RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-002872-MR

PAMELA BOWMAN and REDA TURNER — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 94-CI-00611

SERV-AIR, INC. and GARY CHRISTIAN — APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: DYCHE, KNOPF and JOHNSON, Judges.

JOHNSON, JUDGE: Pamela Bowman (Bowman) and Reda Turner (Turner) have appealed from the judgment of the Fayette Circuit Court entered on October 3, 1996, which summarily dismissed their claims against their former employer, Serv-Air, Inc. (Serv-Air), for damages for employment discrimination and retaliation pursuant to Kentucky Revised Statutes (KRS) 344 et seq. We reverse and remand.

Bowman and Turner had worked for Serv-Air for six and nine years respectively, when on February 16, 1994, they left their employment and never returned. They filed a complaint in the Fayette Circuit Court on February 28, 1994, naming both Serv-

Air and their immediate supervisor, Gary Christian (Christian), as defendants.[1] They alleged that they were constructively discharged by Serv-Air, that they had been discriminated against in the terms and conditions of their employment based on their sex, that "Christian's comments and actions created a hostile working environment," and that "[t]he actions of the Defendants created an intolerable work atmosphere of sexual harassment." They further alleged that as a result of the violations of their civil rights, they suffered and experienced "humiliation, embarrassment and emotional distress." In addition to actual and punitive damages, they also sought reinstatement to their positions at Serv-Air.

In August 1994, Bowman and Turner filed claims with the Workers' Compensation Board (the Board). Although the record of those proceedings is not contained in the record on appeal, it is apparent from the findings of the Administrative Law Judge (ALJ) and the Board's opinions in Serv-Air's appeals, that the injuries complained of in that forum arose from the same conduct complained of in the instant action. In the judgment from which this appeal is taken, the trial court observed that the ALJ's and the Board's opinions "reflect careful consideration of the same evidence of sexual discrimination the Plaintiffs would now use to obtain compensation for the same injury, emotional distress, for

[1]The appellants have not challenged the propriety of the trial court's order dismissing Christian as a defendant.

which they have already been compensated by Workers' Compensation."

Indeed, Bowman and Turner received a small amount of compensation as a result of their claims before the Board. Bowman was awarded temporary total disability benefits from February 17, 1994, until December 19, 1994, but she received no award for permanent occupational disability. The same ALJ heard Turner's claim and, in addition to temporary total disability benefits for the same period, determined that Turner had a permanent occupational disability of 50%.[2] He determined that Turner had an active personality disorder that was exacerbated "to the point that [Turner] could no longer function effectively in the work place" due to "harassment or discriminatory treatment" at work.

Serv-Air, relying on KRS 342.610(4), argued before the Board that Bowman and Turner had waived any right to compensation benefits when they filed this lawsuit in circuit court. The Board rejected this argument and held that the claims of Bowman and Turner did "not involve an assertion of intentional injury which would require election under KRS 342.610(4). . . ." Further, relying on Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), the Board determined that the workers' compensation statutory scheme would not preclude "a claim for

[2]Because the ALJ determined that three-fourths of the occupational disability was active prior to the events which generated the workers' compensation claim, Turner was awarded benefits for a 12.5% disability which amounted to $39.00 per week for 425 weeks.

work-related occupational disability caused by mental emotional injury even assuming the civil action in circuit court asserts employment discrimination." Serv-Air did not seek further appellate review of the Board's decision.[3]

On April 16, 1996, after the Board's opinions that affirmed the ALJ's decisions were rendered, Serv-Air moved for summary judgment in the instant action arguing that (1) the "rules regarding the election of remedies under KRS 342 [ ] preclude recovery under KRS 344 for an injury previously remedied under KRS 342" and, (2) Bowman and Turner had failed to present sufficient evidence to establish a viable claim under KRS 344. The trial court agreed with Serv-Air's first argument, but declined to address the merits of the second.[4] In dismissing the complaint, the trial court reasoned as follows:

> While the Kentucky Civil Rights Act as interpreted by Meyers may preserve an injury for redress under the Civil Rights Act despite a recovery under

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[3]Serv-Air states in its brief that it settled the workers' compensation claim with Bowman and Turner. However, there is nothing in the record to indicate that settlements occurred, or, if so, what the terms of the settlements were.

[4]Serv-Air contends that should this Court determine that the trial court erred in dismissing the complaint under the election of remedies doctrine, we should uphold its ruling on the basis that Bowman and Turner have not made a "threshold showing of actionable sexual harassment." "Claims of discriminatory workplace harassment are rarely summarily dismissed where there is any colorable evidence of such harassment." Kirkwood v. Courier-Journal, Ky. App., 858 S.W.2d 194, 198 (1993). As noted earlier herein, the trial court specifically declined to address the merits of Serv-Air's arguments in this regard. We believe it inappropriate for this Court to attempt to sift through the evidence and determine whether "colorable evidence" exists when the trial court has not yet done so.

> Workers' Compensation for another injury arising from the same circumstances, it does not give the litigant two bites at the apple for the same injury. The Court finds that election of remedies bars the prosecution of this action.

Bowman and Turner argue in this appeal that the common law doctrine concerning election of remedies should not be applied as a bar to their recovery for the personal indignities and other injuries they suffered due to the gender-based discrimination they endured at Serv-Air. We agree that the trial court erred in summarily dismissing their complaint.

In Meyers supra, our Supreme Court made it clear that claims for employment discrimination were not precluded by KRS 342.690, the exclusivity provision of our workers' compensation scheme. 840 S.W.2d at 819. The Court specifically held:

> [T]he workers' compensation statute preempts only common law tort claims and does not preempt a statutory civil rights claim. This Court must presume that the General Assembly knew of the Workers' Compensation Law preemption doctrine when it created a private cause of action for "actual damages" caused by discrimination in the Kentucky Civil Rights Act, and that it intended to create an independent cause of action notwithstanding that the two statutes might provide alternative sources of statutory relief in those cases where the mental emotional injury inflicted causes work-related occupational disability.

Id.

As Meyers implicitly recognized, KRS 344 is designed to compensate for work-related evils that clearly fall outside the scope of our workers' compensation scheme. Thus, there is no

conflict between the two statutes, no need to choose between giving full effect to either, and no need to invoke the election of remedies doctrine. That doctrine was described in Speck v. Bowling, Ky. App., 892 S.W.2d 309 (1995), as follows: "'The doctrine of election of remedies is predicated on inconsistency of remedies. The test of inconsistency is whether the remedies proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other.'" Id. at 311 (citation omitted). See also McNeal v. Armour and Co., Ky. App., 660 S.W.2d 957, 959 (1983), and Kirkwood, 858 S.W.2d at 197 (election of remedies specifically determined inappropriate to deny employee right to maintain KRS 344 civil rights action while simultaneously pursuing grievance against employer under union contract). The fact that the damages may overlap does not detract from the fact that the rights emanating under both KRS 342 and 344 are "independent" and not inconsistent. Meyers supra at 819. Further, there is nothing in KRS 344 which would restrict Bowman's or Turner's pursuit of these rights merely because they sought workers' compensation benefits. See e.g., McNeal, 660 S.W.2d at 959.

Meyers does indicate in dicta that the doctrine "might preclude" a recovery under KRS 344 for the "same" injury where an employee has been "previously compensated under the Workers' Compensation Law." 840 S.W.2d at 819. Bowman and Turner agree that to the extent they have been compensated for lost wages and

medical expenses, they may not receive further compensation in this action.[5] However, they are seeking damages for intangible injuries such as the loss of personal dignity, loss of self-esteem, embarrassment and humiliation. Clearly, these injuries are not the "same" injuries for which Bowman and Turner were compensated before the Board even though the injuries may have arisen from the same wrongful conduct.

Finally, Serv-Air argues that the waiver provisions of KRS 342.610(4) and the holding in Zurich American Insurance Company v. Brierly, Ky., 936 S.W.2d 561 (1996), require the dismissal of Bowman's and Turner's complaint. KRS 342.610(4) is an exception to the exclusivity provisions of the workers' compensation scheme which allows a claimant to pursue common law tort actions for intentionally caused injuries. We agree with the Board that this statute has no application in the context of civil rights violations arising in the work place. Indeed, we are confident that if this statute had any application to injuries resulting from employment discrimination, our Supreme Court would have discussed that application in Meyers. In any event, since this action was filed prior to any proceeding before the Board, a plain reading of the statute would compel a

[5]Serv-Air's contention that Bowman and Turner will receive double recovery for their injuries is simply not justified. Any sums awarded by the jury for elements of damage for which the appellants have been partially or totally compensated, i.e., medical expenses or lost wages, can easily be reduced by Serv-Air's post-verdict motion for a credit or set-off. See Russell v. Able, Ky. App., 931 S.W.2d 460 (1996); Old Republic Insurance Company v. Ashley, Ky. App., 722 S.W.2d 55 (1986); and KRS 342.700.

determination that Bowman and Turner, by first filing an action in circuit court, waived any right to workers' compensation benefits. In fact, Serv-Air made that very argument before the Board which resolved the issue against the employer. Serv-Air's failure to seek appellate review of the Board's determination has resulted in the waiver of any error in this regard.

Accordingly, the judgment of the Fayette Circuit Court is reversed and the matter is remanded for further proceedings consistent with this Opinion.

KNOPF, JUDGE, CONCURS AND FILES A SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING. I fully agree with the majority's conclusion that the doctrine of election of remedies does not bar Bowman and Turner from pursuing a sexual harassment action after they have recovered under their workers' compensation claims. Claims brought under the Workers' Compensation Act involve different factual and legal issues from those brought pursuant to KRS Chapter 344. Although some of the evidence may be the same in both actions, the claims are distinct, and therefore not exclusive.

I write separately to address the issue of damages. In the workers' compensation actions, Bowman and Turner each recovered medical expenses incurred for psychiatric injuries and depression caused by their work environment. The ALJ also awarded income benefits based upon their temporary total disability from February 17, 1994 through December 19, 1994.

Potentially, these items may overlap with those recovered in a sexual harassment judgment.

Clearly, Bowman and Turner are not entitled to a double recovery for those items of damages. Yet at the same time, the workers' compensation awards were based upon entirely different factors than a sexual harassment judgment would be. The focus of damages must be to make the plaintiff whole. Great American Insurance Companies v. Witt, Ky. App., No. 96-CA-3423 (February 13, 1998) (finality endorsement granted April 29, 1998). Consequently, should the issue of liability be submitted to jury, the instructions on the issue of damages must be specific.

First, the trial court must determine whether any damages sought by Bowman and Turner in their sexual harassment claims were awarded in the workers' compensation action. Further, Serv-Air must request separate instructions for each item of damages. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 818 (1992). Lastly, the trial court must determine how those items covered by the workers' compensation award should be presented to the jury.

If the evidence shows that Bowman and Turner were entirely compensated in the workers' compensation action for an item of damages (i.e.; past medical expenses), then that item should be excluded from the jury instructions. However, if the evidence shows that they were not compensated, or only partially compensated for certain damages, (i.e.; lost wages), then those items should be presented to the jury. Serv-Air may be entitled

to set-off or to subrogation for damages recovered in the sexual harassment claim which it previously paid in the workers' compensation claim. In any event, upon remand the parties and the trial court should pay close attention to how the issue of damages is presented to the jury to prevent a double recovery.

DYCHE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING.

> I am unable to agree with the judgment of the majority of the Court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Northern Securities Company v. U. S., 193 U. S. 197, 400 (1904) (Holmes, J., dissenting).

The actions complained of by appellants were undoubtedly intentional, and are imputed to appellee through operation of law. KRS 342.610(4) provides that, in the case of injuries caused to employees "through the deliberate intention" of the employer, the employee

> may take under this chapter [the Workers' Compensation Act], **or in lieu thereof**, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee. . . . **If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury. . . shall be waived as to all persons.**

(Emphasis added.)

Such is the law applicable to this case. "The section of the statute gives the injured employee. . . an election as to the form in which to proceed. It does not afford an opportunity to proceed in both forms and elect the judgment or award that is most beneficial." Zurich American Insurance Company v. Brierly, Ky., 936 S.W.2d 561, 562 (1996).

Appellants admittedly accepted the benefits of their Workers' Compensation claims; they may not now attempt to recover a more beneficial judgment in the civil action. I would affirm the trial court, exercising the proper judicial function, rather than intruding upon the General Assembly's domain as the majority has done.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Hon. David R. Marshall
Lexington, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Hon. Debra H. Dawahare
Lexington, KY