

STATE OF WISCONSIN

PERSONNEL COMMISSION

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LOIS BETZ,

Complainant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Extension),

Respondent.

Case No. 88-0128-PC-ER

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RULING ON
MOTION
TO
DISMISS

This case is before the Commission on respondent's motion to dismiss. The ground for this motion is that complainant is not an employe of the UW-Extension, but rather is employed by LaCrosse County.

This complaint of age discrimination in conditions of employment originally was filed with the Equal Rights Division (ERD) of the Department of Industry, Labor and Human Relations (DILHR) on an ERD form. It named as respondent Ms. Mary Meehan-Strub, Office Chair, UW-Extension Office, LaCrosse County Courthouse. The complaint stated in part as follows:

My supervisor [Meehan-Strub] has stated to other people that I am a detriment to the department because of my age and amount of vacation time.

ERD instructed Ms. Betz to forward this complaint to this Commission because "[w]e do not have jurisdiction over the UW-Extension Office, as it is a state agency." (ERD memo dated July 26, 1988.)

In support of its motion, respondent has submitted an affidavit executed by Ms. Meehan-Strub on November 28, 1990, which includes the following:

(2) The University of Wisconsin-Extension ("UWEX") and participating counties in the state jointly operate county cooperative extension programs pursuant to s. 59.87, Wisconsin Statutes. LaCrosse County and UWEX jointly operate such a program for LaCrosse County.

(3) County extension programs are administered through county Agricultural and Extension Education Committees and UWEX District Directors. Together, they develop a program focus, evaluate the program, and select the professional staff. The

counties provide office space, supplies and expenses and clerical support staff to county extension programs

* * *

(6) In my capacity as Home Economist and office chairperson, I am responsible for directing the work of the county employees serving as staff to the extension program. Other personnel actions, such as hiring, discipline, transfer or termination of county support staff, may be undertaken by me in consultation with, and subject to the approval of, the LaCrosse County Personnel Director and the Agricultural and Extension Education Committee. During Ms. Betz's employment as county staff to the extension program, I directed her work. In consultation with the LaCrosse County Personnel Director, I drafted some letters concerning her performance and indicating the potential consequences if she failed or refused to improve her performance. On two occasions, Ms. Betz filed grievances concerning such letters. These grievances were disposed of through the grievance process established by the terms of the collective bargaining agreement between LaCrosse County and the represented employees of Local 2484. When Ms. Betz left her clerical position supporting the LaCrosse County extension program, she voluntarily exercised her right under the collective bargaining agreement to transfer to another department in county government

Attached to this affidavit are documents including one titled: "Partnership for Extension Education — an Introduction to the Cooperative Extension Service, UW-Extension." This document includes the following:

Developed and funded cooperatively by county, state and federal government, the cooperative Extension Service makes the educational resources of the University of Wisconsin System . . . available to people in Wisconsin through their county Extension office . . . All county Extension staff are jointly employed by the University and a county . . . The county Agricultural and Extension Education Committee . . . and a District Director, representing UW-Extension, jointly administer the county program . . . the county provides office space, support staff (secretaries for example), equipment and supplies . . . the District Director and Extension Committee jointly appoint one county faculty person [Meehan-Strub] to be the office chairperson.

Also attached to the affidavit is a job description for the Office Chair position which includes the following:

I.I.E. Takes leadership, in cooperation with county faculty, in the employment, orientation, evaluation, supervision and recognition of clerical staff.

Finally, a copy of the "Cooperative Extension Agreement" between UWEX and LaCrosse County shows that the county pays approximately 36% of Ms. Meehan-Strub's salary and UWEX approximately 64%.

Section 49.87, Wis. Statutes, provides in part as follows:

(1) Any county board . . . may establish and maintain an educational program in cooperation with the university of Wisconsin, referred to in this section as "University Extension Program"

* * *

(7) DEPARTMENT OF GOVERNMENT, FOR the purposes of s. 59.15(2)(d) the university extension program shall be a department of county government and the committee on agriculture and extension education shall be the committee which is hereby delegated the authority to direct and supervise such department .

...

