UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ARTHUR WAYNE LYNCH — PLAINTIFF

v. — CIVIL ACTION NO. 3:00-CV-323-S

LEAR SEATING CORPORATION — DEFENDANTS
a/k/a LEAR CORPORATION
a/k/a LEAR CORPORATION- LOUISVILLE
and
TRAVELERS PROPERTY CASUALTY CORP.
and
CONSTITUTION STATE SERVICE COMPANY

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of defendant Lear Seating Corporation ("Lear") for summary judgment. For the reasons set forth below, Lear's motion will be **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

Plaintiff was Lear's employee when he suffered a work-related back injury in February, 1995. He underwent two surgeries and his doctor permanently restricted him from lifting over twenty-five pounds, pushing or pulling over fifty pounds, bending, stooping, crawling, working at heights, and working around moving machinery. Plaintiff's doctor also mandated that he be allowed to change positions as necessary.

In August, 1997 Lear settled plaintiff's workers' compensation claim. Lear paid a lump sum and agreed to pay for plaintiff's vocational retraining. Plaintiff continued to work at Lear with his doctor's restrictions.

Plaintiff required additional surgery in April, 1998. Shortly thereafter, he entered into a

voluntary credit agreement with Lear that amended his workers' compensation settlement agreement. Pursuant to the laws then in effect, Lear was not required to pay benefits for two years after the 1997 settlement agreement, regardless of whether Lear continued to employ plaintiff. Under the voluntary credit agreement, Lear agreed to pay plaintiff income benefits while he recovered from surgery. In exchange, it was entitled to a dollar for dollar credit for such payments if plaintiff subsequently re-opened his workers' compensation claim.

Plaintiff underwent a fourth and final surgery in June, 1999. Following this surgery, Lear's third party insurance administrator, defendant Constitution State Service Company ("CSSC"), approved ten physical therapy sessions at Frazier Rehab ("Frazier"). On August 5, 1999 Frazier called a CSSC claims adjuster and told her plaintiff had missed several therapy sessions and was not returning the therapist's calls.

Upon phoning plaintiff, the CSSC adjuster was told he could not come to the phone because he was working on his car. The adjuster contacted Lear and Lear started surveillance on plaintiff.

Lear conducted surveillance for two days and obtained inconclusive video of plaintiff working on his car. Shortly thereafter, plaintiff's doctor released him to return to work. He was restricted from lifting over twenty-five pounds, prolonged standing or sitting, and pushing or pulling over fifty pounds.

Plaintiff worked sporadically through August and September, 1999. During this time he saw two chiropractors for headaches and back and leg pain. He was also taken off work several times. He returned to his doctor in September and was taken off work through November, 1999.

In November, 1999 Lear initiated a second surveillance. Plaintiff was observed bending and squatting while working on his car. He also lifted two car batteries estimated to weigh thirty-three

pounds. Plaintiff was also observed bending, kneeling and twisting while placing groceries in his car.

Lear subsequently contacted plaintiff's doctor regarding the extent of plaintiff's restrictions. The doctor responded that plaintiff could operate a car but was unable to perform any physical activity other than walking or swimming. (Def. Mem. Summ. J. Exh. 24). He also stated plaintiff could not lift over ten pounds and could only sit or stand for thirty minute periods. *See id*.

Lear sent plaintiff an affidavit asking him to confirm his physical limitations. The affidavit stated he could not perform manual labor, operate a car, lift over ten pounds, sit or stand for over thirty minute periods. (Def. Mem. Summ. J. Exh. 25). The affidavit was sent under cover from CSSC stating plaintiff's claim was being reviewed and he was to return the signed affidavit within ten days or his benefits would cease. *See id.*

Upon receiving the signed affidavit, Lear sent plaintiff a letter advising him that Lear determined he "misstated the status of [his] medical condition for the purpose of obtaining workers' compensation benefits" and "misstated [his] condition to obtain excused time off from work." (Def. Mem. Summ. J. Exh. 26). Plaintiff was further advised that he could choose to resign and dismiss his workers' compensation claim and his right to re-open it or be terminated. *See id.* As plaintiff did not respond to this letter, he was terminated effective February 17, 2000. Lear's Human Resources Manager, David McLaughlin, testified plaintiff's termination was based on the discrepancy between the capabilities plaintiff attested to in his affidavit and those depicted in the surveillance videotape. (McLaughlin Dep. at 31-37). Lear also determined plaintiff violated the shop rules for obtaining workers' compensation benefits by falsifying a company document. *Id.*

