

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
CASE NO. 2015-CA-000769

CHARLES COWING

APPELLANT

vs.

APPEAL FROM FAYETTE CIRCUIT COURT  
CIVIL ACTION NO. 14-CI-2514

ANDY COMMERE

APPELLEE

\* \* \* \* \*

BRIEF FOR APPELLANT

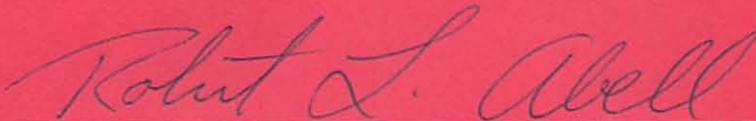
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SUBMITTED BY:

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**Certificate of Service**

It is hereby certified that a true copy of this Brief for Appellant was mailed postage prepaid, this 8 day of September 2015, to the following: Hon. Thomas L. Clark, Fayette Circuit Court, 120 N. Limestone Street, Lexington, KY 40507; and Keith Moorman, Frost Brown Todd, 250 W. Main Street, Suite 2800, Lexington, KY 40507. It is certified that the record has been returned to the Fayette Circuit Court, Appeals Division.



Counsel for Appellant

**INTRODUCTION**

This is an appeal from a summary judgment granted the appellee.

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant respectfully submits that oral argument should be held in this case, because it raises a question of first impression: whether a claim pursuant to KRS 344.280(2) for aiding and abetting an unlawful employment practice is barred, as a matter of law, by the intracorporate conspiracy doctrine.

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## STATEMENT OF THE CASE

This presents an issue of first impression in Kentucky: whether the intracorporate conspiracy doctrine bars, as a matter of law, a claim pursuant to KRS 344.280(2) based on aiding and abetting an unlawful employment practice.

### Statement of Facts

The statement of facts is necessarily brief. The court below granted a summary judgment but did so purely on legal grounds in a manner indistinguishable from a ruling on a Rule 12 motion to dismiss.

Plaintiff-Appellant Charles Cowing is a qualified individual with a disability within the scope of the Kentucky Civil Rights Act (KCRA), KRS Chapter 344. This suit arises from violations of the KCRA by Cowing's former employer, Lockheed Martin Corp., and one of its managing agents, Andy Commare,<sup>1</sup> occurring initially when Cowing attempted to return to work following a brief medical leave.

Cowing pleaded three causes of action in his amended complaint. The first two were against Lockheed Martin for disability discrimination in two forms: wrongfully excluding him from the workplace based on a disability and/or failure to reasonably accommodate his disability. (*See Amended Complaint, RA 65-80*).<sup>2</sup>

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<sup>1</sup> Commare complained that his last name was misspelled as "Commere" in plaintiff's complaint. (Answer RA 20). The spelling of his name was corrected in the amended complaint. (RA 65). Nevertheless, the court below entered judgment using what appellee indicated was a misspelling of his last name. This brief uses what appellee has represented to be the correct spelling of his last name.

<sup>2</sup> The prefix "RA" indicates a citation to the appeal record certified by the Fayette Circuit Clerk and page numbers are those used therein.

Cowing's third cause of action pleaded that Commare aided and abetted an unlawful employment practice in violation of KRS 344.280(2):

**Count 3**

**Aiding and Abetting Discrimination in Violation of the KCRA**

82. Cowing incorporates paragraphs 1 through 81 hereof as if fully set forth herein.

83. It is a violation of the KCRA, KRS 344.280, for an individual to aid and abet discriminatory and unlawful employment practices that violate the KCRA.

84. Commare has aided and abetted the discriminatory and unlawful employment practices to which Lockheed Martin has subjected Cowing.

85. As a direct and proximate result of Commare's aiding and abetting of unlawful employment practices by Lockheed Martin, Cowing has suffered, is suffering and is reasonably certain to suffer in the future damages including lost pay and benefits, impairment to his future earning capacity, emotional distress and mental anguish.

(Amended Complaint, RA 79).

Commare moved for summary judgment, before the close of discovery and about nine months after the action was filed. The Fayette Circuit Court sustained Commare's motion solely on legal grounds ruling as follows:

The intracorporate conspiracy doctrine bars as a matter of law plaintiff's claim against defendant Commere of aiding and abetting an unlawful employment practice pursuant to KR.S 344.280(2). Accordingly, defendants' motion for summary judgment is GRANTED.

(Summary Judgment, RA 487).

Cowing appealed timely. (Notice of Appeal, RA 491).

## ARGUMENT

### POINT 1

#### **THE COURT BELOW ERRED BY RULING THAT THE INTRACORPORATE CONSPIRACY DOCTRINE BARRED, AS A MATTER OF LAW, COWING'S AIDING AND ABETTING CLAIM PURSUANT TO KRS 344.280(2).**

This case presents an issue of first impression under Kentucky law: whether the intracorporate conspiracy doctrine bars, as a matter of law, a claim pursuant to KRS 344.280(2) against an individual for aiding and abetting an unlawful employment practice. Indeed, it does not appear that a Kentucky state appellate court has considered or applied the intracorporate conspiracy doctrine in any context.

The court below erred in its ruling and should be reversed. First, the plain, unambiguous statutory language in KRS 344.280(2) supports Cowing's claim. Second, the intracorporate conspiracy doctrine, a tool of statutory construction originating in cases arising under the federal Sherman Antitrust Act, apparently has never been applied or even considered by a Kentucky state appellate court in any way in any context.

Third, the considerations of statutory construction that led to the initial creation and application of the intracorporate conspiracy doctrine would be frustrated and contravened by its application here. Fourth, the court below's ruling disregards the distinctions Kentucky law recognizes between aiding and abetting and conspiracy liability, distinctions that have been incorporated into KRS 344.280; the court below's ruling also disregards and contravenes long-standing principles of Kentucky law regarding individual liability for actions a

corporate agent takes within the scope of his agency. Finally, the aiding and abetting liability provided under KRS 344.280(2) is similarly found in the laws of 25 other states and the District of Columbia. There is no novelty to Cowing's claim or the KCRA in this regard.

This Court's standard of review is *de novo*, which it applies to circuit court's granting of summary judgment on a legal issue and to issues of statutory construction. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007); *University of Louisville v. Sharp*, 416 S.W.3d, 313, 315 (Ky. App. 2013).

**(A) KRS 344.280(2) Provides for Individual Liability for Aiding & Abetting an Unlawful Employment Practice**

The relevant statute, KRS 344.280(2), provides, in pertinent part, as follows:

**It shall be an unlawful practice for a person,<sup>3</sup> or for two (2) or more persons to conspire:**

**(2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter[.] (emphasis added)**

Reduced to its essentials applicable here KRS 344.280(2) provides that:

It shall be an unlawful practice for a person ... to aid, abet, ...a person to engage in any of the acts or practices declared unlawful by this chapter.

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<sup>3</sup> KRS 344.010(...) defines "Person" as follows: "One (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint- stock companies, trust, incorporated organizations, trustees, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity, the state, any of its political or civil subdivisions or agencies." *See also Brooks v. Lexington-Fayette Urban Co. Govt. Housing Auth.*, 132 S.W.3d 790, 808 (Ky. 2004)("person' is defined in the KCRA to include 'one (1) or more individuals.'").

KRS 344.280(2) makes it unlawful for an individual to aid and/or abet another person, which can be a corporation like defendant Lockheed Martin, to engage in any of the acts declared unlawful by KRS Chapter 344, a chapter that prohibits disability discrimination. The statutory language is plain and unambiguous: as pertinent here, it provides for the individual liability of Commare for aiding and abetting an unlawful employment practice. It fully and directly supports Cowing's claim against Commare.

It appears that *Adams v. United Parcel Service*, 2006 WL 1687699 (W.D. Ky. 2006), is the only prior decision to address directly whether KRS 344.280(2) provides for individual liability for aiding and abetting an unlawful employment practice. The court held that it did, remanded the case to state court and explained that the plain statutory language was determinative: "the mere fact that no case has upheld the application of this statute to an individual does not overcome its plain language, which prohibits a *person* from aiding and abetting." 2006 WL 1687699 at \*3 (emphasis in original). The court further observed:

KRS 344.280(2) finds no analog in Title VII, and the plain language indicates that individuals may be subject to liability for violations of it. The use of the term "person" applies equally to KRS 344.280(1) and KRS 344.280(2).

*Id.*

That KRS 344.280(2) provides for individual liability for aiding and abetting an unlawful employment practice is an easy question. The court below did not rule otherwise; rather, it held erroneously that this plain, unambiguous statutory language was trumped or superseded by the intracorporate conspiracy doctrine. To that doctrine we now turn.

The intracorporate conspiracy doctrine originated as a tool of statutory construction in cases involving one of our Nation's most renowned laws, one enacted in the trust-busting days of President Theodore Roosevelt, the Sherman Antitrust Act. *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1037 (11<sup>th</sup> Cir. 2001). Section 1 of the Sherman Act prohibits conspiracies by two or more persons to restrain trade or commerce. *Nelson Radio & Supply Co. v. Motorola*, 200 F.2d 911, 913-14 (5<sup>th</sup> Cir. 1952). "The [intracorporate conspiracy] doctrine is based on the nature of a conspiracy and the legal conception of a corporation. It is by now axiomatic that a conspiracy requires a meeting of the minds between two or more persons to accomplish a common and unlawful plan." *McAndrew*, 206 F.3d at 1036.

Section 1 of the Sherman Act, if read and applied literally, would apply to perhaps even bar joint actions by corporate employees on behalf of their employer to advance the company's business and restrain or reduce that of its competitors. *Nelson Radio, supra*. That is an absurd result, contrary to basic business operations and American capitalism and contrary to the Sherman Act's central purpose: to prohibit two or more companies or corporations from conspiring to share control of a particular market or business to the detriment of an innovative up and coming competitor(s) and the public. *See Stathos v. Bowden*, 728 F.2d 15, 20-21 (1<sup>st</sup> Cir. 1984)(discussing why the intracorporate conspiracy doctrine promoted the objectives of the Sherman Act and declining to apply it to claims of sex discrimination in employment). Thus, the intracorporate conspiracy doctrine took root as a tool of statutory construction to prevent absurd application of the Sherman Act and to promote its purpose.

Kentucky law, of course, uses these same statutory construction tools. “In construing a statute, it is fundamental that [the Court’s] foremost objective is to determine the legislature’s intent in enacting the legislation.” *Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014). Courts “are to avoid absurd results in construing statutes.” *George v. Alcoholic Beverage Control Board*, 421 S.W.2d 569, 571 (Ky. 1967). “To determine legislative intent, [courts] look first to the language of the statute, giving the words their plain and ordinary meaning.” *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777, 779 (Ky. 2008).

The KCRA includes strong and emphatic statements of legislative intent and purpose including but not limited to the following:

(1) The general purposes of this chapter are:

(a) to provide for execution with in the state of the policies embodied in [a number of federal civil rights laws];

(b) to safeguard all individuals with in the state from discrimination ... Thereby to protect their interest and personal dignity and freedom from humiliation, to make available to the state therefore productive capacities, to secure the state against domestic strife and unrest which would menace its democratic institutions, to preserve the public safety, health, and general welfare, and to further the interests, rights and privileges of individuals with in the state;

...

(2) This chapter shall be construed to further or the general purposes stated in this section and the special purposes of the particular provision involved.

KRS 344.020.

This Court has recognized that “the KCRA is be interpreted broadly in order best to achieve its anti-discriminatory goals.” *Kearney v. City of Simpsonville*, 209 S.W.3d 483, 485 (Ky. App. 2006).

The court below’s ruling frustrates and contravenes all these considerations. First, the court below’s ruling utterly disregards the plain, unambiguous statutory language on which Cowing’s claim rests. Second, the court below’s ruling trims the reach of the KCRA, exactly contrary to its purpose and this Court’s observation that it be “interpreted broadly in order to best achieve its anti-discriminatory goals.” *Id.* The court below’s ruling, if affirmed by this Court, would exempt from coverage of the KCRA exactly those individuals like Commare positioned to undermine and contravene the anti-discriminatory goals of the KCRA.

