

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, KENTUCKY'S SUR-REPLY IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS

The Defendant, Rowan County, Kentucky, by and through counsel, and for its Sur-Reply in Opposition to Plaintiffs' Motion for Attorney Fees and Costs, states as follows:

I. WHEN IT COMES TO ISSUING MARRIAGE LICENSES, KIM DAVIS IS A STATE ACTOR

In their Reply, Plaintiffs argue that Davis is a final policymaker of Rowan County. In its decision on August 12, 2015 the Court stated that “[w]hile Davis is the elected Rowan County Clerk, subject to very little oversight by the Rowan County Fiscal Court, there are *no other facts* in the record to suggest that she set marriage policy for Rowan County.” (Doc. 43 at PageID 1153, emphasis added) “Thus, Davis likely acts for the State of Kentucky, and not as a final policymaker for Rowan County, when issuing marriage licenses.” *Id.* While this finding is admittedly dicta, Plaintiffs have not addressed it, nor have they presented a plausible argument as to why it should be disregarded.

II. PLAINTIFFS' ANALYSIS UNDER THE CRABBS STANDARD IS FAULTY

Plaintiffs argue that Davis is a final policymaker based on her position and duties as a county clerk as a whole. Their argument is mis-directed. As the court has already observed, “[t]he key inquiry is whether an official is a ‘final policymaker [] for the local

government in a particular area or on a particular issue.” (Doc. 43 at PageID 1153; citing *McMillian v. Monroe Cnty, Ala.*, 520 U.S. 781, 785 (1997)). Thus, when walking through the factors in *Crabbs*, the court should consider Davis not just as a county clerk, but as a county clerk who issues marriage licenses. *Crabbs v. Scott*, 786 F.3d 426, 429 (6th Cir. 2015).

A. PLAINTIFFS’ ANALYSIS OF KRS 64.152 AND 64.530 IS FLAWED BECAUSE MARRIAGE LICENSES ARE GOVERNED BY KRS 402, ET SEQ.

Plaintiffs claim that the monies Davis collects are either utilized by the Clerk’s office or retained for the County. That is in direct contradiction with the record facts, at least as it pertains to fees for marriage license. The Rowan County Clerk’s Office serves as a “pass through collection agency” for the Commonwealth of Kentucky. A portion of the marriage license fees collected in exchange for these services is used to fund the Office’s activities through the year. The remainder is remitted to the State.” (Doc. 43 at PageID 1149; internal citations removed) Plaintiffs disregard this specific evidence. Instead they argue that by statute, the County Clerk’s office is required to turn over excess funds to the County, and that the County would be required to cover excess costs of the County Clerk’s office. This general argument is quite beside the point. It is what happens to the marriage license fees that governs.

Plaintiffs claim that because the Commonwealth would not be obligated to pay for excess expenditures, including judgments, incurred by the Rowan County Clerk’s Office, Davis is a County officer. This logic does not follow. Plaintiffs cite a 1993 OAG Opinion that opines that the Fiscal Court “probably” would have a duty to pay expenses if the County Clerk’s office does not generate sufficient fees to pay for necessary expenses. So what? Davis testified that the Clerk’s Office issued 212 marriage licenses at \$35.50 per license. Of that sum, Davis retains \$21.17 and the remainder is remitted to the Commonwealth. (Doc.

43 at PageID 1149) Under these facts, Davis was not a final policymaker for Rowan County with respect to the issuance of state mandated marriage licenses - she was acting on behalf of the Commonwealth. *McMillian v. Monroe County*, 520 U.S 781, 785 (1997).

B. IF DAVIS DOES NOT HAVE AUTHORITY TO ADOPT NEW OR ADDITIONAL REQUIREMENTS TO ISSUE MARRIAGE LICENSES, SHE IS NOT A FINAL POLICYMAKER

Plaintiffs argue that Davis instituted a “no marriage license policy” and that the Commonwealth did not have any authority over this policy. However, as Plaintiffs acknowledge, “Kentucky law does not vest county clerks with discretionary authority to adopt new or additional requirements on the issuance of marriage licenses.” Thus, by Plaintiffs own admission, Davis does not have authority to alter or adopt requirements for marriage licenses. Her “no marriage policy” was, therefore, not an internal policy, but merely a refusal to comply with state law.

Plaintiffs rely heavily on *DeGenova v. Sheriff of DuPage County*, 18 F. Supp. 2d 848 (N.D. Ill. 1998) a case which examines whether or not a County Sheriff is a county official under Illinois law while he is managing his jail. The Court found that the Sheriff’s policies for jail operations are independent and unalterable by any governing body. *Moy v. County of Cook*, 640 N.E.2d 926, 929 (Ill. 1994). The Court also found that the Illinois Constitution specifically designates the Sheriff as a county officer. *DeGenova*. Despite the significant differences in the cases, Plaintiffs liken Davis’ “no marriage license policy” to the policies and procedures instituted by the Sheriff in *DeGenova*. The argument is unpersuasive. In *DeGenova*, the Sheriff was under no obligation to operate any specific duty under direct and explicit statutory authority from the state.

C. THE FISCAL COURT DOES NOT CONTROL THE ISSUANCE OF MARRIAGE LICENSES.

Plaintiffs also argue that because the Fiscal Court approves the budget of the County Clerk's Office, the Commonwealth does not control the Office. Again, the pivotal question is not whether the Fiscal Court has some type of control over the Office as a whole, but whether the Fiscal Court has control of the Clerk's authority to issue marriage licenses. Per KRS 402, *et seq.* the Commonwealth controls the marriage license process; the Fiscal Court has no input on that matter.

III. CONCLUSION

For the foregoing reasons, Defendant, Rowan County, respectfully requests that this Court deny Plaintiffs' Motion for an Award of Attorney Fees and Costs insofar as it seeks an award of attorney fees and costs from 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 December, 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 all counsel of record.

/s/ Jeffrey C. Mando

Jeffrey C. Mando, Esq.