On February 20, 2000 Plaintiff filed a grievance with Lear in accordance with its Collective

Bargaining Agreement ("CBA"). He alleged violations of the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), and the Kentucky Workers' Compensation Act. (Def. Mem. Summ. J. Exh. 30). He also alleged violations of the CBA's discrimination and procedural provisions. *Id.*

Plaintiff also filed this action on May 8, 2000 in Jefferson Circuit Court, Jefferson County, Kentucky claiming Lear's actions were in retaliation for filing a lawful workers' compensation claim in violation of KRS 342.197. (Pltf. Cmplt. ¶ 23). Plaintiff also claims violation of the Kentucky Unfair Claims Settlement Practices Act ("UCSPA"), common law bad faith, outrage, and civil conspiracy. (*Id* at ¶¶ 25, 29, 32). The action was subsequently removed to this court. Plaintiff has further amended his complaint to add a bad faith breach of contract claim and a claim alleging defendants' actions were intended to prevent him from re-opening his workers' compensation claim in violation of KRS 342.197. (Pltf. 2d Am. Cmplt. ¶¶ 14, 18).

Plaintiff's grievance reached the arbitration stage on February 7, 2001. The issues identified for arbitration included whether Lear violated the ADA, the FMLA, and the Kentucky Workers' Compensation and Civil Rights Acts. (Def. Mem. Summ. J. at 13-15). On November 5, 2001, the arbitrator decided Plaintiff had been improperly terminated due to violations of the CBA but that he lacked jurisdiction to rule on Plaintiff's federal and state law claims.[1] (Pltf. Supp. Resp. Exh. 1).

DISCUSSION

In order to support a motion for summary judgment, a moving party must prove the absence

[1]The arbitrator's decision was published after Lear filed this Motion for Summary Judgment.

of a genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding a summary judgment motion, a court's role is not to weigh the evidence or determine its truth, but to determine if a genuine question of fact exists. *Id.* at 249. In making these determinations, the court is to view all facts and inferences in a light most favorable to the nonmoving party. *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941 (6th Cir. 1990).

I. Waiver

Lear first argues plaintiff cannot pursue his claims here because he voluntarily chose arbitration as his remedy. According to Lear, since plaintiff's statutory discrimination claims were also submitted as issues for arbitration, he voluntarily waived his right to pursue those claims in a judicial forum. Without deciding whether plaintiff effected a voluntary waiver, we find the arbitrator's decision that he lacked jurisdiction to rule on plaintiff's statutory discrimination claims nullifies the issue. Regardless of whether plaintiff chose to pursue such claims solely in arbitration, he was barred from doing so and thus they are properly pursued here.

II. Kentucky Unfair Claims Settlement Practices Act

Lear argues it cannot be held liable for violating the UCSPA because claims of such violations may only be brought against insurance carriers and self-insured employers. *See* KRS 342.267 (subjecting "an insurance carrier, self-insurance group, or self insured employer" to the UCSPA as applied to workers' compensation claims). Lear asserts it is neither an insurer nor self-

insured because it holds a workers' compensation policy with a $250,000 deductible. (Def. Mem. Summ. J. Exh. 5). We disagree. While Lear may be insured for workers' compensation liabilities that exceed its deductible, it appears it is responsible to satisfy those that do not and may therefore be considered self-insured up to $250,000.

Lear further argues it is not self-insured because it has not complied "with the strict requirements of KRS 342.340 to be self-insured".[2] (Def. Reply Mem. at 11). Lear cites *Davidson v. American Freightways, Inc.* 25 S.W.3d 94(Ky. 2000) as supporting its argument. First, it appears Lear has misconstrued KRS 342.340. The statute does not impose requirements to become self-insured, it merely requires employers to insure their workers' compensation liabilities or file proof of their ability to satisfy such liabilities themselves. Here, Lear is insured for its workers' compensation liabilities exceeding $250,000. However, this does not prevent it from being considered self-insured for liabilities that do not exceed $250,000.

Second, *Davidson* does not support Lear's argument. In *Davidson* the Kentucky Supreme Court found the defendant could not be considered a self-insured motor carrier because "it had not

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[2] The applicable portion of KRS 342.340 reads:
(1) Every employer under this chapter shall either insure and keep insured his liability for compensation hereunder in some corporation, association, or organization authorized to transact the business of workers' compensation insurance in this state or shall furnish to the commissioner satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this chapter. In the latter case, the commissioner shall require the deposit of an acceptable security, indemnity, or bond to secure, to the extent the commissioner directs, the payment of compensation liabilities as they are incurred.
(2) Every employer subject to this chapter shall file, or have filed on its behalf, with the department, as often as may be necessary, evidence of its compliance with the provisions of this section and all others relating hereto. Any insurance carrier or group self-insurance association providing workers' compensation insurance coverage for a Kentucky location shall file on behalf of the employer, with the commissioner, evidence of the employer's compliance with this chapter.

complied with KRS 304.39-080(7) [and] thus had not qualified as a 'self-insured' under Kentucky law." *Davidson*, 25 S.W.3d at 95. As discussed above, the statute relied on here, KRS 342.340, does not impose specific requirements for becoming self-insured for workers' compensation. Comparatively, the statute relied on in *Davidson*, KRS 304.39-080(7), does impose specific requirements for effecting self-insurance for motor vehicles.[3] The Kentucky Supreme Court's decision in *Davidson* is therefore not analogous to this case.

We therefore find that, as a matter of law, Lear may be considered self-insured for workers' compensation liabilities that do not exceed $250,000 and as such is subject to the UCSPA. We will therefore deny its motion for summary judgment with respect to this issue.

III. <u>Bad Faith</u>

Plaintiff claims Lear is liable for bad faith under both the UCSPA and common law due to its actions surrounding his termination. (Pltf. Cmplt. ¶¶ 25, 29). As we found above, Lear is subject to the USCPA as a matter of law. Summary judgment is therefore improper regarding plaintiff's statutory bad faith claim.

Lear first argues it cannot be liable for common law bad faith because the tort "appl[ies] only

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[3]KRS 304.390-080(7) reads:
Self-insurance, subject to approval of the commissioner of insurance, is effected by filing with the commissioner in satisfactory form:
(a) A continuing undertaking by the owner or other appropriate person to pay tort liabilities or basic reparation benefits, or both, and to perform all other obligations imposed by this subtitle;
(b) Evidence that appropriate provision exists for prompt and efficient administration of all claims, benefits, and obligations provided by this subtitle; and
(c) Evidence that reliable financial arrangements, deposits, or commitments exist providing assurance, substantially equivalent to that afforded by a policy of insurance, complying with this subtitle, for payment of tort liabilities, basic reparation benefits, and all other obligations imposed by this subtitle.

to persons or entities engaged in the business of insurance." *Davidson*, 25 S.W.3d at 95. We agree. In *Davidson* the Kentucky Supreme Court held self-insureds are not subject to UCSPA or common law bad faith claims. *See id.* at 102. While KRS 342.267 specifically subjects self-insureds to the UCSPA in a workers' compensation context, no similar statute exists regarding common law bad faith claims. *See id.* at 101, n.5 (noting "[t]he exclusive remedy provision of Kentucky Workers' Compensation Act, KRS 342.690, precludes any [common law] bad faith tort claim against even a workers' compensation *insurer*.")(citations omitted).[4] Therefore, regardless of whether Lear is found to be self-insured, it cannot be held liable for the common law tort of bad faith under Kentucky law.

Plaintiff also claims common law bad faith due to Lear's alleged breach of their workers' compensation settlement agreement in failing to pay for Plaintiff's vocational training. (Pltf. 2d Am. Cmplt. ¶ 14). It has been found that Kentucky courts have not extended the common law tort of bad faith to non-insurance contracts. *See Ennes v. H&R Block Eastern Tax Svcs., Inc.*, 2002 WL 226345, *4 (W.D. Ky.). Lear's Motion for Summary Judgment will therefore be granted with respect to Plaintiff's common law bad faith claims.

