COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT -- 7TH DIVISION
CIVIL ACTION NO. 99-CI-2600

JEFFREY A. ISHAM PLAINTIFF

vs. **MOTION TO VACATE SUMMARY JUDGMENT ORDER**

ABF FREIGHT SYSTEM, INC., et al DEFENDANTS

* * * * * * * * * *

Of the statement by plaintiff Jeffrey A. Isham at the core of this case the Court of Appeals observed:

> ***the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF.***

Despite this appellate judicial imprimatur of the factual theory supporting Mr. Isham's causes of action, the Court entered on May 12, 2004, a Summary Judgment Order (SJO), centered on defendants' contrary interpretation of Isham's words. Isham accordingly and hereby moves pursuant to CR 59.05 that the Court enter an Order vacating and setting aside the SJO and states as follows:

SUMMARY RECITATION OF FACTS OMITTED FROM SJO

The findings of fact recited in the Court's SJO omit much evidence that supports Isham's causes of action including but not necessarily limited to the following:

1. The Court of Appeals 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. (Court of

Appeals Opinion at 6 and attached hereto marked Exhibit A).

2. The Fayette District Court stated as follows in dismissing the terroristic threatening charge made by defendants against Isham:

> 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.

3. Defendants focused on Isham's threat of legal action immediately. Specifically, Warren McIntyre provided defendants with a sworn statement dated January 25, 1999, stating 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 & attached hereto and marked "C")

4. McIntyre's statement makes no reference to defendants referring to any threat by Isham other than of taking legal action.

5. 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 & attached hereto marked "D")

6. 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 attached hereto and marked "E")

7. 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 attached hereto and marked "F)

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

9. Adkins provided the report on Isham's statement to defendants on January 8, 1999, at about 11:14 a.m.

10. The pertinent statement by Isham was also made to Mike Shepherd, Isham's supervisor, who reported his statement as follows:

> He said if he was wrote up he would have his lawyers sue us and he would fire on everyone here. (Shepherd depo. ex. 1 attached hereto and marked "G")

11. After receiving the reports from Shepherd and Adkins, which are recited in paragraphs 5-6, and 8, defendant Kingston filed a criminal complaint 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 attached hereto and marked "H")

12. 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 attached hereto and marked "I")

13. 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 attached hereto and marked "J")

14. Adkins did not find unusual the use of the term fire on someone in conjunction with a lawyer. (Adkins depo. at 39). He added that it was a usage he'd heard before:

> Q: Have you heard that expression before?
>
> A: Yeah. In fact, I'm pretty sure I have.
>
> Q: You've heard other people say that they were going to get a lawyer and fire on somebody?
>
> A: I'm sure I've heard it somewhere.
> (Adkins depo. at 39-40).

15. Shively Pierce, who has over thirty years in the trucking business, testified regarding Isham's January 8 statement echoed Adkins' testimony on this point:

> I'll get my lawyer and come – that's a terminology that we all use. You know, you go ahead and do what you've got to do. I'll fire on you with a grievance, you know. That's a terminology, that's a shoptalk, basically. So I've used that term. (Pierce depo. at 84-85 attached hereto and marked "K")

16. Isham's testimony in his workers' compensation case that he was not physically capable then of doing his job at ABF was in accordance, as he explained in his deposition, with the restrictions imposed by his treating doctors. (Isham depo. at 79 attached hereto and marked "L")

17. Isham testified in the workers' compensation deposition about one year prior to the judge's opinion on August 14, 1999. (Id).

18. Isham benefited from physical therapy to build himself back up and cause his restrictions to be lifted. (Isham depo. at 80-81).

19. Because Isham built himself back up through physical therapy, the restrictions arising from his work-related injury were lifted. (Id. at 80).

20. Defendants did not appeal the workers' compensation decision.

21. Defendants did not try to reopen Isham's workers' compensation case.

22. Although defendants contend that Isham acted in August 1998, in trying to return to work, contrary to what the evidence was that had been presented in the workers compensation case, defendants did not try to reopen the case.

23. Defendants screen employees for hiring based on whether or not they have previously filed a workers' compensation claim. (Ex. A to Plaintiff's Memorandum Contra ABF & Kingston's Motion for Summary Judgment).

24. Defendants had previously observed adversely to Isham that his work injuries increased the likelihood of his pursuing benefits under the workers' compensation statutes. (Ex. B to Plaintiff's Memorandum Contra ABF & Kingston's Motion for Summary Judgment).

25. Isham expressed to Pierce concern that "he was worried whether [defendants] were going to look at him differently since he had an on-the-job injury[.]" (Pierce depo. at 60).

26. Defendants delayed for seven weeks Isham's return to work from leave caused by his work-related injury. (Isham depo. at 83-84).

27. Following his return from leave caused by his work-related injury, Isham was treated differently than other employees with regard to telephone usage in the workplace and with regard to the accounting of sick and personal days. (Isham depo. at 85).

28. Union steward Sam Adkins intervened on Isham's behalf regarding the accounting of his sick and personal days and caused defendants' to change their position. (Id.).

29. Following the controversy over his sick/personal days, Adkins advised Isham that Kingston had said she would write him up the next time he missed and "get him out the door." (Isham depo. at 86).

30. Adkins also advised Isham regarding Kingston that he'd better watch out, because "she's going to get you." (Id. at 98).

31. Defendants solicited a functional capacity evaluation of Isham in September 1998, by co-defendant Dr. Daniel Wolens, an occupational physician.

32. Wolens authored a letter dated September 10, 1998, regarding his functional capacity evaluation of Isham, reporting in pertinent part as follows:

> I am once again somewhat baffled by the administrative law judge's decision, having awarded this individual a 50% permanent partial disability. … There are several avenues of approach that you may be able to pursue … on a more dramatic note, there is even the potential to assess this individual for having committed perjury. (Wolens depo. ex. 1 attached hereto and marked "M")

33. After Isham's employment was initially terminated by defendants on January 8, 1999, he filed a grievance pursuant to a collective bargaining agreement, stating in the grievance: "In frustration, I stated to Mike that if he & Sheryl 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." (Adkins depo. ex. 1 and attached hereto marked "N).

34. Isham informed Shepherd on the phone on January 8, 1999, that he had been harassed since he had returned to work from his work-related injury. (Isham depo. at 119).

35. Isham informed Shepherd on the phone on January 8, 1999, that he felt he was being discriminated against. (Id. at 120).

36. On January 29, 1999, defendants contacted co-defendant Dr. Wolens for the purpose of having Dr. Wolens write a letter supporting their effort to terminate Isham's employment that could be presented at a hearing on the grievance Isham had filed regarding his initial termination. (Kingston depo. at 45-46 attached hereto and marked "O").

37. It is unchallenged that Isham had a good-faith belief that he was being subjected to discrimination.

38. Defendant Kingston specifically informed Wolens why defendants wanted him to write a letter and the purpose that they were going to put the letter to. (Kingston depo. at 45-46).

39. Wolens responded to defendants' request by authoring a letter dated January 30, 1999. (Wolens depo. ex. 4 attached hereto marked "P").

40. Wolens' January 30 letter reported that defendants and Isham had a "poor" working relationship stemming from Isham's work-related injury and workers' compensation proceeding. (Id.)

41. Wolens testified that the only source of information he had regarding Isham's and defendants' employee-employer relationship was Kingston, the only person affiliated with defendants that he had spoken to. (Wolens depo. at 21-23 attached hereto and marked "Q").

42. Wolens testified that he had never spoken to nor ever seen Isham until July 2003, when the criminal charge filed against Isham by defendants was tried in Fayette District Court. (Wolens depo. at 11-12).

43. Although Wolens had reviewed the worker's compensation judge's ruling regarding Isham's claim and knew that he had been found only 50% occupationally disabled within the legal definition of that term, Wolens twice stated in his January 30 letter that Isham had been found to be 100% occupationally disabled, stating falsely that Isham had received "a total permanent disability award" and a "total disability award."

44. Although defendants had reviewed the worker's compensation judge's ruling regarding Isham's claim and knew that he had been found only 50% occupationally disabled within the legal definition of that term, they did not ask Wolens to correct the two misstatements in his January 30 letter regarding the outcome of Isham's workers' compensation claim.

45. Defendants did not ask Wolens to correct the statement in his January 30 letter that their relationship with Isham was poor owing to his work-related back injury.

46. Wolens misrepresented Isham's workers compensation claim in his January 30 letter to portray Isham in a false and negative light and in furtherance of the plan to eliminate Isham from the ABF workforce, or, as Kingston put it, to get Isham "out the door."

47. Defendants did not request Wolens to correct the misstatements in his January 30 letter, because those misstatements supported defendants' position and portrayed Isham wrongly in a false and negative light.

48. Defendants adopted Wolens' January 30 letter and submitted it as evidence supporting their position at the hearing on Isham's grievance regarding the initial termination of his employment. (Kingston depo. at 58-59).

49. Defendants offered to drop the "charges" against Isham in consideration for his resignation from employment. (Kingston depo. at 55).

50. The only charges filed against Isham was a criminal charge of terroristic threatening filed by defendant Kingston at defendant ABF's instigation.

51. Defendants used the criminal process in an effort to try and get Isham to leave the ABF workforce, or, as Kingston put it, to get Isham "out the door."

52. Defendants based the terroristic threatening charge against Isham based on his statements as reported by Adkins and Shepherd, as recited above in paragraphs 7 and 10.

53. With regard to his claim of abuse of process Isham pleaded as follows:

> 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.

54. Isham did not plead damage to his reputation in regard to the abuse of process cause of action pleaded in his complaint.

POINT 1

GIVEN THE COURT OF APPEALS' OBSERVATION THAT "THE ONLY REASONABLE INTERPRETATION OF ISHAM'S WORDS IS THAT HE PLANNED TO BRING LEGAL ACTION AGAINST ABF," THAT IT IS UNDISPUTED THAT ISHAM MADE THIS STATEMENT IN THE CONTEXT OF COMPLAINING ABOUT DISCRIMINATORY TREATMENT, THAT, THEREFORE, THAT ISHAM'S STATEMENT IS A "PROTECTED ACTIVITY" UNDER BOTH KRS CHAPTERS 342 AND 344, AND THAT DEFENDANTS' REPRESENT THAT ISHAM WAS FIRED BECAUSE OF THIS PROTECTED ACTIVITY, THE COURT HAS ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

At the core of this case are statements plaintiff Jeffrey Isham made on January 8, 1999. The Court's has identified this statement as "ABF's non-discriminatory reason for his discharge." SJO at 4. In so finding and ruling the Court has wholly accepted

defendants' views of the facts and relied upon facts which provide direct evidence supporting Isham's claims, rather than supporting defendants' position.

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.*

The Court has accepted defendants' interpretation of Isham's statement, as well as defendant's explanation for its conduct, and, because of this, has erred in granting summary judgment.

Of course repeating the standard for summary judgment review is little more than shibboleth if the best view of the evidence would not support Isham's claims. This case is unusual in that Isham's statement and its meaning have previously been subject to judicial assessment. The Court of Appeals 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. (Court of Appeals Opinion at 6 and attached hereto marked Exhibit A).

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. (Order attached and marked Exhibit B).

While neither the Court of Appeals observations nor that of the district court is determinative in this context, they certainly warrant consideration by this Court, which, at summary judgment stage, must assess whether it is impossible for a jury to reach the same conclusion reached by the Court of Appeals and by the District Court. Isham has persuaded two different courts, including four different judges, not only that the proper interpretation of his statements supports his claims but that the "only reasonable interpretation" of his statements supports his claim of retaliatory discharge. It is respectfully suggested that Isham having so persuaded four judges, it is not impossible that a jury will find the same. In fact, it is likely.

Since, as the Court of Appeals observed, the only reasonable interpretation of Isham's statements are that "he planned to bring legal action against ABF" and it is undisputed that he made this statement in the context of complaining of discriminatory treatment, his statements constitute protected activity under both KRS 342.197 and KRS 344.280. 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 (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 (3d Cir. 1993)(employee's threat that discriminatory matters could "end up in court very soon" was protected activity under anti-retaliation law); *Horton v. Achievement Services,* 1996 WL, 72 FEP Cases 429 (D. Kan. 1996)(employee's observation that pay differences were "discriminatory" was protected activity); *Knox v. Scope Hosp. Corp.,* 1992 WL 220712, 59 FEP Cases 455 (E.D. Va. 1992)(employee's letter mentioning that she was considering filing another EEOC charge or a lawsuit was protected activity).

Defendants represent (and this Court accepted this representation) that they fired Isham based on his statements on January 8, 1999. This representation is direct evidence of defendants' unlawful intent to terminate Isham because of his protected activity, which violates both KRS Chapters 342 and 344. More to the point, defendants' representation concedes a direct causal relationship between Isham's protected activity and his termination. Rather than constituting a "non-discriminatory reason" for Isham's discharge, defendants have unequivocally admitted that Isham's discharge was retaliatory for his protected activity. Accordingly, since defendants' admission proves Isham's claim, he need not offer evidence rebutting it.

The Court, in granting defendants' motion for summary judgment, accepted wholly defendants' interpretation of Isham's statement and explanation for their actions. It is respectfully submitted that a jury may find, as the Court of Appeals observed, "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF." Accordingly, a jury may find Isham's words to be protected activity. Furthermore, since defendants represent that they fired Isham for his statement, a jury can surely find a causal connection between Isham's protected activity and his termination.

POINT 2

BECAUSE A JURY CAN FIND, AS DID THE COURT OF APPEALS, THAT THE "ONLY REASONABLE INTERPRETATION OF ISHAM'S STATEMENT IS THAT HE PLANNED TO TAKE LEGAL ACTION AGAINST ABF", THAT HE ENGAGED IN PROTECTED ACTIVITY AND SUCH A FIRING VIOLATES STATE LAW, THERE IS NO PREEMPTION OF ISHAM'S STATE LAW CLAIM.

The only real issue, as regards liability, on Isham's retaliatory discharge claim is the interpretation of his statement. The Court, in granting defendants' motion for summary judgment, has accepted defendants' interpretation. It has done so, it is most respectfully represented in error, contrary to the Court of Appeals observation that "the only reasonable interpretation of Isham's words is that he planned to bring legal action against ABF."

There is no argument by defendants (nor could there be) that the jury's responsibility in interpreting Isham's statement requires interpretation of any provision of the collective bargaining agreement. The meaning of Isham's statement is wholly divorced from any term of the contract.

Nor does it support defendants' position if it were argued that Isham's statement, even if interpreted as the Court of Appeals has observed it can only reasonably be, would, nonetheless, in defendants' assessment support and justify his termination. Such an argument would be, of course, essentially that the collective bargaining authorized and sanctioned a termination of an employee for engaging in activity protected by both state and federal law, a position untenable at best. However, even were that argument to be made it does not support a conclusion that Isham's claim is preempted.

The United States Supreme Court rejected a preemption argument in *Lingle v. Norge Division of Magic Chef, Inc*., 486 U.S. 399, 413 (1988), and observed that even a determination that an employee's conduct constituting "just cause" supporting termination under the terms of a collective bargaining agreement neither preempted nor predetermined whether or not the employer's conduct violated state law. The same is true here.

