

RENDERED: DECEMBER 29, 2005; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002190-MR  
AND  
NO. 2004-CA-002287-MR

CHARLES A. SMITH

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM BELL CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 02-CI-00524

HOUSING AUTHORITY OF  
MIDDLESBOROUGH AND  
RANDY EARLE

APPELLEES/CROSS-APPELLANTS

OPINION  
REVERSING AND REMANDING  
WITH DIRECTIONS  
ON CROSS-APPEAL

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BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: In this retaliatory discharge case, Charles A. Smith has appealed from the Bell Circuit Court's October 13, 2004, Amended Judgment and Judgment Notwithstanding the Verdict on his Intentional Infliction of Emotion Distress claim, while the Housing Authority of Middlesborough (hereinafter "HAM") and

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<sup>1</sup> Senior Judge John Woods Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Randy Earl have cross-appealed from the circuit court's ruling on its motion to dismiss, from the Final Judgment entered August 12, 2004, from the October 13, 2004, orders denying their motion to vacate and for a new trial and their motion for a JNOV on Smith's retaliation claim, and from the Amended Judgment.

Because we have determined that the circuit court erred in denying the motion to dismiss on claim preclusion grounds, we reverse and remand with directions on the cross-appeal.

With his various claims, Smith has amassed a rather lengthy history with the circuit and appellate courts of this Commonwealth. All three levels have considered Smith's wage and hour suit, which has some bearing on the present appeal. In Parts Depot, Inc. v. Beiswenger,<sup>2</sup> rendered August 25, 2005, the Supreme Court of Kentucky summarized that case as follows:

On June 10, 1997, a complaint was filed with the Kentucky Labor Cabinet (now Department of Labor) alleging that [HAM] was not paying its "on call" maintenance employees at the on-call rate established in HAM's personnel policy. Pursuant to KRS 337.345, the name of the complainant remains confidential. An investigator from the Labor Cabinet investigated the complaint and reported that the complainant was not an "on call" employee. The Cabinet took no further action.

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<sup>2</sup> 170 S.W.3d 354, 355-57 (Ky. 2005). That opinion represents a consolidated action in which the Supreme Court also addressed on discretionary review the case of Housing Authority of Middlesborough v. Charles Smith and Eddie Harrell, 2004-SC-000124-DG.

On January 20, 1998, Charles Smith and Eddie Harrell, two of HAM's maintenance employees, sued HAM in the Bell Circuit Court<sup>3</sup> alleging that HAM had breached its contractual obligation to compensate them for their services at the on-call rate. . . . Smith and Harrell assert[ed] that they were "on call" maintenance employees and were neither provided a dwelling unit at reduced rent nor compensated at the on-call monetary rate. HAM assert[ed] that Smith and Harrell were "subject to call" employees, not "on call" employees. Smith and Harrell neither asserted a violation of KRS 337.060 ("No employer shall withhold from any employee any part of the wage agreed upon.") nor purported to file their action under the authority of KRS 337.385(1). Their complaint can best be characterized as one for common law breach of contract.

The Bell Circuit Court initially granted summary judgment to the employees and, after a bench trial, awarded damages of \$28,665.70 to Smith and \$11,308.26 to Harrell, plus added contributions to Smith's and Harrell's retirement accounts commensurate with the unpaid wages. The Court of Appeals reversed in an unpublished opinion, No. 1999-CA-000765-MR (August 24, 2000), concluding that there existed a factual issue as to whether Smith and Harrell were "on call" or "subject to call" employees, thus precluding summary judgment. . . . On remand, the Bell Circuit Court granted HAM's belated motion to dismiss the action for lack of subject matter jurisdiction. . . . The Court of Appeals reversed and remanded with directions to permit Smith and Harrell to proceed with their action.

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<sup>3</sup> 98-CI-27.

The Supreme Court affirmed, holding that the circuit court has original subject matter jurisdiction when an employee chooses to exercise the judicial remedy to recover unpaid wages pursuant to KRS 337.385. In addition, the Supreme Court held that if a jury were to find that Smith and Harrell were "on call" employees, HAM's personnel policy created a contractual obligation requiring them to be paid at a specific rate.

We now turn our attention to the specific facts underlying the present appeal. On December 21, 2001, Randy Earle, the Director of HAM, summoned Smith to his office and terminated his employment with HAM by presenting him with the following letter:

It has come to my attention that in the presence of several maintenance employees, one of which being Johnny Brown,<sup>[4]</sup> you used a derogatory racial term repeatedly in a conversation. This clearly made not only Mr. Brown uncomfortable but others as well. The Middlesboro (sic) Housing can not (sic) and will not tolerate this kind of behavior by any employee of any race toward others. Therefore because of this callous disregard for other (sic) your employment is terminated immediately.

You will be given your earnings to date as well as to (sic) Two Weeks severance pay. In addition you are not to come back onto any property owned by the Middlesboro (sic) Housing Authority.

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<sup>4</sup> It is undisputed that Johnny Brown is an African-American.

Earle requested that a police unit be present in the building at the time of the termination in case any problems resulted. The police officers then accompanied Smith to his base of employment at the Hinks Heights office so that he could collect his personal belongings. Pursuant to HAM's personnel policy, Smith sought and received two hearings before HAM's Board of Directors. After hearing testimony from Smith, his wife, and other employees of HAM, the Board opted not to reinstate Smith to his former position.

Smith filed an original, declaratory action with the Bell Circuit Court<sup>5</sup> seeking judicial review of his termination. That case was dismissed on December 3, 2002, as HAM was not one of the administrative agencies whose decisions could be judicially reviewed under KRS Chapter 13B, having been created under KRS Chapter 80. The order goes on to state:

Further, the record clearly reveals no possible violation of Section 2 of the Kentucky Constitution. The Plaintiff, an at-will employee, was terminated by the executive director for making a racial slur. Pursuant to the Defendant's personnel policy the Plaintiff requested and received two "hearings" before the Defendant's board of directors in which the Plaintiff's due process rights were observed. The only purpose of the hearings is to give a terminated employee an opportunity to have the board reverse the decision of its director. The board heard the evidence and decided to affirm the decisions of the

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<sup>5</sup> 02-CI-00306.

director. None of the board's actions remotely resembles the exercise of arbitrary power.

In the same action, Smith filed an amended complaint alleging a violation of the Kentucky Whistleblower Act,<sup>6</sup> identifying his participation in the wage dispute litigation as the true reason for his termination. The amended complaint was also dismissed on December 3, 2002, as it was filed outside of the ninety-day limitations period provided for in KRS 61.103(2).

Smith filed the action presently before this Court on appeal on December 9, 2002, alleging that he was terminated in retaliation for the exercise of his lawful and statutory rights, i.e., his participation in the wage dispute litigation, and that the circumstances of his termination caused him to suffer emotional distress. He sought both compensatory and punitive damages under each count. HAM moved to dismiss Smith's complaint for failure to state a claim, asserting that his claims were barred by res judicata as both the present complaint and his previous complaint and amended complaint arose out of his termination. The circuit court denied the motion.

The case proceeded to a trial on the merits on August 3, 2004. After granting a directed verdict on liability for the individual Board members and denying Smith's claim for punitive damages, the case went to the jury, which returned a verdict in

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<sup>6</sup> KRS 61.101, *et seq.*

favor of Smith on both counts. The jury awarded Smith \$164,290 on his retaliation claim and \$200,000 on his IIED claim. A Judgment memorializing the verdict and award was entered August 12, 2004. HAM filed a motion to vacate, for a JNOV, or for a new trial, arguing that Smith's claims were barred by claim preclusion, that the jury did not consider the applicable law, that there was a Batson<sup>7</sup> violation in jury selection, that the verdict was against the evidence, that the damages awarded were against the evidence, and that the special verdict interrogatories were defective in relation to the question on retaliation. After reviewing the motion as well as Smith's response, the circuit court granted a JNOV on the emotional distress claim only, while denying the motion on the retaliation claim as well as the motion to vacate or to grant a new trial. An Amended Judgment was entered, awarding Smith \$164,290. Smith has appealed from the JNOV on his emotional distress claim and from the Amended Judgment, while HAM and Earle have cross-appealed from the Judgment and the orders denying a JNOV on the retaliation claim and denying their motion to vacate or for a new trial.

In his brief filed in support of his direct appeal, Smith argues that the circuit court erred in granting a JNOV on his emotional distress claim, asserting that the undisputed

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<sup>7</sup> Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

facts of record supported the jury's verdict and the original judgment. In support of their cross-appeal, HAM and Earle continue to argue that Smith's action is barred by claim preclusion, that the circuit court erred in overruling their Batson challenge, that the circuit court erred in failing to grant a JNOV on the retaliation claim because Smith failed to establish a *prima facie* case, and that the jury instructions were incorrect.

Because the resolution of whether Smith's action is barred by the doctrine of claim preclusion is determinative of the case as a whole, we need only address that argument in this opinion. As this is a question of law, we shall review the circuit court's ruling *de novo*. In its brief, HAM argues, as it did in a motion to dismiss below, that Smith impermissibly split his cause of action by alleging a violation of the Kentucky Whistleblower Act in an Amended Complaint and by then filing another original action alleging common law retaliatory discharge and the intentional infliction of emotional distress after the first case was dismissed. HAM asserts that both claims arose from the same facts, i.e., his claim that he was terminated due to his participation in the wage dispute litigation, rather than for the stated reason of his use of a racial slur; that the parties are the same in both actions; and that the whistleblower action was actually litigated.



On the other hand, Smith first argues that this Court should ignore HAM's argument because the record in Action No. 02-CI-00306 was not designated to be included in the certified record on appeal. However, this Court ordered the circuit court clerk to certify the record in that action as a supplement record in the present appeal. This supplemental record has been received and reviewed by the Court. Smith also argues that he had no ability to assert his present claims in his first lawsuit until the court declared that he was an employee-at-will without the right to judicial review as a governmental employee. Furthermore, he asserts that the whistleblower action contained within the amended complaint was dismissed as filed outside of the applicable statute of limitations, and was therefore not resolved on the merits.

In Yeoman v. Com., Health Policy Bd.,<sup>8</sup> the Supreme Court of Kentucky addressed the doctrine of res judicata and its two subparts, claim preclusion and issue preclusion. "Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action."<sup>9</sup> To successfully bar further litigation, a party must establish identity of the parties and of the cause of action, and that the action was resolved on the

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<sup>8</sup> 983 S.W.2d 459 (Ky. 1998).

<sup>9</sup> Id. at 465.

merits.<sup>10</sup> The test to determine whether the suits concern the same controversy is "whether they both arise from the same transactional nucleus of facts."<sup>11</sup> If so, "the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action."<sup>12</sup> The Yeoman court went on to state, "[t]he rule that issues which have been once litigated cannot be the subject matter of a later action is not only salutary, but necessary to the speedy and efficient administration of justice."<sup>13</sup> The Supreme Court of Kentucky further addressed the doctrine of res judicata in the more recent opinion of Whittaker v. Cecil:<sup>14</sup>

[W]here there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in a final judgment. . . . [A] corollary of the doctrine is that a party may not split a cause of action. As a result, a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time.

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> 69 S.W.3d 69, 72 (Ky. 2002).

In the present matter, there is no dispute that the parties to both suits are identical. We also agree with HAM that the causes of action alleged in the separate suits are identical. Both suits allege retaliation, in the first suit as a violation of the Whistleblower Act and in the second as a retaliatory discharge claim. Both arose from the same set of facts, namely, Smith's termination and the reason for his termination. Finally, we agree that the circuit court's dismissal of Smith's whistleblower complaint operated as a final judgment on the merits. We disagree with Smith's assertion that a dismissal on a statute of limitations violation is not a determination on the merits. In Dennis v. Fiscal Court of Bullitt County,<sup>15</sup> this Court, after reviewing the applicable state and federal law, stated that "there is ample authority for the proposition that the dismissal of a pending action based on a failure to comply with the applicable statute of limitations operates as a judgment on the merits for res judicata purposes." We also recognize with approval HAM's citation to Gilles v. Ware,<sup>16</sup> wherein the District of Columbia Court of Appeals stated that "the doctrine generally operates to prevent a party from splitting a single transaction into its several theories of recovery and 'holding one in reserve while he [or she] presses

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<sup>15</sup> 784 S.W.2d 608, 609 (Ky.App. 1990).

<sup>16</sup> 615 A.2d 533, 539 (D.C.App. 1992).

another to judgment.'” Smith should, and could, have raised all of the possible theories in his initial lawsuit alleging a Whistleblower Act violation.

Therefore, we hold that the circuit court committed reversible error in denying HAM’s motion to dismiss based upon claim preclusion. Because this holding is determinative of the case, the remaining issues in the direct appeal and cross-appeal are rendered moot.

For the foregoing reasons, the judgment of the Bell Circuit Court is reversed, and this matter is remanded with directions that Smith’s complaint be dismissed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
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