COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2004-CA-001349-MR

JEFFREY A. ISHAM **APPELLANT**

vs. **APPEAL FROM FAYETTE CIRCUIT COURT**
CIVIL ACTION NO. 99-CI-2600

ABF FREIGHT SYSTEM, INC. **APPELLEES**
and SHERYL D. KINGSTON

BRIEF FOR APPELLANT

SUBMITTED BY:

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Certificate Required by CR 76.12(6)

The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by mail, postage pre-paid this ____ day of December 2004: Hon. Sheila Isaac, Fayette Circuit Court, 120 North Limestone Street, Lexington, KY 40507 and Craig Robertson, Wyatt, Tarrant & Combs, 1700 Lexington Financial Center, Lexington, KY 40507. The undersigned does certify that the record on appeal has been returned to the Fayette Circuit Court, Appeals Division, this the _____ day of December 2004.

COUNSEL FOR APPELLANT

INTRODUCTION

This case arises from a statement by plaintiff-appellant protesting discriminatory and retaliatory treatment directed at him about which this Court has previously observed "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF." The court below, however, took the opposition view, usurping the jury's role and Isham appeals the summary judgment entered against him.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant respectfully submits that oral argument may be helpful to the Court in this case, because it has an unusual procedural history and also presents an unusual number of issues for review.

STATEMENT OF POINTS AND AUTHORITIES

Statutes

Cases

Other Authorities

Cases

STATEMENT OF THE CASE

This case arises from protected activity -- a statement by plaintiff-appellant Jeffrey A. Isham asserting his legal rights and protesting discriminatory treatment -- about which this Court has previously observed:

> the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF. (RA: 113).[1]

Isham drove a truck for defendant-appellee ABF Freight System, Inc. He was injured on the job, filed a claim for workers' compensation benefits that ABF bitterly resisted, returned to work following a prolonged period of convalescence and rehabilitation, and was subjected to discriminatory and retaliatory treatment by ABF and defendant-appellee Sheryl Kingston. When Isham protested and stated "that he planned to bring legal action against ABF," he was fired and appellees prosecuted him for terroristic threatening.

From Isham's statement that he planned to bring legal action against ABF has sprung a malicious criminal prosecution and this case.

Isham's Injury, Workers' Compensation Claim and the Efforts to Keep Him Out of ABF's Workforce

Isham worked as a truckdriver for ABF out of its Lexington terminal. He and the other drivers were represented by the Teamsters union and a collective bargaining agreement applied to their employment.

Isham injured his back while working and was absent from the workforce for a period of convalescence and rehabilitation, during which time he filed a claim for workers' compensation benefits.

[1] The prefix "RA" indicates a reference to the record on appeal certified by the Fayette Circuit Court.

On August 5, 1998, Isham, after persisting successfully through rehabilitation and strengthening program, notified ABF that he was able to return to work on August 10, 1998. (Isham depo., ex. 12). However, rather than letting Isham return to work, ABF demanded an additional medical release, which he provided on August 12, 1998, authorizing his return to work on August 17, 1998. (Isham depo., ex. 18). ABF did not relent and demanded that Isham submit to a functional capacity evaluation as a condition of returning to work. (Isham depo., ex. 17). Isham protested ABF's actions preventing his return to work. (Isham depo., exs. 17, 18). Because of his seniority rights under the collective bargaining agreement Isham was entitled to return to his former position. (Isham depo., ex. 17).

After Isham had notified ABF of his ability and desire to return to work and while ABF resisted his return, the judge presiding over Isham's workers' compensation case rendered his decision, finding Isham to suffer from a 50% permanent partial disability. (Daniel Wolens depo., ex. 5).

ABF enlisted an occupational physician, Daniel Wolens, to help it keep Isham from going back to work.[2] According to Wolens, Kingston believed that Isham's workers' compensation claim and return to work "smelled fishy," that "she knew there was something up in that regard" and this was the basis for a "poor relationship" between ABF, Kingston and Isham. (Wolens depo. at 58, 66). While Wolens reluctantly found Isham fit to return to work, he advised appellees by letter dated September 10, 1998, to consider criminal prosecution of Isham:

> there is even the potential to assess this individual for having committed perjury. (Complaint, ex. 1; RA: 14; Wolens depo., ex. 1).

[2] Discovery revealed that ABF maintained a corporate policy of keeping individuals who had filed a claim for workers' compensation benefits out of its workforce. (Plaintiff's Memorandum *Contra* ABF & Kingston's Motion for Summary Judgment, exs. A & B; RA: 221-222).

Isham returned to work thereafter in late September 1998, although he was not welcomed back. Between his return and his firing on January 8, 1999, Isham was rebuked by Kingston for a bad attitude, admonished to watch it because Kingston wanted him "out the door" and subjected to instances of disparate treatment. (Isham depo. at 85-86, 97-98, 100). Sam Adkins, the union steward, confirmed that Kingston said Isham had a "bad attitude." (Adkins depo. at 90). These problems, Isham noted, all began after he succeeded in getting back to work following his injury. (Isham depo. at 102).

The Events of January 8, 1999

An ice storm was inflicted upon central Kentucky the night of January 7-8, 1999, and Isham, who lived in rural Washington County, called ABF to inform it that the roads near his home were unsafe and impassable and he would not be able to make it into work. He spoke with Mike Shepherd, the dispatcher at ABF. (Isham depo. at 108). Shepherd threatened Isham with disciplinary action if he did not make it through the dangerous and unsafe roads to report to work. (Id. at 111-112). Isham protested this threat as the latest incident of discriminatory and retaliatory treatment by stating, as reported and recorded by Shepherd to Kingston, as follows:

> He said if he was wrote up he would have his lawyers sue us and he would fire on everyone here. (Kingston depo. ex. 1).

Another driver, Warren McIntyre, was standing nearby and overheard Shepherd's end of the conversation with Isham and Shepherd's statements to Kingston. (McIntyre depo. at 30). McIntyre provided ABF with a sworn statement dated January 25, 1999, recounting as follows:

> On Friday 1-8 1999, I heard Mike Shepherd tell Sheryl Kingston that Jeff Isham was sending his lawyer up to fire on us and Mike said some other

> words that I can't repeat at this time that Jeff said. (Warren McIntyre depo. ex. 3)

McIntyre expanded upon his sworn statement by executing an affidavit on February 22, 1999, stating in pertinent part as follows:

> I recalled the following happening on January 8, 1999, relating to the termination of Jeff Isham's employment with ABF Freight and what I understand to be the charges in this case. I heard Mike Sheppard on the phone with Jeff Isham. Sheppard put Isham on hold, turned to Cheryl Kingston, said he had Jeff Isham on the phone and that Isham was threatening "to send his lawyer up her and fire on us" and that Isham had used language that he did not wish to repeat. As I heard Sheppard tell Kingston Isham had made a threat to Sheppard of taking legal action, not of causing anyone bodily or physical harm. Sheppard told Kingston that Isham wanted to talk to her. Kingston said that it was something that they should get the union steward, Sam Adkins, in on and Adkins was called to the phone to speak with Isham. (McIntyre depo. ex. 2)

McIntyre testified in his deposition regarding this incident as follows:

> And it seemed like [Mike Shepherd] turned back around to Sheryl and said Jeff is threatening to send his lawyer up here to fire on us. (McIntyre depo. at 30-31)

Isham's statements on January 8, 1999, were made to Sam Adkins, the union steward, who reported them that same date to Kingston, in pertinent part, as follows:

> Jeff further stated t[hat] if he were to receive a warning letter for missing work that he would have his lawyer come here to work and fire on everyone who works here. (Sam Adkins depo., ex. 3)

Adkins also reported that Isham stated "that he felt that he was being discriminated against." (Id.).

Adkins has testified in deposition regarding Isham's January 8 statement as follows:

> … Mr. Shepherd told him that if he didn't come to work that day, something to the effect that if he didn't come to work that day that there would be disciplinary action taken against him. And about that point Mr. Isham felt that – he said something to the effect that he felt that he was being discriminated against and being treated unfairly. And I believe he said something to the effect that he would get a lawyer and fire on everybody at ABF.

…

> I just felt like, you know, Jeff – if any disciplinary action was taken against him, he was going to get a lawyer and sue ABF. … he said he was going to get a lawyer and fire on everybody. To me that means I'm going to sue you. (Adkins depo. at 33-34, 39)

Adkins executed an affidavit on February 20, 1999, expanding upon his January 8, 1999, statement and reporting, in pertinent part, as follows:

> Isham also said to me that Shepherd and Sheryl Kingston, who is the branch manager for ABF Freight, had been discriminating against him, harassing him and treating him unfairly. Isham told me that if this treatment by Shepherd and Kingston continued he was "going to get a lawyer and fire on everyone there." I understood that to mean that Isham was considering hiring a lawyer and taking legal action regarding the perceived harassment, discrimination and unfair treatment of him by Shepherd and Kingston. I did not understand, nor do I believe that any reasonable person could understand, that Isham was threatening to get a weapon and do anything to harm anyone at ABF Freight.
>
> …
>
> 3. I also recall that after I got off the phone with Jeff Isham joining in a very brief conversation where present was myself, Warren McIntyre, and Sheryl Kingston. During this discussion Mike Shepherd told Sheryl Kingston that Isham had told him that he was going to get a lawyer and fire on everyone there. I then stated that Isham had said the same thing to me.
>
> 4. … I have never informed or indicated to Sheryl Kingston that Jeff Isham has said anything to me that could be taken as a threat of inflicting bodily or physical harm to anyone at ABF Freight.
>
> 5. … Sheryl Kingston says in this [criminal] complaint that Jeff Isham threatened physical harm by stating that "he would fire on all of you (meaning all the employees)." The intake sheet reports that Isham said to me, "I will fire on all of you." This is incomplete and inaccurate, as Isham's reference to firing was coupled with hiring a lawyer. Jeff Isham threatened to take legal action against ABF Freight over the perceived harassment, discrimination and unfair treatment that he believed he was getting from Shepherd and Kingston. He did not make any statement to me threatening anyone with physical harm. (Adkins depo. ex. 2)

Isham has never denied his statements to Shepherd or to Adkins. He recounted it in a grievance he filed following his termination and in his deposition. (Isham depo. at 112, ex. 2).

The Terroristic Threatening Charge and Criminal Proceedings

After receiving the reports from Shepherd and Adkins, Kingston, who did not speak with Isham, filed a criminal complaint in Fayette District Court charging Isham with terroristic threatening and stating:

> Affiant states the defendant called employment and told his supervisor and the union steward he would fire on all of you (meaning all the employees). (Kingston depo. ex. 4)

Adkins noted in his deposition that this misrepresented what was said to him and Shepherd. (Adkins depo. at 110-111).

The Fayette District Court, Hon. Julia K. Tackett presiding, eventually sustained a motion to dismiss the charge, observing in a written order as follows:

> A review of all statements taken in their entirety, and the other previous litigation between these parties, indicates to the Court that defendant expressed, albeit in a colloquial fashion, a threat to hire a lawyer and take legal action against his employer, ABF Freight. A threat to hire a lawyer and take legal action does not, as a matter of law, constitute the offense of terroristic threatening.(Complaint, ex. 8, RA: 23).

The prosecution appealed the dismissal and it was reversed by the Fayette Circuit Court on procedural grounds that the "trial court cannot simply dismiss the matter before a trial because it feels there is a lack of evidence."

This Court then granted discretionary review, reversed the circuit court and reinstated the dismissal order of the trial court. This Court observed as follows regarding Isham's January 8 statement that is at the heart of this case:

> The first portion of Isham's statement necessarily qualifies the second.

> A person does not threaten to have counsel present if he intends to attack his co-workers. ***Rather, the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF***, ultimately resulting in the dismissal of the supervisors with whom he had grievances. While the words "fire on" are ambiguous if taken out of context, Isham's statement, when taken as a whole, is not. (RA: 113).

The Supreme Court then granted discretionary review and reversed this Court, ruling that the "district court simply lacked the authority to dismiss the complaint prior to trial." *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003).

A jury acquitted Isham at a trial on July 27, 2003.

Isham's Efforts to Get His Job Back and ABF's Wrongful Use of Criminal Proceedings to Keep Him From Returning to Work

Isham, after he was fired, tried to return to work again by filing a grievance seeking reinstatement. (Complaint, ex. 6, RA: 19). Having followed Wolens' suggestion to file criminal charges against Isham, ABF enlisted Wolens' help again. Kingston told Wolens that ABF needed him to write an opinion letter that it could use to keep Isham from returning to work. (Kingston depo. at 45-46). Wolens complied in a letter dated January 30, 1999 that, *inter alia*, asserted as follows:

(1) accused Isham of "manipulating the workers compensation system to his advantage";

(2) noted that Isham's and ABF's relationship was "poor," a development relating back to Isham's "low back injury";

(3) asserted falsely that Isham's workers' compensation claim had resulted in "a total permanent disability award"; and,

(4) noted that Isham had reported "feeling discriminated against" (Wolens depo., ex. (4)

ABF also tried to keep Isham from returning to work by offering to drop the criminal prosecution in exchange for his resignation. (Kingston depo. at 55; Shively Pierce depo. at 128).

Isham's Complaint and Causes of Action

Isham filed on July 22, 1999, following dismissal of the terroristic threatening charge by the Fayette District Court a complaint alleging the following causes of action against ABF, Kingston and Wolens: (1) retaliatory discharge in response to his protected activity of protesting discrimination and harassment in violation of KRS 342.197; (2) retaliatory discharge in response to his protected activity of protesting discrimination and harassment in violation of KRS 344.280; (3) conspiracy to unlawfully cause termination of Isham's employment; (4) conspiracy to unlawfully cause termination of Isham's employment in violation of KRS 344.280; (5) malicious prosecution; and, (6) abuse of process. (Complaint, RA: 10-11).

The Court Below's Summary Judgment Order

The court below sustained appellees' motion for summary judgment in its entirety, adopting their version of the facts and incorporating wholly their legal arguments. The court below ruled that Isham's cause of action in count 1 of retaliatory discharge in violation of KRS 342 arising from his "protected activity of stating his intention to take legal action in response to discrimination and harassment of him by ABF" (Complaint ¶ 59; RA 10), was "preempted by federal law" because "it requires interpretation of the Contract." (Summary Judgment Order, RA: 254). Although Isham had premised his cause on action on his "protected activity of stating his intention to take legal action in response to discrimination and harassment of him by ABF," the court below asserted that summary judgment was

appropriate because no jury "could find a causal connection between Isham's worker's compensation claim and his discharge." (*Id*.). Furthermore, the court below completely rejected this Court's interpretation of Isham's statement, accepted completely appellees' view of it and found that it constituted a non-discriminatory reason for his discharge. (*Id*).

Although Isham needed only to be "a person" to maintain his retaliatory discharge cause of action under KRS 344 pleaded in count 2 of his complaint, the court below granted summary judgment because it ruled that Isham "is not a member of one of the classes of employees protected by KRS Chapter 344." (*Id).* The court below elaborated that "Kentucky law does not support a wrongful termination claim in violation of KRS 344 for individuals who do not fall into a protected class." (*Id*).

The court below also found that counts 3 and 4 of Isham's complaint were preempted by federal law because "any analysis of these claims requires examination of the contract." (*Id*). The court below further asserted that no reasonably jury "could find that there was any conspiracy to either terminate or file criminal charges against Isham." (*Id*).

The court below dismissed Isham's malicious prosecution claim (Count 5), holding erroneously that "the decision of Kentucky's Supreme Court in Isham's criminal case, [ ] established as a matter of law that probable cause did exist for the filing of a criminal charge." (*Id.* at 255).

The court below dismissed Isham's abuse of process cause of action, because the "Supreme Court has found that the criminal proceeding was proper." (*Id*.). Furthermore and although Isham pleaded in his complaint that the injuries to his person and property caused by appellees' abuse of the criminal process included "lost wages and benefits, incurred attorney's fees, suffered emotional distress and mental anguish, been put in fear of being

imprisoned, and suffered damage to his future earning capacity" (Complaint ¶¶ 56, 69; RA: 9, 11), the court below inexplicably and erroneously asserted that "Isham has solely alleged injury to his reputation … [which] is insufficient to maintain a claim for abuse of process." (*Id.*)

Isham timely moved to vacate the court below's summary judgment order in its entirety. (Motion to Vacate Summary Judgment Order, RA: 257). The court below overruled that motion in its entirety by order entered June 14, 2004. (Order, RA: 350). Isham timely appealed. (Notice of Appeal, RA: 354).

ARGUMENT

POINT 1

BECAUSE IT IS POSSIBLE FOR A JURY TO SHARE THIS COURT'S VIEW OF ISHAM'S STATEMENT THAT "THE ONLY REASONABLE INTERPRETATION OF ISHAM'S WORDS IS THAT HE PLANNED TO BRING LEGAL ACTION AGAINST ABF," BECAUSE ISHAM'S STATEMENT SO INTERPRETED CONSTITUTES PROTECTED ACTIVITY PROTESTING DISCRIMINATION UNDER KRS 342.197 AND 344.280, AND BECAUSE APPELLEES' ACKNOWLEDGE THAT ISHAM WAS FIRED FOR MAKING THIS STATEMENT, IT IS POSSIBLE FOR A JURY TO FIND THAT A SUBSTANTIAL AND MOTIVATING FACTOR FOR ISHAM'S TERMINATION WAS RETALIATION FOR HIS PROTECTED ACTIVITY AND THE COURT BELOW SHOULD BE REVERSED.

It is possible for a jury to share this Court's view of Isham's statement that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF." If so interpreted, Isham's statement, since it came in the context of his protests of discriminatory treatment, constitutes "protected activity" under both KRS 342.197 and 344.280. Appellees' acknowledge that Isham's statement was the reason he was fired. Therefore, since a jury need only share this Court's view of Isham's statement and since a

jury may accept appellees' explanation that Isham was fired in retaliation for this protected activity, it is possible for a jury to find in Isham's favor on counts 1 and 2 of his complaint. Therefore, the court below erred in granting summary judgment and should be reversed.

The Supreme Court has admonished that the record must be viewed in the light most favorable to Isham at the summary judgment stage. *Steelvest Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476, 480 (1991). All doubts are to be resolved in Isham's favor. *Id.* All favorable inferences must be drawn in Isham's favor. *Id.* It is not the role of the trial judge to decide facts. *Id.* Only if it is impossible for Isham to present evidence sustaining his claims is summary judgment proper. *Id* at 482.

Isham pleaded retaliatory discharge for assertion of his legal rights in violation of KRS 342.197 and KRS 344 in counts 1 and 2 of his complaint. KRS 342.197 and KRS 344 are broadly construed to serve their remedial purposes. *Overnite Transp. Co. v. Gaddis*, Ky. App., 793 S.W.2d 129, 132 (1990)(Chapter 342); *Toyota Motor Mfg., USA, Inc. v. Epperson*, Ky., 945 S.W.2d 413, 415 (1997) (Chapter 344). Isham's causes of actions under those statutes share the following elements: (1) he must have engaged in a statutorily protected activity; (2) he was discharged; and, (3) there was a connection between the protected activity and the discharge. *Willoughby v. Gencorp., Inc.*, Ky. App., 809 S.W.2d 858, 861 (1990)(Chapter 342.197); *Kentucky Center for the Arts v. Handley,* Ky. App., 827 S.W.2d 697, 701 (1991). To prevail Isham must prove that his protected activity was a substantial and motivating factor but for which he would not have been discharged. *First Property Management v. Zarebidaki*, Ky., 867 S.W.2d 185, 189 (1993); *Meyers v. Chapman Printing*, Ky., 840 S.W.2d 814, 823 (1992).

It is possible for a jury to share the interpretation of Isham's statement imputed by this and the Fayette District Court in dismissing the criminal charge. This Court observed as follows regarding Isham's statement:

> The Commonwealth has taken one portion of Isham's statement out of context and argues that the isolated phrase could constitute the offense of terroristic threatening. Such a hyper-technical parsing of the dialogue is not a reasonable basis to support a charge of terroristic threatening. The first portion of Isham's statement necessarily qualifies the second. A person does not threaten to have counsel present if he intends to attack his co-workers. ***Rather, the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF***, ultimately resulting in the dismissal of the supervisors with whom he had grievances. While the words "fire on" are ambiguous if taken out of context, Isham's statement, when taken as a whole, is not. (RA: 113)

Similarly, the Fayette District Court provided the following observations:

> A review of all statements taken in their entirety, and the other previous litigation between these parties, indicates to the Court that defendant expressed, albeit in a colloquial fashion, a threat to hire a lawyer and take legal action against his employer, ABF Freight. A threat to hire a lawyer and take legal action does not, as a matter of law, constitute the offense of terroristic threatening. (RA: 23).

The view taken by this Court and by the Fayette District Court is consistent with colloquial usage among truckers. Both Shively Pierce and Sam Adkins, who have over 40 years experience in the trucking field, testified in their deposition that Isham's phraseology about firing with a lawyer and/or lawsuit was a common usage they had encountered before in their trucking careers. (Pierce depo. at 84-85; Adkins depo. at 39-40).

It is respectfully submitted that it is possible for a reasonable jury to share this Court's interpretation of Isham's statement. In fact, it is likely and the court below erred in granting summary judgment.

A jury can further find Isham's statement that "he planned to bring legal action against ABF" was made in the context of complaining of discriminatory treatment and

constitutes protected activity under both KRS 342.197 and KRS 344.280. First, Sam Adkins informed ABF and Kingston on January 8, 1999, that Isham was protesting discriminatory treatment (Adkins depo., ex. 3); further evidence comes from Adkins' affidavit and his deposition testimony. (Adkins depo. 33-34. 39, ex. 2). Second, an employee's statement of his intent to take legal action in response to perceived discriminatory treatment by his employer constitutes protected activity under employment discrimination law. *EEOC v. Ohio Edison,* 7 F.3d 541, 542 (6th Cir. 1993)(statement that "court action was being contemplated" was protest of discriminatory treatment and protected activity); *Robinson v. SEPTA*, 982 F.2d 892, 897 (3d Cir. 1993)(employee's threat that discriminatory matters could "end up in court very soon" was protected activity under anti-retaliation law); *Jones v. Yonkers Public Schools,* 326 F.Supp.2d 536, 548-49 (S.D.N.Y. 2004)(threat to sue was protected activity); *Geer v. Marco Warehousing, Inc.,* 179 F.Supp.2d 1332, 1342-43 (M.D. Ala. 2001)(employee's suggestion that she might consider legal recourse was protected activity); *Doe v. Kohn, Nast & Graf, PC,* 862 F.Supp. 1310, 1316 (E.D. Pa. 1994)(threat to sue is protected activity).

It is also possible for a jury to find that Isham was fired in retaliation for engaging in protected activity under both KRS 342.197 and KRS 344.280. Kingston admitted that Isham was fired for this statement. (Kingston depo. at 38). This admission directly links Isham's protected activity and his termination and is direct evidence of retaliation. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1190-91 (11th Cir. 1997)(employer's statement basing termination on plaintiff's protected activity is direct evidence of retaliation). The court below erroneously adopted appellees' view of Isham's statement; it erred both in law and fact.

Even if Kingston's admission did not directly link Isham's protected activity and termination, the record includes additional evidence which makes it not impossible for a jury to find a causal link between Isham's protected activity and termination. First, there is Dr. Wolens' testimony regarding the "poor relationship" between Isham and ABF stemming from his injury and workers' compensation case. Second, there is ABF's adoption (and admission) of this Wolens' statement, including his misrepresentations about Isham's workers compensation case. *See* Lawson, Kentucky Evidence Law Handbook § 8.20 at 591-594 (4th ed. 2003)(discussing adoptive admission doctrine). Third, there is Kingston's view that Isham had a "bad attitude" and Isham's observation that he did not encounter difficulties with ABF until his work injury. (Adkins depo. At 90: Isham depo. at 102). Fourth, there is evidence that ABF considered whether an employee had filed a workers' compensation claim as an employment criterion. Fifth, there is ABF's knowledge that Isham was protesting discriminatory treatment and its failure to make any inquiry regarding the protest. *Courtney v. Landair Transp.*, 227 F.3d 559, 566 (6th Cir. 2000)(retaliation where employer made no effort to find out what employee-plaintiff meant by statement that she might "end up hurting someone" and that "a reasonable fact-finder might conclude that management simply got made when it read the letter of complaint about her treatment, grew tired of her complaints, and fired her."). Sixth, the temporal proximity between Isham's firing and the administrative law judge's decision on his workers' compensation claim is, when considered by the animus betrayed by the institution of criminal proceedings against Isham, sufficient for a jury to infer a causative link. *See, e.g., Harrison v. Metro. Govt. of Nashville,* 80 F.3d 1107, 1118-1119 (6th Cir.), *cert. denied,* 519 U.S. 863 (1996)(retaliation proved where one year three months passed between protected activity and termination where other evidence of antagonism

existed). Seventh, courts have found retaliation when an employer instigates government action against a former employee. *See Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 158 (3d Cir. 1999); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 985 (10th Cir.1996) (encouraging a person to report the suspected crime of a former employee can be retaliation); *Beckham v. Grand Affair, Inc.*, 671 F.Supp. 415, 419 (W.D.N.C.1987) (reporting a former employee for criminal trespass can be actionable retaliation). Therefore, appellees' institution of criminal proceedings against Isham, especially since premised on, as this Court observed, an unreasonable interpretation of Isham's statement, is additional evidence of retaliation.

The court below, in granting the motion for summary judgment, accepted wholly appellees' interpretation of Isham's statement and explanation for their actions and usurped the jury's role. It is respectfully submitted that it is possible for a jury to find, as did this Court, that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF," to find therefore that Isham's statement was protected activity under KRS 342.197 and KRS 344.280, and to further find that a substantial and motivating factor for his discharge was retaliation for this protected activity. Accordingly, the court below should be reversed.

POINT 2

BECAUSE A JURY CAN SHARE THIS COURT'S VIEW THAT THE "ONLY REASONABLE INTERPRETATION OF ISHAM'S STATEMENT IS THAT HE PLANNED TO TAKE LEGAL ACTION AGAINST ABF" AND FIND THAT HE WAS FIRED IN VIOLATION OF STATE LAW, THERE IS NO PREEMPTION OF ISHAM'S STATE LAW CLAIMS.

None of Isham's claims require interpretation of or reference to the union contract. In reaching this erroneous ruling, the court below did not and could not identify a single

provision in the union contract that had to be interpreted for Isham and ignored the explicit, repeated holdings of this Court that claims under KRS 342.197 and KRS Chapter 344 are not preempted by the presence of a union contract applicable to the plaintiff's employment. Accordingly, the court below erred in granting summary judgment and should be reversed.

This Court has twice held, in *Willoughby v. Gencorp*, Ky. App., 809 S.W.2d 858, 860 (1990), and in *Bednarek v. United Food and Commercial Workers International Union, Local Union 227*, Ky.App., 780 S.W.2d 630, 632 (1989), that a claim of unlawful retaliation pursuant to KRS 342.197 is not preempted by a union contract. Those decisions both derived from *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988), wherein the United States Supreme Court held that the employee's state law claim that she was unlawfully terminated for asserting her rights under the state workers' compensation statute was not preempted by a union contract. The court below's ruling on the preemption issue flew in the face of clear, controlling authority to the contrary. The summary judgment therefore must be reversed.

That Isham pursued a grievance under the union contract does not preempt his claims. This too has been twice specifically rejected by this Court. In *Willoughby*, this Court held that the adverse decision in arbitration proceedings under the collective bargaining agreement did not preempt the plaintiff's retaliation claim, because "a jury [could] determine[e] that the purported reason was a pretext and that the employer was motivated by impermissible reasons in discharging [plaintiff]." 809 S.W.2d at 860-861.

This Court has likewise held in *McNeal v. Armour and Co.*, Ky.App., 660 S.W.2d 957, 959 (1983), that a claim pursuant to KRS Chapter 344 is not preempted by a grievance

procedure in union contract. That decision was also rooted in a United States Supreme Court decision of *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974).

The terms of the collective bargaining agreement are immaterial to this case. Notably, the court below did not and could not identify a provision whose interpretation was required by Isham's claims. What is required in this case is an interpretation of Isham's statement, which a jury can find was protected activity under KRS 342.197 and KRS 344.280. Also required is assessment of appellees' and Wolens' actions. These are pure issues of fact that do not implicate the collective bargaining agreement. *Lingle, supra.* Accordingly, the court below erred in ruling that Isham's causes of action under counts 1, 3, and 4 of his complaint were preempted and should be reversed.

POINT 3

THE COURT BELOW LEGALLY ERRED REGARDING COUNT 2 OF ISHAM'S COMPLAINT BY ASSERTING THAT "KENTUCKY LAW DOES NOT SUPPORT A WRONGFUL TERMINATION CLAIM IN VIOLATION OF KRS CHAPTER 344 FOR INDIVIDUALS WHO DO NOT FALL INTO A PROTECTED CLASS" SINCE KRS 344.280 PROHIBITS CERTAIN ACTIONS TAKEN AGAINST "A PERSON" AND ISHAM UNDISPUTABLY IS "A PERSON."

Because Isham is and need only be "a person" to plead his retaliatory discharge in violation of KRS 344.280 in count 2 of his complaint, the court below's ruling granting summary judgment because Isham "is not a member of one of the classes of employees protected by KRS Chapter 344" is manifest legal error. Accordingly, the judgment of the court below as to count 2 should be reversed.

Isham pleaded in count 2 that he was subjected to unlawful retaliation in violation of KRS Chapter 344.280. (Complaint: R.A.: 9). KRS 344.280 prohibits retaliatory actions of various kinds taken against "a person." KRS 344.280(1-3, 5). KRS 344.010(1) defines a

"person" within the meaning of KRS Chapter 344, and therefore, within the meaning of KRS 344.280, to include "(1) or more individuals[.]" Isham is unquestionably and undoubtedly "a person" within the meaning of KRS 344.280. There is no statutory or judicial authority providing any support whatsoever for the manifestly erroneous ruling of the court below. The court below has quite simply ignored or misconstrued the plain language of the KRS 344.280. It accordingly should be reversed.

POINT 4

BECAUSE A JURY CAN FIND THAT APPELLEES RECRUITED WOLENS TO AID THEIR RETALIATION AGAINST ISHAM, BECAUSE A JURY CAN FIND THAT WOLENS AGREED TO AID APPELLEES' RETALIATION AGAINST ISHAM, BECAUSE A JURY CAN FIND THAT WOLENS DID AID APPELLEES' RETALIATION AGAINST ISHAM BY PREPARING HIS JANUARY 30 LETTER INCLUDING MISSTATEMENTS INTENDED TO PORTRAY ISHAM NEGATIVELY AND FALSELY AND BECAUSE A JURY CAN FIND THAT APPELLEES USED WOLENS' JANUARY 30 LETTER TO HARM AND INJURE ISHAM, THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT ON COUNTS 3 AND 4 OF ISHAM'S COMPLAINT.

A jury can find that after Wolens suggested that Isham be prosecuted for perjury regarding the outcome of his workers' compensation case, Kingston got back in touch with him in January 1999 and told him that she and ABF needed his help for further retaliation against Isham. A jury can further find that Wolens, knowing of appellees' animus toward Isham over his workers' compensation case (which Wolens noted in his January 30 letter) and wish that Isham was not part of their workforce, agreed to help appellees and did help by writing his January 30, 1999, letter and including therein various falsehoods intended to portray Isham in a false light and therefore aid appellees, and ABF and Kingston did use Wolens letter for this purpose. Accordingly, the court below's ruling granting summary judgment should be reversed.

A civil conspiracy is “a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *James v. Wilson*, Ky. App., 95 S.W.3d 875, 895 (1995). The “action is for damages caused by acts committed pursuant to a formed conspiracy,” *Davenport’s Adm’x v. Crummies Creek Coal Co*., 299 Ky. 79, 184 S.W.2d 887, 888 (1945). For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the third person. *Farmer v. City of Newport*, Ky. App., 748 S.W.2d 162, 164 (1988). Circumstantial evidence is sufficient to prove that a conspiracy existed. *Howard v. Commonwealth*, 220 Ky. 585, 295 S.W. 888, 889 (1927).

Contrary to the erroneous ruling of the court below, it is possible for a jury to find that (a) Wolens conspired with appellees to retaliate against Isham, and (b) that appellees conspired to maliciously prosecute Isham. First, Wolens knew of and acknowledged appellees’ animus toward Isham over his workers’ compensation case and their desire to get him out of ABF’s workforce. (Wolens depo. at 58, 66). Second, Wolens fed this animus by his outrageous assertion that appellees should prosecute Isham for perjury related to his workers’ compensation claim. (Wolens depo., ex. 1). Third, Kingston told Wolens that appellees needed his help to preclude Isham from coming back to work. (Kingston depo. at 45-46). Fourth, Wolens knew that Isham had been terminated related to his protests of discriminatory treatment. (Wolens depo., ex. 4). Thus, Wolens was aware that Isham had

engaged in protected activity, knew that he was being engaged to enhance the injury done Isham by appellees and did so willingly and recklessly. Fifth, a jury can find that Wolens agreed to help appellees knowing of their improper aims, since Wolens did in fact write the letter Kingston requested and included therein misstatements regarding Isham intended to cast him in a negative light. (Wolens depo., ex. 4).

A jury can likewise find that ABF and Kingston conspired to maliciously prosecute Isham. Kingston admitted that she informed ABF higher management of Isham's statements (the same statement this Court assessed) and was directed to file the criminal charge. (Kingston depo. at 42). Kingston withheld from upper management Isham's discrimination protests. (Id). However, it was ABF upper management that subsequently offered to drop the criminal charge in exchange for Isham's resignation. (Kingston depo. at 55).

Appellees raised below a meritless argument regarding the intra-corporate conspiracy doctrine. This argument ignored that "[i]t is well established that an agent for a corporation is personally liable for a tort committed by him although he was acting for the corporation." *Henkin, Inc. v. Berea Bank & Trust Co*., Ky. App., 566 S.W.2d 420, 425 (1978), *citing Peters v. Frey*, Ky., 429 S.W.2d 847 (1968). Therefore, both Kingston and ABF can be liable for tortious and conspiratorial actions. Second, Kingston and/or ABF can obviously conspire with Wolens, a third party. Accordingly, the intra-corporate conspiracy doctrine provides appellees' no shelter.

There are first issues that it is possible for a jury to resolve in Isham's favor regarding his causes of action for conspiracy in violation of KRS 344.280 (count 3) and civil conspiracy (count 4). Those causes of action are not preempted by federal law as discussed in Point 2. Accordingly, the court below should be reversed.

POINT 5

BECAUSE A JURY CAN CONCLUDE, AS DID THIS COURT, THAT "THE ONLY REASONABLE INTERPRETATION OF ISHAM'S STATEMENT IS THE INTENT TO TAKE LEGAL ACTION AGAINST ABF," IT CAN LIKEWISE FIND THAT PROBABLE CASE WAS LACKING FOR THE SPECIOUS CRIMINAL CHARGE AND ISHAM'S MALICIOUS PROSECUTION CAUSE OF ACTION SHOULD BE REMANDED FOR TRIAL.

Contrary to the erroneous assertion of the court below, the Supreme Court in no way considered or addressed whether probable cause supported filing of the criminal charge. Rather, the Court cautioned that a trial court lacked authority to undertake the weighing of evidence that a probable cause determination entails prior to trial. Therefore, because the Supreme Court made no ruling on the issue of probable cause, and because there is an issue of fact regarding the existence of probable cause on which the jury can find in Isham's favor, the court below should be reversed.

A malicious prosecution action has six elements under Kentucky law: (1) (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding. *Raine v. Drasin,* Ky., 621 S.W.2d 895, 899 (1981). Proceedings are terminated in favor of the accused in a criminal case where their final disposition is such as to indicate the innocence of the accused. *Alcorn v. Gordon,* Ky. App., 762 S.W.2d 809, 811-12 (1988). The presence of probable cause is not established even where the trial court overruled a motion for a directed verdict and allowed the case to go to the jury. *Kirk v. Marcum,* Ky. App., 713 S.W. 2d 481, 485 (1986). A person initiating

criminal proceedings against another has probable cause for doing so if he or she correctly or reasonably believes that the accused has acted or failed to act in a particular manner, and that those acts or omission constitute the offense that he or she charge against the accused, and that, he or she is sufficiently informed as to the law and facts to justify the prosecution. 52 Am.Jur.2d, Malicious Prosecution § 60 at p. 181 (2000). A fact issue of probable cause is for the jury to resolve. *Prewitt v. Sexton*, Ky., 777 S.W. 2d 891, 895 (1989).

Fact issues exist regarding this claim, and a jury can resolve them in Isham's favor. First, a jury can share this Court's view that "the only reasonable interpretation of Isham's statement is his intent to take legal action against ABF" and therefore can find that no probable cause existed for the criminal charge made against him. Second, this conclusion would be supported by Adkins' testimony that Kingston misrepresented Isham's statement in the criminal complaint and by ABF's offer to terminate the criminal proceeding in exchange for Isham's resignation. (Adkins depo. at 110-111, see also Pierce depo. at 128; Kingston depo. at 55). Third, a jury can also find malice from the foregoing and from evidence that ABF harbored animus against Isham over his workers' compensation claim, as Wolens testified to and reported in his letter adopted by ABF. (Wolens depo. at 55, 68. ex. 4).

The Supreme Court's ruling in the criminal case did not pass on the question of probable cause for the criminal charge against Isham. Even if it had, it would not be dispositive, because a jury can find the absence of probable cause by sharing this Court's view that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF." Accordingly, the court below should be reversed.

POINT 6

WHERE THE SUPREME COURT MADE NO RULING APPLICABLE TO ISHAM'S ABUSE OF PROCESS CLAIM, WHERE A JURY CAN

FIND THAT APPELLEES USED THE CRIMINAL PROCESS TO GET ISHAM TO RESIGN HIS EMPLOYMENT AND WHERE ISHAM SPECIFICALLY PLEADED INJURY TO HIS PERSON AND PROPERTY IN REGARD TO HIS ABUSE OF PROCESS CLAIM, THE COURT BELOW ERRED IN DISMISSING ISHAM'S CAUSE OF ACTION FOR ABUSE OF PROCESS.

Contrary to the erroneous ruling of the court below, the Supreme Court id not address, consider or make any finding that the "criminal proceeding was proper." Moreover, even if the Court had ruled that there was probable cause for the criminal charge that would not be dispositive, because the existence of probable cause is immaterial to the abuse of process. A jury can find that appellees abused the criminal process, because a jury can find that ABF offered to drop the criminal charge in exchange for Isham's resignation. A jury can find that appellees abused the criminal process to eliminate Isham from its workforce. Therefore, the court below erred in granting summary judgment and should be reversed.

The gist of abuse of process is misusing or misapplying process justified in itself for an end other than which it was designed to accomplish. *Flynn v. Songer,* Ky., 399 S.W. 2d 491, 494 (1966). The essential elements of the tort are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Bonnie Braes Farms, Inc. v. Robinson,* Ky. App., 598 S.W.2d 765, 766 (1980).

Evidence sufficient to show improper purpose "usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender or property or money, by the use of the process as a threat or a club." *Simpson v. Laytart,* Ky., 962 S.W.2d 392, 395 (1998). This Court have an example of this scenario in *Mullins v. Richards,* Ky. App., 705 S.W. 2d 951 (1986).

In *Mullins,* two different car owners obtained felony theft indictments against an auto repairman. The criminal charges ended in a mistrial, and the auto repairman thereafter filed a

civil action for malicious prosecution and abuse of process. In affirming the directed verdict against the repairman granted by the trial court, the Court observed if the car owners "had offered to drop the indictments in return for a release of their debts to [the repairman], then [the repairman] would have stated a cause of action on his claim for abuse of process." 705 S.W. 2d at 952.

Isham can present evidence that appellees abused the criminal process in a manner such as that condemned by this Court in *Mullins*. A jury can find that appellees offered to drop the criminal charge against Isham in exchange for his resignation. Kingston admitted that the offer was made, and Shively Pierce, Isham's union agent, confirmed it. (Kingston depo. at 55; Pierce depo. at 128). A jury can find that appellees abuse the criminal process for the improper and ulterior purpose of getting Isham "out the door." This is no different than the improper quid-pro-quo that this Court condemned in *Mullins.*

The court below manifestly erred in ruling that Isham had "solely alleged injury to his reputation… [which] is insufficient to maintain a claim for abuse of process." (RA:255). Isham alleged in his Complaint that appellees' wrongful actions had caused him to suffer "lost wages and benefits, incurred attorney's fees, suffered emotional distress and mental anguish, been put in fear of being put in prison, and suffered damages to his future earning capacity." (Complaint ¶56, RA:9). Isham further pleaded in Count 6 of his Complaint that appellees' abuse of process had "caused damage to Isham's person and property as above described." (Complaint ¶69, RA:11). The court below simply and manifestly erred in its ruling.

Because a jury can find that appellees abused the criminal process for the purpose of securing Isham's resignation and because Isham pleaded injury to his person and property caused thereby, the court below should be reversed.

CONCLUSION

For all the foregoing reasons, the court below's summary judgment order and order overruling Isham's motion to vacate same should be, in their entirety, reversed and this case remanded for trial.

Respectfully submitted,

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