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Election of Remedies in Kentucky Employment Discrimination Cases – Dead or Alive?

By Rainbow Forbes*

"[W]e hold that KRS Chapter 344 [Kentucky Civil Rights Act] authorizes alternative avenues of relief, one administrative and one judicial. . . Once any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion."

I. INTRODUCTION

The doctrine of election of remedies "requires an individual to elect a single forum in which to pursue a grievance, and prohibits the election of a second forum in which to pursue the same grievance." Reasons in support of such a doctrine include preventing forum shopping and double recovery along with requiring a defendant to answer to the same charges only once. Election of remedies is most prevalent in civil rights cases in respect to employment discrimination.

Kentucky codified such a doctrine in its Civil Rights Act, which states in part that a claimant cannot pursue a judicial remedy while an administrative claim is pending. The statute further states that a final determination by a court or the commission will preclude the

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3. Id.
4. See KY. REV. STAT. ANN. § 344 (Banks-Baldwin 2004).
5. See id. at § 344.270.
alternative avenue of relief.\textsuperscript{6}

Debate on this statute entered the judicial realm in the Kentucky Supreme Court decision of \textit{Vaezkoroni v. Domino's Pizza, Inc.}\textsuperscript{7} In \textit{Vaezkoroni}, Kentucky's highest court held that once an avenue of relief is chosen, administrative or judicial, then that avenue must be pursued to its finality.\textsuperscript{8} The claimant's initial choice was the basis of the election of remedy.\textsuperscript{9} The court's opinion was brief and provided little analysis of the issue.\textsuperscript{10} Such language appeared to be in direct conflict with the Kentucky Civil Rights statute that requires a final order or decision to preclude further remedy.\textsuperscript{11} Due to lingering questions, the case instigated further litigation. Without a clear rationale, the Kentucky Court of Appeals, along with other courts, interpreted \textit{Vaezkoroni} inconsistently.\textsuperscript{12} Nine years later, the Kentucky Supreme Court has yet to clarify the issue.

Having apparently closed the door on election of remedies in employment discrimination, \textit{Vaezkoroni} surprisingly gave rise to a line of cases trying to circumvent its holding.\textsuperscript{13} A recurring problem arose when claimants filed for administrative remedies, withdrew those complaints from the Kentucky Human Rights Commission, and then filed for judicial remedies in state circuit courts. Courts originally upheld the decision,\textsuperscript{14} while factual distinctions were later used to elude the \textit{Vaezkoroni} opinion.\textsuperscript{15} Ultimately, a sharply divided Kentucky Court of Appeals sitting \textit{en banc} held that the language at issue in \textit{Vaezkoroni} was dicta and no longer served as precedent.\textsuperscript{16}

\textit{Vaezkoroni}'s conflicting interpretations demonstrate the remaining question: May a claimant initiate a claim with the Commission, withdraw the claim before finality, and then pursue a judicial remedy? If the answer is yes, then a new set of questions

\begin{itemize}
  \item \textsuperscript{6} \textit{Id.}
  \item \textsuperscript{7} 914 S.W.2d 341, 343.
  \item \textsuperscript{8} See \textit{Vaezkoroni v. Domino's Pizza, Inc.}, 914 S.W.2d 341, 343 (Ky. 1995).
  \item \textsuperscript{9} \textit{Id.}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} See infra pages 6-7 (quoting the language of KY. REV. STAT. ANN. § 344.270).
  \item \textsuperscript{12} See infra Part IV (discussing \textit{Vaezkoroni}'s progeny).
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
\end{itemize}
should be presented to the Kentucky Supreme Court regarding the scope and implementation of such a holding. This note addresses these questions of Vaezkoroni and its progeny. Part II reviews the Kentucky Civil Rights Act. Part III summarizes Vaezkoroni and analyzes its effects. Part IV addresses Vaezkoroni's progeny and discusses problems that have arisen. Part V evaluates the current law and presents future problems that the courts have yet to address.

II. KENTUCKY CIVIL RIGHTS ACT

In 1966, the Kentucky legislature adopted the Kentucky Civil Rights Act (KCRA). The purpose behind KCRA was to prevent discrimination based on race, sex, age, gender, etc. KCRA provided new standards in the employment law context.

KCRA diverged from the federal election of remedies standard established in Title VII of the Civil Rights Act of 1964. The federal statute required a claimant to exhaust the possible administrative remedies by first seeking a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) or a state human rights commission. In contrast, KRCA allows an individual the choice of pursuing an administrative remedy or filing suit in state circuit court. The statute reads in part:

A state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief for the same grievance is pending before the commission. A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with K.R.S. Chapter 13B by the same person based on the same grievance.

Kentucky courts initially construed this statute to allow a

17. KY. REV. STAT. ANN. Ch. 344 (Banks-Baldwin 1966).
20. KY. REV. STAT. ANN. § 344.270.
21. Id.
claimant to file an administrative charge, withdraw that claim, and file for a judicial remedy in state court. *Vaezkoroni* created a new interpretation of the statute.

III. *VAEZKORONI V. DOMINO’S PIZZA, INC.:* 22 **ELECTION OF REMEDIES IN EMPLOYMENT DISCRIMINATION**

The Kentucky Supreme Court’s decision in *Vaezkoroni v. Domino’s Pizza, Inc.* 23 stands as the foundational case for election of remedies under the Kentucky Civil Rights Act 24 in regards to employment discrimination. In this 1995 case, Ahmad Vaezkoroni, whose country of origin is Iran, filed three charges of discrimination against his former employer with the Lexington-Fayette Urban County Human Rights Commission (Fayette County Commission). 25 The Fayette County Commission dismissed all three claims with a finding of “no probable cause.” 26 Over a year and half later, the appellant filed a complaint in Fayette Circuit Court alleging similar contentions. 27 Domino’s Pizza, Inc. moved for summary judgment because Section 344.270 precluded a judicial remedy in circuit court. 28 Also, the respondent asserted res judicata as a ground for barring the complaint. 29 The Fayette County Circuit Court dismissed the action. Vaezkoroni appealed to the Kentucky Court of Appeals, which affirmed the trial court’s decision on res judicata. 30 Vaezkoroni then appealed the case to the Kentucky Supreme Court. 31

The Kentucky Supreme Court affirmed the court of appeals

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22. 914 S.W.2d 341, 343.
23. *Id.*
24. KY. REV. STAT. ANN. § 344.
25. *See Vaezkornoi*, 914 S.W.2d 341.
27. *Id.*
28. *Id.* at 342.
29. *Id.*
30. *See Vaezkornoi*, 914 S.W.2d at 343. Judge Lewis Paisley, sitting as the Fayette County Circuit Court judge, granted summary judgment in this case precluding the claimant’s recovery. *Id.* Later as a Kentucky Court of Appeals judge, he sided with the majority in *Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 109 (Ky. Ct. App. 2003) allowing the claimant’s recovery.
31. *See Vaezkoroni*, 914 S.W.2d at 342.
32. *Id.*
decision under a different rationale. The court first addressed the issue of whether Chapter 344 applies to local human rights commissions as it does to the Kentucky Human Rights Commission. The court quickly answered that the statute's provisions apply to both types of commissions and to hold otherwise would undermine the very purpose of the statute. The court noted that the Act provided "alternative sources of relief, one administrative and one judicial." If the court made a distinction between the two commissions, then an individual would be able to possibly pursue both sources of relief. The court discussed how the two commissions are compatible and how local ordinances, as well as other state statutes, supported this contention. After dismissing the appellant's wrongful reliance on a previous case, the court finished with strong language:

In conclusion, we hold that KRS Chapter 344 [Kentucky Civil Rights Act] authorizes alternative avenues of relief, one administrative and one judicial. The administrative avenue also includes alternatives; the individual may bring a compliant [sic] of discrimination before either the [Kentucky] Commission or the local commission. Once any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion. This interpretation is necessary 'to give meaning to and carry out the obvious purposes of the act as a whole.'

Vaezkoroni established that in employment discrimination cases brought under Chapter 344, there are two methods of relief - administrative and judicial - which operate in an either/or manner.

33. Id. at 342-43.
34. Id. at 342.
35. Id.
36. Id. (citing Meyers v. Chapman Printing Co., 840 S.W.2d. 814, 820 (Ky. 1992)).
37. See Vaezkoroni, 914 S.W.2d at 342.
38. Id. at 342-43.
39. Id. at 343.
40. Id.
This decision allows individuals with a state employment discrimination claim to elect among the remedies and bring a complaint under the Kentucky Human Relations Commission (or a local commission) or file suit in state court alleging discrimination. If the claimant exercises one method, then the other is no longer available.

In hindsight, the Vaezkoroni decision opened the floodgates for employers to seek summary judgment in cases where the plaintiff previously filed administrative charges. The reach of the language in the court’s decision is questionable. For example, is the language the holding or mere dicta? Is the real issue the court’s analysis of the commissions? Can this case be factually distinguished to allow withdrawal of a claim from one avenue and pursuit in another? Understandably, a distinct line of cases followed this decision with the Kentucky Court of Appeals wavering in each new opinion. An analysis of Vaezkoroni’s progeny leads to the following suggestions:

1) the decision has been implicitly overturned, 2) a current Kentucky Supreme Court opinion is desperately needed, or 3) new questions regarding election of remedies in employment discrimination have emerged.

IV. VAEZKORONI’S PROGENY

As relevant to employment discrimination, six cases form Vaezkoroni’s progeny. These cases address the question of whether Vaezkoroni may be applied to bar situations where an administrative remedy has been attempted but not exhausted, and then the individual pursues a judicial remedy. Viewed separately, the cases challenge and demonstrate a step away from the standard for election of remedies applied post-Vaezkoroni.

41. Id.

42. Id. (citing Monmouth St. Mercs’ Bus. Assoc. v. Ryan, 56 S.W.2d 963, 964 (Ky. 1933)).
A. Enforcement of Vaezkoroni

1. Young v. Sabbatine

The Sixth Circuit Court of Appeals, in an unpublished opinion, Young v. Sabbatine, first interpreted the Vaezkoroni decision. James Young, Sr. was fired from his job at a detention center after complaints and disciplinary actions but before the opportunity to resign. Pursuant to that action, the appellant alleged racial discrimination and filed two charges - one with the Equal Employment Opportunity Commission (EEOC) and one with the Fayette County Commission. The Commission made a determination of "no probable cause" so the appellant moved for a rehearing. Before the rehearing could occur, the appellant withdrew his claim from the Commission and asked the EEOC for a right to sue letter. Approximately two months later, the appellant filed suit in federal district court.

The Sixth Circuit Court of Appeals affirmed the district court's dismissal of state law discrimination claims because the appellant's pursuit of an administrative remedy barred him from a subsequent judicial remedy. The court's analysis on this issue was brief. The court summarized the Vaezkoroni case and agreed that the appellant's state law discrimination claim was barred because "[p]laintiff's initial election of an administrative remedy precludes judicial relief."

Two problems arise out of this court's conclusion. First, the Young case is factually distinguishable from the Vaezkoroni case. In Vaezkoroni, the appellant pursued his administrative claims to finality, receiving three separate denials from the Commission before seeking a judicial remedy. However, in the present case, appellant

44. Id.
45. See id. at *1.
46. Id.
47. Id.
48. Id.
49. See Young, 1998 WL 136559 at *1.
50. Id. at *4.
51. Id.
52. Id. (citing Vaezkornoi, 914 S.W.2d at 341-42 (emphasis added)).
53. See Vaezkornoi, 914 S.W.2d at 341.
was in the process of appealing a decision from the Commissioner when he withdrew his administrative claim. His claim was not final under Section 344.270, and thus the statute still permitted him to pursue a judicial remedy. Second, as an extension of the first argument, the Sixth Circuit interpreted the doctrine of election of remedies to apply to a claimant’s initial choice of remedy. In justifying this interpretation, the court relies directly on the language from *Vaezkoroni* interpreting Chapter 344: “once any avenue of relief is chosen, the complaint must follow that through to its final conclusion.” This directly conflicts with the language in Section 344.270 that emphasizes the finality of the remedy as critical: “a final determination by a state or a final order of the commission ... shall exclude any other administrative action or proceeding.” The Sixth Circuit ignored this distinction in the language of the statute and the *Vaezkoroni* case.

Thus, the Sixth Circuit questionably extended *Vaezkoroni* to claimants who may not have pursued their administrative remedy to finality - barring future judicial remedy upon an initial election of remedies.

### 2. Founder v. Cabinet for Human Resources

The next application of *Vaezkoroni* was in *Founder v. Cabinet for Human Resources*, decided by the Kentucky Court of Appeals. This case presented a similar issue to *Young* - whether the doctrine of election of remedies precludes the exercise of a judicial remedy when the administrative claim has been initiated but not pursued to finality. The court of appeals attempted to directly address the question that the Sixth Circuit passed on in *Young* by interpreting the *Vaezkoroni* opinion to preclude a claimant from filing for an administrative remedy, withdrawing that claim, and then seeking a judicial remedy.

In the case *sub judice*, Howard Founder worked for the Kentucky

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54. See *Young*, 1998 WL 136559 at *1.
55. *Id.* at *4* (citing *Vaezkoroni*, 914 S.W.2d 341, 343).
56. *Ky. REV. STAT. ANN* § 344.270.
57. 23 S.W.3d 221 (Ky. Ct. App. 1999).
58. *Id.*
59. See *Founder*, 23 S.W.3d at 221-24.
60. *Id.* at 223-24.
Department of Employment Services (DES) and filed an internal grievance claiming that DES guidelines classified him as an Auditor Chief.\(^{61}\) When the appellant received an unfavorable response, he appealed to the Kentucky Personnel Board (Board) pursuant to law.\(^{62}\) The Board, adopting the hearing officer’s recommendation, found against the appellant and dismissed his claim.\(^{63}\) Appellant then refiled the appeal alleging race discrimination in the reclassification process.\(^{64}\) The Board reached the same conclusion denying the claim.\(^{65}\) The appellant sought four more appeals, all of which were unsuccessful.\(^{66}\) During this time, the appellant filed similar complaints with the EEOC and the Kentucky Commission on Human Rights (Commission).\(^{67}\) Appellant received a right to sue letter from the EEOC and a withdrawal order from the Commission on December 8, 1994.\(^{68}\) Appellant was reclassified to the requested position in September 1994, and he subsequently filed an action in state circuit court alleging racial discrimination and retaliation on October 26, 1994.\(^{69}\)

The Kentucky Court of Appeals, in a three-judge panel, began the court’s analysis by summarizing *Vaezkoroni* and quoting the holding.\(^{70}\) The court moved to statute interpretation and set forth the pertinent language of Section 344.270: “[a] state court shall not take jurisdiction over any claim of an unlawful practice under this chapter while a claim of the same person seeking relief from the same grievance is pending before the commission.”\(^{71}\)

Then, the court attempted to address the appellant’s argument that his case should be distinguished from *Vaezkoroni* because he withdrew his claim from the Commission before it was able to issue a ruling.\(^{72}\) Although *Vaezkoroni* does not expressly address this differing factual situation, the court ultimately decided to extend

\begin{itemize}
\item \textit{Id. at 222.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See Founder, 23 S.W.3d at 222.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 223.}
\item \textit{See Founder, 23 S.W.3d at 223 (quoting KY. REV. STAT. ANN. § 344.270).}
\item \textit{Id.}
\end{itemize}
Vaezkoroni to preclude a judicial remedy in this factual situation because the appellant previously filed an administrative complaint that was not completed to its finality.\(^73\) From an interpretation of the statute and the Vaezkoroni case, the court held that "once a complaint is filed with the Commission, a subsequent action in circuit court based on the same civil rights violation is barred."\(^74\)

The court continued the analysis trying to reconcile two previous cases with the present opinion.\(^75\) The Kentucky Court of Appeals held that the opinion in Canamore v. Tube Turns Division of Chemetron Corp.\(^76\) was consistent with Founder even though it allowed a claimant who had an order pending before the Commission to file a complaint in state circuit court.\(^77\) This decision was in accordance with Founder and, the following year, Clifton v. Midway College narrowed this holding.\(^78\) The appellant, in this instance, filed a claim with the EEOC that deferred the complaint to the Commission.\(^79\) Then, the Commission returned jurisdiction to the EEOC with no sworn complaint filed directly by the claimant with the Commission.\(^80\) The appellant sought relief in circuit court.\(^81\) In Clifton, the court held that election of remedies did not apply because the appellant filed no complaint with the Commission.\(^82\) Without further explanation, the Founder court held that these two cases supported its opinion and barred appellant Founder from election of remedies.\(^83\)

Although this court makes a slightly better attempt at clarifying the application of Vaezkoroni, the justification for applying election of remedies to prevent a judicial remedy is ambiguous and unclear. By quoting the language of Section 344.270, it appeared that the court would not allow the appellant's judicial remedy because, at the time it was filed, he still had not received an order of withdrawal

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) Id. at 223-24.

\(^{76}\) 676 S.W.2d 800 (Ky. Ct. App. 1984).

\(^{77}\) See Founder, 23 S.W.3d at 224 (citing Canamore, 676 S.W.2d 800).

\(^{78}\) 702 S.W.2d 835 (Ky. 1985).

\(^{79}\) See Founder, 23 S.W.3d at 224 (citing Clifton v. Midway College, 702 S.W.2d 835 (Ky. 1985)).

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.
from the Commission. Thus, the appellant’s administrative claim was still pending. However, the court did not expand on this concept to justify the decision as a pure violation of Section 344.270. Instead, the Kentucky Court of Appeals made an unforeseen turn and based the opinion on a similar rationale used in Young – focusing on the initial choice in filing the complaint. In a misleading effort to explain the reasoning, the court tried to cite two cases to support the opinion. Unfortunately, a closer reading shows that these cases seem to contradict the very essence of the Founder decision and can easily be factually distinguished.

Without a clear justification for the court’s reasoning, this decision only further added to the confusion surrounding Vaezkoroni. In addition, the Kentucky Supreme Court denied discretionary review on this case in August 2000.

B. A Step Away From Vaezkoroni

1. Grego v. Meijer, Inc. and Thomas v. Forest City Enterprises

In March 2001, the first major move from Vaezkoroni was in Grego v. Meijer, Inc. Ironically, it was a federal district court that began to re-evaluate the language in a Kentucky statute to provide a new analysis of Vaezkoroni.

The plaintiff, Stephanie Grego, alleged sexual harassment from coworkers while on the job, and accordingly she filed a complaint with the Commission. Over a year and a half later, she requested and was granted a withdrawal of her claim without prejudice. In the following months, she filed suit in state court asserting similar claims. The case was removed to federal court on diversity of

84. Id.
85. See Founder, 23 S.W.3d at 223-24.
86. Id. at 221.
87. 187 F. Supp. 2d 689 (W.D. Ky. 2001). This decision was issued by District Judge John G. Heyburn II. Id.
88. No. CIV.A. 3:00CV-764-H, 2001 WL 1772018 (W.D. Ky. Oct. 17, 2001). This decision was issued by District Judge John G. Heyburn II. Id.
90. See id. at 689, 691.
91. Id.
92. Id.
citizenship grounds.  

