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That next day, the husband stated that he had been advised by his attorney not to bring Robin in for an interview as scheduled; instead, he would appear at the court hearing scheduled for the next day.

At the hearing--held on November 7, 1986--the family was ordered to present the child for interview and examination, and a hearing on the matter was scheduled for December 1st. The same date, Robin was interviewed and, according to the interviewer, indicated nothing to suggest that abuse had taken place. Human Resources began checking on scheduling for the physical examination of Robin and the polygraph examination of the husband, the latter being apparently at the plaintiffs' suggestion.

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The plaintiffs indicate that the local sheriff had been questioned about the identity and ages of the plaintiff's children by the defendant Patrick during the last part of October, 1986. The sheriff had also overheard Patrick make some comment at the outset of the actual investigation about why the husband "was sticking his nose in their business", which could have referred to the fact that the husband was publicly protesting the treatment of other Magoffin County adults who had been recently arrested on sexual abuse charges. After being ordered to do so by the Court, he produced his daughter for interview and physical examination. He also agreed to take a polygraph examination administered out of town by the state police, which was cancelled without notice to him. Thereafter, there was no evidence to indicate abuse or need for social services, and the case was dismissed upon the plaintiffs' motion. No formal findings were ever made, nor were the records (such as the information regarding the alleged "third party's report of abuse") ever produced from the beginning or after a specific request under the Kentucky Open Records Act.

The plaintiffs state that they have a constitutional right "against the filing of such (abuse) petition without probable cause or for reasons of personal animosity, to vindicate some private purpose." However, the defendants have filed a motion to dismiss, based on a number of grounds.

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IMMUNITY FROM 1983 CLAIMS

The rationale behind the absolute immunity doctrine applicable to prosecutors is that the performance of prosecutorial duties would be hindered if the threat of civil liability were present. Imbler v. Pachtman, 424 U.S. 409, 424 (1976). This doctrine has been expanded to those agency officials performing "functions analogous" to those of a prosecutor, Butz v. Economou, 438 U.S. 478, 504 (1978), or persons who are "integral parts" of the judicial process. Briscoe v. LaHue, 460 U.S. 325 (1983).

According to the terms of the pertinent Kentucky statute in effect at the time in question¹:

Any . . .social worker. . .or other person who knows or has reasonable cause to believe that a child is an abused or neglected child, shall report or cause a report to be made in accordance with the provisions of this section. . .

The department (of Social Services) or its delegated representative shall upon the receipt of the initial report immediately make an oral or written report of the suspected physical or sexual abuse to the appropriate law enforcement agency and the county attorney or his designee for any appropriate action. . . Reports shall be made promptly, and without delay, and shall be followed by a written report if requested. .

Upon receipt of a report of an abused or neglected child. . .the department. . . or its delegated representative shall initiate a prompt investigation, take necessary action and shall offer protective services toward safeguarding the welfare of the child, preventing further abuse or neglect of the child or any other child under the same care, preserve and strengthen family life, where possible, by enhancing parental capacity for adequate child care. . .

All information obtained by the departmental staff or its delegated representative, as a result of investigation made pursuant to this section shall not be divulged to anyone except. . .persons suspect of neglect or abuse, provided that in such cases names of informants may be withheld, unless ordered by the court. . . .

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the parent or other person responsible for the child, as a part of the medical evaluation or investigation of such reports. . .

KRS 199.335 (repeal effective July, 1987). Although not specifically mentioned as a duty of the department, the sections also referred to the issuance of search warrants, upon showing of probable cause, and removal proceedings before the juvenile courts. Id. Given the entire context, it is reasonable to assume that the department's employees are an integral part of those proceedings.

The statute, set in its context and especially the reference to the taking of "necessary action" would seem to cloak the social service worker with the authority to determine whether to proceed beyond mere administrative investigation. Given this fact, a social worker and her supervisors would be entitled to absolute immunity. E.g., Kuraszawa v. Mueller, 732 F.2d 1456 (6th Cir. 1984) (Michigan caseworkers); Hennessey v. State of Washington, 627 F. Supp. 137 (E.D. Wash. 1985) (Washington caseworker and supervisor); Whelehan v. County of Monroe, 558 F. Supp. 1093 (N.D. N.Y. 1983) (New York caseworkers).

In addition, and as admitted by the plaintiffs in one of their briefs, the Eleventh Amendment prevents monetary damages from being collected from the defendants in their official capacities. Pennhurst State School and Hospital v. Halderman, 465 U.S. 67 (1984).

QUESTION:

Does absolute immunity cover both personal and official liability?

If not, then there could still be non-monetary damage against the defendants under 1983.

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STATE LAW CLAIMS

Under the recently enacted version of the statute specifically states:

Anyone acting upon reasonable cause in making of a report or acting under Sections 64 to 66 of this Act in good faith shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed.

KRS 620.050. It is clear that the defendants would be spared from liability under the state law claims under this statute.

However, the pertinent state statute in effect at the time provided for immunity for "anyone acting upon reasonable cause in making a report pursuant to this section. . . shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed". KRS 199.335(6). Although this could conceivably apply to state actions against persons filing the original abuse report, it is unclear how it would apply to the full gamut of social service workers conduct here involved.

(JOE--I assume that some reference would have to be made to the legislative history to see what policy decisions were implicated, if any, in the changing of the wording.)

¹Under newly enacted KRS 620.020, 620.030, and 620.040, the procedures is changed slightly in that, for example, persons wishing to report abuse may also contact law enforcement agencies or prosecutors initially, which in turn contact the Department which is given a fixed forty-eight hours to investigate. The social agency, however, remains an integral part of the prosecutorial process.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 87-125

CORBETT SALYER, ET AL., PLAINTIFFS,

VS: REPORT AND RECOMMENDATION

VICKY PATRICK, ET AL., DEFENDANTS.

* * * * *

The above-styled action is one filed pursuant to 42 U.S.C. Section 1983, in which the plaintiffs (husband and wife) allege that their rights under the First and Fourteenth Amendments were violated by the actions of employees of the Commonwealth of Kentucky's Department for Human Resources (Human Resources). It is currently pending on a motion to dismiss.

FACTS

The plaintiffs' daughter Robin was, at the times pertinent to the discussion herein, approximately three years old. The defendants are employees of Human Resources (caseworkers, supervisors and the district manager) who were allegedly directly or indirectly connected with the filing of a child abuse petition concerning said child in Magoffin Juvenile Court in November, 1986.

The facts underlying this turn of events varies, depending upon whose account is credited. The defendants' statement of facts shall be recited first.

The defendants allege that they had no alternative but to pursue the course of action that they took. They state that on November 4, 1986, a report from an unidentified third party indicated that Robin had been sexually abused by the husband. That same date, caseworkers were sent to the plaintiffs' home to begin the investigation; however, the parents refused any cooperation whatsoever,

and immediately ordered them off the property. Search warrant forms were obtained, although the Kentucky State Police (apparently upon advice from the local sheriff that the husband was extremely angry) refused to fill them out or execute them.

The next day, a juvenile petition was filed with the Magoffin Juvenile Court and an emergency custody order was issued by Judge Graham Martin. The Kentucky State Police did not serve this order, apparently on the basis of an ex parte agreement between one Trooper LeMaster, the local sheriff and the husband that the child would be brought to Human Resources for an interview. When the plaintiffs appeared before the Human Resources staff late in the afternoon, they stated that the agreement had been that the child was not to be interviewed, and that, anyway, the child was out of town, "staying with relatives"; the husband insisted that he had not abused the child. After some discussion, the parents agreed to submit Robin for an interview the next day and to allow her to be physically examined, provided she were allowed to remain in their custody.

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The plaintiff has argued that the recent case of Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986) would change that result, even though the case does not expressly overrule Kurzawa, supra. In the more recent case, the Sixth Circuit Court of Appeals held that a nonjudicial officer who takes ministerial actions intimately related to judicial process (including securing necessary information to directly further a decision to initiate prosecution) pursuant to express direction and control of a prosecutor, who is directing the activity, has absolute immunity; when the nonjudicial officer undertakes action on his own initiative or when he carries out administrative or investigatory functions of the prosecutor, he can only claim the affirmative defense of qualified immunity. Id. at 555, 560 (emphasis added). Thus, it would appear that when the social worker was merely investigating a

complaint, this might arguably be covered only by the qualified immunity doctrine under this new standard; however, here, the major concern voiced by the plaintiffs was that an actual proceeding was initiated in state court, an action which must inherently carry absolute immunity.

In addition, and as admitted by the plaintiffs in one of their briefs, the Eleventh Amendment prevents monetary damages from being collected from the defendants in their official capacities. Pennhurst State School and Hospital v. Halderman, 465 U.S. 67 (1984). The undersigned also notes that the principle is equally applicable with regard to proposed injunctive relief, which was the only non-monetary relief specified by the plaintiffs in their complaint. Id. at 97-103. Thus, suit is barred against the employees of Human Resources in their official capacities as well.

All that remains of the plaintiff's cause of action, then, is the possibility of non-monetary relief against the defendants in their individual capacities.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of service of this same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd 474 U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Wright v. Holbrook, 794 F.2d 1152, 1154-1155 (6th Cir. 1986). A party may file a response to another party's objections within ten days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the _____ day of September, 1987.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE