MORGAN LEWIS (Sept. 18, 2012) <https://www.morganlewis.com/index.cfm/publicationID/7a2d92f8-bb88-4336-9965-79125ed375cf/fuseaction/publication.detail> (discussing the *Seff* appellate case).

*B. The Safe Harbor Provision and the Unresolved Issue of Voluntariness
Obfuscate Otherwise Legitimate Discrimination Claims Under the ADA*

The broad exemption in the ADA for wellness programs opens the door to discrimination against obese employees who may be disparately impacted by penalties for not meeting supposedly voluntary wellness program requirements.¹⁴⁹ Because the five factors necessary to exempt a wellness program from ADA regulations were interpreted broadly in *Seff*, it is relatively easy for wellness programs to qualify for a safe harbor exemption. Therefore, obese individuals who either choose not to participate or do participate but do not meet certain requirements may be penalized based on their weight, which is a condition that is increasingly covered under the ADA.¹⁵⁰ As a result, the safe harbor provision of the ADA may serve as a shelter for employers who create a system of discrimination against obese employees.¹⁵¹ These employees will have limited recourse because the discrimination takes place under the broad and largely undefined umbrella of ADA-exempt “voluntary” wellness programs.¹⁵²

149. See Baird, *supra* note 129, at 1482–83, 1492, 1495 (discussing how the judicial and legislative journey in defining the boundaries of wellness programs as penalties has only begun, and how implementation of these programs “could exacerbate” economic disparity); see also Sarah Ritz, *The Need for Parity in Health Insurance Benefits for the Mentally and Physically Disabled: Questioning Inconsistency Between Two Leading Anti-Discrimination Laws*, 18 J.L. & HEALTH 263, 294 (2003–04) (“The safe harbor provision disturbs the statutory framework by exempting traditional, discriminatory insurance practice from Title 1 constraints. It was not included in the original bill but was later added ‘to reassure the insurance industry and other covered entities that the ADA would not disturb current insurance underwriting practices.’”) (citing H. Miriam Farber, Note, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850, 861, 916 (1994)). For a discussion on how those considered disabled under the ADA can be discriminated against, see Shuman, *supra* note 79, at 561. Shuman discussed how the employers’ and insurers’ “burden” to satisfy safe-harbor requirements for their programs is “not very high.” *Id.* Shuman illustrated this with a discussion about an insurer charging higher rates against a person with AIDS, and an administrator treating mental disabilities differently than other disabilities as long as there is “sound actuarial data.” *Id.*

150. See Baird, *supra* note 129, at 1482, 1487 (overviewing the five factors, and the two requirements needed for wellness programs to fall within the safe harbor provision); see generally Jennifer Dianne Thomas, *Mandatory Wellness Programs: A Plan to Reduce Health Care Costs or a Subterfuge to Discriminate Against Overweight Employees?*, 53 HOW. L.J. 513, 514–15 (2010) (opining that penalties allocated with wellness programs could discriminatorily target overweight individuals who otherwise do not have health issues that average weight persons may have).

151. See Ritz, *supra* note 149, at 275 (“The safe harbor provision . . . provides [that,] . . . [e]ssentially, as long as a disabled person is disabled enough to produce a real financial risk, they can be discriminated against.”); but see Ziegler, *supra* note 146, at 849 (noting that Congress’ intent for the safe harbor provision was not for it to be a “trump card” to permit discrimination, but to make sure that the insurance industry for the self-insured was not disrupted). See S. REP. NO. 101-116, at 850 (1989) (Conf. Rep.) (intending to limit the reach of insurers and employers by requiring that they present sound actuarial evidence to support differential treatment of employees).

152. See H.R. REP. NO. 101-485, pt. 2, at 75 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.A.N. 303, 357 (stating that programs that are voluntary and abide by confidentiality regulations are acceptable activities); ENFORCEMENT GUIDANCE, *supra* note 29, at Q.22 (pointing

The presumption of voluntariness in *Seff* and the EEOC's conflicting definition of "voluntary" set the stage for increased ADA litigation involving obese employees.¹⁵³ The *Seff* court did not hold that a twenty-dollar surcharge rendered a wellness program "involuntary" under the ADA, despite the EEOC's guidance that a wellness program is only "voluntary" if the employer neither requires participation nor penalizes employees who do not participate.¹⁵⁴ Employers are increasingly using aggressive financial incentives to "push the boundary between voluntary and coercive."¹⁵⁵ As employers up the ante, it will become easier for employees to argue that they are being penalized for not participating in a program or for participating but not meeting program requirements, and these penalties may not only run afoul of the ADA's regulations on wellness programs but also increase the likelihood of a disparate financial impact on obese employees.¹⁵⁶

out that a program is voluntary if employees are not required to participate or not penalized for not doing so); *ADA & GINA: Incentives for Workplace Wellness Programs*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 24, 2011), http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html (stating that the Commission has not taken an official position regarding what extent employers are permitted to offer incentives to participate in wellness programs); *Baird*, *supra* note 129, at 1490–91 (explaining that until incentives for participating in wellness programs are defined, determining the legality of programs is a "highly subjective" standard, and that a clear line defining the ADA's ability to narrow the scope of wellness programs has not yet been defined by courts); *see also* Joseph J. Lazzarotti, *An Introduction to Wellness Programs: The Legal Implications of "Bona Fide Wellness Programs,"* 6 BENDER'S LAB. & EMP. BULL. 270, 274 (2006) (explaining that it is unclear whether, and to what extent, incentives abrogate voluntariness but maintaining that employees may try to challenge wellness programs).

153. *See Baird*, *supra* note 129, at 1492 ("Perhaps because of the relatively small \$20 penalty for non-participation the court in *Seff* assumed voluntariness without explicitly addressing it."); *see also* ENFORCEMENT GUIDANCE, *supra* note 29, at Q.22 (noting the voluntariness requirement).

154. *See supra* notes 122–23 and accompanying text.

155. *Baird*, *supra* note 129, at 1490. Penn State University's wellness program has recently garnered much attention for being overly intrusive in its employees' lives. Natasha Singer, *Health Plan Penalty Ends at Penn State*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/business/after-uproar-penn-state-suspends-penalty-fee-in-wellness-plan.html>. The university imposed a one-hundred dollar monthly fee on employees who chose not to fill out a questionnaire about their jobs, marital situation, finances, and, for females, whether she planned to become pregnant. *Id.* Penn State adopted a wellness program at the suggestion of its health care claim administrator. *Id.* The president decided to suspend the fee after uproar from faculty and staff regarding the privacy intrusion and the punitive nature of the program. *Id.*; *see also* Tom Emerick & Al Lewis, *The Danger of Wellness Programs: Don't Become the Next Penn State*, HARV. BUS. REV. BLOG NETWORK (Aug. 20, 2013), <http://blogs.hbr.org/2013/08/attention-human-resources-exec/> (suggesting to employers that making employees answer intrusive questions should be avoided, and that offers should be made as incentives to answer such questions).

156. *See Baird*, *supra* note 129, at 1489–91 (noting that "as the incentive differential is permitted to increase, so does the likelihood that a court would strike down a program as incompatible with the ADA."); *see also* Natasha Singer, *Rules Sought for Workplace Wellness Questionnaires*, N.Y. TIMES, Sept. 24, 2013, at B3, *available at* http://www.nytimes.com/2013/09/25/business/rules-sought-for-workplace-wellness-questionnaires.html?_r=0 (reporting that lawmakers are encouraging the EEOC to issue guidelines on how far employers may stretch the term "voluntary"); Michelle M. Mello & Meredith B. Rosenthal, *Wellness Programs and Lifestyle*

IV. CONCLUSION

The rise of wellness programs in the workplace is a positive development because of the improvement in employee health and the potential lowering of medical costs. However, these programs are breeding grounds for a rise in discrimination claims under the ADA. As the obesity epidemic grows and courts increasingly categorize obesity as a disability,¹⁵⁷ the decision in *Seff* has set the stage for an influx of discrimination claims in the context of employer wellness programs.¹⁵⁸ The *Seff* decision is in discord with courts' increasing leniency in ADA cases¹⁵⁹ by categorizing any potential discrimination claim as an exception to the ADA under the safe harbor provision. The *Seff* court's decision, by interpreting the safe harbor provision of the ADA too broadly and ignoring the requirement that wellness programs be voluntary, undermined the broad protection for individuals with disabilities, in particular obese individuals,¹⁶⁰ under the ADA.

Discrimination—The Legal Limits, 359 NEW ENG. J. MED. 192, 197 (2008), available at http://www.hsph.harvard.edu/wp-content/uploads/sites/487/2012/10/Wellness_paper_PDF.pdf (recommending that the voluntary nature of participation should be emphasized by employers to garner support of a program's legality in light of the dearth of case law defining voluntariness).

157. See Jennifer Vallor, *Gut Check: Why Obesity Is Not a Disability Under Tennessee Law and How the Legislature Can Address the Obesity Epidemic*, 9 TENN. J.L. & POL'Y. 265, 283 (2013) (noting that after the ADA 2008 Amendments, federal courts have begun to recognize obesity as a disability); see also Laura C. Hoffman, *The U.S. Supreme Court's "Disability" in Statutory Construction: the Debate Over the Interpretation of the Definition of "Disability Under the Americans with Disabilities Act (ADA) & the ADA Amendments Act of 2008*, 14 SCHOLAR 913, 943 (2012) (positing that if obesity becomes an accepted disability, claims will increase).

158. See *supra* Part III.

159. See *supra* Part I.B.

160. See, e.g., Steven C. Sizemore, *A Fatter Butt Equals a Skinnier Wallet: Why Workplace Wellness Programs Discriminate Against the Obese and Violate Federal Employment Law*, 11 WYO. L. REV. 639, 660–61 (2011).

