

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT ASHLAND
CASE NO. 0:15-CV-00044-DLB

APRIL MILLER, *et al.*

PLAINTIFFS

v.

ROWAN COUNTY, KENTUCKY, *et al.*

DEFENDANTS

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION OF DEFENDANT, ROWAN COUNTY

The Defendant, Rowan County, Kentucky ("the County"), by and through counsel, for its Response in Opposition to Plaintiffs' Motion for Preliminary Injunction (R. 2), states as follows:

I. INTRODUCTION

In their Motion for Preliminary Injunction, Plaintiffs do not specifically request injunctive relief against Defendant, Rowan County. (*See* R. 2 at PageID 34) Instead, they seek an injunction against Defendant, Kim Davis, in her "official capacity." (*Id.*) It is well-established that suits against persons in their official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Ky. v. Graham*, 473 U.S. 159, 165-166 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978); *see also* *Brandon v. Holt*, 469 U.S. 464, 472 n.21 (1985)).

In their Complaint, Plaintiffs assert that Davis was acting as an agent for Rowan County in failing to issue the marriage licenses that they requested. (R. 1, Complaint at PageID 2) In fact, Plaintiffs contend that Davis had "final" authority to make policy on

behalf of the County, such that her unilateral decision to discontinue the issuance of marriage licenses represented County policy. (*Id.*) In light of these allegations, Rowan County construes Plaintiffs' request for a preliminary injunction against Davis as a request for an injunction against the County.

Because Plaintiffs' assumption that Davis served as a policymaker for Rowan County is a mistaken one, there is no legal basis for the issuance of an injunction against the County. Therefore, insofar as Plaintiffs seek a preliminary injunction against Rowan County, it should be denied.

II. NO INJUNCTION SHOULD BE ENTERED AGAINST ROWAN COUNTY

Plaintiffs correctly cite the four factors the Court must consider in assessing their request for a preliminary injunction, including

(1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.

Winnett v. Caterpillar, Inc., 609 F.3d 404, 408 (6th Cir. 2010) (quoting *Entm't Prods., Inc. v. Shelby County, Tenn.*, 588 F.3d 372, 377 (6th Cir. 2009)).

As to Rowan County, however, Plaintiffs' Motion fails because there is no analysis as to whether Plaintiffs are substantially likely to prevail on a claim *against Rowan County*, whether irreparable harm will occur if an injunction is not granted *against Rowan County*, whether the issuance of an injunction *against Rowan County* would cause substantial harm to others, and whether the public interest will be served by granting injunctive relief *against Rowan County*.

Considering all of these factors, it is apparent that no injunction should issue against Rowan County.

A. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM AGAINST ROWAN COUNTY

Since Plaintiffs are unable to show that Davis acted as a policymaker for the County when she refused to issue marriage licenses to Plaintiffs, consideration of the first factor weighs heavily against the issuance of an injunction against Rowan County. Where there is no likelihood of success on the merits, a motion for preliminary injunction should not be granted. *Winnett*, 609 F.3d at 408 (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)).

Assuming *arguendo* that Plaintiffs can show a violation of their constitutional rights, they still must establish that the alleged violation of their rights occurred pursuant to a municipal policy, practice, or custom of the county in order to prevail on their claims against Rowan County. *Monell*, 436 U.S. at 694. A § 1983 claimant may make this showing by alleging

(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance [of] or acquiescence [to] federal rights violations.

Burgess v. Fischer, 735 F.3d 462, 478 (6th Cir. 2013).

Plaintiffs rely on the third option, asserting that Davis acted as a “final policymaker” for the County in refusing to issue marriage licenses to them. (R. 1, Complaint at PageID 2) This assertion is, however, contradicted by governing law and disproved by the facts in the record.

An official's status as a final policymaker is a question of state or local law. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). In conducting this analysis, the court must "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor **concerning the action alleged to have caused the particular constitutional or statutory violation at issue.**" *McMillan v. Monroe County*, 520 U.S. 781, 784 – 785 (1997) (quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989)) (emphasis added).

As a result, the issue is not whether Davis acts for the County or the state "in some categorical, 'all or nothing' manner." *Id.* at 785. Instead, the Court must only consider whether Davis acted as a final policymaker for Rowan County with respect to the issuance (or non-issuance) of marriage licenses. *Id.* at 785.

To determine whether Davis acted for the County or the state, the Court must consider the definition of Davis' job functions as described by state law. *Id.* at 786. In *McMillan*, for example, the Supreme Court found that a county sheriff, when acting in a law enforcement capacity, acted for the state as opposed to the county. The Court found it significant that the sheriff's law enforcement obligations were subject to state control and supervision, with little to no oversight by the county. *Id.* at 787 – 790.

Lower decisions have reached similar conclusions that local officials act on behalf of the state when their job duties serve state functions and are subject to state, rather than local, supervision. For instance, in *D'Ambrosio v. Marino*, the Sixth Circuit found that a county prosecutor served the state when he prosecuted state crimes. 747 F.3d 378, 387 (6th Cir. 2014). Likewise, in *Leslie v. Lacy*, the Southern District of Ohio found that a county clerk of courts acted as an agent of the state, and not the county, where the relevant job duties

were specified by state law and he was subject to the control of the state court system. 91 F. Supp. 2d 1182, 1194 (S.D. Ohio 2000).

As in these cases, county clerks in Kentucky act for the state with respect to the issuance of marriage licenses. First, county clerks are not employees of the county, but instead are the holders of elective offices pursuant to § 99 of the Kentucky Constitution. For this reason, the Rowan County Fiscal Court does not hire Davis to perform functions for it and it does not set her salary. Rather, because Davis is considered under Kentucky law to have duties and jurisdiction “coextensive with that of the Commonwealth” her salary is established pursuant to schedules set by the Kentucky Department of Local Government. *See* KRS 64.5275(1) and (2); *see also* Ky. Cons. § 246. This is significant since fiscal courts in Kentucky are generally required to set the salaries for most other county employees. *See* KRS 64.530(1).

Second, the Rowan County Fiscal Court does not fund or control the internal operations of the County Clerk’s office. Rowan County Judge Executive, Walter Blevins, Jr., testified that the Rowan County Clerk’s Office operates from the fees it generates itself and that the Office does not receive any direct funding from the County’s general fund. (R. 26, 07.20.15 Hearing Tran. at PageID 234) Though fiscal courts are permitted to set the reasonable maximum amount for deputies of the county clerk, they do not have the authority to set their salaries outright. KRS 64.530(3). Likewise, Davis testified that she is free to hire and fire her own deputies and to set their individual salaries. (R. 26, 07.20.15 Hearing Tran. at PageID 240 – 241, 275) Similarly, she testified that she alone, and not the Fiscal Court, sets the internal rules for her office. (*Id.* at 277)

Third, the county clerks' obligations with respect to marriage licenses are subject to state, and not county, control. In Kentucky, the state has "absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. App. 2011) (quoting *Rowley v. Lampe*, 331 S.W.2d 887, 890 (Ky. 1960)). Thus, all matters relating to marriage in Kentucky, including its definition and the procedures for licensing, solemnizing, and dissolving marriages are governed by state statutes in Kentucky Revised Statutes Chapter 402. In particular, the duty of county clerks to issue marriage licenses is governed by KRS 402.080.

Along these lines, Davis testified that her role is to serve as a "pass through" for state agencies, meaning that she collects fees and information for the state and passes it along to various state agencies. (R. 26, 07.20.15 Hearing Tran. at PageID 240 – 241, 275) In particular, Davis testified that she collects a \$35.00 fee for marriage license and that \$14.33 of this amount is then forwarded to the state. (*Id.* at 241 – 242) According to Davis, her office operates from the fees it collects, and it is not funded separately by the fiscal court. (*Id.* at 241)

Fourth, all procedures relating to marriage licenses are governed solely by the state. (*Id.* at 273) The form that county clerks must use for marriage licenses, as required by KRS 420.100, is a form developed by the Kentucky Department of Libraries and Archives. (*Id.* at 252 – 256; *see also* Exh. 2 & Exh. 3) This is why, following the Supreme Court's decision in *Obergefell, et al. v. Hodges, et al.*, 2015 U.S. LEXIS 4250 (U.S. June 26, 2015), Davis received instructions from Governor Steve Beshear to issue marriage licenses. (R. 26, 07.20.15 Hearing Tran. PageID 259 – 260; Exh. 4) In stark contrast, there is no evidence at all that

Judge Executive Blevins or the Fiscal Court ever issued directives to Davis or the Rowan County Clerk's Office with respect to the issuance of marriage licenses.

Indeed, when Davis made the decision to discontinue the issuance of marriage licenses post *Obergefell*, she did not confer with Judge Executive Blevins or consult the Rowan County Fiscal Court. (*Id.* at 278) Instead, Davis merely sat down with her deputies and advised them of the decision that she had made. (*Id.*)

In short, Davis' actions with respect to the issuance of marriage licenses are not funded by Rowan County, are subject entirely to state control, and her decision to discontinue the issuance of marriage licenses was made without any input, guidance or direction from the Fiscal Court. As a result, Davis was not a final policymaker for the County. And, because this essential element of Plaintiffs' claims against Rowan County is lacking, Plaintiffs are not substantially likely to prevail on the merits of their claims against the County.

B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IF THEY ARE DENIED AN INJUNCTION AGAINST ROWAN COUNTY

The denial of an injunction against Rowan County is also unlikely to cause Plaintiffs to suffer irreparable harm. Plaintiffs contend that an injunction against Davis is necessary because her blanket policy of refusing to issue marriage licenses prevents them from marrying in their county of residence. (R. 2-1, Pl. Mot. for Pre. Inj. at PageID 45) Yet, as demonstrated above, the Rowan County Fiscal Court itself does not issue marriage licenses and it does not exert any control or authority over Davis or her office with respect to her decision to issue or not issue marriage licenses. Thus, an injunction against Rowan County would neither undo the constitutional harm that Plaintiffs claim to have suffered or that they allege they will suffer in the future.

C. GRANTING AN INJUNCTION AGAINST ROWAN COUNTY WILL CAUSE SUBSTANTIAL HARM

On the other hand, the issuance of an injunction against Rowan County would cause it and potentially its citizens substantial harm. If an injunction is issued, the County would be saddled with the duty to issue marriage licenses but lack the authority to comply with it. The County does not supervise or control marriage licenses and it does not supervise, control or direct Davis or the operations of her Office. Thus, issuing an injunction against Rowan County in this context would subject it to additional risk of adverse judgments because the County has no lawful means of ensuring that marriage licenses are issued as Plaintiffs request.

D. THE PUBLIC INTEREST IS NOT SERVED BY THE ENTRY OF A PRELIMINARY INJUNCTION AGAINST ROWAN COUNTY

Finally, an injunction against Rowan County would not serve the public interest. The County does not deny that there is a strong public interest in protecting the constitutional rights of its citizens, but that interest is not served by issuing an injunction against the County when it had no authority to control Davis' allegedly unconstitutional actions.

III. CONCLUSION

For the foregoing reasons, Defendant, Rowan County, respectfully requests that this Court deny Plaintiffs' Motion for Preliminary Injunction in part insofar as it seeks the entry of an injunction against Rowan County.

Respectfully submitted,

/s/ Jeffrey C. Mando

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CERTIFICATE OF SERVICE

This is to certify that on the **30th** day of July, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to: William E. Sharp, Esq.; Daniel J. Canon, Esq.; Laura E. Landenwich, Esq.; L. Joe Dunman, Esq.; Roger K. Gannam, Esq.; and, Jonathan D. Christman, Esq.

/s/ Jeffrey C. Mando

Jeffrey C. Mando, Esq.