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SUPREME COURT
STACIE L. COOK

SUPREME COURT OF KENTUCKY
FILE NO. 2009-SC-000341-D
(Court of Appeals File No. 2008-CA-001249)

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APPELLANT

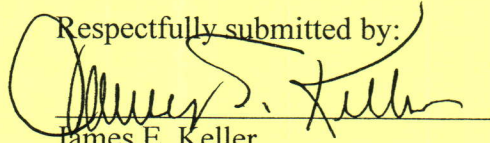
V. Appeal from Russell Circuit Court
Action No. 06-CI-00275

LISHA POPPLEWELL, IN HER
CAPACITY AS COUNTY CLERK OF
RUSSELL COUNTY, KENTUCKY, AND
RUSSELL COUNTY, KENTUCKY

APPELLEES

REPLY BRIEF FOR APPELLANT

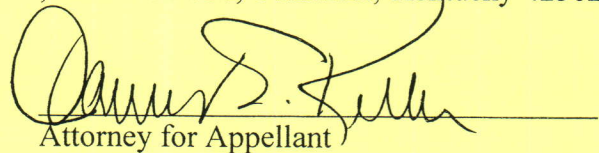
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Reply Brief for Appellant was served on this 26th day of May, 2010, by first class mail, upon the following: Hon. Janet L. Stumbo, First Commonwealth Bank Building, 311 North Arnold Avenue, Suite 502, Prestonsburg, KY 41653; Hon. Jeff S. Taylor, 401 Frederica Street, Suite A-102, Owensboro, KY 42303; Hon. David C. Buckingham, 2010 Gatesborough Circle, Murray, KY 42071; Hon. Vernon Miniard, Jr., Wayne County Judicial Center, 125 West Columbia Avenue, P.O. Box 727, Monticello, Kentucky 42633; and, Winter R. Huff, Esq., Law Offices of John G. Prather P.S.C., P.O. Box 616, Somerset, Kentucky 42502-0616.



Attorney for Appellant

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ARGUMENT

Appellant, Stacie L. Cook (“Stacie”), replies succinctly to the Brief filed by Appellees, Lisha Popplewell in her capacity as County Clerk of Russell County, Kentucky and Russell County, Kentucky.

A. Findings of Fact—as Opposed to Recitals of Undisputed Material Fact—Are Not Appropriate in Ruling on a Motion for Summary Judgment.

Appellees assert that Stacie “has never raised any issue with the Findings of Fact of the Trial Court,” and then set forth the numerous findings of fact that the trial court included in its summary judgment. But, while trial courts often set forth the undisputed material facts in their rulings on motions for summary judgment, findings of fact are inappropriate when ruling upon a motion for summary judgment. *Gross v. Logan*, 197 S.W.3d 571, 574 (Ky.App. 2006) (“[T]he circuit court’s summary judgment order inappropriately makes “[f]indings of [f]act” in its order ...”). CR 52.01 specifically provides that “[f]indings of fact ... are unnecessary on decisions of motions [for summary judgment].” In fact, since CR 56.03 states that a summary judgment may only be granted if there is no genuine issue as to any material fact, “detailed findings of fact are not consistent with a summary judgment” because such findings show a dispute as to the facts. *Continental Ins. Companies v. Hancock*, 507 S.W.2d 146, 150 (Ky. 1974).

Although the Russell Circuit Court did denote the judgment entered as “Findings of Fact, Conclusions of Law, and Judgment,” the trial court granted summary judgment to Appellees only after finding that *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997) was controlling and after concluding that, regardless of whether Lisha Popplewell terminated Stacie for her candidacy, Stacie could not succeed on her claim because candidacy for a

political office is not a fundamental constitutional right. So the trial court did not base its summary judgment upon findings of fact; rather, the trial court entered a summary judgment based upon its interpretation of the law—albeit an erroneous interpretation.

B. Lisha Popplewell Has Admitted That She Was Aware of Stacie's Intended Candidacy at the Time of Her Termination.

Appellees cite and rely upon the trial court's findings to bootstrap their suggestion that they were not aware of Stacie's intended candidacy at the time of her termination. Lisha Popplewell, however, admitted in her responses to Stacie's Requests for Admission that she was aware of Stacie's intended candidacy:

REQUEST FOR ADMISSION NO. 5: That Lisha Popplewell was told and/or learned that Plaintiff was considering running against Lisha Popplewell prior to Lisha Popplewell's termination of the employment of Stacie cook on August 16, 2005.

RESPONSE: Admit

[RA 71-76]. Thus, while Stacie may not have discussed her intention to run for the county clerk's position with Lisha Popplewell, it is undisputed that Lisha Popplewell knew of Stacie's intended candidacy when she terminated her employment with the clerk's office. Thus, it is a factual issue for the trier of fact whether Stacie was fired for her candidacy. And, when reviewing the trial court's underlying summary judgment, Stacie's allegations—including the allegation that Popplewell discharged her because of her rival candidacy—must be taken as true. *Remote Services, Inc. v. FDR Corp.*, 764 S.W.2d 80, 83 (Ky. 1989).

C. Lisha Popplewell Had the Final Authority to Terminate Stacie.

Whether Lisha Popplewell had the final authority to terminate Stacie's employment was resolved by Appellees' Answer. They admitted that Lisha Popplewell, in her capacity as Russell County Clerk, discharged Stacie and that she was acting within her purview as Russell County Clerk. [RA 17-21]. Accordingly, whether Lisha Popplewell had the final authority to terminate Stacie is not an issue in this case; it has been judicially admitted. Additionally, under KRS 64.530(3), Lisha Popplewell had the final authority to establish official policy with respect the hiring and discharging of deputy clerks. *See also* OAG 84-383; OAG 65-423.

D. Candidacy is a Constitutionally Protected Right under Kentucky Law.

Based on the Court of Appeal's adoption of the Sixth Circuit's holding in *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997), political candidacy is not a constitutionally protected right, and there is thus no reason to apply balancing tests to determine the propriety of the termination of an employee based solely on the employee's candidacy. *Carver*, 104 F.3d at 852. In other words, public employers have absolute authority to terminate an employee who seeks elected office. The Opinion of the Court of Appeals, however, is clearly at odds with established Kentucky jurisprudence.

As the parties recognize, the Kentucky Court of Appeals in *Allen v. Board of Ed. of Jefferson County*, 584 S.W.2d 408 (Ky. App. 1979) invalidated a school board policy to suspend involuntarily teachers during their political candidacies for the following reason:

The [teachers], by running for the legislature, were exercising their rights of free speech and association. These rights are protected by the First Amendment to the United

States Constitution and may not be abridged without proof of compelling state interest.

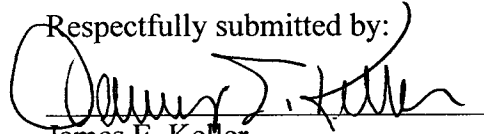
Allen, 584 S.W.2d at 409. Likewise, in *Chapman v. Gorman*, 839 S.W.2d 232 (Ky. 1992), *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621 (Ky. 2005), and *Yonts v. Commonwealth ex rel. Armstrong*, 700 S.W.2d 407 (Ky. 1985), this Court employed balancing tests when upholding the validity of resign-to-run statutes. Why did this Court engage in this analysis unless candidacy is a protected constitutional right? The answer is clear: political candidacy is a protected constitutional right and is the “essence of that which is protected by the First Amendment.” [Slip Op. 21, *Stumbo*, J., concurring].

CONCLUSION

Stacie requests this Court to reverse the Opinion of the Court of Appeals and to hold that Kentucky public employees who seek public office are afforded constitutional protection under both the First and Fourteenth Amendments from being fired for their candidacy. An employee’s right to candidacy must prevail unless, under a *McBee-Pickering-Connick* balancing test, the employee’s constitutional rights must yield to the efficient workings of government. Additionally, because the Appellants have only maintained that Stacie was fired for her poor work performance and have not contended that her candidacy was outweighed by any government interest, nor identified any such interest, Stacie requests that this Court reverse and remand only for the purpose of determining if Stacie was fired by Popplewell for her rival candidacy or for her poor work performance. Finally, Stacie requests this Court to reaffirm its prior holding that

county officials, sued in their official capacities, and counties are not immunized by state law from actions against them under 42 U.S.C. § 1983.

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "James E. Keller", written over a horizontal line.

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