

RENDERED: MAY 13, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000273-MR

RONALD G. SEBREE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
CIVIL ACTION NO. 99-CI-00625

KENTUCKY STATE POLICE, COMMONWEALTH  
OF KENTUCKY and JOSEPH R. ROWE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

HUDDLESTON, SENIOR JUDGE: In June 1999, Ronald G. Sebree<sup>2</sup> filed suit in Franklin Circuit Court against his former employer, the Kentucky State Police (KSP), and against retired State Trooper Joseph R. Rowe, one of Sebree's former supervisors. Sebree

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> In the Franklin Circuit Court's order and opinion, which this Court adopts, Sebree was referred to as "Plaintiff".

alleged that he suffered from a disability - depression, and that, due to his disability, the KSP and Rowe violated his rights pursuant to 42 United States Code (U.S.C.) § 1983; pursuant to the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) Chapter 344; and pursuant to the Family Medical Leave Act, 29 U.S.C. § 2601. By agreement of the parties, the circuit court dismissed Sebree's 42 U.S.C. § 1983 claim. Subsequently, both the KSP and Rowe filed motions for summary judgment. After the parties both briefed and argued the issues, the court granted summary judgment in the defendants' favor, prompting Sebree's appeal to this Court.

On appeal, Sebree argues that the circuit court failed to view the evidence in the light most favorable to him as required by Steelvest, Inc. v. Scansteel Service Center, Inc.<sup>3</sup> He insists that his request for an indefinite amount of additional unpaid sick leave amounted to a request for a reasonable accommodation under the Kentucky Civil Rights Act.<sup>4</sup> He contends that the KSP failed to present evidence regarding undue hardship. And, he insists that he adduced sufficient evidence that Rowe conspired with the KSP to retaliate against him because he suffered from a disability, i.e., depression.

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<sup>3</sup> 807 S.W.2d 476 (Ky. 1991).

<sup>4</sup> For the first time on appeal, Sebree asserts that he did not request an indefinite leave but only an additional thirteen weeks of unpaid sick leave. And he asserts for the first time that he informed the State Police that, if granted this additional thirteen weeks of leave, he would have been able to return to work. Sebree's assertions are not supported by the record.

On appeal, Sebree advances the same arguments that he presented to Franklin Circuit Court. In response, we adopt relevant portions of the circuit court's opinion and order<sup>5</sup> which correctly analyzes and appropriately resolves Sebree's claims.

### **INTRODUCTION**

Plaintiff began employment with the KSP on December 16, 1985[,] as a Security Officer in the Facilities Security Section. He was promoted to Sergeant on April 16, 1990. On June 1, 1994[,] he was promoted to Lieutenant. Shortly thereafter, this gradual progression began to reverse direction for several reasons. First, Plaintiff became the focus of an internal investigation as a result of his alleged association with the Sons of Confederate Veterans ("SCV") and Ku Klux Klan ("KKK"). Second, Plaintiff failed to report the arrest of one of his officers, Officer Reuben Walker, for driving under the influence of alcohol. Third, Plaintiff, Officer Walker and Officer Bill Wise were involved in an incident at the Downtowner Bar in Frankfort on January 23, 1995. Walker and Wise called in sick for their shift while Plaintiff asked a subordinate to cover his shift which began at midnight. The three men spent several hours drinking

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<sup>5</sup> We do not include the trial court's analysis of Sebree's Family Medical Leave Act claim since he does not raise that issue on appeal.

alcohol. Officer Wise accused one of the female patrons of taking his car keys. He followed her out of the bar and demanded that she return his keys. He reached inside her pockets in an effort to find his keys. Plaintiff identified himself as a Kentucky State Police officer and attempted to mediate the dispute. The female civilian made a complaint to KSP concerning the incident.

Ultimately, the Justice Cabinet chose not to renew Plaintiff's Special Law Enforcement Officer ("SLEO") commission. The SLEO commission authorizes an officer to carry a gun and make arrests. As a result, on March 29, 1996, Plaintiff was reclassified to Facilities Security Officer I, which does not require a SLEO commission.

On January 23, 1996, Plaintiff reported to Rowe that he had back pain and was going to take sick leave. Plaintiff assured Rowe that he was not injured while on duty. On April 17, 1996, KSP received a note from Plaintiff's psychiatrist, Dr. Getulio V. Tovar, stating that Plaintiff could not return to work until May 22, 1996. In fact, he never returned to work. Plaintiff ran out of paid sick time on February 6, 1997. Following the application of donated sick time, Plaintiff was placed on Sick Leave Without Pay effective June 4, 1997. On May 19, 1998, KSP delivered a letter to Plaintiff informing him

that he was expected to report to work on June 4, 1998, or KSP would consider him as resigned. Two days later, Dr. Tovar informed KSP that Plaintiff was under his treatment for Affective Disorder with no anticipated date of return to work. Plaintiff did not report to work on June 4, 1998, and his resignation was processed pursuant to 101 KAR 2:100(7)(e) which states that "[A]n employee shall be considered to have resigned if he or she has been on one (1) year continuous sick leave without pay ...." One year later, on June 4, 1999, Plaintiff commenced this action against KSP and Rowe.

## **DISCUSSION**

The standard for Summary Judgment in Kentucky is familiar, well-settled, and does not require elaboration from this Court.<sup>[6]</sup> In this case, Summary Judgment is appropriate for the reasons set forth below.

### *KRS Chapter 344 Claim Against KSP*

Plaintiff claims KSP violated the Kentucky Civil Rights Act, KRS 344.040[, ] for allegedly discriminating against him due to his claimed disability. KRS 344.040 provides that it is unlawful "for an employer to ...

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<sup>6</sup> See Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991); CR 56.

discharge any individual ... because the person is a qualified individual with a disability ...."

First, Plaintiff argues KSP failed to "reasonably accommodate" him and subjected him to disparate treatment in violation of KRS Chapter 344. The relevant portion of the Kentucky Civil Rights Act ("Act") is closely modeled after the Americans with Disabilities Act.<sup>[7]</sup> Thus, it is appropriate to analyze claims under the Act by reference to its federal counterpart.<sup>[8]</sup> A case offering direct evidence in support of the plaintiff's claim should be analyzed under Monette v. Electronic Data Systems Corp.<sup>[9]</sup> One offering indirect evidence requires application of the traditional test stated in McDonnell-Douglas Corp. v. Green.<sup>[10]</sup> Nonetheless, under both tests, the burden rests on the Plaintiff to establish he is a "qualified individual with a disability."<sup>[11]</sup> A "qualified individual with a disability" is defined as follows:

An individual with a disability ... who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires unless an employer

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<sup>7</sup> 42 U.S.C. § 12101, *et seq.*

<sup>8</sup> Brohm v. JH Properties, Inc., 149 F.3d 517 (6<sup>th</sup> Cir. 1998).

<sup>9</sup> 90 F.3d 1173 (6<sup>th</sup> Cir. 1996).

<sup>10</sup> 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

<sup>11</sup> Walsh v. United Parcel Service, 201 F.3d 718, 724-25 (6<sup>th</sup> Cir. 2000); Monette, supra, note 9, at 1186.

demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's disability without undue hardship on the conduct of the employer's business.<sup>[12]</sup>

In the case at hand, Plaintiff requested an indefinite extension of his leave of absence. Courts have consistently held that indefinite leave is not a reasonable accommodation. The Walsh Court recently noted that its review of case law had disclosed no cases where an employer was required to allow an employee to take a leave of absence for well in excess of one (1) year as a reasonable accommodation.<sup>[13]</sup> Here, Plaintiff has been on either unpaid or unpaid leave for over two (2) years. Furthermore, he was unable to offer an estimated date of return to work. A request for additional leave when there are no clear prospects for a return to work is an "objectively unreasonable accommodation."<sup>[14]</sup> Thus, KSP is entitled to judgment as a matter of law.

*KRS Chapter 344 Claim Against Rowe*

Plaintiff argues that Rowe violated KRS 344.280(2) in that he conspired with KSP and others to commit acts

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<sup>12</sup> KRS 344.040.

<sup>13</sup> Walsh, supra, note 11, at 727.

<sup>14</sup> Id., note 11.

declared unlawful by the Kentucky Civil Rights Act. Specifically, the statute makes it "unlawful for a person, or for two (2) or more persons to conspire: ... (2) to aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter ...." Plaintiff insists that Rowe conspired to discriminate against Plaintiff based upon his alleged disability. However, it is undisputed that Plaintiff was not diagnosed with a depressive condition until after his final day of work with KSP.<sup>[15]</sup> Thus, Rowe could not have discriminated against Plaintiff, base upon this alleged disability, prior to the beginning of Plaintiff's leave from work.

The remaining issues raised by Plaintiff, which occurred after Plaintiff was diagnosed with depression, also fail to sustain a claim for discrimination. The overwhelming evidence in the record establishes that the SLEO commission was denied for reasons entirely unrelated to Plaintiff's disability. Moreover, that decision was made after a thorough examination by the Justice Cabinet, not Rowe. Finally, any decisions regarding Plaintiff's sick leave were made by his new supervisor, Captain Tim Hazlette. Furthermore, Plaintiff has not been able to cite any evidence that KSP treated him unfairly with respect to

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<sup>15</sup> See Second Deposition of Plaintiff, pp. 63-64.



his leave from work. Plaintiff received over 16 months of paid sick leave, then another full year of unpaid leave. Considering the evidence in the light most favorable to Plaintiff, it is impossible for Plaintiff to produce evidence at trial warranting a judgment in his favor and against the movant.

Despite Sebree's insistence to the contrary, the circuit court did, in fact, view the evidence in the light most favorable to him, and it correctly concluded that no genuine issues of material facts exist. Consequently, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ruby D. Fenton-Iler  
Borowitz & Goldsmith, PLC  
Louisville, Kentucky

BRIEF FOR APPELLEE, JOSEPH R.  
ROWE:

Stewart C. Burch  
Logan & GAINES, PLLC  
Frankfort, Kentucky

NO BRIEF FOR APPELLEE,  
KENTUCKY STATE POLICE