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KENTUCKY SUPREME COURT GRANTED DISCRETIONARY REVIEW: APRIL 16, 2008 (FILE NO. 2007-SC-0817-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001218-MR

WESLEY GILLIAM — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CI-01854

METHODIST HOSPITAL OF KENTUCKY, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: The Pike Circuit Court dismissed, for lack of subject matter jurisdiction, a petition filed by appellant Wesley Gilliam alleging that he was wrongfully discharged from his employment at appellee's hospital because of his involvement in a

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

labor union's preliminary efforts to organize workers at the hospital. For the reasons stated, we vacate the court's order and remand this matter for further proceedings.

Gilliam's complaint alleged that he was involuntarily terminated from his employment with appellee "in violation of KRS 336.130, to-wit [he] was involved in some preliminary efforts by the United Mine Workers of America, a labor union to organize workers at the [appellee] Hospital and was terminated for that reason or because of his prior connection with union organizing efforts." He claimed damages for lost wages, impaired earning power, harm to his reputation, and past and future pain and suffering. He also sought punitive damages, and costs and attorney's fees. Finally, he asserted that his action was "brought under Kentucky Revised Statutes and not under any federal rules, statute or regulation."

Appellee filed a motion to dismiss based on lack of subject matter jurisdiction. The court granted the motion after a hearing, finding that the allegations against appellee, "if true, would violate §§ 7 and 8 of The National Labor Relations Act [NLRA], 29 U.S.C. §§ 157 and 158[.]" The court noted:

> 4. That the Supreme Court of the United States, in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. J.S. Garmon,* 359 U.S. 236, 79 S.Ct. 733 (1959), ruled that the National Labor Relations Board has exclusive jurisdiction over matters governed by §§ 7 and 8 of the National Labor Relations Act and state courts must yield to federal jurisdiction and are preempted from acting in such cases.
>
> 5. That the decision of the Supreme Court of Kentucky in *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU AFL-CIO v. Kentucky Jockey Club, et al.,* 551

> S.W.2d 801 (1977), and other precedent cited by [Gilliam] in his Response, are inapplicable to the issues raised in this case.

The court granted the motion to dismiss. This appeal followed.

Federal law addresses the rights of employees to be involved in activities relating to labor organizations. 29 U.S.C. § 157[2] provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158[3](a) in turn provides in pertinent part:

> It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization . . . ;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]

[2] Section 7 of the NLRA.

[3] Section 8 of the NLRA.

Kentucky law also addresses employee labor relations. KRS 336.130 provides in part as follows:

> (1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.
>
> (2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion.
>
> (3) Except in instances where violence, personal injury, or damage to property have occurred and such occurrence is supported by an affidavit setting forth the facts and circumstances surrounding such incidents, the employees and their agents shall not be restrained or enjoined from exercising the rights granted them in subsection (1) of this section without a hearing first being held, unless the employees or their agents are engaged in a strike in violation of a "no strike" clause in their labor contract.

The statute, which was last amended in 1978, makes no reference to issues of preemption by the federal NLRA.

The United States Supreme Court held in *San Diego Building Trades Council, Millmen's Union v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations

Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245, 79 S.Ct. at 780. Thus, in *Garmon* the Supreme Court concluded that California lacked jurisdiction to either regulate activities which arguably fell within the prohibitions of the NLRA, or award damages arising out of such conduct.

Subsequently, Kentucky's highest court concluded that a state trial court lacked jurisdiction to perform the functions of the National Labor Relations Board (NLRB) when an employee alleged he was terminated from his horseracing industry employment because of his union association, even though the NLRB "has for some time declined to assert jurisdiction in any proceeding involving the horseracing industry[.]" *Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 802 (Ky. 1977). Thus, even assuming that the employee's claims were true and fell "within the sphere of activity condemned by KRS 336.130[,]" the trial court "lacked jurisdiction to grant the injunctive relief sought." *Id.* at 803. Nevertheless, the matter was remanded to the trial court for further proceedings pertaining to the employee's civil action for wrongful dismissal, as the complaint

> adequately raises the issue of whether the termination of Wilson's employment was in violation of KRS 336.130, which, if proved before the trial court, entitles Wilson under KRS 446.070 to recover from his former employer whatever damages he has sustained by reason of the violation. Here the complaint demanded damages, and thus adequately stated a cause of action.

Id. at 803.

More recently, the *Pari-Mutuel* distinction between claims for regulatory or injunctive relief, and claims for civil damages related to wrongful discharge, was reaffirmed in *Simpson County Steeplechase Ass'n, Inc. v. Roberts,* 898 S.W.2d 523 (Ky.App. 1995). This court affirmed the trial court's determination that although it lacked jurisdiction to provide injunctive relief to employees who allegedly were dismissed for attending a union meeting, the employees' compensatory and punitive damage claims for wrongful discharge should be considered by a jury pursuant to KRS 336.130.

In the matter now before us, Gilliam made no claims for regulatory or injunctive relief which would fall within the exclusive jurisdiction of the NLRB pursuant to §§ 7 and 8 of the NLRA. Instead, he sought only compensatory and punitive damages based on the alleged violation of KRS 336.130. State action was not preempted since such claims do not fall within the "conduct that is actually or arguably either prohibited or protected by the" NLRA. *See Belknap, Inc. v. Hale,* 463 U.S. 491, 498, 103 S.Ct. 3172, 3177, 77 L.Ed.2d 798 (1983). Because Gilliam's limited claim for relief therefore fell squarely within the parameters of *Pari-Mutuel* and *Simpson County,* it follows that the trial court erred by dismissing Gilliam's damages claims for lack of jurisdiction, and this matter must be reinstated on the docket below.

The trial court's order of dismissal is vacated, and this matter is remanded for reinstatement on the docket and further proceedings consistent with the view expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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