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KRISTINE GOETZ,
 Complainant,

v.

DEPARTMENT OF ADMINISTRATION
 and OFFICE OF THE COLUMBIA COUNTY
 DISTRICT ATTORNEY,
 Respondents.

Case No. 95-0083-PC-ER

* * * * *

RULING
ON
MOTIONS

This matter, involving a WFEA (Wisconsin Fair Employment Act) claim of sexual harassment, is before the Commission on two motions. The Commission first will address the motion of DOA (Department of Administration) to dismiss it as a party respondent.

Respondent DOA contends that it is not the complainant's employer in any sense. It is undisputed that complainant is a county employe who effectively is appointed and supervised by the elected district attorney, who is a state employe. §§978.05(8)(b), 978.12, Stats.; 80 OAG 19 (1991). DOA provides administrative support (payroll, fringe benefits, etc.) to the district attorney's office, but asserts it has no impact on the conditions of employment of county employes like complainant. However, complainant asserts, and DOA admits, that it arranged for an investigation of Ms. Goetz's complaint after she initially filed it with DOA. While DOA has no authority to discipline or remove a district attorney, it is a cabinet agency, and the governor has the authority to remove a district attorney for cause, §17.06(3), Stats. These factors raise at least the possibility that DOA could have had a role in a chain of authority over the Columbia County District Attorney.

In the Commission's opinion, it would be premature to conclude at this point in this proceeding that DOA's role in this matter was so limited that it should be dismissed as a party. "Status as an employer can be based on control over the opportunity for and conditions of employment, and does not require a traditional or common law employment relationship." Novak v. Wisconsin Supreme Court, 90-0111-PC-ER (2/7/91); see also Betz v. UW-Extension, 88-0128-PC-ER (2/8/91) (UW-Extension employe's exercise of significant control over

county employe's conditions of employment provides nexus for FEA claim against UW-Extension as employer). Liability for sexual harassment can be premised on an employer's failure to respond appropriately to a complaint of sexual harassment. §111.36(3), Stats. In light of this, and given the paucity of information about the role DOA played with respect to the investigation of Ms. Goetz's complaint, a decision as to whether DOA is a proper party respondent must await the development of a more extensive factual record. Therefore, DOA's motion to dismiss will be denied without prejudice.

District Attorney Bennett has moved to dismiss this claim as to him on an individual basis on the following grounds:

- a) District Attorney Bennett cannot be liable personally because he is not a state agency;
- b) District Attorney Bennett cannot be liable personally to the extent that he was acting as an agent of the Columbia County District Attorney;
- c) District Attorney Bennett is protected by the official immunity doctrine.

The Commission agrees with Mr. Bennett that he cannot be named in his individual capacity as a party respondent. The FEA defines "employer" at §111.32(6)(a), Stats., which provides, inter alia, as follows:

"Employer" means the state and each agency of the state and ... any other person engaged in any activity, enterprise or business employing at least one individual.

Section 111.325, Stats., provides:

Unlawful to discriminate. It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing.

The Commission's FEA jurisdiction runs only to agencies as employers:

This subchapter applies to each agency of the state except that complaints of discrimination ... against the agency as an employer shall be filed and processed by the personnel commission. §111.375(2), Stats. (emphasis added).

Thus, while it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the FEA runs only to the state agency as the employer,

pursuant to §111.375(2), Stats., and not to individual agents of the agency in their individual capacities.¹

Since it is concluded on this basis that Mr. Bennett in his individual capacity is not an appropriate party, the Commission will not address his official immunity argument.

Respondent Bennett also points out that complainant has filed a charge with ERD (Equal Rights Division) of DILHR (Department of Industry, Labor and Human Relations)², and asserts that "Ms. Goetz should not be allowed to entertain claims in both forums, and one of her two claims must be dismissed." Having concluded that it has jurisdiction over this claim pursuant to §111.375(2), Stats., the Commission need not address this contention any further.

¹ C.f. Sinclair v. Mike's Town & Country (LIRC, 4/6/90) (suggests that "where a person has acted under color of their authority as an agent of an employer, it is the employer rather than the individual person that is properly viewed as the respondent.")


² Pursuant to §111.375(2), Stats., the personnel commission administers the FEA with respect to the state agencies as employer, while pursuant to §111.375(1), Stats., ERD has jurisdiction over all other employers.

ORDER

1. Respondent DOA's motion to dismiss is denied without prejudice.
2. Respondent Bennett's motion to dismiss is granted to the extent he is removed as a party respondent in his individual capacity, and otherwise denied.

Dated: November 14, 1995

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


JUDY M. ROGERS, Commissioner

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