

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 RESPONSE TO PLAINTIFFS'
OBJECTIONS TO MAGISTRATE'S RECOMMENDED DISPOSITION AND ORDER

The Defendant, Rowan County, Kentucky, by and through counsel, and for its Response to Plaintiffs' Objections to Magistrate Recommended Disposition and Order (R. 200) states as follows:

The central thesis underlying Plaintiffs' Objections to the Magistrate's rejection of their request for attorney fees is that he "misapplied" the Sixth Circuit's holding from *McQueary v. Conway*, 614 F.3d 91 (6th Cir. 2010). In reality, the Magistrate Judge's conclusions and analysis of *McQueary* was spot on and it is Plaintiffs who have misconstrued its holding to suit their positions. When *McQueary* is viewed appropriately, it is perfectly consistent with the Magistrate Judge's ruling. For the reasons that follow, therefore, the Plaintiffs' objections should be overruled and the Magistrate Judge's Recommended Disposition and Order should be adopted.

Plaintiffs repeatedly assert throughout their Objections that *McQueary's* central holding was that winners of preliminary injunctions *can* achieve prevailing party status under 42 U.S.C. § 1988 to achieve an award of attorney fees. (R. 200, Pl. Objections at PageID 2094) While true, that statement is both incomplete and misleading. Though the

result in *McQueary* shows that a party who wins a preliminary injunction may be entitled to an award of attorney fees, the Court's central holding in that case explicitly states that preliminary injunction winners may also, appropriately, be denied attorney fees. 614 F.3d at 601. In fact, the Court was clear that preliminary injunction winners are not "always" entitled to an award of fees. *Id.*

More significantly, the Court also explained that awarding attorney fees to parties who win preliminary injunctions is an exception and not the rule. The *McQueary* Court acknowledged that the preliminary nature of the relief "will generally counsel against fees in the context of preliminary injunctions." *Id.* at 600. Thus, according to the Court, while "occasional exceptions" may occur, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *Id.* at 604. Hence, while Plaintiffs portray *McQueary* as mandating an award of fees here, the reality is that the case merely permits an award of fees if certain conditions are met.

Contrary to Plaintiffs' arguments, the Magistrate correctly found that the conditions set forth in *McQueary* are not met here. First, Plaintiffs assert that the Magistrate improperly overlooked the "material alteration" of the legal relationship between the parties that the preliminary injunction created. (R. 200, Pl. Objections at PageID 2904 – 2905) This is inaccurate. The Magistrate did not overlook the injunction or the effect it had on Plaintiffs. Rather, consistent with the Supreme Court's decision in *Sole v. Wyner*, 551 U.S. 74, 83 (2007), he considered whether it was a lasting alteration or merely a temporary one. (R. 199, Rec. Disp. & Ord. at PageID 2900) As the Magistrate found, the relief Plaintiffs obtained – requiring Davis to end her "no marriage licenses" policy – was temporary

because it ultimately became unnecessary when the Generally Assembly was passed S.B. 216 and Davis' signature on marriage licenses was no longer required. (*Id.* at 2901).

In *McQueary*, the situation was quite different because the plaintiff there set out to invalidate a law that was ultimately repealed after plaintiff's preliminary success in the litigation. 614 F.3d at 596. In contrast, Plaintiffs at bar did not set out to change the Kentucky statute relating to marriage licenses. They set out to demonstrate the unconstitutionality of Davis' "no marriage licenses" policy. (R. 1, Complaint) As the Magistrate Judge found, however, that relief became unnecessary once the Kentucky General Assembly voluntarily passed S.B. 216. (R. 199, Rec. Disp. & Ord. at PageID 2901) Thus, while the injunction obtained in *McQueary* potentially represented a material and lasting victory, the injunction secured here certainly did not.

Plaintiffs are also incorrect when they suggest that the Magistrate Judge erred when he considered the relief that they requested – but never achieved – in the Complaint. (R. 200, Pl. Objections at Page ID 2096) The Court in *McQueary* did not instruct lower courts to avoid considering the relief *actually* requested. Instead, it merely instructed courts to avoid speculation about relief that the plaintiff *could have requested but did not*. Indeed, the *McQueary* Court said this outright when it noted, "There is good reason for focusing on the relief requested, not the additional relief he might have requested." 614 F.3d. at 602.

The Magistrate did not use his imagination to conjure other types of relief that Plaintiffs could have pursued but chose not to as the trial court judge inappropriately did in *McQueary*. *See id.* at 602 (criticizing trial court for factoring in effect of statutes not challenged by plaintiff in denying fee request). Instead, the Magistrate Judge here simply looked at the Complaint to identify the relief Plaintiffs requested here which was never

obtained. (R. 199, Rec. Disp. & Ord. at PageID 2896 – 97) This substantial list included the following:

- Permanent injunctive relief
- Class certification
- Declaratory judgment finding Davis’ practice unconstitutional
- Trial by jury
- Compensatory and punitive damages
- Costs

(R.1, Complaint) Since Plaintiffs did not secure a single item on this list, the Magistrate correctly found that “the Court never granted the full and final relief they sought.” (R. 199, Rec. Disp. & Ord. at PageID 2901)

Plaintiffs’ criticize this result as a corruption of the prevailing party inquiry, since ordinarily, parties who only succeed on some, but not all claims, are still considered prevailing for purposes of § 1988. (R. 199, Pl. Objections at PageID 2098, n.3) That may be so, if and when the relief ultimately obtained is full and final, rather than temporary or provisional in nature. But, the fact that Plaintiffs requested a boatload of permanent relief that they never obtained, shows that the preliminary injunction was just a provisional gain in this litigation and one that proved fleeting due to legislative action. In other words, consistent with the rule from *McQueary*, the Magistrate Judge found that the nature – and not the extent – of the relief that Plaintiffs requested was insufficient to qualify for prevailing party status. (R. 199, Rec. Disp. & Rep. at PageID 2901)

Since Plaintiffs cannot get around the fact that the preliminary injunction they obtained was not “full and final relief”, they resort to exaggeration, claiming that the

Magistrate Judge's decision is so broad that it effectively eliminates the exemption created in *McQueary* and permits only parties who obtain a final judgment on the merits to recover fees. (R. 200, Pl. Objections at PageID 2908) The Magistrate Judge made no such finding and pronounced no such rule. Instead, he merely found, consistent with the record, that the relief obtained by Plaintiffs was temporary and limited in nature. (R. 199, Rec. Disp. & Rep. at PageID 2901)

Since, even under *McQueary*, such limited and temporary relief does not qualify for prevailing party status, the Magistrate Judge correctly denied Plaintiffs' Motion for Fees. For the foregoing reasons, Defendant, Rowan County, respectfully requests that the Court overrule Plaintiffs' Objections to the Magistrate Judge's Recommended Disposition and Order.

Respectfully submitted,

/s/ Jeffrey C. Mando

Jeffrey C. Mando, Esq. (#43548)
Claire E. Parsons, Esq. (#92934)
ADAMS, STEPNER,
WOLTERMANN & DUSING, PLLC
40 West Pike Street
Covington, KY 41011
859.394.6200
859.392.7263 – Fax
jmando@aswdlaw.com
cparsons@aswdlaw.com

/s/ Cecil Watkins (per authorization)

Cecil Watkins, Esq.
600 West Main Street
Morehead, KY 40351
606.784.4640
cwatkins@prosecutors.ky.gov

*Attorneys for Defendant, Rowan County,
Kentucky*

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of April, 2017, 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.