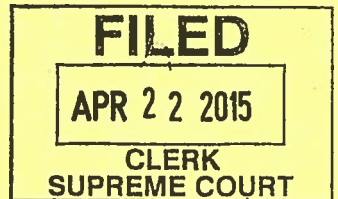


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
Case No. 2014-SC-000137-D



*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 REPLY 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,

A handwritten signature in black ink, appearing to read "Edward E. Dove". The signature is written over a horizontal line.

Edward E. Dove
201 W. Short Street
Suite 300
Lexington, KY 40507
(859)252-0020
eddove@windstream.net

Certificate of Service

This certifies that a true and correct copy of the foregoing has been mailed to the following on this the 20 day of April, 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

TABLE OF POINTS AND AUTHORITIES

CASES

<u>Chestnut v. Commonwealth</u> , 250 S.W.3d 288, 297 (Ky. 2008)	<u>3</u>
<u>Kremer v. Chemical Cons. Corp.</u> , 456 U.S. 461 (1982)	<u>3</u>
<u>Mullane v. Central Hanover Bank & Trust Co.</u> , 339 U.S. 306 (1950)	<u>1</u>
<u>Payne v. City of Covington</u> , 276 Ky. 380, 123 S.W.2d 1045 (1938)	<u>3</u>
<u>Plessy v. Ferguson</u> , 163 U.S. 537 (1896)	<u>3</u>
<u>Vaezkoroni v. Domino's Pizza, Inc.</u> , 914 S.W.2d 341 (Ky. 1995)	<u>1-4</u>
<u>Vasquez v. Hillery</u> , 474 U.S. 254, 265-265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986)	<u>3</u>

STATUTES

42 USC §2000e(b), 701 (b)	<u>2</u>
KRS 13B	<u>2</u>
KRS 344.030(2)	<u>2</u>

OTHER AUTHORITY

Kentucky Constitution, 7 th Amendment	<u>1, 2</u>
Title VII	<u>1</u>

Comes now the Movant/Appellant, by and through Counsel, and for her Reply Brief, states as follows:

REPLY ARGUMENT

While not surprising, the Movant/Appellant does not agree with the Respondent/Appellee's well written argument. In their argument, the Appellee takes great liberty with the process incorporated by the Kentucky Commission on Human Rights (hereinafter "KCHR") to review the Movant/Appellant's Complaint of disability discrimination against University of Kentucky.

The Appellee states that it filed a Response to the Plaintiff's complaint which she filed with the KCHR. What is not mentioned in the Response or in the facts is that at no time during the investigative process, did the Movant/Appellant ever confront the Appellee's witnesses. Not only does the Movant/Appellant place in issue the application of the choice of administrative remedies adopted by Vaezkoroni v. Domino's Pizza, Inc., 914 S.W.2d 341 (Ky. 1995), but the due process denied by the KCHR in addressing her complaint of discrimination.

The elementary fundamentals of due process include notice, opportunity to be heard and an impartial decision. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Title VII's scheme recognized the limitation of the EEOC investigative process and in order to address the due process concerns, incorporated the "right to sue" option, allowing the aggrieved individual to file in Federal Court in order to allow confrontation of the discriminating employer, as well as an impartial decision-maker – judge or jury. The Vaezkoroni decision and the subsequent decisions, in applying choice of remedies, deny even the elementary requirements of due process.

The Appellee also totally ignores the constitutional right to a jury trial guaranteed by the 7th Amendment to the Kentucky Constitution. Although mentioned in passing, the Appellee attempts

to argue to the Court that the Movant/Appellant had a right to jury trial only if she elected to file in Federal Court or state court. However, the fallacy in the Appellee's argument is that the KCHR does not share jurisdictional requirements with the EEOC.

Under Kentucky law, the KCHR can investigate employers who employed eight (8) or more employees. *See* KRS 344.030(2). Conversely, the number of employees required to confer jurisdiction over the employer in EEOC claims is fifteen (15). *See* 42 USC §2000e(b), 701 (b). The application of Vaezkoroni, eliminates the right to judicial review of complaints of discrimination from employees working for smaller employers. Therefore, the Appellee's argument would deny the aggrieved employee their fundamental right under the Kentucky Constitution to a jury trial.

Another argument conspicuously absent from the Appellee's Response is the standard of review afforded to a decision by the KCHR. The aggrieved individual under KRS 344.270 has a right to review the adverse KCHR decision, but only under the standard of KRS 13B. The standard of review of an administrative decision is whether the decision is arbitrary and capricious or contrary to law. KRS 13B. The Court reviews the record to determine whether the decision complies with the standard. KRS 13B does not allow the reviewing Court to review additional evidence not submitted to the investigative agency. The reviewing Court's review is limited by statute. KRS 13B, as it applies to KRS 344 claims, operates to deny the aggrieved the right to confront or present witnesses in support of the reversal of an adverse decision.

It should not be surprising that the Appellee chose not to address the Movant/Appellant's administrative review argument. It is also not surprising that the Appellee chose not to address the Movant/Appellant's argument concerning the requirement of knowing and voluntary waiver of a

right to jury which is critical to a waiver of a constitutional right. Kremer v. Chemical Cons. Corp., 456 U.S. 461, 482 (1982)

The Movant/Appellant presented the wording of the notice provided to the employee upon filing a complaint with the KCHR. The clear reading of the document provided by the KCHR does not specifically states to the aggrieved employee that she is waiving her right to a jury trial by filing with KCHR. The Appellee chose not to respond to the argument because there is simply no way a reasonable person would understand the impact of filing the complaint with the agency would deny a her constitutionally protected right.

Finally, the Appellee submits that the ruling in Vaezkaroni should be affirmed due to the doctrine of *stare decisis*. The Appellee respectfully disagrees. The doctrine of *stare decisis* is well recognized, but the Appellee's application ignores the fact that law is fluid and must be subjected to change when found to be flawed. If the Court accepts the Appellee's application of *stare decisis*, the ruling in Plessy v. Ferguson, 163 U.S. 537 (1896) would still be the law of the land. The Supreme Court of Kentucky, in its previous analysis of *stare decisis*, perfectly stated the following:

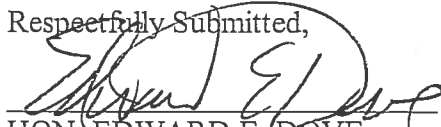
"Stare decisis [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Vasquez v. Hillery, 474 U.S. 254, 265-265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986). Thus, it is with anything but a cavalier attitude that we broach the subject of changing the ebb and flow of settled law. However, we do not feel that the doctrine compels us to unquestioningly follow prior decisions when this Court finds itself otherwise compelled. "The doctrine of *stare decisis*, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." Payne v. City of Covington, 276 Ky. 380, 123 S.W.2d 1045, 1050-1051 (1938). While the doctrine does guide us to decide every case with a respect for precedent, it does not demand that this Court be precluded from change.

Chestnut v. Commonwealth, 250 S.W.3d 288, 297 (Ky. 2008).

CONCLUSION

The Movant/Appellant incorporates her prior arguments presented to the Court in her Appellant Brief. The Court must come to terms with the impact that the prior decision of Vaezkaroni as has been applied in the current case and others alike functions to deny plaintiffs constitutional rights to jury trial, confrontation, and an impartial decision-maker. Additionally, the system employed by the administrative agency does not comply with the necessary requirements to allow the individual a knowing and voluntary waiver of the essential procedural due process rights allowed under the law. Therefore, the Court must address the impact of Vaezkaroni and its progeny and overrule the serious negative impact the decisions have caused to the enforcement of KRS 344 *et. seq.*

Respectfully Submitted,



HON. EDWARD E. DOVE
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(859) 252-0020

