EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Connie Thompson 777 South Mills Street Madison, WI 53715 Complainant vs. St. Mary's Hospital Medical Center 707 South Mills Street Madison, WI 53715 Respondent	NOTICE OF RIGHT TO APPEAL ORDER FROM EXAMINER'S DECISION ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 21734

The attached Order From Examiner's Decision on Respondent's Motion to Dismiss for Lack of Jurisdiction may be appealed within ten (10) days of receipt. Said appeal must be made in writing and must be filed at the Commission offices. The enclosed order will become final without further notice to the parties unless it is timely appealed.

Signed and dated this 8th day of March, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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Connie Thompson 777 South Mills Street Madison, WI 53715 Complainant vs. St. Mary's Hospital Medical Center 707 South Mills Street Madison, WI 53715 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 21734

On July 1, 1992, the Complainant, Connie Thompson, filed a complaint of discrimination with the Madison Equal Opportunities Commission (MEOC or Commission) against the Respondent, St. Mary's Hospital Medical Center. The complaint alleged that the Respondent discriminated against the Complainant by permitting her sexual harassment by a worker employed on a construction site located at the Respondent's facility. The Complainant states that she is an employee of the University of Wisconsin Family Practice Residency Program. The Respondent, on August 7, 1992, filed a motion to dismiss the complaint alleging that the Commission was without jurisdiction because neither the Complainant nor the allegedly harassing worker are employees or in an employment relationship with the Respondent.

This complaint was transferred to the Hearing Examiner for resolution of the jurisdictional issues. A briefing schedule was established and both parties submitted briefs.

After consideration of the positions of the parties and review of the record of the proceedings to date, the Hearing Examiner concludes that the Commission has jurisdiction over the allegations of this complaint pursuant to MGO 3.23(7)(a).

DECISION

The Complainant is employed as a recruiter for the University of Wisconsin Family Practice Residency Program. This is apparently a joint program of the University of Wisconsin and the Respondent. The purpose of the program is to provide an enhanced educational and clinical experience for the participants, while assuring quality health care to the patients of the Respondent. The Respondent and the University of Wisconsin share many facilities and resources through a complex series of agreements and contracts. The program maintains space at the Respondent's facilities. The Respondent is benefited through the program by having residents and other medical personnel available to its patients and by having access to the programs, facilities, resources and personnel of the program.

The duties of the Complainant include meeting with prospective residents and providing them tours of the medical facilities where they will work. These facilities are at St. Mary's Hospital Medical Center. Her office is located at the St. Mary's Hospital Medical Center Alumni Hall. She is paid by the University of Wisconsin though the Respondent contributes approximately half of the budget out of which she is paid. The Complainant sets her schedule and is not supervised by anyone at St. Mary's.

During 1991 and 1992, the Respondent had a construction project under way to expand its facilities. The Respondent contracted with the Oscar J. Boldt Construction Company to perform the work. Oscar J. Boldt employed a construction supervisor named Jerry Schwartz. Schwartz observed the Complainant around the site. He began a course of conduct that was allegedly sexually harassing towards the Complainant. She complained to representatives of the Respondent, Oscar J. Boldt and the University of Wisconsin. Despite her complaints, Mr. Schwartz's unwanted conduct towards her continued. The Complainant asserts that this conduct resulted in a deterioration of the terms and conditions of her employment with the University of Wisconsin. She alleges further that she had to take a leave of absence from her work as a result of the harassment.

The Complainant argues that the Commission has jurisdiction over this complaint under either of two sections of the Ordinance, MGO 3.23(7)(a) and MGO 3.23(7)(k). The relationship and applicability of these two provisions presents an interesting and difficult problem of statutory construction. The Respondent objects to the exercise of jurisdiction by the Commission.

There are actually three questions of jurisdiction raised by the parties. First, is the Complainant a person with standing to file a complaint under either section 7(a) or section 7(k) of the Ordinance? Second, is the Respondent an entity against which a complaint may be filed under either section 7(a) or section 7(k) of the Ordinance? Third, assuming affirmative answers to the first two questions, does the Complainant's complaint state a claim upon which relief can be granted under the Ordinance? The Hearing Examiner will address these questions in the above order.

The Complainant contends that the Commission has jurisdiction over her complaint under either section 7(a) or section 7(k). Section 7(a) states the general protections of the Ordinance with respect to employment discrimination. In pertinent part, the provision prohibits any person or employer from discriminating against "any individual" in the terms and conditions of employment on the basis of sex. Section 7(k) specifically requires employers, labor organizations and employment agencies to provide work places free from sexual harassment for their employees. Section 7(k) also establishes certain presumptions and liabilities with regard to sexual harassment for employers, labor organizations and employment agencies.

