

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BYRON WILLIAMS, SHARON LEWIS,
MICHELLE WILLETT, and AFSCME
LOCAL 1733,

Plaintiffs,

vs.

A.C. GILLESS, MARRON
HOPKINS, PAT SWAIN and
SHELBY COUNTY GOVERNMENT

Defendants.

No. 00-3049-DV

BYRON WILLIAMS,

Plaintiff,

vs.

THE SHERIFF OF SHELBY COUNTY,
TENNESSEE, SHELBY COUNTY
GOVERNMENT, CHIEF MARRON
HOPKINS, CHIEF JOSEPH PONTE,
and CHIEF JAMES COLEMAN,

Defendants.

No. 02-2982-DV

ORDER GRANTING DEFENDANT'S MOTION TO REQUIRE PLAINTIFF TO HAVE A
SUBPOENA PERSONALLY SERVED ON HOPKINS NOTIFYING HIM OF THE TIME,
DATE AND PLACE OF HIS DEPOSITION, ORDER DENYING PLAINTIFF'S
MOTION TO COMPEL HOPKIN'S DEPOSITION, AND ORDER GRANTING
DEFENDANT'S MOTION TO COMPEL WILLIAMS TO EXECUTE IRS FORM 4506

Before the court are three motions: (1) the January 15, 2004 motion of defendants Shelby County and Marron Hopkins in his official capacity to quash Hopkins' deposition or to require plaintiff to have a subpoena personally served on Hopkins notifying him of the time, date and place of his deposition and tendering him fees for one day's attendance and the mileage allowed by law, (2) the January 30, 2004 motion of the plaintiffs to compel the deposition of Marron Hopkins, and (3) the January 21, 2004 motion of defendant Shelby County to compel the plaintiff, Byron Williams,

to execute IRS Form 4506. These motions were referred to the United States Magistrate Judge for determination.

I. Marron Hopkins' Deposition

The plaintiffs are suing Marron Hopkins in his official capacity as the former Chief Jailer for the Shelby County Sheriff's Department. The plaintiffs seek to depose Hopkins as a party to this action. If an examining party seeks to depose a party, then the examining party need only issue a notice of deposition consistent with Federal Rule of Civil Procedure 30(b)(1). 8A Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2106 (2d ed. 1994). If, however, an examining party seeks to depose a nonparty, then the nonparty must be subpoenaed. *Id.* Therefore, if Hopkins is a party, then a notice of deposition is sufficient to compel his deposition, but if he is not a party, then he must be subpoenaed.

Hopkins, as an individual, is not a party. He is sued only in his official capacity. Suits against persons in their official capacity are suits against an entity, not against the individual. See *Karcher v. May*, 484 U.S. 72, 78 (1987) (stating that "[w]e have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder").

Furthermore, Hopkins is not a party because he is no longer in office. When a public officer is sued in his official capacity, and he leaves office, the officer's successor is automatically substituted as a party. Federal Rule of Appellate Procedure 43(c)(2). Consequently, Hopkins' successor should automatically be substituted for Hopkins' as an official capacity party.

Because Hopkins is a nonparty, the plaintiffs must issue a subpoena consistent with Federal Rule of Civil Procedure 45 to compel his deposition. For the foregoing reasons, the plaintiff's motion to compel the deposition of Marron Hopkins is denied, and the defendants' motion to require plaintiff to have a subpoena personally served on Hopkins notifying him of the time, date and place of his deposition and tendering him fees for one day's attendance and the mileage allowed by law is granted.

II. IRS Form 4506

On August 18, 2003, pursuant to Rule 34 of the Federal Rules of Civil Procedure, the defendant, Shelby County, sent plaintiff Byron Williams's attorney a letter requesting that Williams execute an IRS Form 4506 so that the defendant could obtain copies of Williams's 2001 and 2002 federal tax returns. On November 26, 2003, the defendant sent a reminder of the request to Williams's attorney. Williams did not comply with the defendant's request. The defendant has moved the court to compel Williams to execute an IRS Form 4506.

One of the remedies that Williams seeks in this lawsuit is back pay. Back pay awards are reduced by interim earnings. See *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 422 (6th Cir. 1974). Defendant Shelby County seeks Williams's 2001 and 2002 tax returns so that it may compute Williams's interim earnings.

Federal Rule of Civil Procedure 34(a) allows a party to request documents that are in the possession, custody, or control of the party being served. Williams has control over his income tax records because "by either granting or withholding [his] consent, [he] may determine who shall have access to them."

Lischka v. Tidewater Servs., Inc., Civ. A. No. 96-296, 1997 WL 27066 at *2 (E.D. La. Jan. 22, 1997) (quoting *Smith v. Maryland Cas. Co.*, 42 F.R.D. 587, 589 (E.D. La. 1967)).

Because the court has determined that Williams's income tax records are relevant for computing Williams's interim earnings, and because Williams has not invoked any privilege, defendant Shelby County's motion to compel is granted. Williams shall provide the defendant Shelby County's attorney with an executed IRS Form 4506 within eleven (11) days of the date of this order, allowing the defendant to obtain copies of Williams's 2001 and 2002 federal tax returns.

IT IS SO ORDERED this 15th day of March, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE