COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
Case No. 2014-SC-000137-D

KENTUCKY COURT OF APPEALS
CASE NO. 2012-CA-1681

JANET OWEN — MOVANT/APPELLANT

V.

ON APPEAL FROM
FAYETTE CIRCUIT COURT
CASE NO. 10-CI-5885

UNIVERSITY OF KENTUCKY — RESPONDENT/APPELLEE

MOVANT/APPELLANT'S BRIEF IN SUPPORT OF ISSUES RAISED ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT ACTION 2010-CI-05885 AND THE COURT OF APPEALS DECISION RENDERED ON FEBRUARY 14, 2014 AFFIRMING THE DECISION OF FAYETTE CIRCUIT COURT

Respectfully submitted,

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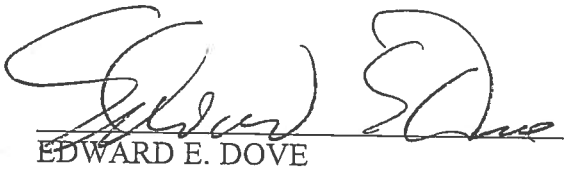
Certificate of Service

This certifies that a true and correct copy of the foregoing has been mailed to the following on this the 9th day of February, 2015:

Hon. Katherine Coleman
STURGILL TURNER BARKER MOLONEY,
333 W Vine St Ste 1400,
Lexington, Ky 40507

Judge Kim Bunnell
Fayette Circuit Court
120 N. Limestone
Lexington, KY 40507



EDWARD E. DOVE

Comes now the Movant/Appellant, by and through Counsel, and submits her written argument in support of her Motion for Discretionary Review.

INTRODUCTION

This case presents the issue of whether or not an individual who believes that he has been harmed by an act prohibited by KRS 344 is precluded from bringing an action in Circuit Court pursuant to KRS 344.450 if he had previously filed a charge of discrimination with the Kentucky Human Rights Commission or any local Human Rights Agency. The Movant/Appellant's case was dually filed with the Equal Employment Opportunity Commission (hereinafter "EEOC") pursuant to their work-sharing agreement. (Exh. 1).

The Movant/Appellant states that the Court's decision in Vaezkoroni v. Domino's Pizza, Inc., 914 S.W.2d 341 (Ky. 1995) operates to deny her and other similarly situated individuals of a fair review of the charge of discrimination and constitutional right to a jury trial pursuant to §7 of the Kentucky Constitution.

STATEMENT CONCERNING ORAL ARGUMENT

The Movant/Appellant would welcome the opportunity to argue her position before the Court. The Oral Argument may assist the Court in understanding of the flawed legal precedent set by the Vaezkoroni decision.

STATEMENT OF POINTS

STATEMENT OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

STATEMENT OF THE CASE

This case arises out of a Complaint filed in Fayette Circuit court by the Movant/Appellant alleging that she was a victim of discrimination in violation of KRS 344.040(1). The Movant/Appellant filed her Complaint in Fayette Circuit court after she had filed a charge of discrimination with the Kentucky Commission on Human Rights (hereinafter "KCHR"). The charge was dually filed with the EEOC due to the work-sharing agreement pursuant to KRS 344.100(5).

The Movant/Appellant initially filed her Complaint with the KCHR on or about April 9, 2009. The Complaint was investigated and on July 9, 2009, the KCHR found that no "probable cause" existed to believe that the University of Kentucky had discriminated against the Movant/Appellant. The Movant/Appellant timely requested reconsideration of the decision pursuant to KCHR policy and practice. The Movant/Appellant's request for reconsideration was denied. On April 15, 2010 the Movant/Appellant also received a right to sue letter from the EEOC. The Movant/Appellant was not represented by Counsel during the review of her complaint by the KCHR. On October 12, 2010 the Movant/Appellant filed a Complaint in Fayette Circuit Court alleging that she was a victim of intentional and illegal discrimination based on her disability.

The Court of Appeals affirmed the decision of Fayette Circuit Court on February 14, 2010 by stating:

> In light of the statutory steps with which KCHR and the University fully complied, and because of the several means of recourse available to Owen, her argument that the administrative process of resolving discrimination complaints is constitutionally insufficient is unpersuasive. Owen sought an administrative remedy to her claim of discrimination. KCHR collected statements and documentary evidence from both parties. KCHR reviewed this evidence not once, but twice before concluding on both occasions that no probable cause existed. Owen then was afforded the opportunity to appeal this finding to the Fayette Circuit Court or to file suit, under federal law, in federal or circuit court. The latter option afforded Owen her right to a jury of her peers. She chose instead the unviable option of filing an original action under state, not federal, law.

Court of Appeals Opinion, p. 7

On or about March 18, 2014 the Movant/Appellant moved for Discretionary Review. On December 10, 2014, the Supreme Court granted the Movant/Appellant's Motion and requested the Movant/Appellant address the 1996 Amendments to KRS 344 and whether it affects the Court's decision in Vaezkoroni v. Domino's Pizza, Inc., 914 S.W.2d 341 (Ky. 1995) and more recently in McKissic v. Commonwealth Transp. Cabinet, 334 S.W.3d 885 (Ky. 2010).

ARGUMENT

I. THE VAEZKORONI AND MCKISSIC DECISIONS ARE ERRONEOUS

Both Vaezkoroni and McKissic apply the wording of KRS 344.270 to deny an aggrieved individual of a constitutionally appropriate review of their claim of discrimination under state law. The Vaezkoroni and McKissic decisions erroneously apply the "election of remedies" doctrine to foreclose an aggrieved individual who follows the administrative route to address a discriminatory practice from judicial review of the decision. Vaezkoroni and subsequent decisions read KRS 344.270 much too broadly. A close reading of KRS 344.270 only states:

> The provisions of KRS 13B.140 notwithstanding, commission shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance under KRS 344.450 is pending. A state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending before the commission. A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance. (*Emphasis added*)
>
> KRS § 344.270

KRS 344.270 does not prohibit judicial review of a complaint of discrimination; it only states that the Court cannot take jurisdiction over a complaint of discrimination while a charge is administratively pending. Also, an action is excluded if brought in accordance with KRS 13B by the same person. KRS13B governs administrative hearings and the procedural process of administrative hearings. An individual who files an action under KRS 13B is denied the right to a jury trial as well as denied the application of Kentucky Rules of Evidence.

Another fault of Vaezkoroni and the subsequent cases fail to address the discovery process of the enforcement agencies. Neither decisions nor the case at bar had the opportunity to determine

the thoroughness of the KCHR investigative process. It is undisputed that the complainant who files a complaint of discrimination will only confront the offending party if the charge of discrimination is determined to have probable cause by the agency and goes forward to a hearing. Clearly, the intent of KRS 344 is to embody the principles of Title VII, not to limit the protection afforded to a victim of discrimination. Additionally, the Court of Appeals took great liberties in addressing the KCHR investigation of the Movant/Appellant charge of discrimination. There is nothing in the record addressing the KCHR's adequacy of investigation. (*See* Court of Appeals Opinion, p. 6)

KRS 344.020(1)(c) states that the general purpose of the chapter is "to provide for execution within the state of the policies embodied in the Federal Civil Rights Act..." The application of KRS 344.270 as applied, ignores the general principles of Title VII by specifically denying the most important procedural protection of Title VII, the granting of the individual by judicial review of a charge of discrimination through the "Right to Sue" letter.

In enacting Title VII, Congress intended that "whenever possible, the problems dealt with by [Title VII] should be resolved locally and voluntarily". 110 Congressional Record 12, 707 (1964). In order to effectuate the intent, the Act provides for initial deferral of charges of discrimination to state and local agencies. Upon completion of an investigation by the EEOC and the local agency, the aggrieved individual may seek judicial review by receiving a ninety (90) day Right to Sue letter. There is not a similar procedure which exists under Kentucky law to allow the aggrieved individual the protected right to judicial review.

However, the Movant/Appellant appealed the final decision of the KCHR to the Circuit Court, her avenue of appeal would have been through KRS 13B.120 and KRS 13B.140. At that time the Court would have only reviewed the decision of the KCHR under the requirements of KRS 13B.140. The Court reviewing the agency decision (KCHR is an agency of the Commonwealth) to

determine whether the decision of the KCHR is supported by the substantial evidence in the record. Thompson v. Ky. Unemployment Ins. Com'n, 85 S.W.3d 621, 624 (Ky. App. 2002). The Court will only review the decision of the KCHR as to its legal correctness, not provide the aggrieved individual a right to address the ultimate issue of discrimination.

The decision finding "probable cause" discrimination occurred by the EEOC and the KCHR is often rendered by an investigative officer who may or may not be an attorney. A reasonable cause determination is procedural, not substantive, affecting only the way the agency acts." *See* EEOC v. Raymond Metal Prods. Co., 530 F.2d 590 (4th Cir., 1976). The way the Courts have applied KRS 344.270 is substantive depriving the Movant/Appellant the right of judicial review.

Kentucky Constitution § 7 allows a Kentucky citizen the right to a jury trial. The exercise of filing of a complaint of discrimination should not deny the individual of their right to a jury trial unless they are fully informed that the exercise of the right will be jeopardized if they file a complaint with the KCHR or local agency. In fact, upon the Complainant, upon filing a charge, is sent a document regarding the investigation of the complaint.

