**State of Wisconsin**
**Labor and Industry Review Commission**

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| **John Ford**, Complainant<br><br>**Briggs & Stratton Corporation**, Respondent<br><br>ERD Case No. CR201700522<br>EEOC Case No. 26G201700598C | **Fair Employment Decision**<br><br>**Dated and Mailed:**<br><br>April 11, 2019 |

The decision of the administrative law judges issued in the above-captioned matter are **affirmed in part, and set aside and remanded in part**. Accordingly, the decision issued on April 17, 2017, dismissing portions of the complaint as untimely, is affirmed. However, the decision issued on September 28, 2018, granting the respondent's motion to dismiss, is set aside and the matter is remanded for further proceedings in accordance with this decision.

By the Commission:

/s/
David B. Falstad, Chairperson

/s/
Michael H. Gillick, Commissioner

## Procedural History

On February 17, 2017, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development, alleging that he was discriminated against based upon a disability and in retaliation for having filed a prior discrimination complaint, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). On April 11, 2017, the respondent submitted a position statement to the Division in which it contended that some of the complainant's allegations were untimely. On August 15, 2017, an equal rights officer for the Division issued a preliminary determination finding that the complainant's allegations that he was discriminated against in the terms and conditions of his employment based on disability were untimely, having occurred more than 300 days prior to the filing of his complaint. Those allegations were, therefore, dismissed. In a separate determination issued on the same day, the equal rights officer found no probable cause to believe that discrimination had occurred with regard to the complainant's allegations that the respondent gave him poor references in retaliation for having engaged in prior protected conduct and because of his disability. Both the preliminary determination pertaining to the statute of limitations and the initial determination finding no probable cause related to the same underlying complaint of discrimination and bore the same case number. On August 21, 2017, the complainant filed a single timely appeal of both determinations.

Department records indicate that, on October 10, 2107, the matter was assigned to an administrative law judge for consideration of the appeal of the preliminary determination. The appeal of the no probable cause determination was not certified to hearing and no action was taken by the Division with respect to that matter. On December 21, 2017, the administrative law judge issued a "Decision and Order on Appeal of Preliminary Determination" in which she affirmed the preliminary determination dismissing the complainant's allegations of discrimination with respect to the terms and conditions of his employment. In her decision the administrative law judge made reference to the fact that the complainant had appealed both the preliminary determination and the no probable cause determination. However, having concluded that the preliminary determination should be affirmed, the administrative law judge's decision contained no further discussion of the complainant's appeal of the no probable cause determination and made no reference to what, if any, additional proceedings would occur with respect to that aspect of his complaint.

The administrative law judge's decision was accompanied by a "Notice of Appeal Rights" which indicated that the decision was a final one and that the complainant could petition for commission review of the decision within 21 days. The complainant filed a timely petition for commission review of the administrative law judge's decision pursuant to those instructions.

In a decision dated April 19, 2018, the commission held that the administrative law judge's Decision and Order on Appeal of Preliminary Determination issued in this matter on December 21, 2017 was not a "final decision," because the matter was still pending before the Division with regard to the allegations on which no probable cause was found. The commission concluded that the complainant's petition for review was premature and it remanded the matter to the Division for further proceedings with respect to the complainant's appeal of the no probable cause determination. The commission explained that, once a final decision was issued by the Division, the complainant would have an opportunity to file a petition for commission review of the entire matter.

On April 23, 2018, the Division certified the matter for hearing on probable cause, and it was assigned to an administrative law judge. On June 15, 2018 the respondent began the pre-hearing discovery process, which included taking the complainant's deposition. On September 13, 2018, after completing discovery, the respondent filed a motion to dismiss the complaint, and on September 25, 2018, an administrative law judge for the Division granted that motion and issued an order dismissing the complaint. The administrative law judge's order dismissing the remainder of the complaint (portions of which had already been dismissed based upon timeliness) constituted a final, appealable decision. On September 28, 2017, the complainant filed a timely petition for commission review of both the December 21, 2017 and September 25, 2018 administrative law judge orders concerning his complaint, and the matter once again came before the commission for decision.

## Memorandum Opinion

*Decision and Order on Appeal of Preliminary Determination*

On December 21, 2017, an administrative law affirmed a preliminary determination which dismissed the complainant's allegations that he was subject to discriminatory terms and conditions of employment. These allegations were dismissed on the ground that the complaint was not timely filed. The complainant's complaint in this matter was filed on February 17, 2017. Wisconsin Stat. § 111.39(1) provides that complaints of discrimination may be filed "no more than 300 days after the alleged discrimination." The Statement of Discrimination signed by the complainant and attached to his complaint indicates that the complainant's employment relationship with the respondent ended on September 27, 2010, more than six years prior to filing the complaint. Therefore, it is not possible that any acts of discrimination with respect to the terms and conditions of the complainant's employment could have taken place within 300 days of the filing of the complaint. That portion of the complaint was properly dismissed, and the administrative law judge's decision is affirmed.

*Ruling on Motion to Dismiss*

In his complaint of discrimination the complainant also contended that the respondent discriminated against him based upon a disability (depression) and in retaliation for having filed a prior discrimination complaint by badmouthing him to other prospective employers, taking an extended period of time to respond to requests for verification of past employment, refusing to provide information to potential future employers by hanging up the phone on them, and requiring potential future employers to pay a fee to get access to information. The complainant stated that there have been situations where he was qualified for a job and had been provided positive feedback, but when the respondent was called for reference checks he no longer had a chance at being hired. The complainant contended that he has been unable to find work since his separation from the respondent and stated that he believes the respondent was engaging in defamation of his character.

In his pre-hearing deposition the complainant clarified that he is not alleging that the respondent retaliated against him based upon a disability. Although the complainant checked the "disability" box on the front of the complaint form, it appears that he was alleging disability discrimination with regard to his terms and conditions claim, which was dismissed as untimely, but *not* with respect to the issue of job references.

At the pre-hearing deposition the complainant also provided additional information regarding his other claims, some of which seems to undercut his assertions that he was retaliated against by the respondent. The complainant denied having been told that the respondent "badmouthed" him to other employers and stated that he wrote that on his complaint form because he was upset. The complainant stated that he was told by his case manager that he was attempting to do a reference check and that it took a month for the respondent to verify he worked for it. The complainant also stated that another individual told him she called the respondent and was hung up on, but that when this person called back she was told she could obtain the complainant's information through an agency called "The Work Number." The complainant stated that in another instance the same individual called "The Work Number" and was told she needed to provide a credit card and pay a service charge in order to obtain an employment verification. At his deposition the complainant identified three employers at which he applied for work but believed he was not hired because of negative references from the respondent: A'Viands, Western State Envelope, and Valspar. However, the complainant stated that he was actually offered a position with A'Viands, which he turned down because it was only part time. He indicated that Valspar and Western State Envelope told him they hired someone more qualified. During his deposition the complainant also indicated that he had no witnesses or documentary evidence to present and that he planned to submit to a lie detector test in support of his case.

Upon completion of the deposition the respondent filed a motion to dismiss. In its motion the respondent argued that the complainant failed to state a claim upon which relief could be granted and that he lacked evidence in support of his case. The administrative law judge granted the motion, stating that:

> The Motion to Dismiss must be granted because Mr. Ford has not stated a claim for which relief can be granted and the only basis he stated he had to establish his case - his alleged right to take a lie detector test - not only does not exist but would not address his complaints [sic] lack, even when supplemented by discovery, of any specific claim or evidence that Briggs & Stratton acted in a way that violated the WFEA. His complaint mentions no specific potential employer, nor does it mention any specific communication from Briggs & Stratton that he claims to violate the WFEA. In his deposition, taken after he had an opportunity to do discovery himself, he identifies three prospective employers. He has no evidence of any of them ever talking to Briggs & Stratton, no claim of whom they talk to, nor any claim about what was said or communicated. Moreover, he actually was offered one of the jobs. He offers only his opinion and generalities.
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> Mr. Ford has not stated a factual claim of a violation of the WFEA. There is nothing for Briggs & Stratton to defend or respond to at the hearing. Briggs & Stratton cannot refute or change Mr. Ford's opinion. Mr. Ford not only has not alleged any specific violation, but has admitted he is not prepared to present specific evidence to support his generalizations about his being "bad mouthed" or Briggs & Stratton having separate policies regarding his references. In these circumstances it would be unfair for Briggs & Stratton to have to do anything further to respond to his complaint.

The commission believes that the administrative law judge erred in dismissing the complaint without affording the complainant an opportunity for hearing, for the reasons set forth herein.

