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United States District Court, N.D. Illinois, Western Division.

UNITED STATES of America, Plaintiff,
v.
MCHENRY COUNTY, the Sheriff of McHenry County (in his official capacity); the Jail Administrator of McHenry County (in his official capacity); and the McHenry County Sheriff's Department Merit Commission, Defendants.

No. 94 C 50086. | Aug. 17, 1994.

Attorneys and Law Firms

Keith C. Syfert, U.S. Attorney's Office, Rockford, IL, for plaintiff.

Gary W. Pack, R. Glenn Gable, McHenry County State's Atty. Office, Woodstock, IL, Harold C. McKenney, Campion, Curran, Rausch, Gummerson & Dunlop, P.C., Crystal Lake, IL, James T. Harrison, Woodstock, IL, for defendants.

Opinion

MEMORANDUM OPINION AND ORDER

REINHARD, District Judge.

INTRODUCTION

***1** Plaintiff United States of America ("United States") filed a one-count complaint against defendants McHenry County (the "county")[1] and the McHenry County Sheriff's Department Merit Commission, as well as the Sheriff of McHenry County and the Jail Administrator of McHenry County (the "Jail Administrator") in their official capacities, under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.,* and 28 U.S.C. § 1345. All defendants filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)[2] and the Jail Administrator also filed a separate motion to dismiss pursuant to Rules 12(b) and 17(b).[3]

FACTS

As it must in determining whether to dismiss under Fed.R.Civ.P. 12(b)(6), the court accepts as true all well-pled factual allegations and draws all reasonable inferences in favor of the plaintiff. In paragraphs three through six of the complaint, the United States identifies the four named defendants, including the two individual officials who have been named in their official capacities. According to the allegations of the complaint, the county was named as a defendant pursuant to Fed.R.Civ.P. 19(a) because it appropriates funds for the operation of the Sheriff's Department. The Sheriff of McHenry County, named in his official capacity, is responsible for the "administration, operation and supervision of the McHenry County Sheriff's Department and the McHenry County Correctional Center." The Jail Administrator of McHenry County was named in his official capacity because, according to the complaint, he has responsibility for:

> (a) assigning correction officers to their posts, positions, and shifts; (b) determining duties and responsibilities of correction officers; (c) selecting Shift Leaders and Assistant Shift Leaders for each of the three shifts; (d) approving and disapproving requests by correction officers for secondary

> employment; (e) approving and disapproving requests by correction officers for light duty assignments; and (f) approving and disapproving requests by correction officers for shift transfers.

Finally, the McHenry County Sheriff's Department Merit Commission is named because it controls the certification of public employment and the promotion of full-time deputy sheriffs.

In paragraph eight, the United States alleges that defendants have "pursued and continue to pursue policies and practices that discriminate against women," in violation of Title VII. These policies deprive women of certain employment opportunities and limit the opportunities available. In addition, defendants create a hostile work environment by subjecting female employees to the use of sexually explicit and vulgar language. This hostile work environment is also created by forcing female employees to view sexually explicit drawings and other graphic and vulgar written material and by subjecting female employees to unwelcome physical conduct of a sexual nature.

The United States alleges that defendants further violated Title VII by failing or refusing to investigate and take remedial action when complaints of sexual harassment and sexual discrimination were brought to defendants' attention. In addition, policies of discrimination against women exist in the assignment and transfer of officers and in refusing to select women for the positions of Shift Leader and Assistant Shift Leader. Defendants also subject women in the correctional center to different and less favorable employment terms than men because of their sex. Additionally, the United States alleges that defendants retaliate against employees who oppose discriminatory employment practices by harassing the employees and threatening to bring, or bringing, disciplinary charges against them. Defendants also retaliate by taking, or threatening to take, adverse personnel action against complaining employees and by refusing to eliminate the discriminatory conduct.

***2** In paragraph nine, the United States alleges that defendants discriminate against women by failing to recruit and hire women for the position of patrol officer. The United States alleges discriminatory acts by the Sheriff specifically, including that the Sheriff implemented policies and practices within the Sheriff's Department of either failing or refusing to recruit and hire women as patrol officers. It is also alleged that there is a policy or practice of failing or refusing to take action to eliminate discrimination against women.

The remedy sought by the United States is an order enjoining defendants from engaging in the discriminatory employment policies and practices outlined in the complaint.

DISCUSSION

In evaluating a motion to dismiss, the court must accept as true all well-pled factual allegations and draw all reasonable inferences in favor of the plaintiff. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Mid Am. Title Co. v. Kirk,* 991 F.2d 417, 419 (7th Cir.) *cert. denied,* 114 S.Ct. 346 (1993). Dismissal is appropriate only if it appears beyond doubt that a plaintiff can prove no set of facts consistent with the complaint that would entitle it to the relief it seeks. *McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 246 (1980) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)); *Zinser v. Rose,* 868 F.2d 938, 939 (7th Cir.1989); *see* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1349 (1990).

This case comes before the court on two separate motions to dismiss. The first motion to dismiss, brought by the Jail Administrator, argues for dismissal under Fed.R.Civ.P. 17(b), stating that the Jail Administrator "does not exist legally, for the purpose of a capacity to sue or be sued." The second motion to dismiss, brought by all defendants, argues that the complaint is insufficient as a matter of law. The court will address the issues raised in each motion to dismiss separately.

I. *The "Jail Administrator"*

The Jail Administrator has filed a motion to dismiss separately from the other defendants, arguing that the party denominated in the complaint as the "Jail Administrator of McHenry County (in his official capacity)" has not been properly named a defendant in this action. Title VII authorizes suit against an "employer" which discriminates on any of several enumerated bases, including sex, 42 U.S.C. § 2000e–2 (1994), and an employer is defined to include "any agent" of an employer otherwise subject to Title VII, 42 U.S.C. § 2000e(b) (1994). While the Seventh Circuit has not directly addressed supervisor liability under Title VII, a number of circuit courts have, allowing "official capacity" suits against employees qualifying as

agents of employers. *See Sauers v. Salt Lake County,* 1 F.3d 1122, 1125 (10th Cir.1993); *Miller v. Maxwell's Int'l, Inc.,* 991 F.2d 583, 587–88 (9th Cir.1993), *cert. denied,* 114 S.Ct. 1049 (1994); *Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir.1991); *Harvey v. Blake,* 913 F.2d 226, 227–28 (5th Cir.1990).[4] While the precise formulation of the test for whether a supervisor qualifies as an agent and, thus, employer under Title VII varies, *see Sauers,* 1 F.3d at 1125 (Supervisor is employer if exercises "significant control over ... hiring, firing or conditions of employment."); *Harvey,* 913 F.2d at 227 (Supervisor is employer "when delegated the employer's traditional rights, such as hiring and firing."); *cf. Saxton v. American Tel. & Tel. Co.,* 10 F.3d 526, 536 n. 19 (7th Cir.1993) (referring to whether supervisor was "highly placed" enough in "employer's decision-making hierarchy," for purpose of determining employer liability), taking the allegations of paragraphs 5 and 8 of the complaint as true, along with their reasonable inferences, the Jail Administrator qualifies.[5]

***3** The issue raised by the Jail Administrator, however, does not end with such a conclusion, as he invokes Fed.R.Civ.P. 17(b), under which a federal court must look to state law to determine if a defendant possesses capacity to be sued. In Illinois, to be sued a defendant must have a legal existence, either artificial or natural. *Jackson v. Village of Rosemont,* 180 Ill.App.3d 932, 937–38, 536 N.E.2d 720, 723 (1st Dist.1988). As defendant asserts, there is under Illinois law no artificial legal entity constituted as the "Jail Administrator of McHenry County." Therefore, in order to be sued, the Jail Administrator must have natural existence. To sue an individual with natural existence—a natural person—a plaintiff must sue that person by name.[6] *Cf.* Fed.R.Civ.P. 10(a) (stating caption of complaint "shall include the names of all the parties"). While a plaintiff may use a fictitious name for an existing defendant if the real name of the defendant is not known at the time of filing and may be discerned through discovery, *see Dean v. Barber,* 951 F.2d 1210, 1215–16 (11th Cir.1992); *Klingler v. Yamaha Motor Corp.,* 738 F.Supp. 898, 909–10 (E.D.Pa.1990); *Swartz v. Gold Dust Casino, Inc.,* 91 F.R.D. 543, 546 (D.Nev.1981), there is no indication that the United States did not know the name of the Jail Administrator at the time of filing and intended to invoke such a procedure. Therefore, the Jail Administrator's motion to dismiss is granted.

II. ***McHenry County, et al.***

The second motion to dismiss is made by all defendants, apparently including the Jail Administrator.[7] In this motion defendants appear to argue that the complaint is insufficient as a matter of law for two reasons.

First, defendants assert that because the complaint fails to allege any specific acts of discrimination, it is impossible to determine when the cause-of-action accrues for statute of limitations purposes.[8] While the case law is sparse on this issue, what exists is persuasive. The authority of the United States to bring a pattern or practice suit against a public employer under Section 707(a) of Title VII, 42 U.S.C. § 2000e–6(a), is not restricted by or subject to any statute of limitations. *United States v. City of Yonkers,* 592 F.Supp. 570, 586–89 (S.D.N.Y.1984); *see United States v. New Jersey,* 473 F.Supp. 1199, 1201–05 (D.N.J.1979). Thus, the provision of facts in that regard is irrelevant, and the motion to dismiss is denied as to the issue of the application of a statute of limitations.[9]

Second, defendants argue that the complaint is insufficient as a matter of law because it does not allege any specific act of misconduct by defendants which would allow for a determination of whether the United States has complied with administrative time limits applicable to suits brought by individuals under Section 706 of Title VII, 42 U.S.C. § 2000e–5(e)(1) (1994).[10] Defendants do not, however, assert that similar requirements are applicable to actions filed by the United States under Section 707(a), 42 U.S.C. § 2000e–6(a) (1994),[11] and the court has discovered no authority for doing so.

***4** As has been noted recently, "there is a general dearth of authority" on the issue of what Title VII prerequisites the United States is required to follow. *United States v. Northern Mariana Islands,* No. 92–0016, 1993 U.S.Dist. LEXIS 16733, at *2 (D.N.M.I. Nov. 18, 1993). The few courts that have been faced with this issue, however, have reached the same conclusion. "Section 707 itself provides the only prerequisite to the Attorney General's authority to bring a pattern-or-practice suit—reasonable cause." *City of Yonkers,* 592 F.Supp. at 584 (citing *United States v. Masonry Contractors Ass'n,* 497 F.2d 871, 876 (6th Cir.1974)); *see New Jersey,* 473 F.Supp. at 1201–05 (outlining statutory and regulatory history); *Northern Mariana Islands,* 1993 U.S.Dist. LEXIS at *1–5. The time limits and administrative prerequisites under section 706 simply do not apply to the United States. *See City of Yonkers,* 592 F.Supp. at 582–85; *New Jersey,* 473 F.Supp. at 1205. The complaint contains allegations of a pattern and practice of gender discrimination by the defendants, alleges there is "reasonable cause" to bring this suit, and was signed by the then-acting Attorney General. As a consequence, the court finds that the complaint contains sufficient allegations upon which relief may be granted, and, therefore, denies defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, the motion to dismiss by all defendants is denied. The motion to dismiss by the Jail Administrator is granted, and the claim against the Jail Administrator in his official capacity is dismissed without prejudice. The United States is granted leave to file an amended complaint properly naming the Jail Administrator, in his official capacity, within 21 days.