Section 59.15(2)(d), Wis. statutes, referred to above, provides:

The board or any board, commission, committee or any agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employes, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.

The foregoing suggests that Ms. Betz was at least nominally a county employe but in a program that was very much a cooperative venture of the county and UWEX, and that she worked under the direct supervision of someone (the office chair, Ms. Meehan-Strub) who was appointed and paid jointly by the county and UWEX. The question that must be resolved on this motion is whether UWEX also is properly considered an employer of Ms. Betz under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, stats.).

The Personnel Commission's jurisdiction over matters of this nature are set forth in §111.375(2), stats., as follows:

This chapter applies to each agency of the state except that complaints of discrimination . . . against the agency as an employer shall be filed with and processed by the personnel commission under s.230.45(1)(b). (emphasis added)

It is clear that UWEX is an agency and is be a statutorily defined employer under §111.375(2), stats., in the most general sense. The more specific issue here presented is whether in the context of this case it is properly con-

sidered an employer of Ms. Betz. In order to resolve this issue, it is necessary to focus on the role with respect to Ms. Betz's employment of UWEX's agent, Ms. Meehan-Strub.

The FEA defines "employer" at §111.32(6), stats., but this definition is not couched in functional terms:

(a) "Employer" means the state and each agency of the state and, except as provided in par.(b), any other person engaging in any activity, enterprise or business employing at least one individual

(b) "Employer" does not include a social club or fraternal society

There is little authority construing this definition. The Commission cases cited by respondent are of little assistance because they involve much more clear-cut situations. For example, in Murchison v. DOJ, 89-0093-PC-ER (10/4/89), the complainant's employment had been terminated by the CYD (Career Youth Development), an organization that had a contract with the SDC (Social Development Commission), which in turn was a subgrantee of certain federal funds from DOJ. The Commission dismissed the complaint, holding that "DOJ was not acting as an employer here but merely acted as a conduit for federal funding which ultimately found its way to CYD, the organization which employed complainant.

However, it is not uncommon to look to the body of law developed under Title VII as an aid to interpreting the FEA. Hiegel v. LIRC, 121 Wis. 2d 205, 217, 359 N.W. 2d 405 (1984); Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 421, N.6, 280 N.W. 2d 142 (1979); Ray-O-Vac v. ILHR Dept., 70 Wis. 2d 917, 236 N.W. 2d 209 (1975).

Title VII defines employer at 42 USC §2000e - (b), in a manner quite similar to the FEA in its omission of a functional definition:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employes

This definition of "employer" has been given a broad construction that focuses on control over conditions of employment. In Vanguard Justice Society v. Hughes, 19 FEP Cases 587, 607 (D. Md. 1979), the court held:

[T]he term "employer" as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities regardless of whether that party may technically be described as an "em-

ployer" of an aggrieved individual as that term has generally been defined at common law.

See also Baranek v. Kelly, 40 FEP Cases 779, 782, 630 F. Supp. 1107 (D. Mass. 1986) ("(e)ntities which exercise significant control over an employment situation may be proper defendants in a Title VII action even though they are not the immediate employer.")

This functional approach to the concept of employer is further illustrated by the opinion in Spirit v. Teachers Insurance and Annuity Assn., 20 FEP Cases 738, 746, 475 F. Supp. 1298 (S.D.N.Y. 1979); affd. in part, revd. in part on other grounds, 691 F. 2d 1054 (2d Cir. 1982); vacated on other grounds, 463 U.S. 1223, 77 L.Ed. 2d 1406, 103 S. Ct. 3566 (1983):

The Court agrees that in most instances pension plans of private insurers will not be subject to the dictates of Title VII, since §703(a) makes unlawful only discriminatory employment practices of an "employer." However, the term "employer" under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment. (citations omitted)

Turning to the situation in this case, the office chair is a UWEX employe who is appointed jointly by the county (represented by the Extension Committee) and UWEX (represented by the District Director), and paid jointly by the county and UWEX, and reports jointly to the county and UWEX. As is set forth in both Ms. Meehan-Strub's affidavit and her job description, she has substantial (although not total) responsibility for the supervision of the office clerical staff.

It is clear that Ms. Meehan-Strub exercised significant control over Ms. Betz's conditions of employment. Furthermore, the fact that Ms. Betz was on the LaCrosse County payroll is not determinative in deciding whether UWEX is an employer under the FEA, see, e.g., Bostick v. Rappleyea, 38 FEP Cases 658, 662-663, 629 F. Supp. 1328 (N.D.N.Y. 1985); affd. 907 F. 2d 144 (2d Cir. 1990). This case involved a Title VII claim of sex discrimination brought by a Legislative Budget Analyst with respect to failure to promote and compensation and working conditions. The defendants were various members of the New York State Assembly and staff administrators of an Assembly committee. They unsuccessfully moved to dismiss on the grounds that they could not be considered

employers under Title VII. The court's discussion of this motion included the following:

Defendants contend that the economic reality test must be applied in determining whether one is an employer or agent under Title VII. In applying this test defendants point out that, since plaintiff's employer technically is the Assembly, and since staff members are chosen by the Chairman of the Committee, who is not a party to this action, they cannot be considered to have control or economic power over plaintiff.

For the most part, defendants' argument is flawed. The term "employer" under Title VII is to be liberally interpreted. The term is not to be construed through an economic reality test, but rather "has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, conditions, or privileges of employment." A person is an agent of an employer "if he participated in the decision making process that forms the basis of the discrimination."

Here, it appears that the majority of the defendants fall within the ambit of the Title VII terms. While it is true that the State Assembly technically employs plaintiff and that the Committee Chairman officially appoints staff members, defendants admit that it is the custom and practice of the Committee for the ranking minority member of the Committee to fill the minority staff positions. In light of the liberal interpretation given to the term "employer" under Title VII, defendant Cochrane, as the ranking minority member of the Committee, could be considered to have had a certain amount of control over plaintiff's employment. As for defendants Jacques, Cocci, Natoli, and Brown, they too could be considered agents of the Assembly, the employer. All of these defendants held, or still hold, administrative positions with the Assembly wherein they, in some manner, assumed some form of supervisory control over plaintiff. (citations omitted)

There are a number of similarities between Bostick and the case before the Commission. Based on an "economic reality" test, LaCrosse County could be considered Ms. Betz's employer because she is on the county payroll. Yet it is clear that the extension program is jointly operated by UWEX and LaCrosse County, and that as part of that joint operation Ms. Meehan-Strub on behalf of UWEX had and exercised the authority to exert significant control over the incidents of Ms. Betz's employment.

Also, that Ms. Meehan-Strub did not have final authority to discipline Ms. Betz is not critical. See, e.g., Paroline v. UNISYS Corp., 50 FEP Cases 306, 310, 879 F. 2d 100 (4th Cir. 1989) ("An individual qualifies as an 'employer' under

Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment. The supervisory employe need not have ultimate authority to hire or fire to qualify as an employer, as long as he or she has significant input into such personnel decisions." (citations omitted)) To reiterate, Ms. Meehan-Strub clearly had significant supervisory authority over Ms. Betz, as recognized explicitly in the office chair job description and in Ms. Meehan-Strug's affidavit. Therefore, the Commission concludes that UWEX is an employer of Ms. Betz in the context of this FEA proceeding, and its motion to dismiss must be denied.

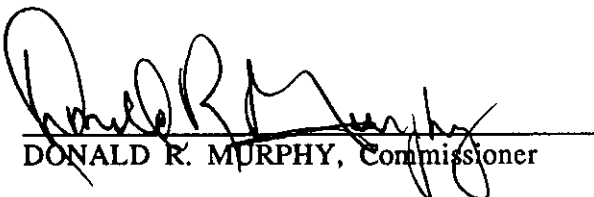
ORDER

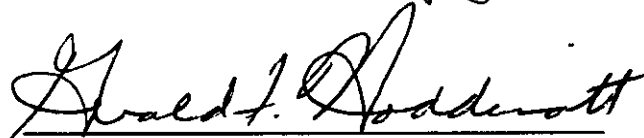
Respondent's motion to dismiss, which was filed October 16, 1990, and supplemented on November 28, 1990, is denied.

Dated: February 8, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/3


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner