

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION AT ASHLAND  
CIVIL ACTION NO. 15-cv-044-DLB  
*Electronically Filed*

APRIL MILLER, PH.D., et al.

PLAINTIFFS

v.

KIM DAVIS, INDIVIDUALLY AND IN HER  
OFFICIAL CAPACITY AS ROWAN  
COUNTY CLERK, et al.

DEFENDANTS

and

**MOTION TO AMEND FINDINGS AND CONCLUSIONS**  
**AND MOTION TO AMEND JUDGMENT**

KIM DAVIS

THIRD-PARTY PLAINTIFF

v.

MATTHEW G. BEVIN, IN HIS OFFICIAL  
CAPACITY AS GOVERNOR OF KENTUCKY, et al.

THIRD-PARTY DEFENDANTS

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Come the third-party defendants, Matthew G. Bevin in his official capacity as Governor of Kentucky, and Terry Manuel, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives (collectively "Third-Party Defendants"), and pursuant to Federal Rules of Civil Procedure 52(b) and 59(e), hereby move the Court to amend the attorneys' fees and costs judgment set out in the Memorandum Opinion and Order (D.E. 206) to provide that the award is assessed against Kim Davis in her official capacity as Rowan County Clerk. In support of this motion, the Third-Party Defendants rely upon the Memorandum of Law filed herewith.

Accordingly, the Third-Party Defendants respectfully request entry of an Order granting this motion and amending the Judgment to state that the fees and costs award is assessed against Kim Davis in her official capacity as Rowan County Clerk.

Respectfully submitted,

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COMMISSIONER TERRY MANUEL  
IN THEIR OFFICIAL CAPACITIES

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 18th day of August 2017, which simultaneously serves a copy to the following via electronic mail:

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO AMEND FINDINGS AND CONCLUSIONS  
AND MOTION TO AMEND JUDGMENT**

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Come the third-party defendants, Matthew G. Bevin in his official capacity as Governor of Kentucky, and Terry Manuel, in his official capacity as State Librarian and Commissioner of Kentucky Department for Libraries and Archives (collectively "Third-Party Defendants"), and pursuant to Federal Rules of Civil Procedure 52(b) and 59(e), hereby tender this Memorandum of Law in support of their Motion to Amend Findings and Conclusions and Motion to Amend Judgment.

## I. INTRODUCTION

Plaintiffs obtained a preliminary injunction against Defendant Kim Davis in her official capacity as Rowan County Clerk relating to the issuance of marriage licenses. See Memorandum Opinion and Order (D.E. 43). The Court eventually vacated the preliminary injunction in conformity with the Sixth Circuit's mandate. See Order (D.E. 181). Thereafter, Plaintiffs moved for attorneys' fees and costs against Ms. Davis. See Motion for Award of Attorneys' Fees and Costs (D.E. 183). The Magistrate Judge recommended that the motion be denied. See Recommended Disposition and Order (D.E. 199). The District Court disagreed and found that Plaintiffs had prevailed on their claims against Ms. Davis as evidenced by the preliminary injunction. See Memorandum Opinion and Order (D.E. 206) (hereinafter "Judgment"). But rather than assessing attorneys' fees and costs against the party that Plaintiffs sued, the Court directed non-party "Commonwealth of Kentucky" to pay the award. Id. at 49.

This motion does not request the Court reconsider its conclusions that a) Plaintiffs prevailed or b) the amount of fees and costs imposed. Those issues were thoroughly briefed and decided, and they are now suitable for appellate review.<sup>1</sup> This motion simply requests the Court amend the Judgment to provide that the award of costs and fees is imposed against the party that Plaintiffs sued and against whom the Court determined that Plaintiffs prevailed: Kim Davis in her official capacity as Rowan County Clerk. In reaching the conclusion that the "Commonwealth of Kentucky" is responsible for payment of Plaintiffs' fees and costs, the Court set up an incorrect dichotomy that Ms. Davis must have been acting as an agent of either Rowan County or

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<sup>1</sup> The Third-Party Defendants do not concede that the Court's decision on these issues is correct and reserve the right to seek appellate review.

the Commonwealth with respect to her refusal to issue marriage licenses. The Court apparently did not appreciate that Ms. Davis was acting on behalf of the Office of the Rowan County Clerk, the agency she controlled in her official capacity. There was no need for the Court to set up such dichotomy at all, as attorneys' fee awards may be obtained "directly from the official, in his official capacity, from funds of his agency or under his control. . . ." Hutto v. Finney, 437 U.S. 678, 700 (1978). An assessment of fees and costs against the Commonwealth of Kentucky apart from the Office of the Rowan County Clerk is particularly unjust since Ms. Davis and Third-Party Defendants were in an adverse relationship in this action, and the claims against the Third-Party Defendants were dismissed.<sup>2</sup>

## II. ARGUMENT

The Court may alter or amend its judgment where there was a clear error of law, newly discovered evidence, an intervening change in controlling law, or a need to prevent manifest injustice. ACLU of Ky. v. McCreary County, 607 F.3d 439, 450 (6th Cir. 2010). The purpose of Rule 59(e) is "to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." Howard v. United States, 533 F.3d 472, 475 (6th Cir. 2008) (citation omitted). Similarly, the Court may amend findings supporting the Judgment<sup>3</sup> to correct a manifest error of fact or law, where there is newly discovered evidence, or following a change in the law. Dow Chemical Pacific Ltd. v. Rascator Mar. S.A., 609 F. Supp. 451, 452-53 (S.D.N.Y. 1984). Here, the Court's determination that the Commonwealth of

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<sup>2</sup> Because the Third-Party Defendants had been dismissed and no relief was sought against them in the Petition for Attorneys' Fees, the Third-Party Defendants did not participate in the briefing on the fees issues.

<sup>3</sup> In assessing attorneys' fees, the Court is required to find facts and state conclusions of law pursuant to Rule 52(a). Fed. R. Civ. P. 54(d)(2)(C).

Kentucky is responsible for Plaintiffs' fees and costs is clear error and constitutes manifest injustice. Accordingly, the Judgment must be amended to provide that any fees and costs are assessed against Kim Davis in her official capacity as Rowan County Clerk.

Plaintiffs' lawsuit names Kim Davis in her official capacity as Rowan County Clerk. See Complaint (D.E. 1). “[A]n official-capacity suit, is in all respects other than name, to be treated as a suit against the entity.” Kentucky v. Graham, 473 U.S. 159, 166 (1985). That is, the official capacity claim is a suit against the Office of the Rowan County Clerk. In Graham, the Supreme Court explained that “liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against . . . § 1988 does not authorize a fee award against that defendant.” Id. at 165. That is, “[t]here is no cause of action against a defendant for fees absent that defendant’s liability for relief on the merits.” Id. at 170. Here, the Court found that Plaintiffs had prevailed because they were successful in obtaining the preliminary injunction. If that is correct, the fees must necessarily be assigned to the party that “lost” the injunction, *i.e.* the party that was enjoined. The preliminary injunction was entered against Kim Davis in her official capacity as Rowan County Clerk, not the Commonwealth of Kentucky. See Memorandum Opinion and Order (D.E. 43). The Commonwealth of Kentucky cannot be assessed attorneys’ fees and costs because it was not the unsuccessful party. The Court’s conclusion to the contrary is manifestly incorrect.

In assessing fees and costs against the Commonwealth of Kentucky, the Court believed it was required to determine whether Ms. Davis was acting on behalf of the

state or county with respect to the issuance of marriage licenses. See Judgment at 23-25. The Court based that analysis upon Crabbs v. Scott, 786 F.3d 426 (6th Cir. 2015). But Crabbs is not applicable to a determination of attorneys' fees and costs. At issue in Crabbs was whether a sheriff was entitled to the state's sovereign immunity. In order to answer that question, the Court was required to determine whether the sheriff was acting as an agent of the state. Id. at 429. The Crabbs Court utilized six enumerated factors to determine whether the sheriff was acting as an officer of the state with respect to the act in question in order to determine whether the state's sovereign immunity applies. Id. Those factors have nothing to do with the imposition of attorneys' fees and costs against an official capacity defendant. The Court's appropriation of those factors for the instant analysis was manifest error.

Graham, 473 U.S. 159, counsels that if fees and costs are to be awarded, they are imposed against the official entity that was the unsuccessful party. Here, that was the Office of the Rowan County Clerk. The Judgment, therefore, should have been against the Office of the Rowan County Clerk. In Hutto v. Finney, 437 U.S. 678 (1978), the Court analyzed the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976. The Court observed that "[t]he legislative history is equally plain: '[it] is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, **from funds of his agency or under his control**, . . .'" Id. at 694 (emphasis added). With the Court having determined fees and costs are appropriate, they should have been assessed directly against the Office of the

Rowan County Clerk.<sup>4</sup> There was need for the Court to engage in an analysis of whether Ms. Davis was acting as an agent of the state or county – indeed, it was clear error to do so.

Summers v. Adams, 2010 U.S. Dist. LEXIS 53164 (D.S.C. 2010), is instructive. At issue was a state license plate that included a religious message. Plaintiffs objected to the state’s issuance of the license plate and secured an injunction against two official capacity defendants: Director of the Department of Motor Vehicles (the agency issuing the plates) and Director of the Department of Corrections (the agency creating the plates). Id. at \*4-\*5. After determining that fees and costs were recoverable and the appropriate amount, the Court turned to the defendants’ request that the Court “shift responsibility for payment of attorneys’ fees and expenses to the State as an entity.” Id. at \*19. The Court rejected the argument and instead imposed the award against the defendants in their official capacities, jointly and severally. Id. at \*20-\*21. The Court correctly observed that the official capacity awards are collectable from the agencies controlled by the defendants. Whether there is to be some allocation for payment of the award between the offices or between the offices and the state, the Court observed, is not a question for the Court to resolve. Id. at \*22.

The approach in Summers should be used here. Any attorneys’ fees and costs award should be imposed against Kim Davis in her official capacity as the Rowan County Clerk. Pursuant to controlling law, any such award may be satisfied from the Office of the Rowan County Clerk. Whether Ms. Davis was acting as a state or county official for purposes of sovereign immunity is not relevant to the attorneys’ fees and

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<sup>4</sup> The Court observed that the Office of Rowan County Clerk is essentially a self-funded entity that operates on the fees it generates. See Judgment at 30-31. Indeed, the Clerk is required by law to execute a performance bond to secure performance of her Office’s obligations. See KRS 62.055

costs analysis. The precise account from which the award may be satisfied and whether there is to be an allocation between the Commonwealth and the Office of Rowan County Clerk are not issues for the Court to decide in this action.<sup>5</sup>

In any event, an award of fees and costs against the Commonwealth of Kentucky would be unjust under the circumstances of this case. The Court has discretion to deny an award where “special circumstances would render such an award unjust.” *Déjà Vu of Nashville, Inc. v. Metro Gov’t of Nashville*, 421 F.3d 417, 422 (6th Cir. 2005) (citation omitted). Ms. Davis’ actions that led to the preliminary injunction – the refusal to issue marriage licenses – was not conduct that was directed or approved by any state official. Indeed, the central allegation of Ms. Davis’ Third-Party Complaint is that the Third-Party Defendants were directing her to do the opposite. In *May v. Cooperman*, 578 F. Supp. 1308 (D.N.J 1984), the Court found that an award of fees and costs against state defendants was unjust where those officials did not take steps to implement an allegedly unconstitutional statute. Here, the Third-Party Defendants did not direct, ratify, or approve Ms. Davis’ decision to withhold the issuance of marriage licenses. To sanction the Commonwealth of Kentucky for a policy that was solely the province of the Rowan County Clerk would be manifestly unfair.

### III. CONCLUSION

For the reasons set out above, the Third-Party Defendants respectfully request entry of an Order granting this motion and amending the Judgment to state that the fees and costs award is assessed against Kim Davis in her official capacity as Rowan County Clerk.

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<sup>5</sup> As an aside, the Office of the Rowan County Clerk appears to have sufficient resources either from funds within its control or through the applicable performance bond without burdening the taxpayers of the Commonwealth of Kentucky with payment of these fees. See Judgment at n.36.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing with the Court's ECF system on the 18th day of August 2017, which simultaneously serves a copy to the following via electronic mail:

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**ORDER**

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This action having come before the Court upon the Third-Party Defendants' Motion to Amend Findings and Conclusions and Motion to Amend Judgment, the Court having reviewed the record and being otherwise sufficiently advised, it is hereby ORDERED and ADJUDGED as follows:

1. That the Motion to Amend Findings and Conclusions and Motion to Amend Judgment is GRANTED; and
2. That the attorneys' fees and costs judgment set out in the Memorandum Opinion and Order (D.E. 206) is AMENDED to provide that the award is assessed against Kim Davis in her official capacity as Rowan County Clerk.

This \_\_\_\_ day of \_\_\_\_\_ 2017.

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UNITED STATES DISTRICT COURT