COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013-SC-000541

WAGNER'S PHARMACY, INC. APPELLANT

VS.

COURT OF APPEALS NO. 2012-CA-000573-MR

APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 07-CI-05314
HON. SUSAN SCHULTZ GIBSON

MELISSA K. PENNINGTON APPELLEE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Brief was served by Federal Express Mail upon Susan Stokely Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601; and by U.S. Mail upon Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; the Hon. Susan Schultz Gibson, Judge, Division 12, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Counsel for Appellee: Phillip C. Kimball, Esq., 1970 Douglass Blvd., Louisville, Kentucky 40205-1826, on this 13th day of October, 2014.

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INTRODUCTION

The Court of Appeals improperly deemed Pennington's morbid obesity as a "qualified disability" under the Kentucky Civil Rights Act and, as such, Wagner's Pharmacy requests this Court to reverse the Court of Appeals' opinion and reinstate the trial court's order granting summary judgment in favor of Wagner's Pharmacy.

STATEMENT CONCERNING ORAL ARGUMENT

Wagner's Pharmacy believes that oral argument would be unnecessary in this case; each party's brief adequately lays out each party's position and oral argument would not be helpful to the Court in deciding the issues presented. However, if the Court would prefer oral argument, Wagner's Pharmacy will of course participate.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This action arises under an allegation of wrongful termination of employment based on Appellee, Melissa K. Pennington's morbid obesity. Pennington was the sole operator of a food and drink concession truck owned by the Appellant, Wagner's Pharmacy. Pennington was employed by Wagner's Pharmacy for about *ten* years in association with the sale of concessions at the "backside" of Churchill Downs. (Trial R. at 212). On or about April 26, 2007, Wagner's Pharmacy, through employee Martha Parrish, informed Pennington that her employment was terminated. (Trial R. at 213). Pennington is and was at all times relevant hereto morbidly obese and "[t]he record is undisputed that [Pennington] weighed the same at the time of her termination as she did when she was hired by [Wagner's Pharmacy; roughly 425 pounds]." (Trial R. at 220-221; Mem & Order, Oct. 21, 2011, at 9-10).

On June 7, 2007, Pennington filed suit against Wagner's Pharmacy alleging that upon termination of Pennington's employment, Wagner's Pharmacy unlawfully discriminated against Pennington in violation of KRS 207.150 and KRS 344.040 because of her disability (morbid obesity) and/or because of a false perception of a disability. (Trial R. at 213). Pennington has tried to meet her burden that she has a "qualified disability" for purposes of KRS 344.040 through testimony of her lone expert witness, Dr. Edwin Earl Garr.

Dr. Garr's deposition was held on September 22, 2011. (Trial R. at 219). This deposition was for the purpose of establishing what evidence Pennington would produce at trial. As Pennington had only one expert witness, her prospects of reaching the jury relied solely on Dr. Garr's testimony. At the deposition, it was revealed that Dr. Garr

had never treated Pennington. (Disc. Depo. Dr. Garr at 4:25, 5:4-5, Sept. 22, 2011). In fact, Dr. Garr had only just met her the day before his deposition for one hour. (Disc. Depo. Dr. Garr 5:2-3, Sept. 22, 2011). He had never examined her and most importantly he had never reviewed a single medical record of Pennington from the time period prior to her termination. (Disc. Depo Dr. Garr 7:13-21, Sept. 22, 2011).

In response to Dr. Garr's deposition, Wagner's Pharmacy filed a motion for summary judgment in the trial court asserting that Pennington could not demonstrate a prima facie case for disability discrimination because, amongst other things, she cannot prove that her morbid obesity constitutes a "disability" as defined in the statute. (Trial R. at 68-97). Specifically, Wagner's argued that Pennington could not meet her burden of proof because she cannot establish that *her* morbid obesity is caused by a physiological condition. In addition, the record reflected that Wagner's Pharmacy had a legitimate non-discriminatory reason for terminating Pennington. (Trial R. at 68-97). The trial court agreed with Wagner's Pharmacy and stated as follows:

> [N]owhere in Dr. Garr's deposition is there testimony that there is a physiological cause for [Pennington's] obesity . . . Dr. Garr's expert testimony does not establish that [Pennington's] morbid obesity has a physiological cause. As such, it does not appear that [Pennington] can establish that her obesity will be considered a qualified disability.

(Trial R. at 219-220; Mem. & Order, Oct. 21, 2011, at 8-9).

The trial court granted summary judgment on October 21, 2011. (Trial R. at 212-227). Pennington submitted a Motion to Alter, Amend, or Vacate the Order (Trial R. at 230-239) which was denied on March 2, 2012. (Trial R. at 252-257). In that order, the trial court again examined the expert testimony of Dr. Garr, and determined "[u]pon a

reexamination of Dr. Garr's deposition testimony, the court continues to be of the opinion that his testimony does not establish that [Pennington's] obesity is the result of a physiological disorder." (Trial R. at 254; Mem. & Order, Mar. 2012, at 3).

Pennington appealed to the Kentucky Court of Appeals, and the Court of Appeals vacated and remanded the trial court's opinion entered on July 12, 2013. The Court of Appeals found that Dr. Garr's opinions about obesity in general were sufficient to satisfy Pennington's burden of proof. This appeal to the Supreme Court followed.

I. ARGUMENT

This Court is called upon to consider whether the Appellee, Melissa K. Pennington, in the underlying action has sufficient evidence for her to present her alleged disability discrimination case in front of a jury. In particular, this Court must determine if a doctor's general, unspecific testimony about morbid obesity is sufficient to deem Pennington as an individual with a qualified disability. For the reasons stated below, this Court should reverse the opinion of the Court of Appeals, reinstate the judgment of the trial court, and hold that Pennington cannot demonstrate a qualified disability that is necessary to establish a *prima facie* case for discrimination.

A. The trial court was correct that Pennington's expert testimony was insufficient to establish a *prima facie* case of disability discrimination under KRS 344.040.

Pennington asserts that Wagner's Pharmacy discriminated against her by terminating her employment because of her weight which she deems is a qualified "disability" in violation of KRS 344.040(1) which reads:

> It is an unlawful practice for an employer: (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . because the person is a qualified individual with a disability.

Id.

A pertinent issue in all disability discrimination cases is determining what qualifies as a "disability" for purposes of the statute. Under the Americans with Disability Act of 1990, a "disability" with respect to an individual is defined as:

> (A) ***a physical*** or ***mental impairment that substantially limits one*** or more major life activities of such individual;

> (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C.S. § 12102(1).

A disability is further defined with respect to an individual 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 an impairment; or (c) Being regarded as having such an impairment.

KRS 344.010(4).

Thus, a person may qualify as an individual with a disability either under 42 U.S.C.S. § 12102(1) or KRS 344.010(4), respectively. Interestingly, Pennington has argued throughout the proceedings that she actually has a substantially limiting impairment under KRS 344.010(4)(a) and that she was "regarded as" having such an impairment by her employer under KRS 344.010(4)(c).

Pennington is not disabled under KRS 344.010(4)(a) as a matter of law because she cannot prove her obesity is the result of a physiological condition. As explained by this Court, to prove a disability under the statute an individual employee "must initially prove that he or she has a physical or mental impairment." *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003) (quoting *Toyota Mfg. Ky., Inc. V. Williams*, 534 U.S. 184, 194 (2002)). An individual employee "must also prove that the impairment 'limits a major life activity,' and this limitation must be 'substantial.'" *Id.* In this case, "Pennington contends that her impairment is her condition of morbid obesity." (App. 1 at 6).

It has been determined that "whether [Pennington] has an impairment and whether the conduct affected by the impairment is a major life activity under the statute

are questions of law." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 707 (Ky. App. Ct. 2004) (citing *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003)). Kentucky courts have looked to federal case law and statutory-related authorities when interpreting the Kentucky Civil Rights Act and its pertinent terms. "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, 592 (Ky. 2003) (citing *Bank One, Ky., N.A. v. Murphy*, 52 S.W.3d 540 (Ky. 2001); *Lococo v. Barger*, 958 F.Supp. 290 (E.D. Ky. 1997); *Mills v. Gibson Greetings, Inc.*, 872 F. Supp. 366 (E.D. Ky. 1994); *Harker v. Federal Land Bank,* 679 S.W.2d 226 (Ky. 1984) (citing *Kentucky Comm'n on Human Rights v. Commonwealth of Kentucky, Dept. Of Justice*, 586 S.W.2d 270 (Ky. App. Ct. 1979)).

Under the Equal Employment Opportunity Commission ("EEOC") regulations and its interpretation of the Americans with Disabilities Act ("ADA"), physical or mental impairment is defined as:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. 1630.2(h)(1)-(2).

In contrast with the Court of Appeals' decision in this case, federal law has been clear that "the ADA guidelines suggest that obesity is rarely considered a disabling impairment." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citing 29 C.F.R. 1630.2)). "[O]besity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the [ADA] statutes." *Francis v. City of Meridian*, 129 F.3d 281, 286 (2d. Cir. 1997) (citing 42 U.S.C.S. § 12102(2), 45 C.F.R. 84.3(j)(1)(i)). The 6th Circuit has agreed and held "that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition." *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006).

Therefore, in order for Pennington to have a "disability" under the statute, her morbid obesity must be the result of a physiological condition. More specifically, in order to carry her burden, Pennington must produce an expert to conclude, within the context of reasonable medical probability, that Pennington's obesity is derived from a physiological condition. Dr. Garr, because he was in no position to offer an opinion as to her specific case, had no such opinion on whether Pennington's obesity is derived from a physiological condition.

1. Pennington's lone expert witness, Dr. Garr, offers no evidence specific to her regarding her morbid obesity being the result of a *physiological condition*.

Pennington is attempting to use the vague and nonspecific testimony of Dr. Garr to establish that her obesity is the result of a *physiological disorder*. The record demonstrates, as explained in detail by the trial court, that Dr. Garr offers no evidence *specific* to Pennington's morbid obesity being the result of a physiological disorder. The

following excerpts from his deposition demonstrate he knows very little about Pennington and offers no opinions specifically related to her and the causes of her obesity:

Q: All right. How did you come to be involved in this case?

A: Mr. Gregory called me and asked if I would look over the records.

Q: And when was that?

A: A week or so ago.

(Disc. Dep. Dr. Garr 4:16-21, Sept. 22. 2011).

Q: Have you ever treated Melissa Pennington?

A: I have not.

Q: Have you ever met her?

A: I met her yesterday briefly.

Q: Have you ever done a comprehensive physical examination of her?

A: No.

(Disc. Dep. Dr. Garr 4:25, 5:1-6, Sept 22, 2011).

Q: Okay. When I went through the records that we've now marked as Exhibit 1, it looked to me that all of these records were from treatment that was rendered in 2011?

A: Correct.

Q: Okay. Have you read any other records other than the ones that we have now marked as Exhibit 1 to your deposition?

A: No.

(Disc. Dep. Dr. Garr 7:13-21, Sept. 22, 2011).

Q: Do you know who Ms. Pennington's treating physicians are other than

those contained in the records that you have in front of you there, Exhibit 1?

A: No.

Q: You've not consulted with any of her - -

A: No.

Q: - - prior physicians?

A: No.

Q: Do you know when it was that she worked at Wagner's Pharmacy?

A: No.

Q: Do you know what her weight was when she began to work at Wagner's Pharmacy?

A. No.

Q. Do you know what it was when she was terminated?

A. No.

(Disc. Dep. Dr. Garr 9:24-25, 10:1-15, Sept. 22, 2011).

Q: And without having examined Ms. Pennington are you able to specifically isolate the cause of her morbid obesity in terms of reasonable medical probability, not guesswork?

A: 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.

(Disc. Dep. Dr. Garr 12:10-17, Sept. 22, 2011).

Q: What about any genetic disorders that she may possess that may contribute to her obesity; are you aware of any?

A: I don't know of any.

(Disc. Dep. Dr. Garr 14:13-16, Sept. 22, 2011).

Q: But with Ms. Pennington you are not prepared to offer any testimony specific to any impairments to her daily activities as a result of her weight?

A: No.

(Disc. Dep. Dr. Garr 18:6-10, Sept. 22, 2011).

In general, Dr. Garr testified that morbid obesity is "caused by a multitude of various factors." (Disc. Dep. Dr. Garr 13:10-15, Sept. 22, 2011). Dr. Garr offers nothing specific to Pennington. As explained by the trial court, "[Dr. Garr] indicated that he did not know of any genetic disorders that [Pennington] may possess that may have contributed to her obesity." (Trial R. at 219;Mem. & Order, Oct. 21, 2011, at 8).

Pennington weighed roughly 425 pounds when hired and terminated by Wagner's Pharmacy (Trial R. At 221). The individual's weight in *EEOC v. Watkins Motor Lines, Inc.* ranged from 340 to 450 pounds while employed by the employer and claimed that he was discharged due to his weight as a violation of the ADA. *EEOC*, 463 F.3d at 438-39. The court upheld summary judgment, however, because "non-physiologically caused obesity is not an 'impairment' under ADA." *Id.* at 439. Simply because Pennington was roughly 425 pounds when hired and terminated by Wagner's Pharmacy is not conclusive evidence of her obesity being a result of a physiological disorder. As recognized by the trial court, "nowhere in Dr. Garr's deposition is there testimony that there is a physiological cause for [Pennington's] obesity." (Trial R. at 219; Mem. & Order, Oct. 21, 2011, at 8).

The Kentucky Court of Appeals however, took no notice that Dr. Garr had nothing *specific* to say about *Pennington's obesity*. Dr. Garr simply testified about obesity in general stating that morbid obesity is a "disease." (App. 1, Op. Vacating & Remanding,

July 12, 2013, at 7). The Court of Appeals chose to focus on an isolated quote from Pennington's attorney, Mr. Gregory, who stated in Dr. Garr's deposition:

> Q: Let me read back to you what I think I've heard you testify about; 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?"
>
> A: That's correct. It's a disease.

(App. 1, Op. Vacating & Remanding, July 12, 2013, at 7).

Again, Dr. Garr only testified about morbid obesity in general. This isolated quote from Pennington's counsel simply added in her name. As noted by the trial court in a very detailed opinion:

> [N]owhere in Dr. Garr's deposition is there testimony that there is a physiological cause for Plaintiff's obesity. The fact that obesity is accompanied by one or more subsequent physiological conditions is not determinative of whether the obesity will be considered a qualified disability. Dr. Garr's expert testimony does not establish that Plaintiff's morbid obesity has a physiological cause.

(Trial R. at 219-220; Mem. & Order, Oct. 21, 2011, at 8-9).

Is a statement about all obesity in general sufficient to establish that a particular person's obesity is caused by a physiological condition? Wagner's Pharmacy asserts that it is not. As demonstrated above, courts have consistently held that obesity, even morbid obesity, is not a qualifying impairment or disability *unless* it is shown to be the result of a physiological disorder. Inherent in that reasoning is that some morbid obesity is *not* the result of a physiological disorder. If this Court affirms the Court of Appeals opinion, *anyone* who is *morbidly obese* will automatically be considered disabled for purposes of the statute. Wagner's Pharmacy asserts this is not the intention of the legislature.

2. There is no evidence in the record to establish that Pennington is substantially limited in conducting *major life activities* prior to and at the time of her termination because of her obesity.

Pennington cannot establish that she is substantially limited in conducting *major life activities because of her obesity*. The regulation explains that major life activities means "[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working." 29 C.F.R. 1630.2(i)(1)(i). Under 29 C.F.R. 1630.2(j)(1)(ii), the term *substantially limits* means "[a]n impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population."

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

> (i) [I]t may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.
>
> (ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be

> considered when determining whether an individual's impairment substantially limits a major life activity.

29 C.F.R. 1630.2(j)(4)(i-ii).

The Court of Appeals found that Pennington was limited in major life activities because "Pennington suffers from sleep apnea, a condition causing difficulty in breathing during sleep. There is no dispute that breathing is a major life activity." (App. 1, Op. Vacating & Remanding, July 12, 2013, at 8). And while this is a true statement from the Court of Appeals, there is no evidence in the record that Pennington's sleep apnea is caused by her obesity. Dr. Garr had neither treated Pennington before he was deposed nor had he reviewed her medical records before 2011. Dr. Garr *only* testified as to morbid obesity *in general* by testifying that "hygiene issues become issues" for patients who are super morbidly obese. (Disc. Dep. Dr. Garr 17:23-24, Sept. 22, 2011). Dr. Garr also said that a simple activity such as tying one's shoes is complicated and difficult due to the condition. (Trial Dep. Dr. Garr 18:8-9, Sept. 22, 2011). Additionally, Dr. Garr testified that morbid obesity shortens a person's life expectancy by approximately 15 years. (Trial Dep. Dr. Garr 14:23-24, Sept. 22, 2011). Dr. Garr further testified that most morbidly obese people are unable to lose weight without drastic intervention – such as bariatric surgery." (Trial Dep. Dr. Garr 11:7-10, Sept. 22, 2011) (see also App. 1, Op. Vacating & Remanding, July 12, 2013, at 8).

This general testimony regarding all morbid obesity should not allow an individual such as Pennington to establish they are limited in *major life activities*. The trial court noted that Dr. Garr did *not* mention anything specific about Pennington in his discussion about *limitations* in conducting *major life activities*:

> Dr. Garr's testimony does not establish that [Pennington's] morbid obesity has a physiological cause. As such, it does not appear that [Pennington] can establish that her obesity will be considered a qualified disability. Furthermore, even if [Pennington] 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.

(Trial R. at 220; Mem & Order, Oct. 21, 2011, at 9).

The trial court looked at the entire record and found there was no evidence to establish that Pennington was substantially limited in conducting *any* major life activity.

B. Pennington is not disabled under KRS 344.010(4)(c) because Wagner's did not perceive Pennington as having a substantially limiting impairment.

"As with actual impairments, the perceived impairment under the 'regarded as' prong must be one that, if real, would substantially limit a major life activity of [Pennington]." *Hallahan,* 138 S.W.3d at 707, citing *Carruthers v. BSA Advertising, Inc.*, 357 F.3d 1213, 1216 (11th Cir. 2004). Under the *regarded as prong*, "[Pennington] must demonstrate not only that the employer thought that [she] was impaired in [her] ability to do the particular job, but also that the employer regarded [her] as substantially impaired in either a class of jobs or a broad range of jobs in various classes." *Id.* at 709, citing *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 523 (1999); *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117 (1st Cir. 2004); *Colwell v. Suffolk Co. Police Dep't*, 158 F.3d 635, 647 (2nd Cir. 1998); *Henderson v. Ardco, Inc.*, 247 F.3d 645, 651-52 (6th Cir. 2001); *Cooper v. Olin Corp., Winchester Division*, 246 F.3d 1083, 1089-90 (8th Cir. 2001); *Cash v. Smith*, 231 F.3d 1301, 1306 (11th Cir. 2000); *Doebele v. Spring/United Management Co.*, 342 F.3d 1117, 1133 (10th Cir. 2003)) .

Pennington has not and cannot do this; she was roughly the same weight when Wagner's Pharmacy hired her as when they terminated her employment. Pennington was employed by Wagner's Pharmacy for nearly ten years. Pennington admits that no employee, including management, of Wagner's Pharmacy ever said anything about her weight or her diabetes during the time she worked there. (Trial R. at 89-90). Although Pennington was diagnosed with borderline diabetes while employed at Wagner's Pharmacy, no employee was aware of this except Pennington's cousin; who also worked at Wagner's Pharmacy but had no managerial authority. (Dep. Melissa Pennington 105:11-17, June 29, 2010). An employer must know about a disability before it can intentionally discriminate against an employee because of the disability. *Kocsis v. Multi-Care Management*, 97 F.3d 876, 884 (6th Cir. 1996).

In *Kocsis*, the employee testified in her deposition that none of her impairments limited her activity in any way. "By her own admission, therefore, she does not have an impairment that limits her major life activities." *Id.* at 884. Pennington, likewise, admitted that her obesity and diabetes are not disabling. (Trial R. at 73. However, Pennington claims that "these caused [Wagner's] to believe that [Pennington] was disabled." (Trial R. at 73). In order to fall under the 'regarded as' prong, one must show: "(1) [an employer] mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) [an employer] mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Hallahan*, 138 S.W.3d at 707, quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). As explained by the trial court, "[t]he record is undisputed that [Pennington] weighed the same at the time of her termination as she did when she

was hired by [Wagner's Pharmacy]. The record is devoid of any affirmative evidence in support of [Pennington's] proposition that she was *regarded as* having a disability." (Trial R. at 221-222, emphasis added; Mem. & Order, Oct. 21, 2011, at 10). The only evidence that Pennington attempts to use to establish that she was fired because she was *obese* are the affidavits of two people; Tanya Calfee and Vickie Young. The Affiants quoted Martha Parrish, the person who informed Pennington of her termination, as saying Ms. Parrish was asked to terminated Pennington because she was "dirty, overweight, and could not do her job." (Trial R. at 213; Mem. & Order, Oct. 21, 2011, at 2). Ms. Parrish gave deposition testimony contradicting the affidavits and re-enforcing the position that Pennington was not "regarded as" having a disability. (Trial R. at 221; Mem. & Order, Oct. 21, 2011, at 10). Ms. Parrish testified during her deposition that Ms. Smyth told her to terminate Pennington because of her "personal appearance." (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11). Ms. Parrish denied that it had anything to do with Pennington being obese. (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11).

1. Dr. Garr offers no evidence of an actual or perceived impairment that substantially limits one or more of Pennington's major life activities.

Pennington must "prove that the impairment 'limits a major life activity,' and this limitation must be 'substantial.'" *Howard*, 127 S.W.3d at 592, citing *Toyota Motor Mfg. Ky., Inc. V. Williams*, 534 U.S. 184 (2002). Pennington's expert witness, Dr. Garr, is not a vocational expert who can testify as to the types of jobs Pennington can or cannot perform. Dr. Garr does not know if Pennington has had any difficulty with any of her previous jobs because of her weight. (Disc. Dep. Dr. Garr 16:22-25, Sept. 22, 2011). Dr. Garr is not aware if Pennington has obtained employment since her former employment

with Wagner's Pharmacy. Dr. Garr is not prepared to offer any testimony specific to any impairments to her daily activities as a result of her weight (Disc. Dep. Dr. Garr 18:6-10, Sept. 22, 2011) and Dr. Garr does not know anything about Pennington's work history for the last ten years (Disc. Dep. Dr. Garr 16:19-21, Sept. 22, 2011). The only thing Dr. Garr did which satisfied the Court of Appeals was to testify *in general* regarding limitations of individuals with obesity and offered no specific testimony regarding Pennington.

2. Dr. Garr offers no evidence that Pennington is or was perceived to be precluded from a broad class of jobs.

"To succeed upon a regarded as disabled claim, [Pennginton] must 'demonstrate that an employer thought [she] was disabled, . . . [and] that the employer thought that [her] disability would prevent [her] from performing a broad class of jobs.'" *Howard Baer, Inc., 127 S.W.3d at 594,* citing *Ross v. Campbell's Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).* Wagner's Pharmacy has never asserted that Pennington was not *qualified* for her job. Pennington was the same weight when hired as when she was terminated and she employed by Wagner's for ten years at this same weight (Trial R. at 220-221).

Pennington has no evidence to demonstrate "that [her] employer thought that [her] disability would prevent [her] from performing a broad class of jobs." *Id.* Pennington's only expert witness, Dr. Garr, does not intend to offer any opinions about what kind of work Pennington can or cannot do because admittedly, this is outside his area of expertise (Disc. Dep. Dr. Garr, 16:11-18, Sept. 22, 2011). Dr. Garr will not offer any testimony as to whether Pennington is substantially limited because of her weight or if she is precluded from a broad class of jobs. For all of these reasons, as recognized by

the trial court, "Pennington has failed to meet her burden that she was 'regarded as' having a disability." (Trial R. at 221; Mem. & Order, Oct. 21, 2011, at 10).

C. Wagner's Pharmacy had numerous, legitimate, nondiscriminatory reasons for terminating Pennington.

Even if an employee does establish a *prima facie* case, the case may still be improper to reach the jury. Once an employee establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. "The 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 Ctr. for Arts v. Handley*, 827 S.W.2d 697, 700 (Ky. App. Ct. 1991) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

Wagner's had *numerous legitimate, nondiscriminatory* reasons for terminating Pennington. Shortly before Pennington was terminated, she came to work on her day off to pick up her paycheck. The manager of Wagner's Pharmacy, Brenda Smyth, saw Pennington come into the office and, on that day, Pennington was admittedly dirty and not in her best appearance. Ms. Parrish testified, during her deposition, that Ms. Smyth told her to "let go" of Pennington due to complaints she had received about her "personal appearance." (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11). Ms. Parrish denied that the termination had anything to do with Pennington being obese. (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11).

In addition, Wagner's Pharmacy responded through interrogatories that sales on the backside of Churchill Downs for which Pennington was responsible had declined

significantly. (Trial R. at 221-222; Mem. & Order, Oct. 21, 2011, at 10-11)). Wagner's Pharmancy stated it had received information showing that Pennington failed to move the vending truck to different locations on the backside in order to generate more sales. (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11). Furthermore, the general condition of the truck utilized by Pennington necessitated that it be repaired or replaced. (Trial R. at 222; Mem. & Order, Oct. 21, 2011, at 11).

The Court of Appeals was troubled that "the record reflect[ed] that Wagner's first dismissed Pennington because of her personal appearance but later asserted that the dismissal was due to failing sales." (App. 1, Op. Vacating & Remanding, July 12, 2013, at 11). To this inquiry, Wagner's Pharmacy asserted that there were many different reasons for the termination of Pennington; there was not just one, single factor. The trial court found that "[Wagner's Pharmancy] has met the burden of refuting the *prima facie* case" by articulating legitimate, nondiscriminatory reasons for terminating [Pennington]." (Trial R. at 222; Mem. &Order, October 21, 2011, at 11).

D. Pennington cannot establish that Wagner's reason for terminating her was pretext to cover actual discrimination.

If an employer in a disability discrimination case demonstrates legitimate reasons for terminating the employee, the next step is whether the employee can show that the articulated reason "is merely a pretext to cover the actual discrimination." *Kentucky Center for the Arts*, 827 S.W.2d at 699, citing *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981).

The trial court cited a United States Supreme Court opinion regarding unlawful discrimination which stated "[an employee's] prima facie case, combined with sufficient

evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." (Trial R. at 222-223; Mem. & Order, Oct. 21, 2011, at 11-12, citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000)). The United States Supreme Court further explained:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory. For instance, the employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id., emphasis maintained in original.

Considering the above factors, the record demonstrates that Wagner's Pharmacy had several non-discriminatory reasons for terminating Pennington and the two affidavits submitted by Pennington at best create a very weak issue of fact as to whether Wagner's Pharmacy's reason for termination was untrue. The United States Supreme Court explained that it is within the trial court's discretion to determine, based upon a number of factors, whether judgment as a matter of law is appropriate:

> Whether judgment as a matter of law is appropriate in any particular case would depend on the number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Id.

The factors in this case overwhelmingly favor Wagner's Pharmacy. First, the strength of Pennington's *prima facie* case is extremely weak because the record is devoid of any evidence that establishes Pennington had a qualified disability as defined in the statute. Second, the probative value of the proof that Wagner's Pharmacy's explanation is false is practically non-existent. The deponent, Martha Parrish denied that she was told to terminate Pennington because she was obese. Even if the affidavits of Pennington's co-workers are deemed admissible hearsay, the probative value of this evidence is also weak. Third, as demonstrated throughout this brief, there is an abundance of evidence that supports Wagner's Pharmacy's position that may properly be considered on a motion for judgment as a matter of law, such as the numerous, legitimate nondiscriminatory reasons Wagner's Pharmacy had for terminating Pennington.

CONCLUSION

For all of the foregoing reasons, the Appellant Wagner's Pharmacy requests that this Court reverse the Opinion of the Court of Appeals' and reinstate the trial court's order granting summary judgment.

Respectfully submitted,

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