



# Another Gender Gap: The Disparate Impact of Obesity on Women

Jennifer Bennett Shinall, Ph.D., J.D. | Vanderbilt University | November 3, 2015



# Obesity as a Women's Issue

- Obesity is typically framed as a health issue
- Obesity is also a women's issue
  - Obesity has a particularly negative impact on the health, economic well-being, and social welfare of women
- State benchmark insurance plans in 28 states do not cover any type of medical weight-loss treatment
  - Women stand to experience the greatest injury from this denial of access to care
- Previously unexplored legal solutions are already in place
  - Title VII of the 1964 Civil Rights Act
  - The Patient Protection and Affordable Care Act (ACA)



# The Frame of the Current Debate

- Obesity is typically framed in the public discourse as a
  - Health issue
    - NIH (2013): Obesity increases risk of type 2 diabetes, coronary heart disease, diabetes, musculoskeletal conditions, and certain types of cancers
  - Voluntary issue
    - Do individuals choose to become obese?
  - Mutable issue
    - Can obese individuals choose to become non-obese at any time?
- Framing obesity as a health issue leads to assumptions about the productivity of obese workers
  - Shinall (2016): No evidence of lower productivity among obese workers in physical-activity occupations, where we might expect the greatest impact of weight on work ability



# The Frame of the Current Debate

- Framing obesity as voluntary and mutable is also problematic
  - Health studies question obesity's mutability and voluntariness
    - Importance of changing market conditions for the rise in obesity rates
      - Courtemanche et al. (2015): Decreased costs (monetary and time) of calorie intake, decreased physical activity, and decreased cigarette smoking
      - Sturm and An (2014): Relative decrease in the price of all food
      - Rao et al. (2013): Relative increase in the price of healthy food
    - Health literature pessimistic on ability of obese individuals to achieve long-term weight loss through traditional dieting
      - For examples, see Ludwig & Friedman (2014), Gall (2008)
    - Obesity rates are positively correlated with age and minority status
      - For examples, see Shinall (2016), Cawley (2004)



# The Frame of the Current Debate

- Framing obesity as voluntary and mutable is also problematic
  - May contribute to obesity stigma
    - Roehling (1999), Berry and Spence (2009): Participants in psychological experiments characterize obese individuals as lazy, unfit, incompetent, sloppy, unmotivated
    - Andreyeva et al. (2008): Self-reported weight discrimination increasing over time
    - Puhl and Heuer (2010): Obesity stigma is not productive (i.e. does not lead to weight loss)
  - May impede access to legal protections and legal remedies for obese individuals
    - From a legal perspective, immutability and involuntariness are the touchstones of discrimination protection
      - May prevent access to remedies under existing laws
      - May discourage passage of new legal remedies



## Reframing the Debate

- The current framing of the obesity debate is unproductive, unhelpful to obese individuals, and often relies on erroneous (or at least questionable) assumptions
- Obesity as a women's issue
  - Substantial empirical evidence that obesity disparately impacts women from the social, economic, and health perspectives
    - The latest form of discrimination against women?
- Emphasizing the particularly negative impact of obesity on women potentially increases legal remedies under federal law for obese individuals



# The Disparate Economic Impact of Obesity on Women

- Obese women encounter wage and employment penalties in the labor market not encountered by obese men
  - Gortmaker et al. (1993), Averett & Korenman (1996), Pagan & Davila (1997), Cawley (2004): Obese women earn lower wages and are less likely to be employed than non-obese women
    - Even after accounting for education, demographics, and socioeconomic status
  - Shinall (2016): Obese women are excluded from high-paying public interaction jobs, earn less when they work in such jobs
    - Low-paying physical activity jobs may be the only ones available to obese women



# The Disparate Social Impact of Obesity on Women

- Economic effects of obesity for women may be compounded by social effects
  - Chiappori et al. (2012): Obese women marry spouses with lower levels of education and lower earnings
- Psychology evidence indicates obesity stigma is more severe for women
  - Taylor (2001): “I’d rather be a fat guy than a fat girl”; “It’s more normal for guys to be overweight”
  - Andreyeva et al. (2008): 15.5 percent of women reported experiencing weight or height discrimination, compared to only 8.1 percent of men
    - Self-reported weight/height discrimination just as common as self-reported race and sex discrimination





# The Disparate Health Impact of Obesity on Women

- Health literature suggests that the health penalty for remaining obese may be greater for women than for men
  - Sjöström et al. (2009): After bariatric surgery, the incidence of developing cancer is less for women (but not men)
  - Adams et al. (2009): After bariatric surgery, the incidence of developing cancer decreases for women
  - Yang et al. (2015): Meta-analysis concludes that after bariatric surgery, the incidence of developing cancer decreases by a greater amount for women



# Why is Reframing Obesity as a Women's Issue Important from a Legal Perspective?

- Weight discrimination is not illegal under federal law
  - Although it is illegal in Michigan, San Francisco, D.C., and seven other U.S. cities
- But if obesity is a women's issue, individual women who experience discrimination because of their weight may have grounds for relief under existing federal anti-discrimination laws
  - Discrimination in employment: Title VII of the 1964 Civil Rights Act
  - Discrimination in medical treatment: ACA



## Legal Relief for Obese Women under Title VII

- How do obese women combat the substantial wage and employment penalties in the labor market?
- Title VII prohibits employers from discriminating against women in the terms and conditions of employment
  - But what if an employer doesn't discriminate against women generally, just women who are obese?
- Sex-plus theory of discrimination: Employer treats a certain characteristic better in one sex than the employer treats the same characteristic in the opposite sex
  - *Phillips v. Martin Marietta Corp.* (1971): U.S. Supreme Court upholds sex-plus as a valid theory of liability under Title VII
  - Disparate treatment theory: A facially non-neutral practice that treats a protected group more negatively than a non-protected group



## Legal Relief for Obese Women under Title VII

- Title VII sex-plus theory of liability has been successfully used by female flight attendants to defeat airline weight restrictions targeted at women
  - For examples, see two 9<sup>th</sup> Circuit cases: *Gerdom v. Continental Airlines* (1992), *Frank v. United Airlines* (2000)
- Potential proof challenge: How does a woman prove her employer has discriminated on the basis of weight in the absence of an explicit weight policy?



## Legal Relief for Obese Women under the ACA

- 42 U.S.C. § 18116: The ACA prohibits health plans and healthcare providers from denying benefits or otherwise discriminating against individuals on the basis of sex
- 28 states do not cover medical or surgical weight-loss treatments in their benchmark insurance plans
- Argument: Insurance plans that deny coverage for medical or surgical weight-loss treatments have a disparate impact (and therefore discriminate) against women
  - Since the effects of obesity are more negative for women, denying weight-loss treatment is more harmful to women than to men
  - Disparate impact theory: A facially neutral practice that disparately affects a legally protected group
- Practical challenge: What is the best way to enforce the anti-discrimination protections in the ACA?



# Overcoming the Gender Gap in Weight Discrimination

- On a variety of fronts, women endure a greater penalty for their weight than do men
- Characterizing obesity as a women's issue has extensive empirical support in the economics, psychological, and health literature
  - It also opens the door to existing legal remedies under Title VII and the ADA
- Next step for legal advocates: Encouraging obese women to come forward and enforce their potential rights under Title VII and the ADA