

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
7th DIVISION – CIVIL BRANCH
No. 99-CI-2600

JEFFREY A. ISHAM

PLAINTIFF

vs.

**COMPLAINT
JURY TRIAL DEMANDED**

ABF FREIGHT SYSTEM, INC.

DEFENDANT

SHERYL D. KINGSTON

DEFENDANT

DANIEL P. WOLENS

DEFENDANT

* * * * *

Plaintiff Jeffrey A. Isham for his complaint against defendants ABF Freight System, Inc., Sheryl D. Kingston, and Daniel P. Wolens states as follows:

Nature of the Case

1. This is an action seeking lost wages, income and benefits, compensatory and punitive damages, reinstatement to employment or front pay in lieu thereof, lost future earning capacity, costs and attorney's fees for defendants' wrongful and unlawful actions.

Jurisdiction & Venue

2. This court has jurisdiction over this matter under KRS 23A.010, KRS 342.197(3), and KRS 344.450. Venue is proper in Fayette Circuit Court because the events and actions at issue herein caused injuries in Fayette County.

Parties

3. Plaintiff Jeffrey A. Isham is a citizen of the United States of America and resides in Washington County, Kentucky.

4. Defendant ABF Freight System, Inc., (ABF) is, upon information and belief, an Arkansas corporation. ABF apparently is not registered to do business in the Commonwealth of Kentucky and the Secretary of State has no listed agent for service of process. ABF does maintain a freight terminal in Fayette County, Kentucky at 1003 Whipple Court, Lexington, KY 40511. ABF's chief agent within the meaning of CR 4.04(5) at that location is Sheryl D. Kingston.

5. Defendant Sheryl D. Kingston is the chief agent for ABF and is a resident of Kentucky.

6. Defendant Daniel P. Wolens is, upon information and belief, a resident of Jefferson County, Kentucky.

Facts Giving Rise to This Lawsuit

7. Isham was employed as a truck driver by ABF at all times pertinent hereto and an employee within the meaning of KRS 342 and KRS 344.

8. At all times pertinent hereto ABF Freight was the employer of Isham within the meaning of KRS 342 and KRS 344.

9. Isham was injured during the course of his employment with ABF.

10. As a result of his injury during the course of his employment with ABF, Isham filed a claim for benefits pursuant to KRS 342.

11. ABF vigorously contested and opposed Isham's claim for workers' compensation benefits.

12. On August 14, 1998, an administrative law judge issued an opinion and order finding Isham to have a 50% occupational disability and ordering that benefits be paid by ABF in accordance with that order.

13. On or about September 10, 1998, Wolens wrote Kingston regarding the “50% permanent partial disability” that the administrative law judge found Isham to have been suffering from. A copy of Wolens’ letter is attached hereto as exhibit 1.

14. In his September 10, 1998, letter, Wolens stated that the factual basis for administrative law judge’s findings as to Isham were “completely untrue.”

15. Also in his September 10, 1998, letter, Wolens recommended to Kingston that ABF appeal the administrative law judge’s decision, reopen the decision or have Isham prosecuted for perjury.

16. Contrary to Wolens’ recommendation ABF did not appeal the opinion and order.

17. Contrary to Wolens’ recommendation ABF has not sought to reopen the workers’ compensation case.

18. Contrary to Wolens’ recommendation ABF has not sought to have Isham prosecuted for perjury, although it has wrongfully and maliciously caused other criminal proceedings to be instituted against Isham.

19. Isham returned to work at ABF in September 1998.

20. On January 8, 1999, Isham telephoned ABF’s terminal in Fayette County. Isham spoke first with Mike Shepherd, who was Isham’s supervisor and was employed as ABF’s dispatcher. Isham informed Shepherd that hazardous road conditions made it unsafe for him to come to work.

21. When Isham informed Shepherd that hazardous road conditions made it unsafe for him to report to work, Shepherd informed Isham that he would be subjected to discipline if he did not report to work as scheduled.

22. Upon being informed that he would be subjected to discipline, Isham told Shepherd that he had been subjected to discrimination and harassment by ABF since he had returned to work from his work-related injuries and that he would take legal action if it continued.

23. After his conversation with Isham, Shepherd got Sam Adkins, who served as the union steward, on the phone with Isham. Isham repeated to Adkins his intention to take legal action against ABF for its discriminatory and harassing treatment of him.

24. Following Isham's conversations with Shepherd and Adkins, Kingston had both prepare a written summary of their conversations with Isham.

25. Adkins provided Kingston with a written summary of his conversation with Isham at about 11:14 a.m. on January 8, 1999. A true and accurate copy of Adkins' summary is attached hereto as exhibit 2.

26. Among other things Adkins reported to Kingston in his summary "Jeff further stated th[at] 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." Adkins also reported to Kingston that Isham "stated that he felt that he was being discriminated against."

27. Shepherd provided Kingston with a written summary of his conversation with Isham at about 11:12 a.m. on January 8, 1999. A true and accurate copy of Shepherd's summary is attached hereto as exhibit 3.

28. Among other things Shepherd reported to Kingston in his summary that Isham "said if he was wrote up he would have his lawyers sue us and he would fire on everyone here."

29. Both Shepherd and Adkins informed Kingston in their written summaries that Isham had stated, in colloquial fashion, that he intended to hire a lawyer and take legal action in response to the illegal discrimination and harassment to which he was being subjected by ABF.

30. Isham's complaint of discrimination and harassment and stated intention to pursue his legal remedies is protected activity under both KRS 342 and KRS 344.

31. Although Adkins and Shepherd had provided Kingston with their written summaries of their conversations with Isham and Kingston knew the content of Isham's statements to Adkins and Shepherd, Kingston, at shortly after 3:00 p.m. on January 8, 1999, filed in Fayette District Court a criminal complaint charging Isham with terroristic threatening.

32. Kingston stated in her criminal complaint against Isham as follows: "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)." A true and accurate copy of Kingston's criminal complaint is attached hereto as exhibit 4.

33. In filing her criminal complaint against Isham, Kingston willfully, knowingly and purposely withheld disclosure that Isham's statement had actually been a statement that he intended to take legal action in response to discriminatory treatment.

34. No probable cause supported Kingston's complaint of terroristic threatening against Isham.

35. As a direct and proximate result of Kingston's malicious and wrongful filing of the charge of terroristic threatening, Isham has suffered emotional distress and

mental anguish, humiliation, damage to his personal and occupational reputations and impairment to his future earning capacity.

36. Kingston maliciously filed the false charge of terroristic threatening against Isham willfully and in wanton disregard for his rights.

37. By letter dated January 8, 1999, Kingston informed Isham that he was discharged from employment by ABF and stated as follows: "On January 8, 1999, during a phone call you made at approximately 10:15 a.m., you manifested the Postal Worker's Syndrome in that you called the terminal to say you were not coming in to work and during that conversation stated that you 'would fire on everyone here' to Mike Shepherd. You made the same statement to union steward[d] Sam Adkins. Therefore, this action on your part is deemed by the company to be a cause for discharge." A true and accurate copy of Kingston's letter is attached hereto as exhibit 5.

38. Kingston's characterization of Isham's statement, as set forth in her letter of January 8, is false and was known by Kingston to be false. As a reason to justify Isham's termination it is pretextual.

39. Isham's protected activity, most specifically, his stated intention to take legal action in response to ABF's discriminatory and harassing treatment of him, was a substantial and motivating factor for his termination from employment by ABF.

40. Isham subsequently filed a grievance pursuant to his union contract regarding his termination from employment. In his grievance Isham acknowledged as follows: "In frustration, I stated to Mike [Shepherd] that if he & Sheryl [Kingston] didn't stop harassing and discriminating against me, I was going to 'get a lawyer and fire on everyone there.' In stating that I meant that I would file suit against everyone there. My

statement was not meant to be taken in any physically threatening way at all.” A true and accurate copy of Isham’s grievance is attached hereto as exhibit 6.

41. In response to Isham’s grievance and in preparation for a committee hearing relative to it, Kingston requested that Wolens write a medical opinion regarding Isham, although Wolens had never met Isham.

42. Wolens agreed to and did prepare the opinion requested by Kingston in a letter to her dated January 30, 1999.

43. In his January 30, 1999, letter to Kingston, Wolens stated as follows: “[Isham] has shown past history of manipulating the workers compensation system to his advantage. This includes first behaving in a manner resulting in a total permanent disability award, only to later behave in a manner of total normality, to achieve reinstatement in a job he originally claimed to be unable to perform – hence the total disability award.” A true and accurate copy of Wolens’ letter is attached hereto as exhibit 7.

44. At the time Wolens prepared his January 30, 1999, letter, he knew that Kingston intended to submit it as a medical statement in proceedings related to Isham’s grievance.

45. The statements in Wolens’ letter dated January 30, 1999, letter to Kingston that Isham had caused his workers’ compensation case to result in a finding that he was totally disabled was false and known to be false by Wolens when he made these statements.

46. Wolens included the false statements regarding the outcome of Isham’s workers’ compensation case for the purpose of influencing the committee that would be

47. ABF, Kingston and Wolens did agree and conspire to wrongfully and unlawfully terminate Isham's employment and to resist his efforts to right this wrong.

