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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000132-MR

TERRI TURNER; WILLIAM TURNER;
SHERRY SEGER; SANDRA MOUNTS;
DANNY MOUNTS; AND STACY
WINDOWS (NOW COMBS) APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH BAMBERGER, JUDGE
ACTION NO. 97-CI-01296

EXPRESS SERVICES, INC. APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, EMBERTON, AND MILLER, JUDGES.

DYCHE, JUDGE. Terri Turner, William Turner, Sherry Seger, Sandra Mounts, Danny Mounts, and Stacy Windows appeal from an order of the Boone Circuit Court granting the summary judgment motion of Express Services, Inc. We affirm.

Express is a privately owned Colorado corporation, with its principal place of business in Oklahoma, that is in the business of franchising temporary personnel firms. The franchise

agreement used by Express with its franchisees details the rights and responsibilities of both Express and the franchisee.

CMS Services, Inc., is a Kentucky corporation owned and operated by Charles Scroggin. CMS is in the business of providing temporary personnel services as a franchisee of Express. CMS and Express entered into the franchise agreement in October, 1994.

Appellants were full-time employees of CMS: Terri Turner was the Marketing Manager; Sherry Seger was the Associate Personnel Supervisor; Sandra Mounts was the Staffing Supervisor; and Stacy Windows was the Personnel Supervisor.

On December 2, 1997, appellants filed a complaint against CMS, Express, and Scroggin, individually and as president of CMS, alleging that Scroggin had violated their civil rights by sexually harassing them.[1] Appellants listed nine counts in their complaint: (1) a sexually hostile work environment; (2) sexual harassment; (3) intentional infliction of emotional distress; (4) failure to provide a safe workplace; (5) negligent infliction of emotional distress; (6) assault; (7) retaliation; (8) defamation; and (9) loss of consortium. They claimed that as a result of Scroggin's conduct, they were all either discharged or constructively discharged from employment with CMS. They further charged that Express was an employer within the meaning of Kentucky Revised Statutes (KRS) 344.030, and that CMS and

[1] William Turner and Danny Mounts, husbands of Terri Turner and Sandra Mounts, respectively, were included as plaintiffs, claiming loss of consortium.

Scroggin were agents of Express as a result of the franchise agreement.

The trial court granted motions by Scroggin and CMS dismissing the first, second, and seventh counts as concerned them, apparently concluding that Scroggin and CMS did not meet the statutory definition of "employer" under KRS 344.030. Express then filed a motion for summary judgment, arguing that it was not appellants' employer; no agency relationship existed between Express and CMS or Scroggin; that even if the court found an agency relationship, Express could not be held liable as principal; and that it could not be held liable for acts of its franchisee. Appellants responded by arguing that Express and CMS should properly be combined as a single employer, and that an agency relationship existed between Express and both CMS and Scroggin. On December 16, 1999, the circuit court granted summary judgment to Express. This appeal followed.

Appellants advance three theories before this Court: (1) Express and CMS are joint employers of appellants; (2) Express and CMS should be considered a single employer of appellants; and (3) an agency relationship existed between Express and CMS and Scroggin.

Express notes that appellants did not argue the "joint employer" theory before the trial court and should be prevented from arguing it before this Court. We agree. As stated by Justice Lukowsky, appellants "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222

(1976). Appellants claim in their reply brief that the joint employer theory is merely an "extension" of the single employer theory argued before the trial court, and argue that the trial court erred by not finding that Express and CMS were joint employers. In their initial brief, however, they were careful to distinguish between the two, and even indicated that courts sometimes mislabel the "single employer" doctrine as that of a joint employer. The trial court did not err by failing to adopt a theory that was not advanced before it, and neither will we consider it. See Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990 (6th Cir. 1997)(court declined to address joint employer doctrine where it had not previously been raised but addressed single employer doctrine on the merits).

The single employer doctrine states that two distinct companies can be so interrelated in their operations that they are essentially acting as a single employer, subject to liability under the civil rights laws. KRS Chapter 344 was modeled after the federal statute in Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000(e)(b), thus we can be guided in our attempt to define "employer" as used in KRS 344.030 by federal cases. Palmer v. International Ass'n of Machinists, Ky., 882 S.W.2d 117, 119 (1994). Four factors are used in determining whether two entities are considered a single employer: (1) interrelation of operations; (2) common management; (3) centralized control of labor; and (4) common ownership or financial control. Id.; Evans v. McDonald's Corporation, 936 F.2d 1087, 1089 (10th Cir. 1991). The determination of what

constitutes an employer is made on a case-by-case basis applying the four factors. Palmer, 882 S.W.2d at 119. "None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern." Swallows, 128 F.3d at 994 (citations omitted).

Examining the four factors as they apply to this case, we are not persuaded that Express was appellants' employer. While the franchise agreement required some interrelation between Express and CMS for operating the business, those activities were not so intermingled that they dissolved the distinctions between the two entities or their individual functions. The agreement provided that CMS was solely responsible for its operational expenses, including "payment of wages to [its] permanent employees, taxes, insurance, advertising, rent, telephone, and leased or rented equipment." CMS kept records separate and distinct from Express, although CMS was required to make those records available to Express for review upon request. The other examples offered of related operations — temporary employees placed on the Express payroll; invoices sent to clients as Express invoices; purchasing office equipment and software from Express; and maintaining a telephone listing in the name of Express — are not indicia of interrelated operations, but rather are typical of the nature of the franchisor/franchisee relationship.

There is likewise no evidence of common management between Express and CMS. The companies are independently owned and operated and share no common directors or boards. While

Robert Fellinger, a regional representative for Express, might have been present during the interview process for one of appellants, there is no indication that he made the hiring decision. Both Scroggin and Fellinger indicated that the decision was Scroggin's alone. Many of the examples cited by appellants as evidence of common management are also merely indicative of the ordinary franchise relationship.

As the court recognized in Evans,

> McDonald's did not exert the type of control that would make it liable as an employer under Title VII. McDonald's may have stringently controlled the manner of its franchisee's operations, conducted frequent inspections, and provided training for franchise employees. The record also indicates, however, that McDonald's did not have control over Everett Allen's labor relations with his employees. McDonald's did not have financial control over Everett Allen's franchises. Outside of the necessary control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over Everett Allen was its power to terminate his franchises.

Evans, 936 F.2d at 1090. See also Palmer, 882 S.W.2d at 119.

As indicated in Swallows, supra, control over labor relations is central to determining single employer status. We can not find that Express asserted control over CMS in such a manner that would make Express and CMS a single employer. The central decision in labor relations — whether to hire or fire an employee — rested with Scroggin, not with Express. In Swallows, the court noted that while Tennessee Technological University (TTU) had a voice in certain employment decisions at Barnes & Noble, the independent contractor managing the campus bookstore,

TTU did not control those decisions in such a manner that would transform the two entities into a single employer. 128 F.3d at 995. Similarly, while Express may have formulated some policies which CMS subsequently adopted, that is not indicia of sufficient control to make these two corporations a single employer.

Likewise, there is no evidence of common ownership or financial control that would make Express and CMS a single employer. "If neither of the entities is a sham then the fourth test is not met." Swallows, 128 F.3d at 995 (quoting EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 572 (6th Cir. 1984). There is no evidence that either of these entities is a sham. Weighing all four factors, the circuit court correctly found that Express and CMS were not a single employer.

Appellants remaining argument is that Scroggin and CMS were agents of Express, and therefore as principal Express is liable for the actions of its agents. Unfortunately, there is no help for appellants in this theory either. First, the franchise agreement clearly prevents agency. Section XIV.A. of the franchise agreement states:

> It is understood that [CMS is] an independent contractor. Nothing in this Agreement shall be construed to constitute [CMS] as [Express's] employee, agent, or representative or to constitute [CMS] and [Express] as partners, or joint venturers, legal representatives, general or special agents, employees or servants of the other for any purpose.

Even if we were persuaded by the agency argument, the actions for which appellants complain fall outside of any conceivable agency relationship. "A principal is not liable for

the torts of an agent, unless the tort committed was under the instruction of the principal, or within the apparent authority of the agent." Home Insurance Co. v. Cohen, Ky., 357 S.W.2d 674, 676 (1962). Scroggin's actions were not committed in the course of his employment, they were not committed under the instruction of Express, and they were not within his apparent authority.

Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56.03. "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, Inc. v Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991). Appellants presented no affirmative evidence which would satisfy the four factor test enunciated in Palmer and Evans, thus Express was entitled to judgment as a matter of law.

The judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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