

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

THE FUND FOR ANIMALS, Inc., et al.

PLAINTIFFS

v.

CIVIL ACTION NO. 3:98CV-365-S

GOVERNOR PAUL PATTON, et al.

DEFENDANTS

MEMORANDUM OPINION

This matter comes before the court on the defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). This court will consider the motion to dismiss as one for summary judgment pursuant to Rule 56(c). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The plaintiffs have brought constitutional challenges to the Commonwealth of Kentucky's procedure for selecting nominees from which the Governor will appoint members to the Commonwealth of Kentucky, Department of Fish and Wildlife Resources Commission ("the Commission"). *See* KRS 150.022. The nominees for the appointment are selected by a vote of "sportsmen" at a meeting called by the commissioner. KRS 150.022(3). A "sportsman" was originally defined as an individual who has been licensed to hunt or fish in Kentucky for the past two consecutive years or who has legally hunted or fished in Kentucky for the past two consecutive

years. KRS 150.022(11). However, effective July 15, 1998, KRS 150.022(11) was amended to include individuals who have a registered motorboat within the definition of sportsman.

The plaintiffs argue that the current process for selecting nominees is unconstitutional because they cannot qualify as sportsmen and, therefore, cannot participate in the voting process without purchasing a hunting or fishing license. The plaintiffs refuse to hunt or fish or to purchase a hunting or fishing license because the proceeds of the license funds support hunting and fishing activities, which the plaintiffs morally oppose. Because they cannot vote for nominees, the plaintiffs believe that members of their group will never be selected as nominees and, therefore, will never be appointed to the Commission. The plaintiffs seek an injunction on the operation of KRS 150.022 as a means of electing members to the Commission and a declaration that the actions of the Commission are void. The plaintiffs have brought this action under 42 U.S.C. §1983, alleging a violation of their constitutional rights.

The plaintiffs' claims are moot. The mootness doctrine is one facet of the case or controversy requirement of Article III. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Banas v. Dempsey*, 742 F.2d 277, 281 (6th Cir. 1984) (citations omitted).

While the plaintiffs' claims were pending, KRS 150.022 was amended to include individuals who have a registered motorboat within the definition of "sportsman." Therefore, the plaintiffs are no longer required to purchase a license for hunting or fishing activities they morally oppose. The plaintiffs have made no claim that they morally oppose boating activities. The change in the definition of sportsman removes the alleged harm underlying the dispute and renders the plaintiffs' claim moot. *See Banas v. Dempsey*, 742 F.2d 277 (6th Cir. 1984). Accordingly, we will grant the defendants' motion to dismiss by separate order.

This ____ day of _____, 1998.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

THE FUND FOR ANIMALS, Inc., et al.

PLAINTIFFS

v.

CIVIL ACTION NO. 3:98CV-365-S

GOVERNOR PAUL PATTON, et al.

DEFENDANTS

ORDER

Motion having been made and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the defendants' motion to dismiss is granted. The plaintiffs complaint is dismissed as to all defendants. There being no just reason for delay, this is a final order.

IT IS SO ORDERED this _____ day of _____, 1998.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

dismissed as to all counts against all defendants.

(1) Standing

The defendants have brought a motion to dismiss arguing that they are entitled to a judgment as a matter of law because the plaintiffs have no standing to sue in this case. The constitutional requirements for standing derive from Article III, §2 of the United States Constitution which grants federal courts jurisdiction over “cases and controversies.” Standing requires three elements: (1) an actual injury in fact; (2) causation between the injury and the defendant’s actions; and (3) likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To see if organization has standing, must first see if individuals have standing.

A. Injury

Both Rogers and Lavelly fully participated in the selection meeting. Lavelly nominated Rogers for selection and served as her representative on the balloting committee. However, neither were eligible to vote under the current statute. The defendants concede that because Lavelly and Rogers participated in the meeting but were not permitted to vote, they both satisfy the injury requirement.

Glidewell and Beeler and Dunbar are not morally opposed to hunting or fishing but are opposed to the defendants’ policies because they have caused Glidewell to limit outdoor activities during hunting season to ensure her personal safety. Glidewell also claims that the defendants’ policies have hindered her ability to observe, study, and enjoy wild animals.

Glidewell, Beeler, and Dunbar did not attend the meeting nor attempt to vote because they claim they are aware that they would not have been permitted to vote had they attended the meeting.

Defendants cite a single D.C. Circuit case in support of this proposition. However, the Supreme Court has held that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 559, 562-63 (1992).

The defendants rely on *Lujan* to argue that, to survive a motion for summary judgment, the plaintiffs must submit evidence that injury is imminent--they have concrete plans in near future to enjoy animals. However, in *Lujan*, the plaintiff had not suffered a past or present injury and only relied on a future injury that she might suffer. at 564. This is distinguished from the instant case in which the plaintiffs allege a continuing injury due to the defendants’ legislation: the current inability to enjoy wild animals without risking their personal safety, the cost of preventing unwanted hunters from coming onto their property, and the lack of a vote. Glidewell stated in her affidavit that, during deer hunting season, there are numerous hunters because the Commission issues lots of licenses to raise money and she feels threatened. Impossible for her to visit or hike in the wilderness for several months each year during deer season. Also worried about finding a wounded or trapped animal.

Dunbar owns a nature preserve in Shelby and Franklin Counties, Kentucky. Dunbar testified by affidavit that he feels it is unsafe for him to travel about and enjoy his land during hunting season due to the large number of hunters; does not feel safe. Must spend time protecting property from hunters who can legally come upon it to shoot animals. Has written letters to Commissioners and state senators regarding this legislation.

Reed is a resident of the state of Wyoming but owns a nature preserve in Kentucky. Reed purchased a Kentucky hunting and fishing license for two years prior to the 1994 meeting for the purpose of being permitted to vote for the Commission nominees. Reed was permitted to vote but was not permitted to question nominees regarding their knowledge of wildlife conservation and

restoration. She claims that this forced her to cast an uninformed vote and denied her the right to elect candidates who were knowledgeable about wildlife conservation and restoration. After this meeting, Reed declined to renew her hunting and fishing license and was, therefore, not permitted to vote at the 1998 meeting.

(2) Caused by defendant

The second prong of the Lujan test for standing is that the injury must be caused by the defendants' actions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The defendants argue that there are only two people who could have caused the plaintiff's injury by denying them the opportunity to vote: the KDFWR (which the defendants claim is a government agency and not entitled to be sued under 1983) and Commissioner C. Thomas Bennett, the chairman of the selection committee (who has not been named as a defendant). The plaintiffs failed to address this prong of the Lujan test for standing.

65 0

Does the organization have standing?

- (2) **Fundamental Rights**
- (3) **State Law Claims**
- (4) **Individual Defendants**