RENDERED: December 31, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2790-MR

LEE JACKSON;
JAMES TERRY;
KEN GRANT; and
DONALD VINSON — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NO. 96-CI-001346

HONORABLE PAUL E. PATTON,
(GOVERNOR OF THE COMMONWEALTH
OF KENTUCKY); and
ROBERT S. PETERS,
(SECRETARY OF THE PERSONNEL
CABINET) — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI and SCHRODER, Judges.

GUIDUGLI, JUDGE. Appellants, Lee A. Jackson, James I. Terry, Ken Grant, and Donald Vinson (collectively Jackson) appeal from an order of the Franklin Circuit Court entered October 7, 1996, which dismissed their declaratory judgment action against Paul Patton, Governor of the Commonwealth of Kentucky, and Robert S. Peters, Secretary of the Personnel Cabinet (collectively Peters). We affirm.

Appellants, all of whom are Kentucky residents, taxpayers, and classified state employees as defined by Chapter 18A of the Kentucky Revised Statutes (KRS) filed a complaint for declaratory judgment and request for permanent injunction with the trial court on April 17, 1996. In the complaint, Jackson sought a judgment holding that a portion of KRS 18A.140(4) was unconstitutional and an injunction prohibiting enforcement of the statute against them. KRS 18A.140(4) provides in pertinent part:

> No employee of the classified service...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 to privately express his opinion and to case his vote. (emphasis added).

Under KRS 18A.990(3), any classified employee who wilfully violates KRS 18A.140 is guilty of a misdemeanor, is subject to a sentence of thirty days to six months in jail, must forfeit his position, and is ineligible for rehiring by the Commonwealth for one year. Jackson complains that the underlined portion of KRS 18A.140(A) is unduly vague and overbroad and that it chilled his constitutionally guaranteed right to free speech.

Attached to the complaint were four identical affidavits executed by each appellant. Each affidavit stated:

> I am an employee of the Commonwealth of Kentucky, serving in the classified service under the provisions of Chapter 18A, Kentucky Revised Statutes. As a registered voter, I

> want to express freely and openly my political views, including the endorsement of particular candidates for election this fall, to whomever I choose, wherever I choose, whenever I choose, without the threat of termination, ineligibility for state employment, and jail time, as provided in KRS 18A.990(3).
>
> I understand and agree that I may not and will not 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 take part in the management or affairs of any political party or in any political campaign, as provided in KRS 18A.190(4). Unless enjoined by this Court, however, I fear that the Commonwealth of Kentucky, through its duly appointed representatives will take actions against me if I openly express, outside the workplace, my views on the issues which affect state employees and the views of the various candidates seeking political office at both the state and national level.

Jackson also filed a motion for temporary injunction on September 17, 1996. In the memorandum in support of the motion, Jackson argued:

> The concern with the statute rests with the meaning of the phrase that an employee may "exercise his right as a citizen privately to express his opinion and to cast his vote." The Plaintiffs and other classified employees need to be able to know what is permitted without running the risk of being terminated for violation of this provision and being prohibited from reapplying for state employment for a period of one year following termination. KRS 18A.140(4) is vague and overbroad, and restricts the Plaintiffs' freedom of speech in violation of the Constitutions of Kentucky and the United States.

Peters filed a memorandum in opposition to Jackson's motion on September 25, 1996, arguing that pursuant to Maupin v. Stansberry, Ky. App., 575 S.W.2d 695 (1978), Jackson was not entitled to a temporary injunction. Peters filed an answer to

Jackson's complaint on October 7, 1996, wherein he contended that Jackson failed to show the existence of an actual justiciable controversy between the parties sufficient enough to invoke the jurisdiction of the Court.

The trial court held a hearing on Jackson's motion for temporary injunction on September 25, 1996. At the hearing, Jackson conceded that to his knowledge no classified employee had been disciplined or fired for expressing a political opinion and that the Commonwealth had neither threatened nor taken any action against them. Jackson also presented no acts which he sought to engage in which he feared would bring reprisal, but only expressed a generalized fear of prosecution.

On October 7, 1996, the trial court entered an order in which it sua sponte dismissed Jackson's complaint on the ground that it failed to present a justiciable controversy. In its order the trial court held:

> While Plaintiffs have said that they fear punishment under the statute, they have not shown that their jobs are actually in jeopardy because of their political speech. "[C]ourts are not provided for the settlement of arguments or differences of opinion, but actual controversies involving legal rights." Kelly v. Jackson, Ky., 268 S.W. 539, 540 (1925); see Veith, 355 S.W.2d at 297.
>
> Plaintiffs have conceded that the state has taken no action against them under the statute. The fact that Plaintiffs may at some time in the future be punished under the statute does not create an actual and justiciable controversy at the present time and under the present circumstances.
>
> * * *

> Defendants presented evidence at the hearing that, under former law, the Opinions of the Attorney General (OAG) outlined the specific acts which may be punished under the statute. Further, it was shown that the Personnel Cabinet compiled these opinions in the form of a memorandum for employees, and represented this memorandum as a guideline for what political activities were and were not acceptable.
>
> While it is true that the OAG opinions are no longer directly controlling as to permitted conduct, the Defendants claim that they are still used as guidelines under the statute and that they have never prosecuted anyone for conduct which these opinions have listed as permitted. These opinions do give Plaintiffs indication as to what activities are or are not permitted under the statute. In addition, Plaintiffs have presented no specific acts of political speech that they believe will be punished. Given that Plaintiffs are not even subject of an investigation into their activities, and that Defendants have established that there exist guidelines for determining punishable conduct under the statute, we find that the declaration of any possible infringement of Plaintiffs' constitutional rights in this action would be speculative and advisory.

On appeal, Jackson contends that under the Declaratory Judgment Act, their challenge to KRS 18A.140(4) is a justiciable controversy. We disagree.

The Declaratory Judgment Act makes it very clear that plaintiffs seeking a declaratory judgment of their rights must demonstrate that an actual controversy exists. See KRS 418.040 and KRS 418.045. While KRS 418.080 provides that the Declaratory Judgment Act should be liberally construed in order to afford "relief from uncertainty and insecurity with respect to rights, duties and relations," it cannot be used to delineate speculative

duties and rights even though a controversy may eventually ripen into a justiciable controversy. Board of Education of Berea v. Muncy, Ky., 239 S.W.2d 471, 473 (1951).

This Court has stated in the past that "cases construing...justiciable controversy appear to be elusive and difficult to grasp without close analysis." Hughes v. Welch, Ky. App., 664 .SW.2d 205, 208 (1984). However, beginning with Dravo v. Liberty National Bank and Trust Co., Ky., 267 S.W.2d 95 (1954), courts have specifically held that "a declaratory judgment should not or cannot be made as to questions which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy." Dravo, 267 S.W.2d at 97. See also, Barrett v. Reynolds, Ky., 817 S.W.2d 439, 441 (1991); Bischoff v. City of Newport, Ky. App., 733 S.W.2d 762, 764 (1987). The fact that the plaintiff and defendant in a declaratory judgment act have differing opinions as to their rights under a particular statute does not, on its own, rise to the level of a justiciable controversy. See Jefferson County v. Chilton, Ky., 33 S.W.2d 609 (1930) (holding mere difference of opinion does not constitute justiciable controversy); Kelly v. Jackson, Ky., 268 S.W. 539 (1925) (holding Declaratory Judgment Act cannot be used to resolve differences of opinion). Nor can the Declaratory Judgment Act be used to "convert courts into a sort of law school for the instruction of the inquisitive mind." Commonwealth v. Crow, Ky., 92 S.W.2d 330, 332 (1936).

Jackson correctly asserts that an actual controversy for the purposes of the Declaratory Judgment Act includes a controversy over present rights, in reliance on KRS 418.045, which provides that a person whose rights are affected by statute may seek a declaratory judgment delineating those rights. However, Jackson conveniently overlooks the fact that under KRS 418.045, a plaintiff must show that an "actual controversy exists with respect thereto." In other words, a plaintiff cannot merely pluck a statute out of the books and ask the court to declare what his rights are under the statute.

In this case, Jackson merely alleged in the affidavit supporting his complaint that he wanted to "express freely and openly my political views" without threat of penalty under KRS 18A.990(3). However, Jackson did not specifically set forth the type of activities he wished to engage in. Furthermore, and more importantly, Jackson has conceded that the Commonwealth has neither threatened nor taken any action against him under KRS 18A.140(4). At best, Jackson has alleged nothing more than a hypothetical scenario of what he feels will happen if he expresses his political opinions "freely and openly." Case law clearly shows that such a claim cannot be the subject of a declaratory judgment action.

Jackson's reliance on Board of Education of Boone County v. Bushee, Ky., 889 S.W.2d 809 (1994); Dravo, supra; Sherrard v. Jefferson County Board of Education, Ky., 171 S.W.2d 963 (1943), and Bischoff, supra, is misplaced. None of those

cases involved situations where the plaintiffs were challenging statutes which subjected them to criminal penalties.

This case is closer to Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995). In that case, the plaintiff filed a declaratory judgment action which challenged twenty-four provisions of the Kentucky Code of Legislative Ethics and the Executive Branch Code of Ethics as being unconstitutional. In response to plaintiff's arguments that the fines and criminal penalties imposed under the two code provisions for failure to register and report their activities and interest violated their First Amendment rights of association and petition, the Court held:

> Appellant, as required, is duly registered with the respective commissions and no proceeding (adjudicatory/investigatory) is disclosed to be pending at this time. A determination of the validity of the challenged statutory penalties is speculative.

Associated Industries, 912 S.W.2d at 950.

Jackson's argument is the same as the plaintiffs in Associated Industries. He claims that KRS 18A.140(4) and the penalties have the effect of chilling his exercise of free speech under the First Amendment. But under Associated Industries, absent a showing that some action is pending or threatened against him for violation of KRS 18A.140(4), a justiciable controversy does not exist.

We realize that cases involving questions as to justiciable controversy require the Courts to engage in legal

hairsplitting to reach a decision. However, we do not believe that a claim of possible prosecution where the Commonwealth has never disciplined any employee for violating KRS 18A.140(4) rises to the level of a justiciable controversy.

The order of the Franklin Circuit Court is affirmed.

GUDGEL, CHIEF JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

SCHRODER, JUDGE, DISSENTING. I believe there is a justiciable controversy ripe for a decision. It is not only unfair, but incomprehensible to require a person to violate a law in order to test its constitutionality. Why turn law-abiding state employees into criminals when we have declaratory judgment actions? With a declaratory judgment action, the employee can question a statute without violating it, without facing a suspension, without facing jail and/or fines, and without risking a criminal record and future employability. The price the majority is requiring an employee to pay to seek out his/her rights is too costly.

The fact that no one has been prosecuted yet misses the point. There is always a first, or the chilling effect becomes a deep freeze. Give the appellants their day in court and get to the merit of the case. Who knows, the law may be constitutional and merit retention. If so, what are we afraid of?

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