

State of Wisconsin



Labor and Industry Review Commission

<p>Cynthia Denman, Complainant</p> <p>Wisconsin Water Well Association, Respondent</p> <p>ERD Case No. CR201703222 EEOC Case No. 26G201800838C</p>	<p>Fair Employment Decision</p> <p>Dated and Mailed:</p> <p>September 29, 2023</p> <hr/> <p>denmacy_rsd:103</p>
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The decision of the administrative law judge and the preliminary determination are **set aside**, and the matter is **remanded** to the Division for an investigation and initial determination on the issue of probable cause and for such further proceedings as may be warranted.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural Posture

On November 21, 2017, the complainant filed a complaint with the Equal Rights Division (hereinafter the “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 the “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 (hereinafter “ALJ”). On March 8, 2019, the ALJ issued a decision affirming the preliminary determination.

The complainant filed a petition for commission review of that decision. On November 21, 2019, the commission set aside the ALJ’s decision and remanded to the Division for further proceedings to determine whether the complainant was an employee of the respondent, or an independent contractor. The commission instructed the Division to apply the factors outlined in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979) and adopted in *Moore v. LIRC*, 175 Wis. 2d 591, 499 N.W.2d 289 (Ct. App. 1993).

On remand, the Division held a hearing and issued a decision, affirming the preliminary determination and dismissing the complaint with prejudice on jurisdictional grounds. The complainant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing before the ALJ. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, the Wisconsin Water Well Association (hereinafter “WWWA”) is an association of about 200 licensed well drillers and pump installers in the state of Wisconsin. The WWWA is operated by a board of directors that met monthly until 2016 and have met quarterly since then.
2. Elected officers of the WWWA have decision making authority for the WWWA and attend meetings of the organization but do not carry out its day to day operations.
3. The complainant, Cynthia Denman, is a high school graduate with no post high school education. She received on-the-job training for her work with the WWWA.

4. Ms. Denman started performing work for the WWWA in 1998, while employed by Pat Essie. She provided accounting and other trade association work.

5. In 2004, Ms. Denman left her work with Pat Essie and was asked by the WWWA to perform work for the association directly as its Executive Director. The president of the WWWA told Ms. Denman that the association wanted to pay her without withholding taxes. The complainant created and registered a corporate entity, Brunner & Associates, which was used by the respondent as a vehicle for paying the complainant directly without having to run the payments through payroll.¹ The WWWA did not withhold payroll taxes from these payments.

6. The Respondent entered into a contract with the complainant through Brunner & Associates. The contract described the relationship as, "an employment-at-will agreement" which the respondent could terminate, with or without cause, upon three months' notice, and provided that the agreement would automatically terminate upon the complainant's death or inability to perform the duties required by her employment.

7. At the time of the formation of Brunner & Associates, the Respondent was the only entity for which the complainant provided services. Ms. Denman's contract with the WWWA provided that she could only work for others with approval of the WWWA. Ms. Denman's work for the WWWA was time consuming and, after 2013, did not allow her the time to pursue other work. Initially, Ms. Denman was called the Executive Director but later was called the Executive Secretary of the WWWA.

8. The complainant was required to perform most of the organization's activities and services. Among other things, she handled the accounting, membership, convention, website, continuing education, and administrative services of the association. She sent out the newsletter, set up meeting agendas, attended meetings of the respondent, and provided secretary's reports.

9. The complainant was assigned tasks and instructed regarding the performance of her duties by members of the board. The president of the association spoke with the complainant frequently and directed her work. The president and other board members dictated the work and required the complainant to provide regular reports to the board.

10. The complainant worked in an office set up in her home. The respondent had a dedicated telephone line installed in the complainant's home for the association and required the complainant to answer the phone during normal business hours and to log her calls. The respondent purchased all supplies and equipment necessary for the

¹ The parties referred to Ms. Denman's business organization variously as "Brunner & Associates, Inc." and "Brunner & Associates, LLC." This decision will refer to Ms. Denman's business entity simply as "Brunner & Associates."

job, including a desk, chairs, a computer and monitor, a post office box, and office supplies.

11. The complainant had business cards that identified her with her title with the organization. She used association letterhead for her correspondence. The complainant had an association credit card in her name, and paid bills and wrote checks on behalf of the WWWA, in her own name.

12. The contract between the parties did not address sick or vacation leave. Ms. Denman was already working from home, and so did not need to request to stay home when she was sick. Ms. Denman took vacations while working for WWWA. She was instructed to discuss her vacation times with the board so that it would not interfere with busy times for the WWWA. Ms. Denman typically gave notice a few months in advance of taking vacation.

In 2017, the board of directors for the WWWA decided to post Ms. Denman's position. Ms. Denman did not reapply for the position and the board contracted with someone else instead. After doing so, members of the board picked up the supplies and materials belonging to the WWWA that were in Ms. Denman's possession and disconnected the WWWA phone and internet services that had been provided to Ms. Denman.

13. The complainant performed services for the respondent as an employee, and not as an independent contractor.

Based upon the above Findings of Fact the commission makes the following:

Conclusion of Law

1. The complainant performed services for the respondent as an employee, within the meaning of the Wisconsin Fair Employment Act.

Memorandum Opinion

The issue before the commission is whether the Division has jurisdiction over the complainant's discrimination complaint. The complainant served as the respondent's executive director. She created a corporate entity, Brunner & Associates, through which the respondent paid her for her work. The complainant contends that the respondent contracted with her through Brunner & Associates to avoid paying payroll taxes, although in reality she was an employee, and not an independent contractor. The respondent argues that the complainant was an independent contractor, and not an employee.

The Act provides 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. The Wisconsin 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). In *Moore*, the court adopted a Title VII test articulated in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), which provided the following guidance:

[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 who heard this case on remand held that the complainant was an independent contractor for three reasons: 1) the respondent, as an association, could only act through its board members; 2) because the complainant’s relationship was only with the board she worked with little supervision; and 3) the contract was between the association and Brunner & Associates, which, although probably “created as a fiction for tax purposes” reflected the intent of the parties for the complainant to be an independent contractor. Although the commission had specifically instructed the ALJ to apply the *Spirides* factors, his decision did not do so. The commission will therefore apply those factors here based on the evidence adduced at the hearing.

No single factor is dispositive in determining whether the claimant is an employee within the meaning of the Act. Rather, the commission considers each of the *Spirides* factors in order to understand the economic reality of the relationship. The commission will address each factor separately:

- (1) *Type of occupation and supervision:* The complainant performed administrative work under the direction of the board of directors of the respondent, and specifically with the oversight of the president of the association.
- (2) *The skill required in the particular occupation:* The complainant is a high school graduate with no post high school education.
- (3) *Furnishing of equipment and place of work:* The respondent furnished all supplies and equipment. The complainant worked in her own home, but the office furniture and equipment were supplied by the respondent. The respondent also furnished dedicated telephone and internet services for the complainant's work.
- (4) *Duration of the position:* The position was not limited or temporary. The complainant had a long relationship with the respondent. She worked for the respondent directly from 2004 through 2017.
- (5) *Method of payment:* The complainant was paid monthly, for which she was expected to perform services during regular business hours.
- (6) *The manner in which the work relationship is terminated:* The contract described the relationship as "an employment-at-will agreement" which the respondent could terminate, with or without cause, upon three months' notice, and provided that the agreement would terminate automatically upon the complainant's death or inability to perform the duties required by her employment.
- (7) *Whether annual leave is afforded:* Although the contract did not address the issue of annual leave, the complainant was able to take vacation time by coordinating her leave with the respondent.
- (8) *Whether the work is an integral part of the business of the respondent:* The complainant performed the majority of all activities that the association undertook, in furtherance of the association's mission to provide advocacy and education for its members.
- (9) *Whether the worker accumulates retirement benefits:* The complainant did not accrue retirement benefits through the respondent.

(10) *Whether the respondent pays social security taxes:* The respondent did not withhold any payroll taxes, including social security taxes, for the complainant.

(11) *The intention of the parties:* The parties intended for the complainant to be considered an independent contractor for tax purposes, in order to avoid having to run her payments through payroll.

The vast majority of the *Spirides* factors discussed above weigh in favor of finding the complainant was an employee of the respondent. The reality of the circumstances was that the complainant performed her work in the manner of a traditional employee, particularly with regard to direction and control. She was not simply tasked with running the organization however she saw fit. Rather, she was given directives and instruction from the board members as to when and how specific tasks were to be completed for the organization. Considering the totality of the circumstances, the commission finds that the complainant worked for the respondent as an employee.

Because the commission concludes that the complainant performed her services as an employee, and not as an independent contractor, it finds that the Division does have jurisdiction over this claim. Accordingly, the decision of the ALJ and the preliminary determination are set aside, and the matter is remanded for an investigation and initial determination on the issue of probable cause and for such further proceedings as may be warranted.

cc: Attorney David Schoenberger
Attorney David Turiciano