State of Wisconsin
Labor and Industry Review Commission

Jordan Reid, Complainant **Milwaukee Area Technical College,** Respondent ERD Case No. CR201700898	**Fair Employment Decision** **Dated and Mailed:** August 13, 2019 reidjo_err.doc:164

The decision of the administrative law judge is **set aside**. Accordingly, this matter is **remanded** to the Equal Rights Division for further proceedings consistent with this decision.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

Procedural Posture

On March 29, 2017, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") alleging that the respondent violated the Wisconsin Fair Employment Act (hereinafter "Act") by determining he was ineligible for admission into its Funeral Services Program based on his criminal record. On October 4, 2017, an Equal Rights Officer for the Division issued an initial determination finding probable cause to believe that discrimination occurred. The matter was therefore certified to hearing and assigned to an administrative law judge.

On January 16, 2018, the administrative law judge held a prehearing conference with the parties. At the pre-hearing conference the respondent made a motion to dismiss the complaint for lack of jurisdiction. The administrative law judge encouraged the parties to create a stipulated set of facts upon which he could rely in deciding the motion to dismiss. On July 18, 2018, the parties submitted a "Joint Stipulation of Record" in which they agreed upon a set of exhibits that the administrative law judge could use for the purpose of deciding the motion to dismiss. The parties specified, however, that none of the matters in the stipulation would be deemed admitted.

On August 30, 2018, the administrative law judge issued a decision dismissing the matter for lack of jurisdiction. The administrative law judge made Findings of Fact and, based upon those findings, concluded that the complainant had failed to state a claim that was covered under the Act. The complainant has filed a petition for commission review of the administrative law judge's decision.

Memorandum Opinion

The administrative law judge's dismissal was based, in large part, upon a finding that, in order to complete the Funeral Services Program, the complainant would need to perform two unpaid internships and that, under the respondent's rules, those internships could not be with family members. The administrative law judge stated that it was impossible to say that the complainant would be able to successfully complete two internships, become licensed, and obtain employment, and concluded that the nexus between the admission decision and the complainant's employment opportunities was tenuous. The administrative law judge indicated that there were several other reasons to find no jurisdiction including, but not limited to, the existence of a separate non-discrimination provision in the statutes pertaining to technical colleges that did not cover conviction record status, the absence of any specific indication in the Act that the relationship at hand was meant to be covered, the unavailability of the substantial relationship defense to these facts, the difficulty of crafting a remedy, and concerns that to find jurisdiction in this case would open the floodgates to further similar claims. The commission

has considered the various concerns and issues raised by the administrative law judge, but disagrees with the decision to grant the motion to dismiss in this case.

The Act provides, in relevant part, as follows:

> **111.322 Discriminatory Actions prohibited.** Subject to ss. 111.33 to 111.365, it is an act of employment discrimination to do any of the following:
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> **(1)** To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321.
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> **111.325 Unlawful to discriminate.** It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or any applicant for employment or licensing.

The commission has consistently held that a complaint may be stated under the Act, even in the absence of an actual or potential employment relationship between the parties, provided the complainant has alleged that the respondent engaged in an action that directly relates to an employment opportunity. *See*, *Lofton v. State of WI DOC*, ERD Case No. CR2014159 (LIRC Sept. 27, 2018); *Maxberry v. Goodwill Industries*, ERD Case No. CR201301901 (LIRC March 19, 2015); *Wilde v. UW-Milwaukee*, ERD Case No. CR201403303 (LIRC Feb. 27, 2015); *Garner v. University of Wisconsin*, ERD Case NO. CR200403960 (LIRC Feb. 10, 2006); *Hinkforth v. Milwaukee Area Technical College*, ERD Case No. CR200103936 (LIRC Feb. 23, 2004); *Jackson v. City of Milwaukee*, ERD Case No. 9230848 (LIRC Oct. 28, 1993); *Olivares v. University of Wisconsin-Oshkosh and University of Wisconsin-Madison* (LIRC Oct. 23, 1973).

In *Olivares*, *supra*, the commission found jurisdiction over the complainant's claim that the respondent discriminated against her by refusing to admit her to a doctoral program. The complainant, who worked at UW-Oshkosh, argued that the respondent, UW-Madison, refused to admit her to a doctoral program and that this restricted her employment opportunities. The complainant was not an employee of UW-Madison and had not applied for a job with UW-Madison. (The complainant's allegations predated the merger of the two institutions, which took place in 1971.) The commission stated that in order for the Division to have jurisdiction under the provisions of the Act, three requirements must be satisfied: (1) the complaint must

allege that an actual or potential "employee" or "applicant for employment or licensing" has been unlawfully discriminated against; (2) the complaint must name as respondent a party who is an "employer," a "labor organization," a "licensing agency," or a "person" within the meaning of the Act; and (3) the complaint must allege a sufficient nexus between the discrimination complained of and the denial or restriction of some employment opportunity. Concluding that the first two requirements were satisfied, the commission found that the respondent's refusal to admit the complainant to a training program impaired her ability to advance in her chosen profession, and that the complainant had alleged a sufficient nexus between UW-Madison and her employment status. The respondent's motion to dismiss for lack of jurisdiction was therefore denied.

By contrast, the commission has found a lack of jurisdiction over complaints involving denials of admission to institutions of higher education where the nexus between the denial and a job opportunity was weak. For instance, in *Wilde v. UW-Milwaukee*, ERD Case No. CR201403303 (LIRC Feb. 27, 2015), the commission held that the complainant failed to state a claim under the Act where his allegation that the respondent denied him entrance into a master's degree program in English for discriminatory reasons was connected only hypothetically to future unidentified employment opportunities. The commission noted that Wilde had failed to identify any specific, real, employment opportunity that was denied as a result of the discriminatory conduct. Similarly, in *Hinkforth v. Milwaukee Area Technical College*, ERD Case No. CR200103936 (LIRC Feb. 23, 2004), the commission found that the complainant's allegations that she was subjected to harassing conduct on the part of her fellow students, which led her to drop a class, and that the respondent further harassed her by giving her a failing mark in a class she dropped rather than indicating that she had withdrawn, were not directly related to her employment opportunities and therefore not covered by the Act.

In the instant case, the complaint alleged that the complainant, a potential employee, who is covered under the Act as an "individual," was unlawfully discriminated against by the respondent, a technical college, which is covered under the Act both as an "employer" and as a "person." Thus, the first two prongs of the test set forth in *Oliveras*, above, are satisfied. The question to decide, then, is whether the complainant has alleged a sufficient nexus between the discrimination complained of and the denial or restriction of an employment opportunity for coverage under the Act. The commission believes he has. The complainant's contention is that the respondent's actions in refusing him entry into the Funeral Services Program directly related to a specific employment opportunity: he had a chance to work at a family business, but was prevented from doing so because he could not gain admission into the professional program needed for licensure. These facts are more similar to *Oliveras* than to *Wilde* or *Hinkforth* in that they involve a very specific employment opportunity, and applying the same analysis that the

commission relied on in those cases, the commission believes that the complainant's complaint, if proven, would state a claim under the Act.

In arriving at this conclusion, the commission is cognizant of the respondent's argument that the complainant would not be eligible for placement in an internship program. However, the commission does not find this argument persuasive. First of all, the complainant contended that he has a family member who is willing to supervise his clinical internship. While the respondent indicated that it has a policy against internship placements with family members, it is not clear from the information in the stipulated record that this is a requirement of the program rather than a policy preference, for which exceptions can be made, and the complainant indicated that he spoke with a dean at the School of Health Sciences who was willing to approve such an internship opportunity for him. Moreover, although the respondent asserted that the complainant would not be eligible for any internship assignment, it presented nothing to establish that other funeral homes at which it places interns would have been unwilling to accept the complainant based upon his conviction record, and the commission sees no basis to assume this is the case. Further, even if the respondent could establish that the complainant's conviction record would make it difficult for him to find clinical internships, the commission is unpersuaded that this fact would permit the respondent to discriminate against the complainant with respect to admission into the program.

The commission has considered the other concerns raised in the administrative law judge in his decision, but does not believe that any of them point to a lack of jurisdiction. To begin with, the administrative law judge noted that Wis. Stat. § 38.23, which prohibits discrimination against student applicants to technical colleges, states that no student may be denied admission into a program on the basis of race, color, creed, religion, sex, national origin, disability, ancestry, age, sexual orientation, pregnancy, marital status or parental status, but does not reference discrimination based upon conviction record. The administrative law judge concluded, therefore, that the legislature did not choose to prohibit the respondent from considering conviction records. However, Wis. Stat. § 38.23, which was enacted after the conviction record provisions were added to the Act, contains nothing to indicate that it was meant to provide the exclusive remedy for allegations of discrimination on the part of a technical college, and there is no reason to believe that the legislature meant for that statute to preempt the Fair Employment Act. The commission also notes that arrest and conviction record are not the only bases covered by the Act that are not included in Wis. Stat. § 38.23. Indeed, military service, a protected classification under the Fair Employment Act, is also not mentioned in Wis. Stat. § 38.23, yet the commission does not assume that the legislature chose not to provide any protections for people denied admission to technical college based upon their military service.

Next, the administrative law judge stated that the relationship between the complainant and MATC is "clearly outside of anything discussed in the complicated balance involved in arrest and conviction record protection found in sec. 111.335, Stats. that contains a series of exceptions to protection," and that the statute "clearly was not written in anticipation of addressing a claim such as [this.]" However, as the complainant points out in his brief, there are many relationships not specifically addressed in the statute for which coverage has been found. Moreover, although the portion of the statute covering discrimination based upon arrest and conviction record contains a lengthy list of exceptions and special cases, technical school admission is not among them. The legislature could have chosen to make an exception for college admission decisions, but it did not.

The administrative law judge also expressed concerns with how the respondent would be able to raise the substantial relationship test where there was no particular job or licensed activity at issue. However, a finding of jurisdiction does not depend upon the availability of affirmative defenses. Thus, even if the substantial relationship defense is not available to the respondent--and the commission makes no finding on this point--this would not require a conclusion that jurisdiction did not exist.

In finding no jurisdiction, the administrative law judge also stated that there is no known case where the Division has ordered the type of remedy that would be necessary in this case, and that to order the respondent to admit the complainant to the program is beyond the Division's authority under the Act. The commission disagrees. In the first place, a finding that a specific remedy is available is not a prerequisite to finding jurisdiction under the Act. The question of jurisdiction and the question of the availability of a remedy are two very separate inquiries, and the absence of an available remedy does not preclude a finding of liability under the Act. *See*, *Muenzenberger v. County of Monroe*, ERD Case No. 199400291 (LIRC Aug. 13, 1998)(although the respondent subsequently remedied its own discriminatory acts, the complainant was still entitled to a finding that she was a victim of discrimination). Further, the commission does not agree that there would be no remedy available here. To the contrary, the respondent could be ordered to consider the complainant's application without regard to his conviction record and, if he would otherwise have been admitted, it could be required to admit him into the program. The Act, which provides at Wis. Stat. § 111.39(4)(c) that the administrative law judge shall "order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay," appears to contemplate such a remedy.

Finally, the administrative law judge expressed concern that finding jurisdiction in this case would open the door for any unsuccessful applicant to law school, medical school, or technical school programs to file a Fair Employment Act complaint.

However, it seems unlikely that a finding of jurisdiction in this matter would lead to a flood of similar complaints. Indeed, although the commission issued the *Oliveras* decision in 1973, specifically finding that there could be jurisdiction over a complaint that an individual was denied admission into an academic program, that decision has not resulted in a flood of litigation, and only a handful of such cases have made their way to the commission since that time. Further, and more to the point, the commission is unpersuaded that such concern, even if warranted, could constitute a legitimate basis to deny jurisdiction over a claim that is covered by the statute.

For all the reasons set forth above, the commission believes that the administrative law judge erred in granting the respondent's motion to dismiss. This matter is therefore remanded to the Division in order to give the complainant an opportunity to establish facts necessary for a finding of jurisdiction, *i.e.* that admission to the Funeral Services Program is a prerequisite to working in a funeral home, and that there is a job opportunity available for him in the event he completes the program. Assuming the complainant can make such a showing, he should be given an opportunity to proceed to a hearing on the merits of his complaint.

cc: Jill M. Hartley
Bethany C. McCurdy