

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

JEFFREY A. ISHAM

PLAINTIFF

vs. **PLAINTIFF'S MEMORANDUM CONTRA ABF & KINGSTON'S
MOTION FOR SUMMARY JUDGMENT**

ABF FREIGHT SYSTEM, INC., et al

DEFENDANTS

* * * * *

It is not impossible for a jury to resolve the fact issues presented by this case in plaintiff Jeffrey A. Isham's favor. Defendants' preemption argument is meritless, because they overlook Supreme Court precedent coming after the case they rely on holding that a retaliatory discharge case under state law is not preempted. Accordingly, defendants' motion for summary judgment should be **overruled** in its entirety.

COUNTERSTATEMENT OF THE CASE

Defendants attempt to smear Mr. Isham by asserting that he snookered them in workers' compensation proceedings by first securing a favorable decision and then later seeking to return to work. This just is not correct. Mr. Isham advised defendants he was released to return to work on August 8, 1998, **prior** to the workers' compensation decision on August 14, 1998.

Defendant omits their efforts to keep Mr. Isham from returning to the workforce. Defendant also omits their corporate practice of screening workers who have been injured and their own notations that Isham's injury made him more likely to suffer injuries in the future.¹

¹ Attached hereto and marked exhibits A & B respectively.

ABF hired defendant Daniel Wolens in an effort to keep Isham from returning. While initially Wolens did not completely serve defendants' aim to keep Isham off their workforce, he did recognize and articulate their rage at the outcome of the worker's compensation case. Wolens suggested to ABF the following steps to retaliate against Isham over the worker's compensation case:

First of all, you as the employer, as I understand the law, have the opportunity to have this case reopened. The benefits awarded to him can be reduced and potentially eliminated since his award was based on a condition that this individual does not have. Secondly, on a more dramatic note, there is even the potential to assess this individual for having committed perjury.
Kingston depo. ex. 3²

Wolens invited the opportunity to aid further ABF's campaign against Isham:

Please let me know if I can provide you any further assistance on this most interesting case.
Id.

Isham returned to work, although his back did cause him some problems and absences in the fall of 1998. Matters came to a head on January 8, 1999. That day Central Kentucky suffered a significant ice storm, and Isham, who resides in Mackville over in rural Washington County, telephoned ABF to report that he did not anticipate that he would be able to get in due to hazardous road conditions in his area. He spoke first with the

² Attached hereto and marked exhibit C.

dispatcher, Mike Shepherd. Shepherd reported the substance of their conversation in pertinent part as follows:

He said if he was wrote up he would have his lawyer sue us and he would fire on everyone here.

Shepherd depo. ex. 1.

Sam Adkins, who was a union steward, was called to the phone. On a three-way call with Isham and Shepherd, Adkins reported Isham's pertinent statements as follows:

Jeff further stated [that] 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. I did not know how to interpret what Jeff meant by that statement. He was obviously very upset [by] the situation and stated he felt that he was being discriminated against.

Kingston depo. ex. 6.

Kingston had Shepherd and Adkins write on the foregoing statements, which they punched in the time clock right before they gave them to Kingston. She then initiated deliberations by the corporation regarding Isham. She and the rest of the corporation agents understood that Isham had complained of discriminatory treatment in his statements to Adkins and Shepherd. Nonetheless the corporation decided to make a big play to effect Isham's separation from employment and Kingston

proceeded to file a criminal complaint in Fayette District Court charging Isham with terroristic threatening.³

Kingston signed a criminal complaint stating that Isham had "called employment and told his supervisor and the union steward he would fire on all of you (meaning all of the employees)" and thereby committed the crime of terroristic threatening.

Kingston depo. ex. 4. Kingston likewise signed a general investigative report prepared by Officer Burton of the Lexington Police Department attesting that Isham was an employee "having problems with management." Kingston depo. ex. 8.

ABF Freight terminated Isham's employment later that day on January 8, 1999. He was terminated because of his expressed opposition to discriminatory treatment and threat to take legal action in response to same made to Adkins and to Shepherd. Kingston depo. at 38.

The Information Provided to ABF Regarding Isham's Statement

Defendants, even while proceeding with criminal prosecution of Isham and his termination from employment, received several pieces of information indicating to them that they had acted improperly with regard to Isham. First, Isham advised them via a grievance filed regarding his termination that his statements had merely intended to state an opposition to discriminatory

³ Defendant erroneously asserts that the criminal prosecution was initiated by the Fayette County Attorney; it was not.

treatment and an intent to take legal action in response thereto. Second, defendants were provided with a statement signed by Warren McIntyre, another employee of ABF who heard Shepherd report Isham's statements to Kingston. McIntyre reported 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.

