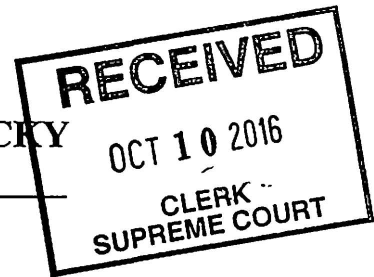


SUPREME COURT OF KENTUCKY
No. ______________________________

CHARLES COWING MOVANT

vs. **MOTION FOR DISCRETIONARY REVIEW**

and

RECORD ON MOTION

ANDY COMMARE RESPONDENT

* * * * * * *

COURT OF APPEALS
No. 2015-CA-000769-MR

FAYETTE CIRCUIT COURT
No. 14-CI-2514

* * * * * * *

ROBERT L. ABELL
120 North Upper Street
Lexington, KY 40507
859.254.7076

COUNSEL FOR MOVANT

SUPREME COURT OF KENTUCKY
No. ____________________________

CHARLES COWING MOVANT

vs. **MOTION FOR DISCRETIONARY REVIEW**

ANDY COMMARE RESPONDENT

****

Charles Cowing pursuant to and in compliance with CR 76.20 hereby moves this Court to grant Discretionary Review in this case and states as follows:

(a) THE NAMES OF THE MOVANT AND RESPONDENT AND THE NAMES AND ADDRESSES OF THEIR COUNSEL:

The name of the movant is Charles Cowing. The name and address of his lawyer is Robert L. Abell, 120 N. Upper Street, Lexington, KY 40507. The Respondent is Andy Commare; his lawyers are Keith Moorman and Kathleen B. Wright, Frost Brown Todd PLLC, 250 W. Main St., Ste. 2700, Lexington, KY 40507.

(b) THE DATE OF THE FINAL DISPOSITION BY THE COURT OF APPEALS:

On September 9, 2016, the Court of Appeals rendered the opinion that is the subject of this Motion for Discretionary Review. No petition for rehearing was filed.

(c) SUPERSEDEAS BOND

No supersedeas bond has been executed in this case.

(d) STATEMENT OF THE CASE

(i) The Material Facts

This case arises under the Kentucky Civil Rights Act, KRS Chapter 344, most specifically, KRS 344.280(2).

Charles Cowing was employed by the Lockheed Martin Corporation at a work-site in Fayette County, Kentucky. In September 2013, Cowing was unlawfully excluded from Lockheed's workforce and, as a practical matter, his employment terminated.

Cowing filed suit in Fayette Circuit Court claiming (1) that Lockheed Martin had violated KRS 344.040 and unlawfully discriminated against him based on a disability; and, (2) that Andy Commare violated KRS 344.280(2) by aiding and abetting Lockheed Martin's unlawful and discriminatory employment practices. Commare was a managing agent for Lockheed Martin, and Cowing claimed that he promoted and substantially assisted its discriminatory employment practices. Cowing sued Commare in his individual capacity.

Commare moved for summary judgment, which the circuit court granted ruling that "[t]he 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)." [1]

In a ruling that renders corporate agents acting within the scope of their agency immune from liability for violations of KRS 344.280, the Court of Appeals affirmed. While acknowledging that "no Kentucky court has yet addressed the application of the intracorporate conspiracy doctrine," the court ruled that it barred Cowing's claim against Commare as a matter of law.[2] The court elaborated that Commare's actions were within the scope of his agency and "solely attributable to Lockheed Martin." Opinion at 7. This conclusion led the court to assert that a corporate agent would not be a suable person under KRS 344.280 and Cowing's claim failed: "Since the challenged conduct is the act

---

[1] A copy of the circuit court's summary judgment order is attached at Tab 1.
[2] A copy of the Court of Appeals' opinion is attached at Tab 2.

of a single corporation acting exclusively through its own employee (who was acting in his capacity as an employee), the requirement of a multiplicity of actors has not been met in this case." *Id.* at 8.

(ii) The Questions of Law Involved

This case presents issues of first impression for this Court arising under the Kentucky Civil Rights Act, KRS Chapter 344:

(1) Whether a corporate agent is a suable "person" under KRS 344.280 for acts taken within the scope of the agency?

(2) Whether the intracorporate conspiracy doctrine bars, as a matter of law, a claim against a managing agent of an employer pursuant to KRS 344.280(2) for aiding and abetting the employer's unlawful employment practice?

(iii) Reasons Why the Court of Appeals' Opinion Should be Reviewed

The Court should grant discretionary review to address two questions of first impression under the Kentucky Civil Rights Act, KRS Chapter 344.

FIRST, the Court should review this case to determine and establish the scope of liability for a corporate agent sued in his individual capacity under KRS 344.280 for acts within the scope of the agency. The Court of Appeals' ruling would insulate corporate agents from any and all liability under the statute, since they would not be deemed a suable "person." This cripples the Act and precludes individual liability for corporate agents not only for aiding and abetting discriminatory employment practices, as pleaded here, but also for retaliating against witnesses or other persons, obstructing compliance with judicial or administrative orders, interfering with the functions of the Kentucky

Commission on Human Rights and intimidating those opposing or acting against housing discrimination.

KRS 344.280 provides as follows:

> It shall be an unlawful practice for a person,[3] or for two (2) or more persons to conspire:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter; or
>
> (2) To aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter; or
>
> (3) To obstruct or prevent a person from complying with the provisions of this chapter or any order issued thereunder;
>
> (4) To resist, prevent, impede, or interfere with the commission, or any of its members or representatives, in the lawful performance of duty under this chapter; or
>
> (5) To coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by KRS 344.360, 344.367, 344.370, 344.380, or 344.680.

If a corporate agent acting within the scope of his agency is not a "person" distinguishable from the corporation, the Court of Appeals' ruling has eliminated liability for such agents for unlawful retaliation under KRS 344.280(1), inciting, compelling and/or coercing unlawful employment discrimination under KRS 344.280(2), obstructing

---

[3] KRS 344.010(1) 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.'").

or interfering with the implementation of orders issued by the Kentucky Commission on Human Rights under KRS 344.280(3), interfering with the KCHR of any of its members in performance of its or their duties under KRS 344.280(4) and the obstruction of justice provisions of KRS 344.280(5). The reach of the Court of Appeals' ruling goes far beyond Cowing's claim; it has substantially nullified KRS 344.280, one of the Act's most important enforcement mechanisms.

The Court of Appeals' conclusion that a corporate agent is not a suable "person" under KRS 344.280 appears contrary to this Court's decision in *Palmer v. International Ass'n of Mach. & Aerospace Workers,* 882 S.W.2d 117 (Ky. 1994), and the Court's analysis of the statute in *Cabinet for Families & Children v. Cummings,* 163 S.W.3d 425 (Ky. 2005).

In *Palmer*, the plaintiff sued a district union lodge and six local unions for sex discrimination; she also sued the district lodge's business representative and president "alleging that they had conspired in violation of KRS 344.280(1) to retaliate against her for filing the discrimination charge by intentionally negotiating a collective bargaining agreement which provided no minimum work hours for her position and then terminating her." 882 S.W.2d at 118-119. This Court affirmed dismissal of the discrimination charge, holding that no defendant-party "qualifie[d] as an employer under the statute." *Id.* at 120.

The Court, however, reversed dismissal of the retaliation claim and remanded it for trial. *Id.* The Court rejected the argument that a civil remedy against the individuals was precluded by KRS 344.990, which makes a willful violation of KRS 344.280 a misdemeanor. *Id.*

Both of the individual defendants in *Palmer* were sued for actions that appear to have been taken within the scope of their agency – their actions purporting to constitute retaliation regarded negotiating provisions of a collective bargaining agreement. As such, under the rationale of the Court of Appeals' ruling in this case, the actions of the individual defendants would be "solely attributable" to their employing entity (the district lodge) and there would not be a "multiplicity of actors" necessary to sustain a conspiracy to retaliate claim under KRS 344.280.

In *Cummings,* the issue before the Court was whether the Kentucky Whistleblower Act, KRS 61.101 *et seq.*, imposed individual civil liability on policymakers and agents. The Court decided it did not; the Court reviewed the language of KRS 344.280 as part of its analysis.

The pertinent analysis and discussion in *Cummings* regards the definition of "employer" under the Kentucky Whistleblower Act, which includes "any person authorized to act on behalf of the Commonwealth, or any of its political subdivisions," in a policy-making or supervisory capacity. 163 S.W.3d at 430; KRS 61.101(2). The Court found persuasive a similar definition of "employer" in Title VII of the federal Civil Rights Act and cases holding that Title VII did not support individual liability for corporate agents. 163 S.W.3d at 432-33.

In contrast, the Court observed that KRS 344.280 "defines a person to include, inter alia, an individual, a partnership, a corporation, or the Commonwealth, but not an agent. KRS 344.280." 163 S.W.3d at 432. This material distinction caused the Court to reject any reliance on the definition of "person" in the Civil Rights Act and a federal case, *Morris v. Oldham County Fiscal Court,* 201 F.3d 784 (6th Cir. 2000), which

observed that KRS 344.280 "plainly permits the imposition of liability on individuals." *Id.* at 794.

The implication, therefore, of the Court's analysis in *Cummings* is that KRS 344.280 distinguishes between the employing entity and the agent and provides for individual liability for the agent. The Court of Appeals ruling herein, however, upends this analysis, since it equates both the corporation and its agent as the same "person," which precludes individual liability for the agent.

The Court of Appeals' ruling is also contrary to this Court's repeated admonishments regarding the interpretation and application of plain, unambiguous statutory language. "[T]he first rule of statutory interpretation is that the text of the statute is supreme." *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016). "[O]ur practice [is] [ ] interpreting statutory provisions faithfully to their text [.]" *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 581 (Ky. 2016). "If the literal language of a statute is clear and unambiguous, it must be given effect as written." *Wilburn v. Commonwealth,* 312 S.W.3d 321, 328 (Ky. 2010).

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.

Since both Lockheed Martin, a corporation, and Commare, an individual, are a "person" under this statute, its plain, unambiguous statutory language supports Cowing's claim.

That a corporate agent may be individually liable for acts done in the course and scope of his agency is an established principle of 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). The plain, unambiguous language of KRS 344.280 imposes individual liability on corporate agents acting within the scope of their agency in a manner consistent with long-standing Kentucky tort law principles.

The aiding and abetting liability provision in KRS 344.280 is similarly found in the statutes of 25 other states and the District of Columbia. 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).

A number of courts have interpreted aiding and abetting provisions similar to KRS 344.280(2) to provide the individual liability that Cowing pleads against Commare. *See EEOC v. Fuller Oil Co.*, 134 A.3d 17 (N.H. 2016); *Matthews v. Eichhorn Motors,*

Inc., 800 N.W.2d 823 (Minn. App. 2011); *Fiol v. Doellstadt,* 50 Cal.App.4th 1318 (Cal. Ct. App. 1996); *Tarr v. Ciasulli,* 853 A.2d 921 (N.J. 2004); *Carr v. UPS,* 955 S.W.2d 832 (Tenn. 1997), *overruled on other grounds, Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999); *Failla v. City of Passaic,* 146 F.3d 149 (3rd Cir. 1998)(applying New Jersey law); *Wallace v. Skadden, Arps, Slate, Meagher & Flom,* 715 A.2d 873 (D.C. 1998); *Holstein v. Norandex, Inc.*, 461 S.E.2d 473 (W.Va. 1995); *but see Mills v. Hankla,* 297 P.3d 158 (Alaska 2013). Cowing's aiding and abetting claim trods a path well-worn by statutory and caselaw.

Cowing's aiding and abetting claim is not a strict liability claim, contrary to the Court of Appeals' view. The court asserted that claims such as Cowing's could subject corporate agents to liability for "routine, collaborative business decisions[.]" Opinion at 8. This is error and contrary to Kentucky law.

