

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000949-MR

LORETTA WRIGHT

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2001-SC-0466-D

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HON. JOHN WOODS POTTER, JUDGE
ACTION NO. 99-CI-001092

HIGHLAND CLEANERS, INC.

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES.

BARBER, JUDGE: This case has been remanded by the Supreme Court of Kentucky for our consideration in light of the decision in *Wilson v. Lowe's Home Center*.¹ Accordingly, we reverse and remand.

On or about July 23, 1997, the Appellant, Loretta Wright (AWright@) filed a charge of discrimination with the Louisville & Jefferson County Human Relations Commission (Athe

¹ Ky. App., 75 S.W.2d 229 (2001).

Commission@. The complaint was also automatically filed with the EEOC. On December 14, 1998, Wright filed a ARequest for Withdrawal of Charge of Discrimination@with the Commission. On December 16, 1998, the Commission issued a ADismissal Order,@ stating that the case was administratively closed. On January 21, 1999, the EEOC issued a ANotice of Right to Sue,@ stating that it was Aterminating the processing of this charge,@ and advising that a lawsuit must be filed in federal court within 90 days. On February 24, 1999, Wright filed a complaint in the Jefferson Circuit Court. By order entered March 15, 2000, the circuit court entered an order granting summary judgment in favor of Appellee, Highland Cleaners (AHighland@). The circuit court dismissed Wright's action because her initiation of an administrative proceeding precluded a later circuit court action, under the rationale of *Vaezkoroni v. Domino's Pizza*.²

On April 14, 2000, Wright filed a notice of appeal to this Court. We affirmed, based upon *Founder v. Cabinet for Human Resources*³. Wright sought discretionary review in the Supreme Court. By order entered June 5, 2002, The Supreme Court vacated this Court's Opinion affirming and remanded the matter for our consideration in light of *Lowe's, supra*. *Lowe's* holds that the doctrine of election of remedies allows an employee to withdraw his complaint before the Kentucky Commission on Human Rights,

² Ky., 914 S.W.2d 341 (1996).

³ Ky. App., 23 S.W.2d 221 (1999).

prior to a final determination on the merits, and to subsequently file a complaint in the circuit court. In *Lowe's*, the Court of Appeals explained that:

KRS Chapter 344 establishes separate avenues for recovering damages due to civil rights violations. A party claiming discrimination may file a complaint with the KCHR pursuant to KRS 344.200 . . . [or] a civil action for damages in circuit court [pursuant to KRS 344.200].

Because KRS Chapter 344 creates two separate avenues upon which a complainant may proceed in an effort to recover damages, another statute addresses jurisdictional issues . . . [KRS 344.270] reads: 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. . . .

. . . .

At first glance, the *Vaezkoroni* and *Founder* cases appear to . . . resolve this matter in favor of *Lowe's*. However, . . . *Vaezkoroni* . . . was pursued to final determination before that commission. . . . Clearly, the employee had completely and unsuccessfully pursued the administrative avenue of relief to a final determination before pursuing the judicial avenue. . . . *Founder* . . . involved an employee who . . . had filed a civil suit in circuit court while the

administrative proceedings were pending. . . .

The facts here present a significantly different situation from those in Vaezkoroni and Founder. In this case, Wilson had neither pursued the administrative avenue to a final determination nor was any complaint pending with an administrative body. Rather, his KCHR complaint had been ordered withdrawn and the EEOC had issued a "Notice of Right to Sue." Under the doctrine of election of remedies, we conclude that the factual differences in the cases are such that Wilson's circuit court claim was not barred.

. . . .

Assuming we are correct in concluding that Wilson had a right to withdraw his claim before the KCHR prior to a final determination on the merits and to file a complaint with the circuit court, there may be a question concerning how long before a final determination Wilson was required to withdraw his claim. Obviously, a party may not file a claim, proceed to trial or hearing, and then withdraw the claim before the ruling body issues a final determination. In this case, Wilson filed his KCHR complaint on March 31, 1999, and requested withdrawal of it two months later. The hearing was scheduled to be held in late December 1999, nearly seven months later. Although Lowe's had responded to a document/information request and had filed an answer and amended answer, it was obviously not prejudiced by the withdrawal of the claim. . . . Further, the chairperson of the KCHR gave Wilson written consent to withdraw his claim without prejudice pursuant to the administrative regulation. In short, we conclude that Wilson withdrew his administrative claim sufficiently early in the process so as not to prejudice Lowe's to any significant extent.

Despite our view that Wilson should have been allowed to file his claim in circuit court in light of Kentucky law regarding the doctrine of election of remedies and in light of the factual differences in this case from the Vaezkoroni and Founder cases, we must nonetheless address language from each case which appears to favor Lowe's and the trial court's position. As we

have noted, in the Vaezkoroni case the Kentucky Supreme Court stated that "[o]nce any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion." 914 S.W.2d at 343. Since the Vaezkoroni case involved an employee who had prosecuted his claims to the administrative body to a final determination, that language is clearly dicta.

Similarly, in the Founder case a panel of this court stated that "[f]rom 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." . . . Since the employee's circuit court complaint in Founder was barred by KRS 344.270 for lack of jurisdiction because the complaint was still pending with an administrative body, this language in the Founder case is also dicta.

Id. at 232-236.

In the case *sub judice*, Wright did not pursue her administrative claim to a final conclusion, nor did she have a pending administrative claim when she filed her complaint in the circuit court. In its motion for summary judgment, Highland does not allege that it suffered any prejudice by Wright's withdrawal of her administrative claim, only that its filing precluded her from bringing a circuit court action. Accordingly, we conclude that the circuit court erred in granting Highland's motion for summary judgment. We reverse the Opinion and Order of the Jefferson Circuit Court entered March 15, 2000, and remand for further proceedings not inconsistent with this Opinion.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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