Third, it does not appear that a Kentucky appellate court has ever applied or even considered the application of the intracorporate conspiracy doctrine in any way or context. No such case was cited to the court below. Westlaw queries in the Kentucky law database using the terms “intra-corporate conspiracy” and “intracorporate conspiracy” yielded zero cases in the search results. Caution weighs against categorical assertions about the complete absence of any supporting authority for a particular legal point but substantial research has yielded none. Accordingly, the court below applied a legal doctrine alien to Kentucky law to contravene plain, unambiguous statutory language while also frustrating the purpose of the KCRA. This was error.

**(B) Kentucky Law Distinguishes Between Aiding & Abetting and Conspiracy Liability**

Kentucky law has long distinguished between aiding and abetting liability and conspiracy liability. Aiding and abetting liability arises where the defendant knowingly gave “substantial assistance and encouragement” to the wrongful conduct. *See Miles Farm Supply, LLC v. Helena Chem. Co.*, 595 F.3d 663, 666 (6<sup>th</sup> Cir. 2010). The *Restatement (Second) of Torts* § 876, which Kentucky has adopted,<sup>4</sup> provides that “substantial assistance” means that a defendant's conduct was a substantial factor in causing the tort, the relevant factors including “the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind.”

Liability for civil conspiracy, on the other hand, requires proof of an agreement: “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.” *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255, 260–61 (Ky.App. 2008). The court here summarized the distinctions between conspiracy and aiding and abetting liability as follows: “there must be proof that the defendants acted tortiously pursuant to a common design, **or** that they rendered substantial assistance to another to accomplish the tortious act.” *Id.*

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<sup>4</sup> *Farmer v. City of Newport*, 748 S.W.2d 162, 164 (Ky. App. 1988).

There are, to be sure, similarities between aiding and abetting liability and conspiracy liability. As a result, sometimes their distinctions are lost. The D.C. Circuit Court of Appeals in *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983), discussed the tendency to erroneously conflate aiding and abetting and civil conspiracy liability:

Courts and commentators have frequently blurred the distinction between the two theories of concerted liability. Most commonly, courts have relied on evidence of assistance to the main tortfeasor to infer an agreement, and then attached the label “civil conspiracy” to the resultant amalgam. Sometimes, although not always, the inference has been factually justified; many tort defendants have both conspired with and substantially assisted each other. But we find it important to keep the distinctions clearly in mind as we review the facts in this novel case to see if tort liability is warranted on either or both concerted action theories. For the distinctions can make a difference. There is a qualitative difference between proving an *agreement to participate* in a tortious line of conduct, and proving *knowing action* that substantially aids tortious conduct. In some situations, the trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement. A court must then ensure that all the elements of the separate basis of aiding-abetting have been satisfied.

705 F.2d at 478.

KRS 344.280 provides multiple and alternative bases for liability, one of which is individual liability for aiding and abetting and another arising from a conspiracy between two or more persons. A quick review of the statutory language shows this point:

It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:

(2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter[.]

There are numerous bases for liability to arise under KRS 344.280(2) and two of them surely are (1) where a “person” aids and/or abets an unlawful employment

practice; and, (2) where two or more persons conspire to aid and/or abet an unlawful employment practice.

These are separate and distinct torts that our Commonwealth has incorporated into its Civil Rights Act. Nothing indicates that these distinctions were erased upon their incorporation into KRS 344.280. Moreover, the presumption is that the General Assembly intentionally incorporated the distinctions between aiding and abetting liability and conspiracy liability into KRS 344.280. *T.M. Crutcher Dental Depot v. Miller*, 64 S.W.2d 466, 467 (Ky. 1933) (“It is to be presumed the Legislature enacted this amendment with a full knowledge of the existing conditions of the common law and of statutes with respect to the subject-matter.”). The plain, unambiguous statutory language incorporates these distinctions. Thus, the court below’s ruling is contrary not only to the statute’s plain, unambiguous language and its purpose but also to long-standing principles of Kentucky law distinguishing between aiding and abetting liability and conspiracy liability.

