STATE OF WISCONSIN PERSONNEL COMMISSION

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JAMES J. NOVAK et al.,

Complainants,

v.

WISCONSIN SUPREME COURT, et al.,

Respondents.

Case No. 90-0111-PC-ER

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RULING ON
MOTION
TO DISMISS

This matter is before the Commission on respondents' motion to dismiss filed October 15, 1990. The parties have filed briefs and supporting documents.

The following letter to the Commission was filed on July 10, 1990, by James J. Novak and the Madison Men's Organization, by Roger Kaufman:

> We are filing a complaint of sex-based discrimination in hiring practices against the Wisconsin Equal Justice Task Force (WEJTF), which is a committee appointed by the Wisconsin Supreme Court. Specifically, we direct this complaint against Honorable Susan Steingass, Chairperson of the WEJTF and against the entire Wisconsin Supreme Court: Justices Ceci, Callow, Day, Heffernan, Abrahamson, Steinmetz and Bablitch.
>
> We charge that the WEJTF has violated Federal law (U.S. Code 42, 2000(h)2)) and Wisconsin statutes (Sec. 230.01(2), 230.02 and 230.18, Wis. Stats.) with regard to hiring of its staff members. Details of this charge are given in the above-referenced Complaint, a copy of which is enclosed for your investigation.
>
> We have reason to believe that members of the Madison Men's Organization, and others, would have desired employment on the staff of the WEJTF and would have applied had they known of such opportunities and been given an equal opportunity to be considered.

Attached to this document are a number of other documents, including a "citizen and Class Action Complaint" which was referred to by the above-quoted letter. This complaint raises a number of issues related to the operation of the WEJTF. Named as defendants are the Justices of the Wisconsin Supreme Court and Dane County Circuit Judge Steingass, Chairperson of the WEJTF. It includes the following allegation:

> It appears that with the use of methods that avoided an open and objective hiring process and which resulted in the exclusive hiring of women for WEJTF paid positions, the Wisconsin Supreme Court and the WEJTF have violated USCS 42 Section 1983, USCS 42 Section 2000(e) and Sections 230.01(2), 230.02 and 230.18, Wis. Stats. Section 230.18, Wis. Stats., state that "no discrimination may be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of the person's political or religious opinions or affiliation or because of age, sex, handicap, race, color, sexual orientation, national origin or ancestry except as otherwise provided."

Although the complaint does not cite the Wisconsin FEA (Fair Employment Act; Subchapter II, Chapter 111, stats.) since the gravamen of the complaint is sex discrimination and there is no even arguable basis for Personnel Commission jurisdiction other than an FEA complaint of sex discrimination,[1] this case has been processed as such. Based on their briefs, it appears the parties are in agreement that the question raised on this motion is whether this complaint presents a charge of sex discrimination under the FEA that is cognizable by this Commission.

Respondents argue that the Supreme Court and the individual Justices are not the "employers" of the positions in question, and that the complaint should be dismissed as to them. Respondents contend that the two employes occupying these positions receive their paychecks from the State Bar Association (SBA), are on the SBA payroll, and that the position are not legislatively authorized for the Supreme Court and the employes are not on the Supreme Court payroll.

In their response to the motion, complainants assert that the WEJTF is not an entity of the SBA, which has no control over it or its staff, that the WEJTF employes are paid through the SBA payroll, but that the SBA acts only as a fiscal agent in an accounting role, and these employes are not on the SBA staff. Complainants also argue as follows:

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[1] As a state administrative agency, this Commission has no jurisdiction over allegations of violations of federal statutes. The Commission's jurisdiction over appeals of examination and appointment decisions under §§230.44(1)(a) and (d), stats., generally do not extend to decisions outside the classified civil service, see, e.g., Garvoille v. DMRS, 90-0379-PC (1/11/91), and it has not been alleged, and it does not appear that the positions in question are in the classified civil service.

> The Wisconsin Equal Justice Task Force is not registered as an independent corporation in the State of Wisconsin.
>
> Thus, Chief Justice Heffernan created what in business is called a bogus corporation. A study committee was appointed using his authority under Supreme Court Rule 70.08. But no formal rules or structure was created as with WISTAF, the Judicial Commission, State Bar, Etc. Instead of asking the legislature for funds, the Court did an end run around the controls and fairness that the legislature would have required; instead it used semi-public tax monies of WISTAF, which of themselves raised questions of constitutional correctness. Thus, the study committee did have [sic] the normal legislative accountability that goes with the use of normal tax monies. The Task Force as a dummy corporation did not register with the state and, consequently, used the State Bar, another corporation created by Supreme Court rule, to avoid the issues of their illegal hiring procedures and discrimination in hiring on the basis of sex.
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> Thus, all the evidence shows that the Task force is a state agency as a study committee of the Supreme Court and should have been hired under state hiring procedures.

Pursuant to §111.375(2), stats., this Commission has jurisdiction over FEA complaints against each state "agency as an employer."[2] The FEA defines the term "agency" as "an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts." §111.32(6)(a), stats. Therefore, since the Supreme Court is a "court," to the extent it has acted as an "employer" with respect to the WEJTF positions in question, the Commission would have jurisdiction over the Court as a state "agency as an employer," §111.375(2), stats.

The authority for the Supreme Court to have created the WEJTF emanates from the Court's inherent constitutional authority over the court system, including attorneys as officers of the courts. See State ex rel Lynch v. Dancey, 71 Wis. 2d 287, 238 N.W. 2d 81 (1976); SCR (Supreme Court Rules) 10.02(1) ("The rules of this chapter [Regulation of the State Bar] . . . are adopted in the exercise of the court's inherent authority over members of the legal profession as officers of the court.") While there is not a great deal of specific information on this record concerning the genesis of the WEJTF, it appears to be undisputed that funding for the WEJTF, including the salaries of the

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[2] Complaints against non-state agencies as empoyer are handled by the Department of Industry, Labor and Human Relations. §111.375(1), stats.

positions in question, has been provided by the WTAF (Wisconsin Trust Account Foundation, Inc.), a "nonstock, nonprofit corporation organized for law-related charitable and educational purposes" pursuant to §SCR 13.02(1), to administer the "interest on trust accounts program of the state bar," §SCR 13.01(1). The members of the WTAF board are appointed in part by the SBA and in part by the Chief Justice. The WTAF is authorized to make grants of money received from the interest paid on attorneys' trust accounts to fund programs for the public benefit, but only with the Supreme Court's specific approval, §SCR 13.03(2)(a)2. It further appears to be undisputed that the WEJTF applied for a grant, the WTAF decided to make the grant, and that the Supreme Court approved the grant. Complainants have alleged, and for purposes of deciding this motion it will be assumed, that the SBA acted as a conduit for this grant money and carried the WEJTF positions on its payroll, but has played no role in the operation of the WEJTF. It also will be assumed for purposes of deciding this motion, and as may be implied from complainants' contentions regarding the SBA's role, that the SBA played no role in the staffing of the positions in question, but that this was carried out by the WEJTF itself. Now, the question to be addressed is whether under these circumstances the Supreme Court is properly considered an employer under the FEA.

The FEA's definition of employer at §111.32(6), stats., addresses the type of entity that is considered an employer, but does not address the functional nature of the employment role. While there is little reported Wisconsin authority on this area, it is not uncommon to look to federal decisions under Title VII for guidance in 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 919, 236 N.W. 2d 209 (1975).

Title VII is similar to the FEA in using a definition of employer which deals with the makeup of the employing entity rather than the functional aspects of the employment relationship:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employes. 42 USC §2000e(b).

Title VII the case law establishes that status as an employer can be based on control over the opportunity for and conditions of employment, and does not

does not require a traditional or common law employment relationship. See Vanguard Justice Society v. Hughes, 19 FEP Cases 587, 607 (D. Md. 1979) ("the term 'employer' . . . 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 'employer' of the aggrieved individual as that term has been defined at common law."); Baranek v. Kelly, 40 FEP Cases 779, 782 630 F. Supp. 1107 (D. Mass. 1986) ("entities 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.") Therefore, even though the positions in question are neither part of the Supreme Court staff nor on the Supreme Court payroll, the Court could still be considered an employer vis-a-vis these positions in the context of this complaint if it had sufficient connection with the staffing of those positions. However, complaintants have not alleged the court played any role or exercised any authority with respect to the staffing process, but rely on the fact that the WEJTF was in effect created by the Court. In the opinion of the Commission, this is an insufficient basis for employer status in the absence of both a traditional employment relationship and any alleged input into or control over the hiring process by the Court.

Looking at the question of employer status from a somewhat different viewpoint, in Title VII cases involving employer status issues related to interrelated entities such as corporate subsidiaries, the Courts typically have looked at a number of factors to determine employer status:

> Factors to be considered in determining whether technically separate corporate entities may be consolidated in an employment discrimination matter include the interrelationship of operations, common management, centralized control of labor relations, and common ownership or financial control. Burns v. Terre Haute Regional Hosp., 37 FEP Cases 1303, 1305, 581 F. Supp. 1301 (S.D. Ind. 1983) (citations omitted)

In the instant case, none of these elements are present in any significant degree.

