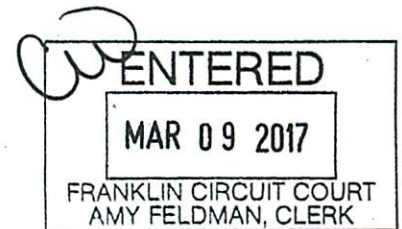


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 13-CI-1413



LESLIE THOMAS

PLAINTIFF

V.

ORDER

BOARD OF REGENTS OF KENTUCKY STATE
UNIVERSITY, et al.

DEFENDANTS

This matter is before the Court for the Final Pretrial Conference on Monday, March 6, 2017 at 2:00 p.m. The Court previously reserved ruling on Motion of Defendants, Mary Sias, Lorenzo Esters, and Jacqueline Gibson, to Dismiss or, in the Alternative, for Summary Judgment in their individual capacity for Courts 2 and 3 of Plaintiff's Complaint. The Court having considered the arguments and being otherwise sufficiently advised, hereby **DENIES** the Defendants' Motion with respect to Counts 2 and 3, for reasons more fully discussed below.

Summary judgment is appropriate only when a court concludes that there are no genuine issues of material fact for which the law can provide relief. CR 56.03. Summary judgment should be granted only when it appears from the facts that the nonmoving party cannot produce evidence at a trial in favor of a judgment on his behalf. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, the record must be viewed in the light most favorable to the non-moving party. *Id.* "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis the focus should be on what is of record rather than what might be presented at trial." *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). Defendants argue that they must be dismissed in their individual capacity from Plaintiff's claims of aiding and abetting race discrimination, Count 2, and of aiding and abetting the tort of wrongful discharge, Count 3, as Plaintiff could not produce

evidence during trial that would warrant judgment on Plaintiff's behalf with respect to those counts.

In support of their argument for the dismissal of the individual capacity claims on Count 2, Defendants cite to a decision by the Kentucky Court of Appeals in *Cowing v. Commare*, 499 S.W.3d 291 (Ky. App. 2016), which dealt with the application of the intra-corporate conspiracy doctrine, which provides that "a corporation cannot conspire with its employees, and its employees, when acting within the scope of their employment, cannot conspire among themselves." *Id.* at 294 (quoting *Tabb v. District of Columbia*, 477 F.Supp.2d 185, 190 (D.D.C. 2007) (internal quotation marks and citation omitted)). In *Cowing*, the Court of Appeals dealt with the application of the intra-corporate conspiracy doctrine in the context of a private employer. In that context, the Court held that, under Kentucky law, a corporation is only able to act through its agents, and conspiracy, by its nature, necessarily involves two or more individuals. *Id.* (citing *Montgomery v. Milam*, 910 S.W.2d 237, 239 (Ky. 1995), and *Caretenders, Inc. v. Kentucky*, 821 S.W.2d 83, 86 (Ky. 1991)). Therefore, the private corporation was acting unlawfully through its agents, and the unlawful actions could not be attributable to anyone other than the corporation, as "Cowing has not argued or alleged that Commare was acting outside his capacity as Lockheed Martin's agent at any time or that Commare's alleged conduct was motivated by his own personal interest independent of the corporate entity's goals." *Id.* at 295. The Court recognizes that *Cowing* is currently pending before the Supreme Court on a motion for discretionary review, and further finds that the relevant facts in that case are distinguishable from the case at bar.

Here, Thomas has alleged that the individually named Defendants in Count 2 were acting in their individual capacities, not in their official capacities. Plaintiff's argument alleges that the Defendants acted illegally in aiding racial discrimination. Racial discrimination is necessarily

beyond the scope of a public official's authority granted to him by the Commonwealth. Accordingly, if Defendants are found by a jury to have racially discriminated against the Plaintiff, those Defendants necessarily were acting beyond the scope of their authority. *See, e.g., Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001) (discussing that an individual's immunity from suit lies in "acts performed in the exercise of their discretionary functions" resting on "*the function performed*"). Violations of state and federal laws can never be within discretionary duties of state officials. Likewise, Kentucky State University, as a public institution created under the laws of Kentucky, is not vested with the power to create discriminatory policies. As such, the intra-corporate conspiracy doctrine is not available as a defense to liability for the conduct of the individual Defendants if that conduct is deemed to be racial discrimination by the jury, or if those individuals are found to have aided or abetted such discriminatory conduct, as alleged in Count 2. Therefore, as a matter of law, Defendants cannot be dismissed from Count 2.

Similarly, Defendants argue that Count 3 of Plaintiff's Complaint, the aiding and abetting of the tort of wrongful discharge, must be dismissed in relation to any claims against them in their individual capacities, as the termination itself was "taken by the University in accordance with KRS 164.360 and KRS 164.365." Additionally, Defendants reassert their contention that Plaintiff was an at-will employee, and could be terminated without cause. However, an exception to the at-will employment doctrine is wrongful termination. Further, Plaintiff clarified in her response that, under the doctrine of wrongful discharge in violation of public policy, public policy can be violated where an employee is fired due to her refusal to violate the law in the course of employment, as well as if she was fired for exercising a right granted to her by statute. Both of these have been alleged by Plaintiff in this case. And just as in Count 2, the intra-corporate conspiracy doctrine would not apply to protect Dr. Sias from individual liability. *Cowing* dealt

with KRS Chapter 344, however, Count 3 deals with wrongful discharge, which is a common-law tort long recognized by Kentucky courts. Additionally, agents for corporations are personally liable for torts they commit, even while acting as an agent for a corporation. *See Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420, 425 (Ky. App. 1978); *Peters v. Frey*, 429 S.W.2d 847 (Ky. 1968); *Small v. Bailey*, 356 S.W.2d 756 (Ky. 1962). As a matter of law, Defendants cannot be dismissed from Count 3 of the Complaint.

Therefore, as summary judgment should be granted only when it appears from the facts that the nonmoving party cannot produce evidence at a trial in favor of a judgment on his behalf, this Court finds that Plaintiff has presented evidence that, when viewed in a light most favorably to her, could allow her to succeed at trial. Defendants have not satisfied their burden with respect to their Motion to Dismiss or, in the Alternative, for Summary Judgment in their individual capacity for Courts 2 and 3 of Plaintiff's Complaint, and their Motion is hereby **DENIED**.

SO ORDERED this 5 day of March, 2017.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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