

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

MODIFIED: SEPTEMBER 24, 2015

RENDERED: MAY 14, 2015

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000541-DG

FINAL
DATE 9-24-15 *2nd Grant P.C.*

WAGNER'S PHARMACY, INC.

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-0000573-MR
JEFFERSON CIRCUIT COURT NO. 07-CI-005314

MELISSA K. PENNINGTON

APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellee, Melissa K. Pennington, alleged that Appellant, Wagner's Pharmacy, discriminated against her by terminating her employment due to her morbid obesity. The trial court determined that the testimony of Pennington's medical expert failed to establish a physiological cause for her obesity and granted Wagner's motion for summary judgment. The Court of Appeals concluded that Pennington had established a *prima facie* case of disability discrimination, vacated the trial court's order of summary judgment, and remanded for further proceedings. This Court granted discretionary review to consider whether a physician's testimony about the cause of morbid obesity in general—not specific to the plaintiff—is sufficient to establish a *prima facie* case of disability discrimination under the Kentucky Civil Rights Act. We

conclude it is not. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's order of summary judgment.

Pennington was employed by Wagner's Pharmacy. On or about April 26, 2007,¹ Pennington's supervisor, Martha Parrish, notified Pennington that her employment was terminated. At that time, and during the preceding ten years Pennington worked for Wagner's, she weighed approximately 425 pounds. She is 5' 4" tall.

On July 7, 2007, Pennington filed a complaint in Jefferson Circuit Court alleging that "Wagner's discriminated against her because of her disability or handicap, and/or because of a false perception of a disability or handicap," in violation of KRS 207.150 and KRS 344.040. On June 3, 2011, Wagner's filed a motion for summary judgment contending that Pennington could not produce evidence that she had or was perceived to have a disability as defined in the statute. The trial court granted Wagner's' motion for summary judgment in a detailed memorandum and order entered October 21, 2011:

Plaintiff . . . was the sole operator of a food and drink concession truck owned by Defendant. Plaintiff parked the truck on the backside area of Churchill Downs, and was responsible for generating food and concession sales. Plaintiff was employed for about ten years in association with the trackside food concession . . . with Defendant as her employer, Martha Parrish as her supervisor, and Brenda Smyth as the owner's manager.

Plaintiff weighed 425 pounds and was 5' 4" tall during her employment with Defendant. Plaintiff also suffered from diabetes,

¹ Both the complaint and answer reflect that Wagner's terminated Pennington's employment on April 26, 2006; however, the date is referred to as April 26, 2007, in Wagner's motion for summary judgment, Pennington's response, and in the decisions of the trial court and Court of Appeals.

and often presented with a classic, raccoon like darkening around her eyes, perhaps giving her a “dirty” appearance. Despite the fact that she was extremely obese, Plaintiff could perform and did perform the essential functions of her job with Defendant.

However, sales on the backside declined significantly and the general condition of the truck necessitated that it be repaired or replaced. Defendant believed that the decline in sales was due in part to a failure of Plaintiff to generate sufficient sales to justify continued use of the truck on the backside. Defendant allegedly received information showing that Plaintiff failed to move the vending truck to different locations on the backside to generate more sales. On or about April 26, 2007, Defendant, through Plaintiff’s supervisor, Martha Parrish, orally informed Plaintiff that her employment was terminated.

Once, just before she was terminated, Plaintiff had come to work on her day off, while she was moving her residence, to pick up her paycheck. The owner’s manager, Brenda Smyth, whom Plaintiff rarely encountered, saw Plaintiff come in the office. On that day, Plaintiff was dirty and not in her best appearance. Plaintiff testified that she never went to work looking like that.

Ms. Parrish testified . . . that Ms. Smyth told her to terminate Plaintiff, because of Plaintiff’s “personal appearance.” Ms. Parrish denies that it had anything to do with Plaintiff being obese. However, Plaintiff’s co-worker, Vicki Young, asserted that Parrish stated Ms. Smyth “asked” Ms. Parrish to terminate Plaintiff due to Plaintiff being “dirty, overweight, and [because she] could not do her job.” Likewise, another co-worker, Tanya Calfee, asserted that Ms. Parrish was crying on the day Plaintiff was terminated, and told Ms. Calfee that Ms. Smyth “instructed” Ms. Parrish to fire Plaintiff “‘because of [Plaintiff’s] weight, and because she was dirty,’ and [Ms. Parrish] could not bring herself to do it.”

. . . .

Defendant argues that Plaintiff cannot establish a *prima facie* case of disability discrimination, since she cannot establish that she is disabled as a matter of law. The Kentucky Civil Rights Act, KRS 344.040(1), provides, pertinently, that it is unlawful “to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, . . . [when] the person is a qualified individual with a disability. . . .” KRS 207.150(1) provides, pertinently:

No employer shall fail or refuse to hire, discharge, or discriminate against any individual with a disability with respect to wages, rates of pay, hours, or other terms and conditions of employment because of the person's physical disability unless the disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible,

"The plaintiff bears the initial burden of establishing a *prima facie* case of disability discrimination against the defendant." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706 (Ky.App. 2004).

In order to establish a *prima facie* case of discrimination based on a disability, the plaintiff must show: (1) that [she] had a disability as that term is used under the statute (*i.e.*, the Kentucky Civil Rights Act in this case); (2) that [she] was "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) that [she] suffered an adverse employment decision because of the disability.

Id. at 706-07. Under KRS 344.010(4), "disability," with respect to an individual, is defined as:

- (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
- (b) A record of such impairment; or
- (c) Being regarded as having such an impairment.

The determination of whether Plaintiff has an impairment and whether the conduct affected by the impairment is a major life activity under the statute are questions of law. *Hallahan*, 138 S.W.3d at 707. The ultimate determination of whether the impairment substantially limits a major life activity generally is a factual issue for the jury, but may be resolved upon summary judgment under the appropriate circumstances. *Id.*

“The Kentucky Civil Rights Act was modeled after federal law, and our courts have interpreted the Kentucky Act consistently therewith.” *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 591 (Ky. 2003), *citing Bank One, Kentucky N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001). Under the Equal Employment Opportunity Commission (“EEOC”) Regulations, interpreting the Americans with Disabilities Act (“ADA”), “physical or mental impairment” means:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. §1630.2(h). “Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). The term “substantially limits” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1). The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §1630.2(j)(2).

A medical diagnosis of impairment is not enough; instead, Plaintiff must show “that the extent of the limitation [caused by her impairment] in terms of [her] own experience ... is substantial.” *Toyota Motor Mfg., Ky., Inc. v. Williams*, [534 U.S. 184, 198] (2002), quoting *Albertson’s, Inc. v. Kirkingburg*, [527 U.S. 555, 567] (1999). “[A]n individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term.” 534 U.S. at 198. The existence of a disability is to be determined on a case-by-case basis. *Id.*

“[T]he ADA guidelines suggest that obesity is rarely considered a disabling impairment” *Greenberg v. BellSouth Telecommunication, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007). See, 29 C.F.R. § 1630.2. Courts have uniformly held that obesity is not a qualifying impairment, or disability, unless it is shown to be the result of a physiological disorder. See, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-443 (6th Cir. 2007) (“we hold that to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of the physiological condition.”); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (“obesity, except in special cases where the obesity relates to a physiological disorder, is not ‘physical impairment’ within the meaning of the [ADA] statutes.”); *Coleman v. Georgia Power Co.*, 81 F.Supp.2d 1365, 1369 (N.D.Ga. 2000) (same). . . .

Pennington relied upon Dr. Gaar, a board-certified surgeon who has performed nearly two thousand gastric bypasses, to show that her morbid

obesity was the result of a physiological condition. The trial court concluded that Pennington did not meet her burden:

[N]owhere in Dr. Gaar's deposition is there testimony that there is a physiological cause for Plaintiff's obesity.

The fact that the obesity is accompanied by one or more subsequent physiological conditions is not determinative of whether the obesity will be considered a qualified disability. Dr. Gaar's expert testimony does not establish that Plaintiff's morbid obesity has a physiological cause. As such[,] it does not appear that Plaintiff can establish that her obesity will be considered a qualified disability. Furthermore, even if Plaintiff had proven that her obesity was a qualified disability, there is nothing of an evidentiary nature in the record which establishes that she was substantially limited in conducting "major life activities" prior to and at the time of her termination.

