UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

APRIL MILLER, et al.,	:	
	:	**CIVIL ACTION**
Plaintiffs,	:	
	:	**0:15-CV-00044-DLB-EBA**
v.	:	
	:	**DISTRICT JUDGE**
KIM DAVIS, et al.,	:	**DAVID L. BUNNING**
	:	
Defendants.	:	**MAGISTRATE JUDGE**
	:	**EDWARD B. ATKINS**
KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MATTHEW G. BEVIN, et al.,	:	
	:	
Third-Party Defendants.	:	

DEFENDANT/THIRD-PARTY PLAINTIFF KIM DAVIS'
RESPONSE IN OPPOSITION TO PLAINTIFFS' OBJECTIONS TO
MAGISTRATE'S RECOMMENDED DISPOSITION AND ORDER

Defendant/Third-Party Plaintiff, KIM DAVIS ("Davis"), pursuant to 28 U.S.C. § 636(b), Fed. R. Civ. P. 72(b), and this Court's Order dated March 21, 2017 (Doc. 202), responds in opposition to Plaintiffs' Objections to Magistrate's Recommended Disposition and Order (Doc. 200, the "Plaintiffs' Objections").

INTRODUCTION

This Court should overrule Plaintiffs' Objections and adopt Magistrate Judge Atkins' Recommended Disposition (Doc. 199, the "Recommendation") denying Plaintiffs' Motion for Award of Attorneys' Fees and Costs (Doc. 183, Plaintiffs' "Fee Motion"). The Recommendation

correctly applies the standard set forth in *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010), in concluding that Plaintiffs are not prevailing parties and therefore not entitled to any award of attorney's fees under 42 U.S.C. § 1988.[1]

Davis incorporates herein by this reference, in its entirety, Davis' Response in Opposition to Plaintiffs' Motion for Award of Attorneys' Fees and Costs (Doc. 193, Davis' "Fee Motion Response"). In her Fee Motion Response, Davis thoroughly explains and applies the binding *McQueary* standard, showing the Court that Plaintiffs fall far short and therefore are not entitled to a prevailing party attorney's fee award under 42 U.S.C. § 1988. Likewise, in accordance with *McQueary*, the Magistrate Judge concluded Plaintiffs are not entitled to prevailing party fees.

Contrary to Plaintiffs' Objections, the Recommendation never departs from the standard set forth in *McQueary*. First, the Recommendation accurately sets out the standard:

> For guidance on this issue, the Court looks to McQueary v. Conway, 614 F.3d 91 (6th Cir. 2010). . . .
>
> McQueary provides instruction on the analysis employed in determining whether a party is a prevailing party within the meaning of 42 U.S.C. § 1988(b). The Court recognized that the preliminary nature of relief granted in a preliminary injunction does not by itself always justify denying an award of attorneys fees. Id. at 600. In doing so, the court recognized that in some cases attorneys fees may be in order, for example in circumstances in which a preliminary injunction does not merely induce a party to make a voluntary change, but rather compels action or inaction **that resolves the matter by giving the plaintiffs all they asked for**. See Young v. City of Chicago, 202 F.3d 1000, 1000 (7th Cir. 2000) (awarding fees to protestors who obtained a preliminary injunction to protest at the 1996 Democratic National Convention, which was the only relief sought); Watson v. County of Riverside, 300 F.3d 1092, 1095-96 (9th Cir. 2002) (preliminary injunction irrevocably excluded an unconstitutionally obtained report from an administrative hearing.);

[1] The Recommendation's Factual Background includes an error which should be corrected, though not material to the holding. The Plaintiffs are two same-sex and two different-sex couples, not "four same sex couples" as stated in the Recommendation. (Recomm. at 1.)

> Thomas v. Nat'l Sci. Found., 330 f.3d 486, 493, 356 U.S. App. D.C. 222(D.C. Cir. 2003) (plaintiff sought to delay enforcement of a statute until a particular event occurred.).
>
> However, the Court also instructed that other considerations may not support an award of fees where a preliminary injunction does not establish prevailing party status due to the injunction being "reversed, dissolved, or otherwise undone by the final decision in the same case." Id. at 600, citing Sole v. Wyner, 551 U.S. 74, 83 (2007). "When a case becomes moot, courts often vacate their earlier rulings on the theory that a ruling should not stand when the party opposing it is deprived of a chance to obtain a final ruling on the issue or to seek appellate review of it – due to events outside of the party's control, such as the defendant's voluntary cessation of conduct." Id. at 600, citing Alvarez v. Smith, 558 U.S. , 130 S.Ct. 576, 581, 175 L. "Ed. 2d 447 (2009); United States v. Munsingwear, Inc., 340 U.S. 36 (1950); cf. U.S. Philips Corp. V. KBC Bank N.V., 590 F.3d 1091, 1093-94(9th Cir. 2010). **Thus, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988"**. Id. at 604.
>
> In this case, the Court must consider the instant motion for attorneys fees in light of the relief both sought and ultimately obtained by the Plaintiffs in this action. Consideration of these matters leads to the conclusion that the Plaintiffs are not "prevailing parties" within the meaning of § 1988, and are therefore not entitled to an award of attorneys' fees.

(Recomm. at 4-5 (emphasis added).)

Then, the Recommendation gets the *McQueary* analysis exactly right in denying fees to Plaintiffs:

> In this action, the Plaintiffs did not merely seek a preliminary injunction to allow all qualified applicants to receive marriage licenses, and their claims for relief did not become moot because the preliminary injunction granted them all the relief they sought. . . . In addition, the record is clear that the Plaintiffs' claims did not become moot merely because the Court granted preliminary relief or because they applied for and received marriage licenses. . . .
>
> **In summary, the Plaintiffs did not merely seek to obtain a marriage license, but to obtain a permanent injunction that would enjoin the Defendant from enforcing the challenged provisions as to all qualified applicants for marriage licenses. . . .**

> **Therefore, the Plaintiffs' claim for relief did not become moot because the preliminary injunction granted all the relief they sought and there was nothing more this Court could do for them.** The Plaintiffs' sought permanent injunctive relief and damages, relief never granted to them. Finally, the Plaintiffs' claim for relief did not become moot when a particular event occurred such as the issuance of marriage licenses, but became moot due to a change of law.

(Recomm. at 5-7 (emphasis added).)

As shown above, the Magistrate Judge's conclusions were correct under the binding standard in this circuit, and no fee award should obtain. Plaintiffs' objections, on the other hand, have no merit. Plaintiffs feign that the Magistrate Judge somehow confused the *McQueary* analysis by focusing on all the categories of relief Plaintiffs did not receive, instead of focusing on the benefits of the temporary relief Plaintiffs did receive. (Pls.' Objs. at 2.) But Plaintiffs give themselves away by (correctly) pointing out to the Court that prevailing party status depends on relief that is "enduring and irrevocable." (Pls.' Objs. at 3 (quoting *Sole v. Wyner*, 551 U.S. 74, 86 (2007).) Where only preliminary relief is obtained, the "enduring and irrevocable" standard generally will not be met, with only "occasional exceptions" for "fact patterns in which **the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time**." *McQueary*¸ 614 F.3d at 599, 604 (emphasis added). To be sure, the Magistrate Judge catalogued all the permanent relief Plaintiffs sought and did not obtain. (Recomm. at 5-7.) But the crux of the Magistrate Judge's analysis was that the preliminary injunction Plaintiffs' obtained did not satisfy the "enduring and irrevocable" test—Plaintiffs did not receive everything they asked for in the lawsuit, and their case was mooted by a change in the law, not the mere passage of time. Despite their objections, Plaintiffs temporary relief never satisfied the "enduring and "irrevocable" test. Thus, Plaintiffs' objections miss the point, and should be overruled.

Plaintiffs even go so far as to suggest their temporary relief was equivalent to "injunctive relief enabling individuals to engage in a specific protest activity." (Pls.' Objs. at 3.) In support of this proposition, Plaintiffs cite *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), in which the court affirmed the award of prevailing party fees to plaintiffs who obtained a preliminary injunction allowing them to demonstrate at a specific time and place. 202 F.3d 1000 at 1000-01. To be sure, the *McQueary* court cited *Young* and other cases involving date-specific preliminary injunctions as examples of "fact patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time." *McQueary*¸ 614 F.3d at 599. But, as shown in Davis' Fee Motion Response, Plaintiffs' preliminary injunction is not like the injunctions in those cases, and therefore does not meet the *McQueary* standard. (Fee Mot. Resp. at 17-21.)

Plaintiffs' preliminary injunction was far more like the injunction under consideration in *McQueary*, where the plaintiff did not obtain a preliminary injunction allowing him to demonstrate at a specific funeral, but rather an injunction allowing him to demonstrate at all future funerals. *See id.* at 596; *McQueary v. Conway*, No. 06-CV-24-KKC, 2012 WL 3149344, *2 (E.D. Ky. Aug. 1, 2012). Likewise, Plaintiffs did not obtain a preliminary injunction allowing them to obtain marriage licenses at specific times. Plaintiffs Miller and Roberts did not seek the issuance of a marriage license on or before September 10, 2015, so that they could marry on that date; Plaintiffs Skaggs and Spartman did not seek the issuance of a marriage license on or before September 9, 2015, so they could marry on that date. (Pls.' Objs. at 3, n.2) Rather, like the plaintiff in *McQueary*, Plaintiffs sought a preliminary injunction allowing "future marriage license requests submitted by Plaintiffs or by other individuals who are legally eligible to marry in Kentucky" (Doc. 74 at PgID

1557), not to mention permanent injunctive relief and damages. Thus, like the plaintiff in *McQueary*, Plaintiffs are not prevailing parties under § 1988.

Perhaps the best illustration of why Plaintiffs' preliminary injunction cannot constitute "enduring and irrevocable" relief comes from Plaintiffs Fernandez and Holloway. They obtained a marriage license on September 8, 2015, but it expired thirty days later without their ever getting married on it—over ten months before SB 16 became law and mooted their claims. (Fee Mot. Resp. at 6, n.2, 10; Doc. 193-1, Decl. Kim Davis, ¶ 3.a.) When the preliminary injunction was vacated, this Plaintiff couple had obtained no enduring or irrevocable legal standing before the Commonwealth of Kentucky or the Rowan County Clerk's Office by virtue of the marriage license they had received. Even Plaintiffs Miller, Roberts, Skaggs, and Spartman were not permanently removed, as a matter of law, from the group of potential future applicants for marriage licenses in Rowan County. Should either couple's marriage end by death or divorce, they would have obtained no enduring or irrevocable legal status *vis-à-vis* Kentucky or the Rowan County Clerk's Office by virtue of the preliminary injunction or licenses received thereunder.[2]

[2] The continuously absent Plaintiffs Burke and Napier likewise illustrate the fleeting nature of Plaintiffs' relief. Burke and Napier never left, even temporarily, the pool of potential future marriage license applicants, and obtained no change in legal status *vis-à-vis* Kentucky or the Clerk.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Objections should be overruled, and Plaintiffs' Fee Motion should be denied.

DATED: April 10, 2017

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record:

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