Finally, any argument that preemption arises, because examples of differential treatment that Isham cited were grieved under the union contract is without merit. First, retaliation for protected activity, i.e., protesting discriminatory treatment, does not require that the actions protested themselves constitute unlawful discrimination. See ,

e.g., *Green v. Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)("Title VII does not require that a plaintiff prove that the conduct opposed was actually in violation of Title VII, but only that a charge was made, or that participation in an investigation of a violation of Title VII occurred."). Second, that Isham engaged the grievance process regarding earlier instances of allegedly discriminatory treatment changes nothing. The plaintiff in *Robinson v. SEPTA*, *supra*, did likewise and no preemption issue was even raised, which shows what a red herring preemption is in this case.

POINT 3

THE COURT'S CONCLUSION OF LAW REGARDING COUNT 2 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" IS AN ERRONEOUS STATEMENT OF LAW AND CONTRARY TO STATUTORY LANGUAGE.

The Court's conclusion of law regarding count two is, it is respectfully submitted, erroneous in several aspects. First, Isham has not conceded that "he is not a member of one of the classes of employees protected by KRS Chapter 344." SJO at 4. Isham makes no claim for which it is relevant whether or not he is a member of a class of employee protected by KRS Chapter 344. Rather, the claim that Isham has pleaded in count 2 is that he was subjected to unlawful retaliation in violation of KRS Chapter 344.280. 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. To be "a person" within the meaning of KRS 344.280 it is not necessary that you be complaining of sex discrimination, age discrimination, disability discrimination or the like. All human beings, including Isham, are a "person" within the meaning of the KRS 344.280, and to invoke the protection of this statute it is not necessary that a "person" also demonstrate that they are a member of a "protected class," a term whose meaning is not clear. Isham being a "person" is a member of a "protected class," because all persons are protected by the statute and hence all persons are members of this very broad "protected class." The Court's SJO, which does not address at all the statutory language, has veered far from the statute in adopting this argument. It according should be vacated and set aside.

POINT 4

BECAUSE A JURY, AS DID THE COURT OF APPEALS, CAN FIND THAT "THE ONLY REASONABLE INTERPRETATION OF ISHAM'S STATEMENT WAS HIS INTENT TO TAKE LEGAL ACTION AGAINST ABF," BECAUSE COUNTS 3 AND 4 IN NO WAY IMPLICATE OR REQUIRE INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT AND BECAUSE A JURY CAN FIND THAT DEFENDANTS ENLISTED WOLENS TO HELP THEM PERPETUATE ISHAM'S UNLAWFUL TERMINATION, THAT WOLENS AGREED TO HELP AND DID SO BY PREPARING HIS JANUARY 30 LETTER INCLUDING MISSTATEMENTS INTENDED TO PROTRAY ISHAM NEGATIVELY AND FALSELY AND THAT DEFENDANTS KNOWING USED WOLENS' JANUARY 30 LETTER TO HARM AND INJURE ISHAM, THE COURT'S CONCLUSIONS OF LAW AND DISMISSAL OF COUNTS 3 AND 4 ARE ERRONEOUS AND SHOULD BE SET ASIDE.

Defendants never identified any provision of the collective bargaining agreement which comes into play regarding Isham's causes of action asserted in counts three and four of his Complaint, nor does the Court's summary judgment order identify any as well. The SJO merely adopts the conclusiory assertions made by defendants, assumes completely that the defendants' representations regarding their actions and their motivations are entirely correct, ignores the evidence supporting Isham and, most significantly, ignores the Court of Appeals observations about Isham's statement on January 8, 1999, which are the genesis of this case. To repeat the pertinent observation of the Court of the Appeals regarding Isham's statement was as follows: "The only reasonable interpretation of Isham's statement was his intent to take legal action against ABF." So interpreted correctly and accurately Isham's statement, rather than being a basis for discharge, is protected activity under both state and federal law.

Defendants admit that they solicited Wolens' aid to perpetuate their injury to Isham. Kingston depo. at 45-46. They admit that Wolens was specifically informed that his letter would be used against Isham. Id. There is (and could not be) no dispute that Wolens' letter includes false statements about Isham and his worker's comp case, which tend to portray Isham negatively. It would be appropriate for a jury to conclude that Wolens agreed to help ABF, that Wolens and defendants knew that Wolens' letter contained false information, which defendants then used to harm Isham.

POINT 5

BECAUSE A JURY, CAN CONCLUDE, AS DID THE COURT OF APPEALS, THAT "THE ONLY REASONABLE INTERPRETATION OF ISHAM'S STATEMENT IS THE INTENT TO TAKE LEGAL ACTION AGAINST ABF," IT CAN LIKEWISE CONCLUDE THAT PROBABLE CASE WAS LACKING FOR THE SPECIOUS CRIMINAL CHARGE.

The Court's conclusion of law regarding Isham's malicious prosecution claim is erroneous. The Supreme Court in the criminal case did not make any assessment of probable cause. No where in the decision of that case is there any analysis of any probable cause issue. Moreover, the law in Kentucky provides that even a trial court decision allowing a criminal charge to go to the jury – the overruling of a motion for a directed verdict – does not preclude a malicious prosecution claim. *Kirk v. Marcum,* Ky. App., 713 S.W. 2d 481, 485 (1986). This authority was brought before the Court by Isham before and the Court has erroneously ignored it. Moreover, where a jury can find, as the Court of Appeals observed, that "the only reasonable interpretation of Isham's statement is his intent to take legal action against ABF," a jury can likewise find an absence of probable cause for the criminal charge and prosecution initiated against Isham. *Prewitt v. Sexton*, Ky., 777 S.W. 2d 891, 895 (1989). Accordingly, the Court should vacate its summary judgment as to count five and order the case set for trial.

POINT 6

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

TRY AND GET ISHAM "OUT THE DOOR" AND WHERE ISHAM SPECIFICALLY PLEADED INJURY TO HIS PERSON AND PROPERTY IN REGARD TO HIS ABUSE OF PROCESS CLAIM, THE COURT'S CONCLUSIONS OF LAW THAT THE SUPREME COURT PRECLUDED THE CLAIM AND THAT ISHAM PLEADED ONLY REPUTATION DAMAGE ARE ERRONEOUS.

Contrary to the Court's assertion, the Kentucky Supreme Court did not make any finding that the "criminal proceeding was proper." No issue of whether the criminal process was abused or not was ruled upon the Supreme Court. That Court did not rule on or even consider whether defendants were wrongfully using the criminal process to get Isham "out the door." Furthermore, a jury can find that defendants indeed used the criminal prosecution to try and get Isham "out the door," since they offered to drop the charge in exchange for his resignation.

The Court's observation that "Isham has solely alleged injury to his reputation," is erroneous. Paragraph 56 of Isham's Complaint alleges that because of defendants' wrongful actions, he "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 in prison, and suffered damages to his future earning capacity." Isham further pleaded in count six of the Complaint specifically regarding abuse of process that defendants had "caused damage to Isham's person and property as above described." Complaint ¶69. The Court's conclusions of law that Isham pleaded only reputation damage on this cause of action is simply erroneous and ignores

specific pleading in Isham's complaint. Accordingly, the summary judgment and dismissal of count six should be vacated and the claim set for trial.

CONCLUSION

For all the foregoing reasons, the Court's SJO should be vacated and set aside in its entirety and the case scheduled for trial.

Notice

PLEASE TAKE NOTICE that the foregoing motion will come on for hearing on Friday, May 28, 2004, before the Fayette Circuit Court, Seventh Division, at the Fayette County Courthouse, Lexington, Kentucky, at 8:30 am or as soon thereafter as counsel may be heard.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served as noted below this ____ day of May, 2004, to the following:

Craig Robertson
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