

UNITED STATES COURT OF APPEALS
FOR THE 6TH CIRCUIT
CASE NO.: 19-5123

NICHOLAS CHARLES BREINER

APPELLANT

v.

**JOINT MOTION TO REMAND TO
UNITED STATES DISTRICT COURT
FOR FURTHER ADJUDICATION**
Electronically Filed

BOARD OF EDUCATION OF MONTGOMERY COUNTY

APPELLEE

* * * * *

MAY IT PLEASE THE COURT:

Comes the Plaintiff/Appellant, Nicholas Charles Breiner, and the Defendant/Appellee, Board of Education of Montgomery County, and jointly, as evidenced by the signatures of their counsel below, request that the United States Court of Appeals for the Sixth Circuit vacate the Briefing Schedule Order and remand this matter back to the United States District Court for the Eastern District of Kentucky, Central Division at Lexington. As grounds, the parties jointly state that there is no issue to be briefed before the Honorable Sixth Circuit Court of Appeals, and in support thereof states as follows:

OPERATIVE FACTS

This matter was originally filed on or about May 3, 2018, before the United States District Court for the Eastern District of Kentucky, Central Division at Lexington, being Case No. 5:18-cv-00351-KKC. The allegations were that the Plaintiff/Appellant disclosed his sexual orientation as a bi-sexual male and contended that thereafter he received disparate treatment in his employment as an employee of the Montgomery County Board of Education. He further alleged that he was “pink slipped” by the Montgomery County

Board of Education, which he contended was the result of his sexual orientation. He contended that he was a victim of discrimination based on his sexual orientation in violation of Title VII.

Without filing an Answer to the Complaint, the Defendant/Appellee, Montgomery County Board of Education moved to dismiss the Plaintiff/Appellant's Complaint on the grounds that it failed to state a cause of action for which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). The basis for the Motion was controlling case law in Kentucky Courts and in the Sixth Circuit, which did not interpret Title VII to include sexual orientation as a prohibited basis for termination or non-renewal in employment. Hudson v. Park Cmty. Credit Union, Inc., 2017 US 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)).

The Plaintiff/Appellant filed a Response to the Motion and Defendant/Appellee filed a Reply. The matter was then submitted. No other steps had taken place in the Court below.

On or about January 25, 2019, the Hon. Karen K. Caldwell issued an Opinion and Order granting the Motion to Dismiss. A Judgment was entered on January 25, 2019.

The Plaintiff/Appellant then filed a Notice of Appeal to the Sixth Circuit on February 7, 2019. The Appeal was placed in abeyance pending several cases before the United States Supreme Court on similar issues.

ARGUMENT

The parties believe that there is simply nothing to Brief before the Sixth Circuit. With the issuance of the Supreme Court's Opinion on Bostock v. Clayton Cty., Nos. 17-

1618, 17-1623, 18-107, 2020 U.S. Lexis 3252, and decided on June 15, 2020, the Supreme Court pronounced termination from employment on the basis of alleged sexual orientation or gender identification fell under Title VII.

As a result, the truncated Complaint, Motion to Dismiss, and Granting Motion to Dismiss in the United States District Court did not address any of the factual issues, factual claims or defenses of the case since no discovery was conducted, and therefore, this matter should be remanded back to the United States District Court for a Scheduling Order, proof taking, and the normal course of litigation.

To do otherwise would leave the Court of Appeals with no factual determinations or legal determinations to consider.

WHEREFORE, the parties jointly respectfully move the United States Court of Appeals for the Sixth Circuit to remand this matter back to the United States District Court, Eastern District of Kentucky, Central Division at Lexington for further handling of this matter consistent with the recent Supreme Court precedent.

Respectfully submitted,

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