

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

BRIAN KIRK,)	
)	
Plaintiff,)	
)	
v.)	Case No.:5:24-CV-06023-GAF
)	
CITY OF ST. JOSEPH,)	
MISSOURI, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S SECOND MOTION FOR LEAVE TO
FILE HIS SECOND AMENDED COMPLAINT AND SUGGESTIONS IN SUPPORT**

COME NOW Defendants City of St. Joseph, Mayor John Josendale, and City Council Members Marty Novak, Taylor Crouse, Andy Trout, Michael Grimm, Madison Davis, Kenton Randolph, Jeff Schomberg, and Randy Schulz, all sued in their official capacities (hereinafter collectively referred to as the “City Defendants”), by and through undersigned counsel, and oppose Plaintiff Kirk’s Second Motion for Leave to File His Second Amended Complaint.¹

INTRODUCTION

Plaintiff Kirk has filed a second motion seeking leave to amend. As it affects the City Defendants, Kirk now wants to sue the St. Joseph mayor and all the city council members in their individual capacities, rather than their official capacities. Although leave to amend can be freely given, that maxim does not apply when the amendment would be futile. Here, Kirk’s sexuality is not a protected class, and these elected officials have legislative immunity.

- **Protected-Class Status.** The Constitution provides equal protection to citizens who are in a protected class. Protected classes are typically things such as race and gender. Here, Kirk alleges that his protected class is,

¹ The City Defendants do not oppose Plaintiff’s Motion for Leave to Withdraw his Motion for Leave to File a First Amended Complaint.

“Being openly gay.”² Is being openly gay a protected class under the Constitution, and, if so, does Kirk have a clearly-established right that can overcome qualified immunity?

- **Legislative Immunity.** Legislators have legislative immunity for their votes on issues of public concern. This includes appointments to local boards. Here, Kirk alleges that he was retaliated against when, “Mayor Josendale and City Council members voted to not reappoint the Plaintiff [to the library board] because of his protected speech.”³ May legislators vote on issues of public concern without fear of being sued every time someone disagrees with their vote?

SUGGESTIONS IN SUPPORT

I. Leave to amend should not be granted when the amendment would be futile.

It would be futile to grant Kirk’s motion for leave to amend because the underlying claims that Kirk wants to bring against the City Defendants in their individual capacities would be subject to dismissal. *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010); *Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008); *Baldwin v. Estherville, Iowa*, 333 F. Supp. 3d 817, 828 (N.D. Iowa 2018); *Steinert v. The Winn Group, Inc.*, 190 F.R.D. 680, 682 (D. Kan. 2000). So long as they were sued in their official capacities, the City Defendants were willing to indulge Kirk’s allegations for the time being. But now that Kirk has sought to involve these legislators in their individual capacities, it is time to make clear that Kirk’s claims are legally deficient.

II. Kirk’s sexuality is not a protected class.

This is a section 1983 lawsuit where Kirk alleges that he was discriminated against based upon being openly gay, in violation of the Equal Protection Clause of the United States Constitution. “To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.” *Pitts v. City of Cuba*, 913 F. Supp. 2d 688, 704 (E.D. Mo. 2012) (citing *Nolan v.*

² Proposed Second Amended Complaint at ¶ 54(a).

³ Proposed Second Amended Complaint at ¶ 44.

Thompson, 521 F.3d 983, 989 (8th Cir. 2008)). The Equal Protection Clause applies to certain protected classes, such as race and sex. See *Wimbley v. Cashion*, 588 F.3d 959, 961-62 (8th Cir. 2009); *Butler v. Crittenden County, Arkansas*, 708 F.3d 1044, 1049 (8th Cir. 2013).

Being openly gay is not a protected class under the Constitution and the Supreme Court has not recognized sexual orientation as a “suspect” or “quasi-suspect” class under the Equal Protection Clause. Gay individuals do have the right to marry, but this is based largely on the right to marry being a fundamental liberty interest under the Due Process Clause. *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015).

The Supreme Court “has never extended heightened constitutional protections to queer people, creating legal ambiguities as to what protections, if any, are afforded to queer Americans.” 38 *Touro L. Rev.* 283, 285 (2022). Considering that the above statement was written only one year before Kirk’s alleged cause of action accrued, Kirk does not have a *clearly established* right to serve on the library board. And if Kirk is allowed to amend to sue the individual defendants in their individual capacities, they will invoke their right to qualified immunity from suit.

Qualified immunity shields the individual defendants from suit unless the supposed right is clearly established. See *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). “A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right’”). *Id.* (citations omitted). “As the Supreme court has reiterated, “qualified immunity protects, ‘all but the plainly incompetent or those who knowingly violate the law.’” *Ryno v. City of Waynesville*, 58 F.4th 995, 1004-05 (8th Cir. 2023). If there are legal ambiguities as to what constitutional protection might apply to Kirk—as the commentator stated in the above-referenced law review article—then qualified immunity is mandated for the individual City Defendants.

Kirk's proposed amendment to sue the mayor and the city council members in their individual capacities is futile because (1) Kirk cannot establish a violation of a constitutional right, and (2) he cannot prove that the supposed constitutional right was clearly established. There is no need to allow the amendment and no need to indulge Kirk any further.

III. Legislators have legislative immunity for voting on who to place on a board.

It is well established that “[l]ocal legislators are entitled to absolute immunity from § 1983 liability for their legislative activities.” *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). See *Hope Baptist Church v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1221 (E.D. Mo. 1987) (city legislators were entitled to absolute immunity).

This Court must consider only the nature of the vote after stripping it of “all considerations of intent and motive.” *Bogan*, 523 U.S. at 55. It does not matter what motivation any elected official had for their vote. What matters is that they voted in the performance of their legislative duties. “Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.” *Church v. Missouri*, 913 F.3d 736, 751 (8th Cir. 2019) (citations omitted).

There is no point in allowing Kirk to amend his pleadings to assert claims against the legislators, as they are immune from suit. Please keep in mind that this is not just an immunity from damages, it is an immunity from *suit*. The individual City Defendants should never be subjected to these claims in their individual capacity, and they should not have to defend against them—at all.

IV. Conclusion

The City of St. Joseph has been willing to indulge Kirk's claims through the pleading stage—thus far. But suing the mayor and the city council members in their individual capacities

is a step too far. These individuals have immunity from suit, and immunity from suit means that they should not even have to be bothered to defend against Kirk's claims. Kirk's requested amendment to sue the individuals in their individual capacities is futile and it should be denied.

Respectfully submitted,

ENSZ & JESTER, P.C.



BRANDON D. MIZNER MO #46515
THOMAS H. OSBORN MO #72953
1100 Main Street, Suite 2121
Kansas City, Missouri 64105
Telephone: 816-474-8010
Facsimile: 816-471-7910
E-mails: bmizner@enszjester.com
 tosborn@enszjester.com

ATTORNEYS FOR DEFENDANTS

City of St. Joseph, Missouri; Mayor John Josendale, Marty Novak, Taylor Crouse, Andy Trout, Michael Grimm, Madison Davis, Kenton Randolph, Jeff Schomburg, and Randy Schulz, all sued in their official capacities

CERTIFICATE OF SERVICE

I hereby certify that, on July 8, 2024, the above and foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

LYNNE JABEN BRATCHER MO #31203
ERIN N. VERNON MO #64590
BRATCHER GOCKEL LAW, L.C.
4014 B South Lynn Court
Independence, Missouri 64055
Telephone: 816-221-1614
Facsimile: 816-421-5910
E-mail(s): lynne@bgklawyers.com
erin@bgklawyers.com

and

SARAH J. DUGGAN MO #73687
WYRSCH HOBBS & MIRAKIAN P.C.
1200 Main Street, Suite 2100
Kansas City, Missouri 64105
Telephone: 816-281-8733
E-mail(s): sduggan@whmlaw.net
ATTORNEYS FOR PLAINTIFF
Brian Kirk

TODD P. GRAVES MO #41319
KATHERINE E. GRAVES MO #74671
GRAVES GARRETT GREIM LLC
1100 Main Street, Suite 2700
Kansas City, Missouri 64105
Telephone: 816-256-3181
Facsimile: 816-256-5958
E-mail(s): tgraves@gravesgarrett.com
kgraves@gravesgarrett.com
ATTORNEYS FOR DEFENDANTS
Josh Blevins and Steven Greiert

*ROBERT H. TYLER CA #179572

*BETHANY ONISHENKO AR #2022079

ADVOCATES FOR FAITH AND FREEDOM

25026 Las Brisas

Murietta, CA 92562

Telephone: 951-600-2733

E-mail(s): rtyler@tylerlawllp.com

bonishenko@faith-freedom.com

ATTORNEYS FOR DEFENDANT

Josh Blevins

***admitted pro hac vice**



ATTORNEYS FOR DEFENDANTS

City of St. Joseph, Missouri; Mayor John Josendale, Marty Novak, Taylor Crouse, Andy Trout, Michael Grimm, Madison Davis, Kenton Randolph, Jeff Schomburg, and Randy Schulz, all sued in their official capacities