

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

DANA OSBORNE,)	
)	
Plaintiff,)	
)	
v.)	Case No.: 6:20-CV-03041-SRB
)	
NIXA FIRE PROTECTION)	
DISTRICT, et.al.,)	
)	
Defendants.)	

**DEFENDANTS BOARD OF NIXA FIRE PROTECTION DISTRICT,
NEFF AND MCGEHEE’S REPLY SUGGESTIONS IN SUPPORT
OF THEIR MOTION TO DISMISS**

Defendants Board of Nixa Fire Protection District (hereinafter “the Board”), Adam Neff, and Will McGehee, by and through their undersigned attorneys, hereby submit their Reply Suggestions in Support of their Motion Dismiss (Doc. 25) as follows:

1. The Board is not Plaintiff’s “employer” under Title VII.

In her Suggestions in Opposition (Doc. 35), Plaintiff essentially alleges that she has two “employers” for Title VII purposes – the Nixa Fire Protection District (“the District”) and the Board. This argument is contradicted by her own pleadings in this matter, which alleges only that the District is an employer. Doc. 1 at ¶ 3. On this basis alone, Plaintiff’s claim that the Board is also her employer for Title VII purposes should fail.

Plaintiff first argues that the Board is a necessary party to this action because it governs the District. But simply being the body that governs the District per statute does not make the Board an “employer” for Title VII purposes.

Plaintiff then mistakenly relies on *Baker v. Stuart Broadcasting Co.*, 560 F.2d 639 (8th Cir. 1977), for the proposition that the Board should also be considered her employer. But *Baker* dealt with a situation involving whether two separate corporations should be treated as one “employer” for purposes of obtaining the required 15 employees for a Title VII claim. *Id.* at. 391 – 92. It does not address the situation here – whether the Board which governs the District is also the employer of the Plaintiff. The Board is not a separate corporation from the District like in *Baker*. Rather, as Plaintiff has alleged, the Board governs the operation of the District. Doc. 1 at ¶¶ 7; 8. The four-prong analysis in *Baker* therefore does not apply to this situation.

Simply put, as Plaintiff herself has stated, the employer of Plaintiff is separate Defendant Nixa Fire Protection District, and not the Board. Plaintiff cannot have two “employers” under Title VII. For these reasons, and the reasons previously put forth in the Motion to Dismiss, the Board cannot be liable to her under Title VII and should be dismissed as a Defendant in Counts I, II and III.

2. The Board is also not Plaintiff’s “employer” under the MHRA.

As Plaintiff acknowledges, claims under the Missouri Human Rights Act are determined using the same analysis as Title VII claims. *Evans v. Seigel-Robert, Inc.*, 139 F. Supp. 2d 1120, 1124 (E.D. Mo. 2001). As stated in the Motion to Dismiss, and above in Section (1), the Board is not the “employer” of Plaintiff Osborne; rather the District is.

Therefore, the Board must be dismissed as a defendant from the Missouri Human Rights Act claims in Counts V, VI and VII as well.

3. Plaintiff's claims in Count IV against the Board, Neff and McGehee fail to state a claim upon which relief can be granted.

a. *The Board.*

In Count IV Plaintiff also brings a claim against the Board for an alleged constitutional violation of her right to equal protection due to her gender under 42 U.S.C. § 1983. In her Suggestions in Opposition, Plaintiff argues that the Board is liable under § 1983 since “it is well settled that authority to make municipal policy ‘may be delegated by an *official* who possesses such authority.’” Doc. 35 at p. 9 (*citing Vickery v. Minooka Volunteer Fire Dep’t*, 990 F. Supp. 995, 1000-01 (N.D. Ill. 1997) (emphasis added)). The Board does not dispute that a § 1983 can be brought against an official, as that would constitute a person acting under the color of state law. *See Tipler v. Douglas Cnty.*, 482 F.3d 1023, 1027 (8th Cir. 2007). But the Board as an entity is not a “person” against whom § 1983 claims can be brought.

Plaintiff's Suggestions in Opposition also does not address that her Complaint contains no actual allegations that the Board itself committed any constitutional violation against Plaintiff. If Plaintiff is attempting to hold the Board liable for the acts of District employees, it is well settled that § 1983 does not impose *respondeat superior* liability. *See Hughes v. Stottlemyre*, 454 F.3d 791, 798 (8th Cir. 2006).

Plaintiff's Suggestions in Opposition also argues that because she has plead a § 1983 claim against the District, she has also pled one against the Board. This argument

misunderstands Plaintiff's § 1983 against the District and the Board. The claim against the District in Count IV is a *Monell* claim, which can be brought against a municipality that has adopted some policy, custom or practice that allegedly caused a violation of the claimant's constitutional rights. See *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 659 (8th Cir. 2007). But Plaintiff fails to recognize that the Board as a collective entity is not a municipality or a political subdivision like the District is. For all these reasons, Plaintiff fails to state a claim in Count IV against the Board

b. Defendant Neff

In her Suggestions in Opposition, Plaintiff does not dispute that her allegation against Neff is that as a Supervisor with the District, he violated her constitutional right to equal protection under the law when she complained to him about discrimination and harassment on October 27, 2018. Doc. 1 at ¶ 42. But there are no allegations that Defendant Neff failed to act on this complaint or took any steps to discriminate against Plaintiff in any way. As stated before, this sole allegation that Plaintiff made a complaint to Defendant Neff does not state a claim for a violation of equal protection, as there is no allegation that Plaintiff was treated differently than other similarly situated individual, nor is there any allegation that Defendant Neff took any action at all. For this reason, Defendant Neff must be dismissed from this lawsuit.

c. Defendant McGehee

Likewise, Plaintiff's Suggestions in Opposition do not dispute that the only allegations against Defendant McGehee is that he hid her uniform, made her run gear drills

that were historically run by senior officers, that he made the comment Plaintiff was receiving special treatment on one occasion, and that he called her “the girl” on one other occasion. Doc. 1 at ¶¶ 24; 32 and 76. But there are no allegations indicating Plaintiff was treated differently than other similarly situated individuals. For these reasons, Defendant McGehee must be dismissed from this lawsuit as well.

WHEREFORE, for the reasons set for here and in their Motion to Dismiss, Defendants Board of Nixa Fire Protection District, Adam Neff, and Will McGehee, hereby request this Court to issue an order:

1. Dismissing Defendant Board of Nixa Fire Protection District from Counts I through VII of Plaintiff’s Complaint for failure to state a claim upon which relief can be granted;
2. Dismissing Defendants Neff and McGehee from this lawsuit for failure to state a claim upon which relief can be granted against them in Count IV; and
3. For such further relief as the Court deems just and proper in the premises.

Respectfully Submitted,

SCHREIMANN, RACKERS
& FRANCKA, L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/ Ryan Bertels