

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

DANA OSBORNE,

Plaintiff,

v.

NIXA FIRE PROTECTION DISTRICT,
THE BOARD OF DIRECTORS OF THE
NIXA FIRE PROTECTION DISTRICT,
ADAM NEFF, in his individual capacity,
LLOYD WALLEES, in his individual
capacity, GARRICK ZOELLER, in his
individual capacity, WILL MCGEHEE, in
his individual capacity,

Defendants.

Case No. 6:20-CV-03041-S-SRB

**PLAINTIFF'S SUGGESTION IN OPPOSITION TO DEFENDANT BOARD OF
NIXA FIRE PROTECTION DISTRICT, NEFF AND MCGEHEE'S
MOTION TO DISMISS**

Plaintiff DANA OSBORNE, through her undersigned counsel, respectfully provides the following suggestion opposing Defendant Board of Nixa Fire Protection District, Neff And McGehee's motion to dismiss. In support, Plaintiff states as follows:

I. MOTION TO DISMISS PLEADING STANDARD

In *Swierkiewicz v. Sorema N. A.*, the Supreme Court set forth that employment discrimination and civil rights claims are only subject to the simplified pleading standards of Fed.R.Civ.P. 8, stating:

Rule 8(e)(1) states that “no technical forms of pleading or motions are required,” and Rule 8(f) provides that “all pleadings shall be so construed as to do substantial justice.” Given the Federal Rules’ simplified standard for pleading, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513–14 (2002)(internal citations omitted).

As discussed below, Plaintiff’s complaint goes well beyond meeting the simplified pleading standards and therefore, Defendants’ motion to dismiss should be denied.

II. THE BOARD OF DIRECTORS OF THE NIXA FIRE PROTECTION DISTRICT IS A PROPERLY NAMED DEFENDANT

Defendant Board of Nixa Fire Protection District (“the Board”) moves to dismiss Plaintiff’s Title VII and Missouri Human Rights Act claims and Equal Protection claim; however, the Board is the authority under which the Fire Protection District acts. Therefore, the Board is a necessary party to Plaintiff’s claims, as well as a consolidated employer for purposes of Title VII and the Missouri Human Rights Act. Similarly, the Board is a person for purposes of Plaintiff’s Section 1983 claim. Thus, the Board’s motion to dismiss should be denied.

A. The Board is a Necessary Party

While Defendants do not address this point, Plaintiff named the Board of Directors as a necessary party to this litigation because the plain language of the Missouri statutes governing the Fire Protection District, as well as the polies and procedures of the Fire Protection District make clear that the District is governed by the Board. Therefore, the Board is responsible for the employment practices of the District and is required to enforce any relief afforded Plaintiff. Therefore, the Board's motion to dismiss should be denied.

It is undisputed that the Nixa Fire Protection District is formed in accordance with Missouri Revised Statutes Chapter 321 and is a political subdivision. *See* 321.010. 1; *see also* *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 661 (Mo. 2009). The Introduction to the Nixa Fire Protection District Policies and Procedures states in relevant part:

The District is governed by a five member board, elected by the constituents of the District, for the purpose of providing protection to the property within the District, and on its behalf, the Board shall have the powers, authority, and privileges as outlined by RSMO Chapter 321.

The Board through State Statute, Ordinances, Resolutions, Policy, Procedure, Programs, and basic employment practices shall govern the operation of the District. The Board shall appoint an Administrator to oversee the District in completing the mission, vision, goals, and objectives of the District.

<https://www.nixafire.org/files/PolicyProcedureTriState/Policies01152014.pdf> (referenced on May 8, 2020).

The powers of the Board on behalf of the District are established by RSMO Chapter 321.220. The Board can sue and be sued. 321.220(3). The Board can enter into contracts and agreements on behalf of the District. 321.220(4). The Board can borrow money and incur indebtedness. 321.220(5); *see also* RSMO 321.180 (“The treasurer shall keep strict and accurate accounts of all money received by and disbursed for and on behalf of the district in permanent records.”) The Board hires and retains employees for the District. 321.220(9). The Board adopts rules and regulations for the District. 321.220 (12)(“To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district, and refer to the proper authorities for prosecution any infraction thereof detrimental to the district.”) The Board also provides benefits for District employees. 321.220(15) and (17). Therefore, the Board is a necessary party to the litigation because they are needed to enter into a settlement agreement or pay a judgment. The Board is also the governing authority for employment practices within the District. Therefore, Defendants’ motion to dismiss the Board should be denied.

B. The Board and the District Are a Single or Joint Employer for Purposes of Title VII and the Missouri Human Rights Act

The Eighth Circuit test for whether two entities can be considered an “employer” for purposes of Title VII, is set forth in *Baker v. Stuart Broadcasting, Co.*, 560 F.2d 389 (8th Cir. 1977.) Under the *Baker* test, it is clear that the Board and the District are a consolidated

employer for the purposes of employment discrimination statutes. The definition of “employer” is to be liberally construed. *Id.* at 391.

The joint or single employer test is used for determining when an entity, which does not directly employ the plaintiff, sufficiently controls the means and manner of the plaintiff’s work to be considered an employer under Title VII. *See Walton v. Edge Med. Prof’l Servs., LLC*, 442 F. Supp. 2d 731, 749 (W.D. Mo. 2006). The single entity analysis is appropriate when separate corporations are not what they appear to be, that in truth they are but divisions or departments of a ‘single enterprise.’ *Id.* “The joint employer relationship consists of no single integrated enterprise. Rather, the analysis assumes the existence of separate legal entities which have chosen to handle jointly important aspects of their employer-employee relationship. *Id.*

In *Baker*, the Eighth Circuit held that the standards to be considered to determine whether the an entity is an employer under 42 U.S.C. § 2000e(b) are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations; and (4) common ownership or financial control. *Baker*, 560 F.2d at 392.

In this case, the Board is clearly a single or joint employer of Plaintiff. The first factor is the interrelation of operations. The Board adopts rules and regulations for the District. 321.220 (12) (“To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the

board and of the district, and refer to the proper authorities for prosecution any infraction thereof detrimental to the district.”) The Policies and Procedures for the District also demonstrate that the operations of the District are interrelated between the Board and District. “The Board Members are responsible for direction and control of the organization. They must ensure the District is following all applicable laws and ordinances. The Board should approve organizational goals, maintain adequate funding, and seek new and additional funds to manage the growth of the organization.” The Board is responsible for hiring and firing employees. 101.2, 106.2; *see also* RSMO 321.200(1). The Fire Chief has to advise the Board of Directors on the administration of the District. 105.2. The Board and the Chief evaluate the pay scale during the budget development process. 120.2. The Board must approve payroll deductions for employees. 120.4.

The second factor is common management. Under the Missouri statutes, the Board manages the District. *See* RSMO 321.220 (8) “To have the management, control and supervision of all the business and affairs of the district, and the construction, installation, operation and maintenance of district improvements therein;” (12) “To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district, and refer to the proper authorities for prosecution any infraction thereof detrimental to the district.”

The Introduction to the Nixa Fire Protection District Policies and Procedures states in relevant part:

The District is governed by a five member board, elected by the constituents of the District, for the purpose of providing protection to the property within the District, and on its behalf, the Board shall have the powers, authority, and privileges as outlined by RSMO Chapter 321.

The Board through State Statute, Ordinances, Resolutions, Policy, Procedure, Programs, and basic employment practices shall govern the operation of the District. The Board shall appoint an Administrator to oversee the District in completing the mission, vision, goals, and objectives of the District.

<https://www.nixafire.org/files/PolicyProcedureTriState/Policies01152014.pdf>

(referenced on May 8, 2020).

The third factor is centralized control of labor relations. The Board is responsible for hiring and firing employees. Policies and Procedure 101.2, 106.2; *see also* RSMO 321.200(1); 321.220(9). The Board also provides benefits for District employees. RSMO 321.220(15) and (17). The Board and the Chief evaluate the pay scale during the budget development process. Policies and Procedures 120.2. The Board must approve payroll deductions for employees. Policies and Procedures 120.4. The Grievance Board of Review for employee labor relations is made up of “two (2) members of the Local, two (2) Chief Officers other than the Fire Chief and one (1) member of the Board of Directors.” Policies and Procedures 108.

The fourth factor is common ownership or financial control. The Board of Directors has financial control over the District. RSMO 321.180 requires the Board

treasurer to account for money received and disbursed by the District. The Board can enter into contracts and agreements on behalf of the District. 321.220(4). The Board can borrow money and incur indebtedness. 321.220(5); *see also* RSMO 321.180 (“The treasurer shall keep strict and accurate accounts of all money received by and disbursed for and on behalf of the district in permanent records.”)

Therefore, all of the *Baker* factors support that the Board and the District are consolidated or joint employers for purposes of the anti-discrimination statutes. Claims under the Missouri Human Rights Act are determined using the same analysis as Title VII claims. *Evans v. Siegel-Robert, Inc.*, 139 F. Supp. 2d 1120, 1124 (E.D. Mo.), *aff’d*, 22 F. App’x 688 (8th Cir. 2001). Thus, Defendants’ motion to dismiss the Board from Plaintiff’s Title VII and Missouri Human Rights Act claims should be denied.

C. The Board is the Governing Authority for the District and Properly Named as a Defendant in Plaintiff’s Equal Protection Claim

The Eighth Circuit Court of Appeals has held that, in the employment discrimination context, the elements of a § 1983 equal protection claim are the same as those of a Title VII claim. *See Richmond v. Board of Regents*, 957 F.2d 595, 598 (8th Cir.1992). To prove an equal protection claim, a public employee must show (1) that he or she was singled out and treated differently from persons similarly situated, and (2) that the plaintiff was singled out on the basis of a prohibited characteristic, such as gender. *See Mercer v. City of Cedar Rapids, Iowa*, 79 F. Supp. 2d 1055, 1062 (N.D. Iowa 1999) (citing *Ellebracht v. Police Bd. of Metro. Police Dep’t of City of St. Louis*, 137 F.3d 563, 566 (8th

Cir.1998)). In this case, Plaintiff has sufficiently alleged that she was intentionally subjected to unequal and discriminatory treatment based on her gender. (Compl. ¶ 95-99.) Defendants do not dispute that Plaintiff has plead an equal protection claim against the District. Likewise, the Board is properly named as well.

In a 1983 claim, “the Board can be liable as the governing body of a municipal entity and the Department can be liable if the Board delegated authority to it. It is well settled that authority to make municipal policy ‘may be delegated by an official who possesses such authority.’” *Vickery v. Minooka Volunteer Fire Dep’t*, 990 F. Supp. 995, 1000–01 (N.D. Ill. 1997) (citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986)).

In this case, the plain language of the Missouri statutes governing the Fire Protection District, as well as the polies and procedures of the Fire Protection District make clear that the District is governed by the Board. It is undisputed that the Nixa Fire Protection District is formed in accordance with Missouri Revised Statutes Chapter 321 and is a political subdivision. *See* 321.010. 1; *see also* *S. Metro. Fire Prot. Dist. v. City of Lee’s Summit*, 278 S.W.3d 659, 661 (Mo. 2009). The Introduction to the Nixa Fire Protection District Policies and Procedures states in relevant part, “The District is governed by a five member board, elected by the constituents of the District, for the purpose of providing protection to the property within the District, and on its behalf, the Board shall have the powers, authority, and privileges as outlined by RSMO Chapter 321.” Because the Board governs the District, the members are elected, and the Board is governed by state statute,

it is properly a person acting under color of law for purposes of 42 U.S.C. § 1983. Moreover, the Board adopts rules and regulations for the District. 321.220 (12). Therefore, Defendants' motion to dismiss the Board should be denied.

III. PLAINTIFF SUFFICIENTLY PLEADS EQUAL PROTECTION VIOLATIONS AGAINST NEFF AND MCGEHEE

A supervisor may be held individually liable under § 1983 if he directly participates in a constitutional violation or if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights. *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996). The standard of liability for failure to supervise is "demonstrated deliberate indifference or tacit authorization of the offensive acts." *Brockinton v. City of Sherwood, Ark.*, 503 F.3d 667, 673 (8th Cir. 2007)

In this case, Plaintiff sufficiently alleges that Defendant Nuff failed to supervise and take corrective action and was actively involved in the discriminatory conduct. (Compl. ¶ 14, 42.) Plaintiff also alleges that she complained to Assistant Chief Neff about the discrimination and harassment she had been experiencing at the fire station. (Compl. ¶ 42.) Plaintiff alleges that Defendants failed to provide proper training to its managers, supervisors, and employees to prevent gender discrimination. Defendants' failure to train was deliberately indifferent to the rights of employees within its purview. (Compl. ¶ 97.) Plaintiff alleges that Defendants acted with deliberate indifference. (Compl. ¶ 98.) Plaintiff also alleges that the actions were taken against her because of her gender. (Compl. ¶ 99.) Therefore, Plaintiff has sufficiently alleged that Assistant Chief Nuff

actively participated in the equal participated in the violation and was deliberately indifferent to and failed to remedy Plaintiff's complaints. Therefore, Defendant Nuff's Motion to Dismiss should be denied.

In regard to Defendant McGehee, Plaintiff alleges that he was actively involved in the constitutional violation. (Compl. ¶ 14.) Plaintiff alleges that throughout November 2017, McGehee, would hide parts of Plaintiff's uniform and make her run "gear drills" even though gear drills were historically (for male firefighters – Plaintiff was the first female) only run by senior officers such as Battalion Chief, Captain or Lieutenant. (Compl. ¶ 24.) Plaintiff alleges that McGehee accused her of receiving special treatment. (Compl. ¶ 32.) Plaintiff alleges that McGehee referred to Osborne as, "the girl." (Compl. ¶ 76.) Moreover, Plaintiff alleged that she was intentionally subjected to unequal and discriminatory treatment based on her gender. (Compl. ¶ 95-99.) Therefore, Defendant McGehee's motion to dismiss should be denied.

IV. CONCLUSION

WHEREFORE, Plaintiff suggests that Defendants' motion to dismiss should be denied where Plaintiff has sufficiently alleged claims, as set forth above, against the Board of Directors, Defendant Nuff, and Defendant McGehee.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2020, a true and correct copy of the above and foregoing was served by electronic filing with the Clerk of the Court in the CM/ECF system, which will automatically send email notification of such filing to the following counsel of record:

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