

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 REPLY IN SUPPORT OF MOTION
TO DISMISS FOR FAILURE TO STATE A CLAIM**

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 in support of its' Motion to Dismiss, states as follows:

REPLY

Plaintiff asserts that this Court has the authority to make a determination independent of Sixth Circuit Precedent. However, decisions from the circuit courts are binding on district courts within that circuit, and therefore Plaintiff's assertion is not supported by law. In fact, the only way this Court could make a decision independent of the Sixth Circuit is if it were applying another jurisdiction's law – which is not the case here. Further, the sister circuit cited in Plaintiff's response is at most a persuasive authority, since the 6th Circuit has already ruled that they are bound by the precedent set in *Gilbert v. Country Music Ass'n, Inc.*, 432 Fed. Appx. 516 (6th Cir. 2011)(holding Title VII does not prohibit discrimination the basis of sexual orientation).

Even more importantly, a Kentucky Court has never held that discrimination based on sexual orientation is prohibited under K.R.S. §§ 344.040. Further, Kentucky Courts have noted that K.R.S. 344.040(1) of the Kentucky Civil Rights Act mirrors its federal

counterpart, which has *never* been read to prohibit sexual orientation discrimination. Crockett v. CHA HMO, Inc., 2008 WL 901815 (Ky. Ct. App. 2008). Likewise, the Sixth Circuit has never held that sexual orientation discrimination is prohibited under Title VII. See generally, Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006). More recently, the Sixth Circuit reaffirmed its view that sexual orientation discrimination is not prohibited under Title VII in Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012). Note that the court did hold that transgender or transitioning status was a protected class, because “discrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping.” However, the court expressly denied that this holding meant that it had adopted the position of the Seventh Circuit in Hively v. Ivy Tech Cmty. Coll of Ind., 853 F.3d 339, 345 (7th Cir. 2017)(emphasis added), that sexual orientation discrimination is prohibited by Title VII. By expressly declining to adopt the Seventh Circuit’s interpretation of Title VII, while expanding the reach of Title VII to transgender persons, the Sixth Circuit clearly still holds that its previous position in Vickers continues to be good law. Accordingly, this means that sexual orientation discrimination is not prohibited by Title VII in the Sixth Circuit.

In closing, this Court determined that, “while stare decisis is not an inexorable command, a departure from controlling precedent demands special justification...the bar is high indeed: the governing decision must be shown to be unworkable or badly reasoned.” Thiele v. Michigan, No.17-2275, 2018 U.S. App. LEXIS 14081 (6th Cir. May 29, 2018)(emphasis added). Plaintiff has not presented even a threshold showing that the prevailing law and governing decisions, as cited and supported in Defendant’s motion to

dismiss are either unworkable or badly reasoned and therefore, Plaintiff's complaint must be dismissed as a matter of law.

WHEREFORE, in consideration of the foregoing argument of law, the Defendant, the Montgomery County Board of Education, respectfully requests that this Court grant the relief sought.

Respectfully submitted,

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BY: /s/ JOHN G. MCNEILL
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 14th day of June, 2018, been electronically mailed to the following:

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