A SURVEY OF KENTUCKY EMPLOYMENT LAW

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I. INTRODUCTION

This survey-article is designed as a practical tool for practitioners who practice employment law in the Commonwealth of Kentucky. In particular, each section provides summaries of relevant Kentucky cases, with an emphasis on those cases arising within the past three years. Section II, which involves the employment-at-will doctrine, is broken down into two categories, common law claims and statutory claims. The common law claims discussed in Section A are the following: (1) public policy exception to the employment-at-will doctrine; (2) contractual modifications of the employment-at-will doctrine (which includes (a)

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written modifications and (b) oral modifications); (3) fraud, misrepresentation, and estoppel; (4) obligation of good faith and fair dealing; (5) negligent hiring, retention, and supervision of employees; (6) intentional infliction of emotional distress; (7) defamation; and (8) drug testing. The statutory claims discussed in Section B are the following: (1) workers' compensation retaliation, (2) Kentucky Whistle Blower Act, (3) Kentucky Civil Rights Act. Topics discussed in Section III include (1) trade secrets, (2) noncompete agreements, and (3) the employee's duty of loyalty.

II. EMPLOYMENT-AT-WILL DOCTRINE[3]

A discussion of the employment-at-will-doctrine necessarily begins with the acknowledgment of two fundamental principles. First, a contract, whether it is oral, written, formal, or informal, is the basis of an employment relationship.[4] Second, an employment contract that contains no specified period of duration is viewed as "employment at will," which can be terminated by either the employer or the employee.[5] While the employment-at-will doctrine is currently in existence in Kentucky, several exceptions—based both on statutory[6] and common law principles—have developed to provide an otherwise "at-will" employee a cause of action.

A. Common Law Claims:

1. Public Policy Exception To The Employment-At-Will Doctrine

In *Firestone Textile Co. v. Meadows*,[7] the Kentucky Supreme Court held that an employee has a cause of action in tort for retaliatory discharge when the discharge is contrary to a fundamental public policy as evidenced by a constitutional or statutory provision.[8] The court, while recognizing that ordinarily an employer may terminate an employee "for good cause, for no cause, or for a cause that some might view as morally indefensible," concluded that

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[3] *See* Clyde Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. L. 65 (2000).

[4] *See, e.g.*, Miller v. Northwestern Ritter Lumber Co., 110 S.W. 869 (Ky. 1908).

[5] The following is a list of some earlier cases extending the general rule in Kentucky that an employment contract, in the absence of a specific agreement concerning duration, is terminable at will: Louisville & N.R. Co. v. Harvey, 34 S.W. 1069 (Ky. 1896); Clay v. Louisville & N.R. Co., 71 S.W.2d 617 (Ky. 1934); Western Union Tel. Co. v. Ramsey, 88 S.W.2d 675 (Ky. 1935); Edwards v. Kentucky Util. Co., 150 S.W.2d 916 (Ky. 1941); Scroghan v. Kratco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977).

[6] *See, e.g.*, KY. REV. STAT. ANN. § 344 (2000) (prohibiting discrimination against employees on the basis of race, gender, religion, ethnic and national origin; it also prohibits discrimination on the basis of an employee's age, as well as mental and physical disability); KY. REV. STAT. ANN. § 342 (2000) (prohibiting an employer from retaliating against employees who have filed a workers' compensation claim, will be subsequently discussed herein); KY. REV. STAT. ANN. § 61.102 (2000)(preventing retaliation against a public employee for reporting violations of law, which will be subsequently discussed herein).

[7] 666 S.W.2d 730 (Ky. 1983).

[8] *See id.* at 732.

Kentucky Revised Statute (KRS) § 342,[9] which pertains to workers' compensation benefits, evinced a public policy that an employee "has a right to be free to assert a lawful claim for [workers' compensation] benefits without suffering retaliatory discharge."[10]

Two years later, in *Grzyb v. Evans*,[11] the Kentucky Supreme Court, expanding on the *Firestone* decision, clearly delineated the public policy exceptions to the employment-at-will doctrine: (1) the discharge must be contrary to a fundamental and well-defined public policy as evidenced by a constitutional or statutory provision; or (2) the discharge must be due to the employee's failure or refusal to violate a law in the course of employment.[12]

In *Boykins v. Housing Authority of Louisville*,[13] the plaintiff, Karen Boykins, was employed as an executive secretary by the Housing Authority of Louisville (HAL). After Boykins' infant son was injured in an apartment owned, operated, and managed by HAL, Boykins, on behalf of her infant son, filed a negligence suit against HAL.[14] HAL fired Boykins. Boykins brought a second suit, this time in her own name, alleging that she had been fired in retaliation for having brought the first suit, and that her discharge violated the Kentucky Constitution's guarantee of open access to the courts.[15] The Jefferson County Circuit Court entered summary judgment for HAL, and Boykins appealed.[16] After the Court of Appeals affirmed in part and remanded, Boykins appealed.[17]

In deciding whether the "open-courts" provision created an exception to the terminable at-will doctrine, the Kentucky Supreme Court revisited its prior decisions in *Firestone*[18] and *Grzyb*.[19] The court reasoned that the "open-court" provision has nothing to do with employment rights, and that there is no "employment-related nexus between the constitutional policy stated in section 14 and Boykin's discharge."[20] The court held that, since there was no well-defined public policy evidenced by a constitutional or a statutory provision which prohibited HAL from discharging her in retaliation for filing suit, Boykins had stated no cause of action.[21]

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[9] Note, this decision by the Kentucky Supreme Court was before the 1984 enactment of Kentucky Revised Statute (KRS) § 442.197, which prohibited employers from retaliating against employees for their pursuit of worker's compensation claims.

[10] *Firestone*, 666 S.W.2d at 731.

[11] 700 S.W.2d 399 (Ky. 1985).

[12] *Id.* at 401.

[13] 842 S.W.2d 527 (Ky. 1992).

[14] *See id.*

[15] Kentucky Constitution section 14 states that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[16] *See Boykins*, 842 S.W.2d at 527.

[17] *Id.*

[18] 666 S.W.2d 730 (Ky. 1983).

[19] 700 S.W.2d 399 (Ky. 1985).

[20] *Boykins*, 842 S.W.2d at 530. The court reasoned that the underlying policy of the "open-courts" provision is to ensure that the government provides open-courts to all for appropriate judicial remedy, and that when Boykins filed suit against HAL, she found the court's door open to her. *Id.*

[21] *See id.*

In *Nelson Steel Corp. v. McDaniel*,[22] the plaintiff, Dale McDaniel, had filed two workers' compensation claims with a prior employer before he began employment with Nelson Steel Corporation (Nelson Steel). Nelson Steel discharged McDaniel, ostensibly as part of a reduction in workload and availability. McDaniel sued in Fayette Circuit Court, alleging that Nelson Steel had wrongfully discharged him due to his prior filings for worker's compensation benefits.[23] Both parties moved for summary judgment.[24]

After the trial court overruled McDaniel's motion for summary judgment and sustained Nelson Steel's motion for summary judgment, McDaniel appealed.[25] The Court of Appeals focused particularly on whether the retaliatory discharge exception to the terminable-at-will doctrine encompasses compensation claims filed against prior employers.[26] In reversing the judgment, the Court of Appeals held that the protection afforded by KRS § 342.197 was not limited to claims against current employers, but could also be extended to those situations, like McDaniel's, where the workers' compensation claim had been filed under a prior employer.[27] Nelson Steel appealed.

The Kentucky Supreme Court, after acknowledging that no Kentucky case specifically addressed the "prior employer question," turned to its earlier decision in *Firestone*.[28] According to the court, the *Firestone* exception to the terminable at-will doctrine centered on whether the discharge was "motivated by the desire to punish the employee for seeking the benefits to which he is entitled by law."[29] Distinguishing between the nature of the discharge in *Firestone* and that of McDaniel, the court reasoned that, rather than being retaliatory in nature, the discharge of McDaniel rested on solely economic reasons, "albeit such reasons had their basis in saving on the cost of worker's compensation premiums."[30] Accordingly, the court ruled against McDaniel, concluding that neither KRS § 342.197(1) nor any other provision of the Workers' Compensation Act evidenced a "well-defined public policy" regarding discharging an employee for purely economic reasons, such as prior workers' compensation claims filed while under the employment of a previous, different employer.[31]

The most recent case involving the Kentucky public policy exception is *Barlow v. Martin-Brower Co.*[32] In that case, Eric Barlow, who was employed as

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[22] 898 S.W.2d 66 (Ky. 1995).

[23] *See id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] 666 S.W.2d 730 (Ky. 1983).

[29] *Nelson Steep Corp.*, 898 S.W.2d at 67.

[30] *Id.* The Court's distinction rests on questionable reasoning. First, in both types of cases, the employer's underlying motive is likely to be economic: to get rid of an employee who is likely to file future workers' compensation claims. Second, McDaniel, like the plaintiff in *Firestone*, *was* "punished...for seeking the benefits to which he [wa]s entitled by law," even if the punishment was meted out by a different employer. Third, the policy behind *Firestone*—to protect an employee who files a lawful workers' compensation claim—is subverted by the holding of *McDaniel*.

[31] *See id.* at 68.

[32] 202 F.3d 267 (6th Cir. 2000).

a truck driver with Martin-Brower Co. (Martin-Brower), alleged that he was wrongfully discharged because he had refused to violate time and safety regulations promulgated under both federal and state law.[33] Barlow brought an action against Martin-Brower in the United States District Court for the Western District of Kentucky. Finding that the administrative remedy available to Barlow under the federal Surface Transportation Assistance Act[34] (STAA) was exclusive, the district court granted Martin-Brower's motion to dismiss.

On appeal to the Sixth Circuit, Barlow argued that, even if the STAA is exclusive under federal law, this was no impediment to his Kentucky state-law claims based on wrongful discharge in violation of public policy.[35] The STAA expressly prohibits discrimination against an employee in the terms of his employment because he refuses to operate a vehicle in violation of "a regulation, standard or order of the Unites States related to commercial motor vehicle safety or health."[36] Relying on *Grzyb*—which specifically indicated that when the statutory provision declaring an act unlawful also provides the civil remedy, that remedy is exclusive[37]—the Sixth Circuit reasoned that, to the extent the alleged public policy emanated directly from the STAA, the STAA's administrative remedy was exclusive of all other possible remedies.[38] However, Barlow argued that the asserted public policy did not emanate exclusively from the STAA, but also was evidenced by state law.[39] In particular, Barlow relied on KRS § 281.730(3), under which the Kentucky "Secretary of Transportation Cabinet may adopt . . . the provisions of 49 C.F.R. § 395."[40] Accordingly, in 601 K.A.R. § 1:005(2), the Kentucky Secretary of Transportation Cabinet did adopt the federal maximum driving time regulations of 49 C.F.R. § 395 (2000).[41] Barlow argued that this regulation evidenced a public policy in Kentucky that was violated by his termination.[42]

Citing *Grzyb*, which requires the asserted public policy to be defined by constitutional or statutory provision,[43] the Sixth Circuit reasoned that the public policy asserted by Barlow was not well-defined by constitutional or statutory provision, but only by an administrative regulation.[44] As KRS § 281.730(3) was enacted by the Kentucky legislature merely to authorize the Secretary of the Transportation Cabinet to adopt regulations defining maximum time, the court concluded that Barlow's discharge did not contravene the legislative will

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[33] *Id.*

[34] 49 U.S.C. § 31105 (2000).

[35] *See Barlow*, 202 F.3d at 267.

[36] *Id.*

[37] *See Grzyb*, 300 S.W.2d at 401.

[38] *See Barlow*, 202 F.3d at 267.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See Grzyb*, 300 S.W.2d at 401.

[44] *See Barlow*, 202 F.3d at 267.

enabling the Secretary to adopt such regulations.[45] The court ultimately held that, though Barlow's discharge may have "contravened the policy evidenced by the [administrative] regulation, such a policy was insufficient to support [Barlow's] state public policy claim under the theory recognized in *Grzyb*."[46]

2. Contractual Modifications Of Employment-At-Will Doctrine

The general rule is that, when the period of employment is indefinite, either the employer or the employee may terminate the contract without cause.[47] However, additional exceptions to the employment-at-will doctrine, aside from those based on the narrow public policy exception discussed above,[48] may exist based on an oral or written modification of the employment agreement. For instance, even if no specified period of duration concerning the length of the employment is specified, the parties may agree that the employment relationship is not terminable at will.

The salient case on this point is *Shah v. American Synthetic Rubber Corp.*[49] The plaintiff, Anil Shah, was employed by American Synthetic Rubber Corp. (ASRC) as a chemical engineer. When Shah began negotiating with ASRC for employment, he had been working eleven years with Monsanto Corporation, a job which had provided him with substantial fringe benefits, including stock purchases, a retirement plan, and life insurance.[50] Shah claimed that he surrendered such benefits by accepting an employment contract with ASRC, a contract under which, Shah alleged, he would serve a ninety-day probationary period during which ASRC could discharge him for any cause, but after which he would become a permanent employee, dischargeable only for cause in accordance with personnel policies and procedures.[51] A supervisor of ASRC defined the term, "for cause," as a situation involving "work-connected performance, insubordination, violation of policy or rules, or lack of work."[52]

After being fired, Shah brought an action in the Jefferson Circuit Court for breach of contract. Shah claimed that, in violation of the employment contract, ASRC had terminated him without cause.[53] ASRC argued that not only was Shah discharged for cause, but he also was employed for an indefinite period of time, rendering his employment terminable at will.[54] Based on its finding that Shah's

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[45] *Id.*

[46] *Id.*

[47] *E.g.*, Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1984); Production Oil Co. v. Johnson, 313 S.W.2d 411 (Ky. 1958); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977).

[48] *See, e.g.*, Firestone, 666 S.W.2d 730; *Grzyb*, 700 S.W.2d 399; *Boykins*, 842 S.W.2d 257; *Nelson Steel Corp.*, 898 S.W.2d 66; *Barlow*, 202 F.3d 267; Stewart v. Pantry, Inc., 715 F. Supp. 1361 (W.D. Ky. 1988); Kentucky Farmers Bank v. Nutter, 1987 WL 194726 (Ky. Ct. App. May 15, 1987).

[49] 655 S.W.2d 489 (Ky. 1983).

[50] *See id.* at 491.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 489.

[54] *Id.*

employment was for an indefinite period of time and, therefore, terminable at will, the trial court sustained ASRC's motion for summary judgment.[55] The court of appeals affirmed, finding that there was merely a contract for employment-at-will.[56]

The Kentucky Supreme Court reversed, finding that, based on the sophistication of the parties and the surrounding circumstances, it was unlikely that the parties intended to incorporate the employment-at-will doctrine into the contract.[57] The court noted, considering the factual findings by the lower court, including the negotiations between the parties, the usage of business, and the nature of the employment, the jury could find the existence of a "just cause" employment contract.[58] The court held that "parties may enter into a contract of employment terminable only pursuant to its express terms—as 'for cause'—by clearly stating their intention to do so, even though no other consideration than services to be performed or promised, is expected by the employer, or performed or promised by the employee."[59]

3. Written Modifications Of The Employment-At-Will Doctrine

In *Nork v. Fetter Printing Co.*,[60] three cases were appealed simultaneously and presented common issues relating to whether employee handbooks and employer policy manuals could alter the employment-at-will doctrine by manifesting an expression of contractual agreement.[61] After finding that each of the policy manuals and employee handbooks contained disclaimers stating that employment was at-will, the Kentucky Court of Appeals held that, though the policy manuals and employee handbooks described the expectations and assurances with respect to employment terms and discharge, due to the existence of the disclaimers, they were not tantamount to expressions of contractual agreement and, therefore, the employment was at will.[62]

In *Norris v. Filson Care Home Ltd.*,[63] the plaintiff, Pamela Norris, filled out a one-page application for employment as a nurse's aide with Filson.[64] The application contained a paragraph indicating employment was "at will."[65] Norris was also required to sign a form acknowledging receipt of the "Employee Handbook-Personnel Policies."[66] The employee handbook stated that new employees were subject to a three-month probationary period during which they

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[55] *See Shah*, 655 S.W.2d at 489.

[56] *Id.*

[57] *Id.* at 491.

[58] *Id.*

[59] *Id.* at 492.

[60] 738 S.W.2d 824 (Ky. Ct. App. 1987).

[61] *Id.*

[62] *Id.* at 826. Each of the policy manuals and handbooks also contained disclaimers, stating that employment was at will. *Id.*

[63] No. 89-CA-0599-MR, 1990 WL 393903, at *1 (Ky. Ct. App. Jan. 26, 1990).

[64] *Id.*

[65] *Id.*

[66] *Id.*

could be terminated for any reason.[67] In addition, the employee handbook contained a detailed list of offenses, as well as a warning system, which stated in pertinent part:

> If an employee is to be discharged for unsatisfactory service after the three-month period is completed, a warning notice will be given and placed in the employee's file...The employee will be verbally counseled by his supervisor making it clear to the employee what he did wrong...Three warnings within a twelve-month period of time will be grounds for dismissal[68]

After receiving a satisfactory evaluation at the end of her three-month probationary period, Norris was subsequently dismissed without receiving any warnings from her supervisors.[69] Norris thereupon filed suit in Jefferson Circuit Court for wrongful discharge, alleging that the employee handbook modified her original employment contract to the extent that she could only be discharged for cause.[70] Filson argued that the employee handbook did not modify the employment-at-will relationship.[71] The trial court granted Filson's motion for a directed verdict, and Norris appealed.

The Kentucky Court of Appeals focused on two specific aspects of the employee handbook. First, while noting that the handbook described a "probationary period" of employment during which an employee could be fired for any reason, the court reasoned that, in a true employment-at-will relationship, it is not necessary to describe a probationary period, since the relationship may naturally be terminated at any time.[72] Based on this, the court concluded that Filson must have contemplated something other than "at will" employment for the post-probationary period.[73] Second, while the employee handbooks in *Nork* contained disclaimers expressly stating that employment was at will, the employee handbook issued to Norris contained no such disclaimer.[74]

Based on the characteristics of the employee handbook, including the language of the probationary period, its warning system, different categories of offenses, and lack of a disclaimer, the court concluded that there was evidence of a clear intention to modify the employment-at-will relationship.[75] In reversing the trial court's judgment, the court held that, due to the modification of the employment relationship, after the ninety-day probationary period, Norris' employment was permanent, subject to discharge for cause.[76]

In *Hines v. Elf Atochem North America Inc.*,[77] the plaintiff, Regina Hines, worked as a full-time salaried nurse at the Elf Atochem North America, Inc. plant

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[67] *Id.*

[68] *Id.* at *2.

[69] *See Norris*, 1990 WL 393903, at *2.

[70] *Id.*

[71] *Id.*

[72] *Id.* at *3.

[73] *Id.*

[74] *Id.*

[75] *See Norris*, 1990 WL 393903, at *3.

[76] *Id.*

[77] 813 F. Supp. 550 (W.D. Ky. 1993).

(Elf Atochem). Hines obtained an extended medical leave from work due to stress-related conditions.[78] Approximately two months later, according to Elf Atochem's Manager of Industrial Relations, Hines told the plant's physician that although Hines personal physician had released her to return to work, she nonetheless was not willing to do so unless certain employment conditions were satisfied.[79] Elf Atochem construed Hines' demands as a "necessary prerequisite for her to return to work."[80] Elf Atochem rejected the requested changes, and considered Hines as having voluntarily resigned.[81] Hines then wrote a letter to Elf Atochem, contending that she had not been released to return to work, and that she had not intended to resign.[82] Hines then filed a diversity action in the United States District Court for the Western District of Kentucky, claiming that Elf Atochem had breached an implied contract created both by provisions in the employment policy regarding the termination of salaried employees, and by posted rules of conduct.[83] Elf Atochem moved for summary judgment, asking the court to find as a matter of law that, since there was no clear intent to modify the employment-at-will status of Hines, there was no implied employment contract.[84]

The district court found that, since the policy regarding the termination of salaried employees did not state a clear intention that Hines could not be dismissed without just cause, Hines was an employee-at-will when hired.[85] However, the court then turned to the posted rules of conduct, which stated: "Our labor agreements have always explicitly recognized [sic] the Company's right to discharge, suspend, or otherwise discipline for *just cause*."[86] In considering the posted rules of conduct, the court concluded that, based on the clear intent to create a "just cause" relationship, as well as the fact that there was no disclaimer or limiting language, there was sufficient evidence to indicate a modification to the employment-at-will relationship had occurred.[87] The court, therefore, denied Elf Atochem's motion for summary judgment regarding the implied contract.[88]

In *Noel v. Elk Brand Mfg. Co.*,[89] Hilda Noel, who had worked for Elk Brand for approximately twenty years, before her employment was terminated, developed severe carpal tunnel syndrome, which eventually led to her being moved to a non-production job.[90] Noel and twenty-nine other employees were laid off. Although twenty of the laid-off employees were expected to be off work

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[78] *See id.* at 551.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *See Hines*, 813 F.Supp. at 551.
[84] *Id.*
[85] *Id.* at 552.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] No. 1998-CA-002052-MR, 2000 WL 331769, at *1 (Ky. Ct. App. Mar 31, 2000).
[90] *See id.*

five days or less, the remaining employees, including Noel, were given "P" status, indicating that they would be eligible for recall according to the company's need for their work in the order of their productivity.[91] Noel, who had the lowest production average at Elk Brand, did not apply for re-employment. Instead, she sued Elk Brand in Trigg County Circuit Court for breach of contract.[92] After the trial court dismissed Noel's complaint, she appealed to the Kentucky Court of Appeals.

On appeal, Noel claimed that there was a material issue of fact as to whether Elk Brand's employee manual had created a contract between her and the company.[93] Elk Brand argued that the case was governed by *Nork*, in which the Kentucky Court of Appeals held that an at-will relationship was not abrogated by an employee manual which contained an express disclaimer stating that it was not a contract and that employment was at-will.[94] Noel argued that Elk Brand's disclaimer was significantly different from the disclaimers at issue in *Nork* on two grounds.[95] First, she pointed out that the Elk Brand employee handbook did not expressly provide that she was an at-will employee.[96] Second, she emphasized that the handbook specifically stated that employees could rely on the company for wages, benefits, holidays, seniority, and workforce adjustment.[97] However, noting that the employee handbook stated that it was "not a contract," the court concluded that neither the lack of "at-will" language, nor the inclusion of reliance language, rendered Elk Brand's disclaimer ineffective.[98] Accordingly, the court held that Noel was an at-will employee with no contractual right to continued employment.[99]

4. Oral Modifications Of The Employment-At-Will Doctrine

In *Audiovox Corp. v. Moody*,[100] the plaintiff, Vicky Moody, filed a breach of contract claim in Jefferson Circuit Court against Audiovox Corporation (Audiovox). Moody was employed as an office manager at Audiovox Kentucky.[101] Hass was Moody's immediate supervisor.[102] After Moody became suspicious that Hass was diverting company funds to his own use, she attended a meeting of credit managers at Audiovox's New York office, taking along company books that allegedly contained evidence of Hass' diversions of company funds.[103] Although Moody claimed that she was initially hesitant to

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[91] *Id.*
[92] *Id.*
[93] *Id.* at *1.
[94] *See Nork*, 738 S.W.2d at 825.
[95] *See Noel*, 2000 WL 331769, at *1.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] 737 S.W.2d 468 (Ky. Ct. App. 1987).
[101] *See id.* Audiovox Kentucky is a wholly-owned subsidiary of Audiovox Corp. *Id.*
[102] *Id.*
[103] *Id.*

reveal her suspicions concerning Hass, she claimed that Audiovox assured her that, if she divulged what she knew, she would not be discharged, and that Hass would not be informed that she had told.[104] When an audit of Audiovox Kentucky revealed no discrepancies, Hass summoned Moody to his office, questioned her about what she had disclosed to the parent company, and then fired her.[105] Moody maintained that an oral contract, which altered the employment-at-will doctrine, arose between herself and Audiovox Corp. during the meeting in New York.[106] The trial court found in favor of Moody on her breach of contract claim, and Audiovox Corp. appealed.

On appeal, Audiovox argued that, even if an oral contract did arise between itself and Moody, it was unenforceable as within the statute of frauds, KRS § 371.010.[107] The court, after indicating that the statute of frauds does not apply if a contract is capable of being performed within one-year,[108] reasoned that, well within one-year of the alleged contract which was created in New York, "the contingency which would have triggered its performance occurred; that is, Hass' learning or suspecting that Moody had incriminated him."[109] According to the court, Audiovox Corp. could have performed the contract by intervening on Moody's behalf, but instead chose to breach the contract.[110] Thus, the court found that the oral contract was sufficient to modify the employment-at-will doctrine with respect to Moody being discharged for incriminating Hass, and that the contract did not fall within the statute of frauds.[111] The court, therefore, upheld the verdict in favor of Moody.

In *Hammond v. Heritage Communications, Inc.*,[112] Lisa Hammond brought an action in the Barren County Circuit Court against her former employer, Heritage Communications, Inc. (Heritage), for breach of an implied contract. At the time of her termination, Hammond was an employee of radio stations WKAY-AM and WGGC-FM, both of which were owned by Heritage. Hammond alleged that, despite the fact that she had been encouraged by her supervisor to appear in *Playboy* magazine, after a nude photograph of her appeared in the March 1986 issue of *Playboy*, she was terminated.[113] The trial court granted Heritage's motion for summary judgment on Hammond's breach of contract claim, finding that, since there was no mutuality of obligation between the parties, there was no contract between Hammond and Heritage.[114]

The Kentucky Court of Appeals reversed, holding that an issue of fact existed as to whether the parties had entered into an oral contract, thereby

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[104] *Id.*

[105] *Id.*

[106] *See* Moody, 737 S.W.2d at 470.

[107] *Id.*

[108] *See, e.g.*, Johnson v. Kentucky Youth Research Center, Inc., 682 S.W.2d 799 (Ky. Ct. App. 1985).

[109] *Moody*, 737 S.W.2d at 470.

[110] *See id.*

[111] *Id.*

[112] 756 S.W.2d 152 (Ky. Ct. App. 1988).

[113] *See id.*

[114] *Id.*

modifying Hammond's status as an at-will employee.[115] There was no dispute that Hammond's supervisor had told her that, if her photograph appeared in *Playboy*, she would not be terminated.[116] Hammond was entitled, concluded the court, "to establish that her status was altered by the oral assurances made to her and that she was thereafter working under the terms of an oral contract for a specific period of time" to be determined according to the facts, including the understanding of the parties.[117]

In *Buchholtz v. Dugan*,[118] Wolfgang Buchholtz sued the University of Kentucky (UK) and various university directors, claiming that he had been wrongfully discharged in violation of an oral modification to his employment contract. In 1968, Buchholtz was hired by Robert Drake, Dean of the College of Engineering, as manager of the UK College of Engineering Machine Shop.[119] Drake informed Buchholtz that he was permitted to conduct private consulting work, up to one day per week, as long as such private consulting did not impede on his UK duties or compete with local machine shops.[120] Over the next several years, Buchholtz undertook various private jobs, using the machine shop and shop materials, as well as other machinists' under his supervision, to assist him in his private consulting work.[121] Buchholtz likewise did not reimburse UK for the use of the shop machines, scrap materials, or the machinists work.[122] Subsequently, two major changes occurred at UK. First, Robert Dugan became Buchholtz's supervisor and a hostile relationship developed between the two.[123] Second, Ray Bowen became Dean of the College of Engineering, replacing Robert Drake.[124] After Dugan discovered what he perceived to be discrepancies in Buchholtz's time sheets and a possible misappropriation of funds, an internal audit was conducted, which revealed that, over a five-year period, UK machinists had worked approximately 1,394 hours on private projects for Buchholtz; such projects, since they were not billed through UK, had cost the University $23,745.[125] UK ultimately terminated Buchholtz for violating UK staff personnel and policy procedures, falsification of records, and dishonesty on the job.[126]

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[115] *Id.* at 154.

[116] *Id.*

[117] *Id.*

[118] 977 S.W.2d 24 (Ky. Ct. App. 1998).

[119] *Id.* at 25.

[120] *Id.*

[121] *Id.* The court found:

> Machinists under [Buchholtz's] supervision who worked on his private projects recorded their work by the client's names on their time sheets, and Buchholtz recorded this as 'non-billable' time. He billed for the work privately, collected consulting fees through a post office box, paid machinists personally for their work, and deposited his earnings in his credit union account.

Id.

[122] *Id.*

[123] *Id.*

[124] *See Buckholtz*, 977 S.W.2d at 25.

[125] *Id.* at 26.

[126] *Id.*

Buchholtz sued in the Fayette Circuit Court, asserting that the oral agreement reached with Dean Drake—in which Drake informed Buchholtz that he could do private consulting work, provided such work did not interfere with his UK duties—removed him from the status of an at-will employee.[127] After allowing Buchholtz's wrongful discharge claim to proceed to trial, the court directed a verdict in favor of UK, and Buchholtz appealed.

On appeal, the court did not dispute the existence of the oral modification regarding Buchholtz's employment contract, but found, as did the trial court, that Buchholtz had acted beyond the scope of the oral agreement, rendering him terminable at will.[128] Under the agreement with Dean Drake, Buchholtz was not to allow private consulting work to interfere with his UK duties, but Buchholtz had persistently removed machinists from UK jobs and assigned them to his private work.[129] Moreover, the oral agreement did not contemplate the use of university personnel in Buchholtz's private work.[130] The court, therefore, held that Buchholtz had not acted within the terms of the oral modification and, therefore, he was terminable at will.[131]

In *Mayo v. Owen Healthcare, Inc.*,[132] Stephen Mayo filed suit against Owen Healthcare, Inc. (Owen) in the United States District Court for the Eastern District of Kentucky, claiming that Owen had breached an oral contract of employment. Mayo had been a pharmacist with King's Daughters' Hospital (KDH) when Owen signed an agreement with KDH, which, in effect, allowed Owen to take over the pharmacy department of KDH. After Owen's director of recruitment, Tom Smith, held a meeting of all KDH pharmacy employees to inform them that they would be offered employment with the pharmacy, Mayo signed a letter of employment with Owen.[133] Although Mayo received superb evaluations for approximately eleven years, his supervisor began receiving complaints about Mayo in 1995.[134] In response, the situation was investigated, and Mayo was eventually terminated.[135] Mayo filed suit, alleging that the termination violated an oral employment contract.[136] The district court granted Owen's motion for summary judgment, and Mayo appealed.

The Sixth Circuit Court of Appeals, applying Kentucky law, affirmed the district court's ruling. Under *Hammond*[137] and *Buchholtz*,[138] Mayo claimed that there was a genuine issue of material fact as to whether there was an oral

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[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See Buckholtz*, 977 S.W. 2d. at 26.

[131] *Id.* at 27.

[132] Nos. 99-5477, 99-5560, 2000 WL 1234359, at *1 (6th Cir. Aug. 24, 2000).

[133] *See id.*

[134] *Id.* Mayo's supervisor claimed that he acted belligerently, hung up on customers, threatened to slash co-workers' tires, made inappropriate comments about his wife, displayed pornography on the computer, threatened to falsify co-workers' reports, and accessed other employees' files. *Id.*

[135] *Id.*

[136] *Id.*

[137] 756 S.W.2d 152 (Ky. Ct. App. 1988).

[138] 977 S.W.2d 24 (Ky. Ct. App. 1998).

modification to his employment status.[139] Specifically, Mayo claimed that Owen's director of recruitment, Tom Smith, assured him that he would receive the "best benefits; that he would be covered by both the KDH and the Owen policy books, whichever was better; and that he would have a job at the pharmacy as long as Owen had the contract to run it."[140] While conceding that the employment-at-will doctrine may be modified by an oral contract, the court, based upon Kentucky's watershed decision in *Shah v. American Synthetic Rubber Corp.*,[141] declared that Mayo had the burden of proving the existence of either (1) an offer of employment for a definite term, or (2) an offer of employment for an indefinite period of time with a covenant not to terminate without cause.[142] The court concluded that Mayo had proved neither.[143] First, Mayo admitted that he was never offered employment for a definite period of time.[144] Second, during the discussion between Mayo and Smith regarding benefits, there was no evidence that a termination-for-cause restriction was included as a benefit.[145]

5. Fraud, Misrepresentation, And Estoppel

In *United Parcel Service Co. v. Rickert*,[146] the plaintiff, John Rickert, sued United Parcel Service Co. (UPS), alleging damages based on fraud and promissory estoppel. UPS, pursuant to a plan in which—over a sixteen-month transition period—it would establish its own airline, expressed its desire to hire pilots who remained throughout that period with its contract carriers. Orion Air, a contract carrier for UPS, employed Rickert. After the transition by UPS was completed, Orion Air ceased doing business, and Rickert was not hired by UPS. Rickert thereafter sued UPS in Jefferson County Circuit Court, alleging damages flowing from fraud and promissory estoppel.[147] Rickert claimed that, during a meeting which he and other Orion pilots attended, an unnamed UPS management representative had guaranteed employment with UPS to those pilots who stayed with Orion throughout the sixteen-month transition period.[148] The jury awarded Rickert $425,160 in lost wages, $321,356 in future lost wages, and $1 million in punitive damages.[149] The Court of Appeals affirmed the judgment, and the Kentucky Supreme Court granted discretionary review.

UPS advanced two primary arguments in support of its position: (1) Rickert had failed to prove fraud by clear and convincing evidence because he was unable to identify the identity and authority of the alleged corporate

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[139] *See Mayo*, 2000 WL 1234359, at *1.
[140] *Id.* at *2.
[141] 655 S.W.2d 489 (Ky. 1983).
[142] *See Mayo*, 2000 WL 1234359, at *1.
[143] *Id.* at *2.
[144] *Id.*
[145] *Id.*
[146] 996 S.W.2d 464 (Ky. 1999).
[147] *See id.*
[148] *Id.*
[149] *Id.* at 468.

representative who allegedly made the fraudulent misrepresentation; and (2) Rickert could not recover on a claim of fraud or promissory estoppel where his failure to act was not a proximate result of the alleged guarantee of employment.[150]

The court began by delineating the six elements of fraud that must be proven by clear and convincing evidence: (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) causing injury.[151] The court found that Rickert had presented sufficient evidence to prove each of the six elements by clear and convincing evidence.[152] First, even though Rickert did not identify the individual who made the representation at the meeting, he did present evidence that a regional coordinator for UPS, who addressed the Orion employees at the meeting, made the representation of employment.[153]

As for the second and third elements, while Rickert was unable to prove that UPS did not intend to hire him at the time of the alleged misrepresentation, he was able to prove that, at the time the statement was made, UPS did not intend to hire all Orion pilots.[154] According to the court, willfully failing to disclose the whole truth, as well as intentionally asserting false information, is a ground for fraud.[155] Therefore, since UPS intentionally failed to disclose all of the material details of its hiring plan, there was no requirement for Rickert to prove that UPS did not intend to specifically hire him.[156]

As for the fourth and fifth elements, the court pointed out the general rule that, in Kentucky, "a claimant may establish detrimental reliance in a fraud action when he acts or fails to act due to fraudulent misrepresentations."[157] Rickert satisfied these elements by introducing evidence not only indicating that the underlying motive for UPS's promise of employment was to induce him to fly its planes during the transition period, but also that, in reliance on the representation by UPS, he had not sought other employment opportunities during the sixteen-month transition period.[158] Accordingly, since Rickert had proven fraud by clear and convincing evidence, the court found that the jury had properly awarded Rickert punitive damages, as well as damages for lost wages.[159]

As for Rickert's cause of action based on promissory estoppel, the court found that the evidence unequivocally indicated that, with the intent to induce

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[150] *Id.*

[151] *Id. See also* Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky. Ct. App. 1978).

[152] *See Rickert*, 996 S.W.2d at 468.

[153] *Id.* This was corroborated by evidence indicating that (1) Rickert had subsequent communications with UPS in which the employment agreement was discussed; (2) Rickert had taken detailed notes during the meeting which highlighted the specifics of the employment agreement; and (3) other witnesses heard the UPS representative make the same promise. *Id.*

[154] *Id.* at 469.

[155] *Id. See also* Chamberlain v. National Life & Accident Ins. Co., 76 S.W.2d 628, 631 (Ky. 1934); RESTATEMENT (SECOND) OF TORTS § 529 (1977) (indicating that a partial truth can be fraudulent if it is materially misleading).

[156] *See Rickert*, 996 S.W.2d at 469.

[157] *Id. See also* Sanford Constr. Co. v. S & H Contractors, Inc., 443 S.W.2d 227, 232 (Ky. 1969).

[158] *See Rickert*, 996 S.W.2d at 469.

[159] *Id.*

either action or forbearance on the part of Rickert, a promise of employment had been made by UPS to Rickert.[160] In reliance on the promise, Rickert remained with Orion, foregoing other employment opportunities.[161] Since Rickert had proven all of the elements of fraud by clear and convincing evidence, this was sufficient to uphold his promissory estoppel claim.[162]

In *Wymer v. JH Properties, Inc.*,[163] Linda Wymer, who worked at Jewish Hospital as an operating room technician, was kicked by a patient who was coming out of anesthesia, resulting in an injury to Wymer's shoulder. Subsequently, while undergoing physical therapy, Wymer alleged that the physical therapist, who also was employed by Jewish Hospital, tore the deltoid muscle in Wymer's shoulder.[164] Upon returning to work to perform clerical duties and odd jobs, Wymer filed both a workers' compensation claim and a negligence claim against Jewish Hospital.[165] Thereafter, Wymer was informed by Jewish Hospital's director of human resources that Wymer had eight days to find a permanent job at Jewish Hospital or her employment would be terminated.[166] Though a meeting was scheduled between Wymer and a human resources director, the director refused to meet with Wymer because Wymer was accompanied by her attorney.[167] As a result, Wymer did not obtain a permanent job with Jewish Hospital, and she was terminated.[168] Wymer then brought an action against JH Properties, Inc.[169]—a Kentucky Corporation doing business as Jewish Hospital Shelbyville—in the Shelby County Circuit Court, alleging damages from fraud and promissory estoppel.[170] The trial court granted summary judgment for Jewish Hospital, and Wymer appealed.

Wymer's fraud claim was based on the allegation that, despite the fact that she had been promised a job as a pre-admissions clerk, Jewish Hospital never intended to hire her for that position.[171] As in *Rickert*,[172] the court set forth the six elements that must be shown by clear and convincing evidence in order to succeed on a fraud claim: (1) a material representation; (2) which is false; (3) which is known to be false or made recklessly; (4) was made with inducement to be acted upon; (5) the plaintiff acted in reliance thereon; and (6) the plaintiff was

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[160] *Id.* at 470.

[161] *Id.*

[162] *Id.*

[163] No. 1998-CA-00986-MR, 1999 WL 731591, at *1 (Ky. Ct. App. Sept. 17, 1999).

[164] *See id.* at *1.

[165] *Id.* at *2.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See Wymer*, 1999 WL 731591, at *2. Wymer's action was also brought against Erick Novosel, a physical therapist employed by Jewish Hospital; Wanda Moore, Wymer's supervisor during her employment with Jewish Hospital; Debbie Molnar, the director of human resources with Jewish Hospital's Louisville office; Carol Hawes, the director of human resources with Jewish Hospital's Shelbyville office; John Kurnick, a human resources assistant with Jewish Hospital's Louisville office; and Lori Fryear, a workers' compensation specialist with Jewish Hospital. *Id.*

[170] *Id.*

[171] *Id.* at *8.

[172] 996 S.W.2d at 468 (Ky. 1999).

injured as a consequence of relying on the materially false misrepresentation.[173] The court concluded that Wymer had not established the six required elements, since she had presented no evidence indicating that she relied on the promise or that the alleged misrepresentation caused her damage.[174]

In Wymer's promissory estoppel claim, she asserted that, though she had been promised a pre-admissions position with Jewish Hospital, such a promise had been breached.[175] However, as the court pointed out, estoppel "is not founded upon a legal duty and a breach thereof; but rather, it is based upon a mere promise and reliance on that promise."[176] Promissory estoppel requires that the plaintiff establish the following five elements:

> (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party was aware of these facts; (3) these facts were unknown to the other party; (4) the estopped party must act with the intention or expectation that its conduct will be acted upon; and (5) the other party in fact relied on this conduct to her detriment.[177]

The court held that Wymer had not established the fifth element, since there was no evidence that she had relied on the promise.[178] The appellate court, therefore, affirmed the circuit court's grant of summary judgment in favor of Jewish Hospital.

6. Obligation Of Good Faith And Fair Dealing

Kentucky courts have declined to imply a duty of good faith and fair dealing into the at-will employment relationship. In *Wyant v. SCM Corp.*,[179] Phillip Wyant sought to recover against his former employer, SCM Corporation, on the basis of bad faith. Wyant, a branch manager of SCM's retail outlet in Lexington, Kentucky for seventeen years, claimed that he was terminated for "championing a subordinate's right to receive overtime pursuant to an unwritten agreement with [SCM]."[180] While conceding that his employment relationship with SCM was terminable at-will, Wyant urged the Fayette Circuit Court to impose "a duty to discharge in good faith" upon SCM.[181] However, the trial court granted SCM's motion for a directed verdict.

On appeal, Wyant argued that, because he had worked for seventeen-years with SCM, such a tenure imposed an implied duty of good faith upon his employer.[182] In affirming the trial court's decision, the court declined to impose

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[173] *Wymer*, 1999 WL 731591, at *8.

[174] *Id.*

[175] *Id.*

[176] *Id.* (citing McCarthy v. Louisville Cartage Co., 796 S.W.2d 10, 12 (Ky. App. 1990)).

[177] *See Wymer*, 1999 WL 731591, at *8 (citing McCarthy v. Louisville Cartage Co., 796 S.W.2d 10, 12 (Ky. Ct. App. 1990)); *accord* Gray v. Jackson Purchase Prod. Credit Ass'n, 691 S.W.2d 904, 906 (Ky. Ct. App. 1985).

[178] *See Wymer*, 1999 WL 731591, at * 8.

[179] 692 S.W.2d 814 (Ky. Ct. App. 1985).

[180] *Id.* at 815.

[181] *See id.*

[182] *Id.*

such an implied duty upon SCM, reasoning that terminable at-will employment in Kentucky "may be ended at any time, with or without cause."[183]

7. Negligent Hiring, Retention, And Supervision Of Employees

As far back as 1908, Kentucky courts have adhered to the following general rule:

> The master must exercise ordinary care in the selection of his servants and if he fails to exercise such care, and one of the servants is injured by the incapacity of another servant, the master is liable, but the incapacity of the fellow servant must relate to the duties required of him by the master.[184]

However, later cases in Kentucky suggested that, in situations where an employer was negligent in hiring an incompetent or dangerous employee, the employer could not be liable based on such negligence when the employee injured a third person. An example is the 1947 case *of Central Trucking Sys., Inc. v. Moore*.[185]

In *Oakley v. Flor-Shin, Inc.*,[186] Holly Oakley, who was working as a part-time employee at a K-Mart department store in Versailles, Kentucky, was sexually assaulted by William Bayes, an employee of Flor-Shin, Inc., a company which had a contract with K-Mart to maintain its floors.[187] Oakley sued Flor-Shin, seeking damages for its negligence in hiring Bayes, a person she alleged was "incompetent and unfit to perform in the capacity he was hired because of his malicious, dangerous, and violent nature."[188] Woodford County Circuit Court, relying on *Central Truckaway*,[189] granted Flor-Shin's motion for summary judgment, holding that, because Bayes' alleged acts did not result in an injury to a fellow servant (but only to a third party), Flor-Shin was not liable for negligent hiring, retention, or supervision.[190]

On appeal, Flor-Shin maintained that, in Kentucky, an employer can never be liable for negligent hiring, retention, or supervision, when the harm is to a third party.[191] Oakley argued that Flor-Shin knew, or should have known, that Bayes was unfit for the position of employment which he held, and that his retention in that job created an unreasonable risk of harm.[192]

In particular, Oakley relied on the following evidence: (1) Bayes' criminal record, prior to being hired by Flor-Shin, included convictions for burglary, theft, and bail-jumping; (2) Bayes had been arrested for criminal attempt to commit rape and for carrying a concealed deadly weapon; (3) Flor-Shin had actual

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[183] *Id.*

[184] Ballard's Adm'x v. Louisville & N.R. Co., 110 S.W. 296, 297 (Ky. 1908).

[185] 201 S.W.2d 725, 728 (Ky. 1947).

[186] 964 S.W.2d 438 (Ky. Ct. App. 1998).

[187] *See id.*

[188] *Id.* at 438-39.

[189] 201 S.W.2d at 725 (Ky. 1947).

[190] *Oakley*, 964 S.W.2d at 439-40.

[191] *Id.* at 439.

[192] *Id.* at 442.

knowledge of Bayes' criminal history, or should have known of such criminal history had it conducted a criminal background check pursuant to its contract with K-Mart; and (4) Flor-Shin knew that Bayes would likely be inside the K-Mart store with a single K-Mart employee.[193]

The court rejected Flor-Shin's reliance on *Central Truckaway*, finding that it neither expressly addressed nor settled the issue regarding the viability of the tort of negligent hiring.[194] In reaching the conclusion that Kentucky did recognize a tort of negligent hiring based on injuries to third persons, the court first analyzed a line of cases affirming the proposition that "every person owes a duty to every other person to exercise ordinary care in his activities to prevent any foreseeable injury from occurring to such other person."[195] Second, the court looked to other jurisdictions, finding that the tort of negligent hiring is generally recognized.[196] Finally, the court relied on the Restatement (Second) of Agency § 213 (1958), which states: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]"[197] Based on the previously cited authorities, the court concluded that Kentucky does recognize a tort for negligent hiring, retention, and supervision.[198] The court, therefore, reversed and remanded the trial court's ruling, holding that in order to succeed on a claim of negligent hiring, the plaintiff must prove that (1) "[the employee] was unfit for the job for which he was employed, and (2)...his placement or retention in that job created an unreasonable risk of harm to [the plaintiff]."[199]

In *Roman Catholic Diocese of Covington v. Secter*,[200] John Secter attended Covington Latin School (CLS), which was operated by the Roman Catholic Diocese of Covington (the Diocese).[201] On several occasions, Secter was touched in a "sexually and inappropriate manner" by Earl Bierman, a high school teacher

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[193] *Id.*

[194] *Id.* at 441.

[195] Waldon v. Housing Authority of Paducah, 854 S.W.2d 777, 778 (Ky. Ct. App. 1991); Grayson Fraternal Order of Eagles, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987); M & T Chemicals, Inc. v. Westrick, 525 S.W.2d 740, 741 (Ky. 1974).

[196] *E.g.*, Carlsen v. Wackenhut Corp., 868 P.2d 882 (Wash. Ct. App. 1994) (girl sexually assaulted by security guard sued guard's employer for negligent hiring); Evan v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748 (Cal. Ct. App. 1992) (a child sexually assaulted by pastor permitted to sue church on theory of negligent hiring); J. v. Victory Tabernacle Baptist Church, 372 S.E.2d 391 (Va. 1988) (ten-year-old child's mother entitled to proceed against church for negligent hiring of pastor who raped child); Copithorne v. Framingham Union Hosp., 520 N.E.2d 139 (Mass. 1988) (rape victim allowed to pursue claim against hospital for negligent hiring of doctor); Ponticas v. K.M.S. Inv., 331 N.W.2d 907 (Minn. 1983) (tenant raped by manager of apartment complex permitted to pursue claim of negligent hiring against landlord); Joiner v. Mitchell County Hosp. Auth., 186 S.E.2d 307 (Ga. Ct. App. 1971) (plaintiff allowed to pursue claim of negligent hiring against hospital based on hospital's negligent selection of physician).

[197] *Oakley*, 964 S.W.2d at 442 (citing RESTATEMENT (SECOND) OF AGENCY § 213 (1958)).

[198] *See id.*

[199] *Id.*

[200] 966 S.W.2d 286 (Ky. Ct. App. 1998).

[201] *See id.*

and guidance counselor at CLS.[202] Though the last incident occurred in July 1976 (roughly six months before Secter turned eighteen), Secter did not disclose the incidents to anyone until 1992.[203] Due to television reports in 1992, Secter learned that Bierman had sexually abused other students as well.[204] Secter sued the Diocese in Kenton Circuit Court, seeking damages for the negligent hiring, retention, and supervision of Bierman.[205] The diocese was ordered, during the discovery phase of the trial, to produce Bierman's "Canon 489" files, which revealed that the diocese had received reports that Bierman had sexually abused students prior to Secter's attendance at CLS.[206] No disciplinary action had been taken against Bierman, nor were the incidents disclosed to students, parents, or state authorities.[207] Ultimately, the jury awarded Secter $50,000 in compensatory damages and $700,000 in punitive damages; the jury also apportioned fault, placing seventy-five percent of the fault on the diocese and twenty-five percent on Bierman.[208] The diocese appealed.

While Secter's claim was based on personal injury and, therefore, subject to the one-year statute of limitations,[209] his action was brought seventeen years after the last incident with Bierman.[210] On appeal, the diocese argued that the trial court incorrectly allowed the jury to determine that the statute of limitations was tolled under KRS § 413.190(2),[211] which provides:

> When a cause of action...accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.[212]

Secter argued that, because it not only failed to report Bierman's sexual abuse, but also concealed such information in secret files, the diocese should have been estopped from relying on the statute of limitations.[213] The diocese argued that concealment alone was insufficient to toll the statute of limitations, and that, in order to toll the statute of limitations, the concealment must "in point of fact" obstruct the plaintiff from instituting suit during the limitations period.[214] The court rejected the diocese's strict interpretation of the statute, finding that the statute of limitations can be tolled whenever a defendant conceals information

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[202] *Id.*

[203] *Id.*

[204] *Id.* at 287. Bierman was later convicted of twenty-eight counts involving the sexual abuse of minors. *Id.*

[205] *Id.*

[206] *See Secter*, 966 S.W.2d at 287-88.

[207] *Id.*

[208] *Id.*

[209] KY. REV. STAT. ANN. § 413.140(1)(a) (Banks-Baldwin 2000).

[210] *See Secter*, 966 S.W.2d at 288.

[211] *Id.* at 290.

[212] KY. REV. STAT. ANN. § 413.190(2) (Banks-Baldwin 2000).

[213] *See Secter*, 966 S.W.2d at 290.

[214] *Id.*

that obstructs the plaintiff's ability to institute a cause of action.[215] While the diocese had knowledge of Bierman's history of sexual abuse, rather than taking disciplinary action or notifying authorities, it kept the information concealed.[216] The court concluded that Secter, who did not learn of the diocese's concealment until 1992, neither knew nor had reason to know that he had a potential cause of action until that time.[217] Therefore, the trial court correctly tolled the statue of limitations. [218]

Secter also argued that, since apportionment of fault between negligent and intentional tortfeasors was not required, the diocese and Bierman should have been held jointly and severally liable for the entire damages.[219] However, the court pointed out that the adoption of comparative fault "has established that liability among joint tortfeasors in negligence cases is no longer joint and several but is several only."[220] Likewise, the court declined to recognize a distinction between negligent and intentional tortfeasors.[221]

In *Stalbosky v. Belew*,[222] William Belew, who worked for Three Rivers Trucking Company (Three Rivers), picked up Myra Stalbosky, who was stranded due to automobile failure, and raped and murdered her in the cab of his truck.[223] The administrator of Myra Stalbosky's estate, Michael Stalbosky, brought an action in the United States District Court for the Eastern District of Kentucky against Three Rivers for negligently hiring and retaining Belew.[224] The district court granted Three River's motion for summary judgment, and Stalbosky appealed.[225]

Belew had an extensive criminal history.[226] In 1991, he had been convicted of arson and sentenced to three years in prison.[227] Later in 1991, a former girlfriend of Belew, Patricia Buchanan, alleged that he had struck her, tied her feet, and pulled her out of the house by her hair.[228] In 1995, Belew entered the home of another former girlfriend, placed a gun to her head, and attempted to rape her; after being arrested, Belew escaped, but was recaptured and charged with aggravated assault and escape.[229] On April 27, 1995, the day after his

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *See Secter*, 966 S.W.2d at 291.

