

1992 WL 672380

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United States District Court,
E.D. Kentucky.

John DOE, et al., Plaintiffs,
v.

COMMONWEALTH of Kentucky, Defendant.

Civ. A. No. 91-187. | Oct. 21, 1992.

Opinion

ORDER

BERTELSMAN, Chief Judge.

*1 This is an action under 28 U.S.C. § 1983 for prospective injunctive relief only. In general, the suit challenges Kentucky's methods of handling juvenile offenders. The remaining named defendants, all sued in their official capacities are James Knauf, jailer of the Kenton County Detention Center; Clyde Middleton, Judge Executive; and Jack Lewis, Secretary of the Cabinet of Corrections, Commonwealth of Kentucky.

On August 24, 1992, this court entered an order that states at Paragraph 6:

“That the Court clarifies its previous Order of April 17, 1992, as follows:

Mr. Jack Lewis, who is sued in his official capacity only, represents the Commonwealth of Kentucky. This Court views the Commonwealth as the actual defendant in this litigation, as it is a legal entity. The Court does not recognize distinctions among the departments of cabinets contained within the state government. All rulings of the Court are binding on all departments within the government of the Commonwealth of Kentucky, and the Commonwealth shall be heard to speak with one voice. All internal disputes among the departments shall be resolved by the Kentucky Attorney General. As further clarification, the Court hereby orders that the caption of this action be amended to reflect that the Commonwealth of Kentucky is the true defendant before the Court.”

This matter is now before the court upon defendant Jack Lewis' motion to amend the proceeding paragraph and motion to stay further discovery pending such ruling. He is represented by Suzanne D. Cordery, who is employed

by the Office of General Counsel for the Corrections Cabinet.

As to the motion to amend, Lewis argues that Paragraph 6 should be altered in two respects. First, he requests that the order be changed to state that he is sued in his official capacity only and only with respect to the Department of Corrections. Second, he requests that the order reflect that the Attorney General is not the office responsible for resolving disputes among the different executive departments as to representation, compliance with discovery requests, etc.

With respect to the first request for modification, defendant argues that under *Hafer v. Melo*, 112 S.Ct. 358 (1991), *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1991), and *Ex Parte Young*, 209 U.S. 123 (1908), prospective injunctive relief is not an action against the state because neither he nor the state is a “person” for § 1983 purposes. Therefore, he reasons, this suit cannot be construed as being brought against the Commonwealth, only the Department that he represents.

This argument is without merit, and reflects a tortured construction of the above cases. The Corrections Cabinet is part of the Executive Branch of the Commonwealth of Kentucky. *E.g.*, KRS 12.010(1), (9); KRS 12.020. It is well settled that for § 1983 purposes a suit against a state employee in his or her official capacity is a suit against the state and that although the eleventh amendment prohibits recovery of damages in official capacity suits, prospective injunctive relief can be obtained. Hence, as this court has stated repeatedly, any relief granted by this court is binding on the Commonwealth and any of its departments or agencies that must act to carry out the relief granted.

*2 With respect to the second request for modification, while conceding that the office of the Attorney General is responsible for representing the Commonwealth, defendant argues that the Attorney General loses all authority to represent the state where a department or agency elects to employ attorneys under KRS 12.210 and KRS 220(1). Defendant argues that by virtue of KRS 12.100, the sole person able to resolve “conflicts” is the Governor. The “conflicts” to which defendant refers concern complying with discovery requests in this litigation:

“Defendant Lewis requests a stay of further discovery in this action because the Court's Order of August 24, 1992 has affected the scope of the litigation and of Defendant Lewis' capacity as the Commissioner of the Department

of Corrections. As was stated in Defendant Lewis' Motion to Alter or Amend, Plaintiffs have construed the Order of the court to mean that Defendant Lewis must be able to provide information known by other agencies of the Commonwealth of Kentucky, to include the Cabinet for Human Resources."

*3 (Doc. 57); *see also* Motion To Amend, Ex. 1 (discovery requests of plaintiffs).

This argument is also without merit. KRS 15.020 provides in part:

The attorney general is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal advisor of all state officers, departments, commissions, and agencies ... He shall appear for the Commonwealth in all cases ... and attend all litigation and legal business ... required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his of its official duties, except where it is made the duty of the commonwealth's attorney or county attorney to represent the Commonwealth. When any attorney is employed for any said agency, the same shall have the approval of such agency before such employment."

KRS 12.210(1) does permit the governor to approve employment of other attorneys if the Attorney General's office cannot provide the legal services necessary—"The governor, or any department with the approval of the governor, may employ and fix their term of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the governor or for such department.... Before approving the employment of an attorney the governor shall consult the attorney general as to whether legal services requested by

departments are available in the attorney general's office."

However, the effect of such approved attorneys does not exclude participation by the Attorney General's office in cases where the Commonwealth is a party as Lewis contends.

"KRS 15.020 shall remain in full force and effect except to the extent the same is in conflict with KRS 12.200 to 12.220 and except to the extent therein provided nothing in those sections shall be construed, nor is the same intended to affect the tenure or compensation of any assistant attorney general appointed and serving pursuant to law. The governor or any department may require the advice or services of the attorney general and the assistant attorneys general in matters relating to the duties or functions of any such office or department."

KRS 12.230 (emphasis added).

Thus, if the Office of General Counsel for the Cabinet of Human Resources or any other agency of the Commonwealth will not cooperate with defendant Lewis' counsel from the Office of General Counsel for the Corrections Cabinet in discovery matters, the Corrections Cabinet should ask the Attorney General for assistance. If the assistance is not forthcoming, then plaintiffs are hereby granted leave to amend their complaint to add the Governor as a party.

Accordingly, the court being advised, it is hereby ORDERED AS FOLLOWS:

1. That defendant Lewis' motions to alter or amend and to hold discovery in abeyance be, and they are, hereby DENIED;
2. That the prior discovery reference to Magistrate Judge Wehrman shall remain in effect; and
3. That plaintiffs are hereby granted leave to amend their complaint to add the Governor of the Commonwealth as a party, if they so desire.