IV. KRS 342.197

Plaintiff claims two violations of KRS 342.197.[5] First, he claims Lear's actions were in retaliation for his pursuing a lawful workers' compensation claim. (Pltf. Cmplt. ¶ 23). Second, he

[4]Lear raises a preemption argument in its Memorandum. However, because we find it is not subject to a common law bad faith claim either as an insured or self-insured, we need not decide whether plaintiff's claim is preempted.

[5] The applicable provision of KRS 342.197 reads: "No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful [workers' compensation] claim." KRS 342.197(1).

claims Lear's actions were taken to prevent him from re-opening his workers' compensation claim. (Pltf. 2d Am. Cmplt. ¶ 18).

Regarding plaintiff's first claim, Lear argues it cannot be held liable for violating KRS 342.197(1) because plaintiff was totally disabled when he was terminated. On December 8, 2000 plaintiff re-opened his workers' compensation claim claiming total and permanent disability. (Def. Mem. Summ. J. Exh. 31). According to Lear, plaintiff had no right to continued employment in light of his total and permanent disability and therefore cannot claim his termination was wrongful.

Lear cites *Daniels v. R.E. Michel Co., Inc.*, 941 F.Supp. 629 (E.D. Ky. 1996), in support of its argument. We find *Daniels* inapplicable here. In *Daniels* the plaintiff sustained a work related injury and was unable to work for approximately four months. He consequently filed a workers' compensation claim and was paid benefits. Upon attempting to return to work, plaintiff learned he was terminated pursuant to a company policy requiring employees to reapply after being absent over a month. He consequently filed suit claiming the policy violated KRS 342.197(1). The court recognized that "[t]o make out a claim for retaliation, an employee 'must prove that the workers' compensation claim was a substantial and motivating factor but for which the employee would not have been discharged.'" *Id.* at 631 (citing *Sutherland v. Hardaway Management, Inc.*, 41 F.3d 250, 256 (6th Cir. 1994)). It therefore found the policy did not violate KRS 342.197(1) because it did not turn on whether the employee filed a workers' compensation claim, but on the employee's condition. Therefore, "the policy [did] not operate on the causal connection prohibited by KRS 342.197(1)." *Id* at 632.

In contrast, Lear cannot claim plaintiff's termination turned on his inability to return to work because at the time he was terminated it was not aware that plaintiff was totally and permanently

disabled. Plaintiff did not claim such a disability until he re-opened his workers' compensation claim approximately ten months after his termination. We therefore find Lear's reliance on *Daniels* misplaced and its argument without merit.

Lear next argues it cannot be held liable for retaliation because plaintiff was not pursuing a lawful workers' compensation claim. KRS 342.197(1) protects employees from discharge or discrimination while pursuing a "lawful" workers' compensation claims. While "lawful claim" is not defined, KRS 342.335(1) prohibits the filing of false or fraudulent claims to workers' compensation benefits. Lear argues the inconsistencies between the activities plaintiff performs on the surveillance video and the restrictions he attested to in his affidavit render his workers' claim false or fraudulent and therefore "unlawful." Thus, he was not pursuing a lawful claim and Lear accordingly cannot be liable for retaliation under KRS 342.197(1).

We cannot accept Lear's argument because to do so would require a finding that plaintiff's workers' compensation claim was fraudulent. First, we have not been presented enough evidence to determine the merits of plaintiff's workers' compensation claim. Second, the arbitrator found the inconsistencies between the video and plaintiff's affidavit did not establish his claim was fraudulent. (Pltf. Supp. Resp. Exh. 1 at 21). While we are not bound by this finding, it does demonstrate a genuine issue of material fact exists regarding the lawfulness of plaintiff's claim. Summary judgment on this basis is therefore improper.

Lear finally argues it is entitled to summary judgment because plaintiff cannot prove his workers' compensation claim was a substantial motivating factor but for which he would not have been terminated. We agree. As discussed above, in order to establish retaliation in violation of KRS 342.197(1) plaintiff must establish a causal connection between his pursuing a lawful workers'

compensation claim and his termination. *See Daniels*, 941 F.Supp at 631. Plaintiff fails to do so. He first argues the temporal proximity between the surveillance initiated on August 8, 1999 and his eligibility to re-open his claim on August 12, 1999 infers improper motivation. However, it is undisputed the surveillance was initiated after Frazier reported plaintiff's missed physical therapy sessions and a phone call to his home revealed he was working on his car. The temporal proximity is thus best viewed as merely coincidental. Plaintiff further asserts Lear's improper motivation is established by communications between Lear, its third party administrator, and its workers' compensation counsel that reveal concern over plaintiff re-opening his claim. Again, however, these communications took place *after* plaintiff's missed sessions and the phone call to his home. Some of the communications even took place after the second surveillance revealed plaintiff performing tasks allegedly beyond his restrictions. Thus, while plaintiff's claim may have been a factor in ordering the surveillance and his subsequent termination, it cannot be viewed as the "substantial motivating factor." Lear's Motion for Summary Judgment on plaintiff's first KRS 342.197 claim will therefore be granted.

Regarding plaintiff's second claim, Lear argues its actions could not have been intended to prevent plaintiff from re-opening his workers' compensation claim because he could have re-opened it regardless of whether he was terminated. We agree. Continued employment is not a factor in re-opening a workers' compensation claim. *See* KRS 342.125. In fact, plaintiff did re-open his claim after he was terminated. (Def. Mem. Summ. J. Exh. 31).

Further, as discussed above, it is undisputed Lear did not express concern over plaintiff re-opening his claim until after it had reason to believe the claim was fraudulent. We therefore find that preventing plaintiff from re-opening his workers' compensation claim was not a substantial

motivating factor in his termination and will grant Lear's motion with respect to plaintiff's second KRS 342.197 claim.

V. Outrage

Lear argues its conduct was not "outrageous" under Kentucky law. We agree. "To prevail on [an outrage] claim, Plaintiff must prove: (1) that the conduct was intentional; (2) that the conduct caused severe emotional distress; and (3) that the conduct was outrageous." *Cheatham v. Paisano Communications, Inc.*, 891 F.Supp. 381, 387 (W.D. Ky. 1995)(citing *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984)). Conduct is "outrageous" if "it offends against generally accepted standards of decency and morality." *Craft*, 671 S.W.2d at 249. Lear has presented evidence that its actions were based on a reasonable concern over the lawfulness of plaintiff's workers' compensation claim. Such actions therefore cannot be viewed as "a deviation from all reasonable bounds of decency and . . . utterly intolerable in a civilized community." *Id.* at 250; *see also Lynch v. McFarland*, 893 F.Supp. 707, 708 (W.D. Ky. 1995)(finding no outrage when defendant's conduct "was not the kind of indecent and immoral behavior that would engender the ire, rather than the mere disapproval, of a civilized community. . . ."). Lear will therefore be granted summary judgment on plaintiff's outrage claim.[6]

VI. Civil Conspiracy

Plaintiff claims Lear acted in conspiracy with its co-defendants to "deprive [him] of his employment and to inflict extreme emotional distress." (Pltf. Cmplt. ¶ 32). Plaintiff must therefore show "an unlawful/corrupt combination or agreement between [Lear] and the [co-defendants] to do

[6]Lear also argues plaintiff's outrage claim is preempted by the Kentucky Workers' Compensation Act's exclusivity provision. As we find Lear's conduct was not "outrageous" under Kentucky law, we need not decide whether plaintiff's claim is preempted.

by some concerted action an unlawful act." *Montgomery v. Milam*, 910 S.W.2d 237, 239 (Ky. 1995)(citing *McDonald v. Goodman*, 239 S.W.2d 97 (Ky. 1951)). Plaintiff offers no evidence of such an agreement. Summary judgment will therefore be granted on his conspiracy claim.

VII. Agency

Plaintiff finally responds that Lynch is liable for claims brought against its third party administrator co-defendants under an agency theory. Lynch argues co-defendants are not its agents because it is an insured rather than an insurer. However, as discussed above, a genuine issue of material facts exists as to Lynch's status in this regard. Lynch's liability as its co-defendant's principle therefore cannot be decided on summary judgment.

CONCLUSION

For the reasons set forth above, we will grant Lear's Motion for Summary Judgment with respect to plaintiff's common law bad faith, KRS 342.197, outrage, and civil conspiracy claims. With respect to plaintiff's claims under the Kentucky Unfair Claims Settlement Practices Act, Lear's motion will be denied.

This _____ day of _____, 2002.

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CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendant Lear Seating Corporation's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

IT IS SO ORDERED this _____ day of _____, 2002.

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CHARLES R. SIMPSON III, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record