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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001752-MR

JERRY S. CRITCHELOE — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. BLAND, JUDGE
ACTION NO. 99-CI-00649

FISCHBACH USA INC.; AND
JEFFREY M. BREWER — APPELLEES

OPINION

AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: BARBER, MILLER AND BUCKINGHAM, JUDGES.

BARBER, JUDGE: Appellant, Jerry Critcheloe ("Critcheloe"), seeks review of an order of the Hardin Circuit Court dismissing his complaint. The trial court determined that it lacked subject matter jurisdiction, and that Critcheloe's discrimination lawsuit was barred by election of remedies. The trial court also determined that Critcheloe had failed to state a claim for intentional infliction of emotional distress, regardless that any such claim would be pre-empted by KRS Chapter 344 and KRS Chapter 342. For

the reasons outlined below, we reverse in part, and affirm in part, and remand for further proceedings consistent with this opinion.

Critcheloe, a printer, initially injured his back while working for the Appellee, Fischbach U.S.A. ("Fischbach"), in March 1995. Critcheloe continued to work at Fischbach. According to the complaint, there were other incidents at work involving his back in 1997 and 1998. Critcheloe alleged that in March 1998, the Appellee plant manager, Jeff Brewer ("Brewer"), requested that he postpone scheduled back surgery, due to an upcoming visit from officers of Fischbach's parent company. Critcheloe complied, and the surgery was rescheduled; however, Critcheloe was discharged on March 9, 1998 before the rescheduled surgery took place.

Critichеloe filed an EEOC Form 5, Charge of Discrimination, with the United States Equal Opportunity Commission ("EEOC") on April 15, 1998, alleging that he was discriminated against in violation of the Americans With Disabilities Act of 1990 ("ADA"). The EEOC deferred the charge to the Kentucky Commission on Human Rights for investigation. In his brief, Critcheloe contends that he did not pursue a "KCHR administrative remedy because he never filed a complaint with the KCHR, nor did he ask the EEOC to refer his charge of an ADA violation to the KCHR.

An administrative charge of discrimination must be timely filed with the EEOC before a plaintiff can bring a Title VII action in federal court. 42 U.S.C. § 2000e-5(e). The ADA has incorporated the same administrative procedures set forth in Title VII. 42 U.S.C. § 12117(a). Where charges arise in jurisdictions which have

state or local laws prohibiting the unlawful employment practice, and establishing a state or local authority authorized to grant relief, the EEOC must "defer" the charge to the state or local authority for sixty days. During this time, the state or local authority has the exclusive right to process allegations of discrimination. 42 U.S.C. § 2000e-5(c); 29 CFR 1601.13(a)(3). Kentucky is a deferral state.

After the EEOC deferred Critcheloe's charge to the KCHR, the KCHR set a hearing date. The hearing was continued because the KCHR had not completed its investigation. Critcheloe alleges that he was contacted by an enforcement officer at KCHR, Doug Lanier, who advised him that he had to make a choice – either allow a KCHR staff attorney to prosecute his claim or ask the KCHR to withdraw and hire a private attorney to pursue a private civil action. Critcheloe chose to withdraw. The KCHR's withdrawal order, dated December 18, 1998, states that the "complaint is hereby withdrawn, without prejudice, to the rights of the Complainant. The complainant may again file with the Commission this complaint subject to the provision of KRS 344.200(1)." Critcheloe received a "Notice of Right to Sue" from the EEOC, dated January 21, 1998. The Notice states:

> This is your notice of Right to Sue. It is issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA must be filed in federal court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on this charge will be lost. (The time limit

for filing suit based on a state claim may be different.).

On May 4, 1999, Critcheloe filed a complaint in Hardin Circuit Court alleging that: (1) Fischbach improperly terminated his employment in violation of KRS 344.040(1) which prohibits discrimination on the basis of disability; and, (2) Brewer's conduct, as agent and employee of Fischbach, constituted the tort of outrage and/or intentional infliction of emotional distress. On May 24, 1999 Fischbach and Brewer filed a motion to dismiss on grounds that: (1) the trial court lacked subject matter jurisdiction, because Critcheloe had elected to pursue an administrative remedy before the Kentucky Commission on Human Rights ("KCHR") and had failed to exhaust that remedy; (2) the facts alleged in the complaint, even if accepted as true, fail to state a claim for the tort of outrage against either Fischbach or Brewer; (3) the common law claim for the tort of outrage is preempted by KRS Chapter 344; and, (4) the common law claim for the tort of outrage is preempted by KRS Chapter 342. On July 13, 1999, the trial court entered an order granting the motion. Critcheloe appeals from that order.

On appeal, Critcheloe contends that the trial court erred in determining that it was deprived of subject matter jurisdiction over his KRS Chapter 344 discrimination claim pursuant to the election of remedies doctrine. Critcheloe argues that the trial court misinterpreted Vaezkoroni v. Domino's Pizza, Inc., Ky., 914 S.W.2d 341 (1996). In Vaezkoroni, the claimant

filed three separate charges with the Lexington-Fayette Urban County Human Rights Commission. Each charge was dismissed with a determination of "No Probable Cause." The claimant subsequently filed a complaint in circuit court alleging the same charges of discrimination and retaliation as had been filed with the local commission. The employer moved for summary judgment on the grounds that KRS 344.270 barred the circuit court action, because of the previous determination of the local commission.

The Kentucky Supreme Court held that KRS Chapter 344 applied equally to the Kentucky Human Rights Commission and to the local commissions. The Court explained that it would be absurd to assume an individual could choose between local and state administrative agencies and still have the option of judicial relief. The Court concluded:

> KRS Chapter 344 authorizes alternative avenues of relief, one administrative, and one judicial. The administrative avenue also includes alternatives; the individual may bring a complaint of discrimination before either the Ky. Commission or the local commission. Once any avenue of relief is chosen, then complainant must follow that avenue to its final conclusion. This interpretation is necessary 'to give meaning to and carry out the obvious purposes of the act as a whole.' Monmouth Street Merchants' Business Association v. Ryan, Ky., 247 Ky. 162, 56 S.W.2d 963, 964 (1933).

The issue decided in Vaezkoroni was simply whether the provisions of KRS Chapter 344 applied equally to the Kentucky Human Rights Commission and to the local human rights commissions. Vaezkoroni is not dispositive of the issue before

us, because Critcheloe did not file a charge with either the Kentucky Commission or a local human rights commission.

Vaezkoroni was addressed in a recent decision of the court, Founder v. Cabinet for Human Resources, Ky. App., 23 S.W.3d 221 (2000), which became final after the submission of appellant's reply brief. Founder filed a charge of racial discrimination with the EEOC on February 13, 1993. He also filed a sworn complaint of racial discrimination with the Kentucky Commission on Human Rights pursuant to KRS 344.200 on February 18, 1994. At Founder's request, that complaint was withdrawn by order dated December 8, 1994. On October 26, 1994 *prior to the issuance of the Kentucky Commission's withdrawal order*, Founder filed an action in Franklin Circuit Court alleging racial discrimination and retaliation. The EEOC issued its right to sue letter on December 5, 1996, providing that the claimant had ninety days to filed his Title VII action in federal court.

The court, in Founder, explained that KRS 344.450 specifically provides a cause of action in circuit court for civil rights violations prohibited by KRS Chapter 344. KRS 344.200 provides for relief from civil rights violations by the filing of a sworn complaint with the Kentucky Commission on Human Rights. KRS 344.270 provides:

> The provisions of KRS 13B.140 notwithstanding, commission shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance under KRS 344.450 is pending. A

> state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending before the commission. A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance.

The Court concluded that:

> Although Vaezkoroni does not explicitly address this situation, we believe that to follow its holding to its logical conclusion, Founder's circuit court claim must be barred since he had already filed the administrative complaint. From our reading of the language in KRS 344.270 and Vaezkoroni, once a complaint is filed with the Commission, a subsequent action in circuit court based on the same civil rights violation(s) is barred. Further, as we shall discuss below, we believe Clifton v. Midway College, Ky., 702 S.W.2d 835 (1986), is consistent with our view.
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> In Clifton, the appellant filed a complaint alleging discrimination with the EEOC, which deferred her claim to the Kentucky Human Rights Commission. However, unlike Founder, the appellant did not file a sworn complaint with the Commission. The Commission thereafter relinquished jurisdiction back to the EEOC. Subsequently, the appellant filed an action in circuit court under KRS 344.450. The Court held that since no sworn complaint was ever filed with the Commission, her separate action in circuit court was not barred:
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> The absence of a written sworn complaint is a jurisdictional defect which precludes the assertion that the Kentucky agency had undertaken any authority in this regard. [citation omitted].

Founder, id., at 223-224. Founder is distinguishable from the case *sub judice*. Founder filed a complaint with the KCHR, after he had filed a charge with the EEOC; further, Founder filed a complaint in circuit court, before the KCHR issued a withdrawal order. Thus, KRS 344.270 clearly prohibited the circuit court from taking jurisdiction, because Founder still had a claim seeking relief for the same grievance pending before the commission. By contrast, Critcheloe did not file a complaint with the KCHR, nor did Critcheloe have a claim pending before the KCHR when he filed a civil action in the Hardin Circuit Court.

