

State of Wisconsin



Labor and Industry Review Commission

Charles Kirksey, DDS, Complainant

Fair Employment Decision¹

International Association for
Orthodontics, Respondent

Dated and Mailed:

ERD Case No. CR202001904

September 29, 2022

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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development issued a decision dismissing the complaint for lack of jurisdiction. The complainant has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the information supplied to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

The complainant's allegations of discrimination stem from events that occurred while serving in the role of officer on the Executive Committee of the International Association for Orthodontics ("hereinafter IAO"). The administrative law judge found that, because the complainant served on a volunteer basis and not as an employee, his complaint was not covered by the Act, which applies only to discrimination in employment. In arriving at this conclusion, the administrative law judge focused on the point that compensation is an essential condition of an employee/employer relationship under the Act.

In his petition for commission review the complainant argues for the first time that he should be considered an employee because, although he concedes that he did not receive any wages, he received some tangible benefits. The complainant--who has been represented by counsel throughout the entirety of these proceedings--maintains that he did not provide information on this point sooner because he was not directly asked to do so by the equal rights officer who investigated the complaint.² He now contends that the respondent pays for travel to conferences, including hotels and airfare, that it offers insurance, and that it provides opportunities to present seminars which he claims have yielded financial benefit in the six-figure range. He suggests that these benefits are sufficient to render him an employee, not a volunteer.

The commission has considered the complainant's arguments, but does not find them persuasive. In a prior decision the commission indicated that, where an intern

² In its response to the complaint of discrimination the respondent took the position that the complainant served the respondent in the role of volunteer secretary and that members of boards of directors are not employees for purposes of employment discrimination law. The complainant was asked by the equal rights officer to provide a response and was specifically told, "I will assume that you agree with any statements that the Respondent provided that you do not dispute." The complainant submitted a response in which he did not disagree that he was a volunteer and not an employee, but argued that "the concept of standing has no place in determining who may file complaints of discrimination under Wisconsin law."

received neither a salary nor any other tangible benefits, she could not be considered an employee. *Masri v. Medical College of Wisconsin*, ERD Case No. CR200902766 (LIRC Aug. 31, 2011). The commission did not find, however, that mere proof of receipt of any type of tangible benefit would necessarily result in a conclusion that an individual should be accorded employee status. Rather, the commission simply held open the possibility that an individual could receive benefits other than a salary that would be sufficient to warrant a conclusion that the parties were involved in an employer/employee relationship.³

In this case the complainant has not alleged that he received the type of tangible benefits that might lead to a conclusion that he was, in fact, being compensated for his services for the respondent. The complainant contends that the respondent paid for travel, some of which was expensive. However, paid travel in conjunction with the complainant's volunteer role for the respondent's organization, even if costly, does not constitute compensation. The complainant also contends that "it appears that individuals who serve [as officers and directors] may receive insurance benefits," but does not suggest that he personally received compensation from the respondent in the form of paid insurance. Finally, the complainant contends that:

"... historically the IAO has developed, in conjunction with the executive board members, educational programming whereby the IAO and the director jointly sponsored educational programs of an advanced nature in the field of orthodontics. These programs are presented by the director, jointly marketed by each entity, with costs of presentation (hotel venue rental, production and material costs bearing both parties' insignia, etc.) being covered by the IAO, with the proceeds of the tuition charge for such programming being shared on a percentage basis by the IAO and the director/presenter. The experience of those programs has yielded financial benefit to the director(s) in the six-figure range. Proposals for other such joint sponsorship programming by directors have been similarly entertained at executive board meetings on a continuing basis. . ."

Notably, the complainant gives no indication that he has ever personally entered into a tuition splitting arrangement with the respondent from which he received compensation, nor has he provided any specific information that would allow the commission to draw the conclusion that this occurred. As with his arguments regarding insurance, the complainant merely suggests that some directors might have received some type of payments from the respondent, or may do so in the future.

³ In a decision affirming the commission's decision, the Wisconsin Supreme Court noted that the absence of wages or tangible benefits indicated the complainant was not an employee but, similarly, did not specify that the receipt of non-compensation benefits would necessarily warrant finding employee status. See, *Masri v. LIRC and Medical College of Wisconsin*, 2014 WI 81, 356 Wis.2d 405, 850 N.W.2d 298.

This is insufficient to raise a genuine issue of fact as to whether the complainant may have received tangible benefits that are akin to compensation.

In addition to the fact that the complainant has not asserted that he received non-wage compensation that was tantamount to a salary for performing services, the commission notes that the type of services he performed for the respondent are outside of a typical employer/employee relationship. In *Chavero v. Local 241, Division of Amalgamated Transit Union*, 787 F.2d 1154 (7th Cir. 1986), cited by the respondent in its response to the complaint, the court stated that “members of boards of directors are not employees for purposes of Title VII coverage under any standards” and that “directors are traditionally employer rather than employee positions.” In fact, the court indicated that even when a director draws a salary, he is not an employee, and that the primary consideration is whether the board members perform traditional employee duties. *Id.*, at 1157. In this case, the complainant explains that his role as a member of the board was to assist in establishing the respondent’s functions, policies, programing and purposes, while the day-to-day management and implementation of those determinations and directions was carried out by the executive director, a compensated employee. Although the tasks described by the complainant may constitute important functions within the organization, they are not what could be considered “traditional employee duties.”

In his petition the complainant also makes an argument that there are public policy and factual reasons why the position of officer of the respondent should be viewed as having a responsibility for ensuring that sexual harassment is vitiated and not condoned or overlooked. The commission does not disagree; holding board members responsible for maintaining an environment free of sexual harassment on the boards on which they serve is certainly a desirable objective. However, the Fair Employment Act only covers situations in which sexual harassment occurs in the context of an employment relationship. Where, as here, no such relationship exists, the Division lacks jurisdiction over the claim. The dismissal of the complaint is, therefore, affirmed.

cc: Attorney Arthur Beck