

FILE

Subject

State Board
Civil Rights

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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

January 7, 1974

Opinion No. 74- 2

Barry A. Bennington
Stafford County Attorney
Stafford County Courthouse
St. John, Kansas 67576

Dear Mr. Bennington:

You inquire concerning a policy adopted by the Stafford County Board of County Commissioners, effective January 1, 1974, that

"no spouse, child, sibling or parent of any employee or elected official of Stafford County, Kansas, shall be employed by Stafford County, Kansas."

This policy was adopted by a resolution dated July 23, 1973. At that time, Gary McKenzie was sheriff, and his wife, Sherida L. McKenzie, was employed as secretary to yourself, as county attorney. This resolution was adopted, apparently, in the context of a factual situation described in your letter. You advise that in 1972, the McKenzies were assigned custody of a minor child who had been declared to be a dependent and neglected child by the Stafford County Juvenile Court. Thereafter, McKenzies applied for aid to foster children with the Stafford County Department of Social Welfare, which authorized an allowance for the minor in an amount less than that provided for by state regulations. This allowance was appealed to the State Board of Social Welfare, which on about July 11, 1973, ordered payment in compliance with state regulations. At the first meeting of the county commissioners thereafter, on July 16, 1973, this allowance was discussed, and as a resolution of "the problem," it was proposed that a policy be adopted prohibiting the employment of two members of the same family. You, as county attorney, were directed to prepare such a resolution for the commissioners' meeting held July 23, 1973, at which meeting the resolution quoted above was adopted. No other county employees were affected by the regulation, as the commissioners were aware at the time of its adoption,

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and the apparent motive for its adoption was to "punish" the McKenzies for applying for and obtaining the allowance provided by law for a foster child.

As you are aware, county commissioners are charged with the management of county affairs, and are empowered to fix reasonable standards to govern the employment of county personnel. Such regulations must, however, be reasonable and nondiscriminatory.

The Kansas Commission on Civil Rights has regulations dealing with discriminatory employment qualifications and hiring practices. Of particular pertinence here, K.A.R. 21-32-4 states in part thus:

"(A) The commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by the Kansas Act Against Discrimination

"(B) An employed woman should not have her employment terminated when she marries a man who works for the same business At the same time, a woman should not be denied employment by an employer due to rules against nepotism if she is otherwise qualified to perform the required work." [Emphasis supplied.]

In Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357 (D.Kan. 1971), plaintiff asserted a claim under the federal Civil Rights Act of 1964, alleging wrongful discharge on the basis of sex. She was discharged because she was pregnant and unwed. The court found that

"During the term of plaintiff's employment, married, pregnant women were actively employed by the defendant hospital, and were routinely granted maternity leaves of absence. One such married pregnant woman was employed in plaintiff's department at the time plaintiff was discharged. The fact of pregnancy did not affect the quality of plaintiff's performance and she would have been able to perform her duties in the business office through the eighth month of her pregnancy."

The court concluded further thus:

"Plaintiff's discharge on May 6, 1970, was an unlawful discrimination, on the basis of sex, in

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violation of 42 U.S.C.A. § 2000e-2, in that, she was dismissed because of unwed pregnancy, a condition peculiar to the female physiology, which condition was not a bona fide occupational disqualification by reason of being reasonably necessary to the normal operation of the business of the Osteopathic Hospital."

The regulations cited above appear to be directly applicable to the proposed dismissal of Mrs. McKenzie. A complaint based on the stated facts may well constitute a prima facie showing of discrimination based on sex which would support, absent a countervailing showing, orders for reinstatement, back pay and perhaps other relief.

In the Doe case cited above, the United States District Court for the District of Kansas found dismissal of a pregnant, unwed employee to be a violation of the Civil Rights Act of 1964, because the pregnancy was not a bona fide occupational disqualification reasonably related to the operation of a hospital. By analogy in this instance, dismissal of an employee solely because of her marriage to an elected officer, or more specifically, because she applied for and received lawful payments for the care of a foster child, seems clearly at least equally questionable. It is most unlikely that any showing can be made in support of the resolution as applied to Mrs. McKenzie that her marriage to the sheriff, or that the care for a foster child, bears any relation whatever to the performance of her duties as secretary to the county attorney.

Obviously, we cannot anticipate the decision of the Kansas Civil Rights Commission on a complaint which might be filed based on these facts. Likewise, we cannot anticipate the decision which might be reached by a federal court on a claim asserted under the Civil Rights Act of 1964. However, based upon the cited regulations and the decision quoted above, dismissal of Mrs. McKenzie would give rise to a very substantial claim under either the Kansas Act Against Discrimination, or the federal act, and such a claim would be squarely analogous to those practices prohibited by state regulations and the decision of the court in Doe, supra.

Yours very truly,

VERN MILLER
Attorney General

VM:JRM:jsm