> At any time prior to the issuance of a final order, a complainant may request the withdrawal of the Complaint. If granted by the Commission, a withdrawal request results in the dismissal of the administrative complaint without prejudice to the rights of the complainant. Following a withdrawal and dismissal without prejudice, a Complainant may retain a private attorney in order to assert the discrimination claim before a state or federal court, provided that the applicable 5 year statute of limitations has not expired.[1]

To apply the election of remedies doctrine, the decision to waive the right must be a "deliberate and settled choice and one's pursuit of [an avenue of relief] will preclude his late choice

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[1]KCHR, "What to Expect During the Investigation of Your Employment or Public Accommodation Discrimination Complaint", *No. 2 - Withdrawal Rights, Mediation and Conciliation Agreements*,

of the other." Brown v. Diversified Decorative Plastics LLC, 103 S.W.3d 108 (Ky. App., 2003). There is no warning from the KCHR that the administrative process will operate to deny the aggrieved a right to a jury trial. It certainly presents the question as to whether the decision to file a charge with an agency is a "deliberate and settled choice" and that there is the possibility a waiver of constitutionally protected right to trial by jury. The waiver of constitutionally protected right demands more notice than the permissive word "may". *See* KRS 446.010(20)

II. THE ELECTION OF REMEDIES DOCTRINE AS APPLIED BY VAEZKORONI DENIES THE INTENT OF KRS 344

In Brown v. Diversified Decorative Plastics LLC, 103 S.W.3d 108 (Ky. App., 2003) a sharply divided Court of Appeals, sitting "en banc", held that the language at issue in Vaezkoroni was dicta and no longer served as precedent. At 110.

In March, 2001, the U.S. District Court decided Grego v. Mejer, 187 F.Supp.2d 689 (W.D. Ky., 2001). In the Grego decision, the Court re-evaluated the language of the Vaezkoroni decision. In evaluating KRS 344.270, the Court employed a straight-forward interpretation of KRS 344.270. The Court held "that if a grievance is pending then the Courts have no jurisdiction over the claim". However, when a claim is withdrawn, it cannot be pending and thus is not barred by the plain language of KRS 344.270. At the time of Movant/Appellant filed her claim in Fayette Circuit Court, there was not a claim pending in the KCHR.

Additionally, the Court criticized the Court's ruling in Founder v. Cabinet of Human Resources, 23 S.W.3d 221 (Ky. App. 1999), which interpreted Vaezkoroni to preclude a Claimant who had filed but withdrawn her complaint from the agency from seeking judicial review.

In Thomas v. Forest City Enterprises, Inc., 2001 WL 1772018 (W.D.Ky., 2001), Judge Heyburn again found as the Court stated in Grego that if no administrative claim was pending then

the judicial avenue of relief was available.

Both the Thomas decision and the Grego decisions makes the distinction whether the judicial remedy and the administrative remedies are both pending at the same time. KRS 344.270 clearly prohibits both avenues of relief to be taken at the same time and the Movant/Appellant agrees with the interpretation. However, the Movant/Appellant's claim was not pending simultaneously with her KCHR complaint.

In Wilson v. Lowe's Home Center, 75 S.W.3d 229 (Ky. App. 2001), the Court of Appeals applied the Grego decision to Wilson's claims of discrimination. Wilson has alleged racial harassment and filed a complaint with the Commission asserting that he was racially harassed over a number of years by his employer. KCHR Commission investigated his complaint and scheduled a hearing pursuant to KRS 344.450. At that point, Wilson withdrew his complaint and filed his complaint in Circuit Court. The Trial Court grated Defendant's Motion for Summary Judgment based on the election or remedies and Vaezkoroni. Upon reviewing past precedents of Vaezkoroni and Founder, the Court of Appeals found that Wilson's complaint was not finalized at the KCHR level upon withdraw and Wilson could pursue the judicial remedy.

The Court's decision was that Wilson had withdrawn the complaint before the final review on the merits. The decision begs the question of "on the merits". The Movant/Appellant has already discussed the shortcomings of the administrative process, the failure to provide due process and whether the decision of an agency is reviewed on the merits due to the standard of review. The Courts erroneously assume that the Complainant's "two bites of the apple" offer equal relief of the prohibited conduct.

In Brown, *supra*. the Court was again faced with the "election of remedies" argument. The Plaintiff received his "right to sue" letter from the EEOC and withdrew his complaint from the

KCHR. He subsequently filed a KRS 344 action in state court. The state court dismissed the Plaintiff's complaint applying Founder and Vaezkoroni. The Court of Appeals, after reviewing the prior decision and history of election of remedies doctrine, upheld their decision in Wilson. The Court also held that the wording in Vaezkoroni was dicta, thus removing any future analysis of the decision because it sets no precedent.

In Wright v. Highland Cleavers Inc., 2003 WL 21241505 (Ky. App., May 2003). On remand from the Supreme Court, the Court of Appeals was ordered to address the case by applying the Wilson standard. The Court again reviewed Vaezkaroni and Wilson and found that the Appellant did not have a claim pending at the administrative level when the complaint was filed and he could proceed in the Circuit Court action.

The plain reading of KRS 344.270 only states that a state court shall not take jurisdiction over a claim brought under KRS 344 while an administrative claim is pending. In and plain and simple language, there are two (2) avenues of relief which cannot be implemented at the same time.

In addressing the two avenues, Title VII recognized the importance of judicial review by issuing the "right to sue" letter allowing the aggrieved individual to address their claim in either State or Federal Court after agency review. The Commonwealth lacks the same procedure for a complainant of discrimination. The failure of the Commonwealth to adopt the procedural scheme of Title VII limits the protection of the general public from seeking judicial review of discriminatory conduct.

III. ELECTION OF REMEDIES DOES NOT APPLY TO KRS 344.270

The problem facing the Movant/Appellant is the Court's application of the "election of remedies" doctrine. The Movant/Appellant has already pointed out that the KCHR does not provide sufficient warning to a complainant that filing her complaint with the KCHR and following through

to a conclusion (without a hearing) denies her the right to a jury trial.

However, there are other problems with the application of the election of remedies not aforementioned. The election of remedies doctrine can be analyzed under the same analysis as issue preclusion or res judicata. The similarity is that the issue has been determined by an agency.

The Supreme Court established the validity of issue preclusion to decisions made by administrative decision in United States v. Union Construction and Mining, 384 U.S. 394, 422 (1966). The Court noted that "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before the parties have had adequate opportunity to litigate, the Courts have not hesitated to apply res judicata". [emphasis added] The Movant/Appellant did not have an opportunity to litigate her claim at the KCHR.

Additionally, many cases such as Herrara v. Churchill McGhee, LLC. 680 F.3d 539 (6th Cir. 2010), appear to place weight on that the claimant was advised to seek assistance from an attorney. The Herrera Opinion clearly state that "both the Executive Director and Investigator advised Herrera that he might wish to consult an attorney". At 549. Likewise, Murray v. Alaska Airlines Inc., 237 P.3d 563 (Cal 2010) and Passon v. State, 189 P.3d 1032 (Alaska 2008) both discussed the importance of an attorney's advice.

The record is clear that the KCHR documents do not suggest legal representation nor was the Movant/Appellant represented by an attorney during the administrative process. The election of remedies doctrine reviewed under the similar standard of administrative preclusion is not valid.

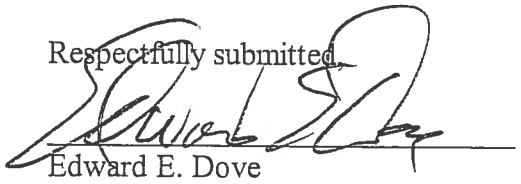
Lastly, the Supreme Court in Kremer v. Chemical Cons. Corp., 456 U.S. 461, 482 (1982) that "[a]ny decision that impacts or terminate...one's right to pursue a remedy in court...implicates the Due Process Clauses of the Fifth and Fourteenth Amendment". As such, "courts addressing the issue of administrative preclusion must ensure that the claimant was afforded due process". Id

Additionally, the Court of Appeals mocked the constitutional right to a jury trial by stating "[O]n the contrary, the exhaustive administrative action and the available but unutilized channel for appeal demonstrates that Owen received more than an adequate opportunity to be heard by a jury of her peers." (P.7 of C.A. Opinion). Where in the record was a jury of Owen's peers reviewing her claim? As has been stated, the investigator may be a lay person. The Movant/Appellant is not represented by counsel, nor did she ever have an opportunity to confront her employer. All rights that are protected if the Movant/Appellant had available to her if she had an opportunity for a jury trial..

CONCLUSION

The factors not considered in the application of the "election of remedies" doctrine including, right to confront, notice and the opportunity to make a knowing and well informed decision and the constitutional right to a jury trial and judicial review all warrant that the "election of remedies doctrine" do not apply to KRS 344.270. To find otherwise would deprive citizens of the Commonwealth alleging discrimination a fair opportunity to seek redress of their claim. Therefore, the Movant/Appellant requests the Court find that the election of remedies doctrine does not apply. The Movant/Appellant respectfully requests that this Court reverse the Court of Appeals and the Fayette Circuit Court Opinions and remand the for further proceedings.

Respectfully submitted,



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