The Kentucky Bar Association
Young Lawyers Section
Presents:

Litigation Basics for Young Lawyers CLE Seminar

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Litigation Basics for Young Lawyers CLE Seminar

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Litigation Basics for Young Lawyers CLE Seminar
Louisville, Kentucky
October 28, 2011

8:00-8:25 a.m.	**Registration**
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8:30-10:00 a.m.	**Automobile Accident Litigation Basics** (1.50 CLE credits) Jay R. Vaughn
10:00-10:10 a.m.	**Break**
10:10-11:40 a.m.	**Employment Law Basics for Young Lawyers** (1.50 CLE credits) S. Chad Meredith
11:40 a.m.-12:10 p.m.	**Lunch (included w/ registration)**
12:10-1:40 p.m.	**Divorce Litigation Basics** (1.50 CLE credits) Jessica R. Sharpe and Cary B. Bishop

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A. Check Service

- May need Special Process Server

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1. Review each defense – anything you didn't expect?

2. Any counterclaims?

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2. Geico v. Winsett, 153 S.W.3d 862 (Ky. App. 2004).

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1. Interrogatories.

- Sometimes better after deposition

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A. Pinpoint the Dispute

1. 100 percent liability denial?

2. Comparative fault?

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1. Any statements that help you? Hurt you?

2. Interview police officer?

3. Anything else in officer's file besides police report?

C. Any Eyewitnesses?

1. EMS?

2. Tow truck driver?

3. Other motorists?

4. Have you or your investigator spoken to them?

5. May need to depose them.

6. Always visit the scene and take photographs.

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1. Is there physical evidence that may help?

2. Are there visibility or illumination issues?

3. Accident reconstructionist?

E. Other Considerations

1. 911 Tape & Dispatch Log.

2. Department of Transportation.

3. Any security/surveillance cameras nearby?

IV. STICKER SHOCK – CAN YOU BACK IT UP?

A. Are All Medical Expenses Documented?

1. Prepare Itemized Medical List.

- Include ICD-9 & CPT codes

2. Make sure there is a bill for every date of treatment.

3. Does Defense have current list & all bills?

4. Are all the bills reasonable, necessary & related?

- Langnehs v. Parmelee, 427 S.W.2d 223 (Ky. 1967)

B. Is There Support for Future Medical Expenses?

1. Is this a component of your case?

2. What is the law in Kentucky? Cannot be speculative; must establish specific future care needed & cost of this care in terms of reasonable probability – *see* Kentucky & Indiana Terminal Railroad Co. v. Mann, 312 S.W.2d 451 (Ky. 1958); Chesapeake & O. Ry. Co. v. Yates, 239 S.W.2d 953 (Ky. 1951); and Walton v. Grant, 194 S.W.2d 366 (Ky. App. 1946).

3. Utilize Life Expectancy Table -- Morris v. Morris, 293 S.W.2d 243 (Ky. 1956).

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1. Off-work notes from doctor?

2. Support from employer/supervisor?

3. Make sure to review personnel file.

4. Do tax returns/W-2's help or hurt?

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1. Do you know what juries are awarding where you are?

- Kentucky Trial Court Review

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3. Have injuries really affected your client's life?

4. *Per diem* arguments are permitted -- Paducah Area Public Library v. Terry, 655 S.W.2d 19 (Ky. App. 1983).

5. Loss of enjoyment of life is recoverable as a component of P&S damages; but not a separate category of loss -- Adams v. Miller, 908 S.W.2d 112 (Ky. 1995).

6. Future P&S is recoverable if it is reasonably certain to occur -- American States Ins. Co. v. Audubon Country Club, 650 S.W.2d 252 (Ky. 1983).

7. Future P&S does not require a permanent injury -- Louisville & Nashville R.R. Co. v. Stewart, 173 S.W. 757 (Ky. 1915) & Consol. Coach Corp. v. Hopkins, 14 S.W.2d 768 (Ky. 1929).

8. Future P&S includes the increased likelihood of future complications -- Capital Holding Corp v. Bailey, 873 S.W.2d 187 (Ky. 1994) and Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984).

V. TAKE ME TO THE OTHER SIDE

A. Identifying Weaknesses

1. Minimal property damage.

2. Delay of, gap in or lack of treatment.

3. Low amount of specials (medical and/or wage).

4. Pre-existing conditions.

5. Unrelated treatment or injuries (causation problems).

6. Client makes more now than at time of injury.

7. Future treatment recommended, but never obtained.

8. Alternative treatment or therapies.

B. Anticipating Defenses

1. Seatbelt defense.

2. Sudden emergency.

3. "It was just an accident" defense.

4. Comparative negligence (speed, proper lookout, etc.).

5. Multiple vehicle collision.

VI. THE LITIGATION FAMILY REUNION – DO YOU GO?

A. Alternative Dispute Resolution

1. Will it benefit your case?
2. Do you have a choice?
3. Is it just an exercise in futility?
4. Do you have client control?

B. Mediation Concerns

1. Sneak peak of your case.
2. Reasonable for case to settle?
3. Decide movement in advance of mediation.
4. Be able to justify demand & position.
5. Prepare client for "realities" of mediation.
6. Who's your mediator?
7. Will an insurance adjuster with settlement authority attend?
8. Make sure defense has ALL pertinent documentation.
9. If it can't be settled consider negotiating a Hi-Low agreement for Arbitration.

C. Arbitration Concerns

1. Takes more effort.
2. Binding or non-binding?
3. Decision may "box you in."
4. May help case settle or guarantee a trial.
5. Creates a record if court reporter is hired.
6. Can be more costly than mediation.

VII. IF YOU CAN TALK THE TALK, THEN WALK THE WALK

A. It's Trial Time

1. File motion to set.
2. Review pros & cons with clients.

B. Prepare (and follow) Trial Checklist

1. Witnesses to call and subpoena.
2. Exhibits to use.
3. Depositions to take.
4. Order of Proof.
5. Jury instructions.
6. *Voir dire*, opening, closing & examinations.
7. Supplement discovery responses.
8. Stipulations.
9. Request for Admissions (Ninety-120 days before trial).
    - Get medical records & bills admitted
10. "Sponsor" for documents/medical records.
11. Get jury questionnaires.
12. Where are you on Trial Docket?
13. Prepare trial notebooks.
14. Etc.

C. Evidentiary Issues

1. Identify areas for motions and/or objections.
2. Brush up on evidence rules and case law.

VIII. WHAT ARE YOU BRINGING TO SHOW & TELL?

A. Physical Evidence

1. Photographs of vehicles.
2. Photographs of injuries.
3. Photographs of the scene.
4. X-rays (positives).
5. Medical hardware, braces, etc.
6. 911 tape.

B. Demonstrative Evidence

1. PowerPoint.
2. Video recreation and/or animation.
3. Aerial photograph.
4. Medical illustration.
5. Anatomical model.
6. Don't out "tech" your opponent too much.

C. Documentary Evidence

1. Medical List (w/redacted bills).
2. Wage Loss List.
3. Medical records.
4. Timeline.
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A. What Court Are You in?

B. Who's Your Judge?

C. Who Is the Defense Lawyer?

D. What Does Palmore Say?

E. Have You Researched Jury Verdicts (KTCR)?

F. Do You Have a Likeable Plaintiff?

G. Who Will Be on Your Jury?

H. What's Been in the News?

I. How Long Has It Been Since You've Tried a Case?

J. Will This Be Your First Trial?

K. What about Subrogation Liens?

L. Have You Reviewed Trial Procedures?

M. Have You Updated CR 8.01 Disclosures?

N. Have You Cleared Your Calendar?

O. Trying the Case Solo or with Help?

P. Do You Need a Trial Consultant?

Q. What Are the Case Expenses to Date?

R. What Will the Case Expenses Be after Trial?

I. THE "EMPLOYMENT-AT-WILL" DOCTRINE IN KENTUCKY[1]

A. Introduction

Almost every discharge is considered "wrongful" and involving unlawful "discrimination" from the affected worker's perspective. In my experience, it is news to the general public that a Kentucky employee in fact has little job protection and no overall assurance of fair treatment in employment. The general rule in Kentucky employment law is simple enough to state, understand, and apply: Employment in Kentucky is employment "at will." Under the doctrine, as such, an employee may leave or lose a job at any time, without notice, and without justification.

> Ordinarily an employer may discharge an at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible.

Wymer v. JH Props., Inc., 50 S.W.3d 195, 198 (Ky. 2001) (citations omitted).

Thus, the analytical starting point is that an employer generally may discharge an employee at its will, even whim. Good cause normally is not required or even particularly relevant.[2]

B. Exceptions to the Doctrine

At its core, the "at-will" doctrine is a contractual model. *See* Grzyb v. Evans, 700 S.W.2d 399, 400 (Ky. 1985) (characterizing "the 'terminable-at-will' doctrine [as] a longstanding corollary to mutuality of contract"). Of course, "at will" status is the default rule, and most

[1] Sections A and C of this outline are adaptations of presentations previously given by John C. Roach, who is one of the named partners in the presenter's law firm. The information in Section A is largely an abridged version of Mr. Roach's previous writings concerning these matters. *See* John C. Roach and Judge Robert E. Wier, "Employee/Employer Relationship: The Employment-At-Will Doctrine and Exceptions," Chapter 3, Employment Law in Kentucky (3rd ed. 2007).

[2] The presence or absence of justification certainly matters to the employee. Even if the "at-will" doctrine precludes job protection, an unjustified discharge normally entitles the affected worker to unemployment benefits. *See* KRS §341.370. Discharge for sufficient cause disqualifies the worker.

Kentucky employees have no contractual rights changing that status. In the absence of a contractual right, a private employee's sole protection against firing lies in the tort of "wrongful discharge." That tort action,[3] derived from specific statutory or common law authority, enforces policy-based limits on a Kentucky employer's right to discharge.

1. Contracts for a definite term.

An employee hired for a definite term may not be discharged without good cause. *See* Otis & Co. v. Power, 1 Ky. Op. 312 (Ky. 1866); *see also* Davies v. Mansbach, 338 S.W.2d 210, 211-12 (Ky. 1960) (burden on employer to justify termination when an employee hired for a definite term).

In most cases, the real question is whether the parties have agreed to a definite term. The negotiations between the parties and the employer's actual offer are critical. In Hunter v. Wehr Constructors, Inc., 875 S.W.2d 899 (Ky. App. 1993), Wehr made a verbal offer of employment, later confirmed in a letter. The letter stated:

> The following is our proposed job offer to you as the project Coordinator/Project Engineer for the Outpatient Surgery addition at the Medical Center, Bowling Green, Kentucky:
>
> Total Wage -- Paid Weekly $25,000.00/year
> *Health Insurance -- Single Person 1,104.00/year
> Life Insurance -- $20,000 84.00/year
> Disability/Salary Continuance 161.00/year
> ———————-
> $26,349.00/year
>
> *Moving allowance reimbursement not to exceed $500.00.
>
> Paid vacation -- One week/year or by special agreement; straight time, holidays paid; 45 hour work week; starting time flexible: 7:30 to 8:00 a.m. No bonuses; a Christmas gift depending on Owner's evaluation. You could/should expect $500.00 to $600.00; profit sharing has been the

[3] The applicable statute of limitation for a wrongful discharge claim is five years. Bednarek v. United Food & Commercial Workers Intern. Union, Local Union 227, 780 S.W.2d 630, 632 (Ky. App. 1989).

> full 15% of salaries/wages since put into existence, but realistically, you should set your sights on 8% to 10%.
>
> You would provide your own vehicle/insurance; position would begin at once with a minimum of two (2) weeks orientation in the Louisville Office. We can discuss your allowance for the duration of your orientation.
>
> This project position will last a minimum of thirteen months. Evaluation for continued employment to be made as mutually apreed [sic] upon.
>
> This offer remains in effect until May 25, 1990. We await your decision.

Id. at 900.

Before Hunter completed four months of employment, Wehr terminated him. The Court of Appeals noted that the offer letter did not contain express language regarding a term of employment. However, the court held that the language of the letter supported "a reasonable inference that a thirteen-month contract was intended," and therefore concluded that a jury question existed as to the parties' intention concerning duration of the contract. *Id.* at 901. It is important to note that the term must be definite. Employment for an indefinite period of time may be terminated by either party at will. *See* Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489, 491 (Ky. 1983).

2. Implied contracts.

The seminal case concerning an implied contract of employment is Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489, 491 (Ky. 1983). Shah was fired by American Synthetic Rubber Corporation ("ARC") after sixteen months of employment. Both the trial court and the Court of Appeals found that Shah was an at-will employee and could be terminated without liability. *Id.* at 490. The Supreme Court began its analysis with the following basic principle:

> The duration of an employment contract must be determined by the circumstances of each particular case, depending upon the

> understanding of the parties as ascertained by inference from their written or oral negotiations and agreements, the usage of business, the situation and objectives of the parties, the nature of the employment, and all circumstances surrounding the transaction. These considerations will govern the fact finders when they set about determining the precise contract between Shah and ARC.

Id. (citation omitted).

Shah claimed that at the time of his hiring, "ARC promised Shah that he would serve a 90-day probationary period during which ARC could discharge him for any cause whatsoever, but after which he would become a permanent employee dischargeable only for cause in accordance with personnel policies and procedures established by ARC." *Id.* at 491. Therefore, Shah argued that the promise made by ARC fixed the term of employment to such time when ARC could demonstrate cause in accordance with the policies and procedures of the company. The Supreme Court agreed and held that ARC's promise was enforceable. In reaching this conclusion, the Court held:

> Employers and individual employees should be equally free to contract against discharge without cause, as Shah and ARC are presumed for purposes of ARC's motion for summary judgment to have done. We join a number of other jurisdictions which hold 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 considerations than services to be performed or promised, is expected by the employer, or performed or promised by the employee.

Id. (citations omitted). Notably, the employee in Shah did not merely seek to enforce a "permanent employment" agreement, a variety traditionally void in Kentucky. Rather the employee had agreed to an initial ninety-day at-will period followed by protection under the "for cause" rules of the employer. As a 4-3 decision from a Court featuring two

special justices, Shah's vitality may ultimately be questionable.

Nevertheless, based on Shah, an employee may rely upon various forms of evidence to establish an employment contract. The practitioner should analyze offer letters, personnel manuals, company rules and procedures, and all oral statements made to the employee regarding the offer and work rules.[4]

3. Personnel manual and handbooks.

Most recent employee handbooks contain disclaimer language because courts clearly honor the effectiveness of disclaimers in employment documentation. *See*, *e.g.*, Wathen v. Gen. Elec. Co., 115 F.3d 400, 408 (6th Cir. 1997) (holding that under Kentucky law a clear disclaimer in an employment manual defeats an employee's breach of contract claim); Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 99 (Ky. App. 2000) ("In order for Noel to prevail on her breach of contract claim, we would have to disregard a disclaimer and create a 'discharge only for cause' employment contract in the absence of the intent of both parties to do so. This we may not do."). However, if the manual does not contain a disclaimer, and pursuant to Shah, contains clear rights for the employee, an implied contract may arise from the manual.

4. Fraud and detrimental reliance.

In United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999), the Supreme Court upheld a damage award that consisted of $745,516.00 in compensatory damages and $1,000,000.00 in punitive damages against United Parcel Service Company ("UPS"). In 1987, UPS decided to change its parcel delivery business by establishing its own airline. Rickert was employed as a captain by one of UPS's contract carriers, Orion Air. During the transition period, UPS expressed its desire to hire pilots who remained throughout the period with its contract carriers. At the end of the transition period, Orion ceased operation, but UPS did not hire Rickert. Later, he did obtain employment in a less lucrative position as a second officer with American Airlines. *Id.* at 467.

[4] For a recent analysis of Shah, *see* Brown v. Louisville Jefferson County Redevelopment Authority, Inc., 310 S.W.3d 221 (Ky. App. 2010).

Rickert's suit against UPS claimed breach of contract, promissory estoppel and fraud by UPS based on promises purportedly made by an unnamed UPS management representative in a meeting attended by Rickert and fifty to seventy-five other Orion pilots. Essentially, Rickert claimed that UPS promised to hire all pilots who stayed with Orion throughout the sixteen-month transition period. *Id.*

After reviewing the evidence concerning representations made by UPS to Rickert and other Orion pilots, the court stated:

> Although Rickert could not prove that UPS did not intend to hire him individually at the time of the alleged misrepresentation, there was significant evidence that UPS did not intend to hire all carrier pilots at the time it made the statement to the assembled Orion personnel. UPS admits that it never intended to hire all carrier flight crew members but claims that it never made a representation to the contrary. Fraud may be committed either by intentionally asserting false information or by willfully failing to disclose the truth. Chamberlain v. National Life & Accident Ins. Co., Ky., 256 Ky. 548, 76 S.W.2d 628, 631 (1934). *See also* Restatement (Second) of Torts §529 (1977), **which indicates that stating a mere partial truth can be fraudulent if it is materially misleading.**
>
> UPS knew that the Orion pilots were extremely concerned about their future after Orion lost its UPS contract. The employees were making career decisions and had the right to and should have been told the complete strategy of the employment situation. **UPS defrauded Rickert by intentionally failing to tell him all the material facts of its hiring plan. Rickert did not need to demonstrate that UPS did not intend to hire him as an individual.** *See generally* Restatement (Second) of Torts, §534 (1977).

Id. at 469 (emphasis added). Thus, representations of job security, not based on complete truth, that induce reliance

may be actionable under a fraud theory. The remedial importance of this case is undeniable.

Rickert's compensatory damages consisted of $425,160 in lost wages to the January 1995 trial date plus $321,356 in future lost wages. *Id.* at 467. These wage awards represented the difference between what Rickert would have probably made at UPS and what he was projected to make at American, in mitigation, through the mandatory retirement age of sixty. The Court found that the award was a fair and reasonable estimate of the particular injury. *Id.* at 469 (citation omitted). The Court rejected UPS's argument that since Rickert would have been an at-will employee, the damage award resulted in converting an oral promise to a guaranteed lifetime job. The Court explained:

> Any possible plaintiffs would still be required to prove to a jury that they would have in all probability remained employed with a defendant for a definite period of time. H.C. Hanson and Kellerman provide adequate safeguards against speculative claims of fraud. Under the circumstances of this case, the employee at will doctrine provides no exception to the rule that employer fraud can be actionable.

Id. at 470.

UPS also argued unsuccessfully that the statute of frauds should apply. The Court noted that "Rickert fully performed his part of the bargain with UPS, and the agreement between UPS and Rickert could have been fully performed within one year." *Id.* at 471. The Court also held

> that the law will not permit a [party] to take advantage of the statute of frauds for the purpose of committing fraud. … Kentucky is with the majority of states in holding that the statute of frauds is not a bar to a fraud or promissory estoppel claim based on an oral promise of indefinite employment.

Id. (citations omitted).[5]

[5] The Kentucky Supreme Court has limited this holding. "It is incorrect to infer from Rickert that detrimental reliance is a bar to the statute of frauds. All that may be deduced from Rickert

The importance of this case is obvious. Its analysis regarding compensatory damages may be applicable to all at-will actionable discharges. That is, any employee wrongfully discharged should, per Rickert, be permitted to pursue his "full" expectancy from the contract. In addition, Rickert makes clear that fraud and promissory estoppel are alive and well in the employment context.

C. Judicial and Statutory Exceptions to the Doctrine

1. Judicial exceptions.

The key Kentucky decisions concerning judicial exceptions to the "at-will" doctrine, all from the Supreme Court, are Boykins v. Housing Authority of Louisville, 842 S.W.2d 527 (Ky. 1992); Firestone Textile Co. Division, Firestone Tire and Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) and Nelson Steel Corp. v. McDaniel, 898 S.W.2d 66 (Ky. 1995). These cases imported the wrongful discharge tort into Kentucky law and define the tort's parameters.

Boykins summarized the level of judicial interference with an employer's freedom:

> An employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law … The public policy must be evidenced by a constitutional or statutory provision.

Boykins, 842 S.W.2d at 529 (emphasis in Boykins*, quoting* Firestone, 666 S.W.2d at 731). Boykins continued, characterizing Grzyb:

> In Grzyb, we adopted a caveat to the Firestone decision. We stated that there exist two situations where the discharge of an employee violates fundamental public policy even absent explicit legislative statements prohibiting the discharge. In effect, we judicially created a

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concerning the statute of frauds is that in a fraud or promissory estoppel action involving a promise of employment, it does not act as a bar." Sawyer v. Mills, 295 S.W.3d 79, 90 (Ky. 2009) (internal citations, internal quotation marks omitted).

> public policy. The two situations described are[] [f]irst, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment."

Boykins, 842 S.W.2d at 530 (*quoting* Grzyb, 700 S.W.2d at 402). Thus, the protection afforded by the judicial exception to the at-will doctrine arises only if a firing is an act of retaliation for 1) exercising a "right conferred by well-established legislative enactment"; or 2) refusing to violate the constitution or a statute. The language of the cases suggests a tort of great breadth -- find a legislative or constitutional policy implicated in a firing, and you've found job protection. In actual application, however, the judicial exceptions to the at-will doctrine are extremely narrow.

The threshold question -- whether the policy implicated by a firing involves retaliation for exercising a "right conferred by well-established legislative enactment or for refusing to violate the constitution or a statute" -- is a legal question. *See* Nelson Steel, 898 S.W.2d at 69. Under the judicial exceptions, a valid claim based on discharge in retaliation for exercising a statutory or constitutional right appears to require that the right directly implicate the employment relationship. Thus, a worker fired for exercising "general" constitutional or statutory rights is not protected.

In Boykins, the plaintiff alleged that she was discharged because she had previously sued her employer over a matter not related to her employment. [The plaintiff sued for personal injury to her child]. The Supreme Court specifically determined that an employer "ha[s] the right to discharge an employee who brought private litigation against the employer seeking damages from an incident not related to her employment." Boykins, 842 S.W.2d at 530. The lesson is that, absent explicit statutory protection, a private employer may fire an employee for asserting general rights of citizenship. General freedoms and matters of public concern are not enough to invoke the Grzyb/Firestone tort. Additional examples include the following:

Grzyb:

> In Grzyb, the right asserted (and rejected) was associational. The employer fired the employee for "fraternization with a female hospital employee." Because there existed no "public policy … directed at providing statutory protection to the worker in his employment situation," *id.* at 400, no job protection existed.
> Hammond v. Heritage Communications, Inc., 756 S.W.2d 152, (Ky. App. 1988):
>
> In Hammond, the plaintiff was fired after appearing in "Playboy." Though the plaintiff ultimately stated a claim for breach of contract, the court did not recognize the case as within the Grzyb tort action.
>
> Shrout v. TFE Group, 161 S.W.3d 351 (Ky. App. 2005):
>
> In Shrout, the Court of Appeals evaluated a wrongful discharge claim by a trucker terminated for failing a drug screen. The employer had violated federal law in conducting and processing the relevant drug test, and the employee attempted to use that federal law as the "policy" supporting a Gryzb-type action. The Court carefully discerned the *primary* purpose of the law -- which was public safety -- and rejected the employee's claim. *See id.* at 355-56. Though there was a public policy at issue that directly concerned employment, the policy was not primarily for protection of the employee, so the employee could not use it as support for a wrongful discharge claim. The Court also rejected use of a federal policy as the basis for a Gryzb-type claim. *See id.*

The cases discussing the public policy exception generally *exclude* claims from the tort. So, what does qualify? Only a few currently valid cases actually endorse specific actions under the exception. Of these cases, Firestone and Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977) are the most prominent examples.

Firestone (since codified at KRS §342.197) and Pari-Mutuel Clerks feature common elements. Each case involves statutes *directly* regulating the employer-employee relationship. Firestone concerns retaliation for filing a workers' compensation claim, and Pari-Mutuel Clerks involves retaliation for pursuing union activity. Additionally, each statute in some manner expressly protected the workers' activity at issue, providing a textual basis for finding a well-defined policy against retaliation. In Firestone, the statute as it then existed protected against "coercion" in acceptance or rejection of Act coverage and against "deceptive" avoidance of liability by employers. The statute at issue in Pari-Mutuel Clerks clearly assured employee activity without "restraint or coercion." In essence, then, this "judicial" exception truly requires a "legislative" exception -- a clear statement by the General Assembly imposing limitations on an employer's otherwise free right to discharge an at-will employee.

The judicial exception pertaining to retaliation for refusal to violate the law is simpler to apply. If an employer terminates an employee because that employee refuses to break the law in the course of employment, the employee states a claim for wrongful discharge. Several cases, including Boykins and Grzyb, expressly affirm the tort, but reported application of the cause of action under Kentucky law is rare.

Bell v. Ashland Petroleum Co., Inc., 812 F.Supp. 639 (S.D. W.Va. 1993), a federal case applying Kentucky law, is a good example of the analysis. In Bell, the plaintiff truthfully answered questions from federal regulators, leading to an EPA citation against plaintiff's employer. The employer then discharged plaintiff, who sued alleging that the employer fired him for refusing to provide a false statement to the government. [18 U.S.C. §1001 makes it a felony to knowingly make a false statement to "any department or agency of the United States." *See id.* at 642.] The court agreed that, under Kentucky law, an employer may not "discharge … an employee for his refusal to violate a law in the course of employment." *Id.* at 641.

This manifestation of the tort lends itself to situations in which an employee's job implicates specific legal requirements -- a coal miner that refuses to falsify safety records; a securities dealer that refuses to engage in insider

trading; even an apartment manager that refuses to discriminate unlawfully. But must the violation involve the "course of employment"? The cases all involve the language, but may an employer lawfully fire a worker that refuses to violate a law outside the "course" or "scope" of employment?

The Court of Appeals considered this question in Northeast Health Management, Inc. v. Cotton, 56 S.W.3d 440 (Ky. App. 2001). In that case, the Court specifically approved an action for wrongful discharge after two hospital employees, Cotton and Howell, claimed that they were fired in retaliation for their refusal to offer perjured testimony in the shoplifting trial of their immediate supervisor, Dennis. As to the requirement that there be an employment-related nexus between the wrongful act, the request that they perjure themselves, and their employment, the Court stated, "it is insignificant that Dennis asked Cotton and Howell to violate a law in a manner that was personal to Dennis. The request and retaliation by Dennis was nonetheless an abuse of her authority as Cotton's and Howell's supervisor." *Id.* at 447. The Court reasoned that the supervisory role of the retaliating party, and the manner of retaliation, supplied the required connection to employment.

As was recognized by the Kentucky Court of Appeals in Cotton, the appropriate analysis requires a nexus between a worker's **refusal** to violate a law and a subsequent, related **impact** on employment. The terminable-at-will doctrine does not reach so far as to permit an employer to take adverse employment action against an employee because the employee refuses to commit crimes unrelated to the employment, such as murder, drug dealing, kidnapping, perjury, or blackmail. Such a rule would lead to the absurd result that a salesman fired for refusing to murder the boss's rich uncle has no job protection, while a butcher fired for refusing to place his thumb on the scales has job protection. Essentially, the employee is protected by the Commonwealth's policy that no one must choose between abiding by the criminal laws of Kentucky and keeping his job.

2. Statutory exceptions.

This section addresses statutory exceptions to the at-will employment doctrine. The most important exceptions are contained in the Kentucky Civil Rights Act, KRS Chapter 344, and the various federal civil rights statutes, like Title VII,

the Americans with Disabilities Act, and the Age Discrimination in Employment Act. These statutes are discussed in Part B of this outline.[6] Other statutory exceptions to the at-will doctrine are discussed below.

a. Workers' compensation retaliation.

As discussed above, in Firestone, the Supreme Court specifically found that an employee could not be terminated because he pursued a claim for workers' compensation. KRS §342.197(1) was enacted the next year. It states:

> No employee shall be harassed, coerced, discharged or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.

The Supreme Court has held that the General Assembly enacted KRS §342.197 to codify the Firestone decision. It is also important to note that an employee need not have filed a formal claim to receive the statute's protections. *See* First Property Management Corp. v. Zarebidaki, 867 S.W.2d 185, 189 (Ky. 1993); Overnite Transportation Co. v. Gaddis, 793 S.W.2d 129, 131 (Ky. App. 1990). It is important to understand that KRS §342.197 does not guarantee a job to the injured worker. The statute simply prohibits discrimination and retaliation against a worker for filing and/or pursuing workers' compensation claims.

b. KRS §446.070.

KRS §446.070 states:

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

[6] It should also be noted that the First Amendment to the United States Constitution generally abrogates the at-will doctrine with respect to most public employees. However, those issues are beyond the scope of this presentation.

In Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985), the Supreme Court made clear that use of KRS §446.070 to bring a cause of action "is limited to where the statute is penal in nature, or where by its terms the statute does not prescribe the remedy for its violation." (citations omitted). If the statute at issue "both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Id.* (citations omitted).

c. Labor laws.

Wage discrimination: KRS §337.423 prohibits compensation to one sex "in any occupation in this state at a rate less than the rate at which [an employer] pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility." It also prohibits employers from discharging employees who invoke KRS §337.423 or assist in its enforcement. Claims under KRS §337.423 must be brought within six months after the cause of action occurs. *See* KRS §337.430.

Prevailing wage: KRS §337.550 prohibits an employer from taking any punitive measure against an employee because the employee "made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing" under the prevailing wage laws.

Wage and hour laws: KRS §337.990 contains civil penalties for employers who violate the wage and hour laws found in KRS Chapter 337. KRS §337.990 contains detailed civil penalty provisions for various offenses ranging from the failure to pay overtime and minimum wages to the failure to give lunch and rest breaks. KRS §337.990(9) prohibits discharge of or discrimination of any manner against an employee that complains of minimum wage or overtime pay violations. KRS §337.990(14) broadly prohibits an employer from discharging or discriminating in any manner against an employee who has "[m]ade any complaint to his employer, the commissioner or any other person." It also protects employees who have

instituted, or caused to be instituted, designated proceedings as well as those who have testified or who are about to testify in such proceedings.

Although KRS §337.990 contains civil penalties, KRS §446.070 supports a private action for violations. Grzyb precludes use of KRS §446.070 where the statute "specifies the civil remedy available to the aggrieved party." Grzyb, 700 S.W.2d at 401. KRS §337.990 provides no civil remedies to the aggrieved party; it simply provides civil penalties that can be sought by the Commissioner of Workplace Standards pursuant to KRS §336.985. In addition, the Kentucky Supreme Court recently held that Kentucky's circuit courts have original subject matter jurisdiction to decide employee claims under certain state wage and hour laws and that the Department of Labor does not have exclusive jurisdiction to decide these disputes. *See* Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). In that decision, which consolidated two separate cases that had been before the Court of Appeals, employers argued "that KRS §337.310 vest[ed] exclusive jurisdiction of all wage-and-hour disputes in the Department of Labor, requiring [employees] to exhaust administrative remedies and limiting circuit court jurisdiction to appellate review." *Id.* at 359. The Court concluded that KRS §337.385, which specifically authorizes uncompensated or under-compensated employees to sue their employers in any court of competent jurisdiction, took precedence over KRS §337.310, a more general statute that arguably conferred original jurisdiction for such disputes in the Department of Labor.

OSHA: KRS §338.121 prohibits an employer from discharging or in any manner discriminating against an employee that "has filed any complaint or instituted or caused to be instituted any proceeding under or related" to Kentucky's OSHA laws, found at KRS Chapter 338. KRS §338.121(3)(b) provides a specific civil remedy and requires the aggrieved employee to file a complaint with the commissioner "within a reasonable amount of time after" the discriminatory act. The commissioner is given the power to investigate and order appropriate relief. This specific remedy forecloses any private action under KRS

§446.070. *See* Bennington v. Pettit Environmental, Inc., 183 S.W.3d 567 (Ky. App. 2005) (holding, in accordance with Gryzb, that a plaintiff's wrongful discharge claim was preempted by KRS §338.121 "because the statute provides both the unlawful act and specifies the civil remedy available to aggrieved parties." *Id.* at 571.).

d. Equal Opportunities Act.

The Kentucky Equal Opportunities Act (the "KEOA") was enacted by the General Assembly in 1976. It is very similar to the Americans with Disabilities Act that was passed by Congress in 1990. Essentially, the KEOA prohibits an employer from discriminating against a person because of a disability "unless the disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible." KRS §207.150(1). The Supreme Court discussed the KEOA at length in Hardaway Management Co. v. Southerland, 977 S.W.2d 910 (Ky. 1998). The General Assembly expanded the KEOA to include HIV/AIDS discrimination. KRS §207.135 gives extensive protection to individuals with HIV/AIDS, precluding job discrimination and testing for the virus as a condition of hiring. Southerland indicates that an aggrieved individual may pursue either a circuit court claim pursuant to KRS §207.230 or a district court claim pursuant to KRS §207.260. Southerland, 977 S.W.2d at 913-14.

e. Military service.

KRS §38.460(1) states:

> No person shall, either by himself or with another, willfully deprive a member of the Kentucky National Guard or Kentucky active militia of his employment or prevent his being employed or in any way obstruct a member of the Kentucky National Guard or Kentucky active militia in the conduct of his trade, business, or profession or by threats of violence prevent any person from enlisting in the Kentucky

> National Guard or Kentucky active militia.

Violation of the statute also constitutes a misdemeanor. KRS §38.990.

f. Court appearances and jury duty.

KRS §29A.160 prohibits an employer from terminating an employee because of jury service. The statute specifies the civil remedy and the limitation period. KRS §29A.160(2) provides:

> If an employer discharges an employee in violation of subsection (1) of this section, the employee may within ninety (90) days of such discharge bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee with full seniority and benefits. Damages recoverable shall not exceed lost wages. If he prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court.

Violation of the statute constitutes a misdemeanor.

KRS §337.415 prohibits discharge for taking time off to appear in local, state or federal court or an administrative tribunal or hearing, provided that the employee provides notice to the employer by "presenting a copy of the court or administrative certificate" to the employer. The statute provides that the penalty for violations "may include, but is not limited to, reemployment, assessment of court costs, appropriate attorney fees, and back pay as ordered by a court of competent jurisdiction."

g. Voting.

KRS §121.310 prohibits an employer from threatening to discharge an employee if he votes for any candidate or discharging an employee on account of

the employee exercising his right to vote.[7] KRS §118.035 gives an employee the right to take off work to request an absentee ballot application or to vote. An employee also has the right to serve as an election officer.

h. Garnishment.

KRS §427.140 prohibits an employer from discharging an employee because the employee's wages "have been subjected to garnishment for any one indebtedness." KRS §427.990 imposes a criminal penalty for willful violations of KRS §427.140.

i. Union activity.

As noted above, the Supreme Court has ruled that KRS §336.130, a statute that gives an employee the right to "associate collectively for self-organization," gives an employee a cause of action against his employer for wrongful termination. It is important to note that many such actions will be preempted under the federal labor laws.

j. Smoking discrimination.

In addition to the traditional civil rights categories, KRS Chapter 344 prohibits discrimination against an individual because the individual is a "smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking." KRS §344.040(1).

k. Medicaid fraud.

KRS §205.8465 prohibits an employer from discharging, discriminating in any manner or retaliating against any person who in good faith makes a report concerning Medicaid fraud to the

[7] In Kentucky Registry of Election Fin. v. Blevins, 57 S.W.3d 289 (Ky. 2001), the Kentucky Supreme Court held that the portion of KRS §121.310 which prohibited any person from giving out or circulating "any statement or report that employees are expected or have been requested or directed by the employer, or by anyone acting for him, to vote for any person, group of persons or measure" was unconstitutionally overbroad as applied in that it infringed on the First Amendment rights of a county clerk. The clerk had requested, in a note printed on his personal stationary, that his employees vote for a candidate for the Kentucky Senate that he personally supported.

Medicaid Fraud Control Unit or testifies in any proceeding relating to the report or investigation. The statute provides that an aggrieved party may seek actual damages together with a "reasonable fee for the individual's attorney of record." KRS §205.8465(3). The Court of Appeals in Follett v. Gateway Regional Health System, Inc., 229 S.W.3d 925, 932 (Ky. App. 2007), reversed a summary judgment for an employer where the employee argued that she had been discharged in part for reporting Medicaid fraud.

l. Nursing homes.

KRS §216.541(2) provides protection to employees of long-term facilities. It states:

> Retaliation and reprisals by a long-term care facility or other entity against any employee or resident for having filed a complaint or having provided information to the long-term care ombudsman shall be unlawful.

m. Patient safety.

Subsections (1) and (2) of KRS §216B.165 require:

> (1) Any agent or employee of a health care facility or service licensed under this chapter who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency.
>
> (2) Any individual in an administrative or supervisory capacity at the health care facility or service who receives a report under subsection (1) of this section shall investigate the

> problem, take appropriate action, and provide a response to the individual reporting the problem within seven (7) working days.

KRS §216B.165(3) prohibits a health care facility from discriminating or making threats of any manner against an employee "who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service" a matter under subsections (1) or (2) of the statute. Further, the health care facility is prohibited from requiring an employee "to give notice prior to making a report, disclosure, or divulgence." KRS §216B.165(3).

n. Living wills and abortions.

KRS §311.633 prohibits discrimination against health care employees that refuse to comply with living wills as long as the employee complies with certain notification and transfer provisions set forth in the statute. KRS §311.800 prohibits discrimination against health care workers who refuse to perform abortions or sterilizations.

o. Adoption.

In an obscure provision, KRS §337.015 requires every employer, upon receiving written notice from the employee, to grant "reasonable personal leave not to exceed six (6) weeks when the reception of an adoptive child under the age of seven (7) is reason for such request."

p. Employment on Sundays.

KRS §436.165 allows local governments the right to allow retail business to operate on Sunday. However, KRS §436.165(4) imposes the following employment limitations:

> (a) No employer shall require as a condition of employment that any employee work on Sunday or on any other day of the week which any such employee may conscientiously wish to observe as a religious Sabbath.

> (b) No employer shall in any way discriminate in the hiring or retaining of employees between those who designate a Sabbath as their day of rest and those who do not make such designation, provided, however, that the payment of premium or overtime wage rates for Sunday employment shall not be deemed discriminatory.

II. DISCRIMINATION CLAIMS

A. Introduction

Numerous federal and state statutes protect employees from discrimination on various grounds. This section will address those statutes, the standards for pursuing claims under them, and the procedural requirements for bringing them.

B. Title VII – 42 U.S.C. §2000e *et seq.*

Title VII makes it unlawful for businesses "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e-2(a)(1). The term "discrimination" encompasses harassment. Title VII also prohibits employers from retaliating against employees who participate in activity that is protected under Title VII, such as making complaints about discrimination or assisting in the enforcement of Title VII. §2000e-3. It is important to remember that Title VII does not strictly apply to all employers. Rather, the term "employer" is defined such that the statute does not apply to employers with fewer than fifteen employees, nor does it apply to employers that are religious organizations.

1. Single-motive and mixed-motive claims.

There are two basic types of Title VII claims: single-motive claims, and mixed-motive claims. When making a single-motive claim, you are asserting that an employment decision was made solely on the basis of an unlawful reason. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 396 (6th Cir. 2008). With a mixed-motive claim, however, you are arguing that an employment decision was made on the basis of both legitimate and illegitimate reasons. *See id.*

Naturally, it is much easier to prevail on a mixed-motive claim. Therefore, an award of damages is not available under a mixed-motive claim. §2000e-5(g)(2)(B). Instead, the only available remedies for a mixed-motive claim are declaratory relief, injunctive relief, and attorney's fees. *Id.*

2. Burden of proof.

A Title VII claim can be proven with either direct or circumstantial evidence. *See* White, 533 F.3d at 391 n.5. Direct evidence of discrimination is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999). "Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred." White, 533 F.3d at 391 n.5.

In a single-motive case, the plaintiff must satisfy the McDonnell Douglas burden-shifting analysis if there is no direct evidence of discrimination. This analysis was first set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis, a plaintiff must first establish a *prima facie* case of discrimination by showing that: (1) he is a member of a protected class; (2) he was qualified for the job; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected individuals.[8] *See* White, 533 F.3d at 391. If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to prove that it had a legitimate, non-discriminatory reason for the adverse employment. *Id.* If the defendant is able to do so, then the burden shifts back to the plaintiff to show that the legitimate, non-discriminatory reasons offered by the defendant were a mere pretext for discrimination. *Id.* at 391-92. Such pretext can be established by showing that (1) the proffered reason had no basis in fact; (2) the proffered reason did not actually

[8] In cases of reverse discrimination -- *i.e.*, where a non-minority is alleging discrimination -- the first and fourth prongs of the analysis are modified. In such a case, the plaintiff must show "background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the minority," and the plaintiff must also show that similarly situated minority employees were treated differently. Arendale v. City of Memphis, 519 F.3d 587, 603 (6th Cir. 2008).

motivate the defendant's action; or (3) the proffered reason was insufficient to motivate the defendant's action. *See* Martin v. Toledo Cardiology Consultants, Inc., 548 F.3d 405, 412 (6th Cir. 2008). It is crucial to remember that "[a]lthough the burdens of production shift, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 392.