The only "interrelationship of operations" that could be hypothesized here is the Court's role, stemming from its plenary authority over the administration of the court system, including the bar as officers of the court, in setting up the WEJTF. However, once the WEJTF was set up, there is nothing in the complaint or complainants' brief which suggests it did not function

independently of the Court, particularly with regard to the subject matter of the complaint before this Commission -- the hiring of its staff. Similarly, there is nothing to indicate any "common management" of the Court and WEJTF, once the latter was set up. Finally, with respect to common ownership or financial control, SCR§13.03(2)(a)2. requires that the Court approve public purpose grants by WTAF, but the decision whether or not to make the grant in the first instance resides with WTAF. The WTAF apparently was established by Supreme Court rule, and the Court appoints three of its fifteen-member board, SCR§13.02(2), but once established it appears that it has general authority to act independently, subject to the grant approval requirement mentioned above.

Based on the foregoing, it cannot be concluded that the WEJTF is so interlocked with the Supreme Court to make the latter the employer with respect to the former's staff. The Supreme Court has rather unique authority over the judicial system and attorneys in general. The Court has extremely broad authority to regulate the practice of law. It has the power to admit attorneys to practice, to suspend or revoke that status, to require that attorneys be members of the SBA, etc. However, the fact that the Court creates a self-governing entity, whether it be the WEJTF or the SBA, does not make employes of that entity employes of the Court. Based on the complainant's contentions, the employes of the SBA also would be considered employes of the Supreme Court because the SBA can be said ultimately to owe its existence to the Court, even though the Court has no authority with respect to the internal management of that association. Similarly, there is no basis on which to conclude that the Supreme Court and the WEJTF are so interrelated as to be considered common to employers of the WEJTF staff.

Respondents next contend that the WEJTF is not a "state agency," and therefore this Commission lacks jurisdiction pursuant to §111.375(2), Stats., over that entity. The FEA defines a state agency at §111.32(6)(a), Stats., as "an office, department, independent agency, authority, institution, association, society or other party in state government created or authorized to be created by the constitution or any law, including the legislature and the courts." The Wisconsin Statutes include Chapter 758, "Judicial Branch Agencies and Committees." However, this chapter contains no reference to the WEJTF. Complainants have not cited, nor is the Commission aware of, any other

statutory or constitutional reference to the WEJTF. Furthermore, the Commission is unaware of any statutory or constitutional provision authorizing the Supreme Court to appoint committees or "task forces" of this nature. Rather, as discussed above, the Supreme Court apparently acted in the exercise of its inherent authority over the administration of the court system when it appointed the WEJTF.

Complainants make the additional argument that: "Judge Mark Farnum ruled that the WEJTF is a study committee of the Wisconsin Supreme Court (90-CV-3300). Thus, the Task Force is an agency of the State, per 111.32(6)(a). (Transcript enclosed)." A review of the relevant part of the transcript of that proceeding leads to the conclusion that this was not the Court's ruling: "Now, the allegations in the complaint are that this is a study committee of the Supreme Court ... And the Court is going to assume, arguendo, at least, for the purpose of its decision on the motion ... that this is a study committee of the Supreme Court." The Court went on to conclude that the open records law does not apply to the judicial branch of government, and accordingly does not apply to WEJTF, even assuming it is a committee of the Supreme Court. What the Circuit Court did was to assume, without deciding, that the WEJTF was a study committee of the Supreme Court because that point made no difference to the ultimate outcome — i.e., the WEJTF was not subject to the open records law. Furthermore, as discussed above, the fact that the Supreme Court created the WEJTF and appointed its members does not make the Supreme Court the employer of the WEJTF staff, nor does it make the WEJTF a state agency as defined at §111.32(6)(a), Stats.

Because the Commission concludes that the Supreme Court is not the employer, as defined at §111.32(6)(a), Stats., of the positions in question, and that the WEJTF is not a state agency as defined in the same subsection, there is no basis for Commission jurisdiction over this matter and it must be dismissed.[3] Therefore, the Commission will not reach the issue of standing raised by respondents.

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[3] As noted above, the Department of Industry, Labor and Human Relations has jurisdiction over FEA complaints against non-state agency employers. §111.375(1), stats.

ORDER

This complaint is dismissed on the ground of lack of jurisdiction.

Dated: February 7, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT/gdt/rcr/3

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