IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GRACIE E. McBROOM,	:	
	:	**Case No. 2:12-CV-01074**
Plaintiff,	:	
	:	**JUDGE ALGENON L. MARBLEY**
v.	:	
	:	
HR DIRECTOR FRANKLIN COUNTY BOARD OF ELECTIONS, *et al.*,	:	**Magistrate Judge King**
	:	
	:	
Defendants.	:	

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on Plaintiff's "Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment" (Doc. 33) and Defendant's Response and Motion to Dismiss (Doc. 41). Pro se Plaintiff, Gracie McBroom, brings this action for alleged employment discrimination, arising from her work as a Precinct Judge with the Franklin County Board of Elections. Plaintiff asks the Court to deny an anticipated motion for summary judgment, which Defendant subsequently filed, but captioned as a "Motion to Dismiss" (Doc. 41). In addition, Plaintiff moves for default judgment (Doc. 19), based on Defendant's late Answer, and for a status conference (Doc. 55). Plaintiff also renews her anticipatory opposition to summary judgment by re-filing a nearly-identical Motion (Doc. 56).

For the reasons set forth herein, Plaintiff's Motion for Default Judgment (Doc. 19) is **DENIED**. Plaintiff's Motion for a status conference (Doc. 55) is **DENIED**. Plaintiff's "Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment" (Doc. 33 & 56) is **DENIED**, and Defendant's Response and Motion to Dismiss (Doc. 41) is **GRANTED**.

II. PROCEDURAL POSTURE

Plaintiff filed this action on November 21, 2012, against Attorney Scott J. Gaugler and the H.R. Director for the Franklin County Board of Elections. (Doc. 5). On the same day, the Magistrate Judge issued a Report and Recommendation, recommending dismissal of the claims against Defendant Gaugler (Doc. 7), which the Court adopted on December 4, 2012 (Doc. 10).

When Defendant H.R. Director failed to answer in the allotted 45 days, the Magistrate Judge, on February 14, 2013, ordered Defendant to report on the status of the case. (Doc. 12). Defendant did so, on February 28 (Doc. 13), and moved the next day for an extension of time to file his Answer (Doc. 14). The Court granted this extension (Doc. 15), and Defendant filed his Answer on March 4 (Doc. 16). Nevertheless, Plaintiff moved for default judgment on March 13 (Doc. 19). That Motion remains pending before the Court.

On May 15, 2013, after several unsuccessful attempts to force the recusal of the Magistrate Judge, Plaintiff filed the pendant "Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment" (Doc. 33). That Motion anticipates that Defendant will file a motion for summary judgment, and argues that it should be denied. It does not argue for judgment on the pleadings, nor does it argue for summary judgment in Plaintiff's favor. On June 6, Defendant responded, and moved for summary judgment (Doc. 41).

Subsequently, Plaintiff filed the following motions: to produce documents (Doc. 45); to amend her motion for default judgment (Doc. 46); for sanctions (Doc. 47); to compel (Doc. 48); to produce documents (Doc. 49); for leave to file a late response to Defendant's Motion to Dismiss (Doc. 50); to amend (Doc. 51); and "for annulment of judgment" on Defendant's motion to dismiss (Doc. 52). The Court denied all of these Motions on August 9, 2013 (Doc. 53).

In response to the Magistrate Judge's denial of her various motions, Plaintiff moved for a status conference, on August 22 (Doc. 55). Plaintiff then repeated her Opposition to summary judgment, by filing a document nearly identical to her original Motion, on August 23 (Doc. 56). The motion for status conference, as well as the renewed Motion (to the extent it differs from the original) also remains pending before the Court.

III. STATEMENT OF FACTS

Plaintiff brings her claim for workplace discrimination under 42 U.S.C. § 2000e-5(f)(1). Plaintiff has worked as a voting official for Defendant since 1981, including as a precinct judge in 1992 and 1993. (*Complaint*, Doc. 5, at 10). In 1995, Plaintiff was demoted from her precinct judge role for the 1994 election. (*Id.* at 10-11). In response, Plaintiff filed a civil rights complaint, which was dismissed by the Court of Common Pleas on September 29, 1995, and the dismissal was affirmed by the Court of Appeals on June 20, 1996. (*Id.* at 11).

After this incident, Plaintiff continued to work with the Board of Elections, and served as a judge in 2000 and 2002, a roster judge in 2003, and presiding judge in 2004 and 2006. (Doc. 5-1 at 3). Plaintiff also worked in the 2010 and 2011 elections. (Doc. 5 at 5).

With regard to the instant case, Plaintiff alleges that, on December 22, 2011, Mary Hacket, the Precinct Election Official Manager, and Deborah Cotner, Precinct Election Official Coordinator, removed Plaintiff as precinct judge and replaced her with Robena Hawkins, a white woman. (*Id.* at 2-3). Plaintiff argues that Ms. Hawkins is "far less" qualified than Plaintiff, and that Plaintiff was removed because of her "race and color." (*Id.* at 3). Plaintiff acknowledges that Defendant informed her that she had failed her performance tests and that Defendant "wanted someone with [a] better skill set than Plaintiff," but Plaintiff disputes that she has failed

any required test, and argues that her work in the 2010 and 2011 elections demonstrates her capability. (*Id.*). Plaintiff asserts that she was never informed of any problem with her skills or performance. (*Id.* at 8). In addition, Plaintiff alleges that she was replaced as precinct judge "in retaliation for" her 1995 civil rights complaint. (*Id.* at 9).

In support of her allegations, Plaintiff asserts that she was unaware that Ms. Hawkins was being prepared as her replacement, even as she trained Ms. Hawkins in the responsibilities of a presiding judge. (Doc. 5-1 at 3-4, 7). Plaintiff argues that Ms. Hawkins was unqualified for the position of presiding judge, and that she only could have been given the job by means of improper racial preference. (*Id.* at 8).

Plaintiff also takes issue with the performance problems cited by her supervisors at the Election Board. During the 2011 election, certain Elections Board officials reported that Plaintiff was late to arrive to the polling site on the day of the 2011 elections. (*Id.* at 4). Plaintiff disputes that she was late, and argues that this could not have been the case, since the back-up procedures intended to be followed if the presiding judge is later were never put into action. (*Id.*). Plaintiff also recounts that elections officials complained of her sleeping on the job, which she denies. (*Id.* at 5). Several other accounts state that Plaintiff had a "difficult time" working as presiding judge, and that she seemed overwhelmed and unable to manage the polling station. (*Id.* at 10-13). On the other hand, Plaintiff cites several election workers who reported no issues with her performance. (*Id.* at 8-9).

On January 10, 2013, Plaintiff filed a complaint with the Ohio Civil Rights Commission ("OCRC"), alleging substantially the same facts as described here. (Doc. 5 at 5; Doc. 5-1 at 14). Plaintiff also filed charges with the United States Equal Opportunity Employment Commission

("EEOC"). (Doc. 5-1 at 14). The EEOC declined to proceed, on the grounds that no employee relationship existed between Plaintiff and Defendant. (Doc. 5 at 4). Plaintiff received her EEOC "right to sue" letter on September 4, 2012. (*Id.*).

Plaintiff filed suit on November 20, 2012, asserting claims for civil rights violations. Plaintiff seeks reinstatement, new supervisors, and back pay. She also requests $7,000,000 in punitive and compensatory damages. (Doc. 5 at 3).

IV. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides, in relevant part, that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A fact is deemed material only if it "might affect the outcome of the lawsuit under the governing substantive law." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, (1986)). The nonmoving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339–40 (6th Cir. 1993). The suggestion of a mere possibility of a factual dispute is insufficient to defeat a motion for summary judgment. *See Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir. 1992) (citing *Gregg v. Allen–Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Summary judgment is inappropriate, however, "if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

The necessary inquiry for this Court is "whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251–52). In evaluating such a motion, the evidence must be viewed in the light most favorable to the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient to survive the motion; there must be evidence on which the jury could reasonably find for the opposing party. *See Anderson*, 477 U.S. at 251; *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995).

V. LAW AND ANALYSIS

Plaintiff's "Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment" (Doc. 33) ("Plaintiff's Motion"), which by its caption appears to seek judgment on the pleadings under Fed. R. Civ. P. 12(c), or summary judgment in favor of Plaintiff under Fed. R. Civ. P. 56, in fact argues only that summary judgment in favor of *Defendant* should be *denied*. Thus, while Plaintiff recites the language of Rule 56, and references various Ohio cases regarding summary judgment (*see* Doc. 33 at 2-5), Plaintiff argues only that "Defendant . . . is not entitled to summary judgment because . . . there exist several genuine issues of material fact" (*id.* at 6).

Anticipating that Defendant would move for summary judgment, Plaintiff filed her Motion to argue, preemptively, that summary judgment would be inappropriate. Plaintiff asserts that she has established her *prima facie* case by showing that she is a member of a protected class, and that she was treated differently than another person who is not a member of that class,

that is, Robena Hawkins, the Caucasian individual who took over Plaintiff's role after her demotion. (*Id.* at 15-17). In support of this position, Plaintiff argues that she was treated differently that Ms. Hawkins, because she had to train Ms. Hawkins how to fulfill her position as presiding judge, and thus Ms. Hawkins is unqualified for the job from which Plaintiff was removed. (*Id.* at 17-18). Plaintiff further insists that the "inconsistencies" between the various statements submitted to the OCRC are "an attempt by Defendant to cover up a violation of Title VII." (*Id.* at 18). Thus, Plaintiff concludes that Defendant is not entitled to summary judgment. (*Id.* at 19).

Defendant's "Motion to Dismiss" (Doc. 41) was filed three months later, and argues in favor of summary judgment. Plaintiff did not respond to or otherwise oppose this Motion, apart from her earlier pre-motion opposition. Defendant argues that summary judgment is appropriate because: (1) Plaintiff was not an employee of the Franklin County Board of Elections, thus rendering 45 U.S.C. § 2000 *et seq.* inapplicable; (2) Defendant did not engage in any discriminatory practices; and (3) Defendant is not "sui juris" and lacks the capacity to be sued.

Defendant first argues that Plaintiff was not an employee of the Franklin County Board of Elections. Instead, Defendant asserts that Plaintiff was a "Precinct Election Official" appointed under O.R.C. § 3501.22 for the "sole purpose of helping administer the primary and general elections during the year in which she is appointed." (Doc. 41 at 4). Defendant reasons that because federal employment discrimination statutes protect only employees, not independent contractors, Plaintiff is not protected, and her suit must be dismissed. (*Id.* at 5).

It is well settled that only employees, and not "independent contractors," are protected by Title VII.[1] *Brintley v. St. Mary Mercy Hosp.*, No. 12-2616, 2013 WL 6038227, at *2 (6th Cir. Nov. 15, 2013); *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004). Section 2000e(f), Title 42, United States Code, helpfully defines "employee" as "an individual employed by an employer." In the Sixth Circuit, an employment relationship is defined, in practice, by a fact-intensive balancing test which assesses numerous factors, including:

> [1] the hiring party's right to control the manner and means by which the product is accomplished; [2] the skill required by the hired party; [3] the duration of the relationship between the parties; [4] the hiring party's right to assign additional projects; [5] the hired party's discretion over when and how to work; [6] the method of payment; [7] the hired party's role in hiring and paying assistants; [8] whether the work is part of the hiring party's regular business; [9] the hired party's employee benefits; and [10] tax treatment of the hired party's compensation.

Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)); *see also Guinn v. Mount Carmel Health*, No. 2:09-CV-226, 2013 WL 4605711, at *8 (S.D. Ohio Aug. 29, 2013).

In this case, the factors outlined by the Sixth Circuit counsel strongly in favor of an independent contractor relationship: (1) election procedures are governed by Ohio law, which spells out the manner of appointment, and duties, of election officials, s*ee* O.R.C. § 3501 *et seq.*; (2) the skills required by election officials are detailed in O.R.C. § 3501.22; (3) the duration of the appointment is for a short, fixed period, lasting typically only one year, *see id.* ("The term of

[1] The Ohio civil rights statutes, O.R.C. § 4112 *et seq.*, similarly requires employee, not independent contractor status, and follows the same multi-factor analysis used in this Circuit. *See Berge v. Columbus Cmty. Cable Access*, 736 N.E.2d 517, 530 (Ohio App. 1999) (requiring employer-employee relationship under O.R.C. § 4112); *Perron v. Hood Indus., Inc*., No. L-06-1396, 2007-Ohio-4478, ¶ 32 (Ohio Ct. App. Aug. 31, 2007) (applying Sixth Circuit case law and *Darden* factors to determine employee vs. independent contractor status).

such precinct officers shall be for one year."); (4) election officials cannot be assigned additional projects, as they are appointed for a specific purpose, and not to act as general agents; (5) the board of elections has no discretion over how and when election officials work, as their duties are set forth by statute; (6) election officials are paid by vouchers of the county board of elections, upon warrants of the county auditor, O.R.C. § 3501.17(A); (7) election officials are not empowered to hire or pay assistants; (8) the work performed by election officials *is* part of the hiring party's regular business; (9) election officials do not receive any benefits or retirement contributions; and (10) election officials are treated as independent contractors for taxation purposes, and given form IRS 1099 (*see Affidavit of Dana Walch*, Doc. 41 at 15-16).

Because the factors weigh almost uniformly in favor of an independent contractor relationship, the Court concludes that, as a matter of law, Plaintiff was not an employee of the Franklin County Board of Elections, and thus her claims under Title VII, and the related Ohio civil rights laws, fail. For these reasons, Defendants' Motion (Doc. 41) is hereby **GRANTED**. Plaintiffs Motions (Doc. 33, 56) are hereby **DENIED**.

VI. OTHER PENDING MOTIONS

Several other motions remain pending for this Court which are ripe for resolution. Plaintiff's Motion for Default Judgment (Doc. 19) asks the Court to enter default judgment against Defendant, based on Defendant's failure to answer within 45 days. Whatever the implicit merits of this motion, the Court has already addressed Defendant's untimeliness: on February 14, 2013, the Court ordered the Defendant to report on the status of the case within 14 days (Doc. 12), which Defendant did on February 28 (Doc. 13). The Defendant moved for additional time to answer (Doc. 14), which the Court granted (Doc. 15). The Defendant then answered on

March 4, 2013, within the new time period granted by the Court (Doc. 16). Accordingly, there is no basis to grant a motion for default judgment. *See Walton v. Rogers*, No. 88-3307, 860 F.2d 1081, at *1 (6th Cir. Oct. 19, 1988) ("Default judgments are disfavored, and there must be strict compliance with the legal prerequisites establishing the court's power to render the judgment"); *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986) ("Our starting point is the general rule that default judgments are ordinarily disfavored. Cases should be decided upon their merits whenever reasonably possible."). Plaintiff's Motion for Default Judgment (Doc. 19) is therefore **DENIED**.

In addition, Plaintiff asks for a status conference (Doc. 55) "in order to discuss the many fundamental errors of [Magistrate] Judge King in this case." Without commenting on the merits of Magistrate Judge King's orders, the Court finds that a status conference is unnecessary in order to resolve the pending motions in this case. Plaintiff's Motion is hereby **DENIED**.

VII. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Default Judgment (Doc. 19) is hereby **DENIED**. Plaintiff's Motion opposing summary judgment (Doc. 33) and her renewed Motion for same (Doc. 56) are hereby **DENIED**. Defendant's Motion to Dismiss (Doc. 41) is hereby **GRANTED**. Plaintiff's motion for a status conference (Doc. 55) is hereby **DENIED**. This case is hereby **DISMISSED.**

IT IS SO ORDERED.

s/ Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: January 10, 2014