2023

EQUAL RIGHTS DECISION DIGEST

Case updates through January 31, 2023

Wisconsin Case Law

Fair Employment, Housing and Public Accommodations, Family and Medical Leave, and Related Statutes

STATE OF WISCONSIN
DWD
Department of Workforce Development
Equal Rights

State of Wisconsin
Department of Workforce Development

ERD-9048-P (R. 6/2023)

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June 2023

Dear Colleagues:

The Equal Rights Division of the Wisconsin Department of Workforce Development is excited to offer the *2023 Equal Rights Decision Digest* as a new e-publication updated with features making it more accessible than ever before.

Features include:

- **UPDATED CASES** through January 31, 2023**.** Cases added since the last edition are in **Italics.*
- **HYPERLINKS** for your convenience.
- **SEARCHABLE** by word, phrase, or number.
- **ACCESSIBLE** with screen reader and Google Translate.
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This edition of the *Equal Rights Decision Digest* is a collaboration between the Equal Rights Division of the Wisconsin Department of Workforce Development and the Labor and Industry Review Commission. A special thank you to Maria Selsor, Peter Reinhardt, Larisa Benitez-Morgan, Alice DeLaO, and Anita Krasno for their monumental efforts. Questions about the Decision Digest may be directed to Maria Selsor, the Bureau Director of Hearings & Mediations, at maria.selsor@dwd.wisconsin.gov, or emailed to the Division's general mailbox ERINFO@dwd.wisconsin.gov.

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Sincerely,

Ramona L. Natera

Ramona L. Natera
Division Administrator

EQUAL RIGHTS DECISION DIGEST
2023

FAIR EMPLOYMENT,
HOUSING and PUBLIC ACCOMMODATIONS,
FAMILY AND MEDICAL LEAVE, and
RELATED STATUTES

WISCONSIN CASE LAW
Decisions through January 31, 2023

HOW TO USE THIS DIGEST

This Digest summarizes significant decisions under the Wisconsin Fair Employment Act, the Wisconsin Open Housing Law, the Wisconsin Public Accommodations and Amusements Law, and other related statutes within the program responsibilities of the Wisconsin Equal Rights Division (ERD). The decisions summarized include those of the former DILHR Industrial Commission, the Labor and Industry Review Commission (LIRC), the former Wisconsin Personnel Commission and the Wisconsin courts. Also included are summaries of selected decisions by ERD Administrative Judges under the Wisconsin Family Medical Leave Act and other laws which are directly appealable to circuit court. The decision summaries are organized according to subject matter, in reverse chronological order (most recent cases first). We have updated the Digest through January 1, 2023 with new cases of note. Any cases that have been added since the last Digest (updated January 31, 2017) are denoted by being printed in *italics.*

Users of the ERD Decision Digest are reminded that the Digest is intended only as an informational service and research aid. The decision summaries do not represent Departmental policy or interpretation. This is a finding tool intended to allow users to locate and identify law and cases significant enough to the issue being researched to merit reading the original decision.

Copies of unpublished decisions summarized in the Digest are generally available for inspection and copying in the offices of the ERD in Madison and Milwaukee. Copies of decisions of the Labor and Industry Review Commission are also available at the Commission's office and their website http://www.dwd.state.wi.us/lirc. As mentioned, they are also hyperlinked in the e-Digest for cases 2013 and more recent.

Person using this Digest to locate decisions to be cited to a court as authority should take note of sec. 809.23(3), Stats., which provides that an unpublished decision of the Court of Appeals issued before July 1, 2009 is of no precedential value and for that reason may not be cited in any court in this state as precedent or authority.

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Any comments or questions about the Decision Digest may be directed to Maria Selsor, the Bureau Director of Hearings & Mediations, at maria.selsor@dwd.wisconsin.gov or emailed to the Division's general mailbox ERINFO@dwd.wisconsin.gov.

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111 Purpose of the Wisconsin Fair Employment Act

Any application or interpretation of a provision of the Wisconsin Fair Employment Act requires consideration of the Act's purpose. Sec. 111.31, Stats., states as follows in this regard:

> The Legislature finds that the practice of unfair discrimination in employment. . . substantially and adversely affects the general welfare of the state. . . . In the interpretation and application of this subchapter, . . . 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. . . . This subchapter shall be liberally construed for the accomplishment of this purpose.

Palmer v. Wis. Public Serv. Corp. (LIRC, 07/30/03).

The Wisconsin Fair Employment Act does not provide a remedy for poor management practices, unless they are specifically shown to constitute a violation of the Act. Lampinen v. City of Shawano (LIRC, 12/14/99).

The Wisconsin Fair Employment Act is concerned with deterring and remedying intangible injuries which rob a person of dignity and self-esteem, and with eliminating a discriminatory environment in the workplace that affects not only the victim of discrimination but the entire workforce and the public welfare. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997).

It is not a function of the Wisconsin Fair Employment Act to dictate to employers, as a general matter, that hiring and other employment decisions must be made on the basis of particular, job-related considerations. Bates v. Thomson Newspapers (LIRC, 12/04/96).

The overall purpose of the Wisconsin Fair Employment Act is to forbid discriminatory employment practices against properly qualified individuals. The legislature has mandated that the Act must be liberally construed to accomplish its purpose. The two purposes of the Act are: (1) to make the individual victims of discrimination "whole," and (2) to discourage discriminatory practices in the employment area. A Complainant who files a complaint under the Wisconsin Fair Employment Act is acting as a "private attorney general" to enforce the rights of the public and to implement a public policy that the legislature considered to be of major importance. The aggregate effect of such individual actions enforces the public's right to be free from discriminatory practices in employment, which in turn effectuates the legislative purpose of outlawing such practices. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).

The broad purpose of the Wisconsin Fair Employment Act is to eliminate practices that have a discriminatory impact, as well as practices which on their face amount to invidious discrimination. Wis. Tel. Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

112 Who may file a complaint

112.1 Covered individuals

Volunteers are not covered under the Fair Employment Act, and mere proof of receipt of some type of tangible benefit is insufficient to render an individual an employee rather than a volunteer. Instead, the Complainant must show that he received the type of tangible benefits that could lead to a conclusion he was compensated for his services. Kirksey v. Int'l Assoc. for Orthodontics (LIRC, 09/29/22).

The Complainant alleged that the Respondent, a technical college, denied him admission into its funeral services program based upon his conviction record and contended that the Respondent's actions related to a specific employment opportunity. The Complainant demonstrated a sufficient nexus between the alleged discrimination and the denial or restriction of an employment opportunity such that his claim was covered under the WFEA. Reid v. Milwaukee Area Tech. Coll. *(LIRC, 08/13/19).*

A complaint may be stated under the WFEA even in the absence of an actual or potential employment relationship between the parties, provided the Complainant has alleged that the Respondent engaged in an action that directly relates to an employment opportunity. Maxberry v. Goodwill Indus. (LIRC, 03/19/15).

Complainant alleged that he was refused re-entry into a master's degree program in the Respondent's English department because of his religion and sexual orientation. In order for an allegation of discrimination to come within the scope of the WFEA, it must show a nexus between the discrimination complained of and the denial or restriction of some real employment opportunity. There was no employment relationship or potential employment relationship between the Complainant and the Respondent here, only a hypothetical connection to an unidentified future employment opportunity. This is not a sufficient nexus on which to state a claim under the WFEA. Wilde v. UW-Milwaukee (LIRC, 02/27/15), *aff'd*, Wilde v. UW Milwaukee (Milwaukee Co. Cir. Ct., 3/28/16).

The Complainant alleged disability discrimination due to reduction in her pay for home care services she provided for her disabled son. The Complaint failed to state a cause of action under the WFEA because the Complainant is not an individual with a disability, and the WFEA does not cover allegations of discrimination based on a Complainant's association with an individual with a disability. The Complainant's retaliation claim for having filed a federal lawsuit fails to state a claim because the lawsuit did not allege any violation recognized by the WFEA as a basis for a retaliation complaint. Bach v. Cnty. of Milwaukee (LIRC, 10/09/14), *aff'd,* Bach v. LIRC (Milwaukee Co. Cir. Ct., 4/16/15), *aff'd* Bach v LIRC, Ct, App. No. 2015AP1097, 01/28/16).

Although anti-retaliation provisions of the WFEA extend to former employees, a nexus with employment is essential to find that retaliatory actions are covered. If the Complainant is alleging that the retaliatory action adversely affects prospects for future employment, the adverse action must have a significant and identifiable employment connection to the former employee's opportunities for future employment. DeMoya v. Wis. Dep't of Veterans Affairs (LIRC, 12/12/13).

The rationale that the Supreme Court relied upon in City of Madison v. DWD, 262 Wis. 2d 652, 664 N.W.2d 584 (2003), to find that the Madison Police and Fire Commission has exclusive jurisdiction to hear complaints of discriminatory discharge or discipline under sec. 62.13(5), Stats., applies equally to the treatment of WFEA claims arising out of actions by the Milwaukee Police and Fire Commission under sec. 62.50(11), Stats. The Department of Workforce Development does not have jurisdiction over a WFEA complaint regarding discriminatory discipline or discharge by members of the Milwaukee Police and Fire Departments. Koch v. City of Milwaukee (LIRC, 06/09/11).

A complaint was dismissed where the Complainant was a former nursing student of the Respondent and her complaint centered around the Respondent's refusal to allow her to return to complete her studies. The Complainant was not involved in an employment relationship with the Respondent, and her complaint did not allege discrimination in employment. Further, to the extent that the Complainant was alleging that she was denied an opportunity to obtain her nursing license, the Respondent could not be considered a licensing agency for purposes of the Act. Bledsoe v. Mount Mary College (LIRC, 04/25/08).

An Administrative Law Judge appropriately determined that the Complainant was not an employee under the Wisconsin Fair Employment Act where the Complainant had been found to be a "sexually violent person" who

was committed to the Wisconsin Resource Center (WRC), which is operated by the State of Wisconsin Department of Health and Family Services (DHFS). The Complainant was part of the WRC's Patient Work Program, which affords patients the opportunity to work while residing at the institution. He filed a complaint alleging that DHFS had discriminated against him with respect to compensation on the basis of disability, arrest record and conviction record. The ALJ utilized the "economic realities" test and determined that the context for the working relationship between the Complainant and WRC was entirely different from that of a voluntary employment relationship between parties. The working relationship was uniquely defined by the circumstances of the Complainant's commitment to WRC. DHFS exercised control and direction over not only the Complainant's work performance, but also over the Complainant himself. The conditions under which he performed his job were functions of his confinement to WRC, not those of an employee who voluntarily enters into an employment relationship with an employer. Desimone, et al v. State of Wis. (LIRC, 02/22/08).

A firefighter who was terminated from city service after a "just cause" hearing before a police and fire commission pursuant to sec. 62.13(5), Stats., may not pursue a discrimination complaint regarding the termination before the Department of Workforce Development under the Wisconsin Fair Employment Act. City of Madison v. DWD, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

Application for service as a volunteer, or even actual service as a volunteer, does not meet the definition of "employee" in the Wisconsin Fair Employment Act, which is a prerequisite for coverage under the Act. Compensation is an essential condition in the employee/employer relationship. Ficken v. Harmon Solutions Group (LIRC, 02/07/03).

The Complainant, who had no employment relationship with the Respondent, alleged that the Respondent denied him the use of a trademark. Even assuming that the Respondent could be considered a licensing agency, the Complainant has not contended that he was denied a license. A trademark does not constitute a form of permission required by a state or local government for undertaking an occupation or profession. While a businessperson's inability to make use of a trademark might arguably have some effect on his ability to earn an income, that is not a matter that is covered under the Wisconsin Fair Employment Act. Wendt v. Marathon County (LIRC, 07/31/02).

The Complainant was a member of a board of zoning appeals. Members of the board are appointed by the mayor and serve without compensation. The Complainant filed a complaint of discrimination against the city and against the mayor when the mayor denied her reappointment to the board. The complaint was properly dismissed because there was no employment relationship between the Complainant and either of the two named Respondents. Moreover, the Complainant did not allege that the Respondents engaged in any actions that affected her future opportunities for employment with them or for any other employer. The Complainant was, therefore, not protected by the Wisconsin Fair Employment Act. Langer v. City of Mequon (LIRC, 03/19/01).

Probationary employees are entitled to the same protections against unlawful discrimination under the Wisconsin Fair Employment Act as are regular employees. Hickman v. Milwaukee Immediate Care Ctr. (LIRC, 02/16/00), aff'd sub nom. Milwaukee Immediate Care Ctr. v. LIRC (Milwaukee Co. Cir. Ct, 11/02/00).

The Complainant, a prisoner at the Green Bay Correctional Institution who earned minimum wage and was required to pay taxes while working for the Badger State Industries Private Sector/Prison Industries Enhancement Program, was not an employee as defined by statute. The Complainant alleged that his decision to voluntarily terminate his employment with Badger Industries was due to racial discrimination in the workplace. The relationship of the Complainant with Badger Industries arose out of his status as an inmate, and not an employee. Whaley v. Wis. Pers. Comm'n (Brown Co. Cir. Ct., 05/13/97).

Inmates performing work in a correctional institution are not considered employees within the meaning of the Wisconsin Fair Employment Act unless the inmate is employed in an off-site work release program in which their employment has the same attributes as that of non-inmates performing similar work duties. Whaley v. Wis. Pers. Comm'n (Brown Co. Cir. Ct., 05/13/97); Pinkins v. DOC (Wis. Pers. Comm'n, 03/12/97).
A stockholder of a corporation is not automatically precluded from filing a discrimination complaint against the corporation where she was also an employee. Schaefer v. New Berlin Realty (LIRC, 06/10/93).

The complaint was dismissed for lack of subject matter jurisdiction when the complaint offered no information which suggested that the Complainant was in an employment relationship with the Respondent. The Complainant's allegations related to her status as a student. Fischer-Guex v. UW-Madison (Wis. Pers. Comm'n, 12/17/92).

A union has the right to bring a complaint of discrimination and to do so by its duly authorized representative. The Wisconsin Fair Employment Act itself does not preclude the possibility of an organization filing a complaint alleging discrimination against individual members of that organization or persons whose interests are shared or represented by that organization. The Act contains no limitation on who may file a complaint. While the Act does refer in sec. 111.39(3), Stats., to "the person filing the complaint," the word "person" includes all partnerships, associations, and bodies politic or corporate. Helton v. Wesbar Corp. (LIRC, 03/19/92).

If a claