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SUPREME COURT CLERK

SUPREME COURT OF KENTUCKY
FILE NO. 2009-SC-000341-D
COURT OF APPEALS NO. 2008-CA-001249

STACIE L. COOK,

APPELLANT

VS.

Appeal from Russell Circuit Court
Civil Action No. 06-CI-00275
Hon. Vernon Miniard, Jr., Judge

LISHA POPPLEWELL, in her capacity as
COUNTY CLERK OF RUSSELL COUNTY, KENTUCKY


and

RUSSELL COUNTY, KENTUCKY,

APPELLEES

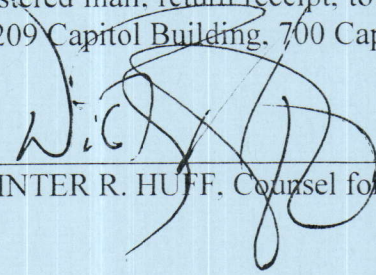
BRIEF ON BEHALF OF APPELLEES

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing was this day mailed, postage prepaid, to: 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., Judge, Wayne County Judicial Center, P.O. Box 727, Monticello, KY 42633; Hon. James E. Keller, Hon. Joseph H. Miller, Hon. Huston B. Combs, Gess Mattingly & Atchison, PSC, 201 W. Short Street, Lexington, KY 40507, Counsel for Appellant, Hon. Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and the original and nine copies and a disc mailed via registered mail, return receipt, to: Hon. Susan Stokley Clary, Clerk of the Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601, all this 10th day of May, 2010.


WINTER R. HUFF, Counsel for Appellees

STATEMENT CONCERNING ORAL ARGUMENT

Appellees, Lisha Popplewell in her capacity as County Clerk of Russell County, Kentucky, and Russell County, Kentucky, concur that oral argument would be beneficial to assist the Court in deciding the issues presented.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

| | <u>PAGE(S)</u> |
|---|---|
| STATEMENT CONCERNING ORAL ARGUMENT | i |
| COUNTERSTATEMENT OF POINTS AND AUTHORITIES | ii |
| COUNTERSTATEMENT OF THE CASE | 1 |
| 42 U.S.C. § 1983 | 2, 17, 18 |
| ARGUMENT | 3 |
| I. Questions on Discretionary Review | 3 |
| II. Decision of the Court of Appeals | 4 |
| <u>Carver v. Dennis,</u> 104 F.3d 847 (6 th Cir. 1997) | 4, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 |
| III. The decision of the lower Courts should be affirmed | 4 |
| A. The Appellant's right to candidacy was never adversely affected | 4 |
| <u>Allen v. Board of Education of Jefferson County,</u> 584 S.W.2d 408 (Ky. App. 1979) | 5, 6, 7, 12 |
| <u>Yonts v. Commonwealth ex rel. Armstrong,</u> 700 S.W.2d 407 (Ky. 1985) | 5, 7, 15 |
| KRS 160.180 | 5 |
| <u>Clements v. Fashing,</u> 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) | 5 |
| <u>Chapman v. Gorman,</u> 839 S.W.2d 232 (Ky. 1992) | 5, 7 |
| <u>Commonwealth ex rel. Stumbo v. Crutchfield,</u> 157 S.W.3d 621 (Ky. 2005) | 5, 7 |
| <u>Bullock v. Carter,</u> 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) | 6, 7 |

| | |
|---|---------------|
| B. The Russell Circuit Court and the Kentucky Court of Appeals correctly held that Appellant had no constitutional protection based on her candidacy | 6 |
| C. <u>Carver</u> is the appropriate analysis and should be followed | 8 |
| <u>Myers v. Dean</u> , 216 Fed. Appx. 552 (6 th Cir. 2007) | 9, 10, 11, 12 |
| <u>Greenwell v. Parsley</u> , 541 F.3d 401 (6 th Cir. 2008) cert. denied, 130 S.Ct. 64 (2009). 9, 10, 12, 16 | |
| <u>Murphy v. Cockrell</u> , 505 F.3d 446 (6 th Cir. 2007) | 10, 11 |
| <u>Stiles v. Blunt</u> , 912 F.2d 260 (8 th Cir. 1990) | 11 |
| <u>Newcomb v. Brennan</u> , 558 F.2d 825 (7 th Cir. 1997) | 11, 12, 13 |
| <u>Magill v. Lynch</u> , 560 F.2d 22 (1 st Cir. 1977) | 12 |
| <u>Finkelstein v. Bergna</u> , 924 F.2d 1449 (9 th Cir. 1991) | 12 |
| <u>Flinn v. Gordon</u> , 775 F.2d 1551 (11 th Cir. 1985) | 12 |
| <u>Washington v. Finlay</u> , 664 F.2d 913 (4 th Cir. 1981) | 12 |
| <u>Mancuso v. Taft</u> , 476 F.2d 187 (1 st Cir. 1973) | 12 |
| <u>Click v. Copeland</u> , 970 F.2d 106 (5 th Cir. 1992) | 12, 13 |
| <u>Jantzen v. Hawkins</u> , 188 F.3d 1247 (10 th Cir. 1999) | 12, 13 |

Connick v. Myers,
461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 13

IV. There was no Fourteenth Amendment violation 14

Becton v. Thomas,
48 F.Supp.2d 747 (W.D. Tn. 1999) 14

V. Appellees are regardless entitled to immunity 16

Harlow v. Fitzgerald,
457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 16

Jefferson County Fiscal Court v. Peerce,
132 S.W.3d 824 (Ky. 2004) 16, 17, 18

Will v. Michigan Department of State Police,
491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) 16

Caudill v. Hollan,
431 F.3d 900 (6th Cir. 2005) 16

Monell v. Department of Social Services,
436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 17, 18

Howlett v. Rose,
496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) 17

Graham v. Connor,
490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 18

CONCLUSION 18

COUNTERSTATEMENT OF THE CASE

The Appellant's Statement of the Case contains allegations which are not established facts of record in this case. Appellant has never raised any issue with the Findings of Fact of the Trial Court in the course of appeal. Those Findings are as follows:

1. The Plaintiff was employed as a Deputy County Court Clerk for Russell County from approximately February 2, 2004, through August 16, 2005. She was hired by the predecessor of the Defendant Lisha Popplewell, Russell County Court Clerk Bridget Popplewell, who is the sister of Defendant Lisha Popplewell.
2. Defendant Lisha Popplewell became the County Court Clerk of Russell County, Kentucky, in approximately October of 2004.
3. During the Plaintiff's employment as a Deputy Clerk, Clerk Popplewell did discuss with the Plaintiff and another Deputy Clerk a problem concerning a missed signature on a title. On another occasion, Clerk Popplewell discussed with the Plaintiff an allegation that the Plaintiff had been rude to a customer.
4. The Plaintiff did not receive any written reprimands, nor written evaluations, nor did any other deputy clerk.
5. The Plaintiff began considering seeking the elective office of the Russell County Court Clerk, i.e., seeking the position held by her supervisor, Lisha Popplewell, in the Spring of 2005.
6. The Plaintiff never discussed her intentions to run for the County Court Clerk's position with Defendant Lisha Popplewell.
7. The Plaintiff discussed her candidacy in the course of her employment as a Deputy Court Clerk with persons doing business in the County Court Clerk's Office. The Plaintiff also campaigned outside of work.
8. The Plaintiff did not discuss any problems or concerns about her employment or termination therefrom with the Russell County Judge Executive, or Magistrates/Members of the Russell County Fiscal Court.
9. The Plaintiff does take medication for depression and anxiety, but has been taking that medication for other reasons for many years. She denies having seen any mental health professional, psychiatrists or psychologists.

10. The Plaintiff did not have a written employment agreement as a Russell County Deputy Court Clerk.
11. Russell County has enacted an administrative code, which includes a section on political activity as follows: "Any employee while in the service of the County is not required to contribute to any political fund or be denied the rights of political activity, as specified by the Kentucky Revised Statutes."
12. The Plaintiff believes she was fired solely because she announced she was going to run against Lisha Popplewell for the County Court Clerk's position.
13. On August 10, 2006, less than one year after the termination, the Plaintiff instituted this action, claiming that her discharge violated the Constitution of the Commonwealth of Kentucky, and the First and Fourteenth Amendments of the United States Constitution, on the basis that her rights of freedom of speech, freedom of expression, freedom to seek public office, freedom of association, the exercise of political franchise, the exercise of political patronage, the right of enjoying life and liberty, and the right of freely communicating thoughts and opinions were violated. The Plaintiff further claims that the Defendant, Russell County, had the ultimate ability to direct the acts of the Defendant Lisha Popplewell, and "by its silence and unwillingness to correct the improper and arbitrary action of the Defendant Popplewell, and terminating the employment of the Plaintiff, furthered the denial of Plaintiff's liberties, rights and privileges accorded to her by the Kentucky and United States Constitutions." The Plaintiff instituted this action pursuant to 42 U.S.C. § 1983 with respect to the claims under the First and Fourteenth Amendments, and has also claimed a breach of duty of good faith and fair dealing, violation of public policy, violation of the Russell County Administrative Code, and infliction of emotional distress.

See Findings of Fact, Conclusions of Law, and Judgment, entered on May 30, 2008; see Appellant's Appendix to Brief, pp. A22-A24.

The key fact for purposes of this proceeding is that the Appellant herself believes she was terminated solely because she announced she was going to run against Lisha Popplewell for the County Court Clerk's position. *Id.*, paragraph 12 (A24); see also deposition of Appellant, p. 38. Appellant admitted that she never discussed her intentions to run for the County Court Clerk's position with Clerk Popplewell. *Id.*, paragraph 6 (A23); see also deposition of Appellant, p. 26.

Although Clerk Popplewell has denied that the Appellant's candidacy was the motivation for the termination decision, nevertheless, since Appellant herself so believes, the only question for review is whether the Appellant had any constitutional protection from being terminated by her employer for the Appellant's rival candidacy against her employer.

It is as important to note what facts are not of record in this case, i.e., what is not at issue. There is no evidence that the Appellant was terminated for engaging in campaign speech or campaign activities, or making any statement on any matter a public concern. There is no evidence of any involvement of whatsoever in the termination decision on the part of Russell County, nor any evidence of any official policy or custom implicated in the termination decision. As noted, Appellant never discussed any employment concerns, before or after her termination, with any Russell County officials. Judgment, paragraph 8 (A23). There is no evidence that Appellees inhibited in any way Appellant's candidacy or her campaign activities.

ARGUMENT

I. Questions on Discretionary Review

The Appellant sought and obtained Discretionary Review on two questions:

(1) Popplewell, the incumbent county clerk, fired Stacie, a deputy clerk, because of her intended rival candidacy for clerk. Did Popplewell's firing of Stacie violate her rights under the United States Constitution?

(2) Stacie sued Popplewell in her capacity as county clerk for her unlawful firing. Was Popplewell, therefore, entitled to sovereign immunity?¹

¹As acknowledged by Appellant in her Motion for Discretionary Review, Appellant admits that Clerk Popplewell contends Stacie was not terminated for her rival candidacy, but, rather, for performance and attitude issues. Appellant also acknowledges that she instituted these

II. Decision of the Court of Appeals

Although the Court of Appeals determined that Kentucky State Courts are not bound by opinions of the Sixth Circuit Court of Appeals, thus rejecting the position that Carver v. Dennis, 104 F.3d 847 (6th Cir. 1997) is determinative, nevertheless, the Court of Appeals held that the Supreme Court of Kentucky precedents likewise established there is no fundamental right to candidacy.² Commonwealth of Kentucky Court of Appeals Opinion Affirming, rendered May 15, 2009 (A15).

The Court of Appeals otherwise determined to follow the law of the Sixth Circuit with regard to Appellant's claimed violation of a liberty interest protected under the Fourteenth Amendment. Id., (A16-A19). The Court of Appeals declined to address the immunity issues, as the Appellant had not shown deprivation of any constitutional right and it was therefore unnecessary. Id. (A19).

III. The decisions of the lower Courts should be affirmed

A. The Appellant's right to candidacy was never adversely affected

The Court of Appeals properly determined that there is no fundamental right of candidacy, under either Federal or Kentucky precedent.

As a threshold matter, however, it is critical to note that the Appellant was never denied candidacy at all; she was entirely free to seek the elective office of County Court Clerk, and indeed did so. Significantly, she did not bring her claims against the Appellees until she was unsuccessful

claims against Clerk Popplewell only in her official capacity. See Motion for Discretionary Review on behalf of Stacie L. Cook, p. 2, footnote 1, and p. 4, section IV, paragraph 2.

²The decision of the Sixth Circuit Court of Appeals in Carver, supra, is described by Appellant as "the 800 pound gorilla in this case." Appellant's Motion for Discretionary Review, p. 6. In Carver, a deputy county clerk determined to run against her employer, the incumbent county clerk in the next election. A day after learning of the deputy's intentions to be a candidate, her employer, the county clerk, laid her off. The county clerk admitted that was the reason for the termination. The Carver decision is discussed elsewhere herein in detail.

in her bid for that office. Thus, at the outset, this situation must be distinguished from cases involving some type of restriction or qualification on candidacy, although the principles of those decisions are relevant. *Cp./cf.*, Allen v. Board of Education of Jefferson County, 584 S.W.2d 408 (Ky. App. 1979). In Allen, the Kentucky Supreme Court held that a school board policy requiring teachers to take a leave of absence when they seek elective office was overly broad and not rationally related to the purported interest of the employer. Id., p. 410.

However, in Yonts v. Commonwealth ex rel Armstrong, 700 S.W.2d 407 (Ky. 1985) this Court rejected a challenge under both the First and Fourteenth Amendments to a “resign to run statute,” upholding KRS 160.180 prohibiting eligibility to membership on a board of education to a candidate for the House of Representatives (incompatible offices). In Yonts, this Court cited with approval the United States Supreme Court determination that “resign to run” statutes did not violate constitutional rights, *and that candidacy is simply not a fundamental right.* Id., pp. 409-411, discussing Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). As this Court noted, **“the effect of the statute is not to impair Mr. Yont’s right of speech, but to bar him from continuing as the education board member if he chooses to run for political office.”** Id., p. 408 (emphasis added).

This case does not involve a “resign to run” statute. Nevertheless, it is germane that Yonts, like Cook, was free to run for the office of state representative, but he was not free to simultaneously retain his membership on a local school board. Also, the precedent that there is no fundamental right to candidacy is important to rebut Appellant’s unfounded contention to the contrary.

The Court of Appeals also referenced Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992) and Commonwealth ex rel. Stumbo v. Crutchfield, 157 S.W.3d 621 (Ky. 2005), which upheld anti-

nepotism statutes prohibiting certain relatives of school district employees from serving on the school board. This Court reaffirmed in those cases that candidacy is not a fundamental right, rejecting both equal protection and free speech challenges. These decisions are premised upon the United States Supreme Court decision of Bullock v. Carter, 405 U.S. 134, 142-143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (declining to apply strict scrutiny to limitations on candidacy). See Opinion of Court of Appeals, pp. 9; 13 (A10; A14).

B. The Russell Circuit Court and the Kentucky Court of Appeals correctly held that Appellant had no constitutional protection based on her candidacy

Appellant asserts that protection for candidacy is an issue of first impression, but, as the Court of Appeals aptly noted, the Supreme Court of Kentucky has already spoken on this issue. Whether considered under applicable federal precedent or state precedent, the outcome is the same: mere candidacy is not afforded protection as a fundamental right. Strangely, Appellant persists in reliance on the decision of Allen, *supra*, which is not on point, while asserting that much more analogous authority is not applicable.

In Allen, while the Kentucky Court of Appeals did quote general statements from U.S. Supreme Court decisions concerning First Amendment protection for political *association* and political *expression* [Id., p. 409], such sweeping pronouncements should not be misconstrued in a factual vacuum. *The actual holding of Allen, supra, was merely that the school board policy requiring teachers to take a leave of absence in order to seek elective office was overly broad and not rationally related to the purported interest of the employer.* Id., p. 410. Thus, despite the broad statements relied upon by Appellant, the Kentucky Court of Appeals actually applied the rational basis test to the school board policy at issue. In Allen, the Court of Appeals merely held that there

was insufficient evidence that teachers' performance would be hindered by seeking elective office.³

The Court of Appeals in this case appropriately cited precedents from this Court holding that there is no fundamental right of candidacy, and Appellant's attempts to distinguish those cases are not well taken. Both Chapman, supra, and Crutchfield, supra, involved challenges to the anti-nepotism statutes enacted as part of the Kentucky Education Reform Act. Relying on Bullock, supra, [also relied upon by the Sixth Circuit in the Carver decision, at pp. 850-851] and Yonts, supra, this Court agreed that there is no fundamental right to candidacy.

In Yonts, supra, this Court rejected a challenge under the First *and* Fourteenth Amendments to a "resign to run" statute, causing forfeiture of a school board member's office upon an unsuccessful candidacy for the legislature. This Court concluded that the statute at issue served a salutary purpose and that any burden on the rights of the candidate were insignificant. Id., p. 411.

Thus, Appellant's contention that this case presents a question of first impression is simply wrong; the lack of a fundamental right of status of candidacy is well established.⁴ The Appellant wishes to use the Allen case as support, yet disregard Chapman and Crutchfield. All are essentially "resign to run" cases; all applied the rational basis test to the written policy/statute at issues; all

³There is no conflict between the Allen decision and this case. For Allen to be relevant, the Appellant would have to show that the Appellees had an unqualified/absolute policy prohibiting a deputy clerk from seeking *any* elective office (*cp./cf.* merely refraining from running against one's own employer if she wished to remain so employed), *and* that such a policy lacked a rational basis.

⁴ Kentucky Courts have, at the most, applied a rational basis test to matters affecting candidacy, yet the Appellant inexplicably argues principles of fundamental status. There are no Kentucky decisions requiring a showing of a "compelling state interest" to justify limitations on candidacy.

declined to accord “fundamental” status to mere candidacy.⁵

Accordingly, since it is well-established by both Kentucky and federal precedent that there is no fundamental right of candidacy, the question is simply whether a public employee engaged in a rival candidacy against her very employer has the right to remain employed under those specific circumstances. Those are the simple facts of this case, and the Appellant’s attempt to frame the question more broadly should be rejected.

C. Carver is the appropriate analysis and should be followed

Significantly, Appellant chose to institute this litigation in State Court, while asserting claims under the United States Constitution, presumably with full knowledge of the precedent in Federal Court of Carver v. Dennis, *supra*. As noted, in Carver, a deputy county clerk, an at will employee, determined to run against her employer, the county clerk, in the next election. The county clerk laid her off one day after learning of her intention to be a candidate, and subsequently replaced her. The county clerk admitted that had her deputy not become a candidate, she would not have terminated her.

The District Court determined that the employer’s interest in avoiding the stressful work environment created by the rivalry outweighed the employee’s presumed rights under the First Amendment to seek elective office. Summary judgment was granted. On appeal, the Sixth Circuit reviewed the long history of the United States Supreme Court jurisprudence, framing the issue as whether the deputy clerk “had a First Amendment right to run against the incumbent clerk in the next election ***and still retain her job.***” *Id.*, p. 849 (emphasis added). That is exactly the question in this

⁵This case does not, as noted, involve a “resign to run” statute. However, the essential question is the same; are there some conflicts so inherent that a person much choose between particular candidacy and particular employment.

case.

The Sixth Circuit determined that the dismissal was for candidacy, not political beliefs. Id., p. 850. The Sixth Circuit considered but rejected any consideration that this was a patronage dismissal. Rather, the Court noted that “it was not a dismissal based on politics at all, except to the extent that running for public office is a political exercise in its broad sense.” Id. The Sixth Circuit noted that the Supreme Court has not applied close scrutiny to candidacy issues. Id., pp. 850-851.

Just as in this case, the deputy clerk Carver did not allege that she was terminated because of political beliefs or political speech; rather, just as in this case, the claim was that the county court clerk fired the deputy county court clerk simply because the deputy was trying to take the clerk’s job.

As the Sixth Circuit held:

... no reading of the First Amendment required Dennis to retain Carver after Carver announced her intention to run against Dennis for Dennis’ office. To hold otherwise, on the facts of this case, would be to read out of the entire line of relevant Supreme Court precedent the factual requirements of political belief, expression and affiliation, partisan political activity, or expression of opinion, and to read into that precedent a fundamental right to candidacy. The First Amendment does not require that an official in Dennis’ situation nourish the viper in the nest. Dennis’ discharge of Carver did not implicate Carver’s First Amendment rights.

Id., p. 853.

It would be difficult to find a case more on point. Although Carver has been criticized, it has never been overruled. Indeed, it has recently been revisited and upheld, in Myers v. Dean, 216 Fed. Appx. 552 (6th Cir. 2007) and most recently in Greenwell v. Parsley, 541 F.3d 401 (6th Cir. 2008) cert. denied, 130 S.Ct. 64, 175 L.Ed.2d 25 (2009). Myers and Greenwell are also on point with this case; the events at issue in Greenwell also arose in Kentucky.

In Myers, a deputy clerk and the incumbent clerk both sought the nomination for the clerk

position. When the incumbent clerk obtained the party nomination to run again, he terminated the deputy the very next day. The deputy clerk argued, as does Appellant here, a number of cases from other Federal Circuits which are simply not applicable, as the Court of Appeals correctly held in this case. Consistent with Carver, the Sixth Circuit in Myers properly made the distinction between mere candidacy and actual political expression.

In Greenwell, *supra*, a sheriff fired a deputy sheriff on the same day that the sheriff learned the deputy planned to run against him in the upcoming election. On review of the District Court's summary judgment in favor of the sheriff, the Sixth Circuit again upheld the applicability of Carver. The Court did review the cases critical of Carver, *supra*, but, noted that on facts such as these, where political speech was not involved, Carver remains controlling.

Judge Martin, concurring, sought to revisit Carver, commenting in colorful language that Carver is “. . . like a stray cat that hangs around the door and infests the house with fleas . . .”. *Id.*, p. 405. Nevertheless, Judge Martin recognized it as binding precedent.⁶

Appellant argues that Carver should be limited to a strict factual context; that it would only apply in a two-person Clerk's office. Such a limitation would be unwarranted; in all instances, it

⁶In Murphy v. Cockrell, 505 F.3d 446 (6th Cir. 2007), Judge Martin opined that dismissal of a rival candidate by the successful candidate for the same office after a “spirited” campaign did present First Amendment issues, as the plaintiff's campaign materials criticized the other, ultimately successful, candidate. Judge Martin's opinion includes a footnote reciting the same cases relied on by the Appellant and as noted in Myers, *supra*, without truly exploring the facts and holdings of those cases. Murphy, p. 450, footnote 1. Nevertheless, Judge Martin's opinion in Murphy still holds that a public employee may be terminated because of the fact of the employee's candidacy pursuant to Carver, *supra*. *Id.* However, the Court held that Murphy's speech *during the course of her campaign* was protected under the First Amendment, as “political” expression, and support of a political candidate is within the right of political association. *Id.*, p. 452 (emphasis added). In this case, there is no evidence that Appellant's speech was at all implicated.

would be unreasonable to require an employer to continue to employ someone who is actively campaigning to take the employer's own job.

Further, as the Court of Appeals noted, the factual differences between the instant case and Carver are not material. Appellant makes much of working in a separate office. While not of record, this Court is asked to take judicial notice of the geographic and demographic facts of Russell County, Kentucky: Russell Springs and Jamestown, the two principal cities in the county, are less than six miles apart. The population of the entire county is under 18,000. It is not as though Appellant and Clerk Popplewell were worlds apart.

As noted above, Appellant was entirely free to run for elective office, and to speak and act as she chose in the course of her campaign, and did so. She was simply not constitutionally entitled to do so while remaining in the employment of the incumbent and rival candidate. Thus, the cases relied upon by Appellant to assert that running for public office is protected by the First Amendment are simply inapplicable on these facts. As the Court of Appeals noted, not only has the U.S. Supreme Court declined to accord fundamental status/strict review to matters affecting candidacy, but most Federal Circuit Courts and the Courts of this Commonwealth have likewise so declined. (A9-A13).

The Court of Appeals did an excellent review of many of the cases cited by Appellant below (which are primarily the ones referenced in the Myers and Murphy cases, supra). Id. As noted, the actual holdings of most of those decisions do not support Appellant's claims, and/or they are factually distinct.⁷ As to the few contrary decisions, if Sixth Circuit decisions are not binding on Kentucky

⁷In Stiles v. Blunt, 912 F.2d 260 (8th Cir. 1990), minimum age requirements for candidates were upheld. In Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1997), the Court held that an employee could be terminated for reasons of personal loyalty, outweighing the employee's rights to seek elective office; that while political expression was protected, the plaintiff's interest in seeking office, by itself, was not entitled to constitutional protection. Id., p.

Courts, then obviously decisions from other Circuits or federal District Courts are not binding either. Nor are any of those other decisions persuasive, since none are as factually on point as Carver.

Even in the decisions of Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973) and Magill, *supra*, the First Circuit balanced the First Amendment interests with the competing interests at issue. As in the Allen decision, the Court in Magill ultimately held that *unqualified* restrictions on public employees from seeking public office were overly broad. That is not the issue here. In Magill, the Court noted: "The city could reasonably fear the prospect of a subordinate running directly against his superior or running for a position that confers great power over his superior." *Id.*, p. 29. That is, of course, the present situation and the fact pattern of Carver, Myers and Greenwell, *supra*.

The Appellant has added a couple of new citations to her Brief herein to support her assertion that "many other federal cases conclude that political candidacy is a constitutionally protected right ..." yet cites only two, Click v. Copeland, 970 F.2d 106 (5th Cir. 1992) and Jantzen v. Hawkins, 188 F.3d 1247 (10th Cir. 1999). Appellant's Brief, pp. 9-10. Of course, as already noted, there is certainly no authority for the proposition that decisions from the Fifth Circuit or the Tenth Circuit are binding on this Court. Second, the actual holding in Click, *supra*, was simply that the sheriff was not entitled to qualified immunity. Here, Appellant was obviously concerned about the qualified immunity jurisprudence in Kentucky, as Appellant chose not to name Clerk Popplewell in her individual

828. In Magill v. Lynch, 560 F.2d 22, 29 (1st Cir. 1977), the Court noted that some restrictions, including provisions to prevent internal dissension when a subordinate runs against a superior, are permissible. In Finkelstein v. Bergna, 924 F.2d 1449 (9th Cir. 1991), the plaintiff was not running against his employer. Several of the other cases cited by Appellant are merely dicta in otherwise factually distinct situations. *E.g.*, Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985), Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981).

capacity, thus evading the qualified immunity defense.⁸

The Tenth Circuit decision in Jantzen, supra, actually supports the Appellees herein, not Appellant. The Tenth Circuit agreed with the analysis of Carver, supra, with regard to the issue of whether the deputy sheriff who became a rival candidate was protected from termination, holding he was not. Jantzen, supra, pp. 1251-1252. The other component of the decision in Jantzen concerned patronage dismissals, that is, a question of whether *other* employees were entitled to protection for their political *speech* in favor of the rival deputy candidate. Id. There is no contention that this is a patronage dismissal, and thus Jantzen actually follows Carver and supports the position of the Appellees herein.

There are well established and well grounded distinctions between First Amendment jurisprudence involving mere candidacy from cases involving political speech and affiliation. The First Amendment does not protect all speech or activities, but, rather, only speech/actions on matters of public concern. *E.g.*, Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Candidacy, in and of itself, is only in the candidate's own self interest of achieving elective office. Newcomb, supra, (n. 7). Accordingly, the Courts have long distinguished cases in which employees complain or act, no matter how legitimately, about grievances in their own interests, as opposed to matters of public concern.⁹

⁸The Fifth Circuit in Click, of course, also did not have the benefit of review of the Sixth Circuit decision in Carver v. Dennis, which was not decided until some five years later. Many of the decisions relied upon by Appellant were decided pre-Carver.

⁹With due respect to Judge Martin of the Sixth Circuit and Judge Stumbo of the Kentucky Court of Appeals, they have overlooked this distinction, and overlooked the distinction between candidacy, which has not been impaired, and continued employment by the rival candidate, which is not constitutionally protected.

Even assuming that Appellees did have the burden to show some rational basis for the termination, nevertheless, that rational basis is abundantly clear. As noted in Carver, supra, it would indeed be irrational in the extreme to require an incumbent elected official, which official is seeking re-election, to continue to employ someone who is undermining the elected official's very office. In this case, to require Clerk Popplewell to continue to employ Stacie Cook as a deputy clerk, when Stacie Cook would be running against Clerk Popplewell, in a small office within a small county, defies common sense. It would essentially require Clerk Popplewell to not only tolerate an employee actively engaged in taking away the employer's own job, but also, to add insult to injury, to pay the employee for doing so. Indeed, in the apt language of Carver, there is simply no requirement for an employer in that circumstance to "nourish the viper in the nest." Carver, supra, p. 853.

IV. There was no Fourteenth Amendment violation

Appellant's sole support for her contention that she had a separate right to candidacy under the Fourteenth Amendment is a federal district court case from another state, Becton v. Thomas, 48 F.Supp.2d 747 (W.D. Tn. 1999). Becton was not a final adjudication, but rather considered preliminary injunctive relief. The Court balanced competing interests, recognizing that the right to seek public office could be qualified. Id., p. 759. The facts are distinct; in Becton; the employee-candidate had begun her candidacy against a rival who was not then even another employee, much less her employer, at that time.

While the Court in Becton found a liberty interest as an alternate grounds for constitutional protection, the decision merely asserts "since the freedom or opportunity to run for political office is a liberty interest under the Fourteenth Amendment's Due Process Clause, a state cannot deny or infringe that liberty interest unless it can offer reasonable justification or rational basis for doing so."

While the Tennessee District Court did enjoin the employer from filling the plaintiff's former position pending a decision on the merits, the District Court declined to reinstate the plaintiff at that juncture.

As noted by the Court of Appeals, the Kentucky Courts and the Sixth Circuit have rejected Fourteenth Amendment challenges in this context. The Due Process of Clause of the Fourteenth Amendment simply provides that a person may not be deprived of "life, liberty, or property without due process of law." Nothing done by the Appellees herein deprived Appellant of life, liberty, or property; she was an at will employee, who was permitted to be a candidate for the clerk position. She was neither deprived of liberty nor property by the termination of her at will employment when she chose to try to unseat her very employer.

In Yonts, supra, this Court rejected the candidate's challenge under the Fourteenth Amendment as well as under the First Amendment, albeit couched as an equal protection interest, not a liberty interest. There is nothing at stake under the Fourteenth Amendment which changes the applicability of the analysis: an at will public employee simply cannot expect an unfettered right of continued employment while actively seeking to unseat his/her employer, and there is no liberty interest implicated when the person is free to choose candidacy.

In sum, the Appellees do not have to show a rational basis or any governmental interest which outweighs the Appellant's rights of either liberty or free speech, because, quite simply, Appellees did nothing whatsoever to interfere with those rights. The Appellant insists on arguing a case that does not exist. This is not a freedom of speech/political activity case. This is not a candidate qualification case. This is not a patronage case. At all times Appellant was free to file for office, engage in political activity designed to gain that office, and do all she could to unseat the incumbent clerk. She

was simply not entitled to do so while continuing to be employed by the said incumbent clerk/rival candidate. There is nothing in either state law or federal law which would give the Appellant such a right, and her citations to inopposite authority are to no avail. The facts and law in this case are virtually identical with Carver, supra, and Greenwell, supra. There is nothing in Kentucky law which changes in any material way the analysis of those decisions.

V. Appellees are regardless entitled to immunity

Appellant deliberately chose to name Appellee Popplewell only in her official capacity. Presumably, Appellant did so with the recognition that any claim against Clerk Popplewell in her individual capacity would be barred by the doctrine of qualified immunity. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Jefferson County Fiscal Court v. Pearce, 132 S.W.3d 824, 833-834 (Ky. 2004).

It is well established that a suit against an official in his or her official capacity is not a suit against the official but is rather a suit against the official's office: Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). A claim against the governmental office, in this case either Russell County or the Russell County Clerk, must assert that the violation resulted from the entity's official policy or custom. *E.g.*, Caudill v. Hollan, 431 F.3d 900, 915 (6th Cir. 2005). As noted in Hollan, in order to maintain a suit against a county clerk in her official capacity, the Appellant would have to show that the county clerk had final authority to establish an official policy of refusing to hire deputy clerks for political or patronage reasons. Hollan, supra, pp. 914-915. There is no such evidence.

There is no evidence of any wrongful conduct whatsoever by Russell County. Appellant never discussed her termination with Russell County officials. There cannot be *respondeat superior* liability

for claims under 42 U.S.C. Section 1983. *E.g.* Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Thus, the Appellant has failed to state a claim against either Appellee at all.

The Appellant's reliance on Peerce, *supra*, is misplaced. In Peerce, relying upon Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), this Court noted that a person whose conduct is wrongful (actionable) under 42 U.S.C. § 1983 is not entitled to immunity under state law. The fundamental problem, as above, is that there has been no wrongful conduct at all by either Appellee, and no viable claim stated under 42 U.S.C. Section 1983.

The reasoning of Howlett, *supra*, should regardless not be applied in Kentucky. Howlett is premised upon the disparate treatment of claims brought in Florida in state court as opposed to federal court. Howlett was intended to prevent forum shopping, but, unfortunately, has been misconstrued elsewhere with the opposite effect. While admittedly Howlett has been relied on in both state and federal courts in Kentucky, as in Peerce, it never should have been; no such discrepancy exists under Kentucky law. Accordingly, the Appellees are entitled to sovereign immunity as to all claims which otherwise might have been applicable, but, regardless, no claim actionable under 42 U.S.C. § 1983 was ever established.

Howlett's principle, however, is relevant to this question: why should a state court entertain claims under federal law which would not be sustainable in federal court? Obviously, the state courts should not. The Appellant is attempting to evade well established precedent by bringing her federal claims in state court, recognizing that in federal court Carver would be dispositive.

The Appellant also skirts the doctrine of qualified immunity by naming Clerk Popplewell only in her official capacity. However, in so doing, the Appellant has outmaneuvered her own causes of

action. The Appellant has not shown anything that Russell County did to deprive her of any interest whatsoever. Accordingly, whether or not Clerk Popplewell was entitled to terminate the Appellant for her candidacy, it ultimately does not matter. By bringing the claims only against the office, and by failing to show any official policy or custom at issue, the Appellant's claims regardless fail.

It bears repeating that 42 U.S.C. § 1983 is not a separate source of substantive rights, but, rather, is simply a mechanism for vindicating federal rights otherwise provided. *E.g.*, Graham v. Connor, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Accordingly, the fact that Cook has brought her claims pursuant to 42 U.S.C. § 1983 does not entitle her to bypass substantive law. Peerce, supra, stands for the proposition that there is no Eleventh Amendment immunity to § 1983 claims in state court since there would not be in federal court, but, also, that the § 1983 claims are governed by federal law. claims have effectively been made only against Russell County. Absent evidence that Russell County did anything wrong, and since Russell County cannot be held liable under a *respondeat superior* theory, there is just no actionable claim at all under 42 U.S.C. § 1983. Monell, supra, p. 691.

CONCLUSION

Wherefore, for all the foregoing reasons, it is respectfully submitted that this Court should affirm the Opinion of the Court of Appeals which in turn affirms the Opinion of the Russell Circuit Court.

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