

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001853-MR

JAMES M. LAVALLE

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 10-CI-00350

MURRAY STATE UNIVERSITY;  
DR. RANDY DUNN; DR. TED BROWN;  
DR. FAROUK UMAR; AND  
DR. LILLIAN DAUGHADAY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

THOMPSON, JUDGE: James M. LaValle, a former assistant professor at Murray State University, appeals from a Calloway Circuit Court order dismissing his complaint with prejudice against Murray State University. We conclude that LaValle failed to state a viable claim and affirm.

In August 2005, LaValle became employed as an assistant professor of sociology at Murray State University. On May 13, 2009, while still on probationary status, LaValle was notified that his contract would not be renewed upon its expiration in May 2010.

Section 2.8.4.1 of the Murray State University Handbook provides that non-renewal of a probationary contract may be based upon, but is not limited to, the following reasons:

- A. cancellation of or change in a program;
- B. declining enrollment or enrollment emergency;
- C. overstaffing;
- D. incongruity between the teaching fields of the faculty member and the programmatic needs of the university;
- E. unfavorable reviews of the faculty member's major appointment responsibilities of teaching and/or advising;
- F. inadequate performance of the faculty member's appointment responsibilities; and,
- G. financial exigency or other reduction in force.

In his complaint, filed on July 23, 2010, LaValle claimed that Murray State University failed to renew his contract in retaliation for his opposition to a curriculum change that required "sociology majors to extend their attendance at Murray State University unnecessarily in order to increase the institution's student population. . . ." LaValle claimed that the curriculum change constituted second-degree official misconduct under KRS 522.030.

On August 2, 2010, pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), Murray State University moved the trial court to dismiss LaValle's complaint based upon his failure to state a viable claim. On September 13, 2010, the court dismissed the complaint with prejudice.

Preliminary to our discussion, we point out that CR 12.02 and 12.03 require that a motion in which matters outside the pleadings are considered to be treated as a motion for summary judgment. *Craft v. Simmons*, 777 S.W.2d 618 (Ky.App. 1989). The Murray State University Handbook was included in response to the motion to dismiss and considered by the trial court and, therefore, the motion must be treated as a motion for summary judgment under CR 56. Regardless, we review *de novo* either a grant of judgment on the pleadings or the grant of summary judgment. *Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1001 (6th Cir. 1995).

LaValle claims that Murray State University violated his rights under Section Two of the Kentucky Constitution, which guarantees that the Commonwealth shall be free of arbitrary action.<sup>1</sup> Non-renewal of an employee contract only raises an issue under Section Two of the Kentucky Constitution if there is a connection between the non-renewal and a constitutionally protected activity. *Roberts v. Fayette Co. Bd. Of Educ.*, 173 S.W.3d 918, 924-25 (Ky.App. 2005); *see also Bishop v. Manpower, Inc. of Central Kentucky*, 211 S.W.3d 71, 75

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<sup>1</sup> Murray State University is a public university. The constitutional prohibition against arbitrary action applies to all public bodies and all public officials. *Board of Educ. of Ashland v. Jayne*, 812 S.W.2d 129, 131 (Ky. 1991).

(Ky.App. 2006). LaValle claims that the non-renewal of his contract was based upon his exercise of his freedom of speech. Freedom of speech, however, is not absolute. *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999).

While the First Amendment of the U.S. Constitution and Sections One and Eight of the Kentucky Constitution protect public employees from retaliation based upon speech, such protection is only afforded for speech that is a matter of public concern and does not outweigh the state's interest in "promoting the efficiency of the public service that it performs." *Connick v. Myers*, 461 U.S. 138, 146, 157, 103 S.Ct. 1684, 1690, 1695, 75 L.Ed.2d 708 (1983). In order to conclude that speech addresses a matter of public concern, "this court must be able to fairly characterize the expression as relating to any matter of political, social, or other concern to the community." *Rahn v. Drake Center, Inc.*, 31 F.3d 407, 412 (6th Cir. 1994).

The addition of class requirements to Murray State University's sociology curriculum is not a matter of political, social or community concern. LaValle's claim that the changes constitute second-degree official misconduct under KRS 522.030(1)(b) are non-persuasive and meritless. LaValle was a non-tenured employee on probationary status. Even if LaValle's contract was not renewed solely based upon his opposition to the curriculum change, LaValle did not state a cause of action.

Accordingly, the Calloway Circuit Court order is affirmed.

ALL CONCUR.

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