

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT ASHLAND

APRIL MILLER, *et al.*,

Plaintiffs,

v.

KIM DAVIS, *et al.*,

Defendants.

Case No. 0:15-cv-00044-DLB

Electronically filed

**PLAINTIFFS' RESPONSE TO THIRD-PARTY DEFENDANTS'
MOTION TO AMEND FINDINGS AND JUDGMENT [RE #208]**

Following this Court's Memorandum Opinion and Order granting Plaintiffs' motion for attorneys' fees and costs [RE #206], the third-party Defendants moved to amend that decision insofar as the Court ordered the state, as opposed to Defendant Davis in her official capacity, to pay the awarded fees and costs. [RE #208, at 2 (stating that the "motion does not request the Court reconsider its conclusion that a) Plaintiffs prevailed or b) the amount of fees and costs imposed.".)] Plaintiffs now respond.

For the reasons advanced in support of their fees motion, Plaintiffs maintain that Davis, in her official capacity, acted as a local, not state, official by adopting a policy of refusing to issue marriage licenses to otherwise eligible applicants. [RE #194.] Having found to the contrary, however, the Court acted within its discretion in allocating financial responsibility for the attorney fee award to the state even though the state was not a party to Plaintiffs' original action. The third-party Defendants, in an attempt to avoid that financial liability, cite *Hutto v. Finney*, 437 U.S. 678 (1978) for the legislative

history concerning the allocation of fee awards [RE #208, 5], but they omit the key portion of that discussion that is relevant here:

The 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, **or from the State or local government (whether or not the agency or government is a named party).**” S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted). The House Report is in accord: “The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.” H. R. Rep. No. 94-1558, p. 7 (1976). The Report adds in a footnote that: “Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer.*” *Id.*, at 7 n. 14. Congress’ intent was expressed in deeds as well as words. It rejected at least two attempts to amend the Act and immunize state and local governments from awards.

Hutto v. Finney, 437 U.S. 678, 694, 98 S. Ct. 2565, 2575 (1978) (emphasis added).

Thus, allocation of fee liability to non-party governmental entities was specifically considered as part of the legislative history. And it is recognized as within district courts’ discretion in awarding attorneys’ fees in civil rights cases, such as here. *See McGee v. Cole*, 115 F.Supp.3d 765, (S.D. W.V. 2015) (“This declaration is part and parcel of the total relief obtained *and shows that the State, not the clerks, is responsible for the legislation that violated Plaintiffs’ civil rights. For the foregoing reasons, the attorneys’ fees assessed against Defendant Clerks will be the responsibility of the State of West Virginia.*”) (emphasis added).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the third-party Defendants’ motion to amend [RE #208] be denied.

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CERTIFICATE OF SERVICE

I certify that on September 7, 2017, I filed this motion and accompanying memorandum with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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ORDER

Motion having been made, and the Court being sufficiently advised,

IT IS HEREBY ORDERED:

That the motion to amend findings and judgment [RE #208] is hereby **DENIED**.