The authority to dismiss a complaint without hearing only extends to circumstances where it appears that, based upon the assertions in the complaint, there is simply no way the complainant could prevail. *Reddin v. Neenah Joint School Dist.*, ERD Case No. CR200301251 (LIRC Aug. 24, 2004); *Jackson v. MATC and AFT*, ERD Case No. 200103304 (LIRC July 16, 2003). A complaint may be dismissed prior to hearing on a motion to dismiss for failure to state a claim upon which relief may be granted if it appears that, even if what is claimed by the complainant is true, a decision in favor of the respondent is nevertheless required as a matter of law. *Ficken v. Harmon Solutions Group*, ERD Case No. CR200003282 (LIRC Feb. 7, 2003). Cases in which the commission has found that there were no circumstances in which the complainant could prevail based upon the allegations in the complaint

have generally involved situations in which the conduct alleged to be discriminatory was not covered under the Act. *McCullum v. Lutheran Home, Inc.*, ERD Case No. CR200600744 (LIRC May 23, 2008). *See*, for example, *Graham v. Lisas Flower and Gift Shop,* ERD Case No. 200003572 (LIRC Jan. 19, 2001), in which the complainant alleged she was harassed, not because of any protected status, but because the employer was facing financial troubles and hoped to force her to quit; *Harris-Wright v. Chrysler Motors*, ERD Case No. 200002413 (LIRC Feb. 20, 2001), in which the complainant made a number of allegations against the employer, including medical malpractice, fraud, the denial of worker's compensation and social security benefits, death threats and blackmail, but did not allege discriminatory conduct; *Hellerude v. State of WI-DILHR*, ERD Case No. 199503643 (LIRC March 25, 1996), in which the complainant attempted to challenge the validity of an administrative rule concerning the inspection of fire extinguishing systems; *Ficken v. Harmon Solutions Group*, ERD Case No. CR200003282 (LIRC Feb. 7, 2003), in which the complainant alleged that he was denied the opportunity to perform unpaid volunteer work; and *Dunn v. City of Burlington Engineering Department*, ERD Case No. 9450930 (LIRC July 28, 1995), in which the complainant alleged that the respondent expected older workers to work at the same pace as younger workers, a matter which the commission interpreted as a request for preferential treatment not required by the Act.

In this case, the complainant contends that the respondent took an extended amount of time to respond to requests for verification of his past employment, refused to provide information to potential future employers (hanging up the telephone on an employer in one instance), and required potential future employers to pay a fee to get access to information. The complainant contends that these actions were undertaken in retaliation for his having filed a prior discrimination complaint. The complainant also contends that he applied for jobs and had good interviews, but then was not hired, a matter which he contends was because the respondent had provided negative references. The complainant's allegations, if proven, would undoubtedly state a claim for relief under the Act. It is unlawful for an employer to refuse to verify a former employee's prior employment status when requested to do so by prospective new employers or to provide negative employment references in retaliation for the former employee's protected conduct. *See*, *Pufahl v. Niebuhr*, ERD Case No. 8802054 (LIRC Aug. 16, 1991). The fact that the complainant's complaint did not identify specific potential employers who received negative references or who were denied information by the respondent and did not explain exactly what negative things were said by the respondent is not a basis to dismiss his complaint. A complainant need only provide a general statement describing the allegedly discriminatory action in order to satisfy the very liberal pleading requirements of the Act. *Moeller v. County of Jackson*, ERD Case No. CR200003908 (LIRC Jan. 27, 2003). The complainant met that standard when he alleged that the respondent interfered with future employment opportunities by

failing to provide requested employment information or giving negative references in retaliation for his having filed prior discrimination complaints.

In granting the motion to dismiss, the administrative law judge conflated the question of whether the complainant stated a claim for which relief could be granted with the question of whether it appeared that he would be able to prove that claim at a hearing. The administrative law judge noted in his decision that it was not possible to prove a claim by taking a lie detector test and that the complainant had no evidence the respondent ever talked to any of the specific employers identified at his deposition. However, while the failure to state a claim for which relief can be granted is an appropriate basis on which to dismiss a complaint, it is not appropriate for the administrative law judge to dismiss a complaint on the ground that the complainant lacks evidence to support his claim. *See*, *Salinas v. Russ Darrow Group*, ERD Case No. 200600355 (LIRC Aug. 31, 2007)("To require the complainant to not only state a cognizable claim, but also to disclose prior to hearing what proof he intends to offer and to have the administrative law judge assess whether this proof will be sufficient to sustain his burden goes beyond the authority of an administrative law judge to dismiss a complaint for failure to state a claim. Such an approach would permit an administrative law judge to avoid the due process safeguard inherent in the administrative hearing process by deciding the merits of a contested case without an evidentiary record.")

Although the complainant's deposition testimony suggests that he lacks evidence to show intentional discrimination and hints at the existence of legitimate nondiscriminatory reasons for the respondent's actions, these are not appropriate bases upon which to dismiss a complaint prior to hearing. While the administrative law judge noted the need to provide fairness to the respondent, due process requires that the complainant be given an opportunity to present what evidence he has at a hearing, however weak that evidence may be. The commission, therefore, remands this matter for a hearing on the merits of the complaint.

cc: Suzanne M. Glisch