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**

DEFENDANT, ROWAN COUNTY'S, RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES AND COSTS

The Defendant, Rowan County, Kentucky ("the County"), by and through counsel, for its Response in Opposition to Plaintiffs' Motion for Award of Attorney Fees (R.183), states as follows:

I. INTRODUCTION

Much like their Motion for Preliminary Injunction, Plaintiffs are less than specific regarding the object of their Motion for an Award of Attorney Fees. In both Motions, Plaintiffs vaguely refer to Defendant, Kim Davis, in her official capacity, but they do not make any argument to support their claim of attorney fees liability against any particular party. Specifically, Plaintiffs fail to make any compelling case for attorney fees liability against Rowan County. Thus, even if Plaintiffs are deemed prevailing parties entitled to an award of fees and costs, any award cannot be imposed on Rowan County.

II. NO ATTORNEY FEES LIABILITY CAN BE IMPOSED ON ROWAN COUNTY BECAUSE IT WAS NOT HELD LIABLE ON THE MERITS

Liability for attorney fees and litigation costs under 42 U.S.C. § 1988 is tied to establishing liability for a constitutional rights violation under 42 U.S.C. § 1983 or other federal civil rights statute. While this fundamental concept requires no detailed

explanation, the Supreme Court succinctly stated it in *Kentucky v. Graham,* 437 U.S. 159 (1985) "liability on the merits and responsibility for fees go hand in hand; **where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant.**" (emphasis added). Because Plaintiffs have not prevailed against Rowan County on the merits, Rowan County is not liable for any attorney fees and costs to which Plaintiffs may otherwise be entitled.

A. THE PRELIMINARY INJUNCTION WAS NOT ENTERED AGAINST ROWAN COUNTY

Plaintiffs have not "prevailed" against Rowan County. The sole basis Plaintiffs' articulate for their claim to prevailing party status is this Court's Order entering a preliminary injunction against Kim Davis, in her official capacity. (R.183 at PageID 2720) Yet, as that Order plainly indicates, Kim Davis, even when acting in her official capacity, was not found to be a policymaker for Rowan County with respect to the issuance of marriage licenses. (R.43 at PageID 1153) Instead, Davis was acting on behalf of the state. (*Id.*) There was, therefore, no material alteration of the relationship between the County and Plaintiffs. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989), and Plaintiffs are not entitled to fees and costs against Rowan County.

B. THERE IS NO REASON FOR THE COURT TO DEVIATE FROM ITS FINDING THAT DAVIS ACTED FOR THE STATE WITH RESPECT TO THE ISSUANCE OF MARRIAGE LICENSES

The County acknowledges that the Court's finding that Davis acted on behalf of the state with respect to the issuance of marriage licenses was a preliminary one. (R.43 at PageID 1153) In their Motion, however, Plaintiffs make no argument to support a claim that Davis acted for the County instead of the state. (*See* R.183) Nor could they. All facts

developed during these proceedings indicate that Davis acted for the state when she refused to issue marriage licenses to Plaintiffs.

To prevail on a claim against Rowan County, Plaintiffs were required to show that the alleged violation of their rights occurred pursuant to a policy, practice, or custom of the county. *Monell,* 436 U.S. at 694. A § 1983 claimant may make this showing by establishing

> (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).

While Plaintiffs *alleged* 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 allegation was not only unsupported, but refuted, and the Court properly rejected it. (R.43 at PageID 1153)

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**." *McMillian 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 Davis' job functions as described by state law. *Id.* at 786. In *McMillian,* for example, the Supreme Court concluded 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 held 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 determined 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). And, more recently, the same court found that county and township clerks acted as state officials when they issued arrest warrants pursuant to state statute. *Graves v. Mahoning County*, 2015 U.S. Dist. LEXIS 9894, at *20 (N.D. Ohio Jan. 28, 2015)

As in these cases, county clerks in Kentucky act for the state in issuing, or declining to issue, marriage licenses. First, county clerks are not employees of the county, but instead are the holders of elective office pursuant to § 99 of the Kentucky Constitution. For this reason, the Rowan County Fiscal Court does not and did not hire Davis to perform functions

for it and it does not and did 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 control or fund 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 and that the Clerk's 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 salary 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, 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)). Indeed, all matters relating to marriage in Kentucky, including its definition and the procedures for licensing, solemnizing, and dissolving marriages are governed by KRS Chapter 402. In particular, the duty of county clerks to issue marriage licenses is governed by KRS 402.080.

Consistent with this state statutory framework, 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) With respect to marriage licenses, Davis testified that she collects a $35.00 fee for marriage license and that $14.33 of this amount is 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 exclusively 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, Governor Steve Beshear instructed Davis and other County Clerks to issue marriage licenses to same sex couples. (R.26, 07.20.15 Hearing Tran. PageID 259 – 260; Exh. 4) In stark contrast, there is no evidence that Judge Executive Blevins or the Fiscal Court ever issued any directive to Davis or the Rowan County Clerk's Office to deny Plaintiffs a marriage license.

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.*)

Furthermore, when Davis finally chose to discontinue the practice of refusing to issue marriage licenses, it was only after the State amended marriage license requirements

by passing Senate Bill 216. (R.182) Following this action by the State, the parties agreed, and the Sixth Circuit found, that the issues presented in this litigation were moot. (*Id.*)

In combination, all of the evidence indicates Davis' marriage license decisions and actions did not represent the policy of Rowan County but instead were those of the State. Davis' actions with respect to marriage licenses were 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 Rowan County Fiscal Court. As a result, this Court correctly found that Davis was not a final policymaker for the County. (R.43 at PageID 1153) And, because Plaintiffs have provided no reason to deviate from this conclusion, no liability for Plaintiffs' attorney fees or costs can be imposed against Rowan County.

Finally, and importantly, while Plaintiffs discuss the procedural history underlying their litigation with Davis in their Motion, there is no mention whatsoever of the efforts they went to secure a judgment against Rowan County. That is because there were very few, if any, such efforts. In fact, Plaintiffs have done nothing to establish liability against the County. Even when briefing their request for a preliminary injunction, Plaintiffs dodged that issue. In response to Rowan County's contention that Davis was not a County policymaker, the Court directed the parties in their briefs to specifically address that issue. (R.30) Despite this directive, Plaintiffs still asked the Court to defer ruling on that issue, saying it was unnecessary to secure an injunction against Davis. (R.36 at PageID 800)

In sum, not only is the law perfectly clear that the injunction against Davis cannot impose attorney fees' liability on the County, there is also no equitable reason that it should. For these reasons, the Court should affirm its finding that Davis did not act as a County policymaker with respect to issuing, or refusing to issue, marriage licenses.

III. EVEN IF THE INJUNCTION AGAINST DAVIS IN HER OFFICIAL CAPACITY TRIGGERED ATTORNEY FEE LIABILTY FOR THE COUNTY, THE REQUEST FOR FEES AND COSTS AGAINST THE COUNTY SHOULD BE DENIED BECAUSE SPECIAL CIRCUMSTANCES RENDER SUCH AN AWARD UNJUST

Even if Rowan County could be held liable for the attorney fees Plaintiffs incurred in litigating their claims against Davis, attorney fees should not be awarded against the County because "special circumstances" make such an award unjust. *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010). Although "special" circumstances are rare, they exist here. Fees may be denied on the grounds of special circumstances when the party against whom fees are sought had no ability to control the conduct that caused the injury at issue. *Jones v. Orange Housing Authority*, 559 F. Supp. 1379 (D.N.J. 1983).

Like the situation in *Jones,* and as the arguments above establish, Rowan County had no authority or ability to control Davis' actions and specifically, to stop her from implementing the practice she unilaterally adopted in refusing to issue marriage licenses. The County could not discipline or terminate Davis because she is an elected official, not a mere employee. It could not dock her pay or remove her salary because her salary is set by state law. It could not even adopt a County policy prohibiting her conduct because marriage licensing is governed by statute and no authority is delegated to Kentucky counties to exert any influence whatsoever in that arena. Nor could the County remove funding for Davis' office, since Davis' office generates its own revenue and the County does not fund the office in the slightest.

Indeed, the County could not have taken any action in this case to avoid attorney fee exposure other than what it has already done: await action by the State to resolve the conflict at issue by statute. In such a situation, none of the policy justifications underlying § 1983 or § 1988 support imposing attorney fee liability against the County. It poses no

deterrent since the County did not elect to adopt the unconstitutional practice which was the subject of the Court's injunction. To the contrary, it undermines such a cause since it deflects responsibility for attorney fees away from the party responsible to the taxpayers and employees of Rowan County even though they had no ability whatsoever to stop her.

In light of this situation, special circumstances make an award of fees and costs against Rowan County unjust.

IV. ASSUMING *ARGUENDO* THAT PLAINTIFFS ARE ENTITLED TO ATTORNEY FEES AGAINST ROWAN COUNTY, CERTAIN ATTORNEY FEES REQUESTED ARE NOT COMPENSABLE

As to Plaintiffs' claim for litigation costs in the amount of $2,008.08, Rowan County objects only as stated in part II, *supra*, because Plaintiffs do not qualify as "prevailing parties" as to it.

With respect to Plaintiffs' claims for attorney fees, however, Rowan County also objects because parts of Plaintiffs' requests for attorney fees are not compensable. In particular, many of the entries of Attorneys Sharp, Mar, and Weaver include billing for clerical tasks. In evaluating attorney fees under a fee shifting statute, "[i]t is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Antes v. Comm'r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 108802 (W.D. Mich.), quoting *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 n. 10, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (attorney's fees under 42 U.S.C. § 1988). *See also* *Hughes v. McCarthy*, 2015 U.S. Dist. LEXIS 132800 (N.D.Ohio) (purely clerical work excluded from number of hours on which

lodestar is calculated); *Gibson v. Scott*, 2014 U.S. Dist. LEXIS 20576 (S.D.Ohio) ("a purely clerical or secretarial activity is not billable at a paralegal's rate, or at any rate at all, because such tasks are included in office overhead"); *see also Wesley v. Rigney,* 2:10-CV-51-DLB-JGW (Order entered August 8, 2016).

For this purpose, clerical work involves tasks that do not require legal knowledge, such as filing motions, preparing or reviewing summons, and receiving and filing correspondence. *Lay v. Astrue*, 2012 U.S. Dist. LEXIS 169501 (E.D.Ky.). *See also* *Salamango v. NCSPLUS Inc.*, 2014 U.S. Dist. LEXIS 110199 (E.D.Mich.) (excluding such clerical tasks as electronically filing pleadings, sending documents to opposing counsel, and handling scheduling matters from the number of hours on which lodestar is calculated).

Under this standard, many of Sharp's entries include references to obviously clerical work, such as filing documents, downloading and printing them from the Court's servers, submitting checks, communicating with court clerks regarding filings, and calendaring. (R.183-5 at Entries dated 07.02.15, 07.23.15, 07.27.15, 08.06.15, 08.13.15, 08.17.15, 08.23 – 25.15, 08.28.15, 09.01.15, 09.02.15, 09.11.15, 09.15.15, 09.21.15, 10.18.15, 10.20.15, 11.3.15, 12.16.15, 06.02.16, 06.17.16; R.183-7 at 01.12.15; R.183-9 at 09.18.15 & 09.21.15) And, although block billing is acceptable in some limited cases, the fact that most of these entries are block billed makes it impossible to determine how much time was devoted to clerical tasks and how much time was devoted to true attorney work. *Gibson*, *supra* at *11-*12 ("Block billing becomes problematic in determining the reasonableness of fees when, as is the case here, counsel works on the case by himself, apparently with no administrative or paralegal support staff.")

As in *Gibson,* the Court should reduce the total award of fees by an appropriate percentage to account for counsels' inclusion of these clerical tasks in block-billed entries.

V. CONCLUSION

For the foregoing reasons, Defendant, Rowan County, respectfully requests that this Court deny Plaintiffs' Motion for Attorney Fees in part insofar as it seeks an award of attorney fees and costs from Rowan County. In the alternative, Rowan County requests that Plaintiffs' award for attorney fees and costs be reduced.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the **27th** day of October, 2016, 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.

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