

Accordingly, judgment will be entered in favor of defendant Terry Davis, and against plaintiff on Count III of plaintiff's First Amended Complaint alleging this claim.

By Order dated September 20, 1996, the Honorable James McGirr Kelly dismissed Count IV of the First Amended Complaint against Davis, which raised a claim under Title VII against Davis in his individual capacity. During a telephone conversation with all counsel on August 26, 1997, plaintiff's counsel, Lek Domni, Esq., confirmed that the plaintiff was not pursuing a Title VII claim against Mr. Davis in his official capacity. Accordingly, judgment will be entered in favor of defendant Terry Davis, and against plaintiff on Count IV of plaintiff's First Amended Complaint.

With respect to the remaining section 1983 claim, (Plaintiff's First Amended Complaint Counts I and II), alleging that defendant Davis violated the plaintiff's First Amendment rights and her right to Equal Protection under the law, the court finds that plaintiff has not shown that defendant Davis was "acting under color of state law" when he allegedly committed the acts of which plaintiff complains. To prove a claim under 42 U.S.C. § 1983, the plaintiff must show that the defendant was acting under "color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). Plaintiff has failed to meet her burden.

Defendant Davis was plaintiff's co-worker. (First Amended Complaint, ¶ 21). He was a non-supervisory employee who did not exercise power over the plaintiff which was "possessed by virtue of state law and made possible only because . . . [he] is clothed with the authority of state law." Barna v. City of Perth Amboy, 42 F.3d 809, 815-16 (3d Cir. 1994) (quoting West, 487 U.S. at 49). See Davis Dep., 12/12/96, at 6-7, 8, 73; Sams Dep., 12/9/96, at 32; Wint Dep., 6/18/97, at 37). It is well established that for a co-employee to be liable under

section 1983 for harassing another state employee, the co-employee must have, and use, state power over the plaintiff to be liable. An action by a state employee, without state power such as supervisory authority, is a private act, and is not state action. As the Court of Appeals for the Tenth Circuit has stated:

[L]iability under the Equal Protection Clause for sexual harassment in the workplace is predicated upon some authority that the wrongdoer has over the victim. Otherwise, it is difficult to establish that the abusive action was perpetrated ‘under color of state law’ rather than as an essentially private act of sexual harassment. The mere fact that all the participants were state employees or that the offending acts occurred during working hours is not enough.

Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992), cert. denied sub nom., Woodward v. Seghetti, 509 U.S. 923 (1993). See also Barna, 42 F.3d at 816 (“a police officer’s purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law.”); Hughes v. Halifax County Sch. Bd., 855 F.2d 183, 186-87 (4th Cir. 1988), cert. denied, 488 U.S. 1042 (1989) (plaintiff’s co-workers at a county maintenance department were not acting under color of state law and, therefore, could not be sued under § 1983 for taunting and pretending to hang the plaintiff after he had testified in a work-related grand jury investigation).

After careful consideration of the exhibits Davis has attached to his motion and the exhibits plaintiff has cited in opposition to the motion for summary judgment, the court concludes that plaintiff has not met her burden of showing that Davis was acting “under color of state law” when he allegedly committed the offending acts. Accordingly, judgment will be entered in favor of defendant Terry Davis, and against plaintiff on Counts I and II of plaintiff’s First Amended Complaint.

Finally, Counts VI and VII of plaintiff's First Amended Complaint request attorney fees and costs, and punitive damages. These are not properly separate causes of actions, but merely demands for relief. Accordingly, Counts VI and VII of plaintiff's First Amended Complaint are DISMISSED since judgment will be entered against plaintiff on all of the previous counts.¹

An appropriate order follows.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge

¹ Judge Kelly had previously dismissed Count V, alleging a claim under the Pennsylvania Whistleblower Law, 42 P.S. § 1421, et seq.

