

Morbid Obesity is Not a Disability in Kentucky - For Now



Article By

[Cynthia L. Effinger](#)

[McBrayer, McGinnis, Leslie and Kirkland, PLLC](#)

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There's no question that obesity is a national health crisis, with the Centers for Disease Control and Prevention estimating that [more than a third of adults in the U.S. are obese](#). In 2013, the American Medical Association pronounced that it [now finds obesity to be a disease](#), adding more fuel to the fire that suggests individuals afflicted with this disease could be considered "disabled" under the Americans with Disabilities Act ("ADA"). With regard to state law, however, the Kentucky Supreme Court closed the door - at least, for the time being - on disability claims with regard to obesity in the case of *Pennington v. Wagner's Pharmacy, Inc.*^[1]

The Kentucky Civil Rights Act tracks the original text of the ADA closely, defining a disability as "(a) A physical or mental impairment that limits one 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. The Kentucky law does not, however, track the language of the amendments to the ADA in 2008 (the Americans with Disabilities Amendments Act ("ADAA")), which expanded the definition of "major life activities" and "regarded as," among other legally operative phrases. This difference might be crucial in future jurisprudence on the same topic.

In *Pennington*, a manager told the plaintiff's supervisor to fire her because of her personal appearance. The plaintiff was morbidly obese and had been so for the duration of her employment. *Pennington* ultimately could not prove that her obesity was the result of a physiological cause, a prerequisite for a prima facie case of disability discrimination, according to the Kentucky Supreme Court. In other words,

an obese person is not a disabled person in the court's eyes under interpretations of the law in place at the time of Pennington's firing.

Kentucky's prohibition on obesity as a disability may not be as final as the Pennington holding suggests. Multiple federal courts have ruled that obesity might constitute a disability under the ADA as amended, and the court in Pennington alluded to the fact that the ADAA does not apply in the present case, as the relevant facts took place before the passage of the act. The court in Pennington noted that "the Kentucky Civil Rights Act was modeled after federal law, and our courts have interpreted the Kentucky Act consistently therewith."^[2] If this interpretation holds true, obese victims of discrimination in Kentucky may see a different result in the future than the one in the present case. The Kentucky Supreme Court stated in no less than three footnotes that the ADAA doesn't apply in the present case, taking pains in at least one of these footnotes to note that the ADAA indicates a trend to treat morbid obesity as a disability. The court even cited as authority a case that had been explicitly superseded by the provisions of the ADAA. It appears as though the Kentucky Supreme Court, in an unpublished opinion, might have left a trail of breadcrumbs to follow for future interpretations of the Kentucky Civil Rights Act. Obesity as disability in Kentucky is down, but not out, and employers should be wary of adverse actions taken against employees on any basis that could be considered due to their obesity.

This article is intended as a summary of federal and state law and does not constitute legal advice.

[1] *Pennington v. Wagner's Pharmacy, Inc.*, ___ S.W.3d ___, 2013-SC-000541-DG (Ky. 2015)

[2] *Pennington* at 5, quoting *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 591 (Ky. 2003)

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