

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KAIL MARIE and MICHELLE L. BROWN,)
and KERRY WILKS, Ph.D., and DONNA)
DITRANI, JAMES E. PETERS and GARY A.)
MOHRMAN; CARRIE L. FOWLER and)
SARAH C. BRAUN; and DARCI JO)
BOHNENBLUST and JOLEEN M.)
HICKMAN,)

Plaintiffs,

) Case No. 14-CV-2518-DDC-TJJ

v.)

SUSAN MOSIER, M.D., in her official capacity)
as Interim Secretary of the Kansas Department of)
Health and Environment and)
DOUGLAS A. HAMILTON, in his official)
Capacity as Clerk of the District Court for the 7th)
Judicial District (Douglas county), and)
BERNIE LUMBRERAS, in her official capacity)
as Clerk of the District Court for the 18th)
Judicial District (Sedgwick County),)
NICK JORDAN, in his official capacity as)
Secretary of the Kansas Department of Revenue,)
LISA KASPAR, in her official capacity as Director)
of the Kansas Department of Revenue’s Division)
of Vehicles, and MIKE MICHAEL, in his official)
capacity as Director of the State Employee)
Health Plan,)

Defendants.)

_____)

**REPLY IN SUPPORT OF MOTION OF DEFENDANT MOSER TO
DISMISS AMENDED COMPLAINT**

Defendant Robert Moser, M.D. has moved for dismissal of all claims against him based on lack of subject matter jurisdiction, including Eleventh Amendment immunity, lack of an Article III case or controversy, and mootness. Plaintiffs have filed a response that disregards the standing issues presented by the refusal of the original plaintiffs to obtain marriage licenses. The newly added plaintiffs state no claims against Dr. Moser or his successor, and the unmarried status of the original plaintiffs demonstrates that their claims are a sham.

PROCEDURAL POSTURE

The original complaint (Doc.1) was filed on behalf of four of the plaintiffs, seeking the legal right to enter into licensed marriages in Kansas. The only claim stated against Dr. Moser in the original complaint was an assertion that he was responsible for gender-specific standard forms that plaintiffs alleged would dissuade court clerks from allowing same-sex couples to marry. There were no allegations in the original complaint concerning alleged refusal to process marriage certificates, denial of requests for copies of marriage-related records, or other acts of alleged discrimination against same-sex couples by Dr. Moser or his subordinates. The original complaint sought recognition of the right to marry, not recognition of every potential legal right that Kansas married couples might claim once they were married.

The four original plaintiffs sought preliminary injunctive relief, and that relief was granted on November 3, 2014 (Doc. 29). The preliminary injunction ordered the defendants named in the original complaint to permit same-sex couples to obtain marriage licenses. No other relief concerning post-marital status was mentioned in the November 3, 2014 order. None of the defendants were ordered to “recognize” existing same-sex marriages under this order. In that order the Court rejected the suggestion in the complaint that the original plaintiffs had Article III standing to litigate recognition of out-of-state marriages, because none of the plaintiffs alleged that they were married under the laws of any other state. *See* Document 29 at page 12. The November 3, 2014 order also noted that any claim against Dr. Moser asserting his participation in a grievance related to “recognition” would have to follow the marriages that plaintiffs allegedly sought to enter into. *See* Document 29 at page 10 footnote 6

Defendants appealed from the November 3, 2014 preliminary injunction order. (Doc. 30). That appeal remains pending at this time.

Following the November 3, 2014 order, the Kansas Supreme Court entered an order allowing Kansas district courts to determine district by district whether they would or would not issue marriage licenses to otherwise qualified same-sex applicants. According to the affidavits submitted on December 10, 2014 by defendants Hamilton and Lumbreras the chief judges of their judicial districts have entered orders directing issuance of otherwise proper same-sex marriage licenses in every county within their respective districts. Although the unmarried plaintiffs presently are permitted to obtain marriage licenses from the defendant court clerks, they have elected not to do so.

On November 26, 2014 an amended complaint (Doc. 52) was filed on behalf of the four original plaintiffs and six new plaintiffs. The amended complaint names three new defendants as well as the three original defendants. The First Amended Complaint states no new claim against Dr. Moser. The additional plaintiffs make no claims against Dr. Moser.

On December 10, 2014 Dr. Moser filed a motion to dismiss (Doc. 57) and defendants Lumbreras and Hamilton also filed a motion to dismiss (Doc. 58). These motions challenged the factual grounds for the Court's subject matter jurisdiction, submitting affidavits that alleged that none of the four original plaintiffs had applied for marriage licenses following the issuance of the preliminary injunction. Responses to the motions to dismiss were filed on December 22, 2014 (Docs. 67 and 68). Neither response alleged that any of the four original plaintiffs had renewed their applications for marriage licenses following the issuance of the preliminary injunction. As the factual record presently stands, the unmarried plaintiffs have offered no reason why they have not obtained marriage licenses.

ARGUMENT AND AUTHORITIES

1. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PURPORTED CLAIMS AGAINST THE KDHE SECRETARY.

A factual attack on the Court's jurisdiction is appropriately made in the form of a motion to dismiss, even though matters outside the complaint are relied upon. When a factual attack is made against the Court's subject matter jurisdiction, the Court is not required to assume the truth of the complaint's factual allegations. *See Rural Water Dist. No. 2 v. City of Glenpool*, 698 F.3d 1270, 1272 (10th Cir. 2012). The Court must instead consider the factual evidence offered by the parties and determine whether the allegations underlying its exercise of jurisdiction are true. Only the moving defendants have offered any factual support for their contentions. Because the facts alleged by these defendants deprive the Court of the case or controversy required by Article III, and establish their Eleventh Amendment immunity, dismissal is required.

Plaintiffs do not deny that they have not married, even though Kansas courts are issuing same-sex licenses pursuant to an order of the Kansas Supreme Court. These plaintiffs have not sought to take advantage either of that order or of this Court's preliminary injunction to request issuance of the licenses for which they sought to apply before suit was filed. The sole claims now asserted against Dr. Moser are made by the original Plaintiffs, Marie, Brown, Wilks and DiTrani. The allegations in the Complaint that they are being prevented from seeking or receiving a license by the Clerks is demonstrably false, and is an apparent attempt to create federal jurisdiction where none exists. The claim that any Kansas district court clerk is acting under orders from Dr. Moser or any other KDHE executive director in deciding whether to issue a marriage license to same-sex applicants is established by affidavits and is also a demonstrably incorrect statement of Kansas law.

The response does not address the relevance of the limitations on subject matter jurisdiction under the exception to sovereign immunity set out in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). When a claim for injunctive relief is brought against a state official who is not involved in the enforcement of an allegedly unconstitutional statute, Eleventh Amendment immunity applies and requires dismissal of the claim. See *Peterson v. Martinez*, 707 F.3d 1197, 1205-1206 (10th Cir. 2013), where the *Ex parte Young* doctrine was described in the following terms:

“Defendants are not required to have a ‘special connection’ to the unconstitutional act or conduct. Rather, state officials must have a particular duty to ‘enforce’ the statute in question and a demonstrated willingness to exercise that duty.” *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 828 (10th Cir.2007). [See *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013)]

The response to the motion to dismiss does not suggest that either Dr. Moser or his successor has a “demonstrated willingness” to enforce the laws and practices that these four plaintiffs complain about. Without that “demonstrated willingness” Eleventh Amendment immunity plainly applies.

The response misconstrues the effect of the preliminary injunction order. That order did not make a final determination of any of the facts relevant to the Court’s jurisdiction. Plaintiffs did not request that a trial on the merits occur at the hearing on their motion for preliminary injunction. All that the order established was that plaintiffs appeared to be likely to prevail on the merits once the issues eventually came to trial. The proceedings did not establish findings of fact that control further proceedings. Compare F.R.C.P. 65 with F.R.C.P. 56 concerning summary judgment proceedings. No doctrine of issue preclusion applies to prevent any fact mentioned in a preliminary injunction order from being refuted at a trial on the merits.

When the November 3, 2014 order granting a preliminary injunction made mention of the appearance of subject matter jurisdiction, it did so based on the presumed reliability of the

representations of plaintiffs that they were eager to marry and would be irreparably harmed if they were prevented from obtaining marriage licenses without delay. The Court's comments about potential future standing to litigate "recognition" issues was similarly based on the assumption that these plaintiffs would enter into Kansas marriages before the "recognition" issues were decided. The potential defenses discussed in the order were not finally resolved on the merits. All that the Court decided was the likelihood of success on the merits, based on the record presented at the hearing. Defendants had no way to establish at the hearing that plaintiffs would not proceed to marry, even after the preliminary injunction was granted.

2. NO CASE OR CONTROVERSY

Dr. Moser no longer has any official capacity relating to the preparation and distribution of Kansas marriage forms. If plaintiffs seek to amend to sue him in his individual capacity for past acts, he will be protected by qualified immunity. See *Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012). According to the response, plaintiffs have acquiesced in his dismissal as a named defendant and have substituted his successor in office, Dr. Susan Mosier, pursuant to F.R.C.P. 25(d). He has therefore been dismissed as a named defendant by agreement, for all practical purposes.

According to the response plaintiffs now concede that there is no existing decision that has already determined the declaratory relief issues in their favor. If this change of position is sincere, then plaintiffs must be prepared to meet their traditional factual and legal burden in this case by establishing the unconstitutionality of the marriage laws of Kansas. Part of that burden is their need to establish Article III standing and subject matter jurisdiction. By demonstrating that the four named plaintiffs who claim that the KDHE forms and the agency's hypothetical enforcement powers are not the origin of any alleged impediment to their marriage under Kansas

law, the judicial orders that permit these plaintiffs to marry have revealed the true source of their continuing status as single persons under Kansas law - their personal preferences, not some legal barrier. Certainly there is no legal barrier to marriage arising from the actions of any named defendant in this case.

The suggestion that defendants are trying to compel the unmarried plaintiffs to marry at a time that is not convenient to them is rebutted by the temporal flexibility of Kansas marriage licenses, which are valid for a period of six months. *See* K.S.A. 2014 Supp. 23-2505(d). By refusing to complete the application process, these plaintiffs are declaring that they have no plan to marry one another within the next six months. As single persons they have no grievance to state about the alleged refusal of one or another state agency to give legal recognition to the marriages of other persons. They have no more standing today as single persons to challenge the marriage laws of Kansas than they had to mount a challenge to the prohibition on recognition of out-of-state marriages on the day the Court decided that they lacked standing to litigate that issue.

This is not a class action brought on behalf of all single persons who might be inclined to apply for marriage licenses at some time in the distant future. It is instead a lawsuit brought by individuals seeking relief that is personal to them. If the unmarried plaintiffs do not in fact desire the relief that the First Amended Complaint says that they desire, then the allegations should be stricken and their claims should be dismissed.

3. MOOTNESS AND ELEVENTH AMENDMENT IMMUNITY

The response speculates that some successor to Dr. Moser will again distribute the forms to which plaintiffs object. But the response does not assert that some Kansas statute requires the use of marriage-related forms that make explicit reference to the sex of the applicants for a marriage license. There is no reason to assume that his successors will recall the new forms. The

amended complaint does not contend that this possibility could predictably come to pass. The affidavits submitted by all defendants confirm, there was never any genuine grievance involving the KDHE secretary, whose role was not to enforce Kansas marriage laws by preventing district court judges and clerks from accepting applications for same-sex marriages.

CONCLUSION

For all of the above stated reasons the KDHE secretary should be dismissed from this litigation for lack of subject matter jurisdiction under the Eleventh Amendment, lack of Article III standing, and mootness of the supposed controversy.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of January, 2015, a true and correct copy of the above and foregoing Answer was filed by electronic means via the Court's electronic filing system which serves a copy upon Plaintiffs' counsel of record, Stephen Douglas Bonney, ACLU Foundation of Kansas, 3601 Main Street, Kansas City, MO 64111 and Mark P. Johnson, Dentons US, LLP, 4520 Main Street, Suite 1100, Kansas City, MO 64111, dbonney@aclukansas.org and Mark.johnson@dentons.com and Joshua A. Block, American Civil Liberties Foundation, 125 Broad Street, 18th Floor, New York, NY 10004, jblock@aclu.org.

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