In determining whether the EEOC's deferral of a charge to the KCHR constitutes an election of remedies on Critcheloe's part, we first must examine that doctrine. Combs v. USA, 768 F. Supp. 584, 594 (E. D. Ky. 1991) provides a review of Kentucky law on the subject:

> As generally defined, "the doctrine simply means that when a person has at his disposal two modes of redress, which are contradictory and inconsistent with each other, his **deliberate and settled choice** and pursuit of one will preclude his later choice and pursuit of the other." *Collings v. Scheen*, 415 S.W.2d 589, 591 (Ky. 1967). The doctrine is not a rule of substantive law but rather is a technical rule of procedure or judicial administration. *NE Coal Co. v. Blevins*, 277 S.W.2d 45, 48 (Ky. 1955); 25 Am. Jur. 2d *Election of Remedies* § 1 (1966). The rule is equitable in nature and is regarded essentially as an application of the law of estoppel. *Id.* at §§ 1, 2. **The rule is considered a "harsh one" that "should not be**

> **lightly enforced" nor "unduly extended," and "it must be strictly confined within its reason and spirit.**" *Id.* at § 3 (footnotes omitted). The doctrine does not apply where the available remedies are consistently concurrent or cumulative. *Id.* at § 12.
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> The filing of a suit is considered in some jurisdictions, including Kentucky, as an act of election, *id.* at § 16; *Reynolds Metals Co. v. Liberty Nat'l Bank & Trust Co.*, 294 S.W.2d 921, 923 (Ky. 1956), although a suit which is abandoned or dismissed without a pronouncement on the merits is not considered to be an election. *Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co.*, 153 Ky. 20, 25, 154 S.W. 374 (1913); 25 Am. Jur. 2d *Election of Remedies* § 19. However, "the commencement of a suit in a court which had no jurisdiction of the subject matter has been held not to be a conclusive election." *Id.* at § 17. (emphasis added).

We cannot construe the EEOC's deferral of a charge to the KCHR to be a "deliberate and settled" choice of state administrative relief on Critcheloe's part. An important purpose of KRS Chapter 344 is to "safeguard all individuals within the state from discrimination, . . . to protect their interest in personal dignity and freedom from humiliation, . . . and to further the interest, rights and privilege of individuals within the state[.]" KRS 344.020(1)(b). KRS 446.080 mandates that "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, ..."

KRS 344.450 provides that any person injured in violation of this chapter "shall have a civil cause of action in

Circuit court." KRS 344.270 is entitled "Commission or court not to take jurisdiction over claim for unlawful practice while claim pending before the other body—Final determination exclusive." The statute provides that "A final determination by a state court or final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance." That statute has been interpreted to mean that there are alternative avenues of relief -- once an avenue of relief is chosen, or a complaint filed, an election of remedies has been made. The statute speaks in terms of excluding any other action or proceeding when *brought by the same* ***person.*** Critcheloe did not bring an action before the KCHR. Thus, the statutory exclusion does not apply to bar his circuit court action. We hold that where the aggrieved individual does not file a complaint with the KCHR (or local commission), the EEOC's automatic deferral to the KCHR is not an "election" of remedies which would preclude an action for state judicial relief in circuit court under KRS 344.450. Accordingly, we reverse that portion of the circuit court's order dismissing Critcheloe's KRS Chapter 344 disability discrimination claim and remand for further proceedings consistent with this opinion.

Critcheloe also contends that the trial court erred in dismissing his claim for intentional infliction of emotional

distress. We cannot improve upon the discussion of the law on this issue in Lococo v. Barger, 958 F. Supp. 290, 297-98 (E.D.Ky. 1997):

> In recognizing a claim for intentional infliction of emotional distress, otherwise known as the tort of outrage, Kentucky has adopted the Restatement (Second) of Torts § 46. Comment d states, "Generally the case is one in which the recitation of facts to an average member of the community would arouse resentment against the actor, and lead him to exclaim, 'Outrageous!' The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities...." Restatement (Second) of Torts § 46.
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> Since the seminal case of Craft v. Rice , 671 S.W.2d 247 (Ky. 1984), which recognized thetort, Kentucky courts have taken a restrictive view towards this tort, granting summary judgments for defendants in many cases. In these cases the courts have found that the defendants' acts did not rise to the level of outrageous conduct needed to sustain a claim for this tort.
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> Moreover, recently revisiting this tort in the case, Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996), the Kentucky Supreme Court . . . [emphasized] that Kentucky still takes a restrictive/limited approach to this tort.
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> Examining the relevant Kentucky case law, it becomes clear that the conduct alleged is not extreme and outrageous. The conduct here is nowhere near that of a nurse shouting "shut up" to a woman who had delivered her still born child, unassisted, into a bedpan, or a husband who had committed adultery spending the proceeds of checks and other assets

> during divorce proceedings and then threatening his soon to be ex-wife to achieve a favorable settlement. Kentucky Courts ruled that the conduct described above did not constitute outrageous conduct under Kentucky law. [citations omitted].
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> Although discharging an employee on the basis of gender may be illegal and reprehensible, a great deal more is required to approach outrageous conduct. Such conduct is bad conduct, but it is not outrageous and intolerable conduct, as defined in Kentucky case law. The record contains nothing which would support a finding of outrageous and intolerable behavior in this matter.

Comment on the Restatement states,

> It is for the court to determine, on the first instance, whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Applying this analysis to the case *sub judice*, we do not believe that the trial court committed reversible error in granting the motion to dismiss the intentional infliction of emotion distress as it failed to state a claim. Having so decided, we need not address the remaining issues.

ALL CONCUR.

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