**State of Wisconsin**

**Labor and Industry Review Commission**

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| **Richard Stohlmeyer**, Complainant<br><br>**Couleecap Thrift Store**, Respondent<br><br>ERD Case No. CR202301644<br>EEOC Case No. 26G202301066 | **Fair Employment Decision**<br><br>**Dated and Mailed:**<br>February 20, 2025<br>stohlri_rsd.doc:164 |

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

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

## Procedural Posture

The complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development alleging that the respondent discriminated against him based upon his age and disability, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An equal rights officer for the Division issued a preliminary determination dismissing the complaint on jurisdictional grounds. The complainant appealed and the matter was assigned to an administrative law judge for the Division, who issued a decision affirming the dismissal of the complaint. The complainant has filed a timely petition for commission review of that decision.

## Memorandum Opinion

The rules applying to discrimination complaints under the Act provide, at Wis. Admin. Code § DWD 218.05(1), that the department shall review every complaint to determine, the following:

> (a) Whether the complainant is protected by the Act,
> (b) Whether the respondent is subject to the Act,
> (c) Whether the complaint states a claim for relief under the Act, and
> (d) Whether the complaint was filed within the time period set forth in the Act, if that issue is raised in writing by the respondent.

Pursuant to the rules, the department will issue a preliminary determination dismissing the complaint if those requirements are not met. Wis. Admin. Code § DWD 218.05(2).

Upon receiving notification of the complaint in this matter, the respondent submitted a letter to the Division in which it contended that the complainant was never an employee or a prospective employee of the respondent's. The respondent maintained, instead, that the complainant was a participant in a training program with an organization called SER Jobs for Progress National, for which the respondent, Couleecap Thrift Store, is a training site. The respondent speculated that the complainant may receive compensation for his services from SER Jobs for Progress National, but stated that the details of that arrangement were not known to it. It contended that, since there was never any employment relationship between the respondent and the complainant, the complaint should be dismissed. On the strength of the representations in that letter, to which the complainant--who is proceeding in this matter pro se--submitted no meaningful rebuttal, the Division issued a preliminary determination dismissing the complaint for lack of jurisdiction. The complainant filed a timely appeal of that determination and the matter was assigned to an administrative law judge.

In his letter of appeal the complainant asserted that he interviewed at the respondent and was given a form to sign that said "volunteer." The complainant averred that he was told he must sign the form or he could not work for the

respondent. The complainant contended, however, that he believed he was in an employer/employee relationship with the respondent. He maintained that the respondent's manager told him what days to work and what time to start, and that she assigned him his job duties. He maintained that the manager evaluated or commented upon his work performance, indicating that "it would be nice if [he] could move faster," and stating that he was clumsy. The complainant's allegations are that he had two work-related accidents while performing services for the respondent and was let go as a result. He contends that, after sustaining a concussion, someone from SER Jobs for Progress National called him and notified him that the respondent did not want him to come back.

After reviewing the complainant's appeal and the earlier submissions from both of the parties, the administrative law judge assigned to the matter issued a decision affirming the dismissal of the complaint on jurisdictional grounds. In her decision the administrative law judge found that the complainant was an unpaid volunteer and, as such, was not covered by the Act. The administrative law judge further stated that the complainant had not provided any evidence that the respondent "offered or extended to him an employment opportunity or that there was an employment relationship with the respondent."

The commission disagrees with that analysis. To begin with, although the complainant may have been required to sign a form indicating he was a volunteer, it is not clear that that characterization of his relationship with the respondent is an accurate one. The parties' depiction of the employment relationship is not determinative, nor is the mere fact that the complainant was not on the respondent's payroll sufficient to render him a "volunteer." The complainant was sent to the respondent by a third party in order to receive job training. He alleges that he received work assignments from the respondent, and it was not shown that the services he performed for the respondent were outside of a typical employer/employee relationship. These facts raise a question as to whether the complainant could truly be considered a volunteer, as that term is generally understood. Further, even if he was a volunteer, that alone does not necessarily require a finding of no jurisdiction.

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. *Maxberry v. Goodwill Industries*, ERD Case No. CR201301901 (LIRC March 19, 2015); *Wilde v. UW-Milwaukee*, ERD Case No. CR201403303 (LIRC Feb. 27, 2015); *Hinkforth v. Milwaukee Area Technical College*, ERD Case No. CR200103936 (LIRC Feb. 23, 2004), *Bledsoe v. Mount Mary College*, ERD Case No. CR200703330 (LIRC April 25, 2008). There have been situations in which the protections of the Act have been extended to cover relationships between complainants and third party employers, such as temporary help agencies, who do not directly employ the complainants but who have the power

to affect the terms of an employment relationship. The commission has consistently construed the coverage of the Act broadly, holding that a "person" other than an employer, labor organization, or licensing agency can violate the Act if it engages in discriminatory conduct which has a sufficient nexus to the denial or restriction of an individual's employment opportunities. *Jackson v. City of Milwaukee*, ERD Case No. 9230848 (LIRC Oct. 28, 1993). In *Lofton v. State of Wisconsin – DOC,* ERD Case No. CR20142159 (LIRC Sept. 27, 2018), involving services performed by a prison inmate for a private employer through a work release program, the commission stated:

> Although it is well settled law that inmates are not considered to be employees of the DOC, even with respect to services they perform for pay for the DOC, *Whaley v. DOC* (96-0157-PC-ER, 3/12/97), it is also well settled law that one need not be an employee of an employer or person in order to bring a claim under the Act. To the contrary, the Act applies to "individuals." *See*, Wis. Stat. §111.322(1), cited above. Consequently, the question is not whether the parties are covered under the Act, but whether the respondent is alleged to have engaged in any conduct that would constitute a violation of the Act.

It is, therefore, clear that the question of whether jurisdiction exists for a claim of discrimination under the Act cannot be determined based solely upon the absence of a paid employer/employee relationship between the parties or the possibility of such a relationship occurring in the future. Rather, the focus must be on whether the actions taken by the respondent that are claimed to be discriminatory affected the complainant's employment or opportunities for future employment.

In this case, the available information is insufficient to permit an answer to that question. The parties agree that the complainant's position with the respondent was intended to provide him with job training, but it is not known whether that training, had it been completed, would have led to future employment opportunities for the complainant. Further, while it is possible that the complainant was compensated for his services performed for the respondent by a third party employing unit, SER Jobs for Progress National, in which case any discrimination against the complainant by the respondent based upon his age or disability could be said to have directly affected his current employment opportunities, this is also not known. The commission therefore believes that a hearing is necessary in order to provide the complainant with an opportunity to establish facts necessary for a finding of jurisdiction. If, after hearing, the administrative law judge concludes that the complainant has failed to establish such facts, the complaint may be dismissed on that basis. If, on the other hand, jurisdiction is found, the matter should be remanded to an equal rights officer to complete an investigation and issue a determination on the question of probable cause.

cc: Attorney Jessica Kirchner