

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002517-MR

KENTUCKY LOTTERY CORPORATION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 99-CI-00655

KENTUCKY UNEMPLOYMENT INSURANCE  
COMMISSION; RHONDA K. RICHARDSON;  
NORMAN MITCHELL; WILLIAM A. FRITTS;  
EDWARD J. GILMORE; AND KEITH HUNTER

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: DYCHE, EMBERTON, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE: Kentucky Lottery Corporation ("the Lottery")  
appeals from an order of the Franklin Circuit Court dismissing  
the Lottery's petition for a writ of mandamus and requiring the  
Lottery to pay attorney fees to Edward Gilmore and Keith Hunter.

Gilmore was discharged from employment by the Lottery  
in November, 1998, and his initial application for unemployment  
benefits was denied. He filed an appeal before the Kentucky  
Unemployment Insurance Commission and was represented before the  
Commission by Hunter, who from 1989 until 1993 was General

Counsel for the Lottery. The Lottery filed a motion with the Commission seeking an order that Hunter be disqualified from representing Gilmore in the action, claiming that such representation violated Rule 1.9 (Conflict of interest: former client) of the Kentucky Rules of Professional Conduct. The Commission determined that it lacked jurisdiction into complaints of attorney misconduct; the Lottery then filed a petition for writ of mandamus in the Franklin Circuit Court, seeking an order compelling the Commission to disqualify Hunter, and a separate motion seeking a stay of the administrative proceedings while the conflict of interest issue was pending. The court denied the motion for the stay, and by subsequent order established a briefing schedule on the merits of the disqualification issue.

The Lottery's brief in support of its petition was filed on July 26, 1999; Hunter's memorandum in opposition to the petition was filed on August 26, 1999; the Commission's brief in opposition was filed on September 3, 1999; and the Lottery's reply brief was filed on September 10, 1999. During the briefing period, and while the motion for disqualification was pending resolution on the merits in the circuit court, the unemployment proceedings terminated with an award in Gilmore's favor. On September 10, 1999, the Lottery also filed a motion for voluntary dismissal pursuant to Kentucky Rule of Civil Procedure (CR) 41.01(2), noting that because proceedings before the Commission had concluded, any ruling by the court on the issue of Hunter's disqualification would be moot. On December 22, 1999, the court issued an order granting the motion for voluntary dismissal on

the condition that the Lottery pay Gilmore's attorney fees. The Lottery was given twenty days to accept the court's terms or to file a notice of rejection and prosecute the case on the merits. The Lottery filed a rejection of the terms on January 11, 2000, and requested that the court rule on the merits.

Hunter then filed a motion to supplement the record, which was denied on February 22, 2000. On March 2, 2000, the court issued what purported to be a final order in the case, again denying the motions for voluntary dismissal and to supplement the record, and ordering the case dismissed on the merits with prejudice, and requiring the Lottery to pay Gilmore's costs and attorney fees. On March 13, 2000, the Lottery moved the court to alter, amend, or vacate the order, noting that the court had not entered findings of fact or conclusions of law. On September 26, 2000, the court entered an order containing findings of fact and conclusions of law, stating that the Lottery had refused to prosecute its case against Gilmore in an attempt to avoid an adverse decision, and that the Lottery had acted in bad faith in its effort to disqualify Hunter in his representation of Gilmore. The court thus reaffirmed its previous order, incorporating the findings of fact and conclusions of law. The Lottery now appeals.

In Louisville Label, Inc. v. Hildesheim, Ky., 843 S.W.2d 321, 325 (1992), the Supreme Court stated that a trial court had three options when faced with a motion for voluntary dismissal: deny the motion; impose terms as conditions for the voluntary dismissal; or sustain the motion unconditionally. "But

the court [can] not turn a motion for voluntary dismissal under CR 41.01(2) into an involuntary dismissal under CR 41.02." Id.

CR 41.02(1) provides for involuntary dismissal as follows: "For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, **a defendant may move for dismissal of an action** or of any claim against him."

(Emphasis added.) The trial court in this case cited the Lottery's failure to prosecute as its primary cause for dismissing the action with prejudice and awarding costs and attorney fees. We have searched the record in vain for a motion made by Gilmore or Hunter for such a dismissal. As in Louisville Label, the appellees here "had the right to move for an involuntary dismissal, with prejudice, for any reason provided for by the civil rules. But [they have] not done so. [Their] right to an involuntary dismissal has never been established in this record." 843 S.W.2d at 325.

If, on remand, the trial court finds itself faced with such a motion and deems it inappropriate, the court should include in its findings of fact a determination of the merits of the Lottery's initial claim, i.e., whether Hunter's actions violated Rule 1.9.

Finally, we briefly address the issue of the award of attorney fees. CR 41.01(2), dealing with voluntary dismissal, provides that a matter may be dismissed on the plaintiff's motion "upon order of the court and **upon such terms and conditions as the court deems proper.**" (Emphasis added.) CR 41.02 contains no similar provision for an involuntary dismissal. In Northern

Kentucky Port Auth. v. Cornett, Ky., 700 S.W.2d 392, 394 (1985), the Supreme Court stated that "costs and attorney fees may be awarded **in a voluntary dismissal** . . . upon a finding of bad faith or unreasonable delay . . . ." (Emphasis added.) The Court in Louisville Label stated that it remanded the case in Northern Kentucky Port Auth. for the trial court to determine the issue of bad faith, "thus justifying an award of attorney's fees and litigation expenses **as a condition of dismissal.**" Louisville Label, 843 S.W.2d at 324 (emphasis added). Thus, while attorney fees and costs are clearly allowed as a condition of dismissal under CR 41.01(2), the absence of similar authority for the trial court to impose "terms and conditions" on an involuntary dismissal precludes an award of attorney fees if the award is based solely on CR 41.02.

The decision of the Franklin Circuit Court is vacated, and this case is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Allen  
Lizabeth Ann Tully  
Lexington, Kentucky

BRIEF FOR APPELLEES KENTUCKY  
UNEMPLOYMENT INSURANCE  
COMMISSION, RHONDA K.  
RICHARDSON, NORMAN MITCHELL  
AND WILLIAM A. FRITTS:

Randall K. Justice  
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BRIEF FOR APPELLEES EDWARD J.  
GILMORE AND KEITH HUNTER:

Keith B. Hunter  
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