

SUPREME COURT OF ARKANSAS

No. 12-102

CHRISTY S. PEPPER

APPELLANT

V.

WENDELL GARRETT, DDS

APPELLEE

Opinion Delivered October 11, 2012

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT,
[NO. CV-2010-0036-6]HONORABLE DAVID F. GUTHRIE,
JUDGEDISMISSED WITHOUT PREJUDICE.**COURTNEY HUDSON GOODSON, Associate Justice**

Appellant Christy S. Pepper appeals an order of the Union County Circuit Court purporting to permit an interlocutory appeal, pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure, on the issue of whether the numerosity requirement of the Arkansas Civil Rights Act (ACRA) violates the United States Constitution and the Arkansas Constitution. For reversal, appellant argues that the ACRA's employee-numerosity requirement offends the Equal Protection Clause of the federal and state constitutions and article 2, section 13 of the Arkansas Constitution because it is not rationally related to a legitimate governmental objective. Because the circuit court's order lacks a Rule 54(b) certification and factual findings, we must dismiss the appeal without prejudice.

From October 2008 to January 2010, appellant was employed as a dental assistant in the dental office of appellee Dr. Wendell Garrett. Appellant alleged that, during the course of her employment, appellee made numerous comments and sent multiple emails that were

sexual in nature. She resigned in January 2010. Following her resignation, appellant filed suit in Union County Circuit Court, alleging sexual harassment and outrage. The suit was removed to federal court where appellee filed a motion to dismiss appellant's claims. The federal district court granted the motion on appellant's sexual-harassment claims, pursuant to Title VII, and remanded her state claims of sexual harassment and outrage. Upon remand, appellee moved to dismiss appellant's state claims of sexual harassment and outrage. In his motion, appellee argued that appellant failed to allege the requisite number of employees to bring a claim pursuant to the ACRA and that she failed to state a claim for outrage. The circuit court denied appellee's motion. Appellee then filed a motion for partial summary judgment, alleging that appellant's state-law claim for sexual harassment failed because the material facts establish that appellee did not have enough employees for a cause of action to exist against him pursuant to the ACRA. The circuit court granted appellee's motion for partial summary judgment. Subsequently, appellant filed a motion for certification on the question of the constitutionality of the numerosity requirement. The circuit court granted appellant's motion, and this interlocutory appeal followed.

Whether an order is subject to an appeal is a jurisdictional issue that this court has the duty to raise, even if the parties do not. See *Kyle v. Gray, Ritter & Graham, P.C.*, 2012 Ark. 268. Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken from a final judgment or decree entered by the circuit court. Although the purpose of requiring a final order is to avoid piecemeal litigation, a circuit court may certify an otherwise nonfinal order for an immediate appeal by executing a certificate pursuant to

Rule 54(b) of the Arkansas Rules of Civil Procedure. *Robinson v. Villines*, 2012 Ark. 211. Rule 54(b) permits an appeal from an order dismissing some of the claims or parties when a final order disposing of all claims has not yet been rendered, but the court must execute a proper Rule 54(b) certificate to do so. Absent the executed certificate, a judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties. *See* Ark. R. Civ. P. 54(b)(2).

Here, the circuit court did not issue a Rule 54(b) certificate with its order, nor does the order contain the relevant factual findings explaining why hardship or injustice would result if an immediate appeal is not permitted. The court's order merely states that appellant was "allowed to appeal on an interlocutory basis the question of whether the numerosity requirement of the [ACRA] violates the United States Constitution and/or the Constitution of the State of Arkansas." The fact that significant issues may be involved is not sufficient in itself for the appellate court to accept jurisdiction of an interlocutory appeal. *Kyle, supra*. Thus, the circuit court's order does not satisfy the requirements of Rule 54(b). Therefore, because the circuit court's order is not final and appealable, this court lacks jurisdiction, and this appeal must be dismissed without prejudice to refile at a later date. *See Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, 361 S.W.3d 262.

Dismissed without prejudice.

Robert L. Depper, Jr., for appellant.

Wright, Lindsey & Jennings LLP, by *Michelle M. Kaemmerling* and *Jane A. Kim*, for appellee.