State of Wisconsin
Department of Workforce Development
Equal Rights Division

Wisconsin Fair Employment Act

Chapter DWD 218 of the Wisconsin Administrative Code, which implements the Fair Employment Act, is also included.

Chapter 111, Employment Relations
Subchapter II, Fair Employment

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Subchapter II

Fair Employment

Cross-reference: See, also, ch. DWD 218, Wis. Adm. Code.

111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters, substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies, and licensing agencies that deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters, deprive those individuals of the earnings that are necessary to maintain a just and decent standard of living.

(2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters, and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family, and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the individual qualifications of the employee or applicant rather than upon a particular class to which the individual may belong.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

(4) The practice of requiring employees or prospective employees to submit to a test administered by means of a lie detector, as defined in s. 111.37 (1) (b), is unfair, the practice of requesting employees and prospective employees to submit to such a test without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employees and prospective employees.

(5) The legislature finds that the prohibition of discrimination on the basis of creed under s. 111.337 is a matter of

statewide concern, requiring uniform enforcement at state, county and municipal levels.

History: 1977 c. 125; 1979 c. 319; 1981 c. 112, 334, 391; 1987 a. 63; 1991 a. 289, 310, 315; 1997 a. 112; 2007 a. 159; 2009 a. 290.

The department is not limited to finding sex discrimination only when a 14th amendment equal protection violation can also be found. Wisconsin Telephone Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

The Wisconsin fair employment act (WEFA), subch. II, ch.111, is more direct and positive in prohibiting sex discrimination in employment than is the basic constitutional guarantee of equal protection of the laws; enforcement of the law is not limited by the "rational basis" or "reasonableness" tests employed in 14th amendment cases. Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

Section 118.20 is not the exclusive remedy of a wronged teacher; it is supplementary to the remedy under WFEA. The general provisions of s. 893.80 are superseded by the specific authority of the act. Kurtz v. City of Waukesha, 91 Wis. 2d 103, 280 N.W.2d 757 (1979).

An employee who was not handicapped, but perceived by the employer to be so, was entitled to protection under WEFA. Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

WFEA provides the exclusive remedy for retaliatory discrimination. Bourque v. Wausau Hospital Center, 145 Wis. 2d 589, 427 N.W.2d 433 (Ct. App. 1988).

WFEA does not apply to national guard personnel decisions; federal law prevents the state from regulating personnel criteria of the national guard. Hazelton v. Personnel Commission, 178 Wis. 2d 776, 505 N.W.2d 793 (Ct. App. 1993).

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under WFEA. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95-2490.

This act protects all employees, including prospective and de facto employees. 67 Atty. Gen. 169.

State courts have concurrent jurisdiction over federal Title VII civil rights actions. Yellow Freight System v. Donnelly, 494 U.S. 820, 108 L. Ed. 2d 834 (1990).

The federal Employee Retirement Income Security Act (ERISA) does not preempt state fair employment laws prohibiting discriminatory exclusion of pregnancy benefits in disability plans. Bucyrus-Erie Company v. DILHR, 599 F.2d 205 (1979).

No private right of action exists under this subchapter. Busse v. Gelco Exp. Corp., 678 F. Supp. 1398 (E. D. Wis. 1988).

The Wisconsin fair employment act and the 1982 amendments. Rice. WBB Aug. 1982.

Wisconsin's fair employment act: coverage, procedures, substance, remedies. 1975 WLR 696.

Perceived handicap under WFEA. 1988 WLR 639 (1988).

111.32 Definitions. When used in this subchapter:

(1) "Arrest record" includes, but is not limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

(2) "Commission" means the labor and industry review commission.

(2r) "Constituent group" includes a civic association, community group, social club, fraternal society, mutual benefit alliance, or labor organization.

(3) "Conviction record" includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.

(3m) "Creed" means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are sincerely held with the strength of traditional religious views.

(4) “Department” means the department of workforce development.

(5) “Employee” does not include any individual employed by his or her parents, spouse or child.

(6) (a) “Employer” means the state and each agency of the state and, except as provided in par. (b), any other person engaging in any activity, enterprise or business employing at least one individual. In this subsection, “agency” means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(b) “Employer” does not include a social club or fraternal society under ch. 188 with respect to a particular job for which the club or society seeks to employ or employs a member, if the particular job is advertised only within the membership.

(7) “Employment agency” means any person, including this state, who regularly undertakes to procure employees or opportunities for employment for any other person.

(7m) “Genetic testing” means a test of a person’s genes, gene products or chromosomes, for abnormalities or deficiencies, including carrier status, that are linked to physical or mental disorders or impairments, or that indicate a susceptibility to illness, disease, impairment or other disorders, whether physical or mental, or that demonstrate genetic or chromosomal damage due to environmental factors.

(8) “Individual with a disability” means an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;

(b) Has a record of such an impairment; or

(c) Is perceived as having such an impairment.

(9) “Labor organization” means:

(a) Any organization, agency or employee representation committee, group, association or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment; or

(b) Any conference, general committee, joint or system board or joint council which is subordinate to a national or international committee, group, association or plan under par. (a).

(10) “License” means the whole or any part of any permit, certificate, approval, registration, charter or similar form of permission required by a state or local unit of government for the undertaking, practice or continuation of any occupation or profession.

(11) “Licensing agency” means any board, commission, committee, department, examining board, affiliated credentialing board or officer, except a judicial officer, in the state or any city, village, town, county or local government authorized to grant, deny, renew, revoke, suspend, annul, withdraw or amend any license.

(12) “Marital status” means the status of being married, single, divorced, separated or widowed.

(12g) “Military service” means service in the U.S. armed forces, the state defense force, the national guard of

any state, or any other reserve component of the U.S. armed forces.

(12j) "Political matters" means political party affiliation, a political campaign, an attempt to influence legislation, or the decision to join or not to join, or to support or not to support, any lawful political group, constituent group, or political or constituent group activity.

(12m) "Religious association" means an organization, whether or not organized under ch. 187, which operates under a creed.

(12p) "Religious matters" means religious affiliation or the decision to join or not to join, or to support or not to support, any bona fide religious association.

(13) "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Sexual harassment" includes conduct directed by a person at another person of the same or opposite gender. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.

(13m) "Sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.

(13r) "Unfair genetic testing" means any test or testing procedure that violates s. 111.372.

(14) "Unfair honesty testing" means any test or testing procedure which violates s. 111.37.

History: 1975 c. 31, 94, 275, 421; 1977 c. 29, 125, 196, 286; 1979 c. 319, 357; 1981 c. 96 s. 67; 1981 c. 112, 334, 391; 1983 a. 36; 1987 a. 149; 1991 a. 117; 1993 a. 107, 427; 1995 a. 27 s. 9130 (4); 1997 a. 3, 112, 283; 2007 a. 159; 2009 a. 290.

The summary discharge, after 2 weeks of satisfactory employment, of a person with a history of asthma violated the fair employment act in that it constituted a discriminatory practice against the claimant based on handicap. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

Singling out disabilities associated with pregnancy for less favorable treatment in a benefit plan designed to relieve the economic burden of physical incapacity constituted discrimination on the basis of sex, as pregnancy is undisputedly sex-linked. Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

"Creed," as used in sub. (5) (a) [now sub. (3m)], means a system of religious beliefs, not political beliefs. Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis. 2d 207, 249 N.W.2d 547 (1977).

Wisconsin law forbidding pregnancy benefits discrimination was not preempted when an employer negotiated, under the National Labor Relations Act, a welfare benefit plan, under the Employee Retirement Income Security Act. Goodyear Tire & Rubber Co. v. DILHR, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978).

The Fair Employment Act (WFEA), subch. II of ch. 111, was not preempted by federal legislation. Sub. (5) (f), which excepts persons who are physically unable to perform a job from protection, includes a "future hazards" exception for employees who because of their physical condition will be a hazard to themselves or others. Chicago & North Western Railroad v. LIRC, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

The inclusion of pregnancy-related benefits within a disability benefit plan does not violate the federal Equal Pay Act. Kimberly-Clark Corp. v. LIRC, 95 Wis. 2d 558, 291 N.W.2d 584 (Ct. App. 1980).

An individual may be found to be handicapped under WFEA although no actual impairment is found. It is sufficient to find that the employer perceived that the individual is handicapped; discrimination may be found when the perceived handicap is the sole basis of a hiring decision. La Crosse Police Commission v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987).

Common-law torts recognized before the adoption of WFEA, if properly pled, are not barred by the act although the complained of act may fit a definition of discriminatory behavior under WFEA. A battery claim was not precluded by WFEA, although the sub. (13) definition of "sexual harassment" is broad enough to include battery, when the tort was pled as an unlawful touching, not a discriminatory act. Becker v. Automatic Garage Door Co. 156 Wis. 2d 409, 456 N.W.2d 888 (Ct. App. 1990).

The standard to determine whether a person is an "employee" under Title VII of the Civil Rights Act is applicable to WFEA cases. A determination of "employee" status in a Title VII action precludes redetermination in a WFEA action. Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 288 (Ct. App. 1993).

Barring spouses who are both public employees from each electing family medical coverage is excepted from the prohibition against discrimination based on marital status under ch. 111. Motola v. LIRC, 219 Wis. 2d 588, 580 N.W.2d 297 (1998), 97-0896.

Unwelcome physical contact of a sexual nature and unwelcome verbal conduct or physical conduct of a sexual nature may constitute sexual harassment, even when they do not create a hostile work environment. Jim Walter Color Separations v. LIRC, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999), 98-2360.

A person claiming a disability under sub. (8) must demonstrate an actual or perceived impairment that makes, or is perceived as making, achievement unusually difficult or limits the capacity to work. An impairment is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or condition. "Achievement" is not as to a particular job, but as to a substantial limitation on life's normal functions or a major life activity. "Limits the capacity to work" refers to the specific job at issue. Hutchinson Technology, Inc. v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343, 02-3328.

LIRC properly interpreted sub. (8) to require a claimant to demonstrate a permanent impairment. To demonstrate that a disability exists, the complainant must present competent evidence of a medical diagnosis regarding the alleged impairment. An employer's decision to grant requests for light-duty work, rather than terminating employment for refusing to perform regular job duties, is not proof of a perceived disability under sub. (8) (c). Erickson v. Labor and Industry Review Commission, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398, 04-3237.

Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, does not hold that a diagnosis of asthma alone establishes a disability. Doepke-Kline v. Labor and Industry Review Commission, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605, 05-0106.

A licensing agency may request information from an applicant regarding conviction records under sub. (5) (h) [now sub. (3)]. 67 Atty. Gen. 327.

Expanding Employer Liability for Sexual Harassment Under the Wisconsin Fair Employment Act: *Jim Walter Color Separations v. Labor & Industry Review Commission*. Edgar. 2000 WLR 885.

111.321 Prohibited bases of discrimination. Subject to ss. 111.33 to 111.365, no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.

History: 1981 c. 334; 1987 a. 63; 1991 a. 310; 1997 a. 112; 2007 a. 159; 2009 a. 290.

NOTE: See 111.36 for definition of sex discrimination.

The denial of a homosexual employee's request for family coverage for herself and her companion did not violate equal protection or the s. 111.321 prohibition of discrimination on the basis of marital status, sexual orientation, or gender. Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

A bargaining agreement requiring married employees with spouses covered by comparable employer-provided health insurance to elect coverage under one policy or the other violated this section. Braatz v. LIRC, 174 Wis. 2d 286, 496 N.W.2d 597 (1993).

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under the fair employment act, subch. II, ch.111. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95−2490.

A *prima facie* case of discrimination triggers a burden of production against an employer, but unless the employer remains silent in the face of the prima facie case, the complainant continues to bear the burden of proof on the ultimate issue of discrimination.

Currie v. DILHR, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997), 96-1720.

Unwelcome physical contact of a sexual nature and unwelcome verbal conduct or physical conduct of a sexual nature may constitute sexual harassment, even when they do not create a hostile work environment. Jim Walter Color Separations v. LIRC, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999), 98-2360.

It was reasonable for LIRC to interpret the prohibition against marital status discrimination as protecting the status of being married in general rather than the status of being married to a particular person. Bammert v. LIRC, 2000 WI App 28, 232 Wis. 2d 365, 606 N.W.2d 620, 99-1271.

The department of workforce development has statutory authority to receive and investigate a firefighter's employment discrimination claim that is tied directly to the charges sustained and disciplinary sanctions imposed by a police and fire commission under s. 62.13 (5), to which claim preclusion is no bar. City of Madison v. DWD, 2002 WI App 199, 257 Wis. 2d 348, 651 N.W.2d 292, 01-1910.

The police and fire commission has exclusive statutory authority under s. 62.13 (5) to review disciplinary actions against firefighters. Any claim that a disciplinary termination is discriminatory under ch.111 must be raised before the PFC. DWD may not take jurisdiction over a ch. 111 complaint arising out of a decision of a PFC to terminate a firefighter. City of Madison v. DWD, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584, 01-1910.

A person other than an employer, labor organization, or licensing agency can violate subch. II of ch. 111, if it engages in discriminatory conduct that has a sufficient nexus with the denial or restriction of some individual's employment opportunity. A trucking company who leased its trucks and drivers from another company that hired the drivers and had the power to reject drivers approved by the leasing company, was an "other person" subject to this section. Szleszinski v. Labor & Industry Review Commission, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345, 04-3033. Affirmed on other grounds. 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111, 04-3033.

Licensing boards do not have authority to enact general regulations that would allow them to suspend, deny, or revoke the license of a person who has a communicable disease. Licensing boards do have authority on a case-by-case basis to suspend, deny, or revoke the license of a person who poses a direct threat to the health and safety of other persons or who is unable to perform duties of the licensed activity. 77 Atty. Gen. 223.

A person suffering from a contagious disease may be handicapped under the federal Rehabilitation Act of 1973. School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records. Hruz. 85 MLR 779 (2002).

Some "Hardship": Defending a Disability Discrimination Suit Under the Wisconsin Fair Employment Act. Hansch. 89 MLR 821 (2005).

Expanding Employer Liability for Sexual Harassment Under the Wisconsin Fair Employment Act: *Jim Walter Color Separations v. Labor & Industry Review Commission*. Edgar. 2000 WLR 885.

Expanding the Notion of "Equal Coverage": The Wisconsin Fair Employment Act Requires Contraceptive Coverage for All Employer-Sponsored Prescription Drug Plans. Mason. 2005 WLR 913. Race, Crime, and Getting a Job. Pager. 2005 WLR 617.

Family Responsibility Discrimination: Making Room at Work for Family Demands. Finerty. Wis. Law. Nov. 2007.

111.322 Discriminatory actions prohibited. Subject to ss. 111.33 to 111.365, it is an act of employment discrimination to do any of the following:

(1) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

(2m) To discharge or otherwise discriminate against any individual because of any of the following:

(a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.34, 103.455, 103.50, 104.12, 106.04, 109.03, 109.07, 109.075, or 146.997 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.34, 103.455, 103.50, 104.12, 106.04, 109.03, 109.07, 109.075, or 146.997 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(bm) The individual files a complaint or attempts to enforce a right under s. 49.197 (6) (d) or 49.845 (4) (d) or testifies or assists in any action or proceeding under s. 49.197 (6) (d) or 49.845 (4) (d).

(c) The individual files a complaint or attempts to enforce a right under s. 66.0903, 66.0904, 103.49, or 229.8275 or testifies or assists in any action or proceeding under s. 66.0903, 66.0904, 103.49, or 229.8275.

(d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

History: 1981 c. 334; 1989 a. 228, 359; 1997 a. 237; 1999 a. 150 s. 672; 1999 a. 167, 176; 2009 a. 3, 28, 76, 182, 290.

Actions under subs. (1) and (2) do not involve wholly different elements of proof. Sub. (1) involves actual discrimination; the violation of sub. (2) is not in adopting a discriminatory policy, but rather the publication of it. The remaining elements are the same for both subsections. Sub. (2) is not limited to advertising for employees, it also applies to the printing of policies that affect existing employees. Racine Unified School District v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

An unlawful practice occurs when an impermissible motivating factor enters into an employment decision, but if the employer can demonstrate that it would have taken the same action in the absence of the impermissible factor, the complainant may not be awarded monetary damages or reinstatement. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

The state is prevented from enforcing discrimination laws against religious associations when the employment at issue serves a ministerial or ecclesiastical function. While it must be given considerable weight, a religious association's designation of a position as ministerial or ecclesiastical does not control its status. Jocz v. LIRC, 196 Wis. 2d 273, 538 N.W.2d 588 (Ct. App. 1995), 93-3042.

The exclusive remedy provision in s. 102.03 (2) does not bar a complainant whose claim is covered by the workers compensation act from pursuing an employment discrimination claim under the fair employment act, subch. II, of ch. 111. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), 95-2490.

A *prima facie* case of discrimination triggers a burden of production against an employer, but unless the employer remains silent in the face of the *prima facie* case, the complainant continues to bear the burden of proof on the ultimate issue of discrimination. Currie v. DILHR, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997), 96-1720.

A *prima facie* case for a violation of this section requires that the complainant: 1) was a member of a protected class; 2) was discharged; 3) was qualified for the position; and 4) was either replaced by someone not in the protected class or that others not in the protected class were treated more favorably. Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998), 97-1606.

The free exercise clause of the 1st Amendment and the freedom of conscience clauses in Article I, Section 18, of the Wisconsin constitution preclude employment discrimination claims under ss. 111.31 to 111.395 for employees whose positions are important and closely linked to the religious mission of a religious organization. Coulee Catholic Schools v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868, 07-0496.

Some "Hardship": Defending a Disability Discrimination Suit Under the Wisconsin Fair Employment Act. Hansch. 89 MLR 821 (2005).

Discrimination in advertising. Abramson, WBB March, 1985.

Employer Liability for Employment References. Mac Kelly. Wis. Law. May 2008.

2009 Wisconsin Act 20: Changes to Wisconsin's Fair Employment Law. Karls-Ruplinger. Wis. Law. Sept. 2009.

111.325 Unlawful to discriminate. It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employee or any applicant for employment or licensing.

111.327 Construction contractors. Any employer described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures who willfully and with intent to evade any requirement of this subchapter misclassifies or attempts to misclassify an individual who is an employee of the employer as a nonemployee shall be fined $25,000 for each violation. The department shall promulgate rules defining what constitutes a willful misclassification of an employee as a nonemployee for purposes of this section and of ss. 102.07 (8) (d) and 108.24 (2m).

History: 2009 a. 28, 288.

111.33 Age; exceptions and special cases. (1) The prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over.

(2) Notwithstanding sub. (1) and s. 111.322, it is not employment discrimination because of age to do any of the following:

(a) To terminate the employment of any employee physically or otherwise unable to perform his or her duties.

(b) To implement the provisions of any retirement plan or system of any employer if the retirement plan or system is not a subterfuge to evade the purposes of this subchapter. No plan or system may excuse the failure to hire, or require or permit the involuntary retirement of, any individual under sub. (1) because of that individual's age.

(d) To apply varying insurance coverage according to an employee's age.

(e) To exercise an age distinction with respect to hiring an individual to a position in which the knowledge and experience to be gained is required for future advancement to a managerial or executive position.

(f) To exercise an age distinction with respect to employment in which the employee is exposed to physical danger or hazard, including, without limitation because of enumeration, certain employment in law enforcement or fire fighting.

(g) To exercise an age distinction under s. 343.12 (2) (a) and (3).

History: 1981 c. 334; 1983 a. 391, 538.

Sub. (2) (f) exempts the hiring of fire fighters from being the subject of age discrimination suits. A fire department need not show that it openly and consistently discriminated on the basis of age to be exempt under sub. (2) (f). Johnson v. LIRC, 200 Wis. 2d 715, 547 N.W.2d 783 (Ct. App. 1996), 95-2346.

An employee is physically unable to perform a job under sub. (2) if that employee is performing the job with a physical accommodation. Harrison v. LIRC, 211 Wis. 2d 681, 565 N.W.2d 572 (Ct. App. 1997), 96-1795.

A city charged under the federal Age Discrimination in Employment Act had the burden of establishing that a mandatory retirement age of 55 for law enforcement personnel was a bona fide occupational qualification. Equal Employment Opportunity Commission v. City of Janesville, 630 F.2d 1254 (1980).

The federal Employment Retirement Income Security Act preempts sub. (2) (b) to the extent that it applies to employee benefit plans covered by it. Waukesha Engine Division v. DILHR, 619 F. Supp. 1310 (1985).

111.335 Arrest or conviction record; exceptions and special cases. (1) (a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not

employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; or

2. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

(cg) 1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26 (6) (b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

3. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under s. 440.26 or as an employee specified in s. 440.26 (5) (b) if the person has been convicted of a felony and has not been pardoned for that felony.

(cm) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

(cs) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).

2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).

3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).

4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).

5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a

law of another state that is substantially similar to s. 961.65.

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.

(cx) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensure, any individual who has been convicted of any offense under s. 38.50 (13) (c).

NOTE: Par. (cv) is amended eff. 7-1-13 by 2011 Wis. Act 32 to read:

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.

(cx) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensure, any individual who has been convicted of any offense under s. 38.50 (13) (c).

(d) 1. In this paragraph, "educational agency" means a school district, a cooperative educational service agency, a county children with disabilities education board, a state prison under s. 302.01, a juvenile correctional care center for children and youth, as defined in s. 938.02 (15g), the Wisconsin Center for the Blind and Visually Impaired, the Wisconsin Educational Services Program for the Deaf and Hard of Hearing, the Mendota Mental Health Institute, a state center for the developmentally disabled, a private school, a charter school, a private, nonprofit, nonsectarian agency under contract with a school board under s. 118.153 (3) (c), or a nonsectarian private school or agency under contract with the board of school directors in a 1st class city under s. 119.235 (1).

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record for an educational agency to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony.

History: 1981 c. 334; 1991 a. 216; 1993 a. 98; 1995 a. 448, 461; 1997 a. 112; 2001 a. 16; 2003 a. 33; 2005 a. 14; 2009 a. 300; 2011 a. 32, 83.

A rule adopted under s. 165.85 properly barred a nonpardoned felon from holding police job. Law Enforcement Standards Board v. Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981).

A conviction for armed robbery in and of itself constituted circumstances substantially elated to a school bus driver's licensure. Gibson v. Transportation Commission, 06 Wis. 2d 22, 315 N.W.2d 346 (1982).

An employer's inquiry is limited to general facts in determining whether the "circumstances of the offense" relate to the job. It is not the details of the criminal activity hat are important, but rather the circumstances that foster criminal activity, such as opportunity for criminal behavior, reaction to responsibility, and character traits of the person. County of Milwaukee v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

There is no requirement that an employer take affirmative steps to accommodate individuals convicted of felonies. Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998), 97-1606.

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to prohibitions against arrest record and conviction record discrimination contained in the WFEA. 79 Atty. Gen. 89.

Race, Crime, and Getting a Job. Pager. 2005 WLR 617.

Discrimination in employment on the basis of arrest or conviction record. Mukamel. WBB Sept. 1983.

111.337 Creed; exceptions and special cases. (1) Employment discrimination because of creed includes, but is not limited to, refusing to reasonably accommodate an employee's or prospective employee's religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program, enterprise or business.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of creed:

(a) For a religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by such a religious association to give preference to an applicant or employee who is a

member of the same or a similar religious denomination.

(am) For a religious association not organized for private profit or an organization or corporation which is primarily owned or controlled by such a religious association to give preference to an applicant or employee who adheres to the religious association's creed, if the job description demonstrates that the position is clearly related to the religious teachings and beliefs of the religious association.

(b) For a fraternal as defined in s. 614.01 (1) (a) to give preference to an employee or applicant who is a member or is eligible for membership in the fraternal, with respect to hiring to or promotion to the position of officer, administrator or salesperson.

(3) No county, city, village or town may adopt any provision concerning employment discrimination because of creed that prohibits activity allowed under this section.

History: 1981 c. 334; 1983 a. 189 s. 329 (25); 1987 a. 149. Sub. (2) does not allow religious organizations to engage in prohibited forms of discrimination. Sacred Heart School Board v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990).

A union violated Title VII of the federal Civil Rights Act by causing an employer to fire an employee because of the employee's refusal, on religious grounds, to pay union dues. Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F. 2d 445 (1981).

The supreme court redefines employer's role in religious accommodation. Soeka. WBB July 1987.

111.34 Disability; exceptions and special cases. (1) Employment discrimination because of disability includes, but is not limited to:

(a) Contributing a lesser amount to the fringe benefits, including life or disability insurance coverage, of any employee because of the employee's disability; or

(b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

(2) (a) Notwithstanding s. 111.322, it is not employment discrimination because of disability to refuse to hire, employ, admit or license any individual, to bar or terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment if the disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure.

(b) In evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a particular class of individuals with disabilities.

(c) If the employment, membership or licensure involves a special duty of care for the safety of the general public, including but not limited to employment with a common carrier, this special duty of care may be considered in evaluating whether the employee or applicant can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of individuals with disabilities in general or a

particular class of individuals with disabilities.

History: 1981 c. 334; 1997 a. 112.

The utilization of federal regulations as a hiring standard, although not applicable to the employing taxi company, demonstrated a rational relationship to the safety obligations imposed on the employer, and its use was not the result of an arbitrary belief lacking in objective reason or rationale. Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

An employee handicapped by alcoholism was properly discharged under s. 111.32 (5) (f), 1973 Stats., (a predecessor to this section) for inability to efficiently perform job duties. Squires v. LIRC, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980).

Small stature is not a handicap. American Motors Corp. v. LIRC, 114 Wis. 2d 288, 338 N.W.2d 518 (Ct. App. 1983); aff'd, 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

Physical standards for school bus operators established under s. 343.12 (2) (g) are not exempt from the requirements of sub. (2) (b). Bothum v. Department of Transportation, 134 Wis. 2d 378, 396 N.W.2d 785 (Ct. App. 1986).

The duty to reasonably accommodate under sub. (1) (b) is to be broadly interpreted and may involve the transfer of an individual from one job to another. What is reasonable will depend on the facts of the case. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 270 (Ct. App. 1986).

To avail itself of the defense under sub. (2) that an ostensibly safety-based employment restriction is job-related, an employer bears the burden of proving to a reasonable probability that the restriction is necessary to prevent harm to the employee or others. Racine Unified School District v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

Temporary forbearance of work rules while determining whether an employee's medical problem is treatable may be a reasonable accommodation under sub. (1) (b). The purpose of reasonable accommodation is to enable employees to adequately undertake job-related responsibilities. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), 97-1253. See also Stoughton Trailers, Inc. v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477, 04-1550.

Whether an employee's mental illness caused him to react angrily and commit the act of insubordination that led to the termination of his employment was sufficiently complex and technical that expert testimony was required. Wal-Mart Stores, Inc. v. LIRC, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633, 99-2632.

A complainant must show that he or she is handicapped and that the employer took one of the prohibited actions based on that handicap. The employer then has a burden of proving a defense. Sub. (1) (b) does not require an employer to make a reasonable accommodation if the accommodation will impose a hardship on the employer, but if the employer is not able to demonstrate that the accommodation would pose a hardship there is a violation. Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651, 02-0815.

A reasonable accommodation is not limited to that which would allow the employee to perform adequately all of his or her job duties. A change in job duties may be a reasonable accommodation in a given circumstance. Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651, 02-0815.

An interstate commercial driver need not seek a determination of medical qualification from the federal department of transportation (DOT) prior to filing a disability discrimination claim under this chapter. When medical and physical qualifications to be an interstate driver are material to a claim, and a dispute arises concerning those qualifications that cannot be resolved by facial application of DOT regulations, the dispute should be resolved by the DOT under its dispute resolution procedure. The employer must seek a determination of medical and physical qualification from the DOT if the employer intends to offer a defense that the driver was not qualified for medical reasons. Szleszinski v. Labor & Industry Review Commission, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111, 04-3033.

A person suffering from a contagious disease may be handicapped under the federal Rehabilitation Act of 1973. School Board of Nassau County v. Arline, 480 U.S. 273 (1987).

Crystal Lake Cheese Factory v. Labor and Industry Review Commission: A Reasonable Turn Under the Wisconsin Fair Employment Act. Haas. 2004 WLR 1535.

Hidden handicaps: Protection of alcoholics, drug addicts, and the mentally ill against employment discrimination under the rehabilitation act of 1973 and the Wisconsin fair employment act. 1983 WLR 725.

Disability Law in Wisconsin Workplaces. Vergeront & Cochrane. Wis. Law. Oct. 2004.

ADA and WFEA: Differing Disability Protections. Backer & Mishlove. Wis. Law. Oct. 2004.

111.345 Marital status; exceptions and special cases. Notwithstanding s. 111.322, it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being directly supervised by his or her spouse.

History: 1981 c. 334.

A work rule intended to limit extramarital affairs among coemployees was not discrimination because of marital status. Federated Rural Electric Insurance v. Kessler, 131 Wis. 2d 189, 388 N.W.2d 553 (1986).

111.35 Use or nonuse of lawful products; exceptions and special cases. (1) (a) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours for a nonprofit corporation that, as one of its primary purposes or objectives, discourages the general public from using a lawful product to refuse to hire or employ an individual, to suspend or terminate the employment of an individual, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment, because that individual uses off the employer's premises during nonworking hours a lawful product that the nonprofit corporation discourages the general public from using.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of nonuse of a lawful product off the employer's premises during nonworking hours for a nonprofit corporation that, as one of its primary purposes or objectives, encourages the general public to use a lawful product to refuse to hire or employ an individual, to suspend or terminate the employment of an individual, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment, because that individual does not use off the employer's premises during nonworking hours a lawful product that the nonprofit corporation encourages the general public to use.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of use or nonuse of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to refuse to hire, employ, admit, or license an individual, to bar, suspend or terminate an individual from employment, membership or licensure, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment or labor organization membership if the individual's use or nonuse of a lawful product off the employer's premises during nonworking hours does any of the following:

(a) Impairs the individual's ability to undertake adequately the job-related responsibilities of that individual's employment, membership or licensure.

(b) Creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment, membership or licensure.

(c) Conflicts with a bona fide occupational qualification that is reasonably related to the job-related responsibilities of that individual's employment, membership or licensure.

(d) Constitutes a violation of s. 254.92 (2).

(e) Conflicts with any federal or state statute, rule or regulation.

(3) (a) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to offer a policy or plan of life, health or disability insurance coverage under which the type of coverage or the price of coverage for an individual who uses a lawful product off the employer's premises during nonworking hours differs from the type of coverage or the price of coverage

provided for an individual who does not use that lawful product, if all of the following conditions apply:

1. The difference between the premium rates charged to an individual who uses that lawful product and the premium rates charged to an individual who does not use that lawful product reflects the cost of providing the coverage to the individual who uses that lawful product.

2. The employer, labor organization, employment agency, licensing agency or other person that offers the coverage provides each individual who is charged a different premium rate based on that individual's use of a lawful product off the employer's premises during nonworking hours with a written statement specifying the premium rate differential used by the insurance carrier.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of nonuse of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to offer a policy or plan of life, health or disability insurance coverage under which the type of coverage or the price of coverage for an individual who does not use a lawful product off the employer's premises during nonworking hours differs from the type of coverage or the price of coverage provided for an individual who uses that lawful product, if all of the following conditions apply:

1. The difference between the premium rates charged to an individual who does not use that lawful product and the premium rates charged to an individual who uses that lawful product reflects the cost of providing the coverage to the individual who does not use that lawful product.

2. The employer, labor organization, employment agency, licensing agency or other person that offers the coverage provides each individual who is charged a different premium rate based on that individual's nonuse of a lawful product off the employer's premises during nonworking hours with a written statement specifying the premium rate differential used by the insurance carrier.

(4) Notwithstanding s. 111.322, it is not employment discrimination because of use of a lawful product off the employer's premises during nonworking hours to refuse to employ an applicant if the applicant's use of a lawful product consists of smoking tobacco and the employment is as a fire fighter covered under s. 891.45 or 891.455.

History: 1991 a. 310; 1995 a. 352; 1997 a. 173; 1999 a. 9.

111.355 Military service; exceptions and special cases. (1) Employment discrimination because of military service includes an employer, labor organization, licensing agency, employment agency, or other person refusing to hire, employ, admit, or license an individual, barring or terminating an individual from employment, membership, or licensure, or discriminating against an individual in promotion, in compensation, or in the terms, conditions, or privileges of employment because the individual is or applies to be a member of the U.S. armed forces, the state defense force, the national guard of any state, or any reserve component of the U.S. armed forces or because the individual performs, has performed, applies to perform, or has an obligation to perform military service.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of military service for an employer, licensing agency, employment agency, or other person to refuse to hire, employ, or

license an individual or to bar or terminate an individual from employment or licensure because the individual has been discharged from military service under a bad conduct, dishonorable, or other than honorable discharge, or under an entry-level separation, and the circumstances of the discharge or separation substantially relate to the circumstances of the particular job or licensed activity.

History: 2007 a. 159.

111.36 Sex, sexual orientation; exceptions and special cases. (1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer, labor organization, employment agency, licensing agency or other person:

(a) Discriminating against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

(b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment; or making or permitting acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision affecting an employee, other than an employment decision that is disciplinary action against an employee for engaging in sexual harassment in violation of this paragraph; or permitting sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

(br) Engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender, other than the conduct described in par. (b), and that has the purpose or effect of creating an intimidating, hostile or offensive work environment or has the purpose or effect of substantially interfering with that individual's work performance. Under this paragraph, substantial interference with an employee's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employee would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

(c) Discriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the actions prohibited under s. 111.322, including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability.

(d) 1. For any employer, labor organization, licensing agency or employment agency or other person to refuse to hire, employ, admit or license, or to bar or terminate from employment, membership or licensure any individual, or to discriminate against an individual in promotion, compensation or in terms,

conditions or privileges of employment because of the individual's sexual orientation; or

2. For any employer, labor organization, licensing agency or employment agency or other person to discharge or otherwise discriminate against any person because he or she has opposed any discriminatory practices under this paragraph or because he or she has made a complaint, testified or assisted in any proceeding under this paragraph.

(2) For the purposes of this subchapter, sex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by a job, or if the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex.

(3) For purposes of sexual harassment claims under sub. (1) (b), an employer, labor organization, employment agency or licensing agency is presumed liable for an act of sexual harassment by that employer, labor organization, employment agency or licensing agency or by any of its employees or members, if the act occurs while the complaining employee is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employee informs the employer, labor organization, employment agency or licensing agency of the act, and if the employer, labor organization, employment agency or licensing agency fails to take appropriate action within a reasonable time.

History: 1981 c. 334 ss. 7m, 22; 1981 c. 391; 1993 a. 427.

Federal law may be looked to in interpreting sub. (1) (b) and (br). Under federal law "hostile environment" sexual harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Kannenberg v. LIRC, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997), 97-0224.

The exclusion of contraceptives from an employer or college or university sponsored benefits program that otherwise provides prescription drug coverage violates Wisconsin law prohibiting sex discrimination in employment and in higher education, ss. 111.31 to 111.395, 36.12, and 38.23. OAG 1-04.

Emotional distress injury due to on-the-job sexual harassment was exclusively compensable under s.102.03. Zabkowicz v. West Bend Co., Division of Dart Industries, Inc. 789 F. 2d 540 (1986).

Expanding the Notion of "Equal Coverage": The Wisconsin Fair Employment Act Requires Contraceptive Coverage for All Employer-Sponsored Prescription Drug Plans. Mason. 2005 WLR 913.

Sexual harassment. Gibson, WBB March, 1981.

111.365 Communication of opinions; exceptions and special cases. (1) Employment discrimination because of declining to attend a meeting or to participate in any communication about religious matters or political matters includes all of the following:

(a) Discharging or otherwise discriminating against an employee because the employee declines to attend an employer-sponsored meeting or to participate in any communication with the employer or with an agent, representative, or designee of the employer, the primary purpose of which is to communicate the opinion of the employer about religious matters or political matters.

(b) Threatening to discharge or otherwise discriminate against an employee as a means of requiring the employee to attend a meeting or participate in a communication described in par. (a).

(2) Notwithstanding s. 111.322, it is not employment discrimination because of declining to attend a meeting or to participate in any communication about religious matters or political matters for an employer to refuse to hire or employ an individual, to suspend or terminate the

employment of an individual, or to discriminate against an individual in promotion, in compensation, or in terms, conditions, or privileges of employment, because the individual declines to attend a meeting or to participate in a communication described in sub. (1) (a) if any of the following applies:

(a) The employer is a religious association not organized for private profit or an organization or corporation that is primarily owned or controlled by such a religious association and the primary purpose of the meeting or communication is to communicate the employer's religious beliefs, tenets, or practices.

(b) The employer is a political organization, including a political party or any other organization that engages, in substantial part, in political activities, and the primary purpose of the meeting or communication is to communicate the employer's political tenets or purposes.

(c) The primary purpose of the meeting or communication is to communicate information about religious matters or political matters that the employer is required by law to communicate and no information is communicated about those matters beyond what is legally required.

(3) This section and s. 111.322 do not limit any of the following:

(a) The application of s. 11.36.

(b) The right of an employer's executive, managerial, or administrative personnel to discuss issues relating to the operation of the employer's program, business, or enterprise, including issues arising under this section.

(c) The right of an employer to offer meetings or other communications about religious matters or political matters for which attendance or participation is strictly voluntary.

History: 2009 a. 290.

111.37 Use of honesty testing devices in employment situations. (1) DEFINITIONS. In this section:

(a) "Employer", notwithstanding s. 111.32 (6), means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. "Employer", notwithstanding s. 111.32 (6), does not include the federal government.

(b) "Lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or other similar device, whether mechanical or electrical, that is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(c) "Polygraph" means an instrument that fulfills all of the following requirements:

1. Records continuously, visually, permanently and simultaneously any changes in cardiovascular, respiratory and electrodermal patterns as minimum instrumentation standards.

2. Is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(2) PROHIBITIONS ON LIE DETECTOR USE. Except as provided in subs. (5) and (6), no employer may do any of the following:

(a) Directly or indirectly require, request, suggest or cause an employee or prospective employee to take or submit to a lie detector test.

(b) Use, accept, refer to or inquire about the results of a lie detector test of an employee or prospective employee.

(c) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, any of the following:

1. An employee or prospective employee who refuses, declines or fails to take or submit to a lie detector test.

2. An employee or prospective employee on the basis of the results of a lie detector test.

(d) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, an employee or prospective employee for any of the following reasons:

1. The employee or prospective employee has filed a complaint or instituted or caused to be instituted a proceeding under this section.

2. The employee or prospective employee has testified or is about to testify in a proceeding under this section.

3. The employee or prospective employee, on behalf of that employee, prospective employee or another person, has exercised any right under this section.

(3) NOTICE OF PROTECTION. The department shall prepare and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this section. Each employer that administers lie detector tests, or that has lie detector tests administered, to its employees shall post and maintain that notice in conspicuous places on its premises where notices to employees and applicants for employment are customarily posted.

(4) DEPARTMENT'S DUTIES AND POWERS. (a) The department shall do all of the following:

1. Promulgate rules that are necessary under this section.

2. Cooperate with regional, local and other agencies and cooperate with, and furnish technical assistance to, employment agencies other than this state, employers and labor organizations to aid in enforcing this section.

3. Make investigations and inspections and require the keeping of records necessary for the administration of this section.

(b) For the purpose of any hearing or investigation under this section, the department may issue subpoenas.

(5) EXEMPTIONS. (a) Except as provided in sub. (6), this section does not prohibit an employer from requesting an employee to submit to a polygraph test if all of the following conditions apply:

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation and unlawful industrial espionage or sabotage.

2. The employee had access to the property that is the subject of the investigation under subd. 1.

3. The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation.

4. The employer executes a statement, provided to the examinee before the test, that sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees; that is signed by a person, other than a polygraph examiner, authorized legally to bind the employer; that is retained by the employer for at least 3 years; and that identifies the specific economic loss or injury to the business of the employer, indicates that the employee had access to the property that is the subject of the investigation and describes the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

(b) Except as provided in sub. (6), this section does not prohibit an employer from administering polygraph tests, or from having polygraph tests administered, on a prospective employee who, if hired, would perform the employer's primary

business purpose if the employer's primary business purpose is providing security personnel, armored car personnel or personnel engaged in the design, installation and maintenance of security alarm systems and if the employer protects any of the following:

1. Facilities, materials or operations that have a significant impact on the public health, safety or welfare of this state or the national security of the United States, including facilities engaged in the production, transmission or distribution of electric or nuclear power; public water supply facilities; shipments or storage of radioactive or other toxic waste materials; and public transportation.

2. Currency, negotiable securities, precious commodities or instruments and proprietary information.

(bm) Except as provided in sub. (6), this section does not prohibit a Wisconsin law enforcement agency from administering a polygraph test, or from having a polygraph test administered, on a prospective employee.

(c) Except as provided in sub. (6), this section does not prohibit an employer that is authorized to manufacture, distribute or dispense a controlled substance included in schedule I, II, III, IV or V under ch. 961 from administering a polygraph test, or from having a polygraph test administered, if the test is administered to a prospective employee who would have direct access to the manufacture, storage, distribution or sale of the controlled substance or to a current employee if the test is administered in connection with an ongoing investigation of criminal or other misconduct that involves, or potentially involves, loss or injury to the manufacture, distribution or dispensing of the controlled substance by that employer and the employee had access to the person or property that is the subject of the investigation.

(6) RESTRICTIONS ON USE OF EXEMPTIONS. (a) The exemption under sub. (5) (a) does not apply if an employee is discharged, disciplined, denied employment or promotion or otherwise discriminated against on the basis of an analysis of a polygraph test chart or a refusal to take a polygraph test without additional supporting evidence. The evidence required by sub. (5) (a) may serve as additional supporting evidence.

(b) The exemptions under sub. (5) (b) to (c) do not apply if an analysis of a polygraph test chart is used, or a refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in par. (a) is taken against an employee or prospective employee.

(c) The exemptions under sub. (5) (a) to (c) do not apply unless all of the following requirements are fulfilled:

1. Throughout all phases of the test the examinee is permitted to end the test at any time; the examinee is not asked questions in a manner that degrades, or needlessly intrudes on, the examinee; the examinee is not asked any question about religious beliefs or affiliations, political beliefs or affiliations, sexual behavior, beliefs or opinions on racial matters, or about beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and the examiner does not conduct the test if there is sufficient written evidence provided by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the testing.

2. Before the test is administered the prospective examinee is provided with reasonable oral and written notice of the date, time and location of the test, and of the examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test; is informed orally and in writing of

the nature and characteristics of the tests and of the instruments involved; is informed orally and in writing whether or not the testing area contains a 2-way mirror, a camera or any other device through which the test can be observed; is informed orally and in writing whether or not any device other than the polygraph, including any device for recording or monitoring the test, will be used; is informed orally and in writing that the employer or the examinee may, after so informing the examinee, make a recording of the test; is read and signs a written notice informing the examinee that the examinee cannot be required to take the test as a condition of employment, that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action under par. (a), of the limitations on the use of a polygraph test under this subsection, of the legal rights and remedies available to the examinee under this section and ss. 905.065 and 942.06, of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this section and of the legal rights and remedies of the employer under this section; is provided an opportunity to review all questions to be asked during the test; and is informed of the right to end the test at any time.

3. The examiner does not ask the examinee any question during the test that was not presented in writing for review to the examinee before the test.

4. Before any adverse employment action, the employer interviews the examinee on the basis of the results of the test; provides the examinee written copies of any opinion or conclusion rendered as a result of the test, the questions asked during the test and the corresponding charted responses; and offers the examinee the opportunity to explain any questionable responses or to retake the examination or both. If the subsequent responses or the reexamination clarify any questionable response, the results of the initial tests shall not be reported further and shall be removed, corrected or clarified in the employee's personnel records under s. 103.13 (4).

5. The examiner does not conduct and complete more than 5 polygraph tests on any day and does not conduct any polygraph test that lasts for less than 90 minutes.

6. The test is administered at a reasonable time and location.

(d) The exemptions under sub. (5) (a) to (c) do not apply unless the individual who conducts the polygraph test satisfies all of the following requirements:

1. Maintains at least a $50,000 bond or an equivalent amount of professional liability coverage.

2. Renders no opinion or conclusion about the test unless it is in writing and based solely on an analysis of polygraph test charts, does not contain information other than admissions, information, case facts and interpretation of the charts relevant to the purpose and stated objectives of the test, and does not include any recommendation concerning the employment of the examinee.

3. Maintains all opinions, reports, charts, written questions, lists and other records relating to the test for at least 3 years after administration of the test.

(7) DISCLOSURE OF INFORMATION. No person other than the examinee may disclose information obtained during a polygraph test, except that a polygraph examiner may disclose information acquired from a polygraph test to the examinee or any other person specifically designated in writing by the examinee.

(8) ENFORCEMENT PROVISIONS. (a) In addition to the

rights, remedies and procedures under ss. 111.375 and 111.39, any employer who violates this section may be required to forfeit not more than $10,000.

(b) The rights, remedies and procedures provided by this section may not be waived by contract or otherwise, unless that waiver is part of a written settlement agreed to and signed by the parties to an action or complaint under this section.

History: 1979 c. 319; 1981 c. 334 ss. 12, 24; Stats. 1981 s. 111.37; 1991 a. 289; 1995 a. 314, 448; 1997 a. 35.

111.371 Local ordinance; collective bargaining agreements. Section 111.37 does not do any of the following:

(1) Prevent a county, city, village or town from adopting an ordinance that prohibits honesty testing, restricts the use of honesty testing to a greater extent than s. 111.37 or provides employees with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

(2) Supersede, preempt or prohibit provisions of a collective bargaining agreement that prohibit honesty testing, restrict the use of honesty testing to a greater extent than s. 111.37 or provide employees with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

History: 1991 a. 289, 315.

111.372 Use of genetic testing in employment situations. (1) No employer, labor organization, employment agency or licensing agency may directly or indirectly:

(a) Solicit, require or administer a genetic test to any person as a condition of employment, labor organization membership or licensure.

(b) Affect the terms, conditions or privileges of employment, labor organization membership or licensure or terminate the employment, labor organization membership or licensure of any person who obtains a genetic test.

(2) Except as provided in sub. (4), no person may sell to or interpret for an employer, labor organization, employment agency or licensing agency a genetic test of an employee, labor organization member or licensee or of a prospective employee, labor organization member or licensee.

(3) Any agreement between an employer, labor organization, employment agency or licensing agency and another person offering employment, labor organization membership, licensure or any pay or benefit to that person in return for taking a genetic test is prohibited.

(4) This section does not prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes:

(a) Investigating a worker's compensation claim under ch. 102.

(b) Determining the employee's susceptibility or level of exposure to potentially toxic chemicals or potentially toxic substances in the workplace, if the employer does not terminate the employee, or take any other action that adversely affects any term, condition or privilege of the employee's employment, as a result of the genetic test.

History: 1991 a. 117.

The New Genetic World and the Law. Derse. Wis. Law. April 2001.

111.375 Department to administer. (1) This subchapter shall be administered by the department. The department may make, amend and rescind such rules as are necessary to carry out this

subchapter. The department or the commission may, by such agents or agencies as it designates, conduct in any part of this state any proceeding, hearing, investigation or inquiry necessary to the performance of its functions. The department shall preserve the anonymity of any employee who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment, of unfair honesty testing or of unfair genetic testing against his or her present employer until a determination as to probable cause has been made, unless the department determines that the anonymity will substantially impede the investigation.

(2) This subchapter applies to each agency of the state.

History: 1975 c. 94; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 s. 13; Stats. 1981 s. 111.375; 1991 a. 117; 2003 a. 33.

Cross-reference: See also ch. DWD 218, Wis. adm. code.

Administrative remedies available under the fair employment act, subch. II of ch. 111, are the exclusive remedies for violations. The act does not provide a remedy for emotional distress resulting from discriminatory firing. Bachand v. Connecticut General Life Insurance Co. 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981).

111.38 Investigation and study of discrimination. Except as provided under s. 111.375 (2), the department shall:

(1) Investigate the existence, character, causes and extent of discrimination in this state and the extent to which the same is susceptible of elimination.

(2) Study the best and most practicable ways of eliminating any discrimination found to exist, and formulate plans for the elimination thereof by education or other practicable means.

(3) Publish and disseminate reports embodying its findings and the results of its investigations and studies relating to discrimination and ways and means of reducing or eliminating it.

(4) Confer, cooperate with and furnish technical assistance to employers, labor unions, educational institutions and other public or private agencies in formulating programs, educational and otherwise, for the elimination of discrimination.

(5) Make specific and detailed recommendations to the interested parties as to the methods of eliminating discrimination.

(6) Transmit to the legislature from time to time recommendations for any legislation which may be deemed desirable in the light of the department's findings as to the existence, character and causes of any discrimination.

History: 1977 c. 196; 1981 c. 334 ss. 18, 25 (2); Stats. 1981 s. 111.38.

111.39 Powers and duties of department. Except as provided under s. 111.375 (2), the department shall have the following powers and duties in carrying out this subchapter:

(1) The department may receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination, unfair honesty testing or unfair genetic testing occurred. The department may give publicity to its findings in the case.

(2) In carrying out this subchapter the department and its duly authorized

agents are empowered to hold hearings, subpoena witnesses, take testimony and make investigations in the manner provided in s. 103.005. The department or its duly authorized agents may privilege witnesses testifying before them under the provisions of this subchapter against self-incrimination.

(3) The department shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the department concerning the complaint and if the correspondence is sent by certified mail to the last-known address of the person.

(4) (a) The department shall employ such examiners as are necessary to hear and decide complaints of discrimination and to assist in the effective administration of this subchapter. The examiners may make findings and orders under this section.

(b) If the department finds probable cause to believe that any discrimination has been or is being committed, that unfair honesty testing has occurred or is occurring or that unfair genetic testing has occurred or is occurring, it may endeavor to eliminate the practice by conference, conciliation or persuasion. If the department does not eliminate the discrimination, unfair honesty testing or unfair genetic testing, the department shall issue and serve a written notice of hearing, specifying the nature of the discrimination that appears to have been committed or unfair honesty testing or unfair genetic testing that has occurred, and requiring the person named, in this section called the "respondent", to answer the complaint at a hearing before an examiner. The notice shall specify a time of hearing not less than 30 days after service of the complaint, and a place of hearing within either the county of the respondent's residence or the county in which the discrimination, unfair honesty testing or unfair genetic testing appears to have occurred. The testimony at the hearing shall be recorded or taken down by a reporter appointed by the department.

(c) If, after hearing, the examiner finds that the respondent has engaged in discrimination, unfair honesty testing or unfair genetic testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. If the examiner awards any payment to an employee because of a violation of s. 111.321 by an individual employed by the employer, under s. 111.32 (6), the employer of that individual is liable for the payment. If the examiner finds a respondent violated s. 111.322 (2m), the examiner shall award compensation in lieu of reinstatement if requested by all parties and may award compensation in lieu of reinstatement if requested by any party. Compensation in lieu of reinstatement for a violation of s. 111.322 (2m) may not be less than 500 times nor more than 1,000 times the hourly wage of the person discriminated against when the violation occurred. Back pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the department. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against or subjected to unfair honesty testing or unfair genetic testing shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty testing or unfair genetic testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to unfair honesty testing or unfair genetic testing and immediately paid to the unemployment reserve fund or, in the

case of a welfare payment, to the welfare agency making the payment.

(d) The department shall serve a certified copy of the findings and order on the respondent, the order to have the same force as other orders of the department and be enforced as provided in s. 103.005. Any person aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity. If the examiner finds that the respondent has not engaged in discrimination, unfair honesty testing, or unfair genetic testing as alleged in the complaint, the department shall serve a certified copy of the examiner's findings on the complainant, together with an order dismissing the complaint. If the examiner finds that the respondent has engaged in discrimination, unfair honesty testing, or unfair genetic testing as alleged in the complaint, the department shall serve a certified copy of the examiner's findings on the complainant, together with a notice advising the complainant that after the completion of all administrative proceedings under this section he or she may bring an action as provided in s. 111.397 (1) (a) to recover compensatory and punitive damages as provided in s. 111.397 (2) (a) and advising the complainant of the time under s. 111.397 (1) (b) within which the action must be commenced or be barred.

(5) (a) Any respondent or complainant who is dissatisfied with the findings and order of the examiner may file a written petition with the department for review by the commission of the findings and order.

(b) If no petition is filed within 21 days from the date that a copy of the findings and order of the examiner is mailed to the last-known address of the respondent the findings and order shall be considered final for purposes of enforcement under sub. (4) (d). If a timely petition is filed, the commission, on review, may either affirm, reverse or modify the findings or order in whole or in part, or set aside the findings and order and remand to the department for further proceedings. Such actions shall be based on a review of the evidence submitted. If the commission is satisfied that a respondent or complainant has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order it may extend the time another 21 days for filing the petition with the department.

(c) On motion, the commission may set aside, modify or change any decision made by the commission, at any time within 28 days from the date thereof if it discovers any mistake therein, or upon the grounds of newly discovered evidence. The commission may on its own motion, for reasons it deems sufficient, set aside any final decision of the commission within one year from the date thereof upon grounds of mistake or newly discovered evidence, and remand the case to the department for further proceedings.

(d) If the commission affirms a finding that the respondent has engaged in discrimination, unfair honesty testing, or unfair genetic testing as alleged in the complaint, the commission shall serve a certified copy of the commission's decision on the complainant, together with a notice advising the complainant that after the completion of all administrative proceedings under this section he or she may bring an action as provided in s. 111.397 (1) (a) to recover compensatory and punitive damages as provided in s. 111.397 (2) (a) and advising the complainant of the time under s. 111.397 (1) (b) within which the action must be commenced or be barred.

(6) If an order issued under sub. (4) is unenforceable against any labor organization in which membership is a privilege, the employer with whom the

labor organization has an all-union shop agreement shall not be held accountable under this chapter when the employer is not responsible for the discrimination, the unfair honesty testing or the unfair genetic testing.

History: 1973 c. 268; 1977 c. 29, 196; 1979 c. 221, 319, 355; 1981 c. 334 ss. 20, 25 (2); Stats. 1981 s. 111.39; 1983 a. 122; 1989 a. 228; 1991 a. 117; 1995 a. 27; 2009 a. 20; 2011 a. 219.

Cross-reference: See also LIRC and ch. DWD 218, Wis. adm. code.

A department order that was broader in scope than the nature of the discrimination set forth in the notice of hearing was overbroad. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, 215 N.W.2d 443 (1972).

An employer found to have discriminated against a female employee with respect to required length of pregnancy leave and applicable employee benefits was denied adequate notice of the leave benefits issue prior to hearing as required by s. 111.36 (3) (a) [now s. 111.39 (4) (b)] and s. 227.09, 1971 stats., because: 1) the notice received by the employer merely charged "an act of discrimination due to sex;" 2) the complaint specified the discriminatory act as the refusal to rehire the employee as soon as she was able to return to work; 3) DILHR characterized the complaint as involving only length of the required leave; and 4) the discriminatory aspects of the required pregnancy leave and applicable benefits constituted separate legal issues. Wisconsin Telephone Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

A court should not use ch. 227 or s. 752.35 to circumvent the policy under s. 111.36 (3m) (c) [now s. 111.39 (5) (c)] that proceedings before the commission are not to be reopened more than one year after entry of a final decision. Chicago & North Western Railroad v. LIRC, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

A valid offer of reinstatement terminates the accrual of back pay. The commission erred in finding an employer's offer to be sufficient. Prejudgment interest should be awarded on back pay. Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

Sub. (1) is a statute of limitations. As such it is an affirmative defense that may be waived. Milwaukee Co. v. LIRC, 113 Wis. 2d 199, 335 N.W.2d 412 (Ct. App. 1983).

Under s. 111.36 (3) (b) [now s. 111.39 (4) (c)] the department may award attorney fees to a prevailing complainant. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).

Under sub. (1), "filing" does not occur until the complaint is received by the department, and when discrimination "occurred" in termination cases is the date of the date of notice of termination. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App. 1988).

The personnel commission may not award costs and attorney fees for discovery motions filed against the state under the fair employment act. DOT v. Personnel Commission, 176 Wis. 2d 731, 500 N.W.2d 664 (1993).

Victims of discrimination in the work place who voluntarily quit a position must show constructive discharge to recover back pay and reinstatement. Marten Transport, Ltd. v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993). Evidence of acts occurring outside of the sub. (1) 300−day statute of limitations period may be admitted as proof of a state of mind for acts during a relevant time. Abbyland Processing v. LIRC, 206 Wis. 2d 309, 557 N.W.2d 419 (Ct. App. 1996), 96-1119.

What constitutes reasonable diligence under sub. (4) (c) is to be determined from all the facts of a case. U. S. Paper Converters, Inc. v. LIRC, 208 Wis. 2d 523, 561 N.W.2d 756 (Ct. App. 1997), 96-2055.

A proposed rule that would prohibit departmental employees from making public any information obtained under s. 111.36 [now s. 111.39] prior to the time an adjudicatory hearing takes place, if used as a blanket to prohibit persons from inspecting or copying public papers and records, would be in violation of s. 19.21. The open meetings law [now ss. 19.81 to 19.98] is discussed. 60 Atty. Gen. 43.

The department may proceed in a matter despite a settlement between the parties if the agreement does not eliminate the discrimination. The department may approve a settlement between the parties that does not provide full back pay if the agreement will eliminate the unlawful practice or act. 66 Atty. Gen. 28.

Under Title VII of the Civil Rights Act, to establish constructive discharge, the plaintiff must show that an abusive working environment became so intolerable that resignation qualified as a fitting response. Unless the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing his or her employment status, an employer may defend against a claim by showing that: 1) it had installed an accessible and effective policy for reporting and resolving sexual harassment complaints; and 2) the plaintiff unreasonably failed to use that preventive or remedial apparatus. Pennsylvania State Police v. Suders, 542 U.S. 129, 159 L. Ed 2d 204, 124 S. Ct. 2342 (2004).

111.395 Judicial review. Findings and orders of the commission under this subchapter are subject to review under ch. 227. Orders of the commission shall have the same force as orders of the department under chs. 103 to 106 and may be enforced as provided in s. 103.005 (11) and (12) or specifically by a

suit in equity. In any enforcement action the merits of any order of the commission are not subject to judicial review. Upon such review, or in any enforcement action, the department of justice shall represent the commission.

History: 1977 c. 29, 418; 1981 c. 334 s. 23; Stats. 1981 s. 111.395; 1995 a. 27.

Chapter DWD 218
FAIR EMPLOYMENT

Note: Chapter Ind 88 as it existed on June 30, 1995 was repealed and chapter ILHR 218 was created effective 7-1-95. Chapter ILHR 218 was renumbered chapter DWD 218 under s. 13.93 (2m) (b) 1., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, November, 1997, No. 503.

DWD 218.01 Purpose. The purpose of this chapter is to implement the provisions of ss. 111.31 to 111.395, 16.009 (5) (d), 46.90 (4) (b), 50.07 (3) (b), 146.997, 21.80 (7) (b), and 106.56, Stats. Sections 111.31 to 111.395 prohibit employment discrimination, unfair honesty testing, and unfair genetic testing. Section 16.009 (5), Stats., prohibits retaliation for reports to the Board on Aging and Long Term Care. Section 46.90 (4) (b), Stats., prohibits reporting the abuse of an elderly person to a state or county agency. Section 50.07 (3) (b), Stats., prohibits retaliation for reports of abuse in care and service residential facilities. Section 146.997, Stats., prohibits retaliation against health care workers who report certain information about a health care facility or health care provider. Section 21.80 (7) (b), Stats., provides reemployment rights after national guard, state defense force, or public health emergency service. Section 106.56, Stats., prohibits discrimination on the basis of physical condition or developmental disability in post-secondary education. The goal of this chapter is to provide a constructive, impartial and speedy procedure for resolving disputes arising under these laws.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; **CR 06−062: am. Register November 2006 No. 610, eff. 12-1-06; corrections made under s. 13.92 (4) (b) 7., Stats.**

DWD 218.02 Definitions. When used in this chapter or in the Wisconsin fair employment act:

(1) "Act" means the Wisconsin fair employment act, ss. 111.31 to 111.395, Stats.

(2) "Administrative law judge" means the examiner appointed to conduct hearings under the act.

(2m) "Agency" means an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(3) "Complainant" means the person who files a complaint alleging that an action prohibited by the act has been committed.

(4) "Day", when used in time computations in this chapter, means a calendar day, except that if the last day of the time period is a Saturday, Sunday or legal holiday, the last day shall be the next business day.

(5) "Division" means the equal rights division of the department of workforce development.

(6) "Filing" means the physical receipt of a document.

(7) "Person" includes, but is not limited to, one or more individuals, partnerships, associations, corporations, joint stock companies, trusts, unincorporated organizations, trustees, or trustees or receivers in bankruptcy.

(8) "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of the act probably has been or is being committed.

(9) "Respondent" means the person or agency alleged to have committed an action prohibited by the act.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; **emerg. cr. (2m), am. (9) eff. 8-5-03; CR 03−092: cr. (2m), am. (9) Register March 2004 No. 579, eff. 4−1−04.**

DWD 218.03 Complaints. (1) WHO MAY FILE COMPLAINTS. A complaint may be filed by any person or by the person's duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(2) WHERE TO FILE COMPLAINTS. (a) A complaint may be filed in person with any division office, or it may be mailed or sent by facsimile transmission to one of the following division offices:

1. Equal Rights Division, 201 East Washington Avenue, Madison, Wisconsin 53702. Facsimile number: 608-267-4592.

2. Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203. Facsimile number: 414-227-4084.

(b) A complaint filed by facsimile transmission shall conform with the requirements of s. DWD 218.25 (1).

(3) FORM AND CONTENT OF COMPLAINT. A complaint shall be written on a form which is available at any division office or on any form acceptable to the department. Each complaint shall be signed by the person filing the complaint or by the person's duly authorized representative. The signature constitutes an acknowledgment that the party or the representative has read the complaint; that to the best of that person's knowledge, information and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

(a) The name and address of the complainant.

(b) The name and address of the respondent.

(c) A concise statement of the facts, including pertinent dates, constituting the alleged act of employment discrimination, unfair honesty testing or unfair genetic testing.

(4) ASSISTANCE BY THE DEPARTMENT. The department shall, upon request, provide appropriate assistance in completing and filing complaints.

(5) DATE OF FILING OF COMPLAINT DEFERRED BY ANOTHER AGENCY. A complaint which is deferred to the department by a federal or local employment opportunity agency with which the department has a worksharing agreement complies with the requirements of sub. (3) and is considered filed when received by the federal or local agency.

