

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002744-MR

COMMONWEALTH OF KENTUCKY,  
COMMISSION ON HUMAN RIGHTS  
ON BEHALF OF SANDI GANN

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 03-CI-01196

SIEMENS ELECTROMECHANICAL/TYCO  
ELECTRONICS

APPELLEE

### OPINION

### VACATING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR  
JUDGE.<sup>1</sup>

BARBER, JUDGE: Appellant, Commonwealth of Kentucky, Commission  
on Human Rights (the Commission) and Sandi Gann (Gann), appeal  
an order from Franklin Circuit Court that found Gann could not

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

add allegations pertaining to her termination to a previous administrative complaint filed and set for hearing because of principles of *res judicata*. The circuit court was without jurisdiction to enter such an order since Appellee, Siemens Electromechanical/Tyco Electronics (Tyco), failed to exhaust its administrative remedies. Thus, we vacate the circuit court's order and remand with directions to dismiss.

On February 4, 1999 Gann filed a complaint with the Kentucky Commission on Human Rights alleging that she was subjected to continuous discrimination in her employment with Siemens Electromechanical (the predecessor to Tyco) because she was denied training that was offered to similarly situated male employees. The Commission found probable cause to believe that discrimination had occurred.

Gann later filed a second complaint on March 2, 2000 claiming that she had been discriminated against by her employer in its termination of her position on January 14, 2000 and because of the previous, still pending, complaint. The Commission found a lack of probable cause and ordered the second complaint dismissed. Gann asked the Commission to reconsider its dismissal and the Commission again issued an order dismissing the second complaint.

Thereafter, Gann's assigned attorney in the first complaint filed a request to amend the complaint with

allegations that are similar to those contained in Gann's dismissed second complaint before the Commission. The hearing officer assigned to the case denied the motion but Gann asked the Commission to overrule his decision and allow the amendment. The Commission agreed.

Tyco then filed a declaratory judgment action in Franklin Circuit Court. In its petition Tyco maintains that the Commission acted outside the scope of the regulations applying to its proceedings, exceeded the scope of its statutory authority, ignored principles of *res judicata* and/or collateral estoppel, and allowed Gann to violate the statute of limitations by adding a new claim.

The circuit court, citing only the principle of *res judicata*, found that Gann should be allowed to amend her original complaint with any evidence of Tyco's "failure to train her as similarly situated males until the date of her termination of employment" but should not be allowed to include allegations pertaining to retaliatory or discriminatory discharge. A motion to dismiss the action filed by Gann contending that the circuit court lacked jurisdiction was never ruled upon.

On appeal a number of arguments are made by Gann for reversal of the circuit court's opinion and she also raises, in her reply brief, the position that the circuit court lacked

jurisdiction. Since we believe the circuit court lacked jurisdiction for the failure of Tyco to exhaust its administrative remedies, we will not address the substantive arguments in the appeal.

Before a party may seek judicial review of an administrative decision, it must appear that it has exhausted its administrative remedies. The exhaustion of administrative remedies is a prerequisite to the court's possession of subject matter jurisdiction. Commonwealth v. DLX, Inc., 42 S.W.3d 624, 625 (Ky. 2001). There are a number of reasons for this doctrine, as stated by our Supreme Court:

"Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may: (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review."

Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 471 (Ky. 2004)(quoting 2 Am.Jur.2d Administrative Law §505 (1994)).

Exceptions to the doctrine requiring an exhaustion of administrative remedies exist. They include a showing by the party seeking immediate judicial review that to follow an administrative proceeding through to its end would be an

exercise in futility. In addition, an attack on the facial validity of a statute does not require the exhaustion of administrative remedies although an "as applied challenge" does. Popplewell's Alligator Dock No. 1, Inc., supra 133 S.W.3d at 468 & 470; DLX, supra 42 S.W.3d at 626; White v. Shepherd, 940 S.W.2d 909, 911 (Ky.App. 1997).

In this case an examination of Tyco's petition for declaratory relief readily shows that it is not claiming that the administrative process would be an exercise in futility, that the statutory authority under which the Commission operates is void on its face, or even that it does not possess an adequate remedy by appeal. In essence it simply argues that the amendment of Gann's complaint should not have been allowed because of certain legal principles.

There is no question that Tyco may seek judicial review of the administrative proceedings and orders entered in this case and it cannot show that it will suffer any immediate or irreparable harm by allowing the administrative process to be completed. Its arguments are focused on what it perceives as an error by the Commission in allowing a complaint to be amended. This question is one that is typically considered on direct appeal. In such circumstances Tyco cannot establish that the administrative process is an exercise in futility. Executive

Branch Ethics Comm'n v. Stephens, 92 S.W.3d 69, 72-73 (Ky. 2002).

Therefore, we conclude that the Franklin Circuit Court lacked subject matter jurisdiction of this action. We are bound, as is any court, to take notice of jurisdictional issues whether or not raised by a party. Commonwealth, Dept. of Highways v. Berryman, 363 S.W.2d 525, 526-527 (Ky. 1963). Thus, the fact that Gann raised this issue in her reply brief is of no consequence; the defect is revealed by the record itself.

The judgment of the circuit court is vacated and the case is remanded with directions to dismiss Tyco's petition.

ALL CONCUR.

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