

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDA PIPPEN, et. al,	CASE NO. CL 107038
Plaintiffs,	(consolidated with
v.	Case Nos. CL 103856 & 103122)
THE STATE OF IOWA, et. al,	ORDER DENYING DEFENDANTS’
Defendants.	MOTION TO DISMISS TITLE VII
	CLAIMS

Hearing in the above-captioned case came before the Court on September 8, 2009. All parties were represented by their attorneys of record. After reviewing the file, various briefs, pleadings, exhibits, and appendices, and hearing arguments of counsel, the Court hereby enters the following order.

STANDARD OF REVIEW

A motion to dismiss is made pursuant to Iowa Rule of Civil Procedure 1.421. “A motion to dismiss tests the legal sufficiency of a plaintiff’s petition.” *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). The Court should only grant a motion to dismiss when it is clear from the face of the petition that the plaintiff can recover under any set of facts. *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). The petition should be construed in the light most favorable to the plaintiff, and if “it reasonably can be conceived that plaintiff can upon the trial make a case which would entitle him to some relief,” the motion to dismiss should be denied. *Newton v. City of Grundy Center*, 70 N.W.2d 162, 165 (Iowa 1955).

ANALYSIS

Defendants claim that the Plaintiffs’ Title VII claims must be dismissed because such claims fail to state a claim upon which any relief can be granted and/or that this Court lacks

subject matter jurisdiction to hear the claims. Defendants did not plead immunity as an affirmative defense in response to Plaintiff's petition. *Cf.* Iowa R. Civ. P. 1.421(1) (requiring every defense to be asserted in a responsive pleading). Plaintiffs acknowledge that lack of subject matter jurisdiction can be raised at any time by a party or *sua sponte* by the Court. The State admits that there is subject matter jurisdiction in suits against the State in federal court pursuant to Title VII, but contends that Plaintiffs cannot enforce their federally protected rights under Title VII in this Court.

The Court initially notes that there is little prejudice to the State by denying their motion given that the State admits Plaintiffs have claims under Iowa Code 216 that provide similar protections and therefore a dismissal would not delay or curtail this litigation which would proceed under the rights guaranteed by Iowa Code 216 regardless of this ruling.

The Court is not convinced that the immunity under Title VII was not abrogated toward all the States, including Iowa long ago through passage of the Fourteenth Amendment to the United States Constitution. Regardless, the Court is also convinced that even without formal abrogation, that the State may have waived immunity given the volumes of information and prior cases suggesting that the Executive Branch, Legislative Branch and the Iowa Attorney General all acted consistent with the understanding that immunity was abrogated or waived.

SOVEREIGN IMMUNITY

Several courts have held that states are not immune from intentional or unintentional discrimination claims under Title VII. *See In re Employment Discrimination Litigation Against Alabama*, 198 F.3d 1305, 1308-09 (11th Cir. 1999) (finding no immunity from suit for a number of employment practices alleged to have a disparate impact on African-Americans); *Okruhlik v. University of Arkansas*, 255 F.3d 615, 620 (8th Cir. 2001) (finding no immunity from suit for

disparate impact sex discrimination claims); *Nanda v. Board of Trustees of the University of Illinois*, 303 F.3d 817, 819 (7th Cir. 2002) (finding no immunity from intentional discrimination claims on the basis of race, sex and national origin).

An executive department of the State maybe subject to suit for Title VII claims, where “it is undisputed that [a state employee] could have joined her Iowa civil rights claim [against a state agency] with a federal Title VII claim and tried them to conclusion in state court.” *E.g.*, *Shumaker v. Iowa Department of Transportation*, 541 N.W.2d 850, 853 (Iowa 1995). *See also*, *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis. 1989) (concluding that conclude that “congress, in enacting Title VII and its 1972 amendments, intended to override not only the eleventh amendment immunity of the states but the immunity that states would claim in actions against them in their own courts”). This Court finds the analysis of the Wisconsin Supreme Court in *Lindas v. Cady* persuasive and determines that the Plaintiffs may avail themselves of their own state courts while seeking enforcement of their federal rights under Title VII. The Court again notes, that the State’s objection to this finding is preserved in the event that a higher court should provide a holding that clearly does not abrogate State immunity from Title VII.

Defendants can also waive immunity by consent or a voluntary appearance, by statute, by the state’s conduct in the suit or by enacting a civil rights statute that permits money damages to be awarded against it. *See Shumaker*, 541 N.W.2d at 853-54. Moreover, immunity need not be expressly waived by statute, and can be impliedly waived through the conduct of the State’s agencies, officers, or employees. *Lee v. State of Iowa*, No. 8-821 / 07-1879, 2009 Iowa App. LEXIS 119, *25-26 (Iowa Feb. 19, 2009) (holding regulations affording employees FMLA leave constituted waiver of immunity for FMLA claims in state court) (publication pending). The State contends that under the United State’s Supreme Court’s decision in *Alden v. Maine*, 527

U.S. 706 (1999), only an act of the legislature, as opposed to an Executive Order or the actions of the Iowa Attorney General in allowing suit after suit under Title IV in Iowa Courts prior to this case, can provide actual waiver as a matter of law that prevents later challenge.

WAIVER BY STATE ENACTMENT OF CIVIL RIGHTS LAWS

The State appears to have engaged in a number of actions since 1972 that could establish waiver of immunity. Those actions include numerous Executive Orders by the Executive Branch indicating that Iowa follows the Equal Protection clause and by the actions of the Iowa Attorney General in allowing suit in State Courts without immunity challenge. In addition to the actions by the Executive Branch and the Iowa Attorney General that suggest waiver, the State has engaged in practices toward its own employees, including drafting numerous policies that reference Title VII and rights guaranteed by that Statute that would show waiver under the analysis of one of the most recent cases issued from the Iowa Court of Appeals.¹ *See Lee v. State of Iowa*, No. 8-821 / 07-1879, *25-26 (Iowa Feb. 19, 2009) (holding the State waived suit under the FMLA by granting employees FMLA leave suggesting not only that an act of the Legislature is not required for waiver, but that the policies and practice of the State toward its employees can provide evidence of waiver).

¹ Plaintiff claims the evidence presented demonstrates that the Defendants informed its employees they were protected under Title VII, explaining they could enforce those rights and informing managers they were obligated to comply with Title VII. Specifically, the State's Equal Employment Opportunity Policy for Executive Branch Employees, in effect since at least December 13, 1999, specifically references Title VII, prohibits discrimination based on race and informs employees they may file a complaint regarding statutory violations – including retaliation – with the “Iowa Civil Rights Commission or the appropriate federal enforcement agency” such as the “U.S. Equal Employment Opportunity Commission.” *See also* State of Iowa “Applicant Screening Manual” (in which the State informs managers they are bound by Title VII in making hiring and promotion decisions, that employees may file Title VII claims and that failure to comply with Title VII will cost the state money though judgments).

The Court is also persuaded by the fact that the Iowa legislature may have acknowledged waiver under Title VII, which should remove the State's objection to the apparent waiver of immunity. While the text of the Iowa Civil Rights Act does not specifically reference Title VII, the Iowa Administrative Code – regulations carrying the force and effect of law – do specifically reference Title VII. *See Jasper v. Nizam*, 764 N.W.2d 751, 764 (Iowa 2009) (administrative regulations carry the full force and effect of a statute and are “required to be consistent with the underlying broader statutory enactment”). Numerous provisions in the Iowa Administrative Code reference Title VII, Civil Rights Act of 1964 in defining terms, activities and duties under Iowa's civil rights laws. *See, e.g.* Iowa Admin. Code r. 161-8.1(2) (utilizing tests for employment); Iowa Admin. Code r. 161-8.2(1) (defining employment agencies and services); Iowa Admin. Code r. 161-8.6 (affirmative action obligations).

Iowa's Administrative Code also makes clear that employees enjoy all rights guaranteed by Title VII – including the right to benefit from affirmative action. *See* Iowa Admin. Code r. 161-8.6. In addition, the ICRA defines discrimination more broadly than in Title VII and specifically includes broader ranges of unintentional discrimination. Iowa Admin. Code r. 161-8.1(1),(2), 8.5.

The Iowa Civil Rights Act and its regulations may subject the State to even greater burden in defending against claims for damages for unintentional discrimination than Title VII. In enacting the Iowa Civil Rights Act, the Iowa Legislature may have expressly waived any immunity it may have had from suit in this Court under Title VII.

The Court finds that Plaintiffs have asserted claims under Title VII in their Petition that can conceivably afford them some relief, and therefore their Title VII claims should not be dismissed at this time.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

The Defendants' Motion to dismiss Title VII claims is **DENIED**

IT IS SO ORDERED this _____ day of _____, 2009.

DONNA L. PAULSEN, JUDGE
Fifth Judicial District of Iowa

Original filed.

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