As noted by the Court of Appeals, Cowing, to sustain his aiding and abetting discrimination claim would have to establish that (1) Lockheed Martin discriminated against him based on his disability; (2) Commare knew Lockheed Martin had breached its duty toward Cowing; and, (3) Commare substantially assisted Lockheed Martin's wrongful act. Opinion at 5. These proof elements are consistent with the Restatement (Second) of Torts § 876. *Id.*

In *Failla v. City of Passaic, supra,* the Third Circuit, in interpreting and applying both an aiding and abetting provision of New Jersey's antidiscrimination law similar to Kentucky's and section 876 of the Restatement, specified that aiding and abetting liability does not arise from mere participation in routine, collaborative business decisions:

> Employees are not liable as aider and abettor merely because they had some role, or knowledge or involvement. Rather, the degree of involvement, knowledge and culpability required as a basis for liability is heightened by the standard that the Restatement sets forth and we adopt. Only those employees who meet this heightened standard will be aiders and abettors. It is important that this standard be set above mere knowledge and/or implementation, lest a reverse respondeat superior liability could be created under the guise of aiding and abetting.

146 F.3d at 159.

The Third Circuit's analysis is consistent with Kentucky law. The Court of Appeals' assertion that aiding and abetting liability could arise from mere participation in routine, collaborative business decisions is not.

<u>SECOND</u>, the Court should also grant review to address the application of the intracorporate conspiracy doctrine to an aiding and abetting claim under KRS 344.280(2). It appears that the Court of Appeals is the first appellate court in the Commonwealth's history to apply the intracorporate conspiracy doctrine in any case in any context. It also appears that the Court of Appeals is the first appellate court anywhere to apply the intracorporate conspiracy doctrine to bar an aiding and abetting claim.

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 (11th 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 (5th 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 (1st 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.

Some courts have applied the intracorporate conspiracy doctrine to bar conspiracy claims arising under 42 U.S.C. § 1985 (not Title VII which has no conspiracy provision) in the employment discrimination context, as the Court of Appeals noted. Opinion at 7. The Sixth Circuit recently predicted in a non-precedential decision that this Court would apply the doctrine to a conspiracy claim under KRS 344.280. *Roof v. Bel Brands USA, Inc.,* 641 Fed.Appx. 492, 499 (6th Cir. 2016). Other courts have found the intracorporate conspiracy doctrine inapplicable in the discrimination context. *Stathos v. Bowden, supra; Novotny v. Great American Federal Savings & Loan Association,* 584 F.2d 1235 (3rd Cir.1978) (*en banc*), *vacated on other grounds,* 442 U.S. 366 (1979).

Prior to this case, it appears that the only case addressing whether KRS 344.280(2) provided individual liability for aiding and abetting discrimination ruled that it did. *Adams v. United Parcel Service,* 2006 WL 1687699 (W.D. Ky. 2006).

The Court of Appeals' decision has rendered corporate agents acting within their agency immune for violations of KRS 344.280. This deals a serious and material blow to the reach and enforceability of the Kentucky Civil Rights Act. Moreover, the Court of Appeals' decision disregards plain, unambiguous statutory language, is contrary to prior decisions of this Court, and is contrary to long-established principles of Kentucky law. This damage to the Act is done by a vehicle – the intracorporate conspiracy doctrine – apparently never before applied by a Kentucky appellate court in any context. The scope and reach of KRS 344.280 is frequently litigated and has been the source of conflicting decisions by other courts. This Court should accept review of this case to address and resolve these important issues.

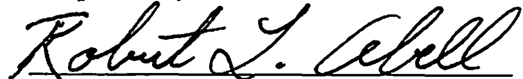
(e) PETITION FOR REHEARING OR MOTION FOR RECONSIDERATION

Neither Movant nor Respondent has a Petition for Rehearing or Motion for Reconsideration pending in the Court of Appeals.

<u>Conclusion</u>

For all the foregoing reasons, this Motion for Discretionary Review should be granted.

Respectfully submitted,



ROBERT L. ABELL
120 North Upper Street
Lexington, KY 40507
859.254.7076
COUNSEL FOR MOVANT

Certificate of Service

I hereby certify that true copies of the foregoing Motion for Discretionary Review were mailed, postage prepaid, this 10th day of October 2016 to the following: Hon. Samuel Givens, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; and Keith Moorman, Kathleen B. Wright, Frost Brown Todd, 250 W. Main St., Suite 2700, Lexington, KY 40507.

COUNSEL FOR MOVANT