

**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.
and SHERYL D. KINGSTON**

APPELLEES

REPLY BRIEF FOR APPELLANT

SUBMITTED BY:

**ROBERT L. ABELL
271 W. SHORT STREET, SUITE 500
P.O. BOX 983
LEXINGTON, KY 40588-0983
859-254-7076
COUNSEL FOR APPELLANT**

Certificate Required by CR 76.12(6)

The undersigned does hereby certify that copies of this Reply Brief were served upon the following named individuals by mail, postage pre-paid this ____ day of February 2005: 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 record has not been checked out for purposes of this reply brief; this the ____ day of February 2005.

COUNSEL FOR APPELLANT

REPLY STATEMENT OF FACTS

Numerous times in their brief appellees assert that Isham was asked in his deposition “to identify the factual basis behind his claims” and cite to pages 72, 84, and 85 thereof. Not on these pages or elsewhere in his deposition was Isham “asked to identify the factual basis behind his claims.” *Brief for Appellees at 9.*

Appellees’ failure and refusal to address what they refer to as “mischaracterizations” by Isham demonstrates why summary judgment was inappropriate. Isham’s view of the facts now must be taken as true, and it is appellees’ burden to demonstrate that even when the facts are so viewed in Isham’s favor, it is impossible for a jury to find in his favor. *Steelvest, Inc. v. Scansteel Serv. Center, Inc.*, 807 S.W.2d 476, 480-481 (Ky. 1991).

ARGUMENT

1. Regarding this Court’s Observation that “the only reasonable interpretation of Isham’s words is that he planned to bring legal action against ABF”

Appellees make numerous errors in their discussion of this Court’s ruling in the criminal case. First and simply put it is respectfully submitted that if three judges on this Court agree that “the only reasonable interpretation of Isham’s words is that he planned to bring legal action against ABF,” it follows that it is not impossible for a jury to agree with this view. This is the only conclusion necessary for Isham to get past summary judgment. *Steelvest, supra.*

Second, the Supreme Court reversed this Court with regard to very narrow issues of criminal procedure law and reserved any interpretation of Isham’s statement. *Commonwealth v. Isham*, 98 S.W.3d 59, 61-62 (Ky. 2003).

Third, contrary to appellees' suggestion, the law of the case doctrine is not applicable. "The law of the case doctrine applies only to the same case." *Roberson v. Commonwealth*, 913 S.W.2d 310, 312 (Ky. 1994).¹ This and the criminal case are not the same case. *Id.*

2. Appellees' Incomplete Representation of Isham's Statement

Appellees offer on page 12 of their brief a truncated and incomplete recitation of Isham's statement (as he testified in deposition), engaging in the same sort of reduction – omitting the first clause of Isham's statement referring to a lawyer -- that this Court criticized previously in the criminal case. It remains that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF."

3. The Relevance and Materiality of Isham's Statement

Isham's statement is at the heart of this case. First, if a jury were to agree with this Court's interpretation of Isham's words "that he planned to bring legal action against ABF," it can further find that this statement was made in the context of complaining about discriminatory treatment, which constitutes protected activity under both KRS 342.197 and KRS 344.280. This is elaborated on at pages 10-17 of the *Brief for Appellant* and need not be repeated here.

Second, while appellees assert on one hand that how Isham's statement is interpreted is "irrelevant,"² they also argue that the court below should be affirmed based on their interpretation of Isham's statement. Appellees contend that no "competent evidence" supported Isham's retaliation claim and that Isham "would have been fired for

¹ *Roberson* also addressed an issue regarding interstate detainers, and its ruling on that point has since been abrogated. *Parks v. Commonwealth*, 89 S.W.3d 395 (Ky. 2002); *Ward v. Commonwealth*, 62 S.W.3d 399 (Ky.App. 2001).

² *Brief for Appellees at 13.*

his statement regardless of his prior worker's compensation claim." *Brief for Appellees at 19*. These two assertions are fundamentally premised on appellees' own interpretation of Isham's statement. Again, if a jury were to adopt this Court's view that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF" and since appellees admit that Isham was fired because of this statement,³ it provides direct evidence of unlawful termination. *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). Thus, Isham's statement and its interpretation are at the heart of this case.

4. Isham Does Not Need to Prove Unlawful Discrimination In Support of His Retaliation Claims

Appellees' argument that Isham did not prove that he was a member of a protected class assumes incorrectly that Isham must prove actionable discrimination in support of his retaliation claims. Proving discrimination is not an element of a retaliation claim which are as follows: (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.*, 809 S.W.2d 858, 861 (Ky. App. 1990); *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App. 1991). Second, courts have specifically and repeatedly held that proof of actionable discrimination is not necessary in support of a retaliation claim. *See, e.g., Fine v. Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002). Accordingly, appellees' arguments that Isham must prove actionable discrimination and/or his membership in a "protected class" is erroneous.

³ Kingston depo. at 38.

5. Interpreting Isham’s Statement and What Defendants Did In Response Are Pure Fact Issues That Do Not Require Interpretation of or Reference to the Union Contract.

Neither Isham’s retaliation claim in count 1 of his complaint, his civil conspiracy claim in count 3 nor his KRS 344.280 claim in count 4 requires reference to or interpretation of the union contract.

The preemption argument regarding count 1 has been put to rest by the Supreme Court’s decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and this Court’s decisions in *Willoughby v. Gencorp, Inc.*, 809 S.W.2d 858 (Ky. App. 1990), and *Bednarek v. United Food and Commercial Workers*, 780 S.W.2d 630 (Ky. App. 1989), show the error of the court below’s preemption ruling.

The plaintiff in *Lingle* claimed, as does Isham in this case, unlawful discharge in retaliation for her pursuit of workers’ comp benefits. 486 U.S. at 407. As such and as does Isham’s, the plaintiff’s claim presented “purely factual questions” regarding the employee’s conduct, and “the conduct and motivation of the employer,” specifically regarding whether the plaintiff’s discharge was motivated by a retaliatory motive arising from her pursuit of workers’ comp benefits. *Id.* at 407. This is precisely what Isham’s cause of action in count 1 of his complaint raises. It was also what the plaintiff in *Bednarek* raised, and the Court there rejected the preemption argument based on *Lingle*. None of this requires reference to or interpretation of any provision in the union contract. Moreover, as the Court noted in *Lingle* that “the existence or the contours of the state law violation [were not] dependent upon the terms of a private contract.” *Id.* at 413. Kentucky state law is not shaped by the terms of a union contract.

Appellees engage in substantial and misguided discussion of three incidents of differential treatment that Isham testified about in his deposition and place their preemption argument on this discussion. To repeat: Isham’s retaliation claim arises from his discharge, which appellees admit was based on his statement. The interpretation of Isham’s statement is central and his claims present “purely factual questions” regarding his conduct, and “the conduct and motivation of the employer,” specifically regarding whether Isham’s discharge was motivated by a retaliatory and/or unlawful motive. These fact questions do not require reference to or interpretation of the union contract.

* * * * *

Isham relies on the arguments in the *Brief for Appellant* in further answer to appellees’ arguments.

CONCLUSION

For all the foregoing reasons and for those set forth in the *Brief for Appellant*, 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,

ROBERT L. ABELL
271 W. Short Street, Suite 500
PO Box 983
Lexington, KY 40588-0983
859-254-7076
COUNSEL FOR APPELLANT