Pennington also argued that she had established a prima facie case of discrimination because she was "regarded as" having a disability. The trial court disagreed. "The record is undisputed that Appellee weighed the same at the time of her termination as she did when she was hired by Defendant." The trial court determined that the affidavits (of co-workers Vicky Young and Tanya Calfee), which Appellee submitted to establish she was fired due to her obesity, were inadmissible hearsay. Further, "Appellee's deposition and affidavit do not even infer that she was 'regarded as' having a disability. Likewise, the deposition testimony of Martha Parrish reflects that Plaintiff was not 'regarded as' having a disability."

The trial court determined that "Appellee has failed to establish she had a qualified disability to establish a prima facie case," but explained it would proceed as if she had:

[T]he burden then shifts to Defendant to establish a legitimate, nondiscriminatory reason for the adverse action. See, *McDonnell Douglas Corp. v. Green*, [411 U.S. 792, 802-03] (1973). “[T]he burden of refuting the *prima facie* case need not be met by persuasion; the employer need only articulate with clarity and reasonable specificity, a reason unrelated to a discriminatory motive and is not required to persuade the trier of fact that the action was lawful.” *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700 (Ky.App. 1991), citing *Texas Dep’t of Community Affairs v. Burdine*, [450 U.S. 248, 258] (1981).

The trial court determined that Wagner’s had articulated such a reason, “that Appellee was terminated because of her personal appearance.” In addition, in its response to Pennington’s interrogatory no. 3, Wagner’s stated that sales on the backside for which Appellee was responsible had declined significantly and that it believed the decline was due in part to Appellee’s failure to generate sufficient sales to justify continued use of the concession truck. The trial court also noted Parrish’s testimony that Ms. Smyth told her to let Pennington go due to complaints about her personal appearance but that Parrish denied it had anything to do with obesity. The trial court concluded that Wagner’s met its burden of refuting the *prima facie* case.

Having determined that the statements in the affidavits of co-workers Young and Calfee were inadmissible hearsay, the trial court concluded that it does not appear that Pennington “can establish that [Wagner’s] articulated reason for terminating [Pennington] was pretext to cover actual discrimination.”

The trial court noted Pennington’s (oral) argument to apply a “mixed-motive” analysis and explained that under “*Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992), . . . the party alleging discrimination

must show that the discriminatory motive ‘was a contributing and essential factor’ and not whether the employer’s action was taken ‘solely because of’ the discrimination. *Meyers*, 840 S.W.2d at 823.” The trial court determined that Pennington could not make the requisite showing because her “case primarily relies upon inadmissible hearsay. . . .”

Pennington filed a motion to alter, amend, or vacate, which was denied by order of March 2, 2011.

Pennington appealed to the Court of Appeals. By opinion rendered July 12, 2013, the Court of Appeals vacated the trial court’s order of summary judgment and remanded for further proceedings because “it was clear error for the trial court to find that Pennington’s condition did not have an underlying physiological cause.”²

The record includes the deposition of Dr. Edwin Gaar, who has performed thousands of bariatric (weight loss) surgeries. Dr. Gaar testified in detail as to the causes of morbid obesity. He stated that while the exact cause is not known and varies from patient to patient, morbid obesity is

a metabolic **disease** of diverse etiologies involving genetic neuro-humeral, environ- mental [sic] that all come together to result in a condition of decreased energy utilization and increased fat storage, and that in itself sets off a cascade of dominos leading to a host of other co-morbidities[.]

He clarified that neuro-humeral means “dysregulation of hormones, dysregulation of sibling cytokines within the body

² The Court of Appeals noted the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) and that the amendments indicate a trend in the law to treat morbid obesity as a disability per se but that they are not retroactive and do not apply to this case.

which stimulate or suppress appetite.” Before the end of the deposition, Dr. Gaar reiterated that “morbid obesity like [Pennington’s] is **caused by** a cluster of often unknown **physiological abnormalities** and that morbid obesity like **hers is in itself** an abnormal physical condition or disease (emphases added)

We must also determine whether her impairment has affected one or more of the body systems as enumerated in 29 C.F.R. § 1630.2h(1). Pennington has developed diabetes, which is as a result of the morbid obesity according to Dr. Gaar’s testimony. Diabetes is a disorder of the endocrine system, a major body system as set forth by regulation. Therefore, Pennington has established that her morbid obesity is an impairment contemplated by the statutory scheme and has established that merely being overweight is not a disability in itself.

The Court of Appeals next considered “whether Pennington’s impairment substantially limits one (or more) major life activity. KRS 344.010(4).” In light of Pennington’s sleep apnea, Dr. Gaar’s testimony that hygiene and simple activities such as tying one’s shoes are difficult for morbidly obese persons, that morbid obesity shortens life expectancy by approximately fifteen years, and that most morbidly obese persons cannot lose weight without drastic intervention such as bariatric surgery, the Court of Appeals concluded that “Pennington has a disability according to law, and she has established a [prima facie] case of discrimination.” The Court of Appeals agreed with Pennington that there was “a genuine question of fact as to the true reason for her dismissal: whether she was dismissed because of her personal appearance or whether the alleged failure to generate sales was pretextual.”

The Court of Appeals also considered the issue of the co-workers’ affidavits and stated that they are examples of double hearsay, “admissible if each part is admissible pursuant to an exception to the exclusion against

hearsay. Kentucky Rules of Evidence (KRE) 805.” The Court of Appeals determined that Smyth’s statement to Parrish (Pennington’s supervisor) was admissible under KRE 801A(b)(4) as an admission by a party and that “KRE 801A(a)(1) applies to Parrish’s statement to the co-workers,” which permits consideration of a prior inconsistent statement of a witness.

We granted Wagner’s motion for discretionary review to consider whether a physician’s testimony about the cause of morbid obesity in general—not specific to the plaintiff—is sufficient to establish a prima facie case of disability discrimination under the Kentucky Civil Rights Act.

Wagner’s argues that Pennington is not disabled under KRS 344.010(4)(a) as a matter of law because she cannot prove that her obesity is the result of a physiological condition and that she is not disabled under KRS 344.010(4)(c) because Wagner’s did not perceive her as having a substantially limiting impairment. Pennington contends that she submitted sufficient proof of a prima facie case under either KRS 344.010(4)(a) or KRS 344.010(4)(c) to survive a motion for summary judgment.

Because this case was decided on a motion for summary judgment, we must first review the applicable standards of appellate review for such cases. Summary judgment is an extraordinary remedy to be used only “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor against the movant.” Under Kentucky Rules of Civil Procedure (CR) 56.03, summary judgment is appropriate when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The review of summary judgment on appeal does not involve fact finding. Only legal questions must be resolved. So we review

the issue de novo with no obligation to offer the trial court's decision deference.

Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891, 894-95 (Ky.), *as corrected* (Nov. 25, 2013) (citations omitted).

The decisions of the trial court and the Court of Appeals, quoted above, provide a thorough discussion of the applicable law.

Dr. Gaar, Pennington's sole expert witness, never treated or examined her. He had met Pennington briefly on one occasion, the day before his deposition. Dr. Gaar testified that he had "looked over her hospital records from Suburban Hospital, which took about five minutes." Those records were all from treatment rendered in 2011, in relation to gastric bypass surgery, which Pennington underwent on March 15, 2011. Dr. Gaar did not review any of her prior medical records, nor did he consult with any of her physicians.

Dr. Gaar opined that Pennington had a classic case of super morbid obesity. He testified that she would have been considered to be super obese based upon her B.M.I. (body mass index) at the time of her 2011 gastric bypass surgery. Dr. Gaar did not know what Pennington's B.M.I. was when she worked for Wagner's, although he testified that Pennington told him she weighed 416 to 425 pounds at that time.

Dr. Gaar was asked about the cause of Pennington's morbid obesity:

Q. My question is, what produced it?

A. Boy, if you could tell me the answer to that we would both get rich. I can't tell you that there is a common theme or a common cause that goes through anybody.

It's a metabolic disease of diverse etiologies involving genetic neuro-humeral,³ environmental that all come together to result in a condition of decreased energy utilization and increased fat storage, and that in itself sets off a cascade of dominos leading to a host of other co-morbidities a lot of which she has.

Q. Let's isolate some of that. You said that it was a confluence of different factors, one being environmental?

A. Right. It's a multifactorial metabolic disease.

Dr. Gaar testified, "Nobody has been able to elucidate the cause of anybody's morbid obesity anywhere in the world, but I can tell you it's the easiest diagnosis to make because all you have to do is look at somebody."

Dr. Gaar explained that environmental factors play a role "because we are a society that likes to sell and consume cheap, high caloric foods that have poor nutritional value. Obesity is an epidemic, which is increasing in proportion not only in the United States but on a worldwide basis." Dr. Gaar could not say what environmental factors may have contributed to Pennington's obesity—"I'm giving you a general cause that's been well accepted amongst all cases of obesity." Dr. Gaar did not know of any genetic disorders that Pennington may have. Asked about neuro-humeral disorders, Dr. Gaar testified that Pennington had "not been evaluated for those, nor are those clinically used in medicine."

Although recent medical records reflected that Pennington needed a C.P.A.P. machine for sleep apnea, Dr. Gaar did not know if she had sleep

³ According to Dr. Gaar, *neuro-humeral* means "dysregulation of hormones, dysregulation of cytokines within the body which stimulate or suppress appetite."

apnea in 2006, nor what her co-morbidities were in 2006. Dr. Gaar did not know Pennington's work history for the last ten years, he did not know if she had any difficulty with any job because of her weight, he did not know if she had ever been placed on any restrictions because of her weight, nor did he know specifically if Pennington had any limitations to her activities of daily living because of her weight.

Pennington testified that none of her doctors ever told her that there was a physiological basis for her obesity.

In *Coleman v. Georgia Power Co.*, 81 F.Supp.2d 1365, 1369-70 (N.D.Ga. 2000),⁴ noted by the trial court, the parties disputed whether the plaintiff's morbid obesity constituted an impairment under the ADA. There, the plaintiff relied upon the deposition of Dr. Dunbar:

Dr. Dunbar's deposition however is somewhat ambiguous. When asked whether he would "agree that morbid obesity would be a physiological disorder or condition affecting one or more of the following body systems including neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive genitourinary, hemic, and lymphatic, skin and endocrine systems, . . . doctor responded "In that general application, yes." However, Dr. Dunbar never agreed that such was so with respect to his application of the term morbid obesity to Plaintiff. In his report, Dr. Dunbar found Plaintiff's heart, peripheral vessels, abdomen, genitalia, prostate, musculoskeletal and neurological systems normal and his chest clear to auscultation and percussion. However, at the deposition, Dr. Dunbar explained that morbid obesity can cause the onset of pathologic conditions such as diabetes mellitus. . . . He indicated that Plaintiff had diabetes mellitus, affecting the endocrine system, and hyperlipidemia, an

⁴ *Coleman* was decided before the ADAAA took effect. See *Lowe v. Am. Eurocopter, LLC*, No. 1:10CV24-A-D, 2010 WL 5232523 (N.D.Miss. Dec. 16, 2010). As noted by the Court of Appeals, the ADAAA is not retroactive and does not apply to this case.

elevation of blood fats, the long-term effect of which may accelerate the rate of peripheral vascular disease and lead to a stroke, heart attack or kidney failure for example.

While it appears that Plaintiff's obesity may have affected his bodily systems, it is less clear whether his obesity was a "physiological disorder." Despite Dr. Dunbar's answer above, when asked whether Mr. Coleman had any kind of medical condition which caused him to weigh 339 pounds, the doctor answered "no. . . ." [The court explained by way of footnote that Dr. Dunbar acknowledged that obesity could be caused by genetic factors and that Coleman had a family history of obesity, but Dr. Dunbar did not conduct any testing to determine if Coleman's obesity was due to a genetic disorder.] Additionally, Plaintiff does not recall any of his doctors ever giving him any medical reason to explain why he was overweight. . . . Although this court will not say that morbid obesity cannot be shown to be a physical impairment in some cases, having applied the above standard to the facts of this case, the court finds that Plaintiff has not met his burden of showing that his morbid obesity is a physical impairment as he has not shown that it is a "physiological disorder."

Id. at 1369-70 & n.4 (footnotes omitted).

Dr. Gaar's generic testimony about morbid obesity does not establish that *Pennington's* obesity is the result of a physiological disorder. Dr. Gaar testified about various factors involved in morbid obesity, but nothing he testified about was specific to *Pennington*. Dr. Gaar did not identify any medical condition that caused *Pennington* to weigh over 400 pounds. Dr. Gaar did not know of any genetic disorders she may have, and he testified that she was not evaluated for neuro-humeral disorders. *Pennington* testified that none of her doctors had ever told her there was a physiological basis for her obesity.⁵

⁵ Nor can we agree that *Pennington's* obesity substantially limits one or more of her major life activities. The Court of Appeals concluded that it did, in part, because *Pennington* suffers from sleep apnea, which causes difficulty breathing during sleep. Dr. Gaar was asked if he noticed "at least in recent history" that *Pennington* needed a breathing machine for sleep. Although Dr. Gaar testified "it would be almost

Pennington has not met her burden of showing that morbid obesity is a physical impairment.

Absent a physiological cause for her morbid obesity, Pennington cannot prevail. In *EEOC v. Watkins*, 463 F.Supp. 436 (6th Cir. 2006),⁶ the EEOC alleged that Stephen Grindle had been discharged by Watkins due to his morbid obesity in violation of the ADA. Grindle did not know of a physiological cause for his obesity.

The EEOC . . . argued that Grindle had an actual impairment—morbid obesity—that was regarded, albeit erroneously, as affecting his ability to do his job. Thus, to be successful when pursuing a “regarded as” claim, an employee must allege that he was perceived to have an impairment protected by the ADA (rather than a disability not named in the ADA that is perceived by the employer to be limiting). Thus we must determine whether non-physiologically caused morbid obesity is an ADA impairment.

impossible to think that she would not have sleep apnea just based on her B.M.I.,” Dr. Gaar only knew what Pennington’s co-morbidities were at the time of her bypass surgery in 2011. The record does not reflect that Pennington actually had sleep apnea or used a C.P.A.P. machine during the time she worked for Wagner’s. The Court of Appeals also noted Dr. Gaar’s testimony that hygiene and simple activities such as tying one’s shoes are difficult for persons with morbid obesity. Dr. Gaar’s general testimony does not establish that Pennington had any difficulty caring for herself. Dr. Gaar did not speak with her about it. He testified that he was not prepared to offer any testimony specific to Pennington’s activities of daily living. Pennington testified by deposition that there was never a time she was unable to do her job at Wagner’s due to her weight. In her affidavit, Pennington states that she is a good worker, capable of doing her job, with good grooming. Although her appearance on the day she went in to pick up her paycheck was not at its best, it was because *she had been moving* (her residence) and she never went in to work looking like that.

⁶ Superseded by Statute, See *BNSF Ry. Co. v. Feit*, 365 Mont. 359, 281 P.3d 225 (2012), noting that *Watkins* was decided before Congress’ passage of the ADAAA. As noted above, the ADAAA is not retroactive and does not apply to this case.

.....
[W]e hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.

Since we find that Grindle has not shown that he suffers from an ADA impairment, we do not address whether Watkins perceived Grindle as substantially limited in any major life activities.

Id. at 440-41, 443 (footnotes omitted).

We conclude that Pennington has not met her burden of proving that she suffers from an impairment under KRS 344.010(4). We reverse the decision of the Court of Appeals and reinstate the summary judgment of the trial court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Brian Edward Clare

COUNSEL FOR APPELLEE:

Philip Clyde Kimball

Supreme Court of Kentucky

2013-SC-000541-DG

WAGNER'S PHARMACY, INC.

APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2012-CA-000573-MR
JEFFERSON CIRCUIT COURT NO. 07-CI-005314

MELISSA K. PENNINGTON

APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

This matter is before the Court on the Appellee's Petition for Rehearing of the Memorandum Opinion of the Court, rendered May 14, 2015. Having reviewed the record and being otherwise fully and sufficiently advised, the Court ORDERS as follows:

- 1) The Appellee's petition is DENIED; and
- 2) The Memorandum Opinion of the Court, rendered May 14, 2015, is MODIFIED on its face and the attached opinion is substituted therefor. The modification does not affect the holding of the case.

All sitting. All concur.

ENTERED: September 24, 2015.


CHIEF JUSTICE