**(C) Kentucky Law Holds Corporate Agents Individually Liable For Wrongs Done in the Scope of their Agency**

The individual liability that Cowing’s claim would impose on appellee for aiding and abetting unlawful employment discrimination is likewise consistent with Kentucky law. “It 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.*, 566 S.W.2d 420, 425 (Ky. App. 1978), citing *Peters v. Frey*, 429 S.W.2d 847 (Ky. 1968); *Small v. Bailey*, 356 S.W.2d 756 (Ky. 1962). Accordingly and again, KRS 344.280 merely

incorporates long-standing Kentucky tort law principles. And in this way also the court below's ruling that the intracorporate conspiracy doctrine bars, as a matter of law, appellee's individual liability for aiding and abetting unlawful employment discrimination is contrary to the plain, unambiguous statutory language and long-standing principles of Kentucky law.

The court below appeared to rely on four federal district court cases, none of which involved an aiding and abetting claim, but which did involve conspiracy claims (some under KRS 344.280 and some not) to which the intracorporate conspiracy doctrine was applied. *McGee v. Continental Mills, Inc.*, 2009 WL 4825010 (W.D. Ky. Dec. 11, 2009), involved a "conspiracy claim" and said nothing whatsoever about aiding and abetting liability under KRS 344.280(2). The other three, *Roof v. Bel Brands USA, Inc.*, 2014 WL 5243051 (W.D. Ky. Oct. 15, 2014), *Bzura v. Lumber Liquidators, Inc.*, 2014 WL 798155 (W.D. Ky. Feb. 27, 2014) and *Dunn v. Gordon Food Services, Inc.*, 2010 WL 4180503 (W.D. Ky. Oct. 20, 2010), are all likewise. *Roof* asserts claims of sex and age discrimination, retaliation, promissory estoppel, negligence and civil conspiracy. 2014 WL 50243051 \*2; *Bzura* included claims only of age discrimination and conspiracy. 2014 WL 798155 at \*1; the claims in *Dunn* were age and gender discrimination, hostile work environment, and conspiracy to violate KRS 344. 2010 WL 4180503 at \*1.

These cases offer only the weakest and most general support for the court below: like the court below's ruling these cases all disregard plain statutory language and apply an alien to Kentucky law concept of statutory construction to

frustrate and preclude achievement of the KCRA's "anti-discrimination goals." But they provide no grounds for affirmance.

First, none offers any explanation as to why an alien to Kentucky law legal doctrine should be applied to contravene plain, unambiguous statutory language and frustrate achievement of the KCRA's "anti-discrimination goals." Second, none involve an aiding and abetting claim under KRS 344.280(2). Third, none consider or acknowledge the distinctions between aiding and abetting and conspiracy liability under Kentucky law. Fourth, none consider or acknowledge that Kentucky law has long held that corporate agents may be individually liable for wrongs done within the scope of their agency, which is all that Cowing's claim against appellee would do. Finally, a conspiracy requires a meeting of the minds of two or more persons, *Peoples Bank, supra*, and this is the premise for the intracorporate conspiracy doctrine. *McAndrew*, 206 F.3d 1031. However, aiding and abetting liability has no such requirement; thus, the central premise on which the intracorporate conspiracy doctrine rests is absent from this case. In sum, the cases disregard the intent and purpose of the KCRA, its plain, unambiguous statutory language, principles of statutory construction and decades of precedent, all in favor of the alien to Kentucky law doctrine of the intracorporate conspiracy doctrine, whose central premise is absent here.

**(D) Aiding and Abetting Discrimination Liability in Other States**

It cannot be argued that the individual liability that KRS 344.280(2) would impose for aiding and abetting a discriminatory employment practice renders unique or unusual Kentucky's employment discrimination law. Twenty-five other states and the District of Columbia have similar statutes that impose

