

## **NEW JERSEY APPELLATE COURT CLARIFIES WHEN OBESITY CAN FORM THE BASIS FOR A “PERCEIVED AS DISABLED” CLAIM**

By: Kevin J. O’Connor, Esq.\*

New Jersey’s intermediate level appeals court has clarified when an employee’s obesity can form the basis for a “perceived as disabled” claim of discrimination under the New Jersey Law Against Discrimination (“NJLAD”). In *Dickson v. Community Bus Lines, Inc. d/b/a Coach USA*, A-3857-17T3 (App. Div. Apr. 4, 2019), the Court upheld dismissal of a bus driver’s discrimination claims where there was no evidence in the record of an underlying medical condition causing the obesity and a lack of credible evidence that the employer perceived the bus driver as being disabled.

The sole claim before the appellate court was that plaintiff was subjected to a hostile work environment due to his obesity. Plaintiff held a commercial driver’s license (“CDL”) as a bus driver. Plaintiff worked for his employer for ten years, and had an average weight of 500 to 600 pounds. He passed the medical examination required every two years to keep his CDL.

Plaintiff alleged that his co-workers and supervisors would regularly make jokes or rude comments about his weight. Plaintiff admitted that he participated in the banter and even called himself “fat boy” in the presence of others and on his Facebook page. While Plaintiff alleged that he complained to supervisors about these rude and inappropriate comments, there was no documentary evidence to suggest that he had done so.

In 2015, Plaintiff underwent a medical examination as part of his license renewal and was temporarily disqualified from driving due to his physical condition and advised that he should undergo further medical testing before his driving privileges could be reinstated. Plaintiff was placed out of service by his employer and sent for a second opinion by a board-certified

physician. The second physician reached the same conclusion—that certain observations could be an indicator of medical conditions and that further testing was recommended.

Plaintiff was put on a leave of absence from his employer but never pursued the testing. A year or so later, he sued.

Plaintiff's claim failed because he could not show that he had an actual medical condition which caused his obesity. As for the claim that he was discriminated against on account of his employer perceiving him to have such a disability, the Court disagreed. The Court pointed to the fact that the employer never altered the conditions of his employment for the worse and only suspended him based upon the medical examination that was required as part of licensure. The Court also pointed to the fact that the employer sought a second opinion, which pointed against any finding that the employer saw the employee as disabled. The Court also pointed to the fact that the employer kept plaintiff's job open after he was suspended so he could pursue the further testing to get his license reinstated—something he chose not to pursue. The Court also rejected the notion that the joking in the workplace—in which Plaintiff joined in the banter—was sufficient to create a hostile work environment.

\*Kevin O'Connor is a shareholder with Peckar & Abramson, P.C. His areas of concentration are EPLI and D&O defense; construction law; class action defense; partnership and corporate dissolutions; restrictive covenant and trade secret litigation. Kevin is a frequent lecturer on these topics and has published numerous articles in those areas. Kevin received his Juris Doctor from Rutgers University School of Law, where he served as Editor-in-Chief of the *Rutgers Law Review*.