[220] *Id.* (citing Dix & Assocs. Pipeline Contractors, Inc. v. Key, 799 S.W.2d 24, 27 (Ky. 1990)).

[221] *See Secter*, 966 S.W.2d at 291.

[222] 205 F.3d 890 (6th Cir. 2000).

[223] *See id.* at 892.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* Belew was released on probation after serving ninety-days. *Id.*

[228] *See Stalbosky*, 205 F.3d at 892. Though Buchanan swore out a complaint describing the events, it was later dismissed. *Id.*

[229] *Id.* On April 26, 1995, Belew was sentenced to eleven months and twenty-nine days of incarceration, the majority of which was suspended. *Id.*

sentencing for aggravated assault and escape, Belew began a hauling assignment for Three Rivers, during which the rape and murder of Stalbosky occurred.[230]

Before hiring Belew as a full-time truck driver in 1994, Three Rivers consulted Belew's previous employer, analyzed his driving record, and conducted drug testing.[231] Though Belew had been convicted of arson in 1991, on his application for employment with Three Rivers, he denied ever being convicted of a felony.[232]

The Sixth Circuit Court of Appeals, applying Kentucky law and relying on Kentucky's earlier decision in *Oakley*,[233] first noted the two elements for a cause of action based on negligent hiring and retention: "(1) the employer knew or reasonably should have known that the employee was unfit for the job for which he was employed, and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff."[234] In support of the first element of the test, Stalbosky argued that the district court erroneously excluded, as inadmissible hearsay, three affidavits which demonstrated Three River's knowledge of Belew's violent history.[235]

After reviewing the three affidavits, the court agreed with the district court that two of the affidavits were inadmissible hearsay.[236] However, the court disagreed with the district court's conclusion that the third affidavit, sworn out by Glenn Boggs, a detective with the Kentucky State Police, constituted inadmissible hearsay.[237] In the affidavit, Boggs stated that an owner of Three Rivers, Sonny Crutcher, told him the following:

> I am ashamed at what happened. This is what happens when you try to give someone a chance. [Belew's] dad told me that [Belew] had served some time in prison and had been in quite a bit of trouble over fighting with his former girl-friends. [Belew's] dad said [Belew] was trying to straighten up, so I gave him a chance.[238]

Additionally, the affidavit quoted Crutcher admitting that, during a conversation with Belew's father, he had been informed that Belew had spent time in a behavioral health hospital at a younger age due to drug addiction and an uncontrollable temper.[239] Stalbosky argued that, because the affidavit contained

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[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] 964 S.W.2d 438 (Ky. Ct. App. 1998).

[234] *Stalbosky*, 205 F.3d at 894.

[235] *See id.* The first affidavit, by Phillip Blakeley, a private investigator hired by Stalbosky, stated that Belew admitted that the owners of Three Rivers knew of his criminal history, but told him not to list it on his application; the Court of Appeals ruled that the statements in the affidavit constituted inadmissible hearsay. *Id.* The second affidavit, by James Noteworthy, a former driver for Three Rivers, contained a statement by Noteworthy that "it was common knowledge at the company that [Belew's] girlfriend had him arrested and put in jail." *Id.* The court also upheld the district court's ruling that the statement constituted inadmissible hearsay. *Id.* at 895. The third affidavit, by Glenn Boggs, a detective with the Kentucky State Police, is discussed above.

[236] *Id.* at 894-95.

[237] *Id.* at 895.

[238] *Id.*

[239] *Id.*

statements made by Crutcher, a party-opponent, it was admissible under Federal Rule of Evidence section 801(d)(2)(D), which provides:

> (D) a statement is not hearsay if...(2) the statement is offered against a party and is...(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.][240]

The court ultimately agreed with Stalbosky, finding that the Bogg's recollections of Crutcher's comments were not hearsay and, therefore, were admissible as an admission of a party-opponent.[241] However, the court also found that the district court's error was not grounds for reversal.[242] In essence, according to the court, Bogg's affidavit demonstrated that, when Three Rivers hired Bewel in 1994, the company may have known that (1) Belew had been convicted of arson in 1991, (2) assault in 1991, and (3) at a younger age, he had been placed in a behavioral health hospital.[243] Such evidence, concluded the court, was insufficient to satisfy the first element of the test—that Three Rivers knew or should have known that Belew was unfit for his job as a truck driver.[244]

Even if Stalbosky had satisfied the first element of the offense, the court pointed out that he would not have established the second element—that Belew's employment as a truck driver posed an unreasonable risk of harm to the plaintiff.[245] Distinguishing the facts in *Oakley*, which involved a situation where an employee with an extensive criminal history, including rape, was placed inside a store alone with a female employee,[246] the court reasoned that Belew's employment as a truck driver did not grant him "supervisory power over or special access to others," notably because picking up hitchhikers violated Three River's express policy.[247] The court affirmed the district court's grant of summary judgment in favor of Three Rivers.

In *Turner v. Pendennis Club*,[248] Malevinnie Turner brought an action in the Jefferson Circuit Court against her employer, The Pendennis Club, alleging damages from negligent training and supervision. The trial court, concluding that Kentucky did not recognize a tort based on negligent training and supervision, dismissed Turner's claim.[249]

Though the underlying facts in support of Turner's claim are not discussed in the opinion, the thrust of Turner's argument on appeal was that the trial court erred in dismissing her claim on the ground that Kentucky had not yet recognized a tort of negligent training and supervision.[250] Citing two Kentucky decisions,[251]

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[240] FED. R. EVID. 810(d)(2)(D) (2000).

[241] *See Stalbosky*, 205 F.3d at 895.

[242] *Id.*

[243] *Id.* at 895-96.

[244] *Id.* at 896.

[245] *Id.*

[246] *See Oakley*, 964 S.W.2d at 442.

[247] *Stalbosky*, 205 F.3d at 896.

[248] 19 S.W.3d 117 (Ky. Ct. App. 2000).

[249] *See id.* at 121.

[250] *Id.*

the appellate court agreed with Turner, holding that Kentucky had, in fact, acknowledged claims based on negligent training and supervision.[252] Though the court withheld judgment as to whether she had stated a viable claim, the court reversed and remanded the trial court's dismissal of Turner's claim for negligent training and supervision.[253]

In *Pennington v. Dollar Tree Stores, Inc.*,[254] the plaintiff, Linda Pennington, along with three young children, had been shopping at Dollar Tree Stores, Inc. (Dollar Tree), and was stopped by the store's manager as she attempted to leave.[255] After asking to view the items in her bags, the manager alleged that Pennington had not paid for certain toys and candy.[256] Pennington paid for her son's toy but refused to pay for the candy.[257] After Pennington left the store, the store manager summoned the police, and Pennington was arrested for petty theft and spent the night in jail.[258] At a subsequent hearing, in exchange for all charges against her being dropped, Pennington stipulated that probable cause existed for the stop and subsequent charges.[259] Pennington thereafter filed a complaint against Dollar Tree alleging negligent hiring.[260]

Citing the familiar two-part test, the court noted that, in order for Pennington to succeed on her claim, she had to prove that (1) the Dollar Tree "knew, or reasonably should have known," that the store manager was "unfit for the job for which [she] was employed," and (2) that her position as a store manager "created an unreasonable risk of harm" to the plaintiff.[261] The court concluded that not only had Pennington failed to produce any evidence that the store manager was incompetent, but she had also stipulated that the store manager had probable cause to notify the police.[262] Accordingly, the court granted the Dollar Tree's motion for summary judgment.[263]

8. Intentional Infliction Of Emotional Distress[264]

Kentucky first recognized the tort of intentional infliction of emotional distress in 1984.[265] In acknowledging the tort, the Kentucky Supreme Court held

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[251] Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. Ct. App. 1998) (discussed above); and Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. Ct. App. 1992).

[252] *See Turner*, 19 S.W.3d at 121.

[253] *Id.*

[254] 104 F. Supp. 2d 710 (E.D. Ky. 2000).

[255] *See id.* at 712.

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *See Pennington*, 104 F. Supp.2d at 712.

[261] *Id.* at 715 (citing Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky. Ct. App. 1998)).

[262] *See Pennington*, 104 F. Supp. 2d at 715.

[263] *Id.*

[264] *See* Richard Bales & Richard O. Hamilton, *Workplace Investigations In Kentucky*, 27 N. KY. L. REV. 201 (2000).

[265] *See* Craft v. Rice, 671 S.W.2d 247, 250 (Ky. 1984). Intentional infliction of emotional distress is also known as the tort of outrage in Kentucky.

that a plaintiff may have a cause of action, regardless of whether she suffers any bodily injury, from intentional and unlawful interference with her rights.[266] The Court expressly adopted the Restatement (Second) of Torts, which provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[267] The plaintiff, in order to successfully recover, must prove: (1) the wrongdoer acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) there is a causal connection between the conduct and the emotional distress; and (4) the emotional distress is severe.[268]

In *Kroger Co., v. Willgruber*,[269] Andrew Willgruber had been employed by the Kroger Company (Kroger) for thirty-two years.[270] The dispute arose when a new marketing manager ordered Willgruber to contact competitors and obtain their price lists for the purpose of setting prices.[271] Though Willgruber initially refused, the plant manager ordered him to comply, and Willgruber set the prices as ordered.[272] Subsequently, while attending a luncheon with the plant manager and one of Kroger's senior personnel officers, Wayne Neal, Willgruber was presented with a resignation letter and severance package.[273] The severance package was contingent, however, on Willgruber signing a release, which discharged Kroger from all liability concerning Willgruber's separation from the company.[274] In addition, Willgruber was assured that, if he signed the release, he would have a job as assistant sales manager at Anderson Bakery, located in South Carolina.[275] Ultimately, Willgruber was informed that if he did not resign and sign the release, he would be terminated.[276]

Although Willgruber made no immediate decision, three-days later, with friends and co-workers present, he was forced to clean out his desk.[277] Thereafter, Willgruber called Neal, informed him that he was "mighty sick," and asked if the job offer for employment in South Carolina was still available.[278] Neal thereupon arranged for Willgruber to fly to South Carolina in order to meet Jack Rosenberg, the Anderson plant manager.[279] Rosenberg would later testify that not only was he solely in charge of hiring, but he also had not authorized

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[266] *Id.* at 249.

[267] *Id.* at 251 (quoting RESTATEMENT (SECOND) OF TORTS § 46(1)).

[268] *See Craft*, 671 S.W.2d at 250 (relying on two cases from Virginia to establish the elements: Moore v. Allied Chemical Corp., 480 F. Supp. 364 (E.D. Va. 1979); Womack v. Eldridge, 210 S.E.2d 145 (Va. 1974)).

[269] 920 S.W.2d 61 (Ky. 1996).

[270] *See id.*

[271] *Id.* at 63.

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *See Kroger Co.*, 920 S.W.2d at 63.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

Neal to make a job offer to Willgruber.[280] Upon returning home from South Carolina, Willgruber experienced a "dramatic, emotional breakdown."[281] Concerned for husband's health, Mrs. Willgruber telephoned Neal, who insisted that Willgruber needed to "sign the papers."[282] When Willgruber subsequently filed for disability benefits with his insurance carrier, Neal attempted to persuade the carrier to deny his benefits; however, the carrier determined that it was obligated to pay the benefits.[283] Willgruber sued Kroger in Warren Circuit Court, seeking damages for intentional infliction of emotional distress; after judgment was entered for Willgruber by the trial court and affirmed by the Court of Appeals, discretionary review was granted by the Kentucky Supreme Court.

The Court began by listing the four elements that must be met in order for a plaintiff to prevail on a claim of intentional infliction of emotional distress: (1) the wrongdoer's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality, (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress, and (4) the emotional distress must be severe.[284] Reasoning that its conduct did not offend generally accepted standards of decency and morality, Kroger's primary argument was that the evidence was insufficient to support the second element.[285] Willgruber, on the other hand, argued that Kroger purposely attempted to coerce him into signing the release documents in order to exonerate Kroger from liability.[286]

Relying on the Restatement (Second) of Torts, the court reasoned that extreme and outrageous conduct "may arise from the actor's knowledge that the other party is peculiarly susceptible to emotional distress, by reasons of some

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[280] *Id.*

[281] *See Kroger Co.*, 920 S.W.2d at 63. A psychotherapist diagnosed Willgruber as suffering from severe, disabling depression. *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.* at 65 (citing Craft v. Rice, 671 S.W.2d 247, 249 (Ky. 1984)).

[285] *See Kroger Co.*, 920 S.W.2d at 65.

[286] *Id.* at 66. The Court summarized Willgruber's evidence as follows:

> In order to induce Willgruber to sign a full release, Kroger repeatedly misrepresented to Willgruber that he would be eligible for the position of assistant sales manager at the Anderson Bakery, knowing full well that no such position was available...[and Kroger] proceeded with sending Willgruber to Anderson, South Carolina, fully cognizant that no job would materialize. When Willgruber returned home, he suffered a complete mental breakdown. This was brought to Neal's attention by Mrs. Willgruber...Neal pressured Mrs. Willgruber to have her husband 'sign the papers.' The next morning, Neal telephoned the Anderson, South Carolina, plant and falsely stated that Willgruber had no interest in the job. As a result of Kroger's actions, Willgruber experienced a real and disabling depression. His psychotherapist recommended that he be placed on total disability. Realizing Willgruber was without income, Neal had conversations with the disability insurance company's representatives calculated to wrongfully defeat or delay the payment of disability benefits to which Willgruber was entitled...Neal's plan, to delay the payment of disability benefits, had its desired effect of causing Willgruber further anguish. In fact, this anguish was so severe that the disability insurance company's own examining physician found it medically necessary to engage Willgruber in a non-suicide pact.

Id.

physical or mental condition of peculiarity."[287] Though Kroger was certainly cognizant of Willgruber's emotional status, it continued to coerce Willgruber into signing the release. Such conduct, the Court held, "constitutes the very essence of the tort of outrage."[288] The Court affirmed the decision of the Court of Appeals, awarding Willgruber $70,000 for the intentional infliction of emotional distress.[289]

In *Brewer v. Hillard*,[290] Kenneth Hillard worked as a local deliveryman for Consolidated Freightways Corporation (CF).[291] Jeff Brewer, who was also employed by CF, worked as a dispatcher-supervisor.[292] Though there was initially no problem between Hillard and Brewer, after several months, Brewer began calling Hillard sexually explicit names: Brewer would grab Hillard's buttocks and comment, "why don't you give me some of that ass;" and Brewer would rub his crotch and make requests to Hillard for oral and anal sex.[293] Hillard was subsequently hospitalized for two to three days for heart papilations.[294] After this brief hospitalization, Hillard returned to work, and Brewer's conduct continued.[295] Thereafter, Hillard visited Dr. Santa-Teresa, who diagnosed Hillard with "severe depression secondary to job stress."[296] Hillard later brought an action in the Fayette County Circuit Court against Brewer, seeking damages for intentional infliction of emotional distress. The trial court found in favor of Hillard, and Brewer appealed.

The court first set forth the four-part test that a plaintiff must satisfy in order to recover for intentional infliction of emotional distress: (1) the plaintiff must show that the defendant's conduct was intentional or reckless, (2) the conduct must be so outrageous and intolerable so as to offend generally accepted standards of morality and decency, (3) a causal connection must exist between the conduct complained of and the distress suffered, and (4) the resulting emotional distress must be severe.[297] Brewer's chief contention was that, since the evidence was insufficient to establish each of the elements, he was entitled to summary judgment.[298] As for the first element, Brewer argued that he only intended to add humor to the workplace.[299] However, the court rejected Brewer's argument, finding that if not intentional, his conduct was certainly reckless.[300]

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[287] *Id.* at 67 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1977)).

[288] *Kroger Co.*, 920 S.W.2d at 67.

[289] *See id.*

[290] 15 S.W.3d 1 (Ky. Ct. App. 1999).

[291] *See id.*

[292] *Id.*

[293] *Id.* at 4.

[294] *Id.* at 5. Dr. Gus Bynum testified that Hillard's problems were likely caused by high caffeine intake and stress. *Id.*

[295] *Id.*

[296] *See Hillard*, 15 S.W.3d at 5.

[297] *Id.* at 6 (citing Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 2-3 (Ky. 1990)).

[298] *See Hillard*, 15 S.W.3d at 6.