(6) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than 45 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated the act as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 218.05 (1).

(7) WITHDRAWAL OF COMPLAINT. A complaint may be withdrawn at any time. A request for withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. Upon the filing of a request for withdrawal, the department shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (6) Register March 2004 No. 579, eff. 4-1-04; CR 06−062: am. (2) Register November 2006 No. 610, eff. 12-1-06.

DWD 218.04 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT. Except where prevented by the anonymity requirement of s. 111.375 (1), Stats., the department shall serve a copy of a complaint which meets the requirements of s. DWD 218.03 upon each respondent prior to the commencement of any investigation.

(2) CONTENT OF NOTICE. The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the department. The notice shall further state that, if the respondent fails to answer the complaint in writing, the department may make an initial determination as to whether an act of employment discrimination, unfair honesty testing or unfair genetic testing has occurred based only on the department's investigation and the information supplied by the complainant.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.05 Preliminary review of complaints. (1) REVIEW OF COMPLAINT. The department shall review every complaint filed to determine all of 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.

(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.

(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The department shall issue a preliminary determination dismissing any complaint, or any portion of a complaint, that fails to meet the requirements of sub. (1). The department shall send the order of dismissal by first class mail to the last-known address of each party and to their attorneys of record.

(3) APPEAL OF PRELIMINARY DETERMINATION. The complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. The department shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (2) and (3) Register March 2004 No. 579, eff. 4-1-04.

DWD 218.06 Investigations. (1) CONDUCT OF INVESTIGATION. Except as provided under sub. (3), the department shall
investigate all complaints that satisfy the review under s. DWD 218.05 (1). In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to

obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) ADVISING COMPLAINANT TO AMEND COMPLAINT. If, during an investigation, it appears that the respondent has engaged in discrimination against the complainant which is not alleged in the complaint, the department may advise the complainant that the complaint should be amended.

(3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION.

(a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint, in accordance with the provisions of s. 111.39 (3), Stats.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent that would preclude the department from finding that the respondent has violated the act.

3. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95**;** CR 03−092: am. (1), cr. (3) Register March 2004 No. 579, eff. 4-1-04.

DWD 218.07 Initial determination. (1) GENERAL. At the conclusion of the investigation, the department shall issue a written initial determination which shall state whether or not there is probable cause to believe that an act of employment discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) INITIAL DETERMINATION OF PROBABLE CAUSE. If the department initially determines that there is probable cause to believe that any discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 218.11 to 218.20.

(3) INITIAL DETERMINATION OF NO PROBABLE CAUSE. If the

department initially determines that there is no probable cause to believe that employment discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 218.08.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.08 Appeal of initial determination of no probable cause. **(1)** WHEN FILED. Within 30 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The department shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) DISMISSAL FINAL IF NO APPEAL FILED. If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the department.

(3) CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS. If a timely appeal is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. DWD 218.11 and DWD 218.13 to 218.20, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues the department may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; **CR 06−062: am. (3) Register November 2006 No. 610, eff. 12-1-06.**

DWD 218.09 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the department. The department may assist the parties to reach a settlement agreement. The parties shall notify the department immediately upon reaching a settlement.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.10 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed based upon the conditions set forth in s. DWD 218.05 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 218.07 (2) or 218.08 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts which may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.11 Notice of hearing. **(1)** CONTENT. In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 218.07 (2) or an appeal of an initial determination of no probable cause under s. DWD 218.08 (3), the department shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 30 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the act of employment discrimination, unfair honesty testing, or unfair genetic testing which is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

(2) PLACE OF HEARING. The hearing shall be held in the county where the alleged act of discrimination occurred, or at another location with the consent of the parties. For purposes of this subsection, the county where the alleged act of discrimination occurred is the county where the respondent resides or where the alleged discrimination, unfair honesty testing or unfair genetic testing occurred.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.12 Answer. (1) WHEN REQUIRED. Within 21 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a certification that a copy of the answer has been mailed to all other parties.

(2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise an affirmative defense in the answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (1) and (2) Register March 2004 No. 579, eff. 4-1-04.

DWD 218.13 Pre-hearing conference. In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.14 Pre-hearing discovery. (1) WHEN DISCOVERY MAY BEGIN. Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that

discovery shall, not less than 10 days prior to conducting such discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

(3) SCOPE, METHOD AND USE OF DISCOVERY. The scope of discovery, the methods of discovery and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. The administrative law judge may compel discovery, issue protective orders, and impose sanctions in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

(5) FILING WITH DEPARTMENT. Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (2) and (4) Register March 2004 No. 579, eff. 4-1-04.

DWD 218.15 Subpoenas and motions. (1) SUBPOENAS. The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness, and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) MOTIONS. Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; **emerg. am. (1) eff. 8-5-03; CR 03−092: am. (1) Register March 2004 No. 579, eff. 4-1-04**.

DWD 218.16 Disqualification of the administrative law judge. Upon the administrative law judge's own motion, or

upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.17 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the day of hearing, the parties shall file with the division and serve upon all other parties a written list of the names of witnesses and copies of the exhibits that the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using prior to the hearing.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. Register March 2004 No. 579, eff. 4-1-04.

DWD 218.18 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with the act and the provisions of ch. 227, Stats.

(2) POSTPONEMENTS AND CONTINUANCES. All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

(3) APPEARANCE OF PARTIES. Parties may appear at the hearing in person and by counsel or other representative.

(4) FAILURE TO APPEAR AT HEARING. If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall proceed as scheduled. If, within 10 days after the date of hearing, any party who failed to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.19 Record of hearing. **(1)** METHOD OF RECORDING HEARING. A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under the act. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is recorded on tape or digitally, the original recording shall remain in the division for 5 years following the hearing, after which it may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim, transcript of the proceedings.

(3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the department shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the department shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (3) Register March 2004 No. 579, eff. 4-1-04; CR 06−062: am. (1) Register November 2006 No. 610, eff. 12-1-06.

DWD 218.20 Decision and order. **(1)** GENERAL. After the close of the hearing, including any briefs which may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision which shall include findings of fact, conclusions of law and an order, and which may be accompanied by an opinion.

(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE. After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

(3) DECISION AND ORDER AFTER HEARING ON THE MERITS. After a hearing on the merits, the administrative law judge shall issue a decision and an order which shall either dismiss the allegations of the complaint or shall order such action by the respondent as shall effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint. A certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

(4) COMPUTATION OF INTEREST. Interest on any award made pursuant to this subchapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter.

History: Cr. Register, June, 1995, No. 474, eff. 7−1−95.

DWD 218.21 Petition for review by the labor and industry review commission. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

(2) REQUIREMENTS FOR FILING PETITION FOR REVIEW. The petition for review shall be filed within 21 days after

the date that a copy of the administrative law judge's decision and order is mailed to the last known addresses of the parties. The petition shall be filed with the division's Madison or Milwaukee office.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; CR 03−092: am. (1) Register March 2004 No. 579, eff. 4-1-04.

DWD 218.22 Pre-employment inquiries and employment records. An employer subject to the act may make such pre-employment inquiries and keep such employment records as will enable the employer to determine statistically the age, race, color, creed, sex, national origin, ancestry or marital status of applicants and employees. Pre-employment inquiries and employment records which tend directly or indirectly to disclose such information do not constitute unlawful discrimination per se.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.23 Posting requirement. Every employer, employment agency, labor organization and licensing agency subject to the act shall post in conspicuous places upon its premises a poster prepared and made available by the department relating to the provisions of the act and this chapter.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.24 Pay status and witness fees for state employee parties and state employee witnesses. **(1)** PAY STATUS OF STATE EMPLOYEE PARTIES. State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(2) PAY STATUS OF STATE EMPLOYEE WITNESSES. State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES. State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

History: Emerg cr. eff. 8-5-03; CR 03−092: cr. Register March 2004 No. 579, eff. 4-1-04; CR 06−062: am. (2) Register November 2006 No. 610, eff. 12-1-06.

DWD 218.25 Filing of documents by facsimile transmission or electronic mail.. (1) FILING OF DOCUMENTS BY FACSIMILE TRANSMISSION. (a) Except where otherwise directed by the division, documents may be filed by facsimile transmission. Documents filed by facsimile transmission shall include a cover sheet setting forth all of the following information:

1. The name of the sender.

2. The individual to whom the transmission is directed, if that individual is known.

3. The number of pages being transmitted, including the cover sheet.

(b) The date of transmission recorded by the division's facsimile machine shall constitute the date of filing of a document under this section, except that documents filed by facsimile after the regular business hours of the division as established by s. 230.35 (4) (f), Stats., or on a day when the offices of the division are closed pursuant to s. 230.35 (4) (a),

Stats., shall be considered filed on the next business day of the division.

(2) FILING OF DOCUMENTS BY ELECTRONIC MAIL. Documents may be filed by electronic mail only if expressly authorized by the equal rights officer or the administrative law judge assigned to the case.

History: CR 06−062: cr. Register November 2006 No. 611, eff. 12−1−06.