

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON**

CASE NO.: 5:18-CV-00351

NICHOLAS CHARLES BRIENER

PLAINTIFF

V.

**OPPOSITION TO
MONTGOMERY COUNTY BOARD OF EDUCATION’S
MOTION TO DISMISS**

**BOARD OF EDUCATION OF
MONTGOMERY COUNTY**

DEFENDANT

* * * * *

NOW INTO COURT comes Nicholas Charles Breiner (“Breiner”), plaintiff, through undersigned counsel, and respectfully submits his opposition to the Motion to Dismiss filed by defendant, Montgomery County Board of Education (“MCBOE”) in this matter.

I. INTRODUCTION

This matter arises out of workplace harassment and the discriminatory termination of Breiner’s employment by MCBOE after Breiner made a public comment indicating he is not heterosexual. In its Memorandum in Support of Motion to Dismiss (“Defendant’s Memorandum”), MCBOE posits that such discrimination is not actionable under “Kentucky law”¹ and relies entirely on a solitary, unpublished trial court opinion² as grounds for its motion. Breiner elected to dismiss his state court action arising from the facts asserted herein and filed the instant matter in this Honorable Court, pursuant to federal question jurisdiction,³ to avail

¹ Defendant’s Memorandum, at 2.

² *Hudson v. Park Community Credit Union, Inc.*, 2017 U.S. Dist. Lexis 187620 (W.D. Ky. Nov. 13, 2017).

³ 28 U.S.C. § 1331 (see also, U.S. Const. art. III, § 2; *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)).

himself of the corpus of federal law. As discussed below, federal jurisprudence does not bar Breiner's cause of action and MCBOE's Motion to Dismiss should, accordingly, be denied.

II. FACTS AND PROCEDURAL POSTURE

Breiner was employed by MCBOE as Director of Vocal Music and Director of Theater Development at McNabb Middle School. While so employed, Breiner learned that a female student, struggling with her sexual orientation, intended to harm herself and Breiner intervened and prevented her from doing so. This event precipitated Breiner's decision to make known his sexual orientation, which he did via social media in a post dated April 7, 2017.

On or about April 10, 2017, Breiner was summoned to a meeting with MCBOE Deputy Director Rick Culross wherein he was questioned about his sexual orientation. On the following day, Breiner was defamed by an Administrative Office of the Court ("AOC") employee whose assignment includes McNabb Middle School. In response to that defamatory remark, Paula Stafford, in her capacity as Principal at McNabb Middle School replied: "We're taking care of it."

After the April 10, 2017 meeting, Breiner began to experience disparate treatment in his employment, including but not exclusively, being called into unscheduled meetings, being accused of violating MCBOE policy not associated with Breiner's duties, harassing phone calls from MCBOE officials during class, and unfavorable evaluations. On or about May 8, 2017, Breiner was "pink slipped" by MCBOE. When Breiner requested the reason for the "pink slip", he was told by the McNabb Middle School Principal that it was due to budget restraints. In July 2017, Breiner discovered that his position at McNabb Middle School had been filled by a heterosexual female.

Breiner originally filed suit in state court naming both MCBOE and the AOC employee. Prior to MCBOE's answer, Breiner and MCBOE executed a joint motion to dismiss MCBOE from that action. Breiner then filed the instant suit in this Court.

III. LAW AND ARGUMENT

Breiner brings his claims under 42 U.S.C.A. § 2000e-2 which provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ... ;

...

(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice.

In *Zarda v. Altitude Express, Inc.*,⁴ the plaintiff-appellant, Zarda, brought claims under Title VII alleging wrongful termination on the basis of sexual stereotyping. The trial court granted defendant's summary judgment on grounds that Zarda's claims of sexual stereotyping were predicated on sexual orientation discrimination⁵ for which there was no remedy in Title VII. On appeal, the Second Circuit, sitting *en banc*, reversed, finding sexual orientation a "function of sex,"⁶ which the U.S. Supreme Court has considered in extending Title VII protections beyond "sex itself."⁷

According to the *Zarda* Court: "Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just 'the principal evil[s] Congress was concerned with when it enacted' the statute in 1964, but also 'reasonably comparable evils' that meet the statutory requirements" (citing *Oncale v. Sundowner Offshore*

⁴ In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2/26/18).

⁵ *Id.* at 109.

⁶ *Id.* at 112.

⁷ *Id.*

Servs., Inc., 523 U.S. 75,79, 118 S.Ct. 998 (1988)). The court further noted, as to *Oncale*, that “male-on-male sexual harassment ... ‘was assuredly not the principal evil Congress was concerned with when it enacted Title VII’” (citing *Oncale* at 79-80). “Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination ‘because of ... sex’ would encompass sexual orientation discrimination does not limit the reach of the statute.”⁸

The *Zarda* court concluded that the test as to whether certain discrimination is a function of sex, and therefore actionable under Title VII, is to ask whether, but for that person’s sex, that person’s treatment would have been different.⁹ By way of example, the court found that if a woman were discriminated against because she is attracted to women, she would have received different treatment (i.e., not discriminated against) if she had been a man attracted to women.¹⁰ “We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.”¹¹

Even as *Zarda* was being decided, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued a ruling articulating its position that Title VII extends to proscribe discrimination on the basis of sexual orientation. In *David Baldwin v. Anthony Foxx*,¹² the complainant, Baldwin, asserted he was illegally declined an offer for permanent employment on the basis of his sexual orientation. The EEOC framed its inquiry as follows:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation

⁸ *Id.* at 115.

⁹ *Id.* at 116.

¹⁰ *Id.* at 119.

¹¹ *Id.*

¹² *David Baldwin v. Anthony Fox, Secretary, Department of Transportation (Federal Aviation Administration), Agency*, EEOC DOC 0120133080, 2015 WL 4397641 (EEOC, Jul. 15, 2015).

claim is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has relied on sex-based considerations or taken gender into account when taking the challenged employment action.¹³

In arriving at judgment, the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’” and that a complainant’s allegation of sexual orientation discrimination is “necessarily an allegation of sex discrimination under Title VII.” Therefore an allegation that “an agency took [the complainant’s] sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.”¹⁴

To date, the federal circuits are split with regard to whether discrimination on the basis of sexual orientation is proscribed by Title VII.¹⁵ The various district courts, unsurprisingly, have held in keeping with their respective circuits’ jurisprudence, generally implying that circuit jurisprudence is universally binding and absent a reversal by the appellate court sitting *en banc* or a U.S. Supreme Court decision to the contrary, reaching any decision other than that within circuit jurisprudence is impossible.¹⁶ Strict reliance on circuit jurisprudence, however, is not an absolute. It should be noted that, unlike the principal of *res judicata*, which is codified in the Federal Rules of Civil Procedure,¹⁷ *stare decisis*—a term applied both to a court’s own rulings and to lower courts’ adherence to higher courts’ determinations¹⁸—is a “principal of policy and not a mechanical adherence to the latest decision.”¹⁹ An inferior court may not, of course,

¹³ *Id.* at 4 (internal quotations omitted).

¹⁴ *Id.* at 5.

¹⁵ See *Zarda*; see also *Phillpot v. New York*, 252 F.Supp.3d 313 (S.D. NY, 5/3/17); cf. *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir., Jul. 19, 2006).

¹⁶ See generally, *Grimsley v. American Showa, Inc.*, 2017 WL 3605440, at 5 (S.D. Ohio, 8/21/17)(“[Plaintiff] alleges that he was discriminated against because he is a homosexual. Under current Sixth Circuit law, Plaintiff has failed to state a plausible claim for sex discrimination under Title VII.”); *Shepherd v. Tennessee*, 2017 WL 4467478, at 2 (M.D. Tenn. Oct. 5, 2017)(The Court dismissed plaintiff’s Title VII sexual orientation discrimination claim because “[the court] is bound by published Sixth Circuit case law.”).

¹⁷ See Fed. R. Civ. P. Rule 8; see also U.S. Const. am. 7.

¹⁸ Childress & Davis, 1 Federal Standards of Review, § 6.01 (4th ed. 2010).

¹⁹ *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

overrule a decision of the Supreme Court.²⁰ To date, however, the Supreme Court has not yet taken up the question of whether Title VII protects against discrimination on grounds of sexual orientation. While the lower courts are cautioned not to “uncritically incorporate *stare decisis* flexibilities and exceptions,”²¹ there is no actual prohibition against a district court decision considered independently of circuit precedent.

Breiner’s complaint alleges discrimination on grounds of his sexual orientation, a Title VII claim found cognizable under sister circuit and EEOC jurisprudence. Fundamentally, the discrimination Breiner suffered was a function of his sex. Namely, but for his admission that he is sometimes attracted to other men—where such an admission by a woman would not have resulted in disparate treatment—he would not have been subjected to discrimination. Discrimination on these ground is proscribed under Title VII’s protection against discrimination “because ... of sex.” This Court has the authority to make a determination, independent of Sixth Circuit precedent, that Breiner’s case has merit under the law and should be heard.

IV. CONCLUSION

WHEREFORE, in consideration of the foregoing argument of law, plaintiff, Nicholas Charles Breiner, respectfully requests this Honorable Court deny defendant’s Motion to Dismiss.

Respectfully Submitted,

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²⁰ See *Jaffree v. Board of School Comm’rs*, 554 F.Supp. 1104.

²¹ *Childress & Davis*.

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CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing has been served upon the following via ECF on this the 1ST da of June, 2018:

Hon. John G. McNeill
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EDWARD E. DOVE

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PROPOSED ORDER

**BOARD OF EDUCATION OF
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DEFENDANT

This matter comes before the Court on the Defendant's Motion to Dismiss. The Court having reviewed the Defendant's Motion and the Plaintiff's Response NOW OVERRULES the Defendant's Motion and Orders this matter to proceed.

SO ORDERED this the _____ day of June, 2018.

JUDGE KAREN CALDWELL