

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CASE NO.: 5:18-cv-00351-KKC
Electronically filed

NICHOLAS CHARLES BREINER

PLAINTIFF

v.

MOTION TO DISMISS

BOARD OF EDUCATION OF MONTGOMERY COUNTY

DEFENDANT

* * * * *

Comes the Defendant, Montgomery County Board of Education, by and through counsel, pursuant to Fed. R. Civ. P. 12(b)(6), and move this Court to dismiss the claims of Plaintiff Nicholas Charles Breiner, against it upon the grounds that he has failed to state a claim upon which relief may be granted and therefore Defendant is entitled to dismissal as a matter of law. In support of this motion, Defendant tenders the attached Memorandum of Law.

Respectfully submitted,

JOHN G. MCNEILL
WHITNEY L. STEPP
Landrum & Shouse LLP
106 West Vine Street
PO Box 951
Lexington, KY 40588-0951
jmcneill@landrumshouse.com
Telephone: 859-255-2424
Facsimile: 859-233-0308

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT,
MONTGOMERY COUNTY BOARD OF
EDUCATION

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 17th day of May, 2018, been electronically mailed to the following:

Edward E. Dove
300 Lexington Building
201 West Short Street
Lexington, KY 40507
eddove@windstream.net
Attorney for Plaintiff

and

Mark A. Mantooth
4508 S. Tonti Street
New Orleans, LA 70125
m.mantooth@lezymantooth.com
Attorney for Plaintiff

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT,
MONTGOMERY COUNTY BOARD OF
EDUCATION

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CASE NO.: 5:18-cv-00351-KKC
Electronically filed

NICHOLAS CHARLES BREINER

PLAINTIFF

v.

DEFENDANT S MEMORAND M
IN S ORT OF MOTION TO DISMISS

BOARD OF EDUCATION OF MONTGOMERY COUNTY

DEFENDANT

MAY IT PLEASE THE COURT:

Comes the Defendant, Montgomery County Board of Education (improperly named as Board of Education of Montgomery County), by and through counsel, and for its Memorandum of Law in support of its Motion to Dismiss, states as follows:

ROCED RA AC RO ND

Plaintiff originally filed this civil matter in Montgomery Circuit Court on April 10, 2018. On or about April 13, 2018, Plaintiff filed a Notice of Voluntary Dismissal pursuant to CR 41.01(1), citing his intent to voluntarily dismiss Count I of his Complaint, the only Count asserting any allegations against the Montgomery County Board of Education (hereinafter Board of Education). On May 2, 2018, an agreed order, signed by Plaintiff and Defendant and dismissing the Board of Education, was tendered to Montgomery County Circuit Court for execution and entry on the circuit court s record.

On May 3, 2018, Plaintiff filed this civil matter in this Court, asserting that he was a victim of discrimination based on his sexual orientation in violation of Title VII. (Doc 1, Page ID 3).

AR GUMENT

The Defendant moves under Fed. R. Civ. P. 12(b)(6) for dismissal of Plaintiff's Complaint against it prior to responsive pleadings. Fed. R. Civ. P. 12(b). For grounds, the Defendant states that Kentucky Courts do not interpret Title VII, to include sexual orientation as a prohibited basis for discriminatory acts. Hudson v. Park Cmty. Credit Union, Inc., 2017 U.S. Dist. Lexis 187620 (W.D. Ky. Nov. 13, 2017)(citing Gilbert v. Country Music Ass'n, 432 Fed. Appx. 516 (6th Cir. 2011))(citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762(6th Cir. 2006)). Therefore, pursuant to Kentucky law, a claim that is premised solely on one's sexual-orientation does not state a claim upon which relief may be granted. Id. at 8.

In Hudson, Plaintiff brought an action against her former employer, Park Community, alleging that she was continually subjected to harassment, disparate treatment and a hostile work environment due to her status as a gay woman. Hudson, 017 U.S. Dist. Lexis 187620 *2. Plaintiff also alleged that she was passed over repeatedly for promotions as a result of her supervisors' animus toward lesbians. Id. On the basis of these allegations, Plaintiff alleged violations of Title VII of the Civil Rights Act of 1964, codified as 42 U.S.C. 2000e *et. seq.* The Court held, pursuant to the Sixth Circuit's interpretation of Title VII, that Plaintiff's claims warranted dismissal for failure to state a claim. See Hudson, 017 U.S. Dist. Lexis 187620 *8 (holding that under Title VII, sexual orientation is not a prohibited basis for discriminatory acts).

Here, Plaintiff is a former music education and choir director at McNabb Middle School, originally hired in August 2014. He alleges that on April 7, 2017, he disclosed his

sexual orientation as a bisexual male on his personal Instagram account, which is notably open to at least some of his former students. (Doc 1, Page ID 2). On April 10, 2017, Plaintiff was purportedly summonsed to a meeting in which he claims he was questioned about his sexuality by Rick Culross, the Deputy Director of Montgomery County Schools. (Doc 1, Page ID 2). Plaintiff also asserts that the following day, on April 11, 2017, he was defamed by John Ledford, an employee of the Administrative Office of the Courts. (Doc 1, Page ID 2). Neither gentlemen is named in this action. In sum, Plaintiff attempts to establish a pattern of disparate treatment by the Defendant Board of Education, which ultimately resulted in his limited employment contract not being renewed on or about May 8, 2017. (Doc 1, Page ID 2). Plaintiff further indicates that his sexual orientation was the motivating factor in the Defendant's decision to terminate the Plaintiff. (Doc 1, Page ID 3).

The Board of Education refutes all of Plaintiff's allegations and contends that his non-renewal was the result of ineffective instructional technique, poor classroom management and failure to follow proper administrative procedures and accounting processes. All of the above-mentioned factors were communicated to Plaintiff via certified correspondence delivered on June 23, 2017. That aside, even if the Court accepts Plaintiff's factual allegations as true, his Complaint fails to state a plausible claim for relief on its face as the only basis for his Complaint is the belief that because of his sexual orientation, he was denied an additional year of employment. Plaintiff provides no other basis for a claim under Title VII or any other federal or state law, and, therefore, as a matter of law, as interpreted by the Sixth Circuit and recently affirmed by Western District of Kentucky, Louisville Division, Plaintiff's claim must be dismissed.

CONC SION

Plaintiff has failed to plead sufficient facts to state a claim under Title VII, and has therefore failed to state a claim for which relief can be granted.

WHEREFORE, for the foregoing reasons, the Defendant, Montgomery County Board of Education, respectfully re uest that the Complaint against it be dismissed.

Respectfully submitted,

JOHN G. MCNEILL
WHITNEY L. STEPP
Landrum & Shouse LLP
106 West Vine Street
PO Box 951
Lexington, KY 40588-0951
jmcneill@landrumshouse.com
Telephone: 859-255-2424
Facsimile: 859-233-0308

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT,
MONTGOMERY COUNTY BOARD OF
EDUCATION

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 17th day of May, 2018, been electronically mailed to the following:

Edward E. Dove
300 Lexington Building
201 West Short Street
Lexington, KY 40507
eddove@windstream.net
Attorney for Plaintiff

and

Mark A. Mantooth
4508 S. Tonti Street
New Orleans, LA 70125
m.mantooth@lezymantooth.com
Attorney for Plaintiff

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT,
MONTGOMERY COUNTY BOARD OF
EDUCATION

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON
CASE NO.: 5:18-cv-00351-KKC

NICHOLAS CHARLES BREINER

PLAINTIFF

v.

**PROPOSED ORDER GRANTING DEFENDANT, MONTGOMERY COUNTY BOARD
OF EDUCATION'S RULE 12(b)(6) MOTION TO DISMISS.**

Electronically Filed

BOARD OF EDUCATION OF MONTGOMERY COUNTY

DEFENDANT

This cause is before the Court on the Defendant, Montgomery County Board of Education's Rule 12(b)(6) Motion to Dismiss the Complaint for failure to state a claim.

Plaintiff, Nicholas Breiner alleges that he was separated from employment with Defendant, Montgomery County Board of Education ". . . based on his sexual orientation in violation of Title VII." Plaintiff provides no other basis for his claim under Title VII or any other federal or state law. Assuming arguendo that Plaintiff's allegations are true, his Complaint nonetheless fails to state a claim upon which relief may be granted.

Pursuant to Kentucky law, an employment decision based on an employee's sexual orientation is not a prohibited under Title VII. Hudson v. Park Cmty. Credit Union, Inc., 2017 U.S. Dist. Lexis 187620 (W.D. Ky. Nov. 13, 2017)(citing Gilbert v. Country Music Ass'n, 432 Fed. Appx. 516 (6th Cir. 2011))(citing Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762(6th Cir. 2006)). As a matter of law, Plaintiff's Complaint fails to state a claim upon which relief can be had under Kentucky law. Id.

Now it is hereby ORDERED that the Defendant's Motion to Dismiss the Complaint is GRANTED and this case is dismissed WITH PREJUDICE.

Respectfully submitted,

JOHN G. MCNEILL
Landrum & Shouse LLP
106 West Vine Street
PO Box 951
Lexington, KY 40588-0951
jmcneill@landrumshouse.com
Telephone: 859-255-2424
Facsimile: 859-233-0308

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT
MONTGOMERY COUNTY BOE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 25TH day of May, 2018, been electronically mailed to the following:

Edward E. Dove
300 Lexington Building
201 West Short Street
Lexington, KY 40507
eddove@windstream.net
Attorney for Plaintiff

Mark A. Mantooth
4508 S. Tonti Street
New Orleans, LA 70125
m.mantooth@lezymantooth.com
Attorney for Plaintiff

BY: /s/ JOHN G. MCNEILL
ATTORNEY FOR DEFENDANT
MONTGOMERY COUNTY BOE