In a mixed-motive case, the McDonnell Douglas analysis does not apply. *Id.* at 400. Instead, a plaintiff "need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor' for the defendant's adverse employment action." *Id.* (*quoting* 42 U.S.C. §2000e-2(m)). This analysis applies to all mixed-motive claims, regardless of whether the plaintiff is relying on direct or circumstantial evidence. *Id.*

Harassment claims have an altogether different analysis because harassment is usually inflicted by co-workers instead of the employer, and harassment usually does not involve a direct adverse employment action on the part of the employer. To prevail on a Title VII harassment claim, a plaintiff must prove that: (1) he or she is a member of a protected class (which includes women); (2) he or she was subjected to unwelcome harassment based on his or her status as a member of a protected class; (3) the harassment had the effect of unreasonably interfering with the plaintiff's work performance by creating an intimidating, hostile, or offensive work environment; and (4) the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action. *See, e.g.,* Hafford v. Seidner, 183 F.3d 506, 512-13 (6th Cir. 1999); Clark v. United Parcel Serv., Inc., 400 F.3d 341, 347 (6th Cir. 2005). As to the first element, it is important to remember that Title VII does not merely protect those who are traditionally thought of as being in a protected class (*e.g.*, women and racial minorities). Instead, Title VII generally protects all employees from being subjected to disparate treatment on the basis of race, color, religion, sex, or national origin. In keeping with this principle, same-sex sexual harassment is actionable under Title VII just as well as opposite-sex sexual harassment. *See* Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 448 (6th Cir. 1997).

Finally, Title VII retaliation claims based on circumstantial evidence are evaluated under the McDonnell Douglas burden-shifting analysis. To establish a *prima facie* case of retaliation, a plaintiff must show that (1) he or she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. Martin v. Toledo Cardiology Consultants, Inc., 548 F.3d 405, 412 (6th Cir. 2008). Once the plaintiff makes out a *prima facie* case, the defendant then must show that it had a legitimate, non-retaliatory reason for its actions. *Id.* If the defendant does so, then the burden shifts back to the plaintiff to show that the defendant's seemingly legitimate reason was a mere pretext for retaliation. *Id.*

It is important to be aware that Title VII retaliation claims can be maintained by someone other than the person who engaged in the protected activity. In Thompson v. North American Stainless, LP, __ U.S. __, 131 S.Ct. 863 (2011), the Supreme Court held that a Title VII retaliation claim could be maintained by an individual who was allegedly fired from his job because his fiancé, who also worked for the defendant, had filed a gender discrimination charge with the EEOC.

3. Exhaustion of administrative remedies.

Before filing a Title VII claim in court, a plaintiff must first file a charge with the EEOC. 42 U.S.C. §2000e-5. Generally speaking, an EEOC charge must be filed within 180 days of the conduct that is the subject of the charge. §2000e-5(e)(1). This is extended to 300 days if the plaintiff first files a charge with a state or local agency that has authority to grant or seek relief with respect to the challenged conduct. *Id.* Kentucky is a so-called "deferral jurisdiction," so the 300-day deadline applies here. After a charge is filed, the EEOC will then conduct an investigation and issue a "right to sue" letter. After the issuance of the "right to sue" letter, the plaintiff has ninety days to file a civil action. §2000e-5(f)(1).

4. Limitation on damages.

42 U.S.C. §1981a(b)(3) places a cap on the total amount of damages that a plaintiff can recover for punitive damages and compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Thus, if you assert a Title VII claim, make sure you also assert claims under the Kentucky Civil Rights Act -- which contains no such limits on damages, although it does not permit punitive damages. If you assert a claim under the Kentucky Civil Rights Act as well as Title VII, and non-punitive damages that exceed the Title VII limit will be treated as damages under the Kentucky Civil Rights Act, which means that the Title VII limits will only apply to punitive damages. *See* West v. Tyson Foods, Inc., No. 4:05-cv-183M, 2008 WL 5110957, at *1 (W.D. Ky. Dec. 3, 2008).

C. Age Discrimination in Employment Act – 29 U.S.C. §623

The ADEA prohibits employers from discriminating on the basis of age. 29 U.S.C. §623(a). It does not apply to employers with fewer than twenty employees. *See id.* §630.

1. Burden of proof.

In the absence of direct evidence of discrimination, the familiar McDonnell Douglas burden-shifting analysis applies. To establish a *prima facie* case under this analysis, the plaintiff must show that: (1) he was at least forty years old at the time of the alleged discrimination; (2) he was subjected to an adverse employment action; (3) he was otherwise qualified for the position; (4) he was replaced by, rejected in favor of, or treated differently than a person who was outside the protected class. Harris v. Metro. Gov. of Nashville & Davidson County, Tenn., 594 F.3d 476, 485 (6th Cir. 2010). The remainder of the McDonnell Douglas analysis is the same as in the Title VII context.

There are no mixed-motive cases under the ADEA. *See* Gross v. FBL Fin. Servs., Inc., __ U.S. __, 129 S.Ct. 2343 (2009). Therefore, a plaintiff must show that age was the "but for" cause of the challenged adverse employment action. It is not good enough to simply produce evidence that age was a motivating factor in the adverse employment action.

Harassment on the basis of age is actionable under the ADEA as a form of age discrimination. The elements and burden of proof are modeled after the elements and burden of proof under a Title VII claim. Thus, an age harassment claim requires proof that: (1) the employee is over forty years old; (2) the employee was subjected to some form of harassment based on age; (3) the harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment; and (4) the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action. *See* Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834-35 (6th Cir. 1996).

Just like Title VII, the ADEA prohibits employers from retaliating against employees who engage in protected activity, such as assisting in the enforcement of the ADEA. *See* 29 U.S.C. §623(d). An ADEA retaliation claim uses the McDonnell Douglas burden-shifting analysis just like a Title VII retaliation claim.

2. Exhaustion of administrative remedies.

As with Title VII, an ADEA plaintiff is required to file a charge with the EEOC before bringing an ADEA action in court. 29 U.S.C. §626.

D. Americans with Disabilities Act – 42 U.S.C. §12101 *et seq.*

The ADA prohibits employers from discriminating against employees on the basis of disability. 42 U.S.C. §12112(a). It does not apply to employers with fewer than fifteen employees.

1. Burden of proof.

The burden of proof in ADA cases is essentially the same as in Title VII cases. Where an employee is relying on circumstantial evidence, the familiar McDonnell Douglas burden-shifting analysis applies. Under this analysis, a *prima facie* case of disability discrimination requires the plaintiff to show that: (1) he or she is disabled; (2) he or she is otherwise qualified for the position, with or without reasonable accommodation; (3) he or she suffered an adverse employment decision; (4) the employer knew or had

reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. Whitfield v. State of Tenn., 639 F.3d 253, 259 (6th Cir. 2011). Establishing that the plaintiff is disabled is often one of the more difficult aspects of an ADA case. The term "disability" means that a person has: (1) "a physical or mental impairment that substantially limits one or more major life activities," (2) "a record of such impairment," or (3) the person is "regarded as having such an impairment." 42 U.S.C. §12102(1). The statute also provides a non-exhaustive list of "major life activities," including caring for oneself, performing manual tasks, seeing, hearing, etc., and it further specifies that major bodily functions, such as the operation of the immune system and respiratory system, are also "major life activities." *Id.* §12102(2). The determination of whether an impairment "substantially limits" a major life activity is made without regard to the ameliorative effects of mitigating measures like medication. *Id.* §12102(4)(E).

Although several circuits allow mixed-motive claims to be brought under the ADA, the Sixth Circuit does not since its cases have consistently held that an ADA plaintiff must show that he or she suffered an adverse employment action solely by reason of his or her disability. *See* Hedrick v. Western Reserve Care Sys., 355 F.3d 444, 454 (6th Cir. 2004).

Harassment claims can also be made under the ADA. The standard is the same as under Title VII. *See* Plautz v. Potter, 156 F. App'x 812, 818 (6th Cir. 2005).

The ADA also prohibits employers from retaliating against those who engage in protected conduct under the ADA, such as assisting in its enforcement. 42 U.S.C. §12203. The standard for an ADA retaliation claim is the same as a Title VII retaliation claim. Baker v. Windsor Republic Doors, 414 F. App'x 764, 776 (6th Cir. 2011).

2. Exhaustion of administrative remedies.

Just like Title VII and the ADEA, the ADA requires a plaintiff to first file a charge with the EEOC. 42 U.S.C. §12117; 42 U.S.C. §2000e-5. The EEOC process works the same with ADA claims as with Title VII and ADEA claims.

3. Limitation on damages.

The same limitation on damages that applies to Title VII claims also applies to ADA claims. *See* 42 U.S.C. §1981a(b)(3). Thus, if you assert an ADA claim, make sure you also assert claims under the Kentucky Civil Rights Act -- which contains no such limits on damages, although it does not permit punitive damages.

E. Family Medical Leave Act – 29 U.S.C. §2601 et seq.

The FMLA permits eligible employees to take twelve weeks of continuous or intermittent unpaid leave per year for the purpose of dealing with personal or family medical issues. *See* 29 U.S.C. §2612(a). Upon return from a period of FMLA leave, the employee must be restored to his or her previous position. *Id.* §2614(a). An employer cannot discharge or otherwise discriminate against an employee who exercises their rights under the FMLA. *Id.* §2615(a). An employer also cannot retaliate against an employee who has engaged in protected activity under the FMLA. *Id.* §2615(b). The FMLA does not apply to employers with fewer than fifty employees. *Id.* §2611(4).

When based on circumstantial evidence, FMLA discrimination and retaliation claims are evaluated under the McDonnell Douglas burden-shifting analysis. *See* Grubb v. YSK Corp., 401 F.App'x 104, 110 (6th Cir. 2010).

Compensatory damages for emotional distress are not allowed under the FMLA. *See* Brumbalough v. Camelot Care Ctrs., Inc., 427 F.3d 996, 1007-08 (6th Cir. 2005). Instead, the FMLA only permits a plaintiff to recover damages equal to lost wages, actual monetary losses, interest, and liquidated damages. *See* 29 U.S.C. §2617(a)(1).

F. The Genetic Information Nondiscrimination Act – 42 U.S.C. §2000ff *et seq.*

The Genetic Information Nondiscrcimination Act is a relatively new law (enacted in 2008) that prohibits employers from discriminating against an employee on the basis of genetic information about the employee. 42 U.S.C. §2000ff-1(a). To date, it appears that there have been less than a half dozen GINA claims, all of which have been dismissed. Thus, it is unclear what analytical framework will be applied to these claims. It seems pretty safe to assume, however, that the same tests and standards that apply under the

other employment discrimination statutes -- including the McDonnell Douglas burden-shifting analysis -- will be applied to this statute. And as with the other employment discrimination statutes, a plaintiff must first file a charge with the EEOC before pursuing a GINA action in court. *Id.* §2000ff-6. The GINA does not apply to employers with fewer than fifteen employees.

G. Uniformed Services Employment and Re-employment Rights Act – 38 U.S.C. §4301 *et seq.*

The USERRA prohibits employers from discriminating against an employee because the employee is a member of the military, former member of the military, or applicant for service in the military. 38 U.S.C. §4311. A claim under the USERRA requires a plaintiff to show that his or her protected status was a motivating factor in an adverse employment action against the employee. Escher v. BWXT Y-12, LLC, 627 F.3d 1020, 1026 (6th Cir. 2010). Such motivation can be inferred from a variety of circumstances, including "(1) proximity in time between the employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reason and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses." *Id.* "If the employer meets this burden, 'the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason." *Id.*

H. Kentucky Civil Rights Act, KRS Chapter 344

The Kentucky Civil Rights Act covers the same ground as Title VII, the ADA, and the ADEA, and it also prohibits discrimination against smokers and nonsmokers. *See* KRS 344.040. The Kentucky Civil Rights Act is interpreted consistently with its federal anti-discrimination analogs. *See* Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 495 (Ky. 2005). Therefore, the foregoing federal standards and analyses will apply to claims under the Kentucky Civil Rights Act.

There are significant difference between the Kentucky Civil Rights Act and its federal counterparts though. First, punitive damages are not available under the Kentucky Civil Rights Act. Ky. Dept. of Corrections v. McCullough, 123 S.W.3d 130, 137-38 (Ky. 2003). Second, the Kentucky Civil Rights Act does not require plaintiffs to

exhaust any administrative remedies before filing a lawsuit. Plaintiffs can pursue administrative remedies with the Kentucky Human Rights Commission or a local human rights commission, but they are not required to do so. Employees may choose to pursue these remedies when their case is too weak for an attorney to take, or when the potential damages are too small to justify the involvement of an attorney.

III. COVENANTS NOT TO COMPETE: A CLOSER LOOK

A. Introduction

Generally speaking, a Kentucky employer may require an employee to agree that he, upon the termination of employment, will not compete with the employer for a specified duration and within a specified geographic area. *See, e.g.*, Central Adjustment Bureau v. Ingram Associates, Inc., 622 S.W.2d 681 (Ky. App. 1981). However the agreement must be reasonable in light of the surrounding circumstances. Crowell v. Woodruff, 245 S.W.2d 447, 449 (Ky. 1951). Kentucky courts generally have taken a decidedly pro-employer stance when assessing the reasonableness of restrictive covenants in the employment context. *See, e.g.*, Hall v. Willard and Woosley, 471 S.W.2d 316 (Ky. 1971) (upholding fifty mile/one year restriction); Central Adjustment Bureau, 622 S.W.2d at 683 (upholding two year restriction covering entire country). This Section will examine two issues concerning covenants not to compete: (i) Does it matter if the employee is terminated? (ii) How broad can the relevant business be defined in a noncompetition agreement?

B. Employee Is Terminated by the Employer

In Hall v. Willard and Woolsey, P.S.C., 471 S.W.2d 316 (Ky. 1971), a medical clinic that employed forty-two physicians, sought to enforce a noncompetition agreement against a doctor that specialized in internal medicine and pediatrics. The restriction read as follows:

> RESTRICTIVE COVENANT: Each fulltime employee further expressly covenants and agrees (unless waived in writing by the corporation) that, for a period of one (1) year following the termination of his employment with the corporation, he will not, directly or indirectly, for himself or as an agent, on behalf of, or in conjunction with, any person, firm, association or corporation, engage in the practice of medicine within

> a fifty (50) mile radius from the city where he has primarily performed his services.

Id. at 317 (internal quotation marks omitted).

The restriction was upheld by Kentucky's highest court. The Court cited to Corbin on Contracts and explained:

> It is the function of the law to maintain a reasonable balance, and this requires us to recognize there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an employer. The circumstances of each case must be carefully scrutinized.
>
> The courts have tried to maintain this reasonable balance. They have specifically enforced restrictive promises in many cases, when the restriction is one that accords with prevailing mores as made known to the judge; and they have refused such enforcement in many other cases in which the restriction is deemed *excessive abinitio*, or in which it subsequently operates harshly, or in which the termination of the employment is accompanied by unworthy action by the employer. In the older cases courts have been too ready to assume a mechanical sanctity of contract.
>
> The restriction is deemed *excessive abinitio* if its limit in either space or time is greater than is necessary for the employer's protection against unfair competition.

Id. at 318 (internal citations and quotations omitted).

Although Hall is frequently relied upon to support restrictive covenants, Kentucky's highest court questioned whether the covenant at issue would be enforceable when the termination is accompanied by "unworthy action by the employer." This principle has a strong foundation in Kentucky law. In Crowell v. Woodruff, 245 S.W.2d 447, 449 (Ky.1951), a production manager at a dry cleaning plant was subject to a one year covenant not to compete. Within five months of the execution of the contract, the production manager was fired. The production manager argued that his former employer was not entitled to equitable relief because the former employer acted with unclean hands in terminating him. *Id.* at 450. The court agreed with the production manager and held that the equitable balance favored the employee. Part of that

equitable balance weighed in the employee's favor because "having exacted the harsh covenant, [the dry cleaning plant] discharged his employee within a brief time." *Id.*[9] In contrast, the Kentucky Court of Appeals upheld the covenant not to compete in Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., 622 S.W.2d 681, 683 (Ky. App. 1981), where the relevant employees voluntarily quit their employment. However, the court noted:

> In a nutshell, the issue in this case boils down to whether a covenant not to compete signed by an employee after the date of his employment is enforceable. We hold that it **is provided the employer continues to employ the employee for an appreciable length of time after he signs the covenant, and the employee severs his relationship with his employer by voluntarily resigning.** In such a situation, the employer has fulfilled an implied promise to continue the employee's employment and that promise is sufficient consideration to support enforcement of the employee's promise not to compete. We express no opinion, however, as to the result we would reach had CAB unilaterally and involuntarily terminated these individuals' employment.

Id. at 685 (emphasis added).

Recently, in Lantech.com v. Yarbrough, 247 F.App'x 769, 774 (6th Cir. 2007), the United States Court of Appeals for the Sixth Circuit relied upon Crowell v. Woodruff in refusing to enforce a covenant not to compete. Lantech hired Yarbrough on November 1, 2002. In January 2006, Yarbrough was given a "needs improvement rating" and was placed on a "performance improvement plan." *Id.* at 770. Thirty days into the performance improvement plan, Yarbrough's manager noted that Yarbrough was making progress. However, before the expiration of the ninety day performance improvement plan period, Yarbrough was terminated "because he was not making an impact out in the field." *Id.* at 771. The restriction in dispute prohibited Yarbrough:

[9] In Higdon Food Service, Inc. v. Walker, 641 S.W.2d 750, 752 (Ky. 1982), the Kentucky Supreme Court cited favorably to Crowell v. Woodruff and its principle of considering the inequity of the discharge by the employer.

> from entering into the employ of ... any [corporation] engaged in the business of designing, manufacturing, selling, or distributing stretch wrapping ... equipment or any other product manufactured or under research and development by Lantech [f]or a period of two years following the date of termination of [his] employment with Lantech to the extent that [entering into such employment] may result in or may be related to any actual competition with Lantech.

Id. at 771 (internal quotation marks omitted).

The district court denied the request for an injunction enforcing the non-compete agreement and found that:

> Lantech terminated Mr. Yarbrough in a manner which was abrupt, peremptory, and without explanation, that Lantech's actions were in violation of its own employment policies as explained by its vice president for human resources, and in violation of the terms of its ninety day improvement plan for Mr. Yarbrough, and that Lantech declined to provide any outplacement assistance [to Yarbrough], in contravention of its normal practice.

Id. at 772 (internal quotation marks omitted).

In affirming the district court, the Sixth Circuit relied heavily upon Crowell v. Woodruff and concluded:

> While the particular facts of Crowell differ from this case, Crowell **establishes that a Kentucky court may look to the circumstances in which an employee was discharged in deciding whether to grant an injunction enforcing a covenant not to compete, and may refuse to enforce an otherwise valid agreement if the court finds that the employer discharged the employee unfairly**.

Id. at 774 (emphasis added).[10]

The circumstances surrounding the departure of the relevant employee was also considered in Orion Broadcasting, Inc. v. Forsythe, 477 F.Supp. 198 (W.D. Ky. 1979). Louisville television

[10] Yarbrough was decided 2-1 with Judge Clay writing a vigorous dissent based on Kentucky's strong presumption of the enforceability of non-compete agreements.

news broadcaster, Melissa Forsythe, was subject to a noncompetition agreement with WAVE-TV. After a change in its news programming, Forsythe was terminated. The district court noted had Forsythe voluntarily severed her employment with WAVE-TV, the court would not have hesitated to enforce the non-competition agreement, but to "hold that Ms. Forsythe, at the whim of plaintiff, could be deprived of her livelihood in a highly competitive market, seems ... to be an example of industrial peonage which has no place in today's society." *Id.* at 201. The district court in Lantech.com, LLC v. Yarbrough, 2006 WL 3323222, 2 (W.D.Ky. 2006), succinctly characterized the holding in Forsythe as follows: "If an employer places little value in an employee's services and determines to sever the relationship, actually or constructively, the employer stands in a weaker position to complain that another employer is receiving the benefit of those services."[11]

C. Scope of the Covenant

Usually when courts discuss the scope of the restriction at issue, scope is normally discussed in terms of time and territory. However, Kentucky law makes clear that another category within the scope of the restriction must be considered: whether the substantive scope of the employment relative to the services offered by the employee is too restrictive. As was the case concerning whether the relevant employee is terminated, this issue is introduced by Hall v. Willard and Woolsey, P. S. C., 471 S.W.2d 316 (Ky. 1971). Hall heavily relied upon Crowell v. Woodruff in defining whether restrictive covenants are reasonable in scope and purpose. The Hall court explained:

> Reasonableness is to be determined generally by the nature of the business or profession and employment, and the scope of the restrictions with respect to their character, duration and territorial extent. In gauging reasonableness, there is a distinction between a covenant ancillary to the sale of a business and to a contract of employment. The character of service to be performed and relationship of the employee are of importance. **Another test of reasonableness may be whether or not the restraint imposed upon the employee as covenantor is more comprehensive than is necessary to afford fair protection to the**

[11] However, Kentucky's highest court enforced a noncompetition agreement in Lareau v. O'Nan, 355 S.W.2d 679 (Ky. 1962), despite the fact that the doctor had been terminated.

> **legitimate interests of the employer as convenantee**.

Hall v. Willard and Woolsey, P. S. C., 471 S.W.2d 316, 318 (Ky. 1971) (*quoting* Crowell v. Woodruff, 245 S.W.2d 447, 449 (Ky.1951) (citations omitted).

The principle that the covenant cannot be any broader than is necessary to protect the relevant employer has not received in-depth treatment by Kentucky courts. However, the Court of Appeals in upholding the covenant in Hammons v. Big Sandy Claims Service, Inc., 567 S.W.2d 313, 315 (Ky. App. 1978) noted that "[i]t is to be born in mind that the covenant herein did not prevent Hammons from working as a staff adjuster (on salary) in the area for any insurance company. He was only restricted from entering into direct competition with Big Sandy [the previous employer] for one year." The Sixth Circuit in Lantech.com v. Yarbrough, 247 F.App'x 769, 774 (6th Cir. 2007), cited to Crowell v. Woodruff and explained that one of the pertinent tests for reasonableness is "whether or not the restraint imposed upon the employee as covenantor is more comprehensive than is necessary to afford fair protection to the legitimate interests of the employer as covenantee Crowell, 245 S.W.2d at 449."

IV. FINAL NOTE: SEXUAL HARASSMENT INVESTIGATIONS MUST BE DONE

It is imperative that objective and fair-minded investigations take place.

> [E]mployer liability in cases of coworker harassment is not derivative, but instead depends on the employer's own acts or omissions. An employer's response is unreasonable if it manifests indifference or unreasonableness in light of the facts the employer knew or should have known. A response is generally adequate, however, if it is reasonably calculated to end the harassment.

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 340 (6th Cir. 2008).

Love, the quest; marriage, the conquest; divorce, the inquest. – Helen Rowland

I. OBJECTIVE – TO PROVIDE BASIC, YET AUTHORITATIVE, HIGH-LEVEL INFORMATION REGARDING DIVORCE PRACTICE AND PROCEDURE IN KENTUCKY

II. THE "AUTHORITY"

A. KRS Chapter 403 (The "Divorce" Statutes)

B. Family Court Rules of Procedure and Practice ("FCRPP")

1. Effective January 1, 2011.

2. Available at KBA website at http://www.kybar.org/676 (under Resources Tab).

C. Kentucky Rules of Civil Procedure

KRS 403.130 provides that Rules of Civil Procedure apply to divorce proceedings.

D. Kentucky Practice, Domestic Relations Law, Graham and Keller

Must have treatise for any divorce practitioner.

E. Kentucky Appellate Court Decisions

Due to the discretionary nature of divorce proceedings, much law is made in these opinions.

III. GETTING STARTED

A. Scope of Representation

1. Important to have a written employment agreement specifying scope of services.

2. ***For general divorce proceedings***, once an entry of appearance is made, you will be responsible for representing and protecting ***all of the client's interests encompassed within those proceedings*** until: (1) you are granted

authority to withdraw; or (2) a divorce decree is entered. *See* Murphy v. Murphy, 272 S.W.3d 864 (Ky. App. 2008).

3. Client interests that may need to be protected include the following:

   a. Custody/timesharing.

   b. Child support.

   c. Property division and distribution.

   d. Maintenance.

   e. Attorney fees.

   f. Protection from domestic violence.

B. Jurisdiction – KRS 403.140 (authority of court to hear and determine case)

1. Creation of Family Courts -- In 2002, an amendment to Section 112 of the Kentucky Constitution authorized the creation of Family Courts.

   a. Designated a division of Circuit Court.

   b. Retains the general jurisdiction of Circuit Court, as well as any additional jurisdiction provided by legislature.

2. Family Court jurisdiction -- KRS 23A.100 states that a Family Court shall retain jurisdiction in the following cases:

   a. Dissolution of marriage;

   b. Child custody;

   c. Visitation;

   d. Maintenance and support;

   e. Equitable distribution of property in dissolution cases;

   f. Adoption; and

g. Termination of parental rights.

h. Family Courts also have the following **additional jurisdiction**:

i. Domestic violence and abuse proceedings under KRS Chapter 403 subsequent to the issuance of an emergency protective order in accord with local protocols under KRS 403.735;

ii. Proceedings under the Uniform Act on Paternity, KRS Chapter 406, and the Uniform Interstate Family Support Act, KRS 407.5101 to 407.5902;

iii. Dependency, neglect, and abuse proceedings under KRS Chapter 620; and

iv. Juvenile status offenses under KRS Chapter 630, except where proceedings under KRS Chapter 635 or 640 are pending.

3. KRS 403.180 -- 180 day residency requirement.

a. "One party, at the time the action was commenced, resided in this state, or was stationed in this state while a member of the armed services, and that the residence or military presence has been maintained for 180 days next preceding the filing of the petition."

b. In divorce context, residency means one's domicile.

Generally, actual residence in state for 180 days is required.

i. Exception – temporary absences (military, schooling).

ii. *See* McGowan v. McGowan, 663 S.W.2d 219 (Ky. App. 1983) – temporary move to another state for advanced training did not divest jurisdiction in Kentucky for divorce proceedings.

C. Venue – KRS 452.470 (where action is filed)

1. Pursuant to KRS 452.470, venue lies in the county "where either party usually resides."

2. Residence, for venue purposes, may be established immediately upon one's actual move to new location.

a. *See* Hummeldorf v. Hummeldorf, 616 S.W.2d 794, 797 (Ky. App. 1981) ("With the requisite intent, the wife can change her residence quickly.")

b. "Race to the courthouse" cases – if a party actually removes themselves to new county, no minimum amount of time is necessary to establish residence for venue purposes.

3. *Forum Non Conveniens* Doctrine -- When two actions are filed in different counties, the action will proceed in the county which is the most convenient forum.

a. Pursuant to Hummeldorf, 616 S.W.2d at 798, the following factors are relevant in determining the most convenient forum:

i. The county of the parties' marital residence prior to separation;

ii. The usual residence of the children, if any; and

iii. Accessibility of witnesses and the economy of offering proof.

b. The first county in which an action is filed usually determines venue – *see* Blanton v. Sparks, 507 S.W.2d 156 (Ky. 1974).

D. Initiating a Divorce

1. Pleadings.

a. KRS 403.130 – must be captioned "In Re: the Marriage of…"

b. Initial Pleading is called a “petition.”

The Petition is filed by the Petitioner and against the Respondent.

2. One party must file a Verified Petition (KRS 403.150) – *i.e.* the allegations must be sworn to by the petitioner in front of a notary.

3. The Petition must contain the following (KRS 403.150):

a. Age, occupation, social security number, and residential address of each party;

- KRS 403.150(2)(a) permits substitution of party’s attorney’s address in cases where domestic violence is alleged.

b. Length of each party’s residence in Kentucky;

c. Date of marriage;

d. Place where marriage is registered;

- Generally, this is the place where the marriage was celebrated.

e. Allegation that marriage is irretrievably broken;

- KRS 403.170 defines “irretrievable breakdown” as a determination that “no reasonable prospect of reconciliation exists.”

f. Allegation that parties are separated;

What is separation?

i. *See* KRS 403.170 – it means living apart.

ii. “Living apart shall include living under the same roof without sexual cohabitation.” – *i.e.* roommates.

g. Date of separation;

h. Whether the wife is pregnant;

- If pregnant at time action is commenced, court may continue action until pregnancy is terminated.

i. If domestic violence and abuse, as defined in KRS 403.720, is alleged by either party, the petitioner must indicate the existence and status of any domestic violence protective orders;

- Where domestic violence orders are currently in existence, a certified copy of the order should be attached to the petition.

j. Any arrangements as to the maintenance of a spouse;

k. **If there are minor children** – *see* KRS 403.480(1) and KRS 403.150;

i. The names, ages, Social Security numbers, and addresses, provided in accordance with KRS 403.135, of any living minor children of the marriage (KRS 403.150);

- KRS 403.150(2)(a) permits substitution of party's attorney's address in cases where domestic violence is alleged against a party or the children.

ii. The places where the children have lived for the last five years;

ii. Whether the petitioner has participated in custody litigation in another state, knows of such litigation, or knows of another person who claims custody of the child or children; and

iv. Any arrangements as to custody, visitation, and child support (KRS 403.150); and

l. The relief sought.

i. Divorce or legal separation.

ii. Restoration of nonmarital property.

iii. Equitable division and distribution of marital property.

iv. Joint or sole custody of minor children.

v. Reasonable timesharing or visitation of minor children.

vi. Maintenance.

vii. Attorney fees.

viii. Any other orders the court deems just.

4. While NOT required, it is also good practice to include the following in the petition:

a. Whether either party is in the military.

b. Why?

i. Jurisdictional issues -- *See* KRS 403.140(1)(a) – confers jurisdiction on the basis of military presence in the state.

ii. Notice and Default issues – *see* Federal Servicemembers Civil Relief Act, 50 App. U.S.C.A. §501 *et. seq.*

a) Allows divorce proceedings to be stayed by servicemember Respondent for a period not less than ninety days.

b) Prohibits entry of default judgments against service members.

iii. Division of Pension Benefits – *see* Uniform Services Former Spouses' Protection Act, 10 U.S.C.A. §§1401 -1408.

- Regulates the division of military pension benefits.

5. Protection of personal identifiers.

   a. KRS 403.135 and CR 7.03 require that personal identifiers be redacted from divorce filings.

   b. What are personal identifiers?

      i. No dispute.

         a) Social Security numbers;

         b) Month and day of birthdates; and

         c) Financial account numbers.

      ii. Unresolved conflict in statute – names of minor children.

         a) KRS 403.135 provides that personal identifiers shall be redacted in accordance with CR 7.03.

         b) CR 7.03 does not provide that the name of a minor child is a personal identifier.

         c) KRS 403.135, however, specifically provides that names of minor children are personal identifiers.

6. Service.

   a. KRS 403.150 dictates that the Respondent to a divorce action must be served with the petition pursuant to the Civil Rules.

   b. <u>For individuals located in Kentucky</u>, the Civil Rules requires service in one of two ways:

      i. Personal service by sheriff or constable – *see* CR 4.04; or

      ii. Waiver and Entry of Appearance.

         - Very common

c. If individual is located outside the state, service may also be accomplished by certified mail.

d. What if whereabouts of Respondent are unknown?

- *See* CR 4.05 -- may use Warning Order Attorney

E. Response

1. KRS 403.150 – indicates that the filing of a verified response is not mandatory.

2. HOWEVER, failure to file a response within twenty days of service can result in the entry of a default judgment.

- *See* CR 12.01 (defendant must service answer within twenty days after service of the summons upon him/her)

IV. TEMPORARY ORDERS

Trial judge is authorized to issue temporary orders pending final resolution of the matter.

A. Temporary Maintenance -- KRS 403.160

- Additional requirements set forth in FCRPP 5

B. Temporary Child Support – KRS 403.160

- Additional requirements set forth in FCRPP 9

C. Temporary Restraining Order and Injunctions – KRS 403.160

- Subject to Civil Rule 65 – setting forth procedural requirements for restraining orders and injunctions

D. Emergency Protective Order – KRS 403.740

- Additional requirements set forth in FCRPP 10

E. Temporary Custody Order – KRS 403.280

F. Temporary Orders are interlocutory (can't be appealed) and can be revoked or modified at any time prior to the entry of a final decree.

G. Temporary Orders dissolve upon entry of a final order and decree or upon dismissal of the action.

V. RESOLVING ISSUES OUTSIDE THE COURTROOM

A. In divorce proceedings, there are no juries. *See* KRS 403.010. If the parties are unable to agree, the trial judge is granted extraordinary discretion in determining issues.

B. Mediation and ADR principles are heavily relied upon in this arena.

C. Separation Agreements -- Most parties resolve issues incident to divorce through a negotiated contract known as a settlement or separation agreement.

See KRS 403.180 – specifically provides for the enforcement of these types of contracts.

1. Except for child custody, child timesharing/visitation, and child support, the terms of a separation agreement are binding on the trial court and are nonmodifiable in the absence of a supplemental agreement to modify.

    a. EXCEPTION – the Court shall not enforce terms or agreements which the Court deems to be unconscionable.

    b. Submission to Court required -- Statute provides that all separation agreements must be submitted to the Court prior to the entry of a decree for a determination that the agreement is not unconscionable.

    c. Agreements to be incorporated into decree unless otherwise provided in agreement -- If the agreement is determined to be not unconscionable, the terms of the agreement may be incorporated into the decree and be enforceable as an order of the Court.

2. Custody, timesharing/visitation, and child support may be revisited at any time and are ALWAYS subject to modification.

VI. DISCOVERY

A. Litigants may utilize the full panoply of discovery tools set forth in the Rules of Civil Procedure – *see* CR Rules 26 through 37.

B. Preliminary Verified Disclosure Statements

1. *See* FCRPP 2(3) – set forth on AOC-238 – mandatory disclosure statement which sets forth each party's income, expenses, and property information, including any nonmarital property claims.

2. Great starting point for gathering information and for initial assessment of case.

VII. PROPERTY DIVISION AND DISTRIBUTION

A. KRS 403.190 – governs the distribution and division of property

B. STEP ONE -- CLASSIFICATION – Two types of property

1. Nonmarital property – includes:

a. Any property obtained prior to marriage; and

b. Property obtained during the marriage by gift or inheritance.

2. Marital property – includes:

a. All property obtained during the marriage regardless of title; and

b. Any increase in value to nonmarital property that was obtained by the efforts of either spouse during the marriage.

i. Example – Husband purchases a house prior to the marriage, but pays off mortgage during the marriage. The increase in value obtained from the payoff of that mortgage during the marriage is marital.

ii. Compare – passive appreciation of nonmarital property will remain nonmarital because the increase in value was not due to the efforts of

either spouse. Example – passive increases in real estate values or investment accounts.

C. STEP TWO: DISTRIBUTION AND DIVISION

1. The Court must first assign to each spouse his or her nonmarital property.

2. Once the nonmarital property is assigned, Court must make an equitable distribution/division of the marital property ***without regard to marital misconduct***.

   a. EXCEPTION – Dissipation of Marital Assets.

   b. "The concept of dissipation requires that a party used marital assets for a non-marital purpose." Brosick v. Brosick, 974 S.W.2d 498, 502 (Ky. App. 1998).

      i. Ex. using marital money to entertain a boyfriend or girlfriend.

      ii. Unaccounted for money -- In Bratcher v. Bratcher, 26 S.W.3d 797, 799 (Ky. App. 2000), dissipation was found where it was established that spouse has used over $77K of marital money during separation period without any indication that the money was used for marital purposes.

   c. What happens when finding of dissipation is made?

      Court will include dissipated assets in marital estate and then apportion those assets to offending spouse.

3. What is an equitable distribution/division?

   KRS 403.190(1) provides that the Court must consider the following factors when making the above determination:

   a. Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

   b. Value of the property set apart to each spouse;

   c. Duration of marriage; and

d. Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

4. There is no presumption of 50/50 split of assets.

See Herron v. Herron, 573 S.W.2d 342, 344 (Ky. 1978) ("It is significant to us that the statutes do not mention 'presumptions;' and in the absence of this, we are of the opinion the legislative mandate is binding upon us and that presumptions in the division of marital property should not be indulged in at all.")

5. Trial Court's division/distribution of property will not be set aside unless there is an abuse of discretion.

VIII. MAINTENANCE

A. KRS 403.200(1) – **provides for WHEN maintenance may be awarded**:

Spouse seeking maintenance must show that he or she:

1. Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

2. Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

B. KRS 403.200(2) – **provides for HOW MUCH and HOW LONG:**

The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

1. The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

2. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

3. The standard of living established during the marriage;

4. The duration of the marriage;

5. The age, and the physical and emotional condition of the spouse seeking maintenance; and

6. The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

IX. CUSTODY

A. What Is Custody?

1. Traditionally described as the "care, control and maintenance of the children."

2. **Sole custody** – Traditional view – "As a consequence of the fault-based divorce scheme, sole custody was the rule for most of the 20th century. As a marital couple, both parents enjoyed full parenting rights and responsibilities; however, the dissolution of the marital bond not only altered the relationship of the parties but also altered the relationship between the parties and any children they might share. The 'innocent' spouse who obtained divorce on appropriate grounds (adultery, insanity, indignities, imprisonment, bigamy, cruel treatment, or desertion) was generally deemed the fit parent. The sole custodian possessed full control and singular decision-making responsibility for his or her children to the exclusion of the other parent who received a limited period of access to the children through visitation, a term which denoted the right to see the children, but not to control them legally. During this time, custodial preference under the law evolved from father first, then to the mother first under the tender years presumption, and finally to equal consideration of both parents seeking sole custody." Pennington v. Marcum, 266 S.W.3d 759, 763 (Ky. 2008).

A hybrid subset of sole custody is "split custody" – arrangement where each parent has "sole custody" during the times when the child is in their care.

3. **Joint custody** -- Modern view – "Joint custody is also a natural progression of our no fault divorce concept, recognizing that both parties may be fit parents but not compatible to be married to each other. A divorce from a spouse is not a divorce from their children, nor should custody decisions be used as a punishment. Joint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's upbringing." Chalupa v. Chalupa, 830 S.W.2d 391, 393 (Ky. App. 1992).

   a. "Joint custody as a legal concept has several defining characteristics. Both parents have responsibility for and authority over their children at all times. Equal time residing with each parent is not required, but a flexible division of physical custody of the children is necessary. A significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are expected to consult and participate equally in the child's upbringing." Pennington v. Marcum, 266 S.W.3d 759, 763 (Ky. 2008).

   b. **A hybrid subset of joint custody is "shared custody"** – both parents have legal custody, but timesharing arrangements are less flexible, tends to mirror more of a traditional sole custody arrangement where child spends more time during the school week with one parent (frequently delineated as the "primary residential parent").

B. Initial Order – **BEST INTERESTS OF THE CHILD CONTROLS**

1. KRS 403.270(2) -- The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any *de facto* custodian. The court shall consider all relevant factors including:

   a. The wishes of the child's parent or parents, and any *de facto* custodian, as to his custody;

   b. The wishes of the child as to his custodian;

c. The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

d. The child's adjustment to his home, school, and community;

e. The mental and physical health of all individuals involved;

f. Information, records, and evidence of domestic violence as defined in KRS 403.720;

g. The extent to which the child has been cared for, nurtured, and supported by any *de facto* custodian;

h. The intent of the parent or parents in placing the child with a *de facto* custodian; and

i. The circumstances under which the child was placed or allowed to remain in the custody of a *de facto* custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a *de facto* custodian to allow the parent now seeking custody to seek employment, work, or attend school.

2. What factor does parental misconduct or "poor character" play in custody determinations?

a. Pursuant to KRS 403.270(3), the court is not supposed to consider conduct of a proposed custodian that does not affect his relationship to the child.

b. If domestic violence and abuse are alleged, the court should determine the extent to which the domestic violence and abuse have affected the child and the child's relationship to both parents.

c. HOWEVER, in Krug v. Krug, 647 S.W.2d 790 (Ky. 1983), the Kentucky Supreme Court held that even though the children were not necessarily aware of the

parent's misconduct and poor character[1] (thus, reducing the likelihood that the conduct affected the parent's relationship with the child), the evidence was nevertheless relevant to the question of whether the child was being exposed to an "unwholesome environment."

3. Modifications.

a. KRS 403.340(2) -- WITHIN TWO YEARS OF LAST ORDER – PRESENT ENVIROMENT MUST SERIOUSLY ENDANGER CHILD.

Custody may not be modified unless there is reason to believe that:

i. The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

ii. The custodian appointed under the prior decree has placed the child with a *de facto* custodian.

b. KRS 403.340(3) **–** MORE THAN TWO YEARS AFTER LAST ORDER – CHANGE OF CIRCUMSTANCES MUST BE DEMONSTRATED.

Custody may not be modified unless:

i. Upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian; AND

ii. That a modification is necessary to serve the best interests of the child.

Factors set forth in KRS 403.270 must be considered.

[1] This conclusion was drawn due to evidence that established that the parent had engaged in three extramarital affairs and had written cold checks.

4. IF either parent wishes to move with the children:

   a. FCRPP 7(2) – for moves to another state of more than 100 miles from present residence -- sixty day notice to other parent required prior to move.

   b. Must obtain court order approving any moves which alter the "status quo."

X. TIMESHARING AND VISITATION

A. What Is It? Actual Physical Control and Possession of the Child

1. PRACTICE POINTER – Custody addresses "who gets to make decisions concerning the child," whereas timesharing/visitation addresses "in whose physical care will the child be in."

2. Initial Order.

   a. Sole custody – Visitation is granted pursuant to KRS 403.320(1) – parent is entitled to "reasonable" visitation rights unless the court finds, after a hearing, that visitation would seriously endanger the child's physical, mental, moral, or emotional health.

   b. Joint custody – Timesharing is granted pursuant to "best interests of the child standard" set forth in KRS 403.270.

3. Modifications.

   a. Sole custody – Visitation may be modified at any time pursuant to KRS 403.320(3) if the court finds that modification is in the best interest of the child.

   b. Joint custody – pursuant to Pennington v. Marcum, 266 S.W.3d 759, 769 (Ky. 2008), timesharing may be modified at any time pursuant to KRS 403.320(3) if the court finds that modification is in the best interest of the child.

B. FCRPP 8 – Adoption of Model Time-Sharing/Visitation Guidelines

1. AOC-P-106 – attached hereto.

2. Guidelines are advisory only.

XI. CHILD SUPPORT

A. Establishment

1. Initiating an action – action may be initiated by parent, custodian, or agency contributing to support of child. [KRS 403.211].

2. Working with the Child Support Guidelines generally.

a. Guidelines presumed to be correct [KRS 403.211(2)].

b. Order divided between parties proportional to their income [KRS 403.212(3)].

c. Items deducted from gross income – to the extent actually paid [KRS 403.212(g)].

i. Spousal support to prior spouses.

ii. Child support for other children.

iii. Amount of support that would be paid for other children residing with parent.

d. Court may deviate from guidelines if their application is unjust and inappropriate. Court must list reason from KRS 403.211(3) when it deviates from guidelines.

e. If party defaults or insufficient income evidence presented court may issue order based on needs of child or child's former standard of living. [KRS 403.211(5)]

- Order may be retroactively increased within two years if income evidence later found.

f. Child care costs are allocated proportionally to parents, by their income, in addition to child support order amount.

g. Health care issues [KRS 403.211(7-13)].

i. Cost of insurance coverage allocated proportionally between the parents.

ii. If parent has 100 percent of combined income, they are permitted a reduction in gross income on guidelines equal to premiums paid.

iii. Must designate which parent will be primarily responsible for child medical coverage.

iv. Cash medical order must be created if private health coverage not accessible and at reasonable cost.

a) Assessable = within sixty miles of child residence.

b) Reasonable cost = less than 5 percent of gross income, pro rata to provide insurance.

v. Extraordinary medical expenses (over $100 per year) allocated proportionally by income share.

vi. Cabinet for Health and Family Services can order employer to enroll child for health coverage unless contested by obligated parent.

h. Minimum support order is $60.00 a month [KRS 403.212(4)].

i. Court may use discretion when party income exceeds the amount of guidelines table [KRS 403.212(5)].

3. Income calculation for self-employed individuals.

a. Usually only income deductions allowed are those involving real expenditure of money, (*i.e.* not mileage credits). [KRS 403.212(2)(c)]

b. Reimbursement and living allowances can be used as income, (*i.e.* company car, housing, meal reimbursement, etc.).

4. Split custody guidelines.

   Two child support worksheets prepared. The smaller obligation is subtracted from the larger obligation to determine the amount to be paid each month.

5. Imputation of income.

   a. If parent is unemployed or underemployed, potential income may be imputed [KRS 403.212(d)].

      i. No imputation if parent is physically or mentally incapacitated.

      ii. No imputation if parent caring for child under three that both parents are legally responsible for.

   b. Imputation is based on parent's recent work history, qualifications, and opportunities and earnings in the community.

6. Modification.

   a. Support amount only modified from date of filing request, not retroactively [KRS 403.213(1)].

   b. Modification requires a showing of change of circumstances.

      i. Order amount changed under 15 percent presumed not a change of circumstances.

      ii. Order amount changed over 15 percent presumed a change of circumstances.

7. Termination of Support Order – order is terminated by emancipation of child at age eighteen, unless child is still in high school. If child is in high school, order can continue as long as child in school, until child turns nineteen. [KRS 403.213(3)].

a. Death of obligor does not terminate order. Order can be modified, revoked, or reduced to a lump sum payment.

b. Emancipation of child does not void requirement that obligor pay arrears owed.

8. Collection.

a. All new orders required to provide for payment of child support via wage assignment. [KRS 403.215]

- If good cause shown, assignment will only begin after accrual of 1 month of arrears.

b. Money received by child as result of disability is credited against child support obligation of that parent. [KRS 201.433(15)]

i. Not counted as income for either parent.

ii. Overpayment cannot be applied to arrears prior to disability date.

iii. Paying agency determines disability date.

B. Enforcement (Contempt Actions)

1. Visitation and Support Payment Orders are separate issues.

2. <u>Contempt must be willful.</u> Evidence that can show inability to pay Includes:

a. Proof of low income.

b. Proof of high living expenses compared to income.

c. Evidence showing constant work search when unemployed.

d. Medical documentation showing disability (as specific as possible).

3. It is well established that a trial court has inherent power to enforce its judgment by means of the incarceration of a

person who is found in contempt of a lawful order of the court. However, contempt power is an extraordinary use of a court's authority and carefully circumscribed. Lewis v. Lewis, 875 S.W.2d 862 (Ky. 1993). The power of contempt cannot be used to compel the doing of an impossible act. Rudd v. Rudd, 214 S.W. 791 (Ky. 1919).

4. In child support enforcement cases, family courts are required to make findings of fact concerning a defendant's ability to pay his support obligation. Clay v. Winn, 434 S.W.2d 650 (Ky. 1968). The court can find a defendant in civil contempt only where the defendant is found to have a present ability to pay the obligation.

C. Interstate Issues

1. Jurisdiction.

a. Basis for jurisdiction over non-residents [KRS 407.5201].

i. Personal service of summons within state.

ii. Consent to jurisdiction.

iii. Entering a general appearance.

iv. Waiver of jurisdiction by filing responsive pleading.

v. Individual resided with child in state.

vi. Individual resided in state and paid prenatal expenses or support.

vii. Child resides in state due to acts or directives of individual.

viii. Individual engaged in sexual intercourse in the state that may have resulted in birth of child.

ix. Individual asserted parentage in KY putative father registry.

x. Other basis consistent with state and national constitutions.

b. Simultaneous proceedings -- can exercise jurisdiction after pleading filed in other state only when [KRS 407.5204]:

i. If Kentucky petition/pleading filed prior to deadline for responsive pleading challenging other state's jurisdiction;

ii. Contesting party timely challenges other state's jurisdiction; AND

iii. Child lives in Kentucky.

c. CEJ (Continuing Exclusive Jurisdiction) -- Kentucky has CEJ IF [KRS 407.5205]:

i. Kentucky remains residence of obligor, obligee, or child OR

ii. Until all parties have signed consent for other state to assume CEJ.

2. Registering an Order -- Kentucky may register order of another state for enforcement. Registration request must include [KRS 407.5602]:

a. Transmittal letter requesting registration and enforcement.

b. Two copies (one certified) all orders to be registered.

c. Sworn arrears statement.

d. Required info (if known).

i. Name of obligor with: address and Social Security Number.

ii. Name and address of obligor employer and any other income source.

e. Description of location of obligor property in state not exempt from execution.

f. Name and address of obligee and agency or person processing payments.

3. Contesting registration.

a. Notice [KRS 407.5606].

i. Registration must include copy of registered order and attached documents.

ii. Twenty days to request hearing to contest registration.

iii. Failure to contest confirms order and any matter that could have been contested.

b. Contesting party can:

i. Ask court to vacate registration.

ii. Assert any defense to allegation of noncompliance to registered order.

iii. Contest remedies being sought.

c. What may be contested [KRS 407.5607 (1)]:

i. Issuing tribunal lacked jurisdiction over party.

ii. Order obtained by fraud.

iii. Order has been vacated, suspended, or modified by later order.

iv. Issuing tribunal stayed order pending appeal.

v. Defense of law of this state to remedy being sought.

vi. Full or partial payment has been made.

vii. Statute of limitation (KRS 407.5604) precluded arrears enforcement.

d. Remedy – Tribunal may [KRS 407.5607 (2)]:

i. Stay enforcement of order.

ii. Continue proceeding to gather more evidence.

iii. Issue other appropriate orders (uncontested portions may be enforced).

XII. ATTORNEY FEES

A. KRS 403.220 – One party may be required to pay all or a portion of the other's attorney fees, but financial disparity between parties required.

1. "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name."

2. Pursuant to Lampton v. Lampton, 721 S.W.2d 736, 739 (Ky. App. 1986), attorney fees under KRS 403.220 may not be awarded unless the Court makes a finding that there is a financial disparity between the parties sufficient to warrant an award of attorney fees under the statute.

3. Court has broad discretion when determining whether award of attorney fees is just.

B. CR 37.01 and CR 11 – Obstructive conduct and tactics may also warrant an award of attorney fees.

1. In Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky.1990), the Kentucky Supreme Court held that obstructive conduct and tactics during litigation may justify an award of attorney fees under CR 37.01.

Must make appropriate motion and allow opposing party an opportunity to be heard before such sanctions can be assessed by the court – *see* Cochran v. Cochran, 746 S.W.2d 568, 570 (Ky. App. 1988).

2. In Clark Equipment Co., Inc. v. Bowman, 762 S.W.2d 417, 420 (Ky. App. 1988), the Court of Appeals explained that Rule 11 is a procedural rule designed to curb abusive conduct in the litigation process.

C. Award of fees is within the discretion of the trial court – *see* Miller v. McGinity, 234 S.W.3d 371, 373 (Ky. App. 2007) (setting forth abuse of discretion standard for review of such determinations) and Tucker v. Hill, 763 S.W.2d 144 (Ky. App. 1988) (court has broad discretion when determining whether award of fees is just).

XIII. OBTAINING A DIVORCE DECREE

A. Waiting Periods

1. KRS 403.170(1) requires that parties must be separated for a period of sixty days prior to the entry of a divorce decree.

   - Sixty day period need not occur ***prior*** to filing

2. If minor children – KRS 403.044 states that no testimony may be taken for sixty days from either: (1) date of service of summons, (2) the appointment of a warning order attorney; (3) the filing of an entry of appearance; or (4) a responsive pleading, whichever occurs first.

3. Local Rules – Local Rules may also impose waiting periods.

   For example, Fayette Circuit Court prohibits final hearings in a dissolution action until twenty days has elapsed following the entry of appearance or service of summons, whichever occurs first.

B. Bifurcated Decrees

Pursuant to Putnam v. Fanning, 495 S.W.2d 175 (Ky. 1973), a divorce decree may be entered prior to the resolution of the matters enumerated in KRS 403.140(1)(d) (property division, maintenance, custody, child support) so long as the trial court specifically reserves those issues for subsequent determination.

C. Specific Procedural Requirements and Forms Required to Obtain Decree

See FCRPP 3 – be sure to follow these guidelines carefully.

XIV. APPEALS

A. May appeal any portion of a divorce decree **except that portion which dissolves the marriage.**

B. Legislature has determined that once a divorce decree is entered, it is final and may not be appealed. *See* Ky Const. §115 and KRS 22A.020(3).

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
___ DIVISION

IN RE THE MARRIAGE OF:

Husband

Petitioner

and Case No. 10-CI-_____

Wife

Respondent

VERIFIED PETITION FOR DISSOLUTION OF MARRIAGE

1. This proceeding is initiated by the petition of the Husband, _____. The Petitioner resides in the Commonwealth of Kentucky and has been a resident thereof for more than 180 days preceding the filing of this Petition:

2. The relevant information concerning the husband is:

(a) Name:

(b) Present address:
Lexington, KY 40511

(c) Age: Date of Birth: xx/xx/xxxx

(d) Occupation:

(e) Length of residence in Kentucky: More than 180 days

(f) Prior marriages:

(g) How terminated:

(h) Social Security Number: xxx-xx-xxxx

3. The relevant information concerning the wife is:

(a) Name:

(b) Present address:
Lexington, KY 40511

(c) Age: Date of Birth: xx/xx/xxxx

(d) Occupation:

(e) Length of residence in Kentucky: More than 180 days

(f) Prior marriages:

(g) How terminated:

(h) Social Security Number: xxx-xx-xxxx

4. The parties were married on _____, 2004, in Fayette County, Kentucky, where the marriage is registered.

5. The parties separated on or about _____, 2010.

6. There are two (2) minor children born of this marriage, namely _____, age 5, DOB: xx/xx/xxxx, SSN: xxx-xx-xxxx; _____, age 3, DOB: xx/xx/xxxx, SSN: xxx-xx-xxxx.

