

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

REPLY IN SUPPORT OF
MOTION TO AMEND FINDINGS AND CONCLUSIONS
AND MOTION TO AMEND JUDGMENT OF
THIRD-PARTY DEFENDANTS

KIM DAVIS

THIRD-PARTY PLAINTIFF

v.

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

THIRD-PARTY DEFENDANTS

*** *** *** *** ***

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 for their reply in support of their Motion to Amend Findings and Conclusions and Motion to Amend Judgment [D.E. 208 (“Motion to Amend”)] respectfully state as follows:

I. INTRODUCTION

Plaintiffs filed this action seeking declaratory relief against Kim Davis, Individually and in her Official Capacity as Rowan County Clerk (hereafter “Davis”). [See Complaint, D.E. 1.] The Court granted Plaintiffs’ requested relief by issuing a preliminary injunction solely against Davis. [See Memorandum Opinion and Order, D.E. 43.] Plaintiffs and the “Commonwealth of Kentucky” have not, at any point in this litigation, been adverse to one another, and Plaintiffs have neither sought nor obtained any relief from the Court regarding the Commonwealth of Kentucky. Davis, at all times, represented and acted as the Rowan County Clerk in carrying out (or not) the duties of that office. Without question, Davis, in both her individual and official capacities, is the only party to this litigation that has ever been adverse to Plaintiffs and been ordered to change or modify behavior to Plaintiffs’ benefit. It is clear that fee liability follows merits liability; that is, that a prevailing party may only be permitted to collect reasonable attorneys’ fees from the non-prevailing party. Therefore, the only party against whom Plaintiffs may collect attorneys’ fees is the Defendant, Kim Davis in her Official Capacity as Rowan County Clerk and the Office of the Rowan County Clerk, the office she controlled in her official capacity. This Court’s Order [D.E. 206 (“Judgment”)] holding otherwise is clearly erroneous and manifestly unjust, and the Court should accordingly grant Third-Party Defendants’ Motion to Amend.

II. ARGUMENT

A. **Third-Party Defendants’ Motion To Amend Is Procedurally Proper.**

At the outset, it must be noted that the Motion to Amend is properly before this Court pursuant to Rules 52(d) and 59(e). Defendant Rowan County, Kentucky

contends that Third-Party Defendants cannot move to amend the attorneys' fees award because they did not make their present arguments prior to the Court's Judgment, and Rule 59(e) cannot be used as a vehicle to raise new arguments. [Defendant Rowan County, Kentucky's Response in Opposition to Third-Party Defendants' Motion to Amend Findings and Conclusions and Motions to Amend Judgment ("Rowan County Response"), D.E. 214 at Page ID # 3032-33 (quoting J.B.F. v. Ky. Dep't of Educ., 2017 U.S. App. LEXIS 11778 (6th Cir. June 30, 2017).]¹ Defendant Rowan County omits, however, that the arguments advanced by the Motion to Amend are not new. This Court's Judgment expressly considered at length the extent to which the Commonwealth of Kentucky may be held liable for Plaintiffs' attorneys' fees. Further, the Third-Party Defendants had been dismissed from the case before the question of attorneys' fees was raised with the Court. Until the Court's decision was entered, there was no reason for the Third-Party Defendants to believe that any party other than Davis was implicated as to the award of attorneys' fees or that the Court would order the fees paid by the generic entity "Commonwealth of Kentucky" rather than by Davis in her Official Capacity as Rowan County Clerk. Therefore, the Motion to Amend is appropriately before this Court.

B. The Office of the Rowan County Clerk Is The Only Party Liable For Plaintiffs' Fees Because It Is The Party Against Which Plaintiffs' Prevailed On The Merits.

It is undisputed that Plaintiffs secured their requested injunction against Kim Davis her Official Capacity as Rowan County Clerk. Since the Office of the Rowan County Clerk was the party against which Plaintiffs prevailed on the merits, it is the only

¹ None of the other parties, including Defendant Rowan County, address the fact that Third-Party Defendants' Motion to Amend was brought pursuant to Rule 59(e) and Rule 52(b). [Motion to Amend at Page ID # 3007.]

party against which fees may be assessed. This is true even if Davis was carrying out responsibilities as a state rather than a county official—a false dichotomy under the facts of this case. The only relevant fact is that Davis in her official capacity controls the Office of the Rowan County Clerk regardless of the functions it performs. If it is performing a state function, then an award of attorneys’ fees must come from the funds it controls as an agency just the same as if an award of attorneys’ fees in a prisoner rights case would come from the Department of Corrections, not from a generic source.

In Kentucky v. Graham, 473 U.S. 159, 164 (1985), the United States Supreme Court made clear that “the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits.” Stated another way, “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.” Id. at 165. “Section 1988 simply does not create fee liability where merits liability is nonexistent.” Id. at 168. In Graham, the plaintiffs had actually named the Commonwealth of Kentucky as a defendant for purposes of imposing fee liability. Id. at 163 n.3. Nonetheless, the Court held that, since the Commonwealth of Kentucky could not be held liable on the merits of the plaintiffs’ claims, it likewise could not be held liable for their fees incurred in litigating those merits. Id. at 170 (“There is no cause of action against a defendant for fees absent that defendant’s liability for relief on the merits.”) It is therefore absolutely clear that a plaintiff may only collect fees pursuant to § 1988 from defendants against whom it prevailed on the merits.

