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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001681-MR

JANET OWEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 10-CI-05885

UNIVERSITY OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, Janet Owen, appeals from a judgment of the Fayette Circuit Court granting Appellee, the University of Kentucky (“the University”), summary judgment on Owen’s claims of employment discrimination. This suit follows Owen’s unsuccessful attempt to seek administrative relief. As we find that

the University was entitled to judgment as a matter of law in this case, we affirm and find no error in the trial court's grant of summary judgment.

Owen was employed for three-and-a-half years as a Nursing Care Technician with the University's Chandler Medical Center until the University terminated her employment on March 17, 2009. Five days later, Owen filed a complaint with the Kentucky Commission on Human Rights (KCHR) alleging that her termination stemmed from a physical disability and recent health problems. Owen's complaint was dually filed with the Equal Employment Opportunity Commission (EEOC), which sent a Notice of Charge of Discrimination as well as a request for a response and for documentation to the University on June 24, 2009.

Three months later, KCHR sent a letter to both parties informing them that, following its investigation of Owen's allegations, it found no probable cause to support Owen's allegations. In addition, the letter informed both parties of Owen's right to seek reconsideration within ten days of the date of the letter. Attached to the letter was a "final and appealable" Dismissal Order, dated September 17, 2009. Owen filed a timely request for reconsideration, prompting KCHR to assign a new investigator to review the allegations and to request additional documentation from the University. Following reexamination of the record, on April 15, 2010, KCHR sent a letter to Owen and the University informing them that it again found no probable cause to support Owen's claims. A second "final and appealable" Dismissal Order was attached to this letter.

In October of 2010, the EEOC dismissed its dual case, adopting the findings of KCHR. In a document dated October 1, 2010, the EEOC notified Owen of this dismissal and informed her of her right to file suit under federal law in federal or state court within ninety days of receipt of the notice. Twelve days later, Owen filed suit against the University, alleging violation of KRS 344, Kentucky's primary civil rights statute. Following nearly two years of discovery, the University filed a motion for summary judgment. In its motion, and at the hearing in August 2012, the University argued that the doctrine of election of remedies barred Owen's suit.¹ Therefore, according to the University, the trial court lacked jurisdiction to hear Owen's suit.

The trial court agreed with the University. In a September 6, 2012 order, the trial court held that Owen "made a knowing and voluntary decision to pursue her KRS 344 claim" administratively, divesting the trial court of its jurisdiction under KRS 344.270. Owen now appeals the trial court's decision.

The standard of review governing an appeal of a summary judgment is well-settled. Since a summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

"The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent

¹ In its motion and at the hearing, the University also argued that Owen was not a qualified disabled person under KRS 344.010 and was not eligible for certain damages. However, the trial court did not address these issues in its order and they are not before this Court on appeal.

to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

In its motion for summary judgment, the University cited, *inter alia*, the doctrine of election of remedies, which “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.” *Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 113 (Ky. App. 2003) (citing to *Collings v. Scheen*, 415 S.W.2d 589, 591 (Ky. 1967)). The trial court found that Owen had chosen an administrative remedy and was therefore barred from pursuing relief in circuit court. On appeal, Owen argues that the doctrine of election of remedies does not apply and serves to deny her the guaranteed rights of due process and a jury of her peers. We address both arguments in turn.

KRS 344.270 states,

The provisions of KRS 13B.140 notwithstanding, [the] 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.

Our courts have held that the doctrine of election of remedies applies to administrative claims which have been completely pursued, *i.e.* received a final order. *See Vaezkoroni v. Domino's Pizza, Inc.*, 914 S.W.2d 341 (Ky. 1995); *Young v. Hammond*, 139 S.W.3d 895 (Ky. 2004); *McKissic v. Commonwealth Transp. Cabinet*, 334 S.W.3d 885, 890 (Ky. App. 2010); *Burton v. Kentucky State Police*, 341 S.W.3d 589, 592-93 (Ky. App. 2011). Specific to KRS 344 and this case, “decisions of the Kentucky intermediate appellate courts have consistently applied the rule that a final order from a human rights commission bars subsequent judicial proceedings based on the same grievance.” *Herrera v. Churchill McGhee, LLC*, 680 F.3d 539, 545-46 (6th Cir. 2010) (citations omitted). In short, KRS 344.270 creates a “deliberate and settled choice” to which the doctrine of election of remedies applies.

Despite this, Owen asserts that the doctrine of election of remedies does not apply and that “the Courts have not addressed exactly what the effect of this election has on the individual claims of discrimination.” We cannot agree.

Citing to *Clifton v. Midway College*, 702 S.W.2d 835 (Ky. 1985), Owen proclaims “the bureaucratic problems of the administrative process” as a reason why the doctrine cannot equitably apply. She also cites to *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001). However, the complaint in *Clifton*

was shuffled between federal and state agencies and never ruled upon by either. In *Wilson*, the complainant withdrew his complaint prior to any final determination by the agency. Accordingly, our courts rightfully held that the doctrine of election of remedies did not apply.

Owen's case is very different. Unlike the complaints in *Clifton* and *Wilson*, KCHR issued a final order regarding Owen's complaint. Hence, *Burton*, *McKissic*, *Herrera*, and *Vaezkoroni* dictate that she cannot now seek judicial relief under state law. Indeed, Owen's attempt to bring the same claim before a different arbiter is the exact practice the doctrine of election of remedies exists to prevent.

On appeal, Owen also argues that the administrative remedy available to her did not afford her adequate due process. She asserts that "[t]he administrative process in contrast to a civil proceeding is totally inadequate...." Again, we must disagree.

Procedural due process requires only an opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976); *Whitley v. Robertson County*, 396 S.W.3d 890 (Ky. 2013). Pursuant to Kentucky law, an individual who has filed a complaint with KCHR is entitled to a determination of whether probable cause exists to support the allegation. KRS 344.200(2). This process involves statements by both parties and discovery of documents prior to a determination on probable cause. KRS 344.190. Upon an adverse finding on probable cause, a complainant is entitled to a second review of her allegations which may require

additional discovery and testimony. KRS 344.200(3). Finally, if unsatisfied with KCHR's findings, a complainant may appeal KCHR's final determination pursuant to KRS 344.240 or file an original action under federal law in state or federal court.

In light of the statutory steps with which KCHR and the University fully complied, and because of the several means of recourse available to Owen, her argument that the administrative process of resolving discrimination complaints is constitutionally insufficient is unpersuasive. Owen sought an administrative remedy to her claim of discrimination. KCHR collected statements and documentary evidence from both parties. KCHR reviewed this evidence not once, but twice before concluding on both occasions that no probable cause existed. Owen then was afforded the opportunity to appeal this finding to the Fayette Circuit Court or to file suit, under *federal* law, in federal or circuit court. The latter option afforded Owen her right to a jury of her peers. She chose instead the unviable option of filing an original action under *state*, not federal, law.

Owen saw the administrative process through to its conclusion. That its conclusion did not benefit her and that she did not take up the judicial remedies available to her afterward does not mean her rights to due process and to a jury trial were violated. On the contrary, the exhaustive administrative action and the available but unutilized channels for appeal demonstrate that Owen received a more than adequate opportunity to be heard by a jury of her peers.

Finding no fault with the trial court's application of the doctrine of election of remedies, we find that Owen's claim of discrimination pursuant to KRS

344 was barred and the University was entitled to judgment as a matter of law.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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