There You Go Again: Admissibility of Other Bad Act Evidence under KRE 404(b)

By Robert L. Abell

KRE 404(b) admits evidence of other acts by a party if relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or some other appropriate purpose.[1] Most often used in criminal cases, the rule also applies in civil cases. It provides a way to get admitted evidence that can strongly bolster a plaintiff's case. It is particularly valuable in employment discrimination cases, which most often rely upon circumstantial evidence, where evidence of an employer's conduct towards other employees has long been held relevant and admissible for the proper purpose of establishing or negating discriminatory intent or motive.[2]

Any discussion of the admissibility of evidence in Kentucky must begin with the Supreme Court's admonition that "'[t]he law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and unmistakable.'"[3] Furthermore, "[r]elevancy is established by any showing of probativeness, however slight."[4] The Court further advised as follows:

> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need not even make that proposition appear more probable than not. … It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence. Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.[5]

These principles find best expression in employment discrimination litigation, as a number of federal appellate courts have noted, by the following: a "plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by 'evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.'"[6] The Kentucky Supreme Court's admonitions in *Tuttle* was echoed by the Sixth Circuit in *Robinson v. Runyon:*

> Neither the appellate nor the district court is permitted to consider the weight or sufficiency of the evidence in determining relevancy and "even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth."[7]

The Kentucky Court of Appeals has acknowledged the importance and admissibility of 404(b) evidence in a trio of employment cases. First, *White v. Rainbo Baking Company,*[8] the plaintiff claimed race discrimination in a failure-to-hire case. The circuit court granted summary judgment against him and he appealed, claiming error, *inter alia*, in limitations imposed on his discovery and the striking of an affidavit offered in response to the employer's motion for summary judgment and other restrictions on the evidence he could submit. The trial court had denied the plaintiff's motion to compel production of documents "relating to prior complaints of discrimination filed against Rainbo"; had denied the plaintiff's motion to compel Rainbo's managing agent to answer deposition questions "about a prior incident where discrimination may have been involved"; and, struck an affidavit executed by a third party "concerning prior discrimination at Rainbo."

The Court of Appeals reversed the summary judgment holding that "the evidence of other discriminatory acts" by Rainbo was admissible to support the plaintiff's claims.[9] The cases on which the court relied principally for this ruling were as follows:

- *Cook v. Borstin,*[10] holding in race discrimination suit against Library of Congress that evidence of library-wide discrimination, rather than just in the plaintiff's job category, was admissible. The D.C. Circuit remarked, "[i]t strikes us as altogether obvious that statistical (or anecdotal) evidence that the Library discriminated against its

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black librarians would be *relevant* to whether the Library discriminated against its black attorneys."[11]

- *Miles v. M.N.C. Corporation,*[12] reversing trial court in failure-to-rehire race discrimination case based on, *inter alia*, exclusion of evidence of hiring manager's use of racial slurs.

Two subsequent cases, *Handley v. Kentucky Center for the Arts*,[13] and *Willoughby v. GenCorp, Inc.*,[14] also recognize that an employer's treatment of other employees is probative evidence to support a plaintiff's individualized claim of discrimination. In *Handley,* a failure-to-promote case alleging race and sex discrimination, the Court of Appeals observed that "[p]roof of intentional discrimination may take a variety of forms and our words are not to be interpreted so as to mandate the manner in which a plaintiff may seek to prove" a discrimination claim.[15] The court then helpfully offered a few acceptable means of proving discrimination:

> An employee may prove intentional discrimination by a variety of means. For instance, she may show that there has been a general attitude of discrimination throughout the employment climate. She could use statistics to show that minorities are infrequently or never hired at her place of employment. She could also show—by objective and subjective standards—that she was better qualified for the position, yet, was rejected.[16]

The plaintiff in *Willoughby* claimed that he had been wrongfully discharged for pursuing workers' compensation benefits after sustaining a work-related injury.[17] In reversing a directed verdict for the employer granted by the circuit court, the Court of Appeals held that "the trial court erred in excluding the testimony of two workers who alleged they were harassed and treated wrongfully by GenCorp after each sustained a work-related injury and sought benefits."[18] The court explained that the "evidence is relevant and shows the employer's attitude toward those similarly situated to Willoughby and its motive in terminating him."[19]

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Willoughby's reference to other employees "similarly situated" to the plaintiff raises the threshold issue of whether the "other act" evidence involving another employee is sufficiently similar to be admissible under KRE 404(b). The Kentucky Supreme Court in *Kentucky Farm Bureau v. Rodgers* emphasized that the requirement for similarity did not mean identical.[20] The Seventh Circuit helpfully described this assessment as nothing more than a common-sense evaluation:

> It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, unflexible requirement that requires near one-to-one mapping between employees – distinctions can always be found in particular job duties or performance history or the nature of the alleged transactions... but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless.[21]

Consistent with *Tuttle*'s recognition that the bias favors admission of evidence and *Handley*'s observation that proof of "a discriminatory atmosphere" can support a discrimination claim, courts have advised and ruled, for example, that evidence of prior sexual harassment in the workplace was admissible in support of a retaliation claim,[22] "that evidence of a corporate state of mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actions or time frame involved in the specific events that generated a claim of discriminatory treatment,"[23] that an "employer's past discriminatory policy and practice may well illustrate that the employer's proffered reasons for disparate treatment are a pretext for intentional discrimination,"[24] that a plaintiff may use evidence of religious discrimination in support of a race discrimination claim,[25] that evidence of sexual harassment was probative of a sex discrimination claim arising from a termination,[26] and that instances of racial harassment directed at a worker was admissible proof toward sustaining a plaintiff's claim of sexual harassment.[27]

The case law, again consistent with the statements of Kentucky law in *Tuttle* and *Handley*, does not demand or require either a strict temporal or type of discrimination congruence. The tilt is toward admission of the acts evidence and mindful that plaintiffs must not be crippled by exclusion of evidence based on crabbed notions of relevance and mistrust of juries.

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1 KRE 404(b) "states the 'other purpose' provision in a way that leaves no doubt that the specifically listed purposes are illustrative rather than exhaustive." Lawson, *Kentucky Evidence Law Handbook* § 2.25[2] at 125 (3rd ed.). The acts need not be criminal or unlawful and may have been committed subsequent to the charged act. *Id.* Subsequent conduct is relevant and probative of an actor's disposition or policy on a prior date. *See* 2 *Wigmore on Evidence* §§ 382, 437 (Chadbourn rev. 1979).

2 *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 521 (3rd Cir. 2003), *citing Coletti v. Cudd Pressure Control,* 165 F.3d 767, 776-77 (10th Cir. 1999);

Heyne v. Caruso, 69 F.3d 1475, 1479-80 (9th Cir. 1995). *Ansell* was cited by the Kentucky Supreme Court in *Kentucky Farm Bureau v. Rodgers,* 179 S.W.3d 815, 819 (Ky. 2005), as proper statement regarding the admissibility of 404(b) evidence. Also cited approvingly in *Rodgers* was *Hitt v. Connell,* 301 F.3d 240, 249-50 (5th Cir. 2002), which affirmed admission of evidence that the employer had fired other employees for union activities to prove the employer's motive to fire the plaintiff.

3 *Tuttle v. Perry,* 82 S.W.3d 920, 922 (Ky. 2002), *quoting* Lawson, *Kentucky Evidence Law Handbook* § 2.05 at 53 (3d ed.).

4 *Tuttle, supra,* 82 S.W.3d at 922.

5 *Tuttle,* 82 S.W.3d at 922, *quoting Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996).

6 *Robinson v. Runyon,* 149 F.3d 507, 513 (6th Cir. 1998), *quoting Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987); *see also Aman v. Cort Furniture,* 85 F.3d 1074, 1082 (3d Cir. 1996); *Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097, 1103 (8th Cir. 1988)(same).

7 149 F.3d at 513, *quoting Douglass v. Eaton Corp.,* 956 F.2d 1339, 1344 (6th Cir. 1992).

8 765 S.W.2d 26 (Ky. App. 1988).

9 765 S.W.2d at 29.

10 763 F.2d 1462 (D.C. Cir. 1985).

11 763 F.2d at 1469.

12 750 F.2d 867 (11th Cir. 1985).

13 827 S.W.2d 697 (Ky. App. 1991).

14 809 S.W.2d 858 (Ky. 1990).

15 827 S.W.2d at 701.

16 827 S.W.2d at 701 n. 5.

17 The Kentucky Supreme Court ruled in *Firestone Textile Co. v. Meadows,* 666 S.W.2d 730 (Ky. 1983), that a tort claim for wrongful discharge arose where an employee was terminated for pursuing workers' compensation benefits. *Firestone* was later codified at KRS 342.197 with the added assistance of a fee-shifting provision.

18 809 S.W.2d at 862.

19 *Id.*

20 179 S.W.3d 815, 819 (Ky. 2005).

21 *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404-05 (7th Cir. 2007).

22 *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 155-156 (8th Cir.), cert. denied, 498 U.S. 854 (1990).

23 *Ercegovich v. Goodyear*, 154 F.3d 344, 356 (6th Cir. 1998).

24 *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 402 (5th Cir. 1986).

25 *Hafford v. Seidner*, 183 F.3d 506, 514-515 (6th Cir. 1999).

26 *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-898 (9th Cir. 1994).

27 *Carr v. Allison Gas Turbine*, 32 F.3d 1007 (7th Cir. 1994).