The federal district court, in predicting how the Kentucky Supreme Court would decide the case, first acknowledged that the Kentucky Civil Rights Act provides for two separate avenues of relief - administrative and judicial.  

The court employed a straightforward interpretation of the language of Section 344.270.  

This was the first time that any court after Vaezkoroni addressed the plain meaning of the statute. The district court held that “if a grievance ‘is pending,’ then courts have no jurisdiction over the claim. However, where one withdraws his claim, it cannot be ‘pending’ and is thus not barred by the plain language of section 344.270.”  

The district court conceded that this interpretation was in direct conflict with the Kentucky Court of Appeals’ decision in Founder.  

In a glaring footnote, the court explained why the Founder opinion was incorrectly decided, including reasons such as ignoring the plain language of the statute, imposing an archaic interpretation of the doctrine of election of remedies, and analyzing other states’ more well-reasoned approaches.  

The court accepted that it could not ignore the Founder decision; thus, it began to search for a way to evade its effect.  

Federal courts sitting in diversity of jurisdiction are bound by a state’s highest court decisions, so a long interpretation of previous Kentucky Supreme Court cases was undertaken.  

Unsurprisingly, the district court began its endeavor with Vaezkoroni and factually distinguished it from the case sub judice. Vaezkoroni decided “the situation where the administrative agency has investigated a complaint and issued a final determination on its merits.” The district court interpreted this to bar a subsequent remedy when one avenue was pursued to its final conclusion.

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93. Id.  
94. Id.  
96. Id.  
97. Id.  
98. Id. at n. 1.  
99. Id.  
100. Id. at 691.  
102. See id. at 693.  
103. Id.
The district court moved to other faults in *Founder*’s reasoning. *Founder* relied upon *Clifton* for support in the analysis. The district court considered *Founder*’s narrow reading of *Clifton* misplaced and speculated that the Kentucky Supreme Court would use the case’s broad language as well as *McNeal v. Armour and Co.*, which was cited in *Clifton*, to hold the “election of remedies provision as only prohibiting simultaneous judicial and administrative actions.”

The district court concluded by stating that the Kentucky Court of Appeals did not follow “the road map” as set out in previous Kentucky Supreme Court decisions and thus decided that the Kentucky Supreme Court would not uphold *Founder*. Therefore, the district court allowed the plaintiff’s suit because she did not have an administrative complaint concurrently pending, and the agency’s review did not reach final determination by the Commission.

A few months later in October 2001, the same district court was again presented with this issue in the unreported opinion of *Thomas v. Forest City Enterprises, Inc.* Shirley Thomas, the plaintiff, initiated an administrative remedy, withdrew that remedy, and then sought a judicial remedy. Predicting that the Kentucky Supreme Court would not follow *Founder*, the district court used almost identical language to that in *Grego* and instead interpreted the statute, along with previous cases, to allow a judicial remedy as long as no administrative complaint is pending.

The *Grego* decision is very informative. It is the first case to focus on the language of the Kentucky Election Remedies Statute. The opinion involved a plain language analysis of the statute, moving the emphasis from the initial choice of an avenue of relief relied upon

104. *Clifton v. Midway College*, 702 S.W.2d 835 (Ky. 1985).
108. *Id.* at 693.
109. *Id.*
111. *Id.* at *1*.
112. *Id.* at *4*.
113. *See supra* text accompanying note 96 (quoting the language of KY. REV. STAT. ANN. § 344.270).
in previous cases, to the final determination, or order, as stated in the statute.\footnote{114} Of lesser importance, the district court looked to past Kentucky Supreme Court decisions for a comprehensive precedent to contrast the factual differences in \textit{Grego}.\footnote{115} The court discussed \textit{Vaezkoroni}, \textit{Clifton}, and \textit{McNeal} to justify the holding.\footnote{116}

However, \textit{Grego} is most significant for being the first decision that makes the distinction regarding whether administrative and judicial remedies are both "pending."\footnote{117} This relates back to the move from an emphasis on initial filing choices to final orders. The timeline of a claimant's action becomes crucial in this type of analysis, as does the timing of an administrative final order.

In recognizing the wrongful reliance on the \textit{Founder} court's reasoning, the district court provided a step-by-step approach for future Kentucky courts to move away from the \textit{Founder} and \textit{Vaezkoroni} rationales and allow a more flexible approach to the doctrine of election of remedies.\footnote{118} Most notably, \textit{Grego} emphasized the pendency of the claim in the two separate avenues of relief.

\section*{2. Wilson v. Lowe's Home Center\footnote{119}}

The Kentucky Court of Appeals wasted little time in adopting and applying the \textit{Grego} reasoning to the state case, \textit{Wilson v. Lowe's Home Center},\footnote{120} in December 2001.

In \textit{Wilson}, Robert Parker Wilson alleged racial harassment from coworkers and management during the period from 1991 to 1999.\footnote{121} The appellant claimed that he notified supervisory personnel, and no action was taken to stop the harassment.\footnote{122} Then, the appellant filed a complaint with the Commission asserting similar charges.\footnote{123} A hearing date was set, but, before the date arrived, the appellant

\begin{footnotes}
\item 115. \textit{See id.}
\item 116. \textit{Id.}
\item 117. \textit{Id.} at 692.
\item 118. \textit{Id.}
\item 120. \textit{Id.}
\item 121. \textit{See id.} at 230.
\item 122. \textit{Id.}
\item 123. \textit{Id.}
\end{footnotes}
withdrew his claim.\textsuperscript{124} He also received a right to sue letter from the EEOC.\textsuperscript{125} Subsequently, the appellant filed suit in state circuit court alleging racial discrimination under K.R.S. Chapter 344.\textsuperscript{126} The trial court awarded summary judgment to the defendant based upon election of remedies and \textit{Vaezkoroni}.\textsuperscript{127} The Kentucky Court of Appeals was presented with a second chance to decide the election of remedies issue.

The court began by stating that the Kentucky Civil Rights Act, K.R.S. Chapter 344, sets forth two separate means of relief – administrative and judicial.\textsuperscript{128} The court then quoted K.R.S. Section 344.270 and said that the two avenues of relief were "alternative, not identical."\textsuperscript{129} Next, the court of appeals addressed \textit{Vaezkoroni}, which the trial court relied upon in granting summary judgment.\textsuperscript{130} \textit{Founder} was also summarized by the court.\textsuperscript{131} It appeared to the court at first glance that these cases supported the trial court’s decision, however, under further examination, factual differences distinguished them from the case \textit{sub judice}.\textsuperscript{132} \textit{Vaezkoroni} was easily differentiated because the appellant had pursued the administrative avenue to final determination, and thus it would be unfair to provide a second avenue of relief to a claimant who was unsuccessful under a first attempt.\textsuperscript{133} The court distinguished \textit{Founder} because there the appellant still had his administrative proceeding pending when he filed for a judicial remedy in circuit court.\textsuperscript{134} This was a clear violation of K.R.S. Section 344.270.\textsuperscript{135} The court noted in the opinion that the contradicting language in both \textit{Founder} and \textit{Vaezkoroni} was dicta and thus did not deserve equal weight.\textsuperscript{136} Ultimately, in \textit{Wilson}, the Kentucky Court of Appeals held that the appellant had not pursued his administrative claims to

\textsuperscript{124} Wilson, 75 S.W.3d at 230-31.
\textsuperscript{125} Id. at 231.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 232; see also \textit{Vaezkornoi}, 914 S.W.2d 341.
\textsuperscript{128} Wilson, 75 S.W.3d at 232.
\textsuperscript{129} Id.
\textsuperscript{130} See id.
\textsuperscript{131} Id. at 233.
\textsuperscript{132} Id.
\textsuperscript{133} See id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 236.
finality, nor was there an administrative claim pending; therefore, the
appellant was not barred by election of remedies.\textsuperscript{137}

The court then analyzed the doctrine of election of remedies.\textsuperscript{138}
Some jurisdictions focus on the beginning of the suit.\textsuperscript{139} If an
administrative avenue is chosen, then a judicial remedy will not be
allowed unless certain exceptions are met.\textsuperscript{140} Other jurisdictions
apply the doctrine of election of remedies only when the cause of
action is prosecuted to judgment.\textsuperscript{141} Still another view looks to the
pendency of the action.\textsuperscript{142} An administrative claim may be
 commenced, but, if it is withdrawn before a judicial remedy is
sought, then the remedy will be allowed.\textsuperscript{143} This view prevents
simultaneous pursuit of both avenues of relief.\textsuperscript{144}

The court continued by citing previous Kentucky Supreme Court
cases, Canamore and Clifton, discussed supra.\textsuperscript{145} The court went
through an extensive examination of Kentucky cases that involve the
doctrine of election of remedies but were outside of the employment
discrimination context.\textsuperscript{146}

The court of appeals concluded that a claimant in Kentucky has
the right to withdraw an administrative complaint prior to final
determination on its merits and then pursue a judicial remedy in state
court.\textsuperscript{147} However, the court recognized that this could create a
problem with late withdrawals of claims.\textsuperscript{148} The court stated that a
"party may not file a claim, proceed to trial or hearing, and then
withdraw the claim before the ruling body issues a final

\begin{itemize}
\item\textsuperscript{137} Id. at 233.
\item\textsuperscript{138} Id. at 233-34 (citing 25 AM. JUR. 2D Election of Remedies § 14 (1996)).
\item\textsuperscript{139} See id. at 233 (citing 25 AM. JUR. 2D Election of Remedies § 14 (1996)).
\item\textsuperscript{140} Wilson, 75 S.W.3d at 234. Exceptions include the pending claim being
dismissed for administrative convenience, filing a lawsuit that is not forbidden by
statute or regulation, and prejudice to the defendant that is more than minimal. 25
\item\textsuperscript{141} Wilson, 75 S.W.3d at 234.
\item\textsuperscript{142} Id.
\item\textsuperscript{143} Id.
\item\textsuperscript{144} Id.
\item\textsuperscript{145} See Wilson, 75 S.W.3d at 234-35.
\item\textsuperscript{146} Id. at 235 (citing Speck v. Bowling, 892 S.W.2d 309 (Ky. 1995); Riley v.
Cumberland & Manchester R. R. Co., 29 S.W.2d 3 (Ky. 1930); Joseph Goldberger
\item\textsuperscript{147} Id.
\item\textsuperscript{148} Id. at 235-36.
\end{itemize}
determination." The question becomes whether the defendant is prejudiced to any significant extent to preclude allowing the withdrawal and following judicial remedy. This court did not elaborate on what would be sufficient prejudice for a defendant.

The Kentucky Court of Appeals' decision was the initial move away from the first interpretations of Vaezkoroni. However, the court was not given any guidelines from the Kentucky Supreme Court as to which interpretation was correct when an appeal of this case was taken, and the Supreme Court denied discretionary review on June 5, 2002. This opinion by the Kentucky Court of Appeals suggested that in the future, a court might take a step beyond the scope of Wilson and possibly continue to narrow the holding in Vaezkoroni, thereby implicitly overruling the decision.

C. The Final Move Away From Vaezkoroni

1. Brown v. Diversified Decorative Plastics, LLC.

With conflicting precedent in March 2003, the Kentucky Court of Appeals, sitting en banc, clarified the election of remedies question by deciding whether to overrule Wilson. In a sharply divided court, and over a strong dissent, the reasoning in Wilson was upheld, and the language in Vaezkoroni was declared dicta.

After waiting for a determinative case, the Kentucky Court of Appeals was presented with Brown v. Diversified Decorative Plastics, LLC. In Brown, two appellants over the age of forty were fired from their jobs, and both filed age discrimination complaints with the EEOC. After receiving right to sue letters from the EEOC, appellants filed similar claims with the Commission and

149. Id.
150. Id. at 235.
151. See id. at 229.
153. See id. at 109.
154. Id. at 110-11. Judge Buckingham wrote the majority opinion. Judges Barber, Combs, Johnson, Knopf, McAnaulty, Paisley, Schroder, and Tackett concurred. Chief Judge Emberton wrote the dissent. Judges Baker, Dyche, Guidugli, and Huddleston all joined. Id. at 109, 115.
156. See id. at 109.
separate civil suits in federal district court.\textsuperscript{157} Upon consolidation of the cases in federal court, appellants were granted a voluntary dismissal without prejudice.\textsuperscript{158} The pending complaints with the Commission were withdrawn, and the appellants filed state court cases.\textsuperscript{159}

The trial court dismissed the case based upon \textit{Founder}.\textsuperscript{160} Consequently, the Kentucky Court of Appeals opinion in \textit{Wilson} followed the trial court's decision, and appellants sought review.\textsuperscript{161} The court began the analysis in \textit{Brown} by acknowledging the similarities with \textit{Wilson} and holding that \textit{Wilson} should be followed.\textsuperscript{162} The court identified the precedent in \textit{Vaezkoroni} but found that \textit{Vaezkoroni} could be factually distinguished in that the administrative remedies were pursued to finality, whereas the same was not true in the case \textit{sub judice}.\textsuperscript{163}

Interestingly, the court established the actual question decided in \textit{Vaezkoroni} was whether K.R.S. Section 344 applied to local human rights commissions as well as the Kentucky Commission on Human Rights.\textsuperscript{164} The language following that determination in \textit{Vaezkoroni}, "\textit{[o]nce any avenue of relief is chosen the complainant must follow that avenue through to its final conclusion}," was considered dicta.\textsuperscript{165} Therefore, the court of appeals was not bound by it as precedent.\textsuperscript{166} The Kentucky Court of Appeals predicted the Kentucky Supreme Court would not follow the language.\textsuperscript{167} The court then moved to a detailed discussion of what constitutes dicta and applied such rules to the \textit{Vaezkoroni} facts.\textsuperscript{168} Furthermore, the court addressed the \textit{Founder} decision and distinguished it based upon the fact that the appellant's administrative claim in that case was still pending when he filed for a judicial remedy in state court.\textsuperscript{169}

\begin{itemize}
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 109-10.
\item \textsuperscript{161} \textit{Id.} at 110.
\item \textsuperscript{162} See \textit{id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} at 110-11.
\item \textsuperscript{165} \textit{Id.} at 111 (citing \textit{Vaezkoroni}, 914 S.W.2d at 343).
\item \textsuperscript{166} \textit{Brown}, 103 S.W.3d at 111.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} See \textit{id.} at 111-12.
\item \textsuperscript{169} \textit{Id.} at 112.
\end{itemize}
The court, as in *Wilson*, was left with the question of "whether [appellant's] complaint was properly dismissed pursuant to the doctrine of the election of remedies."\(^{170}\) The court examined different jurisdictional views on whether commencement of an action constitutes an election of a remedy which precludes another action.\(^{171}\) The court undertook a similar rationale as used in *Wilson*.\(^{172}\) Reviewing the doctrine of election of remedies in prior Kentucky cases outside of the employment discrimination scope, the court concluded that filing a claim with an administrative body does not preclude subsequent judicial remedies as long as the administrative claim has not been pursued to finality.\(^{173}\) The court moved its analysis to prior Kentucky cases involving election of remedies in the employment discrimination context.\(^{174}\) The court cited *Canamore*, *Clifton*, and *Grego*, and summarized that they all added support to *Wilson*’s reasoning.\(^{175}\) In short, the majority upheld *Wilson v. Lowe’s Home Centers*.\(^{176}\)

The dissent, written by Chief Judge Emberton, acknowledged that *Wilson* provided an equitable result but stated that the majority’s interpretation of *Vaezkoroni* was erroneous.\(^{177}\) The dissent reviewed the language in *Vaezkoroni*.\(^{178}\) In disagreeing with the majority, the dissent found that "the ultimate issue before the court was whether Vaezkoroni was permitted to file his claim in the circuit court after having filed with the local human rights commission."\(^{179}\) The dissent suggested that the *Vaezkoroni* court’s in-depth analysis on whether local human rights commissions are in essence the same as the Kentucky Commission on Human Rights under K.R.S. Section 344.270 may have misled the majority to conclude that that was the only issue in the case.\(^{180}\) The election of remedy issue was dependent on the court resolving the commission question first.\(^{181}\)

\(^{170}\) *Id.*

\(^{171}\) *Id.* at 112-13 (citing 25 AM. JUR. 2D Election of Remedies § 14 (1996)).

\(^{172}\) *Brown*, 103 S.W.3d at 113.

\(^{173}\) *Id.* at 112-14.

\(^{174}\) See *id.* at 114-15.

\(^{175}\) *Id.*

\(^{176}\) *Id.* at 115.

\(^{177}\) *Id.* (Emberton, C.J., dissenting).

\(^{178}\) *Id.*

\(^{179}\) *Id.* at 116.

\(^{177}\) *Id.* (Emberton, C.J., dissenting).

\(^{180}\) See *id.* (Emberton, C.J., dissenting).

\(^{181}\) *Brown*, 103 S.W.3d at 116.
Thus, the dissent said the court’s final paragraph in *Vaezkoroni* was not dicta.\(^{182}\) Chief Judge Emberton conceded that *Wilson* was a well-written opinion with an equitable result, but it ignored precedent that the Kentucky Court of Appeals was obligated to follow.\(^{183}\) In conclusion, the dissent pleaded with the Kentucky Supreme Court to grant discretionary review and provide an answer to the confusion.\(^{184}\)

Given the development in *Vaezkoroni*’s line of cases, the *Brown* decision is important for two main reasons. *Brown* was the first court to closely examine the two issues presented in *Vaezkoroni* and to conclude that the language in the final paragraph was dicta, instead of placing the emphasis on factual distinctions. Previously, courts examined factual differences between *Vaezkoroni*, in which the claimant’s administrative remedies had been pursued to finality before filing for a judicial remedy, and other cases, where administrative complaints had been filed, withdrawn, and then a judicial remedy was sought. By holding *en banc* that the *Vaezkoroni* language was dicta, the Kentucky Court of Appeals removed any future analysis of the *Vaezkoroni* case because it sets no precedent. No future factual distinctions should be necessary.

Second, *Brown* sets a clear standard for future appellate court decisions. It can be stated with certainty that a plaintiff with an employment discrimination claim in Kentucky can file for an administrative remedy, withdraw that claim before a final order, and seek a judicial remedy. This is the express view that will be followed by the Kentucky Court of Appeals, however, it is important to note that the Kentucky Supreme Court still has not addressed the issue.

2. *Wright v. Highland Cleaners, Inc.*\(^{185}\)

The most current analysis of election of remedies was issued on May 30, 2003 in *Wright v. Highland Cleaners, Inc.*,\(^{186}\) by the Kentucky Court of Appeals.\(^{187}\) This decision was on remand from

\(^{182}\) *Id.*  
\(^{183}\) *Id.*  
\(^{184}\) *Id.*  
\(^{186}\) *Id.*  
\(^{187}\) See *id.*
the Kentucky Supreme Court by an order dated June 5, 2002.\textsuperscript{188} The Kentucky Supreme Court, in its first indication that it may no longer support the \textit{Vaezkoroni} opinion, vacated the earlier court of appeals decision in the case \textit{sub judice} and remanded it for "consideration in light of \textit{Lowe's}."\textsuperscript{189}

\textit{Wright} presented a familiar factual scenario. Loretta Wright, the appellant, filed a discrimination claim with the Louisville & Jefferson County Human Rights Commission and the EEOC.\textsuperscript{190} Appellant was granted a dismissal order by the Commission,\textsuperscript{191} and, over a month later, the EEOC issued a right to sue letter.\textsuperscript{192} Then, the appellant filed suit in state court.\textsuperscript{193} The Jefferson County Circuit Court granted summary judgment to the appellees based upon \textit{Vaezkoroni}.\textsuperscript{194} The Kentucky Court of Appeals affirmed under the \textit{Founder} rationale.\textsuperscript{195} Discretionary review was granted by the Kentucky Supreme Court, and the above-mentioned order was granted.\textsuperscript{196}

In a new decision, the Kentucky Court of Appeals started by explaining that the holding in \textit{Wilson} allowed an employee to withdraw a complaint before the Commission prior to a final determination, and then file a complaint in circuit court.\textsuperscript{197} The court quoted a large portion of the \textit{Wilson} opinion, explaining the factual distinctions between \textit{Vaezkoroni} and \textit{Founder}.\textsuperscript{198} The Kentucky Court of Appeals in \textit{Wright} next applied the rules from \textit{Wilson} to the facts at hand.\textsuperscript{199} The appellant did not have a claim that was pursued to conclusion under her administrative remedies when she sought judicial relief in state court.\textsuperscript{200} In addition, the court noted that the appellees did not allege any prejudice from withdrawal of the

\begin{itemize}
  \item 188. See Wright v. Highland Cleaners, Inc., No. 2001-SC-0466-D (Ky. June 5, 2002) (remanding the case to the Kentucky Court of Appeals).
  \item 189. See Wright, 2003 WL 21241505, at *1.
  \item 190. Id.
  \item 191. Id.
  \item 192. Id.
  \item 193. Id.
  \item 194. Id.
  \item 195. See id.
  \item 196. Id.; see also Wright, No. 2001-SC-0466-D.
  \item 197. Wright, 2003 WL 21241505, at *1.
  \item 198. Id. at *1-3.
  \item 199. Id. at *3.
  \item 200. Id.
\end{itemize}
administrative claim in their motion for summary judgment.\textsuperscript{201} Therefore, the court reversed the circuit court’s award of summary judgment and remanded the case for proceedings consistent with its opinion.\textsuperscript{202}

The significance of \textit{Wright} in the progeny of \textit{Vaezkoroni} is great. This case is important because it is on remand from the Kentucky Supreme Court. This is the first time since the opinion in \textit{Vaezkoroni} was issued that the Kentucky Supreme Court remotely addressed the doctrine of election of remedies in the employment discrimination context. The supreme court’s order mandating the court of appeals to follow the reasoning in \textit{Wilson} is an implicit adoption of \textit{Wilson} as the new standard for election of remedies in Kentucky. However, it is necessary to note the timeline of the previously mentioned cases. \textit{Wilson} was decided in December 2001,\textsuperscript{203} and discretionary review was denied on June 5, 2002\textsuperscript{204} – the same day that the Kentucky Supreme Court issued the order in \textit{Wright} to follow the \textit{Wilson} rationale.\textsuperscript{205} \textit{Brown} was decided by the Kentucky Court of Appeals in March 2003,\textsuperscript{206} two months before the court issued a second decision in \textit{Wright}.\textsuperscript{207}

The Court of Appeals in \textit{Wright} expressly followed the order to use \textit{Wilson}’s reasoning. A reference to the \textit{Brown} decision that upheld \textit{Wilson}, but did so on a different analysis holding that the language in \textit{Vaezkoroni} was dicta, is clearly absent from the \textit{Wright} opinion. This begs the question – which rationale circumventing \textit{Vaezkoroni} would the Kentucky Supreme Court uphold since \textit{Brown} was decided after the order to remand \textit{Wright}?

V. ELECTION OF REMEDIES AFTER \textit{VAEZKORONI}

A. State of the Current Law Regarding Election of Remedies in Kentucky Employment Discrimination Cases

As indicated by the overview, the interpretation of election of

\begin{enumerate}
\item\textsuperscript{201} See id.
\item\textsuperscript{202} \textit{Wright}, 2003 WL 21241505, at *3.
\item\textsuperscript{203} See \textit{Wilson}, 75 S.W.3d 229.
\item\textsuperscript{204} Id.
\item\textsuperscript{205} See \textit{Wright}, No. 2001-SC-0466-D.
\item\textsuperscript{206} See \textit{Brown}, 103 S.W.3d 108.
\item\textsuperscript{207} See \textit{Wright}, 2003 WL 21241505, at *1.
\end{enumerate}
remedies in Kentucky employment discrimination law has undergone drastic changes since the opinion in *Vaezkoroni*. Courts have moved from a reliance on a claimant’s initial choice regarding an avenue of relief, administrative or judicial,\(^{208}\) to a focus on concurrent pendency of complaints as well as the pursuit to finality of a claim.\(^{209}\) It appears that the new rule of law in Kentucky allows an employee to file a claim with an agency or court, withdraw that claim before a final hearing or order, and then re-file the claim under the alternate avenue of relief.\(^{210}\)

Although this view is followed by the Kentucky Court of Appeals, the Kentucky Supreme Court has yet to issue an opinion adopting the rule with a justified rationale. The only insight the Supreme Court has given was an order remanding the *Wright* case to the court of appeals to follow *Wilson*'s reasoning.\(^{211}\) Although this might appear to be an express adoption of *Wilson*, questions still remain because the Kentucky Court of Appeals subsequently affirmed *Wilson* on different grounds in *Brown*. As Chief Justice Emberton suggested in the *Brown* dissent, the Kentucky Supreme Court desperately needs to issue an opinion clarifying the current law on election of remedies in employment discrimination cases.\(^{212}\) Is *Vaezkoroni*, along with *Founder* and *Young*, overturned? And if these cases are overturned, what is the rationale? Do they serve as mere dicta to courts or, in future cases, should an analysis be employed? Their holdings have been substantially narrowed by numerous courts.

### B. Questions Following Vaezkoroni and Its Progeny

Not only do these questions remain regarding the current law, but the new view of election of remedies in employment discrimination cases presents a wide array of issues, addressed *infra*, that courts will

\(^{208}\) See Young v. Sabbatine, 142 F.3d 438 (6th Cir. Mar. 19, 1998); *Founder*, 23 S.W.3d 221.


\(^{210}\) See *Wilson*, 75 S.W.3d at 235; *Brown*, 103 S.W.3d at 109; *Wright*, No. 2001-SC-0466-D.

\(^{211}\) See *Wright*, No. 2001-SC-0466-D.

\(^{212}\) See *Brown*, 103 S.W.3d at 116 (Emberton, C.J., dissenting).
soon be deciding without proper precedent or guidance.

Does a claimant need an official withdrawal order from an agency or court before pursuing a complaint from an alternative avenue of relief? If a complaint is pending before the Commission, then the claimant must request that his or her complaint be withdrawn from the Commission. Subsequently, the Commission issues a withdrawal order stating that claimant’s case is closed. The question then arises as to the time between the request for withdrawal and the withdrawal order: may a claimant file for a judicial remedy while awaiting a decision? The claimant is still pursuing an administrative remedy until the Commission issues its final order. Although a withdrawal request was filed by the claimant, the administrative avenue of relief is pending as long as the Commission is considering the request. The possibility remains that the Commission could deny the order for withdrawal, therefore, the Kentucky Supreme Court should not allow a claimant to pursue judicial relief until a final order of withdrawal is granted by the Commission because such action would violate the clear language of K.R.S. Section 344.270 prohibiting simultaneous avenues of relief.

The next question asks what constitutes finality in the administrative avenue of relief? For example, a claimant may have received an order denying his or her complaint from the Commission and then file for reconsideration with the Commission. May the complainant withdraw that request and follow with a judicial remedy? A decision by the Commission or a local commission constitutes a final decision of the record for a claimant. Thus, an individual should be precluded from withdrawing an appeal and seeking judicial relief because he or she had already obtained a final administrative decision. The subsequent action of an appeal should have no effect on election of remedies due to the untimeliness of the action.

Another issue involves the timing of withdrawal from the Commission. Once a claimant has initiated an administrative proceeding, how long is he or she allowed to wait before

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214. Id.
216. Id.
withdrawing his or her claim? The Wilson court touched on this question in its analysis holding: "[o]bviously, a party may not file a claim, proceed to trial or hearing, and then withdraw the claim before the ruling body issues a final determination." However, the court provided no further standard as to what would be an acceptable time for withdrawal. An answer to this issue can be deciphered from a determination of the following question regarding a defendant’s prejudice.

The final issue is likely to receive the most litigation. What amounts to sufficient prejudice to a defendant to prevent the claimant from withdrawing a complaint and re-filing under a different avenue? The Wilson court held that the appellee was not prejudiced in that instance since the administrative hearing was seven months later, although Lowe’s responded to a document and information request, and filed and then amended its answer. In addition, the Wright court stated that “[appellee] does not allege that it suffered any prejudice by Wright’s withdrawal of her administrative claim,” so the court was precluded from deciding the issue. With no current standard on what constitutes prejudice to a defendant in employment discrimination election of remedies cases, the Kentucky Supreme Court should adopt a standard that considers subjecting a defendant to the litigation process after participating in an administrative remedy, including discovery and the expense of litigation, and a party's detrimental reliance on the fact that the other party is pursuing an administrative rather than judicial remedy. The moving party must prove actual prejudice. A standard incorporating these factors provides clarity to employees and protects employers.

These lingering uncertainties, along with an unclear precedent for the new view on election of remedies in employment discrimination, begs for a Kentucky Supreme Court decision clarifying the issues.

VI. CONCLUSION

The Kentucky Supreme Court in Vaezkoroni upheld election of remedies to preclude a claimant alleging employment discrimination
from a judicial remedy after pursuing an administrative remedy.\textsuperscript{221} In deciding the case, the court relied on the claimant’s initial choice of a remedy as the determinative factor.\textsuperscript{222} The court’s now infamous language, “once any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion,” remains that by which the case is remembered.\textsuperscript{223}

In attempting to explain election of remedies in employment discrimination, \textit{Vaezkoroni}’s impact had the opposite effect and only created additional problems. Absent a clear rationale, Kentucky courts were left to test the application of \textit{Vaezkoroni}. The \textit{Vaezkoroni} decision gave rise to its progeny which included one federal circuit case,\textsuperscript{224} two federal district decisions,\textsuperscript{225} and four Kentucky Court of Appeals opinions.\textsuperscript{226} These courts have interpreted \textit{Vaezkoroni}’s inconsistently, using two separate rationales. The majority of these courts has made factual distinctions between \textit{Vaezkoroni} and the cases at hand, to reconcile the conflict between Section 344.270 and allow the claimant a judicial remedy.\textsuperscript{227} However, the Kentucky Court of Appeals, in a sharply divided opinion, recently held that the language in \textit{Vaezkoroni} was dicta which no longer served as precedent.\textsuperscript{228} Under both interpretations, courts have allowed claimants to file a complaint with the Commission, then withdraw the complaint before it reaches finality, and seek a judicial remedy in state court.\textsuperscript{229} The emphasis has moved from the initial choice of an avenue of relief to whether a claim is currently pending and its pursuit to finality. It appears that \textit{Vaezkoroni} has been implicitly overruled. This leads to a new group of questions. Is an official withdrawal letter needed from the Commission? Is there a time limit in which the claimant must withdraw the complaint before the Commission? Is there a standard

\textsuperscript{221} See \textit{Vaezkoroni}, 914 S.W.2d at 343.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{226} See \textit{Founder}, 23 S.W.3d at 221; \textit{Wilson}, 75 S.W.3d at 230; \textit{Brown}, 103 S.W.3d at 109; \textit{Wright}, 2003 WL 21241505, at *1.
\textsuperscript{228} See \textit{Brown}, 103 S.W.3d at 109.
\textsuperscript{229} See supra text and accompanying notes 225-27.
for withdrawing a complaint that would amount to prejudice by the
defendant which could preclude a withdrawal?

The law's lack of clarity in this area is attributable to the
Kentucky Supreme Court's refusal to provide a new opinion with
respect to the matter. *Vaezkoroni* was decided in 1995, and, nine
years later, the court has yet to issue another decision. The
conflicting lower court opinions, as well as new questions, express
the need for a Kentucky Supreme Court decision clarifying past and
future problems.

In conclusion, even though *Vaezkoroni* is somewhat settled, it has
only led to a new array of questions regarding election of remedies in
Kentucky employment discrimination.

230. See *Vaezkoroni*, 914 S.W.2d at 341.