Footnotes

[1] The United States has named "McHenry County" as a defendant. The court notes that according to Illinois law, the proper legal name is "The county of McHenry." *See* 55 ILCS 5/5–1001 (1994).

[2] Defendants cite to Fed.R.Civ.P. 12(b) only generally and have given no indication of which provision of Rule 12(b) they rely upon. As the arguments of both motions to dismiss assert failure to state a claim upon which relief can be granted, the court assumes that defendants intend to rely upon Rule 12(b)(6).

[3] The motion itself states that it was filed by "the Certain Defendants, McHenry County Sheriff's Department and Jail Administrator of McHenry County." The McHenry County Sheriff's Department is not named as a defendant in the caption or the body of the complaint, however, and the memorandum in support of the same motion to dismiss omits any mention of the McHenry County Sheriff's Department, stating that the motion to dismiss was filed on behalf of "the Certain Defendant, Jail Administrator of McHenry County."

[4] These courts have held that no individual capacity liability attaches to a qualifying supervisor, but that official capacity suit is permitted under Title VII.

[5] Indeed, section 707(a) of Title VII, which authorizes suits by the United States, requires the complaint to seek injunctive relief "against the person or persons responsible for" the discriminatory pattern or practice. 42 U.S.C. § 2000e–6(a) (1994). According to the complaint, the Jail Administrator has responsibility for:

> (a) assigning correction officers to their posts, positions, and shifts; (b) determining duties and responsibilities of correction officers; (c) selecting Shift Leaders and Assistant Shift Leaders for each of the three shifts; (d) approving and disapproving requests by correction officers for secondary employment; (e) approving and disapproving requests by correction officers for light duty assignments; and (f) approving and disapproving requests by correction officers for shift transfers.

These are the very areas in which many of the discriminatory actions are alleged to have taken place.

[6] The Jail Administrator concedes the existence of the position of "Chief of Corrections or Administrator of Corrections in McHenry County." From such an admission, however, the existence of a human being is not a necessary inference (in that the position may not, at any given time, be filled or be filled by only one person) and the identity of such a person remains unknown.

[7] The court notes while defendants' reply brief is filed in the name of all defendants, it appears to focus solely on issues raised in the separate motion to dismiss by the Jail Administrator. The reply does not attempt to differentiate between the two motions to dismiss, and the court concludes that it is only a reply with respect to the Jail Administrator's motion to dismiss. Regardless, the court has carefully considered all arguments raised therein.

[8] Defendants also argue that the appropriate statute of limitations is contained within Illinois law. As the United States notes, however, defendants fail to identify which statute of limitations would apply. Further, the United States is, in fact, generally not bound by state statutes of limitations. *See* 14 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3652, pp. 166–69 (1994); *United States v. City of Yonkers,* 592 F.Supp. 570, 587–89 (S.D.N.Y.1984).

[9] In addition, the United States has, in essence, alleged an ongoing, "continuing violation" of Title VII and seeks only injunctive relief, which would render a statute of limitations irrelevant here even if one applied. *See Chambers v. American Trans Air, Inc.,* 17 F.3d 998, 1003 (7th Cir.1994); *Selan v. Kiley,* 969 F.2d 560, 564–65 (7th Cir.1992).

[10] Section 706(e) establishes two possible time limits for actions filed by private individuals. The action must be filed within 180 days after the unlawful employment practice unless the individual has also initiated a proceeding with a state or local agency that has the authority to grant or seek relief from such practices. 42 U.S.C. § 2000e–5(e)(1) (1994). In the latter situation, the time limit is extended to 300 days after the unlawful employment practice or thirty days after receipt of notice from the agency that it has terminated its proceedings, whichever is earlier. *Id.*

[11] Section 707(a) of Title VII states:

> (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil

> action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

42 U.S.C. § 2000e–6(a) (1994). Defendants have not alleged that plaintiff failed to follow the dictates of this section, and the United States has, in fact, met them. Section 707(a) contains no time limits equivalent to the 180 and 300–day limits applied to individuals by section 706(e).