

Here's How the ACLU Scored Another Taxpayer-Funded Payday

A federal district judge has overruled a magistrate judge's decision that neither Rowan County, Ky., Clerk Kim Davis, nor the taxpayers of her county, should be liable for attorney's fees related to the American Civil Liberty Union's lawsuit to force her to issue same-sex "marriage" licenses.

Instead, U.S. District Judge David Bunning offered yet another absurd opinion that taxpayers need to be on the hook for the ACLU's attorney's fees—Kentucky's taxpayers. In a 50-page decision, the judge determined that his 2015 temporary preliminary injunction entitled the ACLU, as plaintiffs, to attorney's fees.

Davis had requested a simple accommodation from former Kentucky Gov. Steve Beshear, but he refused to provide one. Upon his election, Beshear's successor, Gov. Matt Bevin, signed an executive order creating a new marriage license form that does not require a county clerk's name and title, and the Kentucky General Assembly unanimously made his protections permanent for Davis and her fellow county clerks.

Bunning's injunction was later vacated by the Sixth Circuit Court of Appeals because those actions by Bevin and the legislature made the lawsuit moot. And, because the ACLU had not prevailed in the case, Magistrate Judge Edward Atkins determined earlier this year it was not eligible for attorney's fees.

Bunning, however, wrote in Friday's opinion:

Under 42 U.S.C. § 1988, Congress "explicitly empowered the courts to grant fees to parties who win § 1983 actions."

Accordingly, a “court, in its discretion, may allow the prevailing party ... a reasonable attorney’s fee as part of the costs.”

Therefore, the pending motion requires the Court to answer a critical threshold question: Did the Plaintiffs prevail?

“Prevailing party” is a “legal term of art.” “The Supreme Court has stated that in providing for fees under § 1988, ‘Congress intended to permit the ... award of counsel fees only when a party has prevailed on the merits.’” “Over time, ‘prevailing on the merits’ has been distilled to succeeding on any significant issue which achieves some of the benefit the parties sought in bringing suit, the settling of some dispute which affects the behavior of the defendant towards the plaintiff, and resolution of the dispute in a way that ... alters the legal relationship of the parties.”

However, not just any change in the legal relationship between the plaintiff and the defendant is sufficient to establish prevailing-party status. “The touchstone of the prevailing party inquiry ... is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.” “A material change ‘directly benefits’ a plaintiff by modifying the defendant’s behavior toward him.”

He quoted additional case law that says such modifications must be “judicially sanctioned,” not voluntary, and that such modifications must be “enduring and irrevocable.” He acknowledged that’s a difficult standard to meet in most preliminary injunctions, but noted that the ACLU basically got everything it wanted, except for a successful completion of their case, so the fees could be recouped.

Bunning also found Davis was acting in her official capacity on behalf of the Commonwealth of Kentucky, therefore she could

not be held liable in to other damages lawsuits by two homosexual couples. The 11th Amendment to the U.S. Constitution precludes them from suing the state for damages—but not attorney's fees.

Liberty Counsel founder and chairman Mat Staver, who has been representing Davis in court since the beginning of her legal issues over the demand to supply homosexuals with "marriage" licenses against her deeply held Christian beliefs, said that while he was pleased that neither Kim Davis nor Rowan County's taxpayers were liable for attorney's fees or costs, he's troubled by Bunning's decision nonetheless. He said the part of the ruling invoking attorney's fees against the state will be appealed.

"The part of the ruling that finds the plaintiffs were prevailing parties is contrary to the law because the legislature mooted the case by passing a law that provides for the precise religious liberty accommodation Kim Davis sought," he said. "The magistrate correctly found that the plaintiffs were not the prevailing parties. That ruling is consistent with the Sixth Circuit Court of Appeals. Governor Matt Bevin's executive order and the legislature mooted the case and prevents the plaintiffs from being prevailing parties. Without prevailing party status, there can be no attorney's fees."

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