48. Wolens prepared his letter to Kingston dated January 30, 1999, and included in it the false information regarding the outcome of Isham's worker's compensation case, in furtherance of the unlawful conspiracy among he, Kingston and ABF.

49. ABF and Kingston tendered Wolens' letter to her dated January 30, 1999, to the committee considering Isham's grievance as an act in furtherance of their conspiracy to unlawfully terminate Isham's employment with ABF.

50. As a direct and proximate result of the unlawful conspiracy among ABF, Kingston and Wolens, Isham has suffered mental anguish and emotional distress, lost wages, impairment to his future earning capacity, and damage to his occupational reputation.

51. ABF, by and through a duly authorized agent, offered to end all proceedings with Isham if he would agree to resign his employment.

52. By order entered July 15, 1999, the Fayette District Court dismissed with prejudice the charge of terroristic threatening made against Isham by Kingston. A true and accurate copy of the Court's order is attached hereto as exhibit 8.

53. The Fayette District Court correctly observed that Isham's statements to Shepherd and Adkins amounted to a colloquial threat "to hire a lawyer and take legal action against his employer, ABF Frieght."

54. “A threat to hire a lawyer and take legal action does not, as a matter of law, constitute the offense of terroristic threatening.”

55. The actions taken by Kingston as described herein were taken in furtherance of ABF’s business interests and within the scope of her authority as ABF’s agent.

56. As a direct and proximate result of the above-described actions of ABF, Kingston, and Wolens, Isham has suffered and/or is reasonably certain to suffer in the future, 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.

57. The above-described actions of ABF, Kingston and Wolens, were willfully and maliciously done and in wanton and intentional disregard for Isham’s rights.

Causes of Action

Count 1

58. Plaintiff incorporates herein paragraphs 1 through 57 hereof.

59. Isham’s protected activity of stating his intention to take legal action in response to discrimination and harassment of him by ABF was a substantial and motivating factor for his termination. Isham’s termination thus violated KRS 342.

Count 2

60. Plaintiff incorporates herein paragraphs 1 through 59 hereof.

61. Isham’s protected activity of stating his intention to take legal action in response to discrimination and harassment of him by ABF was a substantial and motivating factor for his termination. Isham’s termination thus violated KRS 344.

Count 3

62. Plaintiff incorporates herein paragraphs 1 through 61 hereof.

63. ABF, Kingston and Wolens have unlawfully agreed and conspired and taken overt acts in furtherance of their conspiracy to cause termination of Isham's employment, to wrongfully initiate criminal prosecution of Isham and to cause him damage as above described.

Count 4

64. Plaintiff incorporates herein paragraphs 1 through 63 hereof.

65. Kingston and Wolens have conspired to cause and perpetuate the unlawful termination of Isham's employment with ABF in violation of KRS 344.280 and have caused injuries to Isham as above-described.

Count 5

66. Plaintiff incorporates herein paragraphs 1 through 65 hereof.

67. ABF and Kingston instituted maliciously the criminal prosecution of Isham for terroristic threatening, a charge that they withheld the true facts regarding, a charge that was unsupported by probable cause, a charge that was dismissed when the true facts of it were made clear to the Fayette District Court and damaged Isham as above-described.

Count 6

68. Plaintiff incorporates herein paragraphs 1 through 66 hereof.

69. ABF and Kingston wrongfully and unlawfully utilized and abused the criminal prosecution process for the wrongful and ulterior purpose of securing the

termination of Isham's employment with ABF and in so doing have caused damage to Isham's person and property as above-described.

Demand for Relief

WHEREFORE, plaintiff Jeffrey A. Isham demands against defendants ABF Freight Systems, Inc., Sheryl D. Kingston and Daniel P. Wolens as follows:

(1) that the Court enter a judgment granting Isham monetary damages payable by defendants ABF, Kingston and/or Wolens in an amount fairly compensating him for the injuries caused him by the defendants and in specific amount to be determined by a jury at trial and in excess of this Court's jurisdictional minimum;

(2) that the Court enter a judgment granting Isham punitive damages payable by and assessed against defendants ABF, Kingston and/or Wolens by the jury at trial to punish defendants for their wrongful and malicious actions toward Isham, for their wanton and intentional disregard for his rights and to deter repetition of this misconduct;

(3) enter a judgment awarding Isham his costs, litigation expenses and attorney's fees as provided by KRS 342.197(3) and/or KRS 344.450;

(4) reinstate him to his rightful place in the workforce of ABF or have awarded an appropriate and fair sum of front pay; and,

(5) grant him all other relief to which he is entitled.

Demand for a Jury Trial

Pursuant to CR 38 plaintiff hereby demands trial by jury of all issues herein so triable.

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