RENDERED: MAY 15, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

SUPREME COURT GRANTED DISCRETIONARY REVIEW:
JANUARY 13, 2010
(FILE NO. 2009-SC-0341-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001249-MR

STACIE L. COOK — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR, JUDGE
ACTION NO. 06-CI-00275

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: Stacie L. Cook appeals from a summary judgment of the Russell Circuit Court that was granted to Lisha Popplewell, in her official capacity as the Russell County Clerk, and to Russell County. Cook had brought an action pursuant to 42 U.S.C. § 1983, claiming that her rights under the First and Fourteenth Amendments to the U.S. Constitution had been violated when she was discharged from her employment as a deputy county clerk, allegedly for seeking to run against Popplewell in an upcoming election. The court awarded summary judgment to Popplewell and Russell County on the ground that Cook's claims were not actionable under the holding in *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997), and on the ground that the defendants were protected by sovereign immunity. We affirm.

Cook was hired as a deputy court clerk in February 2004 by Bridget Popplewell, who was then the Russell County Clerk. There was no written employment agreement. Bridget subsequently retired, and in October 2004, Bridget's sister, Lisha Popplewell, who was then serving as a deputy clerk, was appointed as the Russell County Clerk to serve out Bridget's unexpired term.

Popplewell was required to stand for election in 2006 in order to continue to hold the office. According to Cook, Popplewell learned that Cook was planning to run for the position as well and, on August 16, 2005, summarily terminated Cook's employment as a deputy clerk for that sole reason. Popplewell denies that she fired Cook in retaliation for her candidacy and claims that she discharged her for poor work performance.

On August 10, 2006, Cook filed a civil complaint in the circuit court pursuant to 42 U.S.C. § 1983, naming Popplewell in her official capacity and Russell County as defendants. She claimed that her discharge violated the Kentucky Constitution and the First and Fourteenth Amendments of the U.S. Constitution, specifically her rights to the "exercise of the freedom of speech, the freedom to express her political beliefs, the freedom to seek public office, the 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[.]" She also asserted claims for breach of the duty of good faith and fair dealing, violation of public policy, violation of the Russell County Administrative Code, and infliction of emotional distress.

After completion of discovery, Popplewell and Russell County filed a motion for summary judgment that the court granted. The court relied on the *Carver* case and rejected Cook's claims of violation of her rights under the First and Fourteenth Amendments. The court further determined that Cook's other claims were either subsumed in her constitutional claims or unsupported by the facts and law and that the defendants were protected by sovereign immunity. This appeal by Cook followed.

Cook has raised three arguments on appeal. First, she contends that the circuit court erred in relying on the *Carver* case as binding authority in rejecting her First and Fourteenth Amendments claims. Second, she argues that

those claims have merit. Finally, Cook argues that the court erroneously held that the defendants were protected by sovereign immunity.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

I. The First Amendment Claim

In awarding Popplewell and Russell County summary judgment on Cook's claim that her discharge violated her rights under the First Amendment, the circuit court held that "[b]eing a candidate for a political office is simply not a fundamental right." It relied on the *Carver* case, a factually-similar case that it described as "binding precedent."

In *Carver*, a deputy county clerk was fired after she announced her candidacy against the incumbent clerk. After acknowledging that the "First

Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern[,]" *id*. at 849, the Sixth Circuit court noted that there was no evidence whatsoever in the record that the deputy clerk had lost her position because of her political beliefs or affiliations. *Id*. at 850. Instead, the court noted that she was fired solely for her rival candidacy. *Id*.

The court concluded that Carver did not have a claim under the First Amendment because the U.S. Supreme Court "has never recognized a fundamental right to express one's political views through candidacy." *Id.* at 850-51. Further, the court stated that the "First Amendment does not require that an official in [the incumbent clerk's] position nourish the viper in the nest." *Id.* at 853. The court concluded by announcing that the discharge of the deputy clerk did not implicate her First Amendment rights.[2] *Id*.

Similarly, in Cook's case, there is no evidence that she was fired for her political beliefs or affiliations or that she ever expressed any political views relating to her candidacy. In fact, Cook acknowledges that she was fired solely because of her candidacy.

Cook concedes that "if *Carver* is binding precedent on Kentucky state courts, then [she] loses." In addition to arguing that *Carver* is not binding precedent on Kentucky state courts, Cook criticizes the holding in *Carver* for

[2] The court was careful, however, to narrowly define the issue before it as "whether Carver, a deputy county clerk who was an at-will employee in a two-person office – the other person being the county clerk herself – had a First Amendment right to run against the incumbent clerk in the next election and still retain her job." *Id*. at 849.

proceeding on the assumption that the U.S. Supreme Court would hold that the right to run for office is not afforded any protection under the First Amendment. She also draws our attention to opinions from other federal courts that she claims have questioned, distinguished, and rejected the holding in *Carver*. Finally, Cook argues that her case is so factually dissimilar from *Carver* that *Carver* does not apply.

Although the circuit court herein stated that the *Carver* case is binding precedent, we are not aware of any authority that holds that the opinions of the Sixth Circuit of the U.S. Court of Appeals are binding authority on Kentucky state courts. In 20 Am. Jur. 2d *Courts* § 148 (2008), it is noted that the states have different views concerning whether a state court is bound by the decisions of a federal court other than the U.S. Supreme Court. "Some jurisdictions adhere to the view that a state court is not bound by decisions of a federal court other than the United States Supreme Court, even though a federal question is involved." *Id*. On the other hand, "other jurisdictions follow the view that in the absence of an opinion of the United States Supreme Court, a decision of a lower federal court as to federal law is binding on state courts." *Id*.

In *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), Justice Thomas stated in a concurring opinion that

> [N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than

> that of the federal court of appeals in whose circuit the trial court is located.

506 U.S. at 376, 113 S.Ct. at 846. In *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989), the U.S. Supreme Court stated that "state courts . . . possess the authority, absent a provision of exclusive jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." Finally, the Supreme Court of Kentucky stated in *Commonwealth Natural Resources v. Kentec Coal Co., Inc.*, 177 S.W.3d 718 (Ky. 2005), that "[d]ecisions of lower federal courts are not conclusive as to state courts." *Id*. at 725. We conclude that the trial court in this case was not bound to follow the *Carver* case.

Cook has asserted in her brief that "almost every federal circuit has recognized the First Amendment right to candidacy[.]" A review of decisions from the federal circuit courts reveals otherwise. For example, in addition to the Sixth Circuit's pronouncement in *Carver*, the Seventh Circuit stated in *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995), that "[t]he associational rights of political parties are fundamental rights, whereas the right to candidacy is not." (Citation omitted). The Tenth Circuit stated in *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997), that "candidacy is not a fundamental right." In *N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997), the Ninth Circuit stated that "[c]andidates do not have a fundamental right to run for public office." Also, the Fifth Circuit stated in *Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988), that "[t]here is no fundamental right to

be a candidate." And, the Eighth Circuit stated in *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990), that "the right to run for public office is not a fundamental right." *Id*. at 266, n.10.

There are a number of federal circuit cases upon which Cook relies to support her assertion that "almost every federal circuit has recognized the First Amendment right to candidacy[.]" Her reliance appears to be based on Judge Martin's concurring opinion in *Greenwell v. Parsley*, 541 F.3d 401 (6th Cir. 2008), wherein he stated that *Carver* "puts us in opposition with as many as six other circuits, which have held that firings based on one's political candidacy do violate the First Amendment." *Id*. at 405. Judge Martin then cites in a footnote the cases upon which Cook relies.[3] *Id*. at n.1. Upon close inspection, it is apparent that those cases are not as supportive of Cook's argument as she claims.

In *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977), the Seventh Circuit did not decide the case based on a First Amendment right to candidacy. *See id*. at 828. In fact, the court stated that

> We would therefore have to affirm the dismissal of the complaint without ever reaching the ground on which the district court relied if plaintiff's First Amendment claim was based solely on a purported right to seek public office. As we read the complaint, however, it implicates interests which are broader than a per se right to candidacy.

Id.

[3] Judge Martin also makes reference to these other federal cases in *Murphy v. Cockrell*, 505 F.3d 446, 450 n.1 (6th Cir. 2007).

Furthermore, the *Newcomb* court acknowledged that the U.S. Supreme Court "has not heretofore attached such fundamental status to candidacy[.]" *Id.*, (quoting *Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972)). The *Newcomb* court then concluded that "[t]hese decisions indicate that plaintiff's interest in seeking office, by itself, is not entitled to constitutional protection." *Id*. In other words, a careful reading of *Newcomb* reveals that it is not at odds with *Carver*. More importantly, the Seventh Circuit has since plainly stated in *Brazil-Breashears* that the right of candidacy is not a fundamental right. *See id*.

Cook also cited *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991). The Ninth Circuit in *Finkelstein* referred to the *Newcomb* case, which we discussed above. *See id*. at 1453. The Ninth Circuit concluded that the *Newcomb* court had upheld a "blatant political firing," emphasizing that in that case the employee was (like Cook) an at-will employee. *Id*. Ultimately, the Ninth Circuit reversed the lower court and directed that summary judgment be awarded to the employer on the employee's First Amendment claims. *Id*. at 1454. Furthermore, the Ninth Circuit clearly held several years later in the *N.A.A.C.P.* case that there is no fundamental right to candidacy. *Id*. at 1324.

Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985), is another case upon which Cook relies to support her argument. As stated by Cook in her brief, the *Flinn* court declared that "he [the appellant therein] certainly had a constitutional right to run for office[.]" *Id*. at 1554. It is important to note, however, that the

statement was dictum and was unrelated to the holding in the opinion. Further, no legal authority was cited to support it. Also, the case did not involve a discharge of employment, as in the case herein, in *Carver*, and in other cases cited by the parties.

Likewise, in *Washington v. Finlay*, 664 F.2d 913 (4th Cir. 1981), another case cited by Cook to support her argument, the reference by the Fourth Circuit to "[t]he first amendment's . . . rights to run for office," *see id.* at 927, was a broad statement made without citing supporting legal authority, was not essential to the court's decision, and was not made in the context of a case involving a discharge of an employee.

Cook has also cited *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008). There, however, the Fifth Circuit noted the "particular circumstances" and "uniqueness" of the case before it and distinguished it from the facts in *Carver* by stating that "the instant case is distinguishable because of Jordan's protected activities in 2002 and the continuing political affiliation; *Carver* itself suggests that such facts would take a case from its reach." *Id*. at 298.

Finally, Cook refers to the First Circuit's decision in *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977). That case involved city employees (firemen) who were prohibited by a city charter from being a candidate for any elective city office. The First Circuit unequivocally stated that "[c]andidacy is a First Amendment freedom." *Id*. at 29. The court also referenced its "view that political candidacy was a fundamental interest which could be entrenched upon only if less restrictive

alternatives were not available." *Id*. at 27. The court ultimately concluded that the city's interests in having the restriction were "sufficiently important" to outweigh the employees' First Amendment rights. *Id*. Nevertheless, *Magill* plainly supports Cook's argument.

Cook has also cited several state court decisions to support her argument that there is a fundamental right to candidacy. She cites *Populist Party of Arkansas v. Chesterfield*, 195 S.W.3d 354, 359 (Ark. 2004), where the Arkansas Supreme Court held that "[o]ur own court has recognized that the right to become a candidate for public office is, under our form of government, a fundamental right, which should not be curtailed in any manner without good cause."[4] Next, Cook cites *Schundler v. Paulsen*, 774 A.2d 585, 595 (N.J. Super. Ct. App. Div. 2001), to support her argument. However, the same New Jersey court stated a few years later in *Batko v. Sayreville Democratic Organization*, 860 A.2d 967, 971 (N.J. Super. Ct. App. Div. 2004), that "there is no fundamental right to run for office[.]"

Another state court case Cook cites to support her argument is *State ex rel. Carenbauer v. Hechler*, 542 S.E.2d 405, 413-14 (W.Va. 2000). The fundamental right to run for public office cited by the West Virginia court is based on that state's constitution, however. *Id*. Additionally, Cook cites a Texas Court of Appeals case, *Davis v. City of Dallas*, 992 S.W.2d 621, 623 (Tex. App. 1999).

[4] Interestingly, the Arkansas Supreme Court had stated ten years earlier in *U.S. Term Limits, Inc. v. Hill,* 872 S.W.2d 349, 359 (Ark. 1994), that "[t]he United States Supreme Court has made it clear that the right to candidacy is not a fundamental right requiring close scrutiny."

In *State v. Hodges*, 92 S.W.3d 489, 498 (Tex. 2002), however, the Texas Supreme Court stated that "candidacy is not a fundamental right."

There are additional states that have determined that there is no fundamental right to candidacy. In *State ex rel. Johnson v. Gale*, 734 N.W.2d 290, 302 (Neb. 2007), the Nebraska Supreme Court stated that "there is no fundamental right to seek elective office[.]" In *Sharp v. Tulsa County Election Board*, 890 P.2d 836, 842 (Okla. 1994), the Oklahoma Supreme Court stated that "[w]hile the right to vote is fundamental, the right to be a candidate is not." In *Painter v. Graley*, 616 N.E.2d 285, 290 (Ohio Ct. App. 1992), the Ohio Court of Appeals stated that "[t]he right to become a candidate, unlike the right to speech, is not a fundamental right."

Cook has drawn our attention to a case from this court in which two teachers challenged a school board policy that required employees who sought political office to take a mandatory unpaid leave of absence. *See Allen v. Board of Education of Jefferson County*, 584 S.W.2d 408 (Ky.App. 1979). The court ruled that the policy violated the First and Fourteenth Amendments to the U.S. Constitution. *Id*. at 409-10. The court stated that

> The appellants, 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 Stated Constitution and may not be abridged without proof of compelling state interest.

Id. at 409. Although *Allen* appears to support Cook's argument that candidacy is a First Amendment right, more recent cases from the Kentucky Supreme Court have

held, in the context of equal protection challenges to anti-nepotism statutes, that there is no right to candidacy under the First Amendment.

In *Chapman v. Gorman*, 839 S.W.2d 232 (Ky. 1992), school board members and a school district employee brought an action challenging an anti-nepotism statute that precluded relatives of school district employees from serving as members of the school board. The Supreme Court of Kentucky observed, specifically in relation to their claims under the First Amendment, that "[t]he alleged injury to . . . appellants who are school board members, does not involve a fundamental right because no such status is given to candidacy." *Chapman*, 839 S.W.2d at 237, (citing *Bullock v. Carter*, *supra*, and *Yonts v. Commonwealth ex rel. Armstrong*, 700 S.W.2d 407 (Ky. 1985)). The court further noted that "[t]he federal circuit courts of appeal, under Equal Protection Clause analysis, sometimes within the context of First Amendment challenges, . . . have adhered to *Bullock v. Carter*, *supra*, in holding that there is no fundamental right to candidacy." *Id*. at 237-38 (citations omitted).

More recently, in *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621 (Ky. 2005), a board of education member whom the Commonwealth sought to remove from office for violating the anti-nepotism statute challenged the statute on equal protection grounds, arguing that there was no rational basis for the distinction drawn in the statute among various relatives. The court observed as follows:

> The initial inquiry is to determine what standard of scrutiny applies when testing the constitutionality of KRS 160.180 [the anti-nepotism statute]. Governmental classifications that do not target suspect classes or groups or fundamental interests are subject only to rational basis review. The challenged statute does not affect a suspect class. It does not inflict injury to Appellee's right to candidacy, because no such constitutional status exists.

Id. at 623-24 (citations omitted).

Finally, in *Yonts, supra*, a school board member challenged the constitutionality of a statute that required him to resign in order to run for a state political office. The board member asserted his free speech rights under the First Amendment. The Supreme Court of Kentucky quoted with approval from the circuit court opinion, which stated that

> 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' right of speech, but to bar him from continuing as an education board member if he chooses to run for political office.

Id. at 408.

While this court is not bound by the *Carver* case, we are bound by the precedents of the Supreme Court of Kentucky. Kentucky Supreme Court Rule (SCR) 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court"). Because our supreme court has held that there is no right to candidacy under the First Amendment, we affirm the trial court's grant of summary judgment on Cook's First Amendment claim.

II. The Fourteenth Amendment Claim

Cook also contends that the circuit court erred in determining that her right to run for public office is not constitutionally protected as a liberty interest under the Fourteenth Amendment's Due Process Clause.[5] In the year following the rendering of the *Carver* case by the Sixth Circuit court, a different panel of that court stated that "whether an individual has a constitutionally protected interest in becoming a candidate for public office is not clear." *Miller v. Lorain County Board of Elections*, 141 F.3d 252 (6th Cir. 1998). The court further stated as follows:

> It is difficult to define the contours of the right of candidacy. Given the relationship between candidacy and voters' rights under the First Amendment, candidacy may involve some level of protected property or liberty interest.

Id. at n.7.

Cook relies on *Becton v. Thomas*, 48 F.Supp.2d 747 (W.D. Tenn. 1999), to support her argument that she suffered a violation of a liberty right under the Fourteenth Amendment when she was discharged. In *Becton*, a federal district court found sufficient grounds to grant a preliminary injunction to a former deputy chief probate clerk when she showed that the new probate clerk's attempts to have her transferred out of the clerk's office were in retaliation for her running against him for office. *Id*. at 750.

[5] As Cook notes in her brief, the circuit court did not specifically address whether her discharge violated a liberty right under the Fourteenth Amendment. Rather, the court relied solely on the *Carver* case, which held that there was no First Amendment right to candidacy. *Carver* did not address a claim of violation of a liberty right under the Fourteenth Amendment.

In *Becton*, the court stated the following concerning the holding of the *Carver* case on the First Amendment issue:

> Where the court expressly limited its discussion of the right to run for public office to such a narrowly defined issue, this court is reluctant to construe the court's opinion as providing a definitive answer to the question of whether the First Amendment prohibits a county clerk from retaliating against a public employee because she ran against him for a political office.

Id. at 757. The court then concluded that "the First Amendment does provide some protection to Plaintiff against retaliation for seeking political office." *Id*.

Next, the *Becton* court held that "[a]lternatively, Plaintiff's right to run for public office is constitutionally protected as a liberty interest under the Fourteenth Amendment's Due Process Clause." *Id*. The court further stated that, "[t]he freedom to run for political office is sufficiently akin to the freedoms listed in *Meyer* to qualify as a liberty interest protected by the Due Process Clause." *Id*. at 758. The court also stated that "[a]bsent a rational and legitimate government interest, retaliatory actions taken against a public employee because she ran for public office constitute an infringement on that employee's liberty interest as protected by the Fourteenth Amendment." *Id*. at 760.

Recently, the Sixth Circuit spoke again on the right of candidacy when it stated that "an individual does not have a fundamental right to run for elected office." *See Molina-Crespo v. U.S. Merit Systems Protection Board*, 547 F.3d 651, 660 (6th Cir. 2008). The court cited the *Carver* case and stated that it had therein "concluded that there is no fundamental right to be a candidate for political

office, and that a public employee may be terminated because of the fact of that employee's candidacy." *Id*. at 657, n. 3.

In another recent Sixth Circuit case, *Greenwell v. Parsley*, 541 F.3d 401 (6th Cir. 2008), the court noted that other panels of that court and other circuits had questioned the wisdom of the *Carver* case. *Greenwell*, 541 F.3d at 404. Nevertheless, under facts very similar to those herein, the court again followed *Carver* and affirmed a summary judgment in favor of an employer (sheriff) who had discharged an employee (deputy sheriff) who had announced his intention to run against the employer in the next election. *Id*. As in the case before us, the employee in *Greenwell* had claimed violations of his rights under both the First and Fourteenth Amendments.

Although the federal district court in *Becton* has held that there is a liberty interest under the Fourteenth Amendment in the freedom to run for political office, Cook has not cited to any other authority from any court to support this proposition. As noted by Cook, the holding in *Carver* is directed to the right to candidacy issue in the context of the First Amendment only. But, in *Greenwell*, the Sixth Circuit affirmed a summary judgment in favor of the employer under similar facts where the employee had alleged violation of rights under both the First and Fourteenth Amendments. *Id*. at 404. The federal district court in Tennessee is, of course, bound by the precedent of the Sixth Circuit. *See Denning v. Metropolitan Government of Nashville*, 564 F.Supp.2d 805, 813 (M.D.Tenn. 2008).

The U.S. Supreme Court "has never recognized a fundamental right to express one's political views through candidacy." *Carver*, 104 F.3d at 850-51. Various federal courts have questioned the wisdom of *Carver*. Nevertheless, it continues to be the law in the Sixth Circuit. *See Molina-Crespo, supra; Greenwell, supra*. While we are not bound by *Carver*, we are persuaded that its holding should be followed in this case.[6] Thus, the circuit court correctly awarded summary judgment to Popplewell and Russell County.

III. Availability of Sovereign and Official Immunity

Cook also argues that the court erred in dismissing her claims based on sovereign immunity. However, "[t]he first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). Because we have determined that Cook has not been deprived of any constitutional right, it is not necessary for us to decide the issue of immunity. *See Martinez v. State of California*, 444 U.S. 277, 284, 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980). Our determination on the merits of the § 1983 action disposes of the case. *See id*.

The summary judgment of the Russell Circuit Court is affirmed.

TAYLOR, JUDGE, CONCURS.

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[6] Cook contends that the *Carver* case should be limited to its facts and not applied to the facts herein. She points specifically to the close relationship between the clerk and deputy clerk in *Carver* where there was only a two-person office. Here, Cook alleges that she worked in a satellite office while Popplewell worked in the main office at another location and provided only minimal supervision. We conclude that the slight difference in facts is unimportant and that the same legal principles apply to both cases.

STUMBO, JUDGE, CONCURS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, CONCURRING: Reluctantly, I concur. Senior Judge Buckingham has clearly, accurately and comprehensively outlined the case law on this issue and I find myself in the same position as our colleague on the Sixth Circuit Court of Appeals, the Honorable Boyce Martin. In his concurrence to *Greenwell v. Parsley*, 541 F.3d 401, 405 (6th Cir. 2008) (Martin, J., concurring), Judge Martin commented in regard to the decision in *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997): "Whether out of hostility to the First Amendment or a mere misreading of the precedent, the *Carver* decision expands these cases to find that a public employee may be terminated simply because of the fact of that employee's candidacy."

I can think of no other act that conveys pure political speech than that of filing for public office. It is the essence of that which is protected by the First Amendment.

It is clear that we, as a state court, are not bound by the decision of the lower federal courts, *Commonwealth Natural Resources v. Kentec Coal Co., Inc.*, 177 S.W.3d 718 (Ky. 2005). It is however for our Supreme Court to consider this issue and determine the manner in which we resolve cases such as this.

BRIEFS FOR APPELLANT:

James E. Keller
Joseph H. Miller
Huston B. Combs
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT:

James E. Keller
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Winter R. Huff
Somerset, Kentucky