In general, a more specific provision such as section 7(k) will take precedence over a more general provision such as section 7(a). However, this is not the case with respect to these two provisions. The language of section 7(k) specifically addresses responsibilities of employers, labor organizations and employment agencies towards employees. The Ordinance does not define employer or employee. It seems logical to believe that the City Council sought to create different protections by its use of different terms to describe covered persons in the two sections. In section 7(a), the term "any individual" is much broader than the term "employee" used in section 7(k). Given the more specific language of section 7(k), the City Council must have intended that the smaller class "employees" receive the benefits of the greater and more specific protections provided in that section. Additionally, section 7(k) which uses the term "employer" seems to set specific higher standards for this category of regulatee as opposed to the broader category of "any person" found in section 7(a). Given the interconnection of some of the terms used in the two sections and the higher standards of liability established by section 7(k), the Hearing Examiner concludes that section 7(k) was not intended to entirely preempt the "terms and conditions" portion of section 7(a). It does, however, preempt that section with respect to the categories of employers, labor organizations, employment agencies and employees. Given this conclusion, the Complainant might be able to file a complaint under section 7 (a) if she is an individual but not an employee of the Respondent and under section 7(k) if she is an employee of the Respondent. She may not find jurisdiction under both.

In interpreting the language of the Ordinance, the Commission may make reference to other laws or statutes that have similar backgrounds or purposes. The Ordinance was modeled, in great part, after Title VII. While cases decided under Title VII are not binding upon the Commission, they may be used for guidance in interpreting the Ordinance. This is particularly necessary given the lack of any significant legislative history for the Ordinance and the small number of cases under the Ordinance dealing with this particular subject matter. In presenting their respective positions in this matter, both parties extensively use Title VII authorities. For the reasons given above, this is appropriate. However, these authorities do not necessarily compel the same result since they are being used to assist with the interpretation of a separate Ordinance with purposes that are specific to the City of Madison.

The Hearing Examiner will first address the Complainant's standing under section 7(k). Cases under Title VII indicate that the term "employee" is broad and not capable of immediate unequivocal definition that it needs to be defined in light of the legislative purposes expressed in the law. This is equally applicable to the same term as used in the Ordinance. In the case of Norman v. Levy, 767 F.

Supp. 1441 (N.D. Ill. 1991) cited by the Complainant, the court surveys other decisions to determine what test should be applied to determine whether a person has standing to sue under Title VII. This case is particularly appropriate because it was seeking to determine whether different tests should be applied to define the terms "any individual" and "employee" which are used in different sections for different purposes in Title VII. Similarly, the Ordinance uses the term "any individual" and "employee" in sections 7(a) and 7(k). In the Norman case, the term "any individual" applied to the plaintiff's standing to sue. The term "employee" appeared in a section that defines whether an employer is capable of being sued. If an employer has fifteen or more "employees" for a set period of time, then it may be sued under Title VII. In the case of Armbruster v. Quinn, 32 FEP Cases 369 (6th Cir. 1983), the 6th Circuit Court of Appeals said that both terms should apply the same test. The court in the Norman case disagreed with that conclusion and applied different tests to the two terms.

The Norman court in its survey of jurisdictions, identified three separate tests. First, there is the common law employment relationship test used in Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377 (7th Cir. 1991). Second, there is the modified employment relationship test developed in Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979). Lastly, there is the economic realities test derived from Armbruster v. Quinn, 32 FEP Cases 369 (6th Cir. 1983). The first two tests are summarized in the Respondent's brief in support of its motion to dismiss. The economic realities test is outlined in the Complainant's briefs. Essentially the first two tests are different versions of the same test. The common law employment relationship test sets forth five factors for determining whether a person has a sufficient legal connection to an employer to grant standing. The modified employment relationship test set forth in Spirides, supra, establishes an eleven factor test that absorbs the factors of the common law test. In applying either the common law or the modified test, one must analyze the nature of the connections between the alleged employee and the alleged employer. The economic realities test looks at the purposes of the law and asks one to determine whether the alleged employee is a person who was intended to be included in the zone of protection provided by the law.

The court in Norman concluded that the broader economic realities test was an appropriate vehicle for determining whether one was an individual for purposes of conferring standing to sue under Title VII. In reaching this conclusion, the court determined that the jurisdictional term "any individual" given the broad remedial purposes of Title VII could not be restricted to the confines of the narrower employment relationship test. The Norman court, however, found that in determining who is capable of being sued it is appropriate to use the stricter modified employment relationship test. In making this determination, the court believed that it was required to give effect to the difference in language signified by the use of the term "employee" for who may be sued, as opposed to use of the term "individual" for who may sue.

Though the uses of the terms "any individual" and "employee" in Title VII are not precisely the same as in the Ordinance, the analysis of the Norman court is useful in attempting to give effect to the City Council's use of similar language in the Ordinance. As noted above, the term "employee" as it appears in section 7(k) is likely to have a more limited scope than that of the term "any individual" as found in section 7(a). This is similar, though not identical to the use of the same terms in Title VII. Since the Hearing Examiner has concluded that "employee" is a narrower term than "any individual", it is appropriate to use the more restrictive modified employment relationship test to determine whether one has standing to bring a complaint under section 7(k). The factors in the modified employment relationship test are ones that look at various indicia of the relationship between a person and a business to see if the relationship is more like that of employe/employer or independent contractor/principal. Since we are attempting to define the term "employee", use of this test is relatively tailor-made for the purpose.

While there are eleven factors to look at in the modified employment relationship test, it is not necessary to exhaustively analyze the facts in this record to reach the conclusion that the Complainant is not an employee of the Respondent within the meaning of section 7(k). The most important factor in making this determination is who controls the Complainant's operations as a recruiter. The Complainant does not report to any supervisor at the Respondent. The Respondent does not establish the Complainant's schedule or directly provide resources to the Complainant to fulfill the requirements of her job. Her pay is controlled by the University of Wisconsin. Though the Respondent contributes to the fund from which the Complainant is paid, it is the University that determines how much she is paid and on what basis. It is the University that provides her other benefits of employment. The skills that the Complainant brings to her job were not acquired with the assistance of the Respondent. When the Complainant sought a leave of absence due to the effects of the sexual harassment that she allegedly suffered, she presumably did not go to the Respondent for permission but to the University. The Respondent provides space to the Family Practice Residency Program and in turn that program has provided the Complainant with work space that is located at the Respondent's Alumni Hall. The Respondent does not directly provide the space to the Complainant.

Given the nature and extent of the connections between the Complainant, the University and the Respondent, the Hearing Examiner believes that the Complainant is more appropriately classified as an employee of the University rather than of the Respondent. This accords with the Complainant's own perception of her status. In her complaint, the Complainant states that she is an employee of the University of Wisconsin. Her perception is not a determining factor in this analysis but does tend to corroborate the conclusion of the Hearing Examiner. The Complainant does not have standing to file a complaint under section 7(k) of the Ordinance.

The Hearing Examiner will now turn to the question of the Complainant's standing to file a complaint under section 7(a). If she falls within the ambit of the term "any individual", she would have standing to file a complaint under this section despite not being an employee within the meaning of section 7 (k). The first question is what test should be used to determine whether the Complainant falls within the meaning of "any individual". The Hearing Examiner is persuaded that because of the similarity of purpose and the connection between the Ordinance and Title VII that the approach taken in the Norman and Armbruster cases is applicable to the task at hand.

The Norman and Armbruster cases determined that the economic realities test was the one most appropriate to giving definition to the term "any individual" as that term is used in Title VII. Similarly, it is appropriate for defining the same term as it is used in section 7(a) of the Ordinance. In applying this test, it is important to prevent one from accomplishing through an artificial scheme that which it would be prevented from doing under the law or Ordinance. Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973). The economic realities test examines the purposes and intent of a law or in this case the Ordinance to determine whether the Complainant is a person who could arguably be someone who was intended to be covered by the protections of the Ordinance. While the Complainant did not have a sufficiently close connection with the Respondent to qualify her as an employee, she did have substantial contacts with the Respondent. She was physically located at the Respondent's facility for much of her work day. Her office was part of a group of offices and other facilities provided by the Respondent for the benefit of the Family Practice Residency Program. The Complainant was employed to attract participants to a program of the University of Wisconsin from which the Respondent received a significant benefit and to which it made a very substantial commitment. To accomplish her duties she had to show off the facilities of the Respondent to their best advantage.

The Respondent attempts to minimize the Complainant's connection with it. Given the nature of the Family Practice Residency Program and the extensive participation of the Respondent in the program it is a disingenuous attempt. The record contains pages of agreements outlining the cooperation and resources pledged to the Family Practice Residency Program. This included monetary, physical and educational resources. The program provides medical residents and other personnel to the Respondent in exchange for the resources and opportunities that the Respondent provides to the program. The presence of the program at the Respondent lends it prestige and medical expertise that it might not be able to replace easily. The interconnection with the University of Wisconsin and several clinics are complex and extensive. This appears to be a major and important program for the Respondent. The Respondent clearly benefited from the work of the Complainant. It was through her efforts at and around the Respondent's facilities that prospective residents would be attracted to work through the Family Practice Residency Program at the Respondent's facilities. In performing her duties, the Complainant had access to all of the Respondent's facilities and presumably most of its personnel. Her presence at the Respondent's facilities was a weekly if not daily occurrence. Her presence and the benefit of her work could reasonably be anticipated and the Respondent knew or reasonably should have known of her activities and presence.

Given the joint venture nature of the Family Practice Residency Program and the Respondent's benefit from and undoubted knowledge of the Complainant's activities at its facilities, the Respondent owed the Complainant a duty not to interfere with her work. In this way the Complainant falls within the ambit of the term "any individual" as used in section 7(a) of the Ordinance. It is reasonable for this section to cover the terms and conditions of employment of a person who is engaged in a project that will in part benefit the Respondent and whose work takes place primarily at the facilities of the Respondent. Since section 7(k) imposes an obligation on the Respondent to provide a work environment free of sexual harassment for its own employees, it would pose little if any additional burden to it to provide such an environment to an individual in the circumstances of the Complainant. The Complainant has standing to file a complaint under section 7(a) of the Ordinance.

The next question is whether the Respondent is an entity against which a complaint may be filed. The Hearing Examiner has already determined that the Complainant is not an employee of the Respondent for purposes of standing under section 7(k). Given this determination, the question of the Respondent's capacity to be sued under that section is moot.

The Respondent is both a "person" and an "employer" within the meaning of section 7(a). The materials in the record indicate that the Respondent is a corporation doing business within the limits of the City of Madison. As such the Respondent falls within the broad definition of "person" found at section 2(a) of the Ordinance. Further, in the context of section 7(a), it does not seem that an "employer" has to be the employer of the Complainant. It would appear that so long as a respondent employs people or individuals in furtherance of its business or enterprise, it may be considered an "employer". While it is true that the Complainant is not strictly the employee of the Respondent, the language of section 7(a) does not draw a clear jurisdictional connection between a Respondent's status as an employer and any individual's status as an employee of the respondent.

The Hearing Examiner leaves it to the Complainant to demonstrate how the action of the Respondent truly discriminated against the Complainant in the terms and conditions of her employment. It would appear that there are several difficult proof problems that must be overcome but this is not the time to address them.

The final issue is best framed as a motion to dismiss for failure to state a claim upon which relief can be granted. The essence of the Respondent's contention is that even if the Complainant could file a

complaint against the Respondent, the acts of alleged sexual harassment were attributable to Jerry Schwartz. Schwartz is an employee of Oscar J. Boldt. Oscar J. Boldt is allegedly an independent contractor performing work for the Respondent. The Respondent asserts that it cannot be held responsible for the conduct of an employee of its independent contractor. The Complainant contends that the status of Boldt and Schwartz is irrelevant.

The general rule of law in Wisconsin in this matter is that a principal, such as the Respondent in this case, cannot be held responsible for the acts or omissions of it independent contractor. Lofy v. Joint School Dist. No. 2 City of Cumberland, 42 Wis. 2d 253, 166 N.W.2d 809 (1969). As with most general rules in the law, there are exceptions to the general statement. In this situation, there are at least five exceptions.

First, a principal may be held responsible for injuries caused by its independent contractor, if the subject of the contract presents an intrinsic or unreasonable risk of injury. Mueller v. Luther, 31 Wis. 2d 220, 142 N.W.2d 848 (1966). This may be restated as a rule of strict liability for conduct or operations that pose an unreasonable or intrinsic risk of injury to others. This rule prevents the principal from avoiding liability for such conduct by requiring an independent contractor to perform the conduct or operation.

This exception does not apply in this circumstance. Despite the stereotype of construction workers as wolf whistling insensitive louts, the Hearing Examiner is unwilling to state that any construction project creates an unreasonable risk of sexual harassment. Also, it is doubtful that the injuries that may be attendant to sexual harassment are really the type for which the law would impose a strict liability rule.

The second exception is where the principal knows that the subject of the contract will pose a risk of injury and does not by contract shift responsibility for protecting against that injury to the independent contractor. Mueller, supra. This is essentially a rule of foreseeability. It requires the principal to accept liability for injuries caused by the performance of a contract, where the principal knew or could have foreseen the likelihood of the injury and did not notify the independent contractor of the potential liability so that the contractor might take steps to avoid or limit liability.

The second exception does not apply to this circumstance either. There is nothing in the record that indicates that the Respondent knew or reasonably should have known that the construction project would likely result in the sexual harassment of persons on its premises. Given this lack of foreseeability, this exception would not apply.

The third exception applies where the principal knows or reasonably could know of the likelihood of injury and could take steps to prevent the injury through some other means but does not. Mueller, supra. This is a rule of notice. It prevents the principal from avoiding liability for injuries caused by the performance of a contract where the principal knew of the likelihood of the injuries, could have taken steps to prevent the injury and did not.

It is possible that this exception may have some application to this case. It cannot be said that the Respondent knew or reasonably should have known of the likelihood that a person for whom it might have some responsibility would be sexually harassed by an employee of its contractor at the time that it entered into the contract. However, the Respondent was placed on notice by the complaints of the Complainant. If the Respondent could have taken some reasonable action to assure that the Complainant would not be further sexually harassed and it did not, then liability against the Respondent could be found.

The fourth exception applies where the principal negligently supervises the conduct or performance of a contract and someone is injured as a result of that negligence., U.S. Fidelity & Guaranty Co. v. Frantl Industries Inc., 72 Wis. 2d 478, 241 N.W.2d 421 (1976), Snider v. Northern States Power Co., 81 Wis. 2d 224, 260 N.W.2d 260 (1977). This is nothing more than a requirement that a principal exercise reasonable supervision over its affairs including the performance of any contract to which it is a party.

This exception also may have some possible applicability to this case. As established above, the Complainant is within the zone of protection set forth by section 7(a) of the Ordinance. This creates a duty and standard of care on the part of the Respondent. If the Respondent did not take reasonable steps to assure that it did not discriminate against the Complainant in the terms and conditions of her employment, then the Respondent could be found liable for it failure to properly supervise its contract with its contractor.

The fifth exception applies where there is an apparent agency relationship between the principal and in this case the alleged sexual harasser and where the Complainant relies to his or her detriment on that apparent relationship. Pamperin v. Trinity Memorial Hosp., 144 Wis. 2d 188, 423 N.W.2d 848 (1988). This is known as apparent authority and is essentially a situation of detrimental reliance.

This exception has no applicability to this situation. In order to use this exception one must demonstrate that the principal and the wrong-doer had a relationship which the reasonable person might expect to be one of principal and agent or employer and employee; that the principal was aware that the relationship was perceived in this manner and that the injured person reasonably relied to her detriment on the existence of this apparent relationship. It is not reasonable for the Complainant to have assumed that Jerry Schwartz had any direct relationship with the Respondent. Given the Complainant's presumed education and knowledge of the world, it is only reasonable for her to have thought Schwartz to be an employee of an independent contractor. There is nothing in this record to indicate that there was anything that would or could lead the Complainant to a different conclusion. The only evidence in the record that indicates that the Complainant might have had this belief and that the Respondent knew of it is the fact that the Complainant complained to the Respondent of Schwartz's unwanted conduct. It is equally clear from the record that the Respondent made the Complainant aware that Schwartz was not its agent and was only an employee of Oscar J. Boldt. Under these circumstances it would have been unreasonable for the Complainant to rely on any perception that she had that Schwartz was an agent or employee of the Respondent. There is no basis in this record to apply this exception.

Given the potential applicability of two exceptions to the rule that a principal may not be held responsible for the acts or omissions of its independent contractor, the Complainant's complaint states a claim upon which relief could be granted by the Commission. The facts necessary to apply the exceptions must be investigated through the usual process. It is not appropriate to attempt to resolve these factual issues at this time. Accordingly, the complaint will be remanded to the Investigator for further investigation and issuance of an appropriate Initial Determination. In conducting the investigation, the Investigator should attempt to answer the following questions:

1. In what manner did the Respondent adversely affect the terms and conditions of the Complainant's employment?

2. Were other employees not of the Complainant's protected class affected by the actions of the Respondent?

3. Once the Respondent was placed on notice of the conduct of Jerry Schwartz, did it act reasonably within the constraints of its relationship with Oscar J. Boldt to prevent further occurrences?

4. Did the conduct of Jerry Schwartz towards the Complainant rise to the level of sexual harassment?

5. Did the Respondent reasonably supervise its contract with Oscar J. Boldt in light of its responsibility to maintain a workplace free of sexual harassment for its employees?

This does not represent an exhaustive list of questions for the Investigator to answer but is intended to offer the Investigator some guidance in her or his investigation.

For the foregoing reasons, the Hearing Examiner denies the Respondent's motion to dismiss the complaint for lack of jurisdiction. The complaint is remanded to the Investigator for further proceedings consistent with this decision.

Signed and dated this 8th day of March, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner