State of Wisconsin
Labor and Industry Review Commission

Cynthia Denman, Complainant	**Fair Employment Decision**
Wisconsin Water Well Association, Respondent 6737 W. Washington St., Ste. 4210 Milwaukee, WI 53214-5636	**Dated and Mailed:**
ERD Case No. CR201703222	November 21, 2019 denmacy_rsd.doc:164

The decision of the administrative law judge is **set aside** and this matter is **remanded** to the 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 History

On November 21, 2017, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development alleging that the respondent terminated her employment based upon disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). The respondent filed a written response to the complaint, in which it argued that the complainant was not its employee but had a contract with the respondent that it terminated for poor performance. On January 28, 2019, an equal rights officer for the Division issued a preliminary determination dismissing the complaint on the ground that the complainant was an independent contractor and not in a relationship covered by the Act. The complainant filed an appeal of that determination and the matter was assigned to an administrative law judge. On March 8, 2019, the administrative law judge issued a decision affirming the preliminary determination. The complainant has filed a petition for commission review of that decision.

Memorandum Opinion

The question presented in this appeal is whether the Division has jurisdiction over the complainant's discrimination complaint. In her complaint the complainant contended that she was the respondent's Executive Secretary and performed tasks "from administration to accounting to event planning," but that shortly after the respondent learned she had fibromyalgia it terminated her employment. The complainant elaborated that she did business as "Brunner & Associates, Inc," and stated that the respondent contracted with her to avoid paying payroll taxes, although in reality she was an employee and not an independent contractor. As stated in the procedural history above, the respondent has taken the position that the complainant was not its employee, but had a contract with the respondent that it terminated for poor performance.

The Act states that, "It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or applicant for employment or licensing." Wis. Stat. 111.325. While the Act does not contain a definition of the word "employee," except to state that an employee does not include any individual employed by his or her parents, spouse or child, the Court of Appeals has effectively held that the protections afforded individuals against prohibited discrimination under the Act cover only employees and not independent contractors. *See*, *Moore v. LIRC*, 175 Wis. 2d 561, 499 N.W.2d 289 (Ct. App. 1993), cited in *Ingram v. Bridgeman Machine Tooling and Packing Inc.*, ERD Case No. 200301821 (LIRC June 27, 2005). In *Moore*, the court adopted a Title VII test articulated in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), which provides, as follows:

> "[D]etermination of whether an individual is an employee or an independent contractor for purposes of [Title VII] involves analysis of the 'economic realities' of the work relationship. Consideration of all of the circumstances surrounding the work relationship is essential, and

> no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review here.
>
> "Additional matters of fact that an agency or reviewing court must consider include, among others, (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties."

Moore, 175 Wis. 2d at 569.

The administrative law judge assigned to this case resolved the jurisdictional issue without applying the factors set forth above. Rather, the administrative law judge sent an email to the parties in which he stated that the question to decide was whether the relationship was with the complainant as an individual or with a corporation; if the latter, the case would have to be dismissed, since a corporation cannot be an employee. The administrative law judge gave the parties a month to explain whether the contract was with the complainant or with a corporation and to make arguments regarding the underlying legal issue of whether a corporation could be an employee such that there could be coverage under the Act. On March 1, 2019, both parties submitted replies in which they agreed that the contract was between the respondent and Brunner & Associates, LLC, and not with the complainant as an individual. However, the complainant argued that the issue of corporate status is not dispositive and that the question is whether or not the factors set forth in *Moore v. LIRC*, cited above, (the *Spirides* test) indicate an employment relationship.

The administrative law judge rejected the complainant's argument. He reasoned that, as a matter of law, the department does not have jurisdiction over a corporation. The commission disagrees with this analysis of the issue. The complainant is an individual who performed services for the respondent. That she did so as the owner of an LLC may be suggestive of independent contractor status, but it does not fully resolve the jurisdictional question in this case. The commission is aware of no precedent, nor was any cited in the administrative law judge's decision, for the proposition that an individual who performs services while a

member of a corporation or LLC must be considered an independent contractor *per se*. However, there is prior commission precedent suggesting otherwise. *Omegbu v. Mequon-Thiensville School District*, ERD Case No. 9315006 (LIRC Dec. 21, 1995), a decision identified by the complainant in her response to the administrative law judge's inquiry, involved the same question that is presented in the instant case--whether the Division had jurisdiction over the complainant's claim of discrimination based upon his relationship with the respondent. The complainant in *Omegbu* was the president and sole shareholder of a corporation that submitted a successful bid to act as general contractor for the respondent, a school district. In determining whether he was an employee or an independent contractor the commission relied on the "economic realities" test (the *Spirides* test) set forth in *Moore v. LIRC*. The commission took into consideration the fact that the complainant was the owner of a general contracting business, but did not base its conclusion solely on that fact. Rather, the commission looked at a number of factors including but not limited to the fact that the complainant provided his own equipment to use on the job, that the agreement for payment for work performed was the agreement the respondent entered into with the corporation in accordance with bid requirements and procedures followed by all contractors, that the complainant's work relationship with the respondent terminated when it released the corporation as general contractor based upon a failure to furnish necessary bonds, and that the complainant, as a representative of the corporation, only entered into a contract with the respondent for a single construction project. Based on these and other factors, the commission concluded that the complainant was not an employee of the respondent's, but performed his services as an independent contractor with no direct control from the respondent.

The commission finds the analysis in *Omegbu* to be instructive--it supports a conclusion that the determination of whether the complainant was an employee or an independent contractor requires more than a simple inquiry into whether the complainant performed her services for a corporation. Rather, all of the "economic realities" of the relationship must be considered; the *Spirides* test must be applied. The commission therefore remands this matter to the Division so that it may do so.[1]

cc: Peter M. Reinhardt
David J. Turiciano

[1] The administrative law judge's decision to dismiss was made without benefit of a hearing. On remand, a hearing may be held if necessary to resolve factual disputes and to develop a record upon which findings of fact can be based.