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DOCKET NO. 2007-SC-0769-D**

**APPEAL FROM THE KENTUCKY
COURT OF APPEALS
CASE NO. 2006-CA-002163**

BRAVO! DEVELOPMENT INC.

APPELLANT

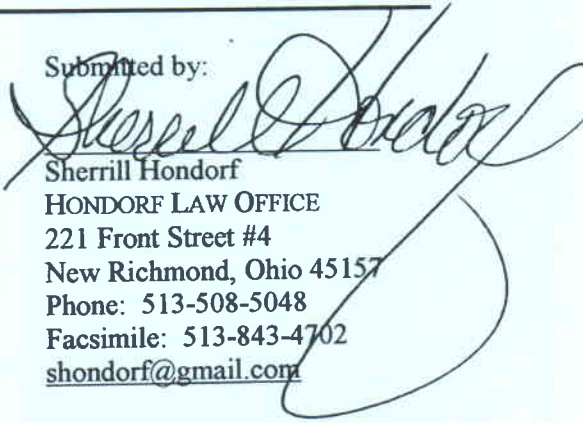
-v-

SCOTT SINGLETON

APPELLEE

BRIEF OF PLAINTIFF/APPELLEE SCOTT SINGLETON

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Certificate Required by CR 76.12(6)

I hereby certify that copies of this Appellee's Brief were served upon the following named individuals via hand delivery, Federal Express, or United States Postal Mail on August 28, 2008: Clerk Susan Stokley Clary, Kentucky Supreme Court, Room 235 Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3415; Hon. Fred Stine V, Campbell County Circuit Court, 330 York Street, Newport, KY 41071, P. Douglas Barr, Stoll, Keenan, Ogden, 300 Vine St., Suite 2100, Lexington, KY 40507, Andrew Smith, Vorys, Sater, Seymour & Pease, 52 East Gay St., Columbus, Ohio 43216-1008, Anthony Osterlund, Vorys, Sater, Seymour & Pease, 221 East Fourth St., Cincinnati, Ohio 45202, Charles English, English, Lucas, Priest & Owsley, 1101 College Street, PO Box 770, Bowling Green, KY 42102-0770.


Sherrill Hondorf, Counsel for Appellee

I. COUNTER INTRODUCTION

Appellee Scot Singleton disagrees with the framing of the issue in Appellant's Introduction. This case is not simply about election or remedies and "settlement" of an unpaid wages claim. At the foundation of this case is a Kentucky worker's entitlement to liquidated damages pursuant to KRS 337.385(1) if his wages have been unlawfully withheld by his employer. This issue arises because KRS 337.385(1) entitling an employee to liquidated damages has been the law of Kentucky since 1978 and has never been enforced.

Prior to *Parts Depot v. Beiswanger*, 170 S.W.2d 354 (Ky. 2005), a Kentucky employee with a wage issue had no option other than to file a complaint with the Kentucky Department of Labor ("DOL"). The DOL by its own admission does not consider or enforce the liquidated damages provision of 337.385(1). Prior to *Parts Depot*, the Circuit Court did not have jurisdiction to resolve employer/employee disputes based upon KRS Chapter 337. *Early v. Campbell Fiscal Court*, 690 S.W.2d 398 (S.W.2d 398 (Ky. App. 1985); *Noel v. Season-Sash, Inc.*, 722 S.W.2d 901 (Ky. App. 1987).

At issue here is the right of a Kentucky employee who has had his wages unlawfully taken by his employer to recover liquidated damages. The KRS establishes the employer's liability for the damages. The *Parts Depot* opinion resolves the issue of Circuit Court's original and concurrent jurisdiction with the DOL. Singleton's right to recover liquidated damages arose prior to the *Parts Depot* opinion. The effect of the *Parts Depot* decision on this case and on those to follow is to crystallize the dilemma of how the employee can enforce his right to recover liquidated damages.

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III. COUNTER STATEMENT OF THE CASE

Scot Singleton worked for Appellant Bravo at the Brio Tuscan Grille in Northern Kentucky as a server. Brio required him to remit "gratuities," or 3% of his sales, for payment to other employees of the restaurant. This practice is called "tipping out" and is unlawful in Kentucky under KRS 337.065. On several occasions Singleton informed Brio management that mandatory tipping out is unlawful in Kentucky. He was told that tipping out is corporate policy and he could find a new job if he was dissatisfied with the practice. (Appendix Tab 1, Singleton Affidavit)

Singleton filed a Complaint with the Kentucky Department of Labor ("DOL") about the unlawful practice.¹ The DOL found Brio was violating Kentucky law by requiring its servers to tip out. KRS 337.990(5) and KRS 337.385(1) require the employer to reimburse the employee the entire amount of the unlawfully withheld wages. Brio, intentionally or not, provided incorrect information to the DOL about the actual amount of the unlawful deductions.² In early May 2005, the DOL sent letters to all current and former Brio employees framed as an "offer of settlement:"

This office has recently completed an investigation of your employer/former employer. As a result, the employer has offered the net amount specified on the enclosed receipt for payment of back wages as full settlement of all wage claims.

¹ The Kentucky Department of Labor was abolished as of June 2, 2008 and is now reorganized under the Labor Cabinet. For the purpose of briefing all issues in this case, Appellee will continue to refer to the Kentucky Department of Labor ("DOL").

² Whether the mistaken calculation of the amount owed was intentional or unintentional has never been determined. The original amount "offered" was \$78,882.08. The actual amount owed was \$390,536.81. Nevertheless, Singleton was never able to obtain a satisfactory answer to inquiries about why the correct amount was typed onto the DOL "Report of Investigation," was crossed out and the amount of \$78,882.08 was handwritten on the form and then crossed out, and the correct amount of \$390,536.81 was again handwritten on the form. (See Appendix Exhibit 7)

Please sign the enclosed form and return all copies to this office within ten days. Upon receipt, your check will be forwarded by return mail. Failure to return the signed release within ten days will result in the check being returned to the employer. (Appendix Tab 2).

Upon receipt of the letter, Singleton immediately called the DOL and spoke with investigator Mark Klein about the "settlement offer" being nowhere near the actual amount he had been required to "tip out." Mr. Klein informed him that the offer seemed reasonable to him, that the investigation was closed, and that he could take the offered payment or leave it. (Appendix Tab 1, Affidavit at 15).³ Singleton immediately contacted counsel about the offer being inadequate to fully compensate him for the amount unlawfully withheld. Counsel filed an action on May 13, 2005 on behalf of Singleton, Derrick Whittle, and the class of persons whose wages had been unlawfully taken by Brio. (Case No. 05-CI-678, Campbell Circuit Court)

At some point after the filing of the first Complaint, the DOL reopened the investigation and sent letters to Brio employees telling them that the amounts due them were being recalculated. (Appendix Tab 3, Superseding Notice of Violation, dated May 18, 2005 and letter dated May 19, 2005). Bravo filed a motion to dismiss the Complaint for failure to exhaust administrative remedies. During the time that the motion was pending, the DOL sent recalculated "offers" to the servers that reflected the real amounts unlawfully withheld. The total of the first "offer" was \$78,882.08 and the final recalculated amount was \$390,536.81. (Appendix Tab 7) The first complaint was subsequently dismissed for failure to exhaust administrative remedies. (Appendix Tab 4, Order dated October 26, 2005) Singleton appealed, but voluntarily dismissed the appeal after the DOL finally notified Plaintiffs that the

³ Mark Klein has a somewhat different recollection of his conversation with Mr. Singleton. His testimony is that he advised Singleton that a second investigation was already under way. (Appendix Tab 6, Klein Deposition Testimony at 22-23).

factual investigation was closed on September 28, 2005, without notice to the employees or the issuance of a formal report. (Appendix Tab 5, letter to Kentucky General Counsel and response to Plaintiff's Counsel Sherrill Hondorf)

The completion of the Department of Labor's investigation, without notice or a final report, perfects Singleton's claim, and those of the class he seeks to represent, against Brio for liquidated damages mandated by KRS 337.385. The "offer of settlement" is a misnomer, Bravo is legally required to disgorge and reimburse its employees the entire amount of the unlawfully withheld wages. The DOL is not empowered to negotiate a "settlement" for anything less than the entire amount of the unlawfully withheld wages.

Singleton filed a second Complaint on February 6, 2006, alleging *inter alia* that the DOL investigation was closed without notice or factual findings and seeking to enforce, on behalf of himself and the class, the mandate of KRS 337.385(1) for liquidated damages, costs and attorney's fees. Plaintiff's second Complaint was dismissed for failure to exhaust the elected administrative remedy, and because Singleton had "settled" his claim with Bravo. (Appendix Tab 8, Orders dated June 23, 2005 and September 15, 2006)

IV. ARGUMENT

A. STANDARD OF REVIEW

Singleton's Complaint was dismissed on jurisdictional and other legal grounds. The *de novo* standard is the appropriate standard of review for the issues presented in this case. "The question of jurisdiction is ordinarily one of law, meaning that the standard of review to be applied is *de novo*." *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53 (KY. 2007) "As the issues on this appeal are to be decided as a matter of law, our review of the Court of Appeals decision is not confined to an abuse of discretion inquiry." *Kentucky*

Labor Cabinet v. Graham, 43 S.W.3d 247, 251 (KY. 2001) (citing *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 465 (KY 1998))

B. THE KENTUCKY STATUTORY STRUCTURE

KRS 337.065(1) UNLAWFUL FOR EMPLOYER TO REQUIRE REMITTANCE OF GRATUITY – TIP POOLING – “No employer shall require an employee to remit to the employer any gratuity, or any portion thereof, except for the purpose of withholding amounts required by federal or state law.

KRS 337.065(3) -- “No employer shall require an employee to participate in a tip pool whereby the employee is required to remit to the pool any gratuity, or any portion thereof, for distribution among employees of the employer.”

KRS 337.990(5) PENALTIES -- Any employer who violates the provisions of KRS 337.065 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and shall make full payment to the employee by reason of the violation.

The DOL is not given the discretion to seek an “offer of settlement” from the employer. The DOL is obligated to determine the amount of full reimbursement owed to the employee and to then obtain it on behalf of the employee. In Scot Singleton’s case the “offer” from the employer was not even a third of the amount owed to the employees. It was only after Singleton complained about the so-called “offer” that the full reimbursement was obtained. KRS 337.990(5) is unequivocal that the employee is entitled to complete, total and full reimbursement of the unlawfully withheld wages.

KRS 337.385(1) EMPLOYER'S LIABILITY -- UNPAID WAGES AND LIQUIDATED DAMAGES

Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself or themselves. (emphasis supplied)

KRS 337.385(1) reiterates that the employee is entitled full reimbursement, but then goes on to impose further liability upon the employer for the same amount as liquidated damages. The statute is unequivocal and contains mandatory language.

KRS 337.310 APPEAL OF EXECUTIVE DIRECTOR'S ORDER OR DECISION provides for the appeal of a DOL order or decision under certain conditions delineated in 803 KAR 1:035§1(2). "All orders or decisions of the executive director issued or made under KRS 337.020 to 337.405 may be appealed, and upon appeal an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

It stands to reason that there first must be an "order or decision" to be appealed. Singleton's complaint was closed without notice or a final report. (Appendix Tab 5)

803 KAR 1:035§1(2) governs the hearing procedures at the DOL. "Where a settlement cannot be reached between the employer and employee and if an investigation reveals that questions of fact are in issue or the complaint or routine inspection gives the commissioner, or his authorized agent, good cause to believe that factual issues need to be

resolved, then the commissioner, or his authorized agent, shall evaluate all proof submitted and render his tentative findings of fact.”

C. **THE ELECTION OF REMEDIES DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE**

Prior to the *Parts Depot* case, Singleton did not have the option to “elect” where to file his complaint. Scott Singleton could only take his complaint to the DOL. The DOL found that Brio was illegally taking money from its employees. Singleton had no quarrel with the finding of the DOL that Bravo was unlawfully withholding his money. He does have a quarrel with the fact that the DOL did not make the further finding that Bravo was or was not acting in bad faith when taking his tips.

Singleton and his co-workers were each sent a take-it-or-leave-it “settlement offer” from the DOL, were not told of the liquidated damages provision of KRS 337.385(1), were not told they had a right to object to the “settlement offer” from the DOL, and each simply cashed a check for an amount they were legally owed anyway. The Court of Appeals agreed that the “Release” simply does not go far enough to constitute a knowing relinquishment or waiver of the right to receive liquidated damages. “We believe that the release language ... unambiguously applies only to amounts owed Singleton pursuant to Bravo’s violations and does not extend to amounts which may be owed pursuant to KRS 337.385.” *Singleton v. Bravo Development*, No. 2006-CA-002163-MR, 2007 Ky. App. LEXIS 352, *3

Prior to *Parts Depot*, Kentucky law was clear that Singleton’s only option was to file a complaint at the DOL. Singleton filed his Complaint with the DOL in November of 2004. The *Parts Depot* Opinion was issued in August of 2005. Prior to the *Parts Depot* decision, the system was structured to deny an employee any chance of recovering liquidated damages

under KRS 337.385(1) because a) an employee could not bring a direct action in the Circuit Court to enforce it, and b) the DOL ignores KRS 337.385(1).

Because of the *Parts Depot* opinion, however, it is now settled that the DOL and the Circuit Court have original and concurrent jurisdiction over employee claims for employer violations of KRS Chapter 337. Bravo's election of remedies argument can only apply to cases arising after the *Parts Depot* opinion issued. Singleton's case originated prior to *Parts Depot*.

Even after *Parts Depot*, however, adopting Bravo's position will guarantee that the employee will never recover liquidated damages if he files a complaint with the DOL. This Court has the opportunity to clarify the operation of KRS 337.385(1) at both the DOL and in the Circuit Court.

Under Bravo's view of the law, an employee must seek legal advice and sue in Circuit Court before she can recover the mandated liquidated damages, costs and attorneys fees. If, however, as argued by Bravo, the DOL is the arbiter of choice for labor disputes, such a result is unreasonable and counter-productive.

The election of remedies doctrine says that when a person has at his disposal two modes of redress that are contradictory and inconsistent with each other, his deliberate and settled choice and pursuit of one will preclude his later choice and pursuit of the other. *Young v. Hammond*, 139 S.W.2d 895 (KY 2004) citing *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky. App. 2001). Here, the operative words are contradictory and inconsistent. "The purpose of the doctrine of election of remedies is to prevent more than one redress for a single wrong." *McCabe v. Stivers*, 388 S.E.2d 571 (N.C. App. 1990). KRS Chapter 337 allows the employee to recover his funds and to recover liquidated damages because his employer

unlawfully took his money. The liability imposed upon the employer by the Legislature in KRS 337.385(1) is neither inconsistent nor contradictory with the employee's statutory right to reimbursement of unlawfully withheld wages. The liquidated damages provision is an added liability for the employer who unlawfully and without a good reason takes an employee's wages.

Had the DOL considered the mandate of KRS 337.385(1) during the investigation and "settlement" of Singleton's Complaint, the election of remedies doctrine could logically be applied to Singleton's case. The DOL, however, acknowledged that it ignores the liquidated damages provision of KRS 337.385(1). The election of remedies argument cannot be harmonized with the KRS mandate of reimbursement and recovery of liquidated damages. These two provisions are neither inconsistent nor contradictory.

An employee would not knowingly choose an option that paid him half of his due nor accept an offer of settlement if he was informed that he was legally entitled to twice the amount offered in "settlement." Singleton is not seeking an inconsistent, contradictory or alternative remedy; he is seeking to recover liquidated damages for Bravo's bad faith in taking over \$4,000.00 of his money and paying it to other employees.

1. **An employee is forced to resort to the judicial process because of the inaction of the DOL.**

The *Parts Depot* decision settled the issue of Circuit Court jurisdiction over a direct action, but the issue of an employee's entitlement to liquidated damages remained unclear until the *Singleton* Opinion. . It has been Singleton's position from the beginning that he and the class he seeks to represent are entitled to the liquidated damages. If the DOL chooses not to enforce or even consider the liquidated damages provision of KRS 337.385(1), an employee is forced to go to the Circuit Court to recover them.

The Court of Appeals agreed with Singleton that the doctrine of election of remedies does not bar Singleton's action. The Court found that the use of the disjunctive "or" in the phrase "any action commenced to recover such unpaid wages or liquidated damages" indicates that an action may be brought in the Circuit a Court for recovery of 1) wages and damages; or 2) for damages alone in the event that the damages have not been recovered by the DOL on behalf of the employee.

The DOL has a responsibility to enforce all provisions of KRS Chapter 337, including liquidated damages. Yet, the DOL has historically abdicated its responsibility to enforce KRS 337.385(1). "The DOL's position of record is that the administrative process does not provide for the recovery of KRS 337.385 damages, but rather such damages must be pursued through the judicial process." *Singleton v. Bravo Development*, at *14. It would not be necessary for an employee to seek liquidated damages in a separate action if the DOL did its job.

This Court must resolve the issue of an employee's legislatively mandated entitlement to liquidated damages in the wake of the *Parts Depot* case. The Kentucky Legislature used the word "shall" when it enacted KRS 337.385(1) in 1978. As Singleton has argued over and over and over, the statute is compulsory, not suggestive. The word "shall" indicates an obligation; and when used in a statute it means an order or a requirement. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 29 May. 2007 at Dictionary.com.

The rules of statutory construction require that we construe this statute to carry out the intent of the legislature. *KRS 446.080*. Our statutory scheme has also provided a definitional section to aid in construction. *KRS 446.010*. It is elementary that "may" is permissive and "shall" is mandatory in statutory language, *KRS 446.010(20), (29)*; and, a statute should be construed, if possible, so that no part of it is meaningless and ineffectual. *Hardin County*

Fiscal Court v. Hardin County Board of Health, 899 S.W.2d 859, 861 (Ky. App. 1995) (citations omitted)

D. **WHAT IS A "SETTLEMENT" WITH THE DOL? SCOTT SINGLETON MERELY ACCEPTED THE AMOUNT OF WITHHELD WAGES HE IS LEGALLY ENTITLED TO RECEIVE.**

The doctrine of election of remedies encompasses the notion that a litigant has made a "settled choice" to the exclusion of another mode of redress. Bravo argues that Singleton's acceptance of the entire amount of his withheld wages constitutes a "settled choice." Bravo argues that "[b]y pursuing his claim to resolution by settlement in the Administrative Process, Singleton obtained redress of the violation of his rights under KRS 337.065 just the same as if the parties had not settled but, instead, litigated the claim through to final adjudication." (Appellant Bravo's Brief at 7).

This argument is wrong for several reasons, the first of which is the fact that Singleton had no choice where to bring his initial complaint. A person cannot be said to have made a "settled choice" among different choices, when there is only one choice available. The second is that Singleton merely accepted and cashed a check for the amount he was legally entitled to receive. Both KRS 337.990(5) and 337.385(1) require the DOL to seek and Bravo to pay back the full amount of the unlawfully withheld wages.

Under Bravo's logic, the employee who elects to pursue his case with the DOL and accepts his legally required reimbursement, is barred from obtaining liquidated damages because he has made the "settled choice" to forego his mandated right to liquidated damages. Conversely, the employee who "elects" to pursue an action in the Circuit Court can obtain the liquidated damages provided for by KRS 337.385(1). This is not what the statute says nor what the Legislature intended.

Both KRS 337.990(5) and KRS 337.085(1) require Bravo to reimburse its employees for the entire amount of the unlawfully withheld wages. There is no flexibility under either KRS 337.990(5) or KRS 337.085 for the employer or the DOL to negotiate for or offer a lesser amount in settlement of the claim. The employer is required to disgorge the entire amount of unlawfully withheld wages. It is a legislatively mandated all or nothing proposition. The finding that the employer has violated the law triggers the obligation to make a full reimbursement. KRS 337.385(1) is an additional liability to the employer who withholds funds in bad faith. Scot Singleton merely accepted the total amount that he was due under KRS 337.990(5).

The third is that the Court of Appeals determined that the very nature of the document signed by Singleton shows that Singleton did not “choose” to waive his right to receive liquidated damages. Brio’s employees were required by the DOL to sign a document which stated:

NOTICE TO EMPLOYEE. Your acceptance of the these back wages as marked for the period indicated above means you are accepting this amount as a satisfactory settlement and are releasing this employer from any further liability for your claim as indicated above. (Appendix Tab 1, at Ex. 3)

Singleton took the deposition of the DOL investigator Mark Klein. In response to questions about the intended scope of the “settlement,” Klein responded that it was intended only to encompass reimbursements to Brio employees for violation of KRS 337.065. Mark Klein confirmed that the phrase “for your claim as indicated above” in the Notice refers only to Singleton’s claim for Brio’s violation of KRS 337.065. (Appendix Tab 6 at 36-44) In response to questions about the application of KRS 337.385(1) in his “settlement” negotiations with Brio, he stated that KRS 337.385(1) was not considered by the DOL in the investigation or in the “settlement” of the claims. (Appendix Tab 6 at 41).

The Court of Appeals agreed with Singleton that the only claim that was “settled” was Singleton’s entitlement to full reimbursement of his wages under KRS 337.065. Singleton’s position and the Court of Appeals’ conclusion is bolstered by the fact that in 2005, because of complaints that the former “Notice to Employees” was over-inclusive and had the effect of releasing all claims, the DOL “Notice of Employee” was changed. (See Appendix Tab 9, Former “Notice to Employee)

Klein confirmed that the only claim investigated and resolved by the DOL was Brio’s violation of KRS 337.065. DOL General Counsel further confirmed that the mandate of KRS 337.385 is not a part of the DOL investigation process nor included in the resolution of the claim procedure. “The statute authorizes liquidated damages by court action, not in settlements or other administrative proceedings under the provisions of the Department.” (Appendix Tab 10, Letter from Plaintiff’s Counsel and Response from Department of Labor General Counsel)

Singleton did not “settle” anything other than his right to full reimbursement arising from Brio’s violation of KRS 337.065. He merely accepted what he was legally owed. The Kentucky Legislature imposed the further liability upon an employer who withholds funds without a solid or good faith basis for doing so. The DOL does not investigate the factual underpinning of the claim, simply ignores the imposition of liquidated damages, and the employee is forced to seek his damages on his own.

Singleton’s signature does not appear on any document that “settles” any more than his right to full reimbursement of his unlawfully withheld money. Bravo’s liability for liquidated damages arises from another statute, nowhere mentioned in any communications from the DOL to Scot Singleton. Bravo’s attempt to shoe-horn the DOL’s “negotiations” and

take-it-or-leave-it proposition into an offer and acceptance and waiver of liquidated damages is absurd. A “legal waiver” is “a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon.” *Bear v. Stearns Coal and Lumber Co*, 163 S.W.2d 466 (1942).

Bravo’s position might be plausible, but for the fact that KRS 337.385(1) contains mandatory language and the additional fact that the DOL defers the imposition of damages under KRS 337.385(1) to the judicial system. KRS 337.385(1) does not say “may or might be liable” nor does it say “shall be liable only if the DOL says so.”

The issue here is how can an employee enforce his legislatively mandated entitlement to liquidated damages under KRS 337.385(1) when the DOL does not do it for him? KRS 337.385(1) does not contain a suggestion that Brio may or might be liable for these damages, it says Brio **shall** make the payment. Direct judicial relief is not only appropriate on the facts of this case, but is the only avenue open to Plaintiff and the class he seeks to represent to obtain their legislatively mandated right to liquidated damages because Brio unlawfully withheld their wages.

E. **KRS 337.385(1) IS NOT A “REMEDY” SEPARATE FROM SINGLETON’S CLAIM FOR A VIOLATION OF KRS 337.065. KRS 337.385(1) IMPOSES THE ADDITIONAL LIABILITY OF LIQUIDATED DAMAGES AS A PUNITIVE MEASURE FOR BAD FAITH WITHHOLDING OF WAGES. THE COURT OF APPEALS CORRECTLY CONSTRUED AND INTERPRETED THE KENTUCKY STATUTORY STRUCTURE.**

The KRS is structured like this:

- 1) KRS 337.065 makes it violation to require tip pooling.
- 2) KRS 337.990(5) requires restitution to the employee of the entire amount of unlawfully withheld funds.

3) KRS 337.990(5) also imposes a civil penalty on the employer for the violation.

4) KRS 337.385(1) establishes restitution and liability to the employee in the form of liquidated damages for bad faith withholding by the employer.

It is a simple structure: violation, restitution, penalty, liability to employee for bad acts. This is neither an alternative nor mutually exclusive process. The DOL is empowered to make factual findings by KRS Chapter 13B and KRS 337.310, and can certainly make the determination that an employer has or has not acted in good faith. It is logical and reasonable to expect the DOL, charged with protecting Kentucky's employees from overreaching employers, will explain the punitive nature of KRS337.385(1) to the employer and enforce the liquidated damages provision in an appropriate case. The Legislature made the task a simple one, upon a finding of bad faith, the DOL assesses the liquidated damages and recovers them for the employee.

Bravo's analogies to Kentucky's civil rights cases are not applicable or helpful here. The Kentucky Civil Rights Act gives a specific cause of action and actual damages to the employee. Here, it is *Parts Depot* that finally confirmed a Kentucky employee's right to bring a direct action in the Circuit Court for violations of KRS Chapter 337.

This case involves the application of KRS 337.383(1) to employee disputes pursued by the DOL. It is certainly within the purview of the DOL to make a factual finding that the employer does or does not have a good faith justification for taking employee funds.

"The authority of an administrative agency is limited to a direct implementation of the functions assigned to the agency by statute, and it is [the Court's] responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Smith v. Housing Authority*

of *Middlesborough*, 2002-CA-000738-MR (Ky App 2003) (Huddleston, concurring)⁴

“[T]here is no statute currently in Chapter 337 which delegates exclusive jurisdiction to adjudicate factual dispute (sic) to the Labor Cabinet. And, in fact, there is no statute delegating any adjudicative authority whatsoever.” *Id.* Thus, either the DOL is not empowered to apply KRS 337.385(1) or it failed to carry out its statutory mandate. The intent of the Legislature is clear, the damages are owed for a violation; subject only to a showing of an honest or good faith mistake.

Bravo argues that it is “unaware of *any* instances in all of those years prior to the *Singleton* decision in which a plaintiff-employee has settled a claim for unpaid wages through the DOL administrative process and then later requested, let alone, received, liquidated damages despite prior settlement.” (Bravo Brief at 19). There is a very simple reason for this. The DOL, by its own admission, does not enforce the provisions of 337.385(1). And, because an employee could not bring a direct action in the Circuit Court until the *Parts Depot* opinion clarified the issue, an employee simply had no way to enforce the liquidated damages provision.

Unless the employer can show that the unlawful withholding of wages is the result of a good faith mistake, the employee is statutorily entitled to the liquidated damages. Bravo has never asserted that it made a good faith mistake and has never explained why the initial “settlement offer” was less than a third of the amount owed to its employees. If an employer is caught cheating its employees with no reasonable explanation for doing so, the employer owes liquidated damages to the employee.

⁴ The *Smith* case was consolidated with the *Parts Depot* case by this Court and was upheld. *Singleton* is in this Court in the same procedural posture as Charles Smith and Eddie Harrell.

F. THE CITY OF FRANKFORT V. DAVENPORT OPINION IS CONTRARY TO THE SINGLETON OPINION.

Recognizing the unequal bargaining power between employers and employees, the Kentucky Legislature in 1978 enacted KRS 337.385 and included the employer's liquidated damages liability as a punitive measure against an employer who is caught shortchanging its employees.

In August 2005, the *Parts Depot* Opinion settled the issue of original and concurrent jurisdiction over employee labor claims pursuant to KRS Chapter 337. Relying upon *Parts Depot*, the Court in *City of Frankfort v. Davenport*, subsequently held that KRS 337.385(1) applies only to original judicial actions and not to administrative appeals:

In the recent case of *Parts Depot Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005), our Supreme Court held that KRS 335.385 applies when "an employee, or the commissioner on employee's behalf, chooses to exercise the *judicial remedy* for recovery of unpaid wages. *Id.* At 362 (emphasis added) The Court was distinguishing the judicial remedy from the administrative remedy referred to in KRS 337.310. Here, the paramedics chose the administrative remedy of filing the complaint with the labor cabinet. Thus, the paramedics were not entitled to liquidated damages and attorney fees under KRS 337.385(1). *City of Frankfort v. Davenport*, Nos. 2005-CA-000036-MR; 2005-CA-000048-MR; 2005-CA-000049-MR, 2006 WL 2380792 (Ky. App. Aug. 18, 2006).

The *Singleton* Opinion is not contrary to the *Davenport* decision. The procedural posture of the two cases is markedly different. Scot Singleton brought an original action in the Circuit Court for recovery of liquidated damages because the so-called "settlement" with the DOL did not include them. In *Davenport*, the paramedics sought review of an administrative decision. The *Davenport* decision says that the liquidated damages and attorney fees provision of KRS 337.385(1) do not apply to an administrative appeal. If the Singleton case was in the court pursuant to an administrative appeal, the Circuit Court would not have dismissed it for failure to exhaust administrative remedies.

Moreover, the Frankfort paramedics' case, like Scot Singleton's, was moving through the system both before and after the *Parts Depot* Opinion was issued. The *Parts Depot* Opinion is a sea change in Kentucky labor law procedure. The *Davenport* Opinion was issued August 18, 2006. The system as then structured gave the paramedics no option but to file their complaint with the DOL. At that time the Circuit Court was empowered only to review the DOL decision and that review was limited. When *Davenport* was decided at the Court of Appeals level, the *Parts Depot* Opinion had been issued. Like Scot Singleton, the Frankfort paramedics found themselves on both sides of the *Parts Depot* Opinion.

G. **THE SINGLETON DECISION IS WELL REASONED AND SHOULD NOT BE REVERSED.**

There is a not a lot of case law to guide us here, but common sense tells us that the system was broken and the combined effect of *Parts Depot* and *Singleton* is to fix it. The *Singleton* decision is based upon sound logic and reasoning and should not be reversed. The *Parts Depot* Opinion as well as the *Singleton* Opinion are a wakeup call for the DOL. A Kentucky employee can finally enforce his right to recover liquidated damages.

Bravo's dire consequences and doom and gloom predictions, a standard fallback when workers' rights are so soundly protected, will not come to fruition. Both the DOL and the employers of Kentucky are capable of resolving unpaid wage claims in the wake of the *Singleton* decision. *Singleton* is a logical and sensible extension of *Parts Depot*:

- 1) Singleton did not waive his right to pursue KRS 337.385(1) liquidated damages because he cashed a check for the amount Bravo was legally required to reimburse him.
- 2) The language of KRS 337.385 is unambiguous in allowing an original action for liquidated damages to be brought in the Circuit Court.
- 3) The express language of KRS 337.385 negates the application of the doctrines of exhaustion of administrative remedies and election of remedies.

The Kentucky Legislature saw fit to enact liquidated damages. It is only the combined holdings of *Parts Depot* and *Singleton* that frees the liquidated damages provision of the bureaucratic grip that closed every avenue of recovery for so many years. Employers can no longer short change their employees and simply pay them back with no other liability. The liquidated damages portion of KRS 337.385(1) is triggered by a factual finding by the DOL that an employer unlawfully withheld wages. The burden then shifts to the employer to show that an honest mistake was made. Short of such a showing, the liquidated damages are due to the employee. If the DOL fails to make the inquiry or enforce the statute, the employee can do so on her own. The *Singleton* Opinion confirms the plain meaning of the statute.

The meaning of the language "[s]uch action may be maintained in any court of competent jurisdiction by any one (1) or more employees for and in behalf of himself or themselves" is plain and unambiguous. Under this plain meaning, a private cause of action lies in circuit court for recovery of KRS 337.385 damages.

Moreover, we note that the statute refers to "any action commenced to recover such unpaid wages or liquidated damages . . . [.]". The statute's use of the disjunctive "or" presupposes that the employee has recovered unpaid wages prior to filing his court action under KRS 337.385. It stands to reason that in most cases the unpaid wages will have been recovered through the DOL administrative process. As such, the statute contemplates the recovery of unpaid wages outside of the judicial process, followed by an action pursuant to KRS 337.385. *Singleton* at *12.

In the wake of the *Parts Depot* and *Singleton* Opinions, if the DOL continues to ignore the provisions of KRS 337.385(1), the *Singleton* Opinion gives an employee the opportunity to do so on her own. In *Parts Depot*, the Court left the liquidated damages provision an open question, holding that:

... KRS 337.385 applies specifically to an employer's liability for unpaid wages. In fact, the title of the latter provision is "Employers liability - Unpaid wages

and liquidated damages.” ... We now hold that *KRS 337.385*, the more specific statute, takes precedence over *KRS 337.310*, the general statute, whenever an employee, or the commissioner on employee's behalf, chooses to exercise the judicial remedy for recovery of unpaid wages. *Parts Depot* at 361-362 (citations omitted)

The *Parts Depot* Court, however, did not take the next step:

Subsection (1) unambiguously authorizes an uncompensated or undercompensated employee to sue the employer in "any court of competent jurisdiction" for the amount due and unpaid, plus liquidated damages, costs and attorney fees. ... *KRS 337.385(2)* is admittedly less clear than subsection (1), but the phrases "any legal action necessary" and "in case of suit" appear to authorize the commissioner to file suit on behalf of the employee in a court of competent jurisdiction. * Undoubtedly, the General Assembly included the liquidated damages provision in subsection (1) and omitted it from subsection (2) as an incentive for employees to hire their own attorneys and pursue their own claims, thereby relieving the commissioner of much of the burden of litigation. *Parts Depot* at 358-359 (citations omitted)

* *See also KRS 336.985(1)* ("The commissioner ... shall initiate enforcement of civil penalties imposed in KRS Chapters 336, 337, and 339.") and (3) ("The commissioner ... shall initiate a civil action to collect the penalty ... in the court which has jurisdiction over the location in which the violation occurred."). We do not decide today whether those statutes preclude attempts to enforce the penalty provisions of the statutory scheme through administrative adjudication, or whether the phrase "any legal action necessary" in *KRS 337.385(2)* authorizes the commissioner to pursue an administrative adjudication against the employer on behalf of the employee. We only decide that *KRS 337.385(1)* authorizes the employee, or the commissioner on behalf of the employee, to bring an action in circuit or district court against the employer for unpaid salary or wages. *Parts Depot* at 364, nt.3.

Thus, the unanswered question after *Parts Depot* is who will enforce the liquidated damages provision of *KRS 337.385(1)*. It is certain that no person, knowledgeable of his right to receive double what has been offered, would ever agree to a settlement for half that amount. If the DOL does not enforce the liquidated damages provision in the administrative proceeding, the language of the statute, reinforced by the *Singleton* opinion, empowers the employee to do it for himself in the circuit court.

Bravo's concerns are unfounded, the DOL has ample authority to negotiate binding and final settlements that encompass the liquidated damages liability. The employer and the DOL can obtain finality and resolve all claims by simply recognizing that the bad faith unlawful withholding of wages carries with it an additional liability to the employee for liquidated damages.

CONCLUSION

The Court of Appeals was correct in the logic and reasoning underpinning the *Singleton* Opinion. Singleton urges this Court not to reverse it, but to implement it with a directive to the DOL to do its job.

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