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Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

Memo

Date: June 11, 2012

To: Amy M. Sneirson, Executive Director

From: John P. Gause, Commission Counsel

Re: E11-0651,

Respondent and the Chief Investigator have requested administrative dismissal of this public accommodations and employment discrimination complaint because of Complainant's "volunteer driver" status with Respondent. A complaint may be administratively dismissed by the Executive Director for lack of jurisdiction and a failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, § 2.02(H)(1, 2). For the following reasons, I recommend that the public accommodations portion of the complaint be dismissed but that the employment claims not be dismissed.

The complaint alleges that Complainant was terminated from her 17-year position as a "volunteer driver" for Respondent because of her disability, a hearing impairment; that she was denied a reasonable accommodation for her disability (that Respondent text her assignments to her instead of calling her); and that she was terminated because she requested the reasonable accommodation. Complaint ¶¶ 11-12. As a "volunteer driver," Complainant operated her private vehicle and transported passengers referred to her by Respondent. Respondent's submission, dated January 20, 2012 ("Respondent's

submission") at 1. Although she did not receive a salary, she was paid 40 cents per mile (44 cents per mile for a trip).[1] Complainant's submission, dated April 23, 2012 (hereinafter "Complainant's submission"), at 1, quoting Respondent's website, . In addition, Complainant alleges that she received "training, connection in the community, and equipment to do my job including a phone and charger, among other things." Complaint at ¶ 4. Respondent asserts that the complaint should be dismissed for lack of jurisdiction because the Maine Human Rights Act, 5 M.R.S. §§ 4551, et seq. ("MHRA"), does not cover claims brought by a volunteer. Respondent's submission at 1.

Public Accommodations Claim

The public accommodations provisions of the MHRA provide, in relevant part, as follows:

> It is unlawful public accommodations discrimination, in violation of this Act: . . . For any public accommodation . . . to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . physical or mental disability. . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.
>
> For purposes of this subsection, unlawful discrimination also includes, but is not limited to:
>
> A failure to make reasonable modifications in policies, practices or procedures, when modifications are necessary to afford the goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless, in the case of a private entity, the

[1] Respondent characterizes this payment as a "reimbursement for costs associated with the use and operation of her car while performing volunteer services." Respondent's submission at 4. Complainant describes it as "tax-free remuneration" and "a livelihood." Complaint at ¶¶ 4, 10. It is currently unknown whether the payment was reimbursement (equal to Complainant's driving costs) or remuneration (in excess of those costs). This would depend on factors such as the type of car Complainant drives, its condition, and Complainant's driving habits.

> private entity can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.
>
> 5 M.R.S. § 4592(1, 1(B)).

A "public accommodation" is defined as "a public or private entity that owns, leases, leases to or operates a place of public accommodation." 5 M.R.S. § 4553(8-B). A "place of public accommodation" includes, in part, a facility operated by a private entity whose operations fall within the category of a "social service center establishment." 5 M.R.S. § 4553(8)(K). Here, although neither party has described the nature of Respondent's business, Respondent's website identifies it as a nonprofit that provides a variety of services to low-income and disadvantaged clients, including "Early Childhood Development to Home Repairs, Transportation, Fuel Assistance and Family Planning." *See* . Thus, Respondent is a "public accommodation" by virtue of it operating a "social service center establishment." *See* 5 M.R.S. § 4553(8)(K).

To establish her public accommodations claim, Complainant must show that she was denied the full and equal enjoyment of "the accommodations, advantages, facilities, . . . services or privileges of public accommodation," 5 M.R.S. § 4592(1), or denied a modification that was necessary "to afford the . . . services, facilities, privileges, advantages or accommodations" of the public accommodation. 5 M.R.S. § 4592(1)(B). Providing services to a public accommodation—as opposed to receiving them from it—is not covered by the public accommodations provisions. *See, e.g.,* Commission Counsel Memo 3/31/2010, http://www.maine.gov/mhrc/guidance/memo/20100331_g.pdf.

Complainant cites no cases holding that an individual who provides services on behalf of a public accommodation is covered by the public accommodations provisions of

the MHRA or analogous nondiscrimination laws, and I am aware of none. Complainant asserts, however, that she sought to receive something from—not give something to—Respondent, namely, participation in what she characterizes as its program for volunteer drivers. Complainant's submission at 1. For support, she cites the following notice on Respondent's website:

> Volunteer Drivers Needed
> The is looking for Volunteer Drivers to transport children and adults to medical visits, children's services and other programs throughout Maine.
> If you have a desire to help others, a reliable vehicle, and are 21 years of age or older, you can receive a tax-free mileage reimbursement of 40 cents per mile for your service (44 cents per mile for a trip). Applicants must pass background checks through the , , and the .
> Together we can make a difference.

There is nothing about this notice, however, that suggests that Respondent is offering a program for the benefit of drivers. Rather, the advertisement states that the drivers "transport children and adults" and "help others." Although benefits may inure to the drivers, these are not the purpose behind the program. Rather, additional information on Respondent's website describes the transportation program as a service offered to its clients who need transportation. *See, e.g.*, http://www.

(has made a firm commitment to providing the citizens of Kennebec and Somerset Counties with safe, dependable transportation services. has established ongoing working relationships with communities and area social service agencies to offer a variety of transportation services to local citizens.").

Because Complainant sought to provide a service for others on behalf of Respondent, rather than receive a service from Respondent, she was not denied the

accommodations, advantages, facilities, services, or privileges of a public accommodation. Accordingly, that aspect of the complaint should be administratively dismissed for failure to substantiate.

Employment Claims

The employment claims fare differently. At issue is whether Complainant was an "employee" within the meaning of the MHRA notwithstanding the fact that the only payment she received was 40 or 44 cents per mile, which was either reimbursement or remuneration. Respondent argues that Complainant was a volunteer notwithstanding this payment and that volunteers are not "employees" under the MHRA. Respondent's submission at 3-4.

The MHRA prohibits discrimination against an "employee," in relevant part, as follows: "It is unlawful employment discrimination, in violation of this Act, . . . [f]or any employer [because of physical or mental disability] to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment." 5 M.R.S. § 4572(1)(A). Discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee. . . ." 5 M.R.S. § 4553(2)(E). The MHRA also makes it "unlawful for a person to coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of the rights granted or protected by this Act or because that individual has exercised or enjoyed, or has aided or encouraged another individual in the exercise or enjoyment of, those rights." 5 M.R.S. § 4633(2).

The MHRA does not expressly address whether an individual must receive any payment at all in order to be an "employee." It defines "employee," in relevant part, simply as "an individual employed by an employer." 5 M.R.S. § 4553(3). *Compare* 26 M.R.S. § 832(1) (Whistleblowers' Protection Act) ("[e]mployee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied") (emphasis added). Courts recognize that this terminology "is completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 1348 (1992). When a statute does not define a term that has a settled meaning at common law, the common-law definition should be applied. *See Tremblay v. Murphy*, 111 Me. 38, 53-54 (1913) (currently published sub nom. *Pelletier v. O'Connell*, 88 A. 55, 63) (holding that when a statute is silent, common law principles must be applied); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003) ("congressional silence often reflects an expectation that courts look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law"). *Cf. Lopez v. Massachusetts*, 588 F.3d 69, 83 (1st Cir. 2009) ("A series of Supreme Court decisions have established that when a statute contains the term "employee" but does not define it, a court must presume that Congress has incorporated traditional agency law principles for identifying 'master-servant relationships.'").

In Maine, the settled common law does not require an individual to receive any compensation in order to be an "employee." *See Lunt v. Fidelity & Cas. Co. of New York*, 28 A.2d 736, 739-740 (Me. 1942) ("a sufficient contract of employment is created by a mutual agreement that one is to labor in the service of another, and that the question

of compensation is not material"); *Fournier v. Rochambeau Club*, 611 A.2d 578, 579 (Me. 1992) ("That Fournier was not paid for his services does not preclude the existence of an employment relationship, although a contrary rule applies for purposes of workers' compensation.") (citations omitted). *Cf.* 30 C.J.S. *Employer—Employee Relationship* § 10 (2012) ("The fact of compensation and the manner of paying it are factors to be considered in determining whether an employer-employee relationship exists, but such considerations are not conclusive."). Accordingly, regardless of whether Complainant's mileage payments constitute compensation, Complainant may be found to be an "employee" for purposes of the MHRA.[2]

This interpretation is different from the position taken by the Equal Employment Opportunity Commission ("EEOC") and federal courts, which require the existence of remuneration in order for a person to be an "employee" under substantively identical definitions of "employee" in federal statutes.[3] *See, e.g.,* EEOC Compliance Manual § 2-III(a)(1)(c) ("Volunteers usually are not protected 'employees.' However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if the benefits are provided by a third party. The benefits constitute 'significant remuneration' rather than merely the 'inconsequential incidents of an otherwise gratuitous relationship.'")(footnotes and citations omitted); *Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990) (interpreting Title VII of the Civil Rights Act of 1964) (relying on a dictionary definition

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[2] The term for an employee who does not receive compensation is a "gratuitous employee." *See Fournier v. Rochambeau Club*, 611 A.2d at 579.

[3] While these interpretations provide guidance in interpreting the MHRA, they are not controlling. *See, e.g., Jackson v. State*, 544 A.2d 291, 296 n.7 (Me. 1988).

of "employee" because "the legislative history explicitly provides that the dictionary definition should govern the interpretation of 'employer' under Title VII"); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 295, 105 S.Ct. 1953, 1958 (1985) (interpreting Fair Labor Standards Act).

These interpretations are not persuasive guidance here, however, in light of the settled Maine common-law meaning of employee, which does not require compensation. In addition, the federal interpretations can be traced to the Title VII legislative history—inapplicable to the MHRA—which "explicitly provides that the dictionary definition should govern the interpretation of 'employer' under Title VII." *Graves v. Women's Professional Rodeo Ass'n, Inc.*, 907 F.2d at 73. Moreover, decisions interpreting the definition of "employee" in the Fair Labor Standards Act to require compensation should not be relied upon in this context because of the different purposes behind the FLSA and the MHRA. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 152, 67 S.Ct. 639, 641 (1947) (FLSA) ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages."); *Percy v. Allen*, 449 A.2d 337, 342 (Me. 1982) ("To the extent that there exists an identity of purpose and objectives as between the Maine and federal provisions, reference to the latter in construing the former is entirely appropriate."). It would be entirely consistent with the purposes behind the MHRA, by contrast, to prevent employment discrimination against a gratuitous employee. *See* 5 M.R.S. § 4552 ("[t]o protect the public health, safety and welfare").

Because Complainant may be considered an “employee” regardless of whether she received any compensation, the employment discrimination aspect of the complaint should not be administratively dismissed on this basis.