Kingston depo. ex. 7.

The Enlistment of Wolens

Since Wolens had invited the opportunity to further participate in ABF's efforts to eliminate Isham from its workforce, defendants contacted him for that purpose. Specifically, Kingston told Wolens that defendants needed him to write up something that it could use in the grievance proceedings against Isham to keep him off their workforce. Wolens predictably denies he was told anything by Kingston about defendants' intention to use his letter in grievance proceedings over Isham's termination. Wolens depo. at 24, 30-31.

Since the testimony of Kingston and Wolens is in direct conflict on this point and since it is relevant to a factfinder's conclusion about what Wolens knew he was getting into, it is important to note Kingston's testimony as follows:

Q: Exhibit 9 [to Kingston's deposition], just to identify it, is a letter dated January 30, 1999,

and it's from Daniel Wolens and addressed to you. Do you recognize it?

A: Yes, I do.

Q: Okay. Tell us what you know about how this letter came to be written?

A: Mr. Isham had filed a grievance appealing his termination. I had talked to Les Blalock, and Mr. Isham had had a previous grievance that had involved Dr. Wolens; and Mr. Blalock told me that I should contact Mr. Wolens and ask him to write a letter concerning his knowledge of Mr. Isham, so that we would have that for the grievance hearing.

Q: And obviously you did contact -

A: Yes.

Q: -- Dr. Wolens -

A: Yes, I did.

Q: -- and asked him to write out a letter. And this letter dated January 30, that we've marked as Exhibit 9, is in fact the letter he wrote?

A: Yes.

Q: Okay. Did you advise Dr. Wolens of the purpose to which his letter was going to be put? How it was going to be used?

A: As far as in the grievance, yes.

Q: Yeah, I mean, so he knew - you told him, "We need you to write something up, so we can present it when Isham's grievance is heard by the committee."

A: That is correct.

Kingston depo. at 45-46.

Wolens proved a forceful advocate for defendants. Although an occupational physician, who most commonly deals with such as

issues as asbestosis and black lung, he was more than willing to render a psychiatric opinion about Isham to aid defendants' efforts to eliminate Isham permanently from its workforce.

To buttress his conclusion and no doubt in recognition of ABF's continuing animus over the outcome of Isham's worker's compensation claim, Wolens wove his view of that case into his letter and there showed his desire and inclination to vent and serve the malice of ABF. Toward this end and to paint Isham in the most unfavorable light Wolens deliberately misrepresented the outcome of Isham's worker's compensation case as shown in the following comparison:

I am somewhat baffled after having reviewed the medical record that [the worker's compensation administrative law judge] awarded this individual a **50% permanent partial disability (PPD)** for his injuries. (Letter to Kingston dated September 10, 1998). (Kingston depo. ex. 3).⁴

In January 1999, Wolens described the outcome of and ABF's disappointment therewith as follows:

He has shown past history of manipulating the worker's 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**. (Kingston depo. ex. 4).⁵

⁴ See Ex. C hereto.

⁵ Attached as exhibit D hereto.

Wolens' January 30 letter also identifies Isham's worker's compensation claim as the basis for defendants' animus toward him:

A situation exists in which Mr. Isham's relationship with his employer is poor. This in the past has centered around his low back injury. (Kingston depo. ex. 4).

And here it is: Wolens knows that ABF wants to get rid of Isham, because it is mad about his worker's compensation injury and the poor relationship between them that has arisen from Isham's back injury. He knows that his letter is to be used in furtherance of their efforts to achieve same. Knowing all of this, he falsifies the information in his letter to help ABF achieve its goal.

Wolens' help proved quite successful. Knowing that his letter contained material misrepresentations, ABF proceeded nonetheless to use in the grievance proceedings. They even succeeded in getting Wolens a material role in same, as he was assigned veto power over the selection by Isham's treating physician, Dr. Robert Woolley, of a psychologist to evaluate Isham for return to work. Wolens depo. at 35. And thus it is that gross injustice puts an advocate for the criminal prosecution of Isham in a decision-making role regarding his continued employment with ABF. The medical review process bogged down. Isham was not examined by two psychologists who were initially selected, because having recently been

terminated, and having to incur the expense of hiring a criminal defense lawyer, he could not pay their fee in full up front. Isham depo. at 140. Wolens then suggested a third psychologist, a Scott Moeller, to whom Woolley initially assented but then retracted. Wolens depo. ex. 16. Despite the fact that it was Woolley's in any event, at least according to Wolens, ABF refused to agree to any alternative. Isham depo. at 142. ABF thereby succeeded in bringing grievance proceedings to a halt, Isham was fired and that was that, except for this lawsuit.

ABF betrayed its purposes during the grievance proceedings. ABF proposed that it would drop the charge against Mr. Isham if he would agree to resign. Kingston depo. at 55. It is difficult to imagine that a corporation who sincerely believes (as ABF protests too much that it does) would make such a gesture to an employee who had supposedly threatened the lives of some his co-workers. This effort should be recognized for what it is: a betrayal of ABF's knowledge they had no basis for the charge against Isham, and an indication of its desire to painlessly (and without prospect of legal liability) eliminate Isham from its workforce.

The Criminal Case Proceedings

Isham's criminal case proceeded before trial to the Kentucky Supreme Court, which ruled that the trial court overstepped its authority by dismissing defendants' criminal

charge against Isham prior to trial. This followed rulings by the trial court and the Court of Appeals that Isham's statements could not be considered terroristic threatening. The case went to trial last July, and the jury agreed with these assessments, acquitting Isham in about 10 minutes.

ARGUMENT

POINT 1

(RESPONDING TO POINT I IN DEFENDANTS' MEMO)

THE PREEMPTION DOCTRINE IS INAPPLICABLE.

The Supreme Court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), which came after the case principally relied upon by defendants, puts to rest their preemption argument. The plaintiff in *Lingle*, like Isham here, pursued workers' comp benefits after being injured on the job, and, as a result, was fired. She filed, as did Isham, a grievance under a union contract regarding her termination, and filed suit for retaliatory discharge, as does Isham here, in state court. 486 U.S. at 401-402.

The Supreme Court rejected the identical preemption doctrine asserted by defendants here. First, the court observed that 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. Second, the Court observed that neither of these "purely factual questions" required "a court to interpret any term of a collective-bargaining agreement." *Id.* Third, the Court noted that "the existence or the contours of the state law violation [were not] dependent upon the terms of a private contract." *Id.* at 413. Therefore, the Court ruled that the preemption doctrine did not apply.

This case does not present any need to interpret the collective bargaining agreement. Defendants admit that they had an animus against Isham arising from his workers' compensation claim; they tried to have him convicted of a crime and jailed when he asserted his rights to be free from discrimination. Neither of these findings involve the union contract. Therefore, defendants' preemption doctrine is without merit.

POINT 2
(RESPONDING TO POINT II IN DEFENDANTS' MEMO)

BECAUSE IT IS NOT IMPOSSIBLE FOR A JURY TO FIND THAT DEFENDANTS' ANIMUS AT ISHAM OVER HIS WORK INJURY AND/OR HIS PROTEST OF DISCRIMINATORY TREATMENT WAS A SUBSTANTIAL AND MOTIVATING FACTOR FOR HIS TERMINATION, DEFENDANTS' MOTION REGARDING COUNTS I, III AND IV SHOULD BE OVERRULED.

It is not impossible for a jury to find that defendants' continuing animus against Isham was a substantial and motivating factor for his termination. The evidence of this animus, which

defendants' memo omits, is Wolens' January 30 letter which reported defendants' animus at Isham over his workers' comp claim. Kingston depo. ex. 4. Since defendants affirmatively used Wolens' letter in grievance proceedings, it constitutes an adoptive admission⁶ and sufficient evidence for a jury to find that Isham's pursuit of benefits and assertion of his rights under KRS Chapter 342 was a substantial and motivating factor for his termination. That Wolens' letter includes false representations regarding the outcome of Isham's workers' comp claim further supports such a finding. Accordingly, defendants' motion with regard to Count I of the Complaint should be **overruled.**

It is not impossible for a jury to find that Wolens agreed to help and cause the termination of Isham's employment by defendant ABF. Kingston testified that she told Wolens that defendants needed his letter to use in the grievance proceedings to effect the permanent termination of Isham's employment. Kingston depo. at 45-46. Therefore, it is not impossible for a jury to find that Kingston told Wolens this and find from his letter that he agreed to help defendants. Circumstantial evidence is sufficient to prove that a conspiracy existed. *Howard v. Commonwealth*, 220 Ky. 585, 295 S.W. 888, 889 (1927).

⁶ Lawson, Kentucky Evidence Law Handbook § 8.20 at 591-594 (4th ed. 2003).

This is especially true given the material misrepresentations regarding Isham's workers' comp claim set forth in this January 30 letter. Furthermore, as shown above it is not impossible for a jury to find that Isham's employment was unlawful in violation of KRS 342.197. Accordingly and since 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), defendants' argument is without merit.

Defendants' argument regarding the intra-corporate conspiracy doctrine is likewise without merit. First, defendants cite no Kentucky authority supporting their argument and ignore 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, defendants' argument is without merit.

POINT 3
(RESPONDING TO POINT III IN DEFENDANTS' MEMO)

ISHAM ASSERTS A RETALIATORY DISMISSAL CLAIM IN VIOLATION OF KRS 344 NOT A DISCRIMINATION CLAIM IN COUNT II OF HIS COMPLAINT.

Defendants' argument under Point III of their memo is far off the mark, because Isham does not assert a discrimination claim in Count II of his complaint. Rather, Isham asserts a retaliatory discharge claim in violation of KRS 344.⁷ Since it defendants' burden to demonstrate that it is impossible for a jury to find in Isham's favor on this claim and defendants do not even address the claim, defendants' motion regarding Count II of the complaint should be **overruled**.

**POINT 4
(RESPONDING TO POINT IV OF DEFENDANTS' MEMO)**

THE SUPREME COURT DID NOT PASS ON THE ISSUE OF PROBABLE CAUSE FOR THE CRIMINAL CHARGE MADE AGAINST ISHAM BY DEFENDANTS AND THE CRIMINAL TRIAL COURT'S RULINGS ON ISHAM'S MOTIONS FOR DIRECTED VERDICT ARE NOT DISPOSITIVE OF THE ISSUE.

Contrary to defendants' assertion, the Supreme Court did not pass on whether there was probable cause for the terroristic threatening charge against Isham. The Court ruled only on a narrow procedural issue regarding what stage of the proceedings a district court had authority to dismiss a criminal charge. It did not address the issue of probable cause.

⁷ Count II states in pertinent part as follows: "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."

Defendants' argument that since the terroristic threatening charge went to the jury Isham cannot show the absence of probable cause is without merit. The denial of a motion for a directed verdict does not establish the presence of probable cause. *Kirk v. Marcum*, Ky.App., 713 S.W.2d 481, 485 (1986). Furthermore and also contrary to defendants' assertion, where the facts regarding probable cause are in dispute, it is for the jury to resolve. *Prewitt v. Sexton*, Ky., 777 S.W.2d 891, 895 (1989). Here, the import of Isham's statement are very much in dispute. As shown by the conclusions of the trial court, the Court of Appeals and the criminal jury, it is not impossible for a jury to find that defendants did not truly believe Isham to have threatened them. This finding is further buttressed by defendants' offer to Isham to drop the charges in exchange for his resignation; it is not impossible for a jury to view this as a concession by defendants' that they had no basis for Isham's criminal prosecution and termination. Accordingly, defendants' motion as to Count V of Isham's complaint should be **overruled**.

POINT 5
(RESPONDING TO POINT V IN DEFENDANTS' MEMO)

BECAUSE IT IS NOT IMPOSSIBLE FOR A JURY TO FIND THAT DEFENDANTS USED THE CRIMINAL PROSECUTION AS A MEANS TO OBTAIN ISHAM'S RESIGNATION, DEFENDANTS' MOTION ON ISHAM'S ABUSE OF PROCESS CLAIM SHOULD BE OVERRULED.

During the course of the grievance proceedings, defendants proposed to drop the charges against Isham in exchange for his

resignation. Kingston depo. at 55. While defendants claim this pertained only to the grievance proceedings and not to the criminal charge defendants filed, it is for the jury to decide the import of this proposal, just as it is for the jury to decide the import of Isham's statements. Since no one in their right mind would reach an agreement erasing the basis for Isham's termination (and his criminal prosecution) while then proposing to continue a criminal prosecution based on facts to which they had entered a contrary stipulation, it is certainly not impossible for a jury to reach a finding in Isham's favor.

In *Mullins v. Richards*, Ky. App., 705 S.W.2d 951 (1986), the Court of Appeals ruled that an abuse of process claim was made out where an offer to drop criminal charges was made in return for a release of a civil claim. Similarly here if the jury finds that defendants proposed to drop the criminal charge in exchange for Isham's resignation, it is possible for the jury to return a verdict in his favor. Accordingly, defendants' motion as to Count VI of Isham's complaint should be **overruled**.

CONCLUSION

Summary judgment is improper where it is not impossible for a jury to find in Isham's favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991). Since defendants' preemption argument is without merit and it is not

impossible for a jury to find in Isham's favor on his claims,
defendants' motion should be **overruled** in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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