There is no question that Plaintiffs have not, in any way, prevailed on the merits against the “Commonwealth of Kentucky.” In order to prevail over a defendant for purposes of a fee award under § 1988, a plaintiff must “prove the settling of some dispute which affects the behavior of the defendant towards the plaintiff.” Farrar v. Hobby, 506 U.S. 103, 110 (1992) (quotations and citation omitted). A plaintiff prevails over a defendant “if, and only if, [the judgment] affects the behavior of the defendant toward the plaintiff.” Rhodes v. Stewart, 488 U.S. 1, 4 (1988). “[T]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.” Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 792-93 (1989). Here, to the extent the plaintiffs prevailed against any party it was against Davis as Rowan County Clerk in her Official Capacity. This Court’s injunction was expressly entered against Kim Davis in her Official Capacity as Rowan County Clerk. [See Memorandum Opinion and Order, D.E. 43, p. 28]. It follows that the unsuccessful party over which Plaintiffs prevailed is the Office of the Rowan County Clerk. Therefore, the Office of the Rowan County Clerk is responsible for Plaintiffs’ fees under the analysis in the Court’s ruling.

Defendant Rowan County argues that Third-Party Defendants “lost” their case against Plaintiffs when this Court determined that Davis acted as an agent of the Commonwealth when she refused to issue marriage licenses. [Rowan County Response at Page ID # 3034.] Defendant Rowan County misunderstands the issue.² Official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Graham, 473 U.S. at 165 (citation and

² Defendant Rowan County’s argument is also incorrect, since the inquiry is whether a party was prevailed against on the *merits*, not on the ancillary question of whether it is liable for attorneys’ fees. If Defendant Rowan County’s argument were correct, then any party against which attorneys’ fees are assessed would be a losing party.

quotations omitted). Official capacity awards are collectable from the agencies controlled by the party against whom the plaintiff prevails on the merits. See, e.g., Summers v. Adams, 2010 U.S. Dist. LEXIS 53164, 20-1 (D.S.C. 2010); Motion to Amend at Page ID # 3012. Therefore, once the Court determined that Plaintiffs had prevailed over Kim Davis in her official capacity as Rowan County Clerk, the inquiry was over. It was error to engage in any unnecessary analysis as to whether Kim Davis was acting on behalf of the Commonwealth of Kentucky or the Office of the Rowan County Clerk when she refused to issue marriage licenses. [See Motion to Amend at Page ID 3010-11.] It was the Office of the Rowan County Clerk that failed to comply with its obligation to issue marriage licenses under applicable law, and that was the party against which fees must have been assessed.

The Commonwealth of Kentucky cannot be liable for Plaintiffs' fees pursuant to § 1988 because the Commonwealth of Kentucky was not the subject of a claim by Plaintiffs and did not lose to Plaintiffs in any form. The only party against whom Plaintiffs arguably prevailed on the merits is Davis in her Official Capacity as Rowan County Clerk. Therefore, the only party liable for Plaintiffs' fees is the Office of the Rowan County Clerk. To hold otherwise was in error, and the Motion to Amend should accordingly be granted.

III. CONCLUSION

Attorneys' fees should be assessed against the non-prevailing party, or the party against whom judgment was entered. Accordingly, the Third-Party Defendants respectfully request the entry of an Order granting their Motion to Amend 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,

STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, Kentucky 40507-1380
(859) 231-3000
(859) 253-1093 facsimile

By: /s/ Palmer G. Vance II
William M. Lear, Jr.
Palmer G. Vance II

COUNSEL FOR THIRD-PARTY
DEFENDANTS GOVERNOR
MATTHEW G. BEVIN AND
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 3rd day of October 2017, which simultaneously serves a copy to the following via electronic mail:

Daniel J. Canon
Laura E. Landenwich
Leonard Joe Dunman
CLAY DANIEL WALTON ADAMS, PLC
dan@dancanonlaw.com
laura@justiceky.com
joe@justiceky.com
COUNSEL FOR PLAINTIFFS

William Ellis Sharp
ACLU OF KENTUCKY
sharp@aclu-ky.org
COUNSEL FOR PLAINTIFFS

Anthony Charles Donahue
DONAHUE LAW GROUP, PSC
acdonahue@donahuelawgroup.com
COUNSEL FOR KIM DAVIS

James D. Esseks
Ria Tabacco Mar
Daniel Mach
Heather Weaver
AMERICAN CIVIL LIBERTIES UNION
jesseks@aclu.org
rmar@aclu.org
dmach@aclu.org
hweaver@aclu.org
COUNSEL FOR PLAINTIFFS

Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Jonathan D. Christman
LIBERTY COUNSEL
court@lc.org
hmihet@lc.org
rgannam@lc.org
jchristman@lc.org
COUNSEL FOR KIM DAVIS

Cecil R. Watkins
ROWAN COUNTY ATTORNEY
cwatkins@prosecutors.ky.gov
COUNSEL FOR DEFENDANT
ROWAN COUNTY KENTUCKY

Jeffrey C. Mando
Claire E. Parsons
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
cparsons@aswdlaw.com
jmando@aswdlaw.com
COUNSEL FOR DEFENDANT
ROWAN COUNTY KENTUCKY

/s/ Palmer G. Vance II
COUNSEL FOR THIRD-PARTY
DEFENDANTS GOVERNOR
MATTHEW G. BEVIN AND
COMMISSIONER TERRY MANUEL
IN THEIR OFFICIAL CAPACITIES