[299] *Id.*

[300] *Id.*

Second, considering Brewer's lewd acts and name calling, as well as his unsolicited and unwanted requests for homosexual sex, the court had no problem finding sufficient evidence that Brewer's conduct was outrageous and intolerable.[301] The court described the case as "one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[302] Third, since both of the doctors who treated Hillard specifically noted his complaints of problems at work, diagnosed him with problems relating to anxiety and stress, and prescribed medication for such problems, the court found that Hillard had presented sufficient evidence regarding the causal connection between Brewer's conduct and Hillard's emotional distress, and the severity thereof.[303]

Relying on *Rigazio v. Archdiocese of Louisville*,[304] Brewer argued that the tort of intentional infliction of emotional distress was not available to Hillard, since such a cause of action is merely a gap-filler, which is not available when traditional torts, such as assault and battery, afford a remedy.[305] While the court agreed that the tort of intentional infliction of emotional distress—which provides a remedy when other torts are inadequate—acts as a gap-filler, it also pointed out that, when conduct is intended solely to cause extreme emotional disturbance to the plaintiff, the tort of intentional infliction of emotional distress provides the appropriate cause of action.[306] Although battery requires an unwanted touching, and assault requires the threat of touching, the tort of intentional infliction of emotional distress only requires an intent to cause extreme emotional distress to the plaintiff.[307] Finding sufficient evidence that Brewer's intent was to intimidate Hillard, rather than to simply touch or threaten him, the court held that the cause of action of intentional infliction of emotional distress was appropriate.[308]

In *Wymer v. JH Properties, Inc.*,[309] Linda Wymer, who worked at Jewish Hospital as an operating room technician, was kicked by a patient who was coming out of anesthesia, resulting in an injury to Wymer's shoulder.[310] Wymer thereafter filed both a worker's compensation claim and a negligence claim

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[301] *Id.* at 6-7.

[302] *Id.* at 7 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

[303] *See Hillard*, 15 S.W.3d at 7.

[304] 853 S.W.2d 295 (Ky. Ct. App. 1993).

> [W]here an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, *and the conduct was not only intended to cause extreme emotional distress to the victim*, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action.

Id. at 299. (emphasis added).

[305] *See Hillard*, 15 S.W.3d at 7.

[306] *Id.* at 8.

[307] *Id.*

[308] *Id.*

[309] No. 1998-CA-00986-MR, 1999 WL 731591, at *1 (Ky. Ct. App. Sept. 17, 1999).

[310] *See id.*

against Jewish Hospital.[311] Subsequently, Wymer was informed by Jewish Hospital's director of human resources that Wymer had eight days to find a permanent job at Jewish Hospital or her employment would be terminated.[312] Though a meeting was scheduled between Wymer and a human resources director, the director refused to meet with Wymer because Wymer was accompanied by her attorney.[313] As a result, Wymer was unable to obtain a permanent job with Jewish Hospital, and was terminated.[314] Wymer then brought an action in the Shelby County Circuit Court against JH Properties, Inc.—a Kentucky Corporation doing business as Jewish Hospital Shelbyville (Jewish)—as well as several director and supervisors employed by Jewish, seeking damages for intentional infliction of emotional distress.[315] The trial court granted summary judgment in favor of JH Properties, Inc.[316]

On appeal, citing the Restatement (Second) of Torts, the court defined the tort as "the intentional or reckless causation of severe emotional distress by outrageous, extreme and intolerable conduct by the defendant upon the plaintiff."[317] Noting that even gross negligence on the part of the defendant is insufficient to satisfy the tort, the court asserted that the defendant's conduct must be "outrageous in character . . . extreme in degree . . . and beyond all bounds of decency."[318] Based on the foregoing standards, the court held that the mere act of terminating Wymer did not satisfy the element of "outrageous conduct."[319] Additionally, the court noted that there was no evidence that JH Properties, Inc., acted either intentionally or recklessly, nor was there evidence that Wymer suffered severe emotional distress.[320] Consequently, the court affirmed the trial court's dismissal of Wymer's claim of intentional infliction of emotional distress.

In *Pennington v. Dollar Tree Stores, Inc.*,[321] the plaintiff, Linda Pennington, who had been arrested for petty theft after leaving a Dollar Tree Store, Inc. (Dollar Tree), filed a complaint in the United States District Court for the Eastern District of Kentucky against Dollar Tree, alleging damages based on intentional infliction of emotional distress.[322] In exchange for having the criminal charges against her dropped, Pennington stipulated that probable cause existed for the stop and subsequent charges.[323] The court ruled against Pennington on her claim of intentional infliction of emotional distress, finding that her stipulation in

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[311] *Id.* at *2.

[312] *Id.*

[313] *Id.*

[314] *See Wymer*, 1999 WL 731591, at *1.

[315] *Id.* at *1.

[316] *Id.*

[317] *Id.* at 6 (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

[318] *Wymer*, 1999 WL 731591, at *6 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

[319] *Wymer*, 1999 WL 731591, at *6.

[320] *See id.*

[321] 104 F. Supp. 2d 710 (E.D. Ky. 2000).

[322] *See id.* at 712.

[323] *Id.*

regard to probable cause clearly undermined her argument that Dollar Tree acted outrageously or recklessly.[324]

9. Defamation[325]

In Kentucky, defamation consists of two distinct torts, libel and slander,[326] both of which require the following elements: (1) a false and defamatory statement; (2) about the plaintiff; (3) communicated to a third person recklessly or negligently; (4) which results in injury to the plaintiff's reputation; (5) that is made without privilege.[327]

In *Columbia Sussex Corp. v. Hay*,[328] the plaintiff, Laverne Hay, was working as a manager at the Best Western Hotel of Richwood, Kentucky, which was robbed on February 26, 1979.[329] During the robbery, the perpetrator revealed knowledge of a unique alarm system, which could be activated by the lifting of certain bills from the cash register.[330] William Yung, president of Columbia Sussex Corporation (Columbia Sussex), which owned and operated the Best Western Hotel of Richwood, believed that the robber, based on his or her knowledge of the alarm system, must have had inside information.[331] As a result, Yung informed Hay that lie detector tests would be given to her and other employees.[332] When Hay asked whether Yung believed that she or other employees were involved in the robbery, Yung responded, "[T]hat is exactly what I am saying, you will be surprised to find out which one did it;" during this incident, other employees were allegedly present.[333] Also, David Diehl, general manager of Columbia Sussex, allegedly stated that he agreed with Yung that either Hay or one of her subordinates was involved in the robbery; Hay testified

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[324] *Id.* at 715.

[325] *See* DAVID ELDER, KENTUCKY TORT LAW: DEFAMATION AND THE RIGHT TO PRIVACY (1983); David Elder, *Kentucky Defamation and Privacy Law – The Last Decade*, 23 N. KY. L. REV. 231 (1996); DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE (West 1993); *See also* Bales and Hamilton *supra* note 264.

[326] Libel is a written defamatory statement, Smith v. Pure Oil Co., 128 S.W.2d 931, 932 (Ky. 1939), whereas slander is a spoken defamatory statement, Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951).

[327] *See* Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981) ("Four elements are necessary to establish an action: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation."); *see also* William S. Haynes, Ky. Jur. § 8-2, 168 (Lawyers Co-op. 1988) ("[I]t is necessary to establish (a) a false and defamatory statement (b) concerning the plaintiff (c) was made to a third person (d) with fault or in a negligent manner (e) which was unprivileged and (f) which resulted, either directly or indirectly, in injury to the reputation of plaintiff."); *accord* RESTATEMENT (SECOND) OF TORTS § 558 (1977) ("[T]here must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."). Because this Restatement preceded the Supreme Court's decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), fault probably is no longer an element of plaintiff's claim in purely private cases.

[328] 627 S.W.2d 270 (Ky. Ct. App. 1981).

[329] *See id.*

[330] *Id.* at 272.

[331] *Id.*

[332] *Id.*

[333] *Id.*

that other employees were likewise present during this incident.[334] Ultimately, polygraph examinations revealed no connection between Hay, or any other employee, and the robbery.[335] Hay thereafter brought an action in Boone Circuit Court against Columbia Sussex, seeking damages for slander. The jury found in favor of Hay, and Columbia Sussex appealed.

On appeal, the court engaged in an elaborate analysis of the law of defamation, which began by listing the four elements necessary to establish a cause of action: "(1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation."[336] From there, the court discussed the essential distinction between slander and slander *per se*.[337] Whereas mere slander requires a showing of "special damages" in order to show an injury to the plaintiff's reputation, slander *per se*, based on the words themselves, is actionable without a showing of special damages.[338] Based on the imputations that Hay was involved in a criminal offense, the court found sufficient evidence that the defendant's words were slanderous *per se*.[339]

Next, in determining whether Hay had standing to pursue a defamation claim, the court analyzed whether she had been sufficiently identified by the defendant's words.[340] As a general rule, when defamatory statements are directed at a class of individuals, the plaintiff must prove that she was personally defamed.[341] However, when a statement defames all members of a relatively small or restricted group, any member of such group has standing to sue.[342] Based on the comparatively small group of employees of which Hay was a member, as well as the fact that the defendants' statements were directed at the group as a whole, the court found that Hay had presented sufficient evidence to allow her standing to assert her claim of defamation.[343]

Lastly, Columbia Sussex contended that, since a qualified privilege attached to matters within the employment relationship, the trial court erred in failing to instruct the jury on such a defense.[344] Hay, on the other hand, argued that the trial court's instruction to the jury clearly incorporated any benefit that would have been derived from an instruction on the defense of privilege.[345] The court agreed

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[334] *See Columbia Sussex Corp.*, 627 S.W.2d at 273.

[335] *Id.*

[336] *Id.*

[337] *Id.* at 274.

[338] *Id.* In terms of slander *per se*, the words "must tend to expose the plaintiff to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people and to deprive him of their friendship, intercourse and society. But it is not necessary that the words imply a crime or impute a violation of laws, or involve moral turpitude or immoral conduct." *Id.* (citing Digest Publ'g Co. v. Perry Publ'g Co., 284 S.W.2d 832, 834 (Ky. 1955)).

[339] *See Columbia Sussex Corp.*, 627 S.W.2d at 274.

[340] *Id.*

[341] *Id.* (citing Louisville Times v. Stivers, 68 S.W.2d 411, 412 (Ky. 1934)).

[342] *See Columbia Sussex Corp.*, 627 S.W.2d at 274-275 (citing Louisville Times v. Stivers, 68 S.W.2d 411, 412 (Ky. 1934)).

[343] *See Columbia Sussex Corp.*, 627 S.W.2d at 275.

[344] *Id.*

[345] *Id.* The trial court's instruction to the jury was as follows:

If you believe from the evidence that on the occasions (sic) referred to in the evidence the

that a qualified privilege did exist.[346] As the privilege was qualified, rather than absolute, the court emphasized three restrictions: (1) any defamatory statements on the part of the defendant must have related exclusively to their investigation of the robbery; (2) the statements could not be over-publicized; and (3) the statements could not be published with malice.[347] Next, in terms of the trial court's instruction to the jury, the court found that it clearly did not include the defense of privilege.[348] While the trial court's instruction did encompass questions as to whether Columbia Sussex had acted prudently and confidentially, it did not provide the jury with the opportunity to determine whether the defendants' statements, even if negligently published, had been overly publicized or made with malice.[349] As a consequence, the court reversed and remanded for a new trial.

In *Wyant v. SCM Corp.*,[350] Phillip Wyant worked as a branch manager of SCM Corporation's (SCM) retail outlet in Lexington, Kentucky.[351] After Wyant was terminated, he brought an action in the Fayette County Circuit Court against SCM, alleging damages based on defamation.[352] Wyant's defamation claim was based on an internal report by SCM's credit manager, which stated that Wyant dominated his store through "intimidation, sarcasm, and fear."[353] The trial court granted SCM's motion for directed verdict, and Wyant appealed.

On appeal, the court pointed out two substantial deficiencies of Wyant's defamation claim.[354] First, Wyant produced no evidence indicating that SCM had ever published the statement to a third person.[355] Second, being part of an internal document and a necessary means of communication within the workplace, the statement was protected by a qualified privilege; further, there

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> defendants, William J. Yung and David Diehl, or either of them, made any false statement, or statements, to or in the presence of, any person other than the plaintiff which would charge or connect the plaintiff with the commission or participation in the crime of robbery occurring at the Best Western Motel on or about February 26, 1979 or which would tend to communicate unfitness of the plaintiff in her occupation or prejudice her in her trade, then the law is for the plaintiff and you shall so find.
>
> If you do not so believe from the evidence, or if you believe from the evidence that the words and actions of the defendants, about which the plaintiff complains, were based upon facts detailed and prudently made in good faith and were spoken or done as confidentially as circumstances permitted, to aid in the detection of a crime, then the law is for the Defendants and you shall so find.

Id.

[346] *Id.* The court's finding that a qualified privilege existed rested on the following two facts: (1) a robbery had occurred at the defendants' place of business; and (2) the robbery tended to indicate that one with inside knowledge was involved. *Id.*

[347] *Id.* (citing Baker v. Clark, 218 S.W. 280 (Ky. 1920)).

[348] *See Columbia Sussex Corp.*, 627 S.W.2d at 276.

[349] *Id.*

[350] 692 S.W.2d 814 (Ky. Ct. App. 1985).

[351] *See id.*

[352] *Id.*

[353] *Id.* at 815.

[354] *Id.* at 816.

[355] *Id.*

was no evidence, such as over-publication or malice, which would defeat the privilege.[356] Accordingly, the court affirmed the directed verdict in favor of SCM.

In *Matthews v. Holland*,[357] Mary Ann Matthews had been employed as a principal of the Morganfield Elementary School under a limited contract.[358] After learning that her contract would not be renewed for the following year, Matthews asked David Holland, Superintendent of Union County public schools, to advise her as to the reasons for the nonrenewal of her contract.[359] In response, Holland sent Matthews a letter, as well as several written complaints, which were comprised of evaluations of her performances as a principal.[360] Because these documents also were provided to the Professional Standards Board, Matthews sued Holland in the Franklin County Circuit Court, alleging damages based on defamation.[361] The trial court dismissed Matthews complaint, and she appealed.

On appeal, Holland argued that, pursuant to KRS § 161.120(2), he was required to provide the information to the Professional Standards Board.[362] The statutory provision at issue provides:

> (a) The superintendent of each local school district shall report in writing to the Education Professional Standards Board the name, Social Security number, position name, and position code of any certified school employee in his district whose contract is terminated or not renewed, for cause[.]
>
> (b) The district superintendent shall inform the Education Professional Standards Board in writing of the full facts and circumstances leading to the contract termination or nonrenewal.[363]

Matthews argued that, since KRS § 161.120(2)(b) and 161.120(a) have to be read together, the superintendent was only permitted to forward information to the Professional Standards Board regarding employees who had been terminated "for cause."[364]

The court affirmed the dismissal of Matthew's complaint for two reasons.[365] First, though the court agreed that the two sections of the statutory provision must be read together, it rejected Matthew's interpretation of the statute, which would effectively prevent the Professional Standards Board from acquiring necessary information about an entire class of employees.[366] Second, the court found that Holland, acting as a public official pursuant to a statute, was entitled

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[356] *See Wyant*, 692 S.W.2d at 816.

[357] 912 S.W.2d 459 (Ky. Ct. App. 1995).

[358] *Id.* at 460.

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *See Matthews*, 912 S.W.2d at 460 (*quoting* KY. REV. STAT ANN. § 161.120(2) (Banks-Baldwin 2000)).

[364] *See id.* at 461.

[365] *Id.*

[366] *Id.*

to an absolute privilege from defamation, regardless of whether the information provided to the Professional Standards Board was false.[367]

In *Buchholtz v. Dugan*,[368] Wolfgang Buchholtz initiated an action in Fayette Circuit Court against the University of Kentucky (UK) and various university directors, seeking damages based on allegedly defamatory statements made by UK.[369] In 1968, Buchholtz was hired by Robert Drake, Dean of the College of Engineering, as manager of the UK College of Engineering Machine Shop.[370] Drake informed Buchholtz that he was permitted to conduct private consulting work, up to one day per week, as long as such private consulting did not impede on his UK duties or compete with local machine shops.[371] Over the next several years, Buchholtz undertook various private jobs, using the machine shop and shop materials, as well as other machinists under his supervision to assist him in his private consulting work.[372] Buchholtz likewise did not reimburse UK for the use of the shop machines, scrap materials, or the machinists' work.[373] Subsequently, John Carrico, an employee in the Office of Management and Organization, conducted an internal audit, the results of which led to the termination of Buchholtz.[374] The trial court dismissed Buchholtz's defamation claim, and Buchholtz appealed.[375]

On appeal, Buchholtz argued that the trial court erroneously granted UK's summary judgment motion on the issue of defamation.[376] In particular, Buchholtz contended that a report prepared by UK's auditor, Carrico, was defamatory *per se*.[377] The auditor's report was as follows:

> It appears, based upon testing and review of our records, observations, and interviews with various personnel and officials, that the Manager of the Machine Shop had machinists perform work for [his private consulting projects] with University resources and on University time for which he personally received payment.
>
> It appears the Machine Shop Manager is in violation of University Personnel Policy and Procedure 18.0 and K.R.S. 514.030, 514.070 and 517.110

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[367] *Id.*

[368] 977 S.W.2d 24 (Ky. Ct. App. 1998).

[369] *See id.* at 27.

[370] *Id.* at 25.

[371] *Id.*

[372] *Id.* at 26. The court found that,

> Machinists under [Buchholtz's] supervision who worked on his private projects recorded their work by the client's names on their time sheets, and Buchholtz recorded this as 'non-billable' time. He billed for the work privately, collected consulting fees through a post office box, paid machinists personally for their work, and deposited his earnings in his credit union account.

Id.

[373] *Id.*

[374] *See Buckholtz*, 977 S.W.2d at 26.

[375] *Id.* at 24.

[376] *Id.* at 27.

[377] *Id.*

regarding theft and misapplication of property.[378]

The court began by noting that truth is an absolute defense to libel.[379] As such, the first statement was not defamatory, since Buchholtz conceded that he had used university machinists for his personal work.[380] As for the second statement, which claimed that Buchholtz may have been in violation of university policy as well as several criminal statutes, the court relied on *Yancey v. Hamilton*,[381] which held: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion."[382]

Based on the previously cited rule, the court found that Carrico's opinion did not imply the allegation of an undisclosed defamatory fact upon which the opinion was based; instead, the body of Carrico's report was comprised of his detailed findings, which provided a basis for his conclusions and recommendations.[383] Consequently, the court affirmed the trial court's summary judgment in favor of UK, ruling that the report was "pure opinion" and, therefore, entitled to an absolute privilege.[384]

In *Landrum v. Braun*,[385] Robert Landrum was employed as a visiting professor at Kentucky State University.[386] When Landrum sought to become a tenured professor, he and Thomas Braun, acting Vice President of Academic Affairs, began exchanging hostile memoranda with one another.[387] In response to a memorandum written by Landrum, Braun wrote the following memorandum, which was sent to Landrum, as well as the Dean of the School of Business and the President of the university:

> Someone has written an insulting and incoherent memorandum to me and signed your name to it. The memo misquotes me and whoever wrote it had the poor taste to discuss your personal business and try to use it as a reason for your employment. I am sending a copy to you so that you can pursue the matter of who forged your name as it is not your signature. Quite frankly, Robert, you have tried my patience and succeeded in reaching the limit. Your continued attacks upon my character, integrity, and judgment have led me to the conclusion that I cannot and will not recommend that you be appointed to a faculty position for 1991/92. I am putting you on notice that I will not entertain nor respond to any further correspondence from you on this matter.[388]

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[378] *Bucholtz*, 977 S.W.2d at 27.

[379] *See id.*

[380] *Id.*

[381] 786 S.W.2d 854, 857 (Ky. 1989).

[382] *Buchholtz*, 977 S.W.2d at 28 (citing Yancey v. Hamilton, 786 S.W.2d 854, 857 (Ky. 1989)).

[383] *See Buchholtz*, 977 S.W.2d at 28.

[384] *Id.*

[385] 978 S.W.2d 756 (Ky. Ct. App. 1998).

[386] *See id.* at 757.

[387] *Id.*

[388] *Landrum*, 978 S.W.2d at 757.

Alleging that Braun's memorandum injured his reputation and future employment, Landrum sued in Franklin Circuit Court.[389] The trial court granted Braun's motion to dismiss, finding that a qualified privilege applied to communications between employees in their place of employment.[390]

On appeal, Landrum argued that the jury, rather than the trial judge, should have determined whether the memorandum constituted a "necessary communication" within the workforce.[391] The court rejected Landrum's contention, holding that the question of "privilege is a matter of law for the court's determination."[392] Accordingly, the court affirmed the dismissal of Landrum's complaint.[393]

10. Drug Testing[394]

In *Smith v. Kentucky Unemployment Insurance Commission*,[395] Avalee Smith, who was employed by Fruit of the Loom, was required to submit to a drug test based on information that she allegedly used drugs during work hours.[396] In order to comply with the employer's drug testing policy, Smith was required to sign a "Release of Liability," which stated: "In order to insure the accuracy of the testing procedure, I list below all drugs, whether prescription or not, that I have taken in the last two weeks."[397] Though Smith later admitted that she had smoked marijuana the previous weekend, she did not list marijuana on the Release of Liability form.[398] As a result, Smith was terminated based on the fact that the test was positive for marijuana, as well as the fact that she failed to honestly complete the form.[399] Smith sought to receive unemployment benefits, which were denied by the Kentucky Unemployment Insurance Commission.[400] After appealing to Russell County Circuit Court, Smith's claim was again denied, and she appealed.[401]

Relying on KRS § 341.370(6),[402] which asserts that only knowing violations will result in disqualification from receiving benefits, Smith argued that the employer's drug-testing policy had not been presented to her.[403] However, the court rejected Smith's argument, finding that there was sufficient evidence, including the fact that Smith had signed a drug-free pledge card, to indicate that

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[389] *Id.* at 756.
[390] *Id.* at 757.
[391] *Id.*
[392] *Id.*
[393] *Id.*
[394] *See* Bales and Hamilton, *supra* note 264.
[395] 906 S.W.2d 362 (Ky. Ct. App. 1995).
[396] *See id.* at 363.
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *See Smith*, 906 S.W.2d at 363.
[402] KY. REV. STAT. ANN. § 341.370(6) (Banks-Baldwin 2000).
[403] *See Smith*, 906 S.W.2d at 364.

Smith had knowledge of the employer's intention to maintain a drug-free workforce.[404] As such, Smith's use of drugs constituted a knowing violation of KRS § 341.370(6).[405]

In addition, Smith contended that, since the drug policy was not properly published, her failure to honestly complete the release form could not be considered an independent ground for disqualification.[406] The court likewise rejected this argument, holding that regardless of whether the drug policy was published, an employer has a rightful expectation that employees will truthfully respond to all inquiries.[407] Consequently, the court affirmed the decision in favor of the Kentucky Unemployment Insurance Commission.[408]

In *Cornette v. Commonwealth*,[409] Betty Cornette and other school bus drivers filed a declaratory judgment action questioning the constitutionality of mandatory drug testing of public school bus drivers.[410] The defendants moved for summary judgment, which was granted.[411]

On appeal, the court found that drug and alcohol tests conducted by public-sector employers are recognized as searches under the Fourth Amendment, but only those searches that are unreasonable are proscribed.[412] The court balanced the government's interest in ensuring the safety of school children against the privacy interests of public employee bus drivers.[413] In such circumstances, the court found that the public employer has a need to discover hidden drug or alcohol use, and such interests are sufficiently compelling to justify the intrusion of privacy of the individual employee resulting from conducting the drug test.[414] Accordingly, the court upheld the constitutionality of the drug testing.[415]

B. Statutory Claims

1. Workers' Compensation Retaliation

Kentucky Revised Statute § 342.197(1) prohibits an employer from retaliating against an employee who pursues a claim for workers' compensation. The statute provides that "(1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and

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[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.*

[408] *Id.*

[409] 899 S.W.2d 502 (Ky. Ct. App. 1995).

[410] *See id.* at 504. The suit was against the Commonwealth of Kentucky, Kentucky Department of Education, State Board for Elementary and Secondary Education; Thomas C. Boysen, Commissioner; Board of Education of Jefferson County, Kentucky; Donald W. Ingwerson, and John Wilhoit. *Id.* at 502.

[411] *Id.* at 505.

[412] *Id.* at 508.

[413] *Id.*

[414] *Id.*

[415] *See Cornette*, 899 S.W.2d at 508.

pursuing a lawful claim under this chapter."[416] This provision codifies the holding of *Firestone Textile Co. v. Meadows*,[417] in which the Kentucky Supreme Court, prior to the enactment of § 342.197(1), held that the Kentucky Workers' Compensation statute implied a tort[418] action for retaliation.[419]

A plaintiff, to prove workers' compensation retaliation, must show three things.[420] First, she must show that she engaged in statutorily protected activity.[421] She need not show that she has actually filed a formal claim for workers' compensation;[422] it is sufficient that she intended to file a workers' compensation claim.[423]

Second, the plaintiff must show that she was discharged.[424] While there is no published Kentucky decision on point, it is probable, based on the language of § 342.197(1), that Kentucky courts would recognize a cause of action for a lesser adverse employment action such as a demotion.

Third, the plaintiff must show a causal connection between the protected activity and the adverse employment action. The Kentucky Supreme Court, in *First Property Management Corp. v. Zarebidaki*,[425] held that the proper standard for causation is whether the impermissible reason for the adverse employment action "was a substantial and motivating factor."[426] Thus, an employer may not escape liability merely by showing that the same adverse employment action would have been taken anyway.[427]

The plaintiff can show the requisite causal connection in a variety of ways. For example, in *Willoughby v. Gencorp, Inc.*,[428] the Kentucky Court of Appeals reversed a directed verdict for the employer where the employee had testified that the employer acted with hostility when the plaintiff presented a doctor's statement restricting his work-related activities due to a work-related injury, and the employer had fired the employee a week later.[429] The *Willoughby* Court also held admissible the testimony of two workers who alleged that the employer had harassed them after they had suffered work-related injuries and sought benefits;

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[416] KY. REV. STAT. ANN. § 342.197(1) (Banks-Baldwin 2000).

[417] 666 S.W.2d 730 (Ky. 1983).

[418] *See id.* at 733.

[419] *Id.* at 733-34.

[420] For cases listing the three elements of plaintiff's *prima facie* case, see Lamb v. Bell County Coal Corp., 188 F.3d 508 (table), 1999 WL 717976 (6th Cir. Sept. 9, 1999); Willoughby v. Gencorp, Inc., 809 S.W.2d 858, 861 (Ky. Ct. App. 1990).

[421] *See, e.g., Lamb*, 1999 WL 717976 at *6 (plaintiff must show that "(1) the employee pursued a workers' compensation claim.").

[422] *See* First Property Management Corp. v. Zarebidaki, 867 S.W.2d 185, 189 (Ky. 1993).

[423] *Id.* at 189.

[424] *See Willoughby*, 809 S.W.2d at 861.

[425] 867 S.W.2d 185 (Ky. 1993).

[426] *Id.* at 188.

[427] *See id.*

[428] 809 S.W.2d 858.

[429] *See Willoughby*, 809 S.W.2d at 862.

the Court noted that they were employed in the same plant and under the same management as the plaintiff.[430]

A plaintiff's personal beliefs or conclusions that there was a causal connection between the protected activity and the adverse employment action are insufficient to prove a claim of workers' compensation retaliation.[431] Similarly, if the employer can show that the plaintiff was discharged as a result of a neutral absence control policy, that will not qualify as a causal connection. For example, in *Daniels v. R.E. Michel Co., Inc.*,[432] the Employee Handbook provided that an employee absent from work for more than a month for *any* reason must reapply to return to work.[433] The United States District Court for the Eastern District of Kentucky held that because that policy applied to absences other than absences caused by work-related accidents (such as illness or military service), the policy did not discriminate on the basis of the pursuit of workers' compensation benefits.[434]

Some employers have argued that, when an employee is covered by a collective bargaining agreement, any claim she brings for workers' compensation retaliation is preempted by Section 301 of the Labor Management Relations Act.[435] Kentucky courts, and the federal courts applying Kentucky law, have uniformly rejected this argument.[436] This is consistent with the approach taken in other jurisdictions.[437]

Recent decisions are consistent with the framework discussed above. In *Noel v. Elk Brand Mfg. Co.*,[438] Hilda Noel, a seamstress, was a twenty-year employee of Elk Brand.[439] She developed carpal tunnel syndrome, for which she filed a workers' compensation claim.[440] Approximately thirty days after an evidentiary hearing on her claim, she, along with twenty-nine other employees, was laid off.[441] Twenty of these employees were laid off with the expectation of recall; Noel and nine others were laid off with a lesser expectation of recall.[442]

Noel sued Elk Brand in the Trigg County Circuit Court, alleging, among other things, workers' compensation retaliation. Elk Brand moved for summary

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[430] *Id.*

[431] *See* White v. General Elec. Co., 121 F.3d 710 (table), 1997 WL 437092 at *3 (6th Cir. Sept. 9, 1997); *see also* Lamb v. Bell County Coal Corp., 188 F.3d 508 (table), 1999 WL 717976 at *6 (6th Cir. 1999) (affirming grant of summary judgment on behalf of employer where the uncontradicted summary judgment evidence showed that the employer was motivated by the plaintiff's poor work performance rather than the plaintiff's pursuit of a workers' compensation claim).

[432] 941 F. Supp. 629 (E.D. Ky. 1996).

[433] *See id.* at 631.

[434] *Id.* at 632.

[435] 29 U.S.C. § 186(e).

[436] *White*, 1997 WL 437092 at *2; *Willoughby*, 809 S.W.2d at 860; Bednarek v. United Food & Comm'l Workers Int'l Union, Local Union 227, 780 S.W.2d 630 (Ky. Ct. App. 1989).

[437] *See* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 BOSTON U. L. REV. 687, 712 (1997).

[438] No. 1998-CA-002052-MR, 2000 WL 331769 (Ky. Ct. App. Mar. 31, 2000).

[439] *See id.* at *1.

[440] *Id.*

[441] *Id.*

[442] *Id.*

judgment, arguing that evidence that Noel had the lowest production average of any employee at its plant, and that this was the criterion Elk Brand had used in its layoff decision, demonstrated the lack of a causal connection between Noel's layoff and her pursuit of a workers' compensation claim.[443] The trial court agreed, and granted Elk Brand's motion for summary judgment.[444] The Kentucky Court of Appeals affirmed, finding that "the circuit court correctly determined that the evidence of record, viewed in the light most favorable to Noel, does not support her claim."[445]

In *Pike County Coal Corp. v. Ratliff*,[446] the plaintiff was J.C. Ratliff, the owner of Ratliff Construction.[447] Ratliff had contracted with Pike County Coal to haul coal in Ratliff's trucks.[448] James Smith, one of Ratliff's employees, injured his back while loading coal at one of Pike County Coal mines.[449] Smith filed a workers' compensation claim against a subsidiary of Pike County Coal instead of against Ratliff.[450] Pike County Coal asked Ratliff to get Pike County Coal dismissed from the suit and to substitute Ratliff.[451] Ratliff stonewalled.[452] Meanwhile, Pike County Coal canceled the coal hauling contract, claiming that Ratliff had failed to provide proof that he had purchased workers' compensation coverage and liability coverage on his coal trucks.[453]

Ratliff sued Pike County Coal in the Trigg County Circuit Court, alleging a violation of KRS § 342.197(1). Ratliff claimed that the Pike County Coal's proffered reasons for the cancellation of the hauling contract were pretextual, and that the real reason for the cancellation was his failure to harass Smith and to persuade him to drop his workers' compensation claim.[454] Pike County Coal moved for summary judgment, arguing that the workers' compensation retaliation provision was not intended to protect an employer who was trying to shift the cost of its employee's workplace injury to a general contractor.[455] Ratliff countered that he was protected by the language of § 342.197(3), which provides that "[*a*]*ny individual* injured by any act in violation of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court . . ."[456] The trial court agreed with Ratliff, and denied the summary judgment motion.[457] After trial, a jury awarded Ratliff damages representing lost profits of $46,964, and the

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[443] *See Noel*, 2000 WL 331769, at *1, *3.

[444] *Noel*, 1999 WL 331769, at *1, *3.

[445] *Id.* at *3.

[446] Nos. 1998-CA-002003-MR, 1998-CA-002043-MR, 2000 WL 266699 (Ky. Ct. App. Mar. 10, 2000).

[447] *See id.* at *1.

[448] *Id.*

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *See Ratliff*, 2000 WL 266699, at *1.

[453] *Id.*

[454] *Id.* at *2.

[455] *Id.* at *3.

[456] KRS § 342.197(3) (emphasis added).

[457] *Ratliff*, 2000 WL 266699 at *3.

trial court awarded Ratliff's attorneys a fee of $32,745.[458] Pike County Coal appealed.

The Kentucky Court of Appeals reversed, and remanded for dismissal of the complaint.[459] The court agreed with the trial court that the "any individual" language of § 342.197(3) extended § 342.197(1) protection beyond an injured employee:

> We can envision many situations in which an individual other than the injured employee, such as a co-worker, might be subjected to retaliation by the employer in an effort to impede the injured worker's pursuit of a workers' compensation claim. Clearly, to insure the integrity of the underlying policies of the statute, we would not hesitate to construe the "any individual" language to encompass any person who sought to protect his own rights to pursue a workers' compensation claim as well as any person who acted in support of another's pursuit of those rights and who suffered reprisals from the employer of the injured employee.[460]

However, the court held that the language of § 342.197(3) does not provide a cause of action to an employer "against a business with whom it has contracted, but which has no responsibility for the payment of workers' compensation benefits."[461]

Because of the unique facts of *Ratliff*, the formal holding of the case probably is less significant than the discussion of the "any individual" language of § 342.197(3). *Ratliff* is the first case in which a Kentucky court has indicated that § 342.197(1) protection extends beyond an injured employee to persons who act on behalf on an injured employee. Though this language is *dicta*, it nonetheless represents a significant extension of the protection afforded by § 342.197(1).

2. Kentucky Whistle-Blower Statute

Kentucky Revised Statute (KRS) § 61.102(1) prohibits any reprisal by an employer against an employee who in good faith discloses to a governmental entity "any facts or information relative to an actual or suspected violation of any law."[462] Section 61.102(2) prohibits any reprisal by an employer against an employee who supports another employee who makes a § 61.102(1) disclosure.[463] Section 61.103(2) provides that an employee alleging a violation of § 61.102(1) or (2) may bring a civil action for injunctive relief or punitive damages or both.[464]

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[458] *Id.* at *2.

[459] *Id.* at *4.

[460] *Id.* at *3.

[461] *Id.* at *3.

[462] *See* KY. REV. STAT. ANN. § 61.102(1) (Banks-Baldwin 2000). The Kentucky Supreme Court has held that this statute does not protect from discharge an employee who sues her employer for negligence. Boykins v. Housing Auth. of Louisville, 842 S.W.2d 527, 529 (Ky. 1992).

[463] *See* KY. REV. STAT. ANN. § 61.102(2) (Banks-Baldwin 2000).

[464] *See* KY. REV. STAT. ANN. § 61.103(2) (Banks-Baldwin 2000); *see also* KRS § 61.990(4) (stating that the Court "shall order, as it considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, exemplary or punitive

Commonwealth v. Vinson[465] contains the Kentucky Supreme Court's most recent discussion of the Kentucky whistle-blower statute. This case involved two employees of the Kentucky Department of Agriculture who were demoted, without loss of pay or benefits, from pesticide inspector supervisors to pesticide inspectors.[466] They sued the Department of Agriculture under the whistle-blower statute for an injunction requiring appointment to their previous positions and for punitive damages.[467] The Franklin Circuit Court, apparently unsure whether the statute required a jury trial, impaneled an "advisory" jury.[468] The trial judge adopted the jury verdict for the employees and awarded injunctive relief and $1 million in punitive damages.[469] The Department of Agriculture appealed to the Court of Appeals, which affirmed.[470]

The Department of Agriculture on appeal to the Kentucky Supreme Court, urged reversal on four grounds. First, the Department argued that the whistle-blower statute was unconstitutionally vague.[471] The Court, in an opinion authored by Justice Donald C. Wintersheimer, rejected this argument, finding that the statute "does not fail to provide persons with adequate notice as to what conduct is prohibited, nor does it require a person of common intelligence to guess as to its meaning."[472]

Second, the Department argued that the employees were not entitled to punitive damages absent an award of compensatory damages.[473] The Court disagreed, holding that the disjunctive language of the statute indicated the General Assembly's intent that an award of compensatory damages not be a prerequisite for an award of punitive damages.[474] The Court also held that the award of equitable relief would support the award of punitive damages.[475]

Third, the Department of Agriculture argued that the employees were not entitled to a jury trial, and that the trial court erred by impaneling a jury.[476] The Court, noting statutory silence regarding the right to a jury trial under the whistle-blower statute, held that plaintiffs suing under the statute are entitled to a jury trial.[477] The Court also held that the trial court's use of an advisory jury had created only "harmless and nonprejudicial" error since the court for all practical purposes had treated the case like a regular jury trial.[478]

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damages, or any combination thereof.").

[465] 30 S.W.3d 162 (Ky. 2000).

[466] *See id.* at 163-64.

[467] *Id.* at 164. The court's opinion does not explain the factual basis of their complaint under the statute.

[468] *Id.*

[469] *Id.* at 163-64.

[470] *Id.* at 164.

[471] *See Vinson*, 30 S.W.3d at 164-65.

[472] *Id.* at 164.

[473] *Id.* at 165-67.

[474] *Id.* at 165.

[475] *Id.* at 166.

[476] *Id.* at 167-68.

[477] *See Vinson*, 30 S.W.3d at 167-68.

[478] *Id.* at 167.

Fourth, the Department argued that the trial court improperly had determined liability using the amended version of the whistle-blower statute, rather than using the original version of the statute which was in effect at the time the employees were demoted.[479] The Court agreed. The 1993 amendments to the statute were very favorable to employees. Under the original version, an employee had to prove that the report or threat to report a suspected violation of the law was a "direct cause" of the employer's reprisal, and this had to be proven by clear and convincing evidence.[480] The 1993 amendments, however, reduced the evidence required to show causation; now, the employee need only prove that the report or threat to report was a "contributing factor" in the reprisal, and this must be shown by a preponderance of the evidence.[481] Thus, the amendments shifted to the employer "an affirmative burden of proving by clear and convincing evidence that the report was not a material factor in the personnel action."[482]

The Court held that the 1993 amendments imposed a change in substantive law, and "provide[d] for new legal consequences as a result of certain types of employer conduct which did not have any legal significance prior to amendment . . . ."[483] The Court held that the amendments should not be imposed on the Department of Agriculture retroactively.[484] On this basis, the Court reversed the judgment and remanded the case for a new trial under the original version of the statute.[485]

3. Kentucky Civil Rights Act

The Kentucky Civil Rights Act[486] (KCRA) is the state analog of Title VII of the Civil Rights Act of 1964.[487] Like Title VII, the KCRA prohibits discrimination on the basis of race, sex, and other similar criteria. The administrative provisions of the two statutes, however, are very different. Under Title VII, an aggrieved individual must, as a prerequisite to filing suit, exhaust her administrative remedies by filing and pursuing a charge of discrimination with either the federal Equal Employment Opportunity Commission[488] (EEOC) or the equivalent state or local human rights agency.[489] Under the KCRA, however, an aggrieved individual may *either* file an administrative charge *or* file a civil action in circuit court.[490] If an aggrieved individual chooses the former, then she

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[479] *Id.* at 168-170.

[480] *Id.* at 169.

[481] *Id.*

[482] *Vinson*, 30 S.W.3d at 169.

[483] *Id.*

[484] *See id.* at 170.

[485] *Id.*

[486] Embodied in Chapter 344 of the Kentucky Revised Statutes.

[487] 42 U.S.C. § 2000e-4.

[488] For a general discussion of the EEOC, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 3-9 (1999).

[489] *See* U.S.C.§ 2000e-5.

[490] *See* KRS §§ 344.200-.270, 344.450 (Banks-Baldwin 2000).

cannot simultaneously pursue the latter. Until recently, however, it was relatively common for an individual to file an administrative charge, withdraw that charge prior to the agency's final determination, and then file a civil suit in circuit court.

From the employee's perspective, there are several advantages to turning to the Kentucky Commission on Human Rights (KCHR) before turning to the courts. The KCHR will investigate the charge of discrimination, and often will engage in formal discovery. If the KCHR finds reason to believe that discrimination occurred, it will represent the employee in administrative proceedings designed to provide redress. Perhaps most importantly, there is the possibility that the KCHR will help the employee and employer settle the case short of adversarial litigation.

Consistent with this approach of encouraging initial recourse to the KCHR, the Kentucky Court of Appeals, in the 1984 decision of *Canamore v. Tube Turns Division of Chemetron Corp.*,[491] held that the filing of a charge with the EEOC, and the EEOC's subsequent referral of the charge to the KCHR, did not preclude an aggrieved individual from filing a subsequent civil suit, so long as neither agency had reached a final determination on the merits of the charge.[492] James Canamore filed a charge of race discrimination with the EEOC.[493] The EEOC referred the charge to the KCHR, which took no action on the charge.[494] The EEOC, without conducting a formal investigation or making a formal finding, issued Canamore a right-to-sue letter[495] which gave him, under Title VII, the right to file suit:[496]

Canamore sued his former employer, Tube Turns, in Jefferson Circuit Court.[497] Tube Turns filed a motion to dismiss, arguing that once Canamore had filed an administrative charge and that charge had been referred to the KCHR, Canamore was prohibited from filing a civil action based on the same factual allegations.[498] Tube Turns' argument was based on KRS § 344.270, which at the time provided that "[a] final determination of a claim alleging an unlawful practice under [the KCRA] shall exclude any other action or proceeding brought by the same person based on the same grievance."[499]

The Circuit Court agreed and dismissed the case.[500] Canamore appealed. The Court of Appeals agreed with Tube Turns that if the EEOC or KCHR had made a final determination on Canamore's discrimination charge, then Canamore would be prohibited by KRS § 344.270 from filing a subsequent civil suit on the

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[491] 676 S.W.2d 800 (Ky. Ct. App. 1984).

[492] *See id.* at 804.

[493] *Id.* at 802.

[494] *Id.*

[495] *Id.*

[496] *See* 42 U.S.C. § 2000e-5(f)(1).

[497] *See Canamore*, 676 S.W.2d at 802.

[498] *Id.* at 803.

[499] KY. REV. STAT. ANN. § 344.270 (Banks-Baldwin 1984).

[500] *See Canamore*, 676 S.W.2d at 802-03.

same facts.[501] However, the Court held that neither the EEOC's issuance of a right-to-sue letter, nor the KCHR's apparent inaction on the case, constituted a "final determination" sufficient to trigger KRS § 344.270.[502] Therefore, the Court held, Canamore could proceed with his civil suit. "[T]o hold otherwise," explained the Court, "might well deny Canamore his only opportunity for a hearing on the merits of his charge."[503]

The *Canamore* holding, then, is that when an aggrieved individual files a charge with an administrative agency and that agency does not make a final determination on the merits of the charge, the plaintiff may subsequently file a civil suit based on the same underlying facts. In *dicta*, however, the Court seemed to go a step farther, stating:

> To permit a claimant to have the benefit of a separate civil action based on identical facts after he or she *has instituted* administrative action under KRS 344.200 followed by judicial review pursuant to KRS 344.240 would, in fact, be tantamount to giving one claimant two bites of the apple.[504]

The "has instituted" language could be interpreted as an indication that once a plaintiff has filed an administrative charge, she cannot withdraw it in favor of a civil suit, but instead must wait until the agency relinquishes its authority over the charge; at that point, she would be permitted to sue if and only if the agency had not made a "final determination" on the merits.

The difference between the holding and the *dicta* is the point in time at which the choice of an administrative remedy precludes a subsequent civil suit. The holding of *Canamore* and the statutory language of § 344.270 indicate that this does not occur until the agency has made a final determination, meaning that an individual could file an administrative charge and later withdraw it in favor of a civil suit. The "has instituted" *dicta*, however, implies that the choice of an administrative remedy becomes irrevocable as soon as a valid charge is filed with the KCHR.

Less than two years after *Canamore*, the Kentucky Supreme Court decided *Clifton v. Midway College*.[505] *Clifton* is virtually identical to *Canamore* in its posture, holding, and *dicta*. Elizabeth Clifton filed a charge with the EEOC alleging that Midway College had discriminated against her on the basis of sex.[506] The EEOC referred the charge to the KCHR, which took no action other than referring the charge back to the EEOC.[507] The EEOC issued a right-to-sue letter, after which Clifton filed suit in Woodford Circuit Court.[508] Midway College moved for summary judgment, arguing that the EEOC's right-to-sue letter constituted a final determination under KRS § 344.270.[509] The Circuit Court

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[501] *Id.* at 803-04.

[502] *Id.* at 804.

[503] *Id.*

[504] *Id.* at 803-04 (emphasis added).

[505] 702 S.W.2d 835 (Ky. 1986).

[506] *See id.* at 836.

[507] *Id.*

[508] *Id.*

[509] *Id.*

granted the summary judgment motion, the Court of Appeals affirmed, and the Kentucky Supreme Court granted review.[510]

The Kentucky Supreme Court, citing *Canamore*, held that "an individual who has charges of discrimination referred by the federal agency to the state agency, but *without an order* issued by the Kentucky agency, is not precluded" from filing a subsequent civil suit.[511] The "without an order" language seemed to underscore that, consistent with the language of § 344.270, an agency charge would only bar a subsequent civil suit once the agency had made a final determination on the merits of the charge. However, as in *Canamore*, the *Clifton* Court went farther afield in *dicta*:

> The argument that Clifton was barred by her decision to elect certain remedies is without merit. The charge of discrimination filed with the federal agency was completed on a standard form . . . . The form included a typed addition of Kentucky Commission on Human Rights near the top. *The signature of Elizabeth Clifton on the charge of discrimination form filed with the federal agency which was subsequently deferred to the Kentucky bureau did not transform that document into [a] written, sworn complaint before the Kentucky Commission on Human Rights . . . .*[512]

This temporal focus of this "sworn complaint" language is very different from the "final determination" language of § 344.270 and the "without an order" language the *Clifton* Court had used in a preceding paragraph. This *dicta*, like the *dicta* in *Canamore*, could be interpreted to mean that a civil suit is barred from the moment a valid complaint is filed with the KCHR, as opposed to being barred only upon the KCHR's final determination of the merits of the charge.

Vaezkoroni v. Domino's Pizza, Inc.,[513] is a third case containing an unexceptional holding but very troubling *dicta*. In this 1995 Kentucky Supreme Court case, Ahmad Vaezkoroni filed three charges of national origin discrimination and retaliation with the Lexington-Fayette Urban County Human Rights Commission (Fayette County Commission).[514] The Fayette County Commission investigated the charges and dismissed each with a finding of "no probable cause."[515] Vaezkoroni filed suit in Fayette Circuit Court, alleging facts identical to those in his charges.[516] Domino's Pizza, Vaezkoroni's prior employer, moved for summary judgment, arguing that the "no probable cause" determination constituted a final decision on the merits and therefore barred a subsequent suit.[517] The circuit court agreed and dismissed the suit; the Court of Appeals affirmed.[518]

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[510] *Id.*

[511] *Clifton*, 702 S.W.2d at 837 (emphasis added).

[512] *Id.* at 837 (emphasis added).

[513] 914 S.W.2d 341 (Ky. 1995).

[514] *See id.* at 341.

[515] *Id.*

[516] *Id.* at 342.

[517] *Id.*

[518] *Id.*

The issue before the Kentucky Supreme Court was whether the Fayette County Commission was the legal equivalent of the KCHR. Vaezkoroni apparently argued that it was not, and that the language of KRS § 344.270, providing that "final determination" of a claim by the KCHR would preclude a subsequent civil suit, would not apply to actions taken by the Fayette County Commission.[519] The Supreme Court disagreed, holding that local commissions and the KCHR "must be treated as one and the same."[520] In *dicta*, however, the Court stated:

> [W]e hold that 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*, the complainant must follow that avenue through to its final conclusion.[521]

Like the *dicta* in *Canamore* and *Clifton*, this *dicta* implied that a choice between administrative and civil relief is irrevocably made at the time a valid administrative charge is filed, instead of only upon the KCHR's final determination of the merits of the charge.

After *Vaezkoroni*, many defense attorneys began filing motions to dismiss in cases where a litigant had filed a claim with a state or local agency, even though a final determination had not been reached by the agency. As a result of the confusion, the Kentucky Legislature amended KRS § 344.270 in 1996. The provision now reads:

> 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.[522]

Similarly, the administrative regulations governing administrative proceedings of the KCHR permits the withdrawal of an administrative charge without prejudice:

> Withdrawal of complaint. A complainant may withdraw the complaint, or any part of the complaint, without prejudice if the complainant: (a) Files a written request stating the reasons for withdrawal; and (b) Written consent is obtained from the: (1) Executive director, if the request is made before the issuance of a notice of hearing; or (2) Chairperson of the commission or presiding officer, if the request is made after the issuance of a notice of hearing.[523]

Moreover, a former Compliance Director and Staff Attorney for the Kentucky Commission on Human Rights has rejected the idea that *Vaezkoroni* stands for the proposition that filing with a state or local agency constitutes an

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[519] *See Vaezkoroni*, 914 S.W.2d at 342-43.

[520] *Id.* at 342.

[521] *Id.* at 343 (emphasis added).

[522] KY. REV. STAT. ANN. § 344.270 (Banks-Baldwin 2000)(emphasis added).

[523] 104 KAR 1:020 § 2(6) (L.R.C. 1999). On a somewhat related issue, see Kiah Creek Mining v. Stewart, 2000 WL 1166315 (Ky. Ct. App. Aug. 18, 2000) (discussing the inherent powers of an agency acting in a quasi-judicial capacity).

election of remedies. After quoting the "alternative avenues of relief" paragraph quoted above, he stated:

> A literal reading of this language would suggest that once a complaint is filed, it would be impossible for a plaintiff to bring a lawsuit in Circuit Court. However, Courts who have been asked to embrace this conclusion have been unwilling to find such a bar in this language. Instead, Courts who have considered this procedural argument have been unwilling to place this bar in front of a lawsuit in situations where the case has not been adjudicated on the merits or an Order of Dismissal entered. Additionally, the legislature in 1996 amended Section 270 to clarify the point at which the election would bar further action in an alternate forum. The pertinent language now reads, "A final determination by state court or a final order of the Commission . . . shall exclude any other administrative action or proceeding . . . by the same person based on the same grievance." This modification and the Commission's regulations which set for[th] a procedure for withdraw prior to a final ruling on the complaint, provide a prospective plaintiff the opportunity to disengage the state's administrative machinery and proceed to court under KRS 344.450. However, the complaint must be written before a "final order of the Commission is issued."[524]

Nonetheless, in *Founder v. Cabinet for Human Resources*,[525] the Kentucky Court of Appeals held that an aggrieved individual who had filed a claim with the KCHR, but then had withdrawn it before final determination, was barred from seeking a judicial remedy. Howard Founder filed race discrimination charges with the EEOC and the KCHR.[526] The EEOC issued a right-to-sue letter, and Founder withdrew the KCHR charge before the agency had reached a final determination.[527] He then filed suit in Franklin Circuit Court.[528] His employer moved for summary judgment based on election of remedies. The court granted the motion and Founder appealed.[529]

The Kentucky Court of Appeals affirmed. Quoting the "alternative avenues of relief" *dicta* from *Vaezkoroni*, the *Founder* Court stated:

> Founder argues that the case at hand is different from *Vaezkoroni* by the fact that he abandoned his claim before the Commission by withdrawing it before the Commission had made a ruling thereon. 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

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[524] Thomas Ebendorf, Federal and State Discrimination Claims: Successfully Navigating the Administrative Process 7 (Feb. 26, 1999) (paper delivered at Kentucky Academy of Trial Attorneys seminar).

[525] 23 S.W.3d 221 (1999).

[526] *See id.* at 222.

[527] *Id.*

[528] *Id.*

[529] *Id.*

violation(s) is barred.[530]

Similarly, the *Founder* Court, after quoting the "written sworn complaint" *dicta* of *Clifton*, stated:

> Although there was some additional language in *Clifton* suggesting that whether a separate civil action is barred is dependant upon whether there has been a final determination by the Commission, the Court's ruling was clearly based on the fact that no sworn complaint had been filed with the Commission.[531]

Thus, *Founder* stands for the proposition that once an aggrieved individual has filed an administrative charge with the KCHR, she is forever barred from seeking judicial relief for the same claim, even if she withdraws her charge before the KCHR has taken any action.

Founder creates three problems. First, it is contrary to the plain language of KRS § 344.270. *Founder* also is inconsistent with the holdings, though not the *dicta*, of prior Kentucky Supreme Court and Court of Appeals decisions.

Second, *Founder* frustrates the legislature's intent in creating an administrative apparatus for resolving employment discrimination claims. Since the KCHR was modeled on the EEOC, it can reasonably be assumed that the Kentucky Legislature's intent in creating the KCHR was similar to Congress' intent in creating the EEOC. With regard to the latter, the legislative history makes very clear that the intention of creating an administrative agency to oversee employment discrimination complaints was the hope that the agency could resolve complaints "through conciliation and persuasion."[532] However, there was no expectation that all allegations of discrimination would be settled this way, so the statute permitted aggrieved individuals to sue the employer on their own behalf.[533]

This goal of settling cases administratively is frustrated by the *Founder* holding. Prior to *Founder*, an aggrieved individual had every reason to file with the KCHR, because the KCHR might conciliate the case to the benefit all parties. Certainly, prior to *Founder*, there was no *disadvantage* to filing a KCHR charge, because the aggrieved individual could always withdraw the charge and file her case in circuit court. After *Founder*, however, a well-informed aggrieved individual who wants to retain the right to pursue her claim in court will never file a charge with the KCHR, since this will forever bar a circuit court action. Instead, she will proceed perhaps to the EEOC, but more likely directly to circuit court. The practical effect of the *Founder* holding will be, in many if not most cases, to cut the KCHR out of the process; to deprive the KCHR of its statutory responsibility to attempt to mediate and conciliate employment discrimination charges. Many plaintiff's attorneys already are counseling their clients not to file charges with the KCHR; the KCHR itself warns prospective claimants that once

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[530] *Id.* at 223.

[531] *Founder*, 23 S.W.3d at 224.

[532] *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3284 (1968) (statement of Rep. Cellar); *see also* Wheeldon v. Monon Corp., 946 F.2d 533, 535-56 (7th Cir. 1991).

[533] Bales, *supra* note 488, at 6.

a "complaint is filed with the Commission, a subsequent action in a Kentucky Circuit Court based upon the same civil rights violation(s) may be barred."[534]

The third problem with *Founder* is that it applies retroactively. In *Founder*, the Court of Appeals held that:

> *Clifton* foreshadowed the ruling in *Vaezkoroni* and should at least have put Founder on notice that it was possible that the filing of the complaint with the Commission would bar a separate action in circuit court. Thus, it was not error for the court to retroactively apply *Vaezkoroni*.[535]

The effect is to leave Howard Founder, and every other potential claimant who had filed an administrative charge but later had withdrawn it in favor of a circuit court suit, with no remedy at all. Because the statute of limitations on KCRA civil actions is five years, the retroactive application of *Founder* probably affects hundreds of people. In other words, hundreds of possible discrimination victims, who reasonably relied on the holdings of *Canamore*, *Clifton*, and *Vaezkoroni*, are left without a remedy because the *dicta* of these opinions put them on notice of what was to come in *Founder*.

III. TRADE SECRETS, NONCOMPETE AGREEMENTS, AND THE EMPLOYEE'S DUTY OF LOYALTY

A. Trade Secrets[536]

Kentucky has adopted, with minor modifications, the Uniform Trade Secrets Act.[537] The Kentucky version begins at KRS § 356.880[538] A trade secret consists of economically valuable information that is not readily available to the public or to competitors.[539] Although Kentucky courts have not considered the scope of a trade secret under the statute, decisions from other states have defined trade secrets to include customer lists, software systems, and pricing information.[540]

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[534] The KCHR's "*Founder Notice*" provides:

> The Kentucky Civil Rights Act allows a victim of discrimination to file a complaint of discrimination with either the Kentucky Commission on Human Rights or a Kentucky Circuit Court. Please be advised that once the enclosed complaint is filed with the Commission, a subsequent action in a Kentucky Circuit Court based upon the same civil rights violation(s) may be barred. *Founder v. Cabinet for Human Resources, et al.*, Ky. App., 23 S.W.3d 221 (1999).
>
> Should you have any questions regarding your ability to pursue a complaint in a Kentucky Circuit Court we urge you to consult with an attorney before returning your complaint to the Commission for filing.

[535] *Founder*, 23 S.W.3d at 224.

[536] *See generally* Denise H. McClelland & John L. Forgy, *Is Kentucky Law "Pro-Business" in its Protection of Trade Secrets, Confidential and Proprietary Information? A Practical Guide for Kentucky Businesses and Their Lawyers*, 24 N. KY. L. REV. 229, 230-33 (1997).

[537] Unif. Trade Secrets Act, 14 U.L.A. 433 (1990).

[538] KY. REV. STAT. ANN. § 365.880-.990 (Banks-Baldwin 2000).

[539] *See id.* at § 365.880(4).

[540] *See* McClelland & Forgy, *supra* note 536, at 231, and cases cited therein.

The Trade Secrets Act prohibits the misappropriation of a trade secret.[541] Misappropriation refers to the acquisition, disclosure, or use of a trade secret through "improper means."[542] Improper means includes "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage . . . ."[543] A misappropriation also occurs when a person uses or discloses a trade secret and that person knew or should have known that the trade secret had been obtained by improper means.[544] Reverse engineering is not prohibited so long as the product was acquired by "fair and honest means."[545]

B. Noncompete Agreements[546]

Kentucky courts are relatively deferential toward noncompete agreements.[547] These agreements will be enforced so long as the restrictions imposed by the agreements are reasonable both temporally and geographically.[548] The reasonableness of the time restriction depends in part on the employee's length of tenure;[549] courts have consistently upheld restrictions of one to two years.[550] The reasonableness of the geographic restrictions depends on the geographic reach of the employer's business,[551] the nature of the employer's business,[552] and whether the geographical area is rural or urban.[553] If the court finds a restriction unreasonable, the court may reform the noncompete agreement before ordering enforcement. For example, in *Hammons v. Big Sandy Claims Service*,[554] the

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[541] KY. REV. STAT. ANN. § 365.880 (Banks-Baldwin 2000).

[542] *Id.* at § 365.880(2).

[543] *Id.* at § 365.880(1).

[544] *Id.* at § 365.880(2)(b).

[545] Unif. Trade Secrets Act § 1 cmt., 14 U.L.A. 437 (1990).

[546] *See generally* McClelland & Forgy, *supra* note 536, at 233-37.

[547] *See* Central Adjustment Bureau, Inc. v. Ingram Assoc., 622 S.W.2d 681, 685-86 (Ky. Ct. App. 1981) (noting that the only protection for highly specialized businesses against employees resigning and taking their clients away are noncompete clauses); Lareau v. O'Nan, 355 S.W.2d 679, 681 (Ky. 1962) ("[T]he policy of this state is to enforce [noncompete clauses] unless very serious inequities would result."); Borg-Warner Protective Services, Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 501 (E.D. Ky. 1996) (noting that "the more modern cases, including those in Kentucky, place more emphasis on the employer's investment in the employee and have evolved an approach balancing the importance of that factor against the hardship to the employee and the public interest").

[548] *See, e.g.*, Hall v. Willard & Woolsey, P.S.C., 471 S.W.2d 316 (Ky. 1971).

[549] *Id.* at 317-18.

[550] *See, e.g.*, Higdon Food Serv., Inc. v. Walker, 641 S.W.2d 750 (Ky. 1982 (one year); Louisville Cycle & Supply Co., Inc. v. Baach, 535 S.W.2d 230 (Ky. 1976) (eighteen months); Central Adjustment Bureau, Inc. v. Ingram Assocs., Inc., 622 S.W.2d 681 (Ky. Ct. App. 1981) (two years); Hammons v. Big Sandy Claims Serv., Inc., 567 S.W.2d 313 (Ky. Ct. App. 1978) (one year). *See also* Hodges v. Todd, 698 S.W.2d 317 (Ky. Ct. App. 1985) (enforcing a five-year restriction related to the sale of a business).

[551] *See, e.g.*, Hodges v. Todd, 698 S.W.2d 317 (Ky. Ct. App. 1985).

[552] *Hammons*, 567 S.W.2d at 315 ("An insurance adjusting office must depend on a large surrounding area in which to sustain itself in business.").

[553] *See, e.g.*, Karpinski v. Ingrasci, 268 N.E.2d 751 (N.Y. 1971) (while in some instances a restriction to one county may be unreasonable, a restriction to five small rural counties was reasonable).

[554] 567 S.W.2d 313, 315 (Ky. Ct. App. 1985).

original agreement restricted the employee from competing "within a radius of 200 miles of any territory being serviced by the Employer at the time of Employee's termination . . . ."[555] The trial court reformed the agreement by issuing an injunction prohibiting competition within a 200 mile radius of the office at which the employee had worked.[556]

A noncompete agreement must be supported by consideration.[557] In Kentucky, however, the employer has a relatively light burden of showing such consideration. For a new employee, the employer's offer of employment is sufficient consideration.[558] For existing employees, continued employment is sufficient consideration.[559]

Historically, Kentucky courts have been more inclined to enforce noncompete agreements against highly trained or professional employees.[560] This is because these employees are likely to have a better opportunity to find alternative employment, because the employer is likely to have invested heavily in these employees and disclosed trade secrets to these employees, and because these employees have more bargaining power and therefore are in a better position to negotiate reasonable noncompete clauses. However, as Judge William Bertelsman has noted, this tendency has changed. After a scholarly review of both Kentucky cases and the academic literature, Judge Bertelsman noted that today, noncompete agreements are equally likely to be enforced against lower-level employees.[561] This is particularly true when a policy argument can be made for enforcement of such an agreement, such as when the client of a personnel placement company attempts to "poach" employees that the placement company has hired, trained, and placed at the client's business.[562]

The most recent case construing Kentucky noncompete law is the Sixth Circuit decision of *Managed Health Care Associates, Inc. v. Kethan*.[563] In that case, Ronald Kethan was employed by MedEcon as a salesperson.[564] When he began his employment, he signed a two-year agreement that he would not "engage in any of the kinds of business activities in which [MedEcon] . . . is now

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[555] *Id.* at 314.

[556] *See id.* at 314-15; *see also Hodges*, 698 S.W.2d 317 (reforming agreement that was silent regarding the geographic restriction).

[557] *See, e.g., Louisville Cycle*, 535 S.W.2d at 234.

[558] *See* Stiles v. Reda, 228 S.W.2d 455, 456 (Ky. 1950); *see also Louisville Cycle*, 535 S.W.2d at 234 (an employment contract for a term of years constitutes adequate consideration to support a noncompete clause in that contract).

[559] *See Ingram*, 622 S.W.2d 681; *see also Higdon*, 641 S.W.2d at 751 (the "rehiring" of an employee under a contract that imposed a good-faith limitation on the employer's ability to fire the employee constitutes adequate consideration to support a noncompete clause in that contract).

[560] *See* Lareau v. O'Nan, 355 S.W.2d 679, 680 (Ky. 1962); McClelland & Forgy, *supra* note 534, at 234-35.

[561] *See* Borg-Warner Protective Servs., Corp. v. Guardsmark, Inc., 946 F. Supp. 495, 502 (E.D. Ky.1996).

[562] Judge Bertelsman calls this "disintermediation," by which he means "to cut out the middleman." *Id.*

[563] 209 F.3d 923 (6th Cir. 2000).

[564] *Id.* at 926.

engaged" within certain specified states.[565] While employed by MedEcon, Kethan worked extensively on the account of First Choice, which was one of MedEcon's clients.[566]

MedEcon was purchased by MHA.[567] Shortly thereafter, Kethan resigned and went to work for First Choice, which in the interim had ceased doing business with MedEcon.[568] MHA brought suit to enforce Kethan's noncompete agreement with MedEcon.[569] The district court concluded that noncompete agreements were not assignable under Kentucky law, and that therefore MHA could not enforce Kethan's agreement with MedEcon.[570] The court also found that the assignment was a modification of the agreement.[571] Since the agreement specified that any modifications must be in writing, and no such writing existed, the court held that Kethan was no longer bound by the agreement.[572]

The Sixth Circuit reversed. On the assignability issue, the court noted that the only Kentucky authority on point was the unpublished decisions of the Jefferson County Circuit Court and the Kentucky Court of Appeals in a case that was moot by the time it reached the Kentucky Supreme Court.[573] Both of the lower court decisions had held that noncompete agreements were assignable.[574] Based on these decisions, on similar holdings by courts in other jurisdictions, and on Kentucky courts' general reverence for noncompete agreements, the Sixth Circuit concluded that noncompete agreements are assignable under Kentucky law.[575]

On the modification issue, the Sixth Circuit again noted the lack of Kentucky authority on point.[576] Adopting the reasoning of a Second Circuit case,[577] the court concluded that the terms of Kethan's employment were not modified by the assignment of his contract to MHA, and that the lack of a writing did not preclude enforcement of the noncompete clause.[578]

C. Common Law Duty of Loyalty[579]

Kentucky employees have a common law duty to act in the best interests of their employer. In the 1926 case of *Hodge v. Kentucky River Coal Co.*,[580] the Kentucky Supreme Court stated:

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[565] *Id.*

[566] *Id.*

[567] *Id.*

[568] *Id.*

[569] *See Kethan*, 209 F.3d at 926.

[570] *Id.* at 927.

[571] *Id.*

[572] *Id.*

[573] *Id.* at 928-29 (citing Choate v. Koorsen Protective Servs., Inc., 929 S.W.2d 184 (Ky. 1996)).

[574] *Kethan*, 209 F.3d at 928-29.

[575] *Id.* at 928-930.

[576] *Id.* at 927.

[577] *Id.* at 927, *citing* Citibank, N.A. v. Tele/Resources, Inc., 724 F.2d 266, 268-69 (2d Cir. 1983).

[578] *Kethan*, 209 F.3d at 927-28.

[579] *See generally* McClelland & Forgy, *supra* note 536, at 237-40.

> [E]veryone-whether designated agent, trustee, servant or what not-who is under contract or other legal obligation to represent or act for another in any particular business or for any valuable purpose must be loyal and faithful to the interest of such other in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it . . . . He may not use any information that he may have acquired by reason of his employment either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest.[581]

Kentucky courts have held that this duty of loyalty precludes an employee from acquiring for himself property that her employer had contracted to acquire,[582] from soliciting business for her own company while still working for an employer in the same line of business,[583] and copying his employer's forms and documents for use by the competing company she is in the process of establishing.[584]

In most states, the rule is that an employee may *prepare* to compete with her employer prior to resigning (by, for example, telling customers and employees that he plans to establish a competing company), but may not actively compete with her employer (by, for example, soliciting her employer's customers or employees or submitting a competing bid).[585] Kentucky law seems to go even farther, requiring an employee to resign her employment before beginning preparations to compete with her employer.[586] However, it should be noted that the cases described above all involved high-level employees who had a fiduciary obligation to their employers; it is unclear under Kentucky law whether and to what extent the duty of loyalty extends to lower-level employees.[587]

IV. CONCLUSION

Though the employment at will doctrine provides Kentucky employers with some flexibility and protection in terms of the hiring and firing of employees, recent Kentucky decisions suggest a definite willingness of the courts to recognize a plaintiff's statutory and common law claims. Plaintiffs have many more avenues to pursue in order to seek redress from an employer today than employees had even ten years ago. To avoid liability, employers must be certain that managers and supervisors understand any potential legal ramifications of

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[580] 287 S.W. 226 (Ky. 1926).

[581] *Id.* at 227.

[582] *Id.* at 226.

[583] Stewart v. Kentucky Paving Co. Inc., 557 S.W.2d 435 (Ky. Ct. App. 1977).

[584] *See* Aero Drapery of Kentucky, Inc. v. Engdahl, 507 S.W.2d 166 (Ky. 1974); Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476 (Ky. 1991); *see also* DSG Corp. v. Anderson, 754 F.2d 678 (6th Cir. 1985) (employees violated Kentucky duty of loyalty when they used confidential information obtained through their employment to prepare a competing bid and establish a competing business while still employed).

[585] *See, e.g.*, Jet Courier Serv., Inc., v. Mulei, 771 P.2d 486 (Col. 1989); Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978); Bancroft-Whitney Co. v. Glen, 411 P.2d 921, 935 (Cal. 1966).

[586] *See, e.g, Aero Drapery*, 557 S.W.2d at 169; Covington & Lexington L.R. Co. v. Bowler's Heirs, 72 Ky. 468, 489 (1872).

[587] *See* McClelland & Forgy, *supra* note 536, at 239.

their act, including employer liability which might result from common law claims, statutory claims, and noncompete agreements.