

# MICHIGAN LAWYERS WEEKLY

by Richard Mitchell

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## **Contracting with public entities: Can liability spill over?**

Public entities have unique defenses when they become involved in civil litigation. They often also have unique exposures. Under certain circumstances, that exposure can extend to contracting parties.

The issue is often one of the precise nature of the relationship created by a contract between a private and public entity, including the clear delineation of responsibilities of each party.

This can be a particular problem for entities leasing employees to public bodies. We have written previously in this space of developments in the concept of co-employer relationships.

Creative attorneys have sought to extend that concept to impose liability on private entities that would not otherwise exist but for the relationships with public bodies.

### **Application of federal statutes to private entities**

Our office has recently successfully defended multiple claims in which allegations were brought against privately held defendants arising from their relationships with public entities.

In one such case, a public school district was sued for alleged violations of Title IX and USC § 1983 arising from claims of sexual misconduct. Plaintiff also brought allegations against the professional staffing agency with which the district contracted. The Court dismissed those claims.

The individual at issue had been a longtime employee of the school district. The district, however, determined it no longer wished directly to employ some of its employees, including this particular person. It entered into a contract with the agency, which leased some of those employees back to the district.

At the time it did so, the agency conducted a criminal background check on the individual, as well as all other potential employees, which revealed no criminal

history at all. It did not interview the individual, although the court agreed that would have been futile. The individual was going to be placed with the school district, which had been the employer for the previous several years.

The individual defendant developed a sexual relationship with a student. Plaintiff argued that, although the agency was not a federal entity, it benefited economically from the district's federal assistance and was therefore subject to the same liability.

The court rejected that argument, stating that economic gain from contracting with a federal entity was insufficient to impose liability pursuant to Title IX, *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999).

The court went on to hold that a party's liability for sexual harassment under Title IX is limited to circumstances where the party has substantial control over both the individual alleged to have conducted the harassment and the context in which that harassment occurred. *David v. Monroe County Board of Education*, 526 U.S. 629 (1999).

Similarly, the court rejected plaintiff's Section 1983 claim. As in another matter our office defended, there are three tests for holding a private individual or entity liable pursuant to Section 1983.

The first is the public function test, which requires that the private entity exercise powers which are traditionally exclusively reserved to the state.

The second is the state compulsion test, which requires proof that the state significantly encouraged or somehow coerced the private party to take a particular action that is truly the purview of the state actor.

Finally, the nexus test requires a sufficiently close relationship between the state and the private actor so that its actions may be attributed to the state actor, *American Postal Workers Union v. City of Memphis*, 361 F3d 898 (6th Cir. 2004).

### **A cautionary tale in avoiding liability**

While the standard for imposing liability on a private entity for conduct undertaken in conjunction with a state actor is high, a little protection can go a long way. The contract should clearly define the powers and responsibilities of the private actor, articulating that it is not undertaking any powers that are typically attributed to state actors. Additionally, the contract should make clear that the entities are completely separate, both in form and function.

Finally, in the context of employment situations, a thorough vetting of potential

employees is prudent, even where those employees formerly worked for the public entity. As always, thorough and careful documentation is a powerful shield in any litigation.

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