individual liability for aiding and abetting a discriminatory employment practice. They include, Alaska, Alaska Stat. § 18.80.260; California, Cal. Govt. Code § 12940(i); Connecticut, Conn. Gen. Stat. § 46-60-(a)(5); District of Columbia, D.C. Code Ann. § 2-1402.62; Illinois, Ill. Rev. Stat. ch. 775, § 6-101(B); Iowa, Iowa Code Ann. § 216.11; Kansas, Kan. Stat. Ann. § 44-10009; Maryland, Maryland State Govt. Code Ann. § 20-801; Massachusetts, Mass. Gen. Laws Ann. ch. 151B, § 4 (5); Minnesota, Minn. Stat. Ann. § 363A.14; Missouri, Mo. Rev. Stat. § 213.070; Montana, Mont. Code. Ann. § 49-2-302; New Hampshire, N.H. Rev. Stat. Ann. §§ 354A: 4 & 7; New Jersey, N.J. Rev. Stat. Ann. § 10:5-12e; New Mexico, N.M. Stat. Ann. § 28-1-7(1); New York, N.Y. Exec. Law § 296(6); North Dakota, N.D. Cent. Code § 14-0 2.4-18; Ohio, Ohio Rev. Code Ann. § 4112.02 (J); Oklahoma, Okla. Stat. title 25, § 1601(2); Oregon, Or. Rev. Stat. § 659A.030(1)(g); Pennsylvania, Pa. Stat. Ann. title 43, § 955(e); Rhode Island, R.I. Gen. Laws § 28-5-7 (6); South Dakota, S.D. Laws Ann. § 20-13-26; Utah, Utah Code Ann. § 34A-5-106(1)(e)(i); Washington, Wash. Rev. Code § 49.60.220; and West Virginia, W. Va. Code § 5-11-9(7)(A).

Kentucky has joined the majority of states endeavoring to deter employment discrimination by imposing individual liability for aiding and abetting a discriminatory employment practice. Cowing's claim simply aims to enforce KRS 344.280(2) as written and enacted by the General Assembly and in furtherance of the KCRA's "anti-discrimination goals." Accordingly, this Court should reverse the court below and remand Cowing's claim for trial.

## CONCLUSION

Consistent with its ambitious purpose the KCRA casts a broad net to deter and remedy employment discrimination, as well as individual acts that aid and abet such unlawful practices. The plain, unambiguous language of KRS 344.280(2) is consistent both with this purpose and those pre-existing principles of Kentucky law distinguishing between aiding and abetting liability and conspiracy liability and imposing individual liability on corporate agents for wrongful acts taken within the scope of their agency. It is likewise consistent with the similar laws of a majority of other states and jurisdictions in our Nation that do likewise. The court below erred in ruling that the intracorporate conspiracy doctrine barred, as a matter of law, appellee's individual liability for aiding and abetting unlawful employment discrimination. Accordingly, this Court should reverse the summary judgment granted appellee by the court below and remand this case for trial.

Respectfully submitted,



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**APPENDIX**

**Item**

**Tab No. R.A. Pg. #**

Summary Judgment  
April 21, 2015

1 487

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
DIVISION 8  
CIVIL ACTION NO. 14-CI-2514

ENTERED  
ATTEST VINCENT RIGGS, CLERK  
APR 21 2015  
FAYETTE CIRCUIT CLERK  
BY \_\_\_\_\_ DEPUTY

CHARLES COWING

PLAINTIFF

VS.

SUMMARY JUDGMENT

LOCKHEED MARTIN CORPORATION  
and ANDY COMMERE

DEFENDANTS

The motion for summary judgment by defendant Andy Commere came on for hearing on Friday, April 10, 2015. Kathleen B. Wright appeared for defendants; Robert L. Abell appeared for plaintiff.

The Court having considered the parties' submissions, heard argument from counsel and being otherwise adequately and sufficiently advised,

**IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The intracorporate conspiracy doctrine bars as a matter of law plaintiff's claim against defendant Commere of aiding and abetting an unlawful employment practice pursuant to KRS 344.280(2). Accordingly, defendants' motion for summary judgment is **GRANTED**.

2. There is no just reason for delay, and this is a final and appealable order.

Dated: 4/20/15

Attest:

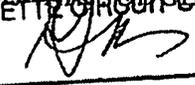
  
Robert Abell

Counsel for the plaintiff

  
Kathleen Wright

Keith Moorman

Counsel for the defendants

/S/ THOMAS L. CLARK  
A TRUE COPY  
ATTEST VINCENT RIGGS, CLERK  
FAYETTE CIRCUIT COURT  
BY  D.C.

**CLERK'S CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following via first-class U.S. Mail, postage prepaid on this the 21 day of April 2015:

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*Vincent R. Hight*  
*MH*

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Clerk, Fayette Circuit Court

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