UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-2281, *Kevin Gary v. TrueBlue, Inc.*
Originating Case No. : 2:17-cv-10544

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-2281

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KEVIN GARY, Plaintiff-Appellant, v. TRUEBLUE, INC., dba Labor Ready, Inc., dba PeopleReady, Inc., Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

O R D E R

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

Kevin A. Gary, a pro se litigant from Michigan, appeals the district court's grant of summary judgment to the defendant, TrueBlue, Inc., in his civil suit alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

TrueBlue, which operated as People Ready, Inc., and Labor Ready, Inc., is a staffing company that used a messaging platform called WorkAlert to send texts about potential jobs to people who signed up for the service. Gary signed up in 2011, at which time he signed a form consenting to receive alerts on his phone about job opportunities. He alleged that he has received over 5600 text messages from TrueBlue, despite his having revoked his consent to receive texts several times. He sued under the TCPA, which creates a private right of action, *see* 47 U.S.C. § 227(b)(3), for violating the Act's prohibition against using an "automatic telephone dialing

system" ("ATDS") to text someone who has not given "prior express consent," 47 U.S.C. § 227(b)(1)(A)(iii); *see also Keating v. Peterson's Nelnet, LLC*, 615 F. App'x 365, 370 (6th Cir. 2015). After engaging in discovery, both parties moved for summary judgment. The district court denied Gary's motion, *Gary v. TrueBlue, Inc.*, No. 17-CV-10544, 2018 WL 3647046 (E.D. Mich. Aug. 1, 2018), and granted TrueBlue's, *Gary v. TrueBlue, Inc.*, 346 F. Supp. 3d 1040 (E.D. Mich. 2018). The district court held that there was no genuine dispute that TrueBlue's texting system was not an ATDS under the TCPA, and thus the company was not liable under the Act. *Id*. at 1047.

Gary appeals the district court's judgment for TrueBlue. He asks this court to reverse and remand. He does not seek review of the district court's denial of his own motion for summary judgment.

We review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a).

The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Congress empowered the Federal Communications Commission ("FCC") to prescribe regulations to implement the TCPA. 47 U.S.C. § 227(b)(2).

The district court determined that Gary submitted no evidence that TrueBlue used an ATDS. TrueBlue offered sworn testimony that its WorkAlert service "lack[ed] the capability to randomly or sequentially dial or text potential workers." *Gary*, 346 F. Supp. 3d at 1044. In response, Gary asserted that TrueBlue combined its WorkAlert system with a "third-party aggregate" called mBlox. *Id*. He presented "a series of documents he obtained from the Internet" to show that mBlox had the capacity to randomly generate phone numbers and thus was an ATDS. *Id*. at 1045. The district court noted that Gary "provide[d] no additional commentary on th[ese] article[s], and therefore, ask[ed] the Court to make the inferential leap that th[ese] document[s]

prove[d] mBlox can randomly generate and text phone numbers." *Id*. The court also pointed out that Gary "had the opportunity to add mBlox as a co-defendant, conduct discovery to see how mBlox interacts with [TrueBlue's] WorkAlert system, and even obtain evidence directly from mBlox to see how these . . . programs [referenced in Gary's articles] operate within its system. [He] did none of these things." *Id*. (citation omitted).

Gary also argued that TrueBlue's system qualified as an ATDS because it could operate without human intervention. But the district court ruled that "the TCPA does not prohibit the use of devices with automated functions. *See* 47 U.S.C. § 227(a)(1). Instead, the statute requires a showing that the system has the capacity to randomly or sequentially dial or text phone numbers." *Id*. at 1046. The court held that Gary had "not made such a showing." *Id*.

Finally, Gary argued that TrueBlue's system was an ATDS just because it sent messages through a web browser. *Id*. He cited the FCC's 2015 ruling, which stated that "the equipment used to originate Internet-to-phone text messages to wireless numbers via email or via a wireless carrier's web portal is an 'automatic telephone dialing system' as defined in the TCPA." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8018 (F.C.C. July 20, 2015), *set aside in part by ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018). The district court rejected this argument, citing a case on point, *Blow v. Bijora, Inc.*, 191 F. Supp. 3d 780, 788 (N.D. Ill. 2016), *aff'd on other grounds*, 855 F.3d 793 (7th Cir. 2017), as well as the D.C. Circuit case that set aside the FCC's definition of "capacity," *ACA Int'l*, 885 F.3d at 703. *Gary*, 346 F. Supp. 3d at 1046-47. The court held that there was still no evidence that TrueBlue's system could randomly or sequentially text phone numbers. *Id*. at 1047.

Gary now raises four arguments. First, he asserts that the district court erred by not considering the FCC's orders from before 2015 to have been binding. Under these orders, Gary believes that TrueBlue's system qualifies as an ATDS. But Gary has not shown that this is true. Even if these orders define an ATDS as broadly as Gary suggests, Gary has not explained how TrueBlue's system functions in way that would satisfy this definition.

In his second argument, Gary maintains that we should remand the case because TrueBlue qualifies as a telemarketer and the district court needs to make findings consistent with this determination. Gary cites no authority for this proposition, let alone why this determination would be relevant to this case. We decline to take his invitation.

Gary next argues that the district court erred in holding that there was no genuine dispute that TrueBlue's use of a web-based system was not enough to qualify it as an ATDS. But the district court correctly explained why the evidence Gary pointed to was insufficient on this front, noting that he submitted unhelpful, general internet articles that did not create a genuine dispute about the matter.

In his final argument, Gary asserts that the district court mistakenly relied on his outdated consent to receive texts from TrueBlue. The district court's decision, though, was not based on Gary's having given his consent. The court determined that TrueBlue's system did not qualify as an ATDS, obviating any need to resolve whether he had given his "prior express consent." 47 U.S.C. § 227(b)(1)(A).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk