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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2002-CA-000990-MR

JOSEPH R. LEWIS

APPELLANT

v. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
CIVIL ACTION NO. 98-CI-00037

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION CABINET

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: PAISLEY and TACKETT, Judges; and HUDDLESTON, Senior
Judge.¹

HUDDLESTON, Senior Judge: Joseph R. Lewis appeals from a
summary judgment granted by Leslie Circuit Court in favor of his

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge
by assignment of the Chief Justice pursuant to Section 110(5)(b)
of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

former employer,² the Natural Resources and Environmental Protection Cabinet, in this action challenging the constitutionality of Kentucky Revised Statutes (KRS) 18A.140.³

As correctly observed by the circuit court, the relevant facts⁴ of this controversy are not in dispute and are as follows:

² Lewis is also appealing from the simultaneous denial of his own motion for summary judgment. Under Ky. R. Civ. P.(CR) 56.03, the general rule is that such a denial is, "first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact." Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Leneave, Ky. App., 751 S.W.2d 36, 37 (1988). However, there is an exception to the general rule which applies when, as is the case here, the following criteria are met: "(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." Ky. App., 751 S.W.2d 36, 37 (1988).

³ KRS 18A.140(4) provides that:

No employee in the classified service or member of the board or its executive director shall be a member of any national, state, or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. Officers or employees of the classified service may be candidates for and occupy a town or school district office if the office is one for which no compensation, other than a per diem payment, is provided and the election is on a nonpartisan basis.

⁴ Although the circuit court purports to make findings of fact, such findings are inappropriate in the context of a

. . . [Lewis] was a classified employee with the [Cabinet]. On or about January 12, 1998, [Lewis] informed the [Cabinet] that he intended to become a candidate for public office. He was advised in writing by [the Cabinet] that KRS 18A.140 required him to resign his position as a classified employee. After [Lewis] filed his declaration to be a candidate for the Leslie County Property Valuation Administrator without resigning, [the Cabinet] informed him in writing of its intention to dismiss him from his position as Environmental Technologist Chief in the Division of Abandoned Mine Lands based on his violation of KRS 18A.140 and 101 KAR [Kentucky Administrative Regulations] 1:345, Section 1. Following a pre-termination hearing with the appointing authority's designee, [Lewis's] employment with the [Cabinet] was terminated effective close of business, February 9, 1998. [Lewis] did not appeal his termination to the Kentucky Personnel Board.

summary judgment. When ruling on a motion for summary judgment, the court must refrain from deciding issues of fact, simply examining the evidence to determine if a genuine issue as to any material fact exists. CR 56.03. Here, the court apparently determined that no genuine issue existed as to these material facts which it presumably set forth to clarify the basis for its decision in order to assist with the review process.

Instead, he filed this action in which he challenges the constitutionality of KRS 18A.140.

In his complaint, Lewis alleged that KRS 18A.140 is unconstitutional as applied to him because “[i]t violates [his] rights to political belief and association and freedom of speech which protects political association as well as political expression.” According to Lewis, “the policy behind KRS 18A.140 is overbroad in that it imposes mandatory termination upon [Lewis] or requires him to resign without any determination as to whether or not the political activity [in] which he is engaged or [in] which he proposes to engage would adversely affect the performance of his duties . . .” In his view, KRS 18A.140 “and the penalty section relevant thereto”⁵ operate to deprive him of equal protection as guaranteed by both the Kentucky and United States Constitutions. Lewis further contended that “the classification to which [he] has been subjected is unreasonable and not rationally related to the

⁵ KRS 18A.990(3) provides:

Any officer or employee of the classified service who willfully violates any of the provisions of KRS 18A.140 shall forfeit his office or position, and for one (1) year shall be ineligible for any office or position in the Commonwealth’s service. Violation of KRS 18A.140 shall constitute a misdemeanor subject to a sentence of from thirty (30) days to a maximum of six (6) months in jail.

interests which are sought to be protected." Thus, he sought a temporary and permanent injunction enjoining the Cabinet from suspending him, requiring him to take a leave of absence, terminating him, prosecuting him or otherwise imposing sanctions in the event that he announced his candidacy for PVA.

Relying upon Yonts v. Commonwealth,⁶ the circuit court observed that both the United States Supreme Court and the Kentucky Supreme Court have held that "[r]esign-to-run" statutes do not violate the First Amendment, emphasizing that "[c]andidacy for public office is not a fundamental right." Further, the court determined that "the effect of the statute is not to impair [Lewis's] First Amendment rights but to bar him from continuing as a classified employee if he chooses to run for office."

In rejecting Lewis's equal protection argument, the circuit court engaged in the following analysis:

Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. They are set aside only if they are based on reasons totally unrelated to the state's

⁶ Yonts v. Commonwealth of Kentucky, Ky., 700 S.W.2d 407 (1985), citing Clements v. Fashing, 457 U.S. 957, 102 S. Ct. 2836, 73 L. Ed. 2d 508 (1982).

goals and only if no grounds can be conceived to justify them. Courts have departed from tradition[all] equal protection principles only when the challenged statute places burdens on suspect classes of persons or on fundamental constitutional rights. Barriers to a candidate's access to the ballot do not of themselves compel close scrutiny.^[7] The [U.S.] Supreme Court has afforded close scrutiny only when the classification is based on wealth or imposes burdens on new or small political parties or on independent candidates.^[8] Since [Lewis] does not challenge the statute on either of these bases [and] is not a member of a suspect class of persons[,], the classification must only have a rational predicate to a legitimate state interest.

KRS 18A.140 is part of a comprehensive legislative scheme designed to separate the public services provided by its classified employees from political considerations and influences. The Commonwealth, as an employer, has a legitimate interest in having its classified employees devote

⁷ Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

⁸ Clements, supra, n. 6.

their full and unhampered attention to their public duties and [] avoid even the hint of impropriety as to the rendition of those services. With its restrictions on the political activities of classified employees and the protections it provides those employees from political pressures, KRS 18A.140 is rationally related to the state's goal. As such, it does not offend the equal protection provisions of either the federal or state constitutions.

Citing Broadrick v. Oklahoma,⁹ in which the U.S. Supreme Court upheld the validity of a statute that parallels KRS 18A.140, the court also concluded that the statute does not violate equal protection guarantees simply because it distinguishes between classified and non-classified state employees. On appeal, Lewis's arguments echo those he made below.

Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary

⁹ 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1972).

judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."¹⁰

On appeal from a summary judgment, our function is to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."¹¹ Since there are no factual findings at issue, deference to the trial court is not required.¹² Rather, when the dispositive issue is purely a question of law, as is the case here, our review is de novo.¹³

Statutes enacted by the General Assembly are presumed valid.¹⁴ Thus, those attacking the rationality of a legislative classification have the burden of refuting every conceivable basis that might support it.¹⁵ In short, Lewis has failed to meet that burden.

¹⁰ Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

¹¹ Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

¹² Id.

¹³ Bob Hook Chevrolet Isuzu v. Commonwealth of Kentucky, Transportation Cab., Ky., 983 S.W.2d 488, 490 (1999).

¹⁴ Clements, supra, n. 6, 457 U.S. at 962, 73 L. Ed. 2d at 515; Roberts v. Mooneyhan, Ky. App., 902 S.W.2d 842, 844 (1995).

¹⁵ Id.

In Clements,¹⁶ the U.S. Supreme Court was confronted with the question of whether two provisions¹⁷ of the Texas constitution that limit a public official's ability to become a candidate for another public office violate the Equal Protection Clause of the Fourteenth Amendment. As observed by the Court, the Equal Protection Clause allows states "considerable leeway to enact legislation that may appear to affect similarly situated people differently."¹⁸ After establishing the

¹⁶ Supra, n. 6.

¹⁷ At issue in Clements were Article III, § 19 and Article XVI, § 65 of the Texas Constitution. Article III, § 19 provides:

No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

Article XVI, § 65 (commonly referred to as a "resign-to-run" or "automatic resignation" provision), in relevant part, provides:

[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held. Id., 457 U.S. at 960, 73 L. Ed. 2d at 513.

¹⁸ Id., 457 U.S. at 962, 73 L. Ed. 2d at 515.

guidelines to be applied in the present context as aptly outlined by the circuit court, the Court held that both § 19 and § 65 rest on a rational predicate and, therefore, survive a challenge under the Equal Protection Clause.¹⁹ With respect to the appellee's alternative argument that § 19 and § 65 violate the First Amendment, the Court held:

Our analysis of appellees' challenge under the Equal Protection Clause disposes of this argument. We have concluded that the burden on appellees' First Amendment interests in candidacy are so insignificant that the classifications of § 19 and § 65 may be upheld consistent with traditional equal protection principles. The State's interests in this regard are sufficient to warrant the de minimis interference with appellees' interests in candidacy.²⁰

Because the statute in question parallels the foregoing provisions in significant part, this reasoning is equally applicable here.

Yonts, cited by both parties as well as the court, provides further support for this position, albeit in a slightly different context. In that case, the Attorney General filed an

¹⁹ Id., 457 U.S. at 970, 73 L. Ed. 2d at 520.

²⁰ Id., 457 U.S. at 971, 73 L. Ed. 2d at 521.

action pursuant to KRS 160.180²¹ seeking to declare forfeited the office of Brent Yonts, a member of the Board of Education for the Greenville Independent School District, when he filed and ran for the Democratic nomination for state representative from his legislative district.²² In rejecting Yonts's argument that the statute is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution, the Supreme Court adopted the circuit court's opinion as its own:

The 'free speech' argument evokes but little reaction in this circuit court. The law complained of is generally called a 'resign-to-run' statute. The effect of the statute is not to impair Mr. Yonts'[s] right of speech, but to bar him from continuing as an education board member if he chooses to run for political office. The general purpose and authority for these statutes was explained by the [then]

²¹ In relevant part, KRS 160.180 renders any person who holds a state office requiring the constitutional oath or is a member of the General Assembly ineligible for membership on a board of education. Once elected, any board member who becomes a candidate for nomination or election to any office or agency for which he would have previously been ineligible is subject to removal from office.

²² Supra, n. 6, 700 S.W.2d at 407.

Kentucky Court of Appeals in Adams v. Commonwealth,^[23]
thusly:

'Ordinarily, the courts look to the legislature for declarations of public policy or of the public interest. Upon examining the legislative enactments relating to boards of education, we *find running through them a clear expression of policy that such board members shall be divorced from political considerations.*(emphasis added)

* * *

The Supreme Court of the United States in 1982, in the case Clements v. Fashing,^[24] dispensed the current and last word on the constitutional health of 'resign-to-run' statutes.²⁵

Since any question regarding whether resign-to-run statutes such as KRS 18A.140 survive challenges under the First and Fourteenth Amendments has been conclusively resolved in Clements and Yonts, the same outcome necessarily follows here.

Likewise, Lewis's overbreadth argument must fail. In Broadrick, the U.S. Supreme Court was confronted with the

²³ Ky., 268 S.W.2d 930 (1954).

²⁴ Supra, n. 6.

²⁵ Yonts, supra, n. 6., at 408.

question of whether two paragraphs of § 818 of Oklahoma's Merit System of Personnel Administration Act, are unconstitutionally vague and/or overbroad.²⁶ Section 818 "restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees."²⁷ As observed by the Court, §

²⁶ Supra, n. 9.

²⁷ Id., 413 U.S. at 602, 37 L. Ed. 2d at 834

With respect to the relevance of the Hatch Act, the Cabinet offers the following analysis regarding the legislative intent behind KRS 18A.140 which we deem persuasive:

In OAG 94-3, the Kentucky Attorney General took an in-depth look at KRS 18A.140(4), comparing it to corresponding language in the Hatch Act, and noting that the statute (formerly KRS 18.310) was enacted in 1960 as part of the act creating the merit system for state employment:

Shortly after the adoption of [that act], we said that it 'was designed to prohibit pernicious political activity on the part of classified employees and prohibit them from holding party offices and participating in political campaigns.' OAG 60-1183.

The Attorney General concluded that the construction of KRS 18A.140(4) does not differ in any material respect from the construction given to corresponding portions of the Hatch Act, since "both statutes are intended to prevent an organized political party from exerting its influence on government employees in a manner that unfairly strengthens the party's power or inhibits the efficient operation of government." OAG 94-3 at p.6.

The dispositive provision in the Hatch Act states that an individual employed in the Executive Branch of federal government "may not . . . run for the

818 "serves roughly the same function as the analogous provisions of the other 49 States and is patterned on § 9(a) of the Hatch Act."²⁸

According to the appellants, the statute purported to reach protected as well as unprotected conduct and, therefore, was incapable of any constitutional application.²⁹ However, the Court concluded that the overbreadth doctrine could not be invoked in that manner on the facts presented.³⁰ Because § 818 is "not a censorial statute, directed at particular groups or viewpoints," but, rather, "seeks to regulate political activity in an evenhanded and neutral manner," the Court applied a less exacting overbreadth scrutiny.³¹

nomination or as a candidate for election to a partisan political office." 5 U.S.C.A. § 7323(a)(3). There is no qualifying or conditional language; the prohibition is clear.

²⁸ Id. On the same day, the Court rendered its decision in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), in which the Court held that the Hatch Act is not impermissibly vague. Because Lewis does not allege that KRS 18A.140 is impermissibly vague, further discussion as to the Court's treatment of this issue is unnecessary.

²⁹ Id., 413 U.S. at 610, 37 L. Ed. 2d at 838.

³⁰ Id., 413 U.S. at 610, 37 L. Ed. 2d at 839.

³¹ Id., 413 U.S. at 616, 37 L. Ed. 2d at 842.

Citing its decision in Letter Carriers as authority, the Court said: "[T]here is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office . . ." ³² Accordingly, the Court did not believe that § 818 had to be "discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute," and, thus, held that § 818 is not substantially overbroad. ³³ In light of this dispositive authority, the circuit court properly determined that KRS 18A.140 is not unconstitutionally overbroad.

Consistent with the foregoing, the judgment upholding the constitutionality of KRS 18A.140 is affirmed.

ALL CONCUR.

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³² Id., 413 U.S. at 616, 37 L. Ed. 2d at 843.

³³ Id., 413 U.S. at 617, 37 L. Ed. 2d at 843.