

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

APRIL MILLER, et al.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
	:	0:15-CV-00044-DLB
v.	:	
	:	DISTRICT JUDGE
KIM DAVIS, et al.,	:	DAVID L. BUNNING
	:	
Defendants.	:	

KIM DAVIS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MATTHEW G. BEVIN, et al.,	:	
	:	
Third-Party Defendants.	:	

**DEFENDANT/THIRD-PARTY PLAINTIFF KIM DAVIS’
RESPONSE IN OPPOSITION TO THIRD-PARTY DEFENDANTS’
MOTION TO AMEND FINDINGS AND CONCLUSIONS
AND MOTION TO AMEND JUDGMENT**

Defendant/Third-Party Plaintiff, KIM DAVIS (“Davis”), responds in opposition to Third-Party Defendants’ Motion to Amend Findings and Conclusions and Motion to Amend Judgment (Doc. # 208, the “Motion to Amend”).

INTRODUCTION

Third-Party Plaintiffs’ Motion to Amend is an after-the-fact attempt to have the Court disregard the nature of Davis’ office and the Commonwealth’s obligations. Third-Party Defendants’ Memorandum of Law in Support of their Motion to Amend (Doc. # 208-1, the “TPD

Memorandum”) provides no justification for amending the Court’s Memorandum Opinion and Order (Doc. # 206, the “Fee Order”). The Motion to Amend should be denied.

Davis generally agrees with the cogent arguments made by Defendant Rowan County in its Response in Opposition to the Motion to Amend (Doc. # 214), and Davis adopts the County’s arguments in opposition to the Motion to Amend, but only to the extent of Third-Party Defendants’ (as opposed to Davis’) liability under the Fee Order, and except as otherwise indicated herein.¹ Following is Davis’ additional argument in opposition to the Motion to Amend.

ARGUMENT

I. Third-Party Defendants Are Parties to This Action Who Received Notice and an Opportunity to Respond.

The County correctly argued that Third-Party Defendants had ample notice and opportunity to respond with respect to the Fee Motion. (County Resp., Doc. 208-1, at PageID 3032-33 (citing Fee Order, Doc. 206, at Page ID2966 n.22).) It should be noted, however, that Third-Party Defendants’ notice and opportunity was actual and not merely constructive—they were not mere spectators or observers. Rather, Third-Party Defendants are fully parties to this action, in their official capacities, making the Commonwealth fully a party by and through them. And Davis, in her official capacity, is also an agent of the Commonwealth in the administration of marriage licenses. (Fee Order at PageID 2965-2980.) Thus, third-Party Defendants’ assertion that Davis, in her official capacity, was the party sued, but that the Commonwealth is a “non-party” (TPD Mem.

¹ Davis maintains the position that Plaintiffs are not entitled to any award of attorney’s fees or costs pursuant to their Motion for Attorneys’ Fees and Costs (Doc. # 183, the “Fee Motion”), or otherwise under 42 U.S.C. § 1988. By both opposing the Motion to Amend and adopting the County’s arguments in opposition to the Motion to Amend, however, Davis does not intend to waive, and expressly does not waive, her appeal rights with respect to the Fee Order, or any argument she previously asserted in filings opposing Plaintiffs’ Fee Motion. (Doc. ## 193, 204.)

at PageID 3008), is not only wrong, but also a direct attack on the Court’s findings and conclusions in its Fee Order.²

Nor is it true that Third-Party Defendants had been “dismissed” in any sense material to the Fee Motion, or to Third-Party Defendants’ responsibility to speak up. (TPD Mem. at PageID 3009 n.2.) At the time of the Fee Motion, all parties had been “dismissed,” because the entire action had been dismissed. (Order, *In re: Ashland Civil Actions*, Doc. 182, at PageID 2710.) Thus, at the time of the Fee Motion, Third-Party Defendants were no less parties than Davis. Given their status as full parties to the action at all material times, the fee liability conditions precedent of “notice” and an “opportunity to respond” were fully satisfied.³

Third-Party Defendants’ outsider argument is further undermined by the unpublished district court opinion they cite in their Memorandum, *Summers v. Adams*, No. 3:08-2265-CMC, 2010 WL 2179571 (D.S.C. May 26, 2010). (TPD Mem. at PageID 3012-13.) Two state agency officials were defendants before the *Summers* court, but the court observed that the “‘State’ as a whole” was “arguably the more responsible entity.” *Id.* at *6. The court, however, would not impose liability on the “State” as a whole because the state agency defendants “were . . . the only parties before [the] court.” *Id.* at *6, n.9. Even if the *Summers* court’s reasoning could be squared with the Supreme Court’s reasoning in *Hutto v. Finney*, 473 U.S. 678, 694 (1978) (it cannot—*see*

² This direct attack on the underlying findings and conclusions of the Fee Order belies an intent to displace far more of the Fee Order than is suggested by the Motion to Amend.

³ According to the Supreme Court, no more is required:

In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant “in his official capacity” imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.

Brandon v. Holt, 469 U.S. 464, 471–72 (1985) (footnote omitted).

County Resp. at PageID 3035), the instant case is distinguishable from *Summers* in this critical respect: Third-Party Defendants, one of which is the highest executive officer of the Commonwealth, are before the Court, in addition to the agency official Davis. As shown above, it cannot be credibly argued that the Commonwealth is not a party to this action.

II. Third-Party Defendants Committed Legal Error Themselves in Their Mischaracterization of *Kentucky v Graham*.

The County correctly argued that Third-Party Defendants failed to demonstrate any clear error of law by the Court in its Fee Order.⁴ (County Resp. at PageID 3033-37.) To be sure, it is Third-Party Defendants who have committed the legal error, specifically in their selective reading and presentation of the Supreme Court’s opinion in *Kentucky v. Graham*, 473 U.S. 159 (1985). (TPD Mem. at PageID 3010-3012.)

In their attempt to deflect liability and isolate Davis as “the unsuccessful party” (*id.*), Third-Party Defendants quote *Kentucky v. Graham* for the proposition 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.* (quoting 473 U.S. at 165).) The full quote, however, reads as follows: “Thus, liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, **either because of legal immunity or on the merits**, § 1988 does not authorize a fee award against that defendant.” 473 U.S. at 165 (emphasis added). The emphasized portion, which is the portion omitted by Third-Party Defendants, makes it clear the Supreme Court was not discussing whether a state is liable for fees to a plaintiff who prevailed against a state official. The Court’s point was simply that a plaintiff must prevail against a party in order to recover fees from the party, and if a plaintiff does

⁴ See *supra* note 1.

not prevail—whether due to legal immunity or on the merits—then the plaintiff cannot recover fees. Thus, “liability on the merits and responsibility for fees go hand in hand” 473 U.S. at 165. Whether Plaintiffs in the instant case prevailed is not at issue in the Motion to Amend, and as shown above, to the extent Plaintiffs prevailed against Davis in her official capacity, they prevailed against the Commonwealth.⁵ Thus, it is legal error for Third-Party Defendants to cite *Kentucky v. Graham* in support of their motion to amend.

III. There Is No Injustice in Imposing Fee Liability on the Commonwealth.

The County correctly argued that Third-Party Defendants failed to demonstrate manifest injustice in the imposition of fee liability against the Commonwealth.⁶ (County Resp. at PageID 3037-3040.) To the extent Plaintiffs are entitled to any fee recovery, as having prevailed against Davis in her official capacity, the Commonwealth, acting through its highest elected official, implicitly endorsed Davis’ rationale for the “no marriage licenses policy” challenged by Plaintiffs. By Executive Order 2015-048, Third-Party Defendant Governor Bevin admitted, on behalf of the Commonwealth, that Davis was entitled to an accommodation relieving her from carrying out former Governor Beshear’s marriage license mandate. As Davis explained in her Response in Opposition to Plaintiffs’ Motion for Award of Attorneys’ Fees and Costs (Doc. 193),

On December 22, 2015, Gov. Bevin issued Executive Order 2015-048 Relating to the Commonwealth’s Marriage License Form (the “Executive Order”), which states, *inter alia*, that “the issuance of marriage licenses on the form currently prescribed by [the SSM Mandate] creates a **substantial burden on the freedom of religion of some County Clerks** and employees of their offices because the current form bears the name of the issuing County Clerk, and some County Clerks and their employees sincerely believe that the presence of their name on the form implies their personal endorsement of, and participation in, same-sex marriage, which

⁵ See *supra* note 1.

⁶ See *supra* note 1.

conflicts with their sincerely held religious beliefs,” that “KRS 446.350 requires use of the least restrictive means available to carry out compelling governmental interests, and there are less restrictive means available to further the governmental interest of issuing marriage licenses to all applicants who qualify than the form that is currently being used,” that “there is no compelling governmental interest, particularly under the heightened ‘clear and convincing evidence’ standard required by KRS 446.350, necessitating that the name and signature of County Clerks be present on the marriage license form used in the Commonwealth,” that the Commonwealth “can readily prescribe a different form that reasonably accommodates the interests protected by KRS 446.350” and does not substantially burden the “free exercise of religion” by County Clerks and their employees “who hold sincerely-held religious beliefs that conflict with same-sex marriage,” and, pursuant to the authority vested in Gov. Bevin by Section 69 of the Kentucky Constitution and the Kentucky Religious Freedom Restoration Act, orders and directs that the Commonwealth “shall forthwith create, prescribe and publish to all County Clerks in the Commonwealth a marriage license form substantially identical to the form attached hereto, henceforth to be used by the offices of all County Clerks in the Commonwealth.” 5 (Doc. 156-1, Executive Order, at PgID 2601-04.)

(Doc. 193 at PageID 2840-41 (emphasis added).)

The Commonwealth, acting through its governors, created the situation from which Davis required an accommodation, and then admitted as a matter of Commonwealth policy that the accommodation was owed to her. Thus, to the extent Plaintiffs are entitled to any fee award, there is no injustice in imposing fee liability on the Commonwealth.

CONCLUSION

For all of the foregoing reasons, Third-Party Defendants’ Motion to Amend should be denied.

DATED this September 19, 2017.

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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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DATED this September 19, 2017.

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