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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000913-MR

DOYLE ARMSTRONG — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
ACTION NO. 06-CI-000298

BOBBIE HOLSCLAW, INDIVIDUALLY,
AND AS JEFFERSON COUNTY CLERK;
OFFICE OF THE JEFFERSON COUNTY
CLERK — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

WINE, JUDGE: Doyle Armstrong ("Armstrong") appeals from an order of the Jefferson Circuit Court granting summary judgment to Jefferson County Clerk Bobbie Holsclaw ("Holsclaw") and the Office of the Jefferson County Clerk in an action brought by Armstrong challenging Holsclaw's authority to ban him from all Jefferson County

[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 KRS 21.580.

Clerk's Offices. For the reasons set out below, we find that summary judgment was improperly granted and therefore reverse the trial court and remand this matter for additional proceedings.

Armstrong is an employee of E & G Transfers, a company that retrieves automobile titles from local auto dealers and takes them to the Jefferson County Clerk's specialized office ("Dealer's Office"). Auto dealers and their agents exclusively use the Dealer's Office to transfer motor vehicle titles to buyers. As a runner for E & G Transfers, Armstrong made frequent visits to the Dealer's Office and routinely interacted with its employees until Holsclaw banned Armstrong from the premises. Holsclaw says that she banned Armstrong because he made offensive statements to and had inappropriate physical contact with employees at the Dealer's Office. According to Holsclaw, Armstrong continues to work for E & G Transfers, but no longer makes the runs that require him to visit the Dealer's Office.

Holsclaw alleges that on March 15, 2005, Armstrong repeatedly said to Bobbie Bell ("Bell"), an African-American female employee of the Dealer's Office, "Go back to your cage, monkey," as she stepped away from her workstation. Bell told Armstrong that his remarks were "racist." The Dealer's Office manager, Alan McNeil ("McNeil"), then called Armstrong, Bell, and Denise Curry ("Curry"), a customer who witnessed the exchange, into his office where he warned Armstrong not to make such remarks again. Armstrong admitted making the comments and apologized to Bell, but denied that his remarks were offensive or racial. Holsclaw also alleges that on August

23, 2005, Armstrong made the same remark to Bell. Although Armstrong did not audibly call Bell a "monkey," she alleges that Armstrong briefly mumbled something after the initial comment.

Kent Hall ("Hall"), Human Resources Director for the Clerk's Office, conducted an investigation on October 4 and 5, 2005, into employee complaints of Armstrong's behavior at the Dealer's Office. The investigation charged that Armstrong called African-American men employed at the Dealer's Office "boy"; he made "monkey" remarks to other African-American employees; he told racial jokes; he touched a female employee's breasts; he hugged a female employee in a manner that Armstrong described to her as "a two-boob hug"; he pressed his lower body against female employees while hugging them; and he looked down the shirts of female employees while saying, "I'm enjoying the view." Due to the results of the investigation and Bell's threats to pursue legal action against Holsclaw and the Clerk's Office for failing to adequately address Armstrong's behavior, counsel for Holsclaw notified Armstrong by letter on October 7, 2005, that he was banned from all Jefferson County Clerk's Offices.

On January 11, 2006, Armstrong filed a complaint in Jefferson Circuit Court challenging Holsclaw's authority to ban him and seeking declaratory and injunctive relief. At a February 3, 2006, evidentiary hearing, Armstrong denied all of the unwanted touching allegations, but did not deny the occurrence of verbal exchanges he had with Bell. Armstrong also denied that his remarks were offensive or racial. Armstrong admitted in his complaint, however, that Holsclaw and the employees of the

Jefferson County Clerk's Offices could have found his behavior unacceptable. On February 15, 2006, the trial court upheld Holsclaw's ban, but denied Holsclaw's motion to dismiss as premature, citing the insufficiency of the evidence regarding Armstrong's due process claim. On April 25, 2006, after Holsclaw filed an amended motion to dismiss and submitted affidavits to the court addressing Armstrong's due process claim, the trial court granted summary judgment in Holsclaw's favor, converting her motion to dismiss into a motion for summary judgment due to the inclusion of the affidavits of Bell, McNeil, Hall, and Curry. Armstrong now appeals.

The standard of review on appeal is, when a trial court grants a motion for summary judgment, "whether the trial court correctly found that there were no genuine issues as to any material fact . . . ." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001), *quoting Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Further, evidence must be viewed in a light most favorable to the party in opposition and the moving party must be entitled to judgment as a matter of law. *Lewis, supra, citing Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). In order to successfully oppose the motion, the nonmoving party must come forward with some affirmative evidence that a genuine issue of material fact exists. *Lewis, supra.*

This Court is not bound by the trial court's factual findings and conclusions of law because the standard of review of a trial court's grant of summary judgment is *de novo*. *Lewis, supra*.

Armstrong contends that Holsclaw's motion was one for dismissal, not summary judgment. Armstrong argues, therefore, that because Holsclaw's motion should have remained a motion to dismiss for failure to state a claim upon which relief can be granted, this Court must accept as true Armstrong's allegations.

This Court rejected the same argument in *Craft v. Simmons,* 777 S.W.2d 618, 620 (Ky.App. 1989). The defendants submitted, along with their motion to dismiss, copies of the residential ordinances that were at issue in the case. The Court held that the trial court did not err in converting the motion to dismiss into one for summary judgment because the trial court considered matters outside of the pleadings, which effectively converts the motion to dismiss into one for summary judgment. *McCray v. City of Lake Louisvilla,* 332 S.W.2d 837, 840 (Ky. 1960); CR 12.02.

In the instant case, Holsclaw submitted, along with her motion to dismiss, several affidavits supporting her contention that Armstrong received adequate due process and the trial court based its order granting summary judgment to Holsclaw on those affidavits. As in *Craft, supra*, the trial court here "considered matters outside of the pleadings" and, therefore, properly converted Holsclaw's motion into one for summary judgment. The rules pertaining to the standard of review on appeal when a trial court grants a motion to dismiss are, therefore, inapplicable in this case.

When a trial court considers matters outside of the pleadings, such as affidavits in a motion to dismiss, it must treat the motion as one for summary judgment.

*See Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky.App. 2004); *Craft, supra,* at 620; CR 12.02; CR 12.03.

There remains a genuine issue as to a material fact on the issue of whether Holsclaw's actions were arbitrary and thereby violated Armstrong's due process rights. At the very least, there remains a dispute as to whether Armstrong committed the unwanted touching acts that Holsclaw alleges is one of the justifications for imposing the ban. The arbitrary power clause of the Kentucky Constitution embraces the principles of due process. Notwithstanding the factual dispute, the trial court's grant of summary judgment to Holsclaw was erroneous on the due process issue because Holsclaw was not entitled to judgment as a matter of law. Holsclaw failed to adequately provide Armstrong with notice and an opportunity to be heard before imposing the ban, depriving Armstrong of his constitutionally-protected liberty interest in pursuing his livelihood.

The trial court improperly granted summary judgment on the issue of whether Holsclaw acted arbitrarily and violated Armstrong's due process rights because Armstrong denied at the evidentiary hearing that he committed any of the unwanted touching that Holsclaw alleged, both at the hearing and in the affidavits, on which the trial court based its order granting summary judgment. Despite Armstrong's denials, the trial court held in its February 15, 2006, opinion and order that there was no genuine issue as to a material fact on the issue because the court concluded that Armstrong admitted to the allegations in his complaint. Pointing to paragraph four of Armstrong's complaint, which states that Armstrong acknowledges that "the Defendants could have

found the Plaintiff's behavior unacceptable," the trial court concluded that Armstrong's statement constituted a judicial admission that barred him from denying any of the allegations Holsclaw made against him.

"The doctrine of judicial admissions should be applied only where the statements are unequivocal and must be considered to be deliberately true or false." *George M. Eady Co. v. Stevenson*, 550 S.W.2d 473-74 (Ky. 1977). Reading Armstrong's statement in context with the entire sentence, the statement merely conveys Armstrong's general argument that, regardless of whether the defendants found his behavior unacceptable, they still had no right to ban him. Even the strictest interpretation of the sentence does not render the statement an admission of any of Holsclaw's allegations because Armstrong "admits" only to the possibility that the defendants found his "behavior unacceptable." The trial court improperly concluded that the statement in Armstrong's complaint was a judicial admission and the court should not have barred Armstrong from denying Holsclaw's allegations. Because Armstrong denies the facts as alleged by Holsclaw—facts which go to the heart of the issue of whether Holsclaw arbitrarily imposed the ban on Armstrong and thereby violated his due process rights—the trial court erred when it granted summary judgment to Holsclaw.

Holsclaw did not violate Armstrong's First Amendment right of freedom of speech when she banned him, based in part on the sexual and racial remarks she alleges he made at the Dealer's Office, because Holsclaw imposed a reasonable and content-neutral time, place, and manner restriction on Armstrong's offensive, but protected,

speech. Although the trial court did not address this issue, Holsclaw is entitled to summary judgment as a matter of law.

To invoke the First Amendment's protections, there must be a restriction on protected speech or protected expressive conduct. *Restaurant Ventures, LLC v. Lexington-Fayette Urban County*, 60 S.W.3d 572, 576 (Ky.App. 2001), *citing U.S. v. O'Brien*, 391 U.S. 367, 375, 88 S. Ct. 1673, 1678, 20 L. Ed. 2d 672 (1968). The remarks Armstrong admits he made to Bell in March 2005 and August 2005 and the sexual and racial remarks Holsclaw alleges Armstrong made that Armstrong fails to affirmatively deny or admit, *i.e.* calling other African-American employees "monkey" and "boy" and making racial jokes, qualify as speech, not conduct. Further, while his remarks may be offensive, they are, nevertheless, protected because there is no evidence that the remarks incited or tended to incite violence, were intentionally abusive, or profane and lewd. *See, e.g., Unemployment Insurance Commission v. Dye*, 731 S.W.2d 826, 828 (Ky.App. 1987) (characterizing as unprotected speech plaintiff's motioning with middle finger and stating "up your ass" to manager). The protections of the First Amendment were, therefore, invoked when Holsclaw restricted Armstrong from the Clerk's Office based, in part, on the protected speech Armstrong expressed at the Dealer's Office.

Because there are no genuine issues as to whether Armstrong made these remarks, the court should grant summary judgment if Armstrong or Holsclaw are entitled to judgment as a matter of law.

In order to evaluate the constitutionality of the ban, this Court must first determine whether the Clerk's Offices are public forums, dedicated-public forums, or nonpublic forums. *Jobe v. City of Catlettsburg*, 409 F.3d 261, 266 (6th Cir. 2005). Contrary to Armstrong's declaration that, as a government office open to the public, the Clerk's Offices cannot restrict his access to the premises, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U. S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981). Holsclaw correctly classifies the Clerk's Offices as nonpublic forums because the offices are not government property that has traditionally been open for public expression, *e.g.*, parks, and because the State has not opened the Clerk's Offices for expressive activity, *e.g.*, university meeting facilities. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3448-49, 87 L. Ed. 2d 567 (1985); *Jobe*, 409 F.3d at 266.

As nonpublic forums, the Clerk's Offices' access restriction is valid if it is reasonable in light of the forum and if it is content-neutral. *Jobe*, 409 F.3d at 266, *citing International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 679, 112 S. Ct. 2701, 2705, 120 L. Ed. 2d 541 (1992). The United States Supreme Court has held that state-imposed restrictions designed to prevent the disruption of business caused by speech activities in nonpublic forums are reasonable, as are restrictions designed to promote peace in the workplace. *See, e.g., Lee*, 505 U.S. at 685, 112 S. Ct. at 2709 (leafleting prohibition at airport is reasonable because it prevents passenger

inconveniences such as congestion); *Cornelius*, 473 U.S. at 808-10, 105 S. Ct. at 3452-53 (prohibiting political advocacy groups from participating in charity drive with federal employees is reasonable because it prevents disruption caused by controversy and eliminates employee complaints). It is clear that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811, 105 S. Ct. at 3453.

In light of the forum and its purpose of serving the public with important vehicular licensing and registration services, Holsclaw's ban against racial and sexual remarks is reasonable because such speech has a disruptive effect on the business the Clerk's Offices conducts. The record sufficiently supports this conclusion. Holsclaw's affidavits and Armstrong's admissions reveal that McNeil had to call several employees and a customer into his office in order to address the remarks Armstrong made to Bell. Furthermore, as a nonpublic forum, Holsclaw's restriction need only be reasonable, not the most reasonable. *Cornelius*, 473 U.S. at 808, 105 S. Ct. at 3452. It is not fatal, then, if other reasonable limitations are available.

The ban against racial and sexual remarks is also content-neutral and is not an attempt to prohibit speech based on Holsclaw's disagreement with Armstrong's viewpoint. Armstrong argues that the restriction is content-based because Holsclaw proscribes only language that she deems offensive. This argument fails to recognize, however, that a content-based restriction prohibits speech based on the state's

disagreement with the speaker's *viewpoint*, not the speaker's classification of the type of speech. *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 862 S.W.2d 297, 301 (Ky. 1993). For example, in *Cornelius,* the Court held that, while the government's prohibition on the participation of the political groups in the charity drive was reasonable, the groups came forth with evidence that controverted the government's additional argument that the groups were prohibited because they did not directly relate to the purpose of the charity drive. The evidence suggested that the restriction was based on the government's disagreement with the groups' message because other groups that did not directly relate to the drive's purpose were allowed to participate. *Cornelius*, 473 U.S. at 812-13, 105 S. Ct. at 3454-55. The Court remanded the case so that the lower court could determine whether the restriction was, in fact, based on viewpoint discrimination. *Id.*

In the instant case, Armstrong fails to come forth with evidence showing that Holsclaw's prohibition of racial and sexual speech is based on viewpoint discrimination. Armstrong does not argue, for example, that Holsclaw allows other forms of "offensive" speech or that other racial and sexual remarks are tolerated. Without such evidence, Armstrong cannot successfully argue that the ban is an attempt to prohibit speech on the basis of Holsclaw's disagreement with his viewpoint or that the ban is not a method by which Holsclaw reasonably seeks to maintain peace and efficiency in the Clerk's Offices.

As a reasonable and content-neutral restriction on speech, Holsclaw's decision to prohibit racial and sexual speech at Jefferson County Clerk's Offices does not violate the First Amendment. Holsclaw is entitled to summary judgment on this issue.

Although the trial court properly converted Holsclaw's motion to dismiss into a motion for summary judgment, the grant of summary judgment to Holsclaw was premature on the issue of whether Holsclaw acted arbitrarily and violated Armstrong's due process rights because a question of material facts exists as to whether Armstrong committed certain acts Holsclaw alleges Armstrong committed. Further, Holsclaw was not entitled to judgment as a matter of law on the issue of due process because she did not provide Armstrong with notice or an opportunity to be heard on the investigation's charges. Therefore, this Court reverses the trial court's grant of summary judgment and remands for further proceedings.

However, Holsclaw is entitled to a grant of summary judgment on the First Amendment issue, despite the trial court's failure to address it, because the restriction on offensive racial and sexual speech is a reasonable, content-neutral time, place, and manner restriction.

ALL CONCUR.

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