

OBESITY, DISABILITY AND THE COURT OF JUSTICE IN THE EUROPEAN UNION

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ABSTRACT

Obesity, something apparently neutral in principle, is socially built and follows some scientific and ideologically interested parameters, until they reach in the social imagination an idea considered the reference for daily performances. In the same sense, obesity is considered in the same imagination through a similar scientific-medical knowledge and intervention. Both realities refuse their neutrality for becoming legal concepts. Everything that does not fulfill the norm is, following its definition, abnormal, and needs a special consideration.

KEYWORDS: Obesity, disability, fordism, discrimination.

RESUMEN

La obesidad, algo en principio aparentemente neutral, se construye socialmente y bajo unos parámetros científicos e ideológicamente interesados, hasta conferirse en el imaginario social una idea que sirve de referente en las actuaciones cotidianas. En el mismo sentido, la obesidad se configura en el mismo imaginario a través de un conocimiento y una intervención científico-médica análoga. Ambas realidades dejan de ser neutrales para normativizarse, y todo lo que no siga la norma es, por definición, anormal, y sobre ello hay que actuar.

PALABRAS CLAVES: Obesidad, discapacidad, fordismo, discriminación.

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I. INTRODUCTION

On December 18, 2014, the European Court of Justice published a sentence (Case C-354/13, *Fag og Arbejde (FOA) against Kommunernes Lands forening (KL)*) responding to a preliminary ruling addressed by a Danish court in a process to claim for damages raised between a public employee and the Danish administration, in which the incidence of obesity on the maintenance and extinction of the employment contract relationship between a worker and the company where he was employed was analyzed.

The fact consisted on the dismissal of a caregiver by his employer, a Danish municipal administration, this dismissal was based on objective reasons, due to organizational and productive causes: the decrease in the number of children that each worker had to take care of.

The contract relation began on November 1, 1996, by means of a contract of limited period establishing the care of children in his own residence. The temporary contract relation turned into permanent after two years and lasted fifteen years until the dismissal occurred. It is a fact that the worker was already “obese” (BMI over 30) from the very beginning of the working relation and remained the same during the time when the contract relation was effective. The worker had tried to lose weight several times—even with economical support provided by his employer in the frame of the health policies established for the development of public servants—without any positive results. The worker was on leave for one year, going back to work in March 2010. The company contacted him to communicate that they had begun the legal procedure for the dismissal of the contract due to objective reasons, being stated as the dismissal clause “...the decreasing number of children and, consequently, the work amount descend due to it, that would imply serious consequences for the childcare service and its organization”. The dismissed worker was the only caregiver fired from the total of workers. He maintained that the real reason for having being fired was his obesity, and he claimed to have been treated in a discriminatory manner.

The worker presented a claim for obtaining the damages compensation and the Court in Kolding suspended proceedings to raise four prejudicial questions regarding the existence of possible discrimination for obesity in the European legal scope and the inclusion of obesity in the general definition for disability.

Basically, the response given by the ECJ starts from two statements considering if the law in the European Union establishes a general principle of non discrimination on account of obesity under the scope of employment and occupation. The first one takes into consideration the existence, among the fundamental rights belonging to the general principles of European law of a general principle of non discrimination due to that reason, but there is no article in the Treaties with a concrete prohibition regarding discrimination by means of obesity. And, the second one, it is not possible to extend the application scope of the Directive by means of analogy. The ECJ sustains both precisions in the cases *Chacón Navas*, C-13/05, and *Coleman*, C-303/06 and concludes by asseverating that “EU law has not enshrined a general principle of non-discrimination on grounds of obesity under employment and occupational scope”.

However, the ECJ could not disclaim two circumstances. One of them, the sentence ECJ from 11th April 2013 (C-335/11 and C-337/11 *HK Denmark*) and the other, the adhesion of the EU by Decision taken by the Council the 26th November 2009 to the

UN *Convention on the Rights of Persons with Disabilities* and its Optional Protocol from 2006. The consequence of this adhesion is that the ECJ performs the Directive 2000/78 by considering the obesity a motivating cause of disability, which is already entitled to be considered discriminatory on grounds of Article 1 of the Directive. Comparing obesity to disability, the ECJ argues that the protection of the latter can be extended to the former when the conditions for disability concur under the Directive 2000/78/CE by the Council from 27th November, i.e., “where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.”.

In summary, the ECJ interprets the concept of disability as referred to a long-term limitation, resulting from physical, mental or psychological impairments which in interaction with various barriers may hinder the performance of his professional activity or can constitute a long-term limitation, that could be included in the concept of disability established in the Directive 2000/78.

II. DISABILITY MODELS

An overweight person is someone whose corporality has not yet been recognized in its singularity and nowadays, as in the case of disability, consists of a social, cultural and historical construction on social categories conforming a different schema depending on the times we take into account. So, following its social development through history, we find diverse explanatory models of disability, beginning with a total absence of its consideration in Ancient Greek and Roman world, thought to be a divine punishment, to a biological deficiency and till nowadays, when an overlapping of two models, the medical and the social one are seen..

During the XVII and XVIII centuries disability began not to be considered of divine origin anymore, but an effective cause of the organism, and so it has begun to be studied by the medical science. Disability is fundamentally equated to the physiological substrate on which it is originated, it means, the deficiency, no matter if physical, sensorial or psychical, and is associated to the concept of “illness”. The arise of the capitalist societies linked to the Industrial Revolution consolidated a scientific-medical vision of disability from logical Positivists and Darwinists points of view. Medicine has conquered spaces that symbolized the economical and aesthetic success reproduced until nowadays: aesthetic surgery, healthy diets and a long list of examples longing for the healthy body, identified with a beautiful body associating it to success.

Medicine gives disability its actual sense, presupposing, because it has been stated by the medical science, that the human organism shall fulfill some standards in its constitution and performance in order to be classified as normal. A diversion from the medical standards corresponds to a non suitable organism for performing certain functions that a normal body could perfectly do. After all, reality is just a social construction crossed by dominant speeches. The abnormality emerges as the opposed to the norm, the diversion arises as the contrary of the law, the disability comes up as opposite of the health, the disabled body as the other compared to the healthy-beautiful body considered as the ruling pattern.

In the last decades, disability is submitted to a model named mostly after a social model, for which disability is caused ultimately by the environment, by the context surrounding the person. It does not consist of a model trying to force a sociological vision for the

study of disability, but simply, points out its social dimension for not having been adequately considered, pointing out that disability is the product of interaction between the human physiological substrate and the environmental social conditions surrounding him in his habitat and that can consist in barriers or obstructions.

Disability only reaches its own sense in a specific social and cultural context. Disability can be conceived differently from an objective characteristic applied to the human being, but as an interpretative construction belonging to a culture in which, due its particular way to describe the normality, disability would be a derivation of that norm. So, for example, the prevailing hierarchy of senses has not always been the same, we passed from the oral culture to a visual one after the invention of the alphabet, due to the writing, that became the principal way of acquiring knowledge. This fact was intensively improved by the invention of the printing and the massive literacy occurred in the state run schools.

We can also verify how our own personal identity is socially built because it is originated in the coexistence with other individuals; in the case of disabled persons, their identity is being built by others, by people with no disability.

Ultimately, the process we have just described shows how something apparently neutral in principle (obesity) is socially built and follows some scientific and ideologically interested parameters, until they reach in the social imagination an idea considered the reference for daily performances. In the same sense, obesity is considered in the same imagination through a similar scientific-medical knowledge and intervention. Both realities refuse their neutrality for becoming legal concepts. Everything that does not fulfill the norm is, following its definition, abnormal, and needs a special consideration. The social reality is being built under the impulse of dominant speeches that cover others to be finally considered the unique and truly ones, erasing the former.

III. DISABILITY AND FORDISM

The First World War caused the maiming of thousands of people who, once the conflict was finished, faced the impossibility of their assimilation into society. Simultaneously, a new economical system associated to the second Industrial Revolution emerged ruling the living and productive conditions. It consisted of a new productive order that excluded the participation of persons not suitable to contribute with all their work force, on one side, those who began to be considered abnormal or deviant considering the patterns of the “statistic normality”. And, on the other, that productive order becomes an efficient producer of work injured: ex-workers not suitable to perform their duties in factories, who, in addition to the massive itinerant war handicaps conducted the States to create policies and healthcare measures from a social scope (subsidies, benefits, social benefits) to a medical one (rehabilitation for returning to the production system). As a result,, all the professions linked to those policies and measures emerged and were consolidated.

Professional activity has been consolidated since the beginning of the XXth century as the fundamental condition for the existence of all persons. Economical structure articulated around the capitalist industrial production has driven most human beings to assume the working condition? Fordial capitalism needs specific functional requirements; in other words, it requires capable, productive manpower. On the other hand, it also needs solvent consumers, so that for the majority, the first condition is a requirement in order to fulfill the second one. In this economical system, disabled

people cannot offer the required efficiency conditions that are necessary for performing the work to be done, and this fact justifies their withdrawal from the system. As a result of this exclusion, disability acquires a specific form: an individual problem requiring medical treatment. The conclusion becomes obvious, so if production is an essential element in capitalist societies, disabled persons are in an extremely disadvantageous position, since they cannot sell their work force as others, because it is established that they do not produce the same. Under the consumerist view, they are also rejected from that space, since they cannot consume following the same standards as those who have no impairments.

IV. SOCIAL MODEL FOR DISABILITY

A new movement appeared at the end of the sixties proposing a political way that would overcome the independence and autonomy disabled persons lacked by practicing a medical model and an idea of independence is established for answering and breaking off from the previous model. Namely, independence in relation with practices denying or undermining it. The emphasis is driven to attain an effective equality in rights and opportunities among disabled persons, and to adopt necessary measures to accomplish it. This leads to practices which are typical of the social model, among which the consideration of the disabled's entitlement to rights appears. Disability is going to be considered not the result of a deficient physiological substratum, but the consequence of social structures that does not count with the real needs of the disabled while marginalizing and excluding them from participation of collective life. So, disability has been transferred from the individual to the collective level, the social context mainly being the one producing the concept in a specific sense; in the same way as some associated practices such as a context, where physical spaces are inadequate and the stereotype discriminatory, will also produce disability.

A basic idea of the social model is to consider disability the result of a disabling society instead of the result of a personal corporal pathology. Disability is to be taken as a problem located in society itself, so that the way to weaken it needs to be transforming the social environment.

Disability produced by society is directly related to discrimination.

The social model explained the causes that motivated the historic origin for disability in its modern definition, placing the causes for its oppression in the structural requirements of the capitalist system, fundamentally, capable, efficient and productive manpower.

Likewise, since the social model claimed the autonomy of these persons to decide on their own lives, it therefore focused on removing any type of obstacles, in order to offer an appropriate equality of opportunities. These obstacles lead to the inaccessibility to education, information and communication systems, work environments and provoke unsuitable benefit systems for disabled, discriminating health and social support services, transport, residence, inaccessible public buildings and leisure spaces, and also the devaluation of persons classified as disabled by their both their image and their negative representation in mass media.

Even the EU has assumed those new considerations regarding discrimination due to disability, stemming from the social model, insisting that the requirement for goods and services provided by society shall be adapted to possible special needs for the person, and not the other way around ("Discrimination by design". Working document. European Day of persons with Disabilities. Conference 3-12-2001). It is remarkable to

mention regarding it that historically and since its very first beginnings, the Movement for Independent Life was aware that design constituted a crucial element in the way to equality when equal opportunities in the exercise of their civil rights for disabled persons were being demanded.

V. THE DISABILITY MODEL UNTIL THE ECJ 18-12-2014 SENTENCE (CASE C-354-13)

The ECJ used to follow the medical model, the one considering disability as an individual condition, being the result of a physical, psychical or sensorial deficiency. To date, the Court interprets disability as an illness situation and assumes that people with any disability shall go through a rehabilitation process to resemble in as much as possible to the rest “healthy” and “able” persons in society. Disabled people become thus object of mainly medical attention and their reality is considered from a highly medical perspective. Following those statements, the Court was settling that a worker affected by an illness was left out of the application of non-discriminatory norms. Illness is not a discriminatory element for the Court, since it is not even mentioned as such in Community Directives nor can it be subsumed under the circumstances considered by them. Thereby, the sentence from 11th July 2006 (Case ChacónNavas) explained that the person dismissed exclusively due to illness is not included under the protection of Directive 2000/78/CE and also interpreted that Community law dismisses equating illness with disability since “there is no disposal in the EC Treaty containing a prohibition to discriminate by means of illness” and “the scope of Directive 2000/78 should not be extended by analogy.”

As it is more and more common, echoes of American Law are changing European case-law, due to the severe limits of the discrimination causes in Community Law, that do not permit enclosing potentially discriminating situations, under its protection, like obesity, in which elements not considered in the norm but that shall receive legal protection, concur. Therefore, those causes that are not able to be assimilated or identified with the ones expressly protected in the anti-discrimination Directive (Directives 2006/54, 2000/78 and 2000/43) are encased under the non-discriminatory protection by the Court, creating a new interpretation on the concept of disability including in it, from the perspective of the functional repercussion, not only the impossibility of performing a professional activity, but also the difficulty of its performance and, from the perspective of the illness causing a limitation, when the characteristics of the illness and its permanence expectation can constitute an obstacle for the complete and effective participation of the person in his professional life in equal conditions as the rest of workers due to different barriers interacting.

North American Law uses non-discriminatory protection as a referent and identifies obesity with the case in which a functional diversity, physical or mentally, determines a bigger or lower limitation in activities or when it is medically recognized or when it is assumed that it will drive to it, without needing any psychological disorder in addition to outlaw dismissal if it is possible to continue performing the fundamental tasks of the job, with or without reasonable adjustments and, therefore, if it is just based on simple perceptions or prejudices. On the other hand, North American case-law maintains different favorable thesis to the binomial obesity-discrimination, associating it to disability in 2008 in the sentences EEOC v. Resources for Human Development, Inc, and EEOC v. BAE Systems Tactical Vehicle Systems, LP, and finally, Whittaker v. America's Car-Mart, Inc., case No. 1:13-cv-00108, in the U.S. District Court for the

Eastern District of Missouri, cases that equate morbid obesity to disability, considering the cases perfectly subsumable under the Americans with Disability Act, ADA.

The latter sentence is almost contemporary with the SECJ dated on 18th December 2014, case C-354/13, Fag og Arbejde (FOA) y Kommunernes Landsforening (KL) that curiously reaches a similar conclusion while admitting the equalization of obesity and disability and, consequently, the protection based on this protection when concurring the conditions for it under Directive 2000/78/CE from the Council, from 27th November.

Canadian courts had already stated their own and more interesting answer from the point of view of warranties entitled to the obese worker regarding the Law against discrimination in the work, overcoming the tight limits on the causes established by non-discriminatory European Law (Canadian Charter of Human Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B of the Canada Act 1982/97, c. 11; the Employment Equity Act de 1986).

A specific treatment was given in the scope of labour to this cause of discrimination, but under the framework of human rights, under which the protection for obesity by means of assimilating it to disability is understood.

VI. THE MODEL OF DISABILITY IN THE ECJ 18-12-14 SENTENCE (Case C-354/13)

The Community Law turns into the social model due to the influence of American Law, that created the model ON that shore of the Atlantic.

We consider as disability what is not related to causes of individual or medical nature, but of social nature, and whose origin is the limitations imposed by society for offering services that can take the performing requirements (physical, psychical and sensorial) of every person into account. It assumes that disabled persons can take part in the society in equal conditions as others, something which requires the inclusion and acceptance of their difference. Disability is considered the result of a disabling society and the only way to weaken it requires, a transformation of the social environment.

The union of practices attributable to the social model emerges as the answer to previous practices carried out by the medical model, with a fundamentally emancipatory component from which a totally opposite context to the performances by the medical model is claimed. The disabled person's status rises and is considered entitled to rights, far from the former vision as simple object of rehabilitating care; those rights are being claimed as an assertion of the autonomy and the capability to decide of disabled persons, as the demand of both respect for them and equal opportunities in all the spaces and contexts from the society.

Ability and disability take us to performance conditions. Performance, like these categories, is thus a social construction related to the body. The performance categories are related to the organic difference between a healthy and a sick body, between health and illness, which, taken to the functional level, drives to determine an efficient performance (ability) and a deficient one (disability). This implies for example, the so-called "physical disability" as a deficient physical performance, or a deficient performance on a physical level. So that starting from the health and illness conditions tribute to an organism, we arrive to the medical and social construction for performance by means of capacity (functional efficiency) and disability (functional deficiency).

The sentence from 18th December 2014, Case C-354/13, Fag og Arbejde (FOA) y

Kommunernes Landsforening (KL) implies the turn to a social model for disability and, literally, conceives it as “it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”. To equalize obesity with disability, the ECJ requires the following characteristics:

- a) The existence of an obesity level that could be symptomatic of a pejorative treatment while interacting with various barriers that may hinder the full and effective participation of that person in professional life on an equal basis with other workers. (p. 59), independently of the cause that would have motivated it (p. 56), not constituting a ‘disability’ in itself, despite the serious level of it (p. 58).
- b) That obesity limits or prevents the achievement of the professional duties by themselves, independently of the application of reasonable settings (p. 57) on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity (p. 60).
- c) Obesity as long-lasting, considered to be permanent, though not necessarily definitive.
- d) The court or judge entitled to solve the question shall prove both the permanence of the illness or the excluded limitation and the existence of barriers that could interfere in the total working inclusion of the person hypothetically discriminated (p. 62), according to the rule for the “flexibility” of the burden of proof (p. 63).

VII. CONCLUSIONS

Although from the political point of view, the proposals emerged from the social model seem to be enough for reaching legally the equal of opportunities and the absence of discrimination, from the ethic scope, the model entails shortage because any human being, not depending on the nature or complexity of the functional diversion that affects him, is granted to receive equal based dignity, defining the idea of dignity as a trait that pertains to all, and not leaving open to interpretation that some human beings can be worthier than others.

The conclusion is that disabled persons have the right to equal opportunities, on account to their humanity, and not due to functionality. We overpass the traditional concept of human dignity established in the social model, based on capacity, in several competences, generally rational ones, that are intrinsically part to a regulated and functional human being, given equal value to all lives of every human being, whatever his functional diversity might be and guaranteeing the same rights and opportunities for everybody. Therefore, the word functional diversity should substitute the word disability as the positive expression of this vital situation inherent to human life and accept functional diversity as another one of the diversities conforming and enriching humankind.

In this diversity model, every person acquires the same dignity and human condition. All the persons are entitled to the same moral value, independently from their abilities

or disabilities and, therefore, shall have the same human rights granted. In this model, the fact of disability turns into a question of ethic and philosophical character and acquires a moral status (unreachable until now), through which any person with serious disability and despite being incapable of taking care of himself acquires the same condition regarding humanity and dignity; and thus, any discrimination suffered by this person will be expressly as a violation of the human rights belonging to disabled people.