

# Test Your OHS IQ: Is It Discrimination to Treat a Worker Adversely Because of His Weight?



## SITUATION

A worker who works as a flagger for a company was overweight when he was hired and has gained even more weight since then. His roommate is also a flagger and they often work as a team. The company calls his roommate 'but not him' for a flagging job just three blocks from their home. The roommate says that the company didn't call him because of his disability. The worker calls the company and asks why he isn't working. The company explains that because of his disability, it would be too hard on him to work a long shift as he can't stand that long, noting that he'd previously asked to work four-hour shifts only. When the worker protests, the company then claims that the *real* reason was that the contractor who needed the flagger had specifically asked it not to send him because of a prior incident. The worker sues for disability discrimination.

## QUESTION: Is the company liable for disability discrimination?

- A. Yes, because it treated the worker adversely because of a perceived disability'his weight
- B. Yes, because obesity is a disability *per se*.
- C. No, because the worker's weight wasn't the primary reason the company didn't call him into work.
- D. No, because obesity is not considered a disability.

## ANSWER

A. Treating a worker adversely because you believe that he's disabled is discrimination.

## EXPLANATION

This situation, which is based on a case from BC, raises the question of whether obesity is a disability entitled to protection from discrimination under the human rights laws. Cases on obesity discrimination have gotten mixed results. Workers have been most successful when they argue that being overweight is perceived to be a disability, which is what happened in the BC case.

The worker claimed he was discriminated against because of his weight, which he said was a physical disability. But he also said that his weight *didn't* interfere with his ability to stand or work long shifts as a flagger. The BC Human Rights Tribunal found that, based on the circumstances, the worker did *not* have a disability due to his weight. However, the analysis didn't stop there. The Tribunal explained that an employer is also guilty of discrimination if it treats a worker adversely because it *perceives him to be disabled*. Here, it appeared that the company did see the worker as disabled because he was overweight and that this perception was at least a factor in the decision not to call him for work. So the Tribunal ruled that the company was liable for disability discrimination and ordered it to pay the worker \$2,000 in damages.

#### **WHY WRONG ANSWERS ARE WRONG**

**B is wrong** because obesity is not automatically a disability. Several courts have held that it *can* be a disability if the condition limits or restricts the individual's ability to carry out the activities of daily living or work. In other words, simply being overweight—even very overweight—generally isn't enough alone to constitute a disability under the law.

**C is wrong** because a disability doesn't need to be the sole reason for the adverse treatment; it just needs to be a factor. Let's assume the main reason the company didn't call the worker was because of the contractor's request. If the worker's perceived weight-related disability was *any* factor at all in that decision—even if it was a secondary factor—then the company would still be liable for disability discrimination.

**D is wrong** because, as noted above, obesity *can* be a disability under the law. For example, the Canadian Transportation Agency ruled that airlines committed disability discrimination against obese passengers by forcing them to pay for an additional seat to accommodate their size. It found that obese passengers who were limited or restricted by their weight were disabled under the law [*Decision No. 6-AT-A-2008*, Canadian Transportation Agency, Jan. 10, 2008]. The Supreme Court of Canada refused to hear an appeal of this decision, effectively upholding it.

**Insider Says:** For information on ensuring the health and safety of overweight workers without discriminating against them, see 'Worker Profile'Overweight Workers,' Feb. 2010, p. 13.

#### **SHOW YOUR LAWYER**

*Johnson v. D & B Traffic Control*, [2010] BCHRT 287 (CanLII), Oct. 20, 2010