7. Respondent is not pregnant.

8. In accordance with KRS 403.150, the Petitioner certifies that there are no EPOs or DVOs entered involving the parties.

9. In accordance with KRS 403.838, the Petitioner gives the following additional information concerning the minor children:

A) Said children have resided with Petitioner and Respondent since birth.

B) The Petitioner has not participated as a party, witness, or in any other capacity in any litigation concerning the custody of said children in this or any other state.

C) The Petitioner has no information of any custody proceeding concerning said children in any Court of this or any other State; and

D) The Petitioner does not know of any person not a party to this proceeding who has physical custody of the children or claims to have custody or visitation rights with respect to the children.

10. No arrangements have been made between the parties regarding custody, visitation, or support of the minor children.

11. Neither party is currently in the military service.

12. The marriage between the parties is irretrievably broken.

13. The property subject to disposition by the Court includes certain non-marital property, marital property, both real and personal, and certain debts and obligations of the parties.

WHEREFORE, Petitioner prays the Court to:

1. Enter a Decree of Dissolution of the parties' marriage;

2. Award joint custody of the minor children to the parties;

3. Determine an award of child support, both temporary and permanent;

4. Assign the non-marital property, and divide the marital property and debts and obligations of the parties;

5. Require each party to pay his/her own attorneys' fees; and

6. Make such other orders as may be appropriate.

LAW FIRM

_____
Signature
ATTORNEYS FOR PETITIONER

VERIFICATION

I have read the foregoing petition and the facts stated therein are true and correct to the best of my knowledge and belief.

_____
Husband
PETITIONER

STATE OF KENTUCKY)
) SCT
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Husband on this the ___ day of _____, 2011.

My Commission expires: _____.

_____
NOTARY PUBLIC, STATE AT LARGE

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY COURT
___ DIVISION

IN RE THE MARRIAGE OF:

HUSBAND

Petitioner

AND No. 10-CI-_____

WIFE

Respondent

VERIFIED RESPONSE TO PETITION
FOR DISSOLUTION OF MARRIAGE

Comes now the Respondent, Wife, and for her response to the Petition for Dissolution of Marriage, states as follows:

1. Respondent admits paragraph 1 except she is without sufficient information to admit or deny the allegations concerning Petitioner's residence or his employment.

2. Respondent admits paragraphs 2, 3, 4, 5, 6, 7, 8, and 10.

3. Respondent denies paragraph 9.

4. Respondent is without sufficient information to admit or deny the allegations set forth in paragraph 11.

WHEREFORE, the Respondent asks that the Court:

1. Enter a Decree of Dissolution of the parties' marriage;

2. Assign the non-marital property, and divide the marital property and debts and obligations of the parties;

3. Provide for attorney fees pursuant to KRS 403.220; and

4. Make such other orders as may be appropriate.

LAW FIRM

By: _____
Signature
ATTORNEYS FOR RESPONDENT

VERIFICATION

The Respondent, Wife, states that she has read the foregoing and that the facts stated therein are true and correct, to the best of her knowledge.

_____
Wife

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Wife this ____ day of _____, 2011.

My Commission expires: _____.

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Verified Response has been served this _____ day of _____, 2011, by first class mail, postage prepaid, addressed to the following:

ATTORNEY FOR PETITIONER

_____
ATTORNEYS FOR RESPONDENT

AOC-238 Doc. Code: DSPV Rev. 1-11 Page 1 of 8 Commonwealth of Kentucky Court of Justice *www.courts.ky.gov* FCRPP 2	**PRELIMINARY VERIFIED DISCLOSURE STATEMENT**	Case No. _____ Court _____ County _____ Division _____

IN RE THE MARRIAGE OF:

_____ _____ _____ _____ PETITIONER

and

_____ _____ _____ _____ RESPONDENT

☐ Petitioner ☐ Respondent submits under oath the following Preliminary Verified Disclosure Statement pursuant to FCRPP 2 which requires full and prompt disclosure of the following information:

NOTE: A RESPONSE OF "SEE ATTACHED" IS NOT APPROPRIATE FOR ANY PORTION OF THIS STATEMENT. ATTACH DOCUMENTS REQUESTED HEREIN ONLY.

A. BACKGROUND INFORMATION:

1. Name: _____ Maiden Name: _____
2. Current Address: _____
   _____
   _____ _____
3. Date of Birth: _____ State of Birth: _____
4. Number of Prior Marriages: _____ How Each Terminated: _____
5. Minor Children From Prior Marriages:

Name	Date of Birth	Residing With

6. Date of Marriage: _____ Where License Obtained: _____
7. Date of Separation: _____
8. Children of This Marriage: _____

Name	Date of Birth	Residing With

9. Have you attended a divorce education program? _____ When: _____
10. Have children attended a children's divorce education program? _____ When: _____

11. Is there an Emergency Protective Order or a Domestic Violence Order in effect regarding these parties? ☐
If so, ATTACH COPY OF ORDER (all pages).

12. Is there a Petition pending filed by either party for an Emergency Protective Order? ☐
If so, ATTACH COPY OF PETITION (all pages).

B. EMPLOYMENT INFORMATION:

1. Current Employer: _____
Address: _____
_____ _____ _____

Length of Employment: _____
Present Position: _____
How Often Paid: _____
Gross Pay Per Pay Period (including overtime): _____
Net Pay Per Pay Period (including overtime): _____

2. Other/Additional Employer: _____
Address: _____
_____ _____ _____

Length of Employment: _____
Present Position: _____
How Often Paid: _____
Gross Pay Per Pay Period (including overtime): _____
Net Pay Per Pay Period (including overtime): _____

3. Self-Employment: _____
Name of Business: _____
Type of Business: _____
Address: _____
_____ _____ _____

Length of Self-Employment: _____
Present Position: _____
Gross Income Year to Date: _____

Ordinary and Necessary Business Expenses Year to Date (list and give totals):

_____
_____
_____
_____
_____
_____
_____

Gross Income Last Year from Self-Employment: _____
Net Income Last Year from Self-Employment: _____

ATTACH COPIES OF LAST THREE PAY STUBS FROM EACH EMPLOYER, LAST YEAR'S W-2(S) AND LAST THREE STATE AND FEDERAL TAX RETURNS.

C. ADDITIONAL INCOME RECEIVED IN LAST 12 MONTHS (Specify amounts):

		Amount
1.	Employment Benefits:	
	Commissions:	
	Bonuses, incentives, etc.:	
	Health Insurance paid by employer	
	Housing expenses:	
	Automobile expenses:	
	Payment/lease:	
	Mileage:	
	Repairs:	
	Gas:	
	Insurance:	
	Phone/Mobile phone expenses:	
	Meals or allowance:	
	Club dues:	
	Others (list all and specify amount or value):	
2.	Interest and Dividends:	
	Source	
3.	Unemployment:	
4.	Worker's Compensation:	
5.	Social Security/SSI:	
6.	TANF:	
7.	Child Support:	
8.	Maintenance:	
9.	Retirement Benefits:	
10.	Others (list all and give amounts):	

D. CHILD SUPPORT GUIDELINE INFORMATION:

1. Medical Insurance:
   Who pays:
   How paid:
   How Much for Child(ren) Only:

2. Dental Insurance:
   Who pays:
   How paid:
   How Much for Child(ren) Only:

3. Child Care Costs:
   Who Provides:
   How Often is Provider Paid:
   Name of Provider:
   How Much Paid:
4. Amount Paid for Court Ordered Child Support for Prior Born Child(ren):
5. Amount Paid for Court Ordered Maintenance for Prior Marriage(s):
6. Imputed Child Support for Prior Born Child(ren):
7. Child Support Received for Child not of this Marriage:
8. Maintenance Received from Prior Marriage:

E. NONMARITAL PROPERTY CLAIMS:

List all property, real or personal, tangible or intangible, of greater than $100.00 in value, which you claim to be either entirely or partially your nonmarital property.

Item 1--Specify item:

Fair Market Value at Date of Marriage:
Debt Balance on Item at Date of Marriage:
Current Debt Balance on Item:
Current Fair Market Value:
Basis for your Claim Item is Nonmarital:
Nonmarital Value of Item:

Item 2--Specify item

Fair Market Value at Date of Marriage:
Debt Balance on Item at Date of Marriage:
Current Debt Balance on Item:
Current Fair Market Value:
Basis for your Claim Item is Nonmarital:
Nonmarital Value of Item:

F. MARITAL PROPERTY:

1. Real Property:

Address	*Fair Market Value*	*Mortgage(s) Balance*	*% Interest*

2. Vehicles, Motorcycles, Boats, Trailers, Equipment, etc.:

Year/Make/Model/Type	*Fair Market Value*	*Loan Balance*

3. Bank Accounts*

Bank and Type of Account	*Balance*

4. Investments (Stocks, Bonds, Mutual Funds, Stock Options, etc.)*:

Type and Location of Investment	*# of Shares*	*Fair Market Value*

5. Life Insurance*:

Company and Type of Policy	*Insured*	*Cash Surrender Value*	*Loan Balance*

***** Bank statements, canceled checks, registers, carbon copies of checks, deposit tickets, periodic statements from investments, statements on life insurance, periodic statements from retirement plans, periodic statements reflecting assets held in name of or on behalf of children, and documents reflecting debts and credit card statements for past 12 months should be in possession of answering party or answering party's attorney when this statement is served on the opposing party.

6. Assets Held in Name of/on Behalf of Children*

Type & Name of Account	*Balance or Value*

7. Retirement Plans (Pensions, 401(k), Tax Deferred Savings, IRAs, etc.)*:

Type and Name of Plan	*Plan Administrator*	*Balance or Value*

8. Interests In/Ownership of Business:

Location of Business, Business Name & Address	*% and Type of Business*	*Tax Returns & Financial Documents*

9. Household Property in Dispute:

Item	*Location*	*Fair Market Value*	*Loan Balance*

* Bank statements, canceled checks, registers, carbon copies of checks, deposit tickets, periodic statements from investments, statements on life insurance, periodic statements from retirement plans, periodic statements reflecting assets held in name of or on behalf of children, and documents reflecting debts and credit card statements for past 12 months should be in possession of answering party or answering party's attorney when this statement is served on the opposing party.

10. Safety Deposit Box? ☐ Yes ☐ No If yes:

Location	*Contents*	*Value*	*Date of Last Visit*

11. Other Property - (specify item and value):

Jewelry:
Furs:
Antiques:
Art:
Collections:
Country Club Memberships:
Season Tickets:
Income Tax Refunds Expected:
Frequent Flyer Miles:
Accounts Receivables/Loans:
Claims Against Others:
Accrued Vacation Pay:
Others:

G. DEBTS*:

Creditor	*Purpose/Security*	*Balance*	*Monthly Pmt.*

***** Bank statements, canceled checks, registers, carbon copies of checks, deposit tickets, periodic statements from investments, statements on life insurance, periodic statements from retirement plans, periodic statements reflecting assets held in name of or on behalf of children, and documents reflecting debts and credit card statements for past 12 months should be in possession of answering party or answering party's attorney when this statement is served on the opposing party.

H. MONTHLY EXPENSES (Specify amounts):

	Actual	***Anticipated***
Rent:		
Mortgage:		
Property Tax:		
Homeowner's/Renter's Insurance:		
House Maintenance:		
Electric Utilities:		
Fuel, Oil, Gas Utilities:		
Telephone:		
Cellular Phone:		
Water and Sewer:		
Garbage Pickup:		
Yard Expense:		
Cleaning Service:		
Child Care/Babysitter:		
Cable Television:		
Car Payments/Lease Payments:		
Auto Gas and Oil:		
Car Maintenance and Repairs:		
Car Licenses/Taxes		
Car Insurance:		
Religious/Charitable Contributions:		
Clothing:		
Uniforms:		
Dry Cleaners:		
Entertainment:		
Gifts:		
Food:		
Doctor:		
Dentist:		
Orthodontist:		
Prescriptions Drugs/Medicines:		
Optometrist/Ophthalmologist/Eyeglasses:		
Medical/Dental Insurance (not deducted from pay):		
Life Insurance (not deducted from pay):		
Disability Insurance (not deducted from pay):		
Newspaper:		
Magazine Subscriptions:		
Veterinarian/Pet Food:		

	Actual	*Anticipated*
Professional Dues/Club Memberships:		
Social Clubs:		
Barber/Beauty Shop:		
Tuition/School Expenses:		
State/Federal/Local Taxes Not Withheld:		
Child support paid for prior born child		
Child support for child of marriage		
Maintenance paid to prior spouse		
Maintenance paid to current spouse		
Athletic and Activity Fees (list)		
Debt payments (list)		
Other Monthly Expenses (list)		
TOTAL MONTHLY EXPENSES	**$**	**$**

☐ Petitioner ☐ Respondent states that the above information is true and correct to the best of my knowledge and belief, and that it results from a diligent, good faith effort to ascertain the information sought herein, based upon information and documents available to me and/or within my possession or control. All documents upon which this information is based and the documents requested herein have been produced and are currently in the office of my counsel.

_____

☐ Petitioner ☐ Respondent

STATE OF KENTUCKY)
) SCT.
COUNTY OF_____)

Subscribed and sworn to before me by _____, on this the _____ day of _____, 2_____.

_____
Notary Public, _____

My commission expires: _____.

CERTIFICATE OF SERVICE

This is to certify that the foregoing Preliminary Verified Disclosure Statement was ☐ mailed ☐ hand-delivered to counsel for ☐ Petitioner ☐ Respondent on this the _____ day of _____, _____, and documents requested and supporting the information set forth herein are currently available at the undersigned's office or are in the undersigned's possession and are available for inspection and copying at the requesting party's expense.

_____
ATTORNEY FOR ☐ PETITIONER ☐ RESPONDENT
or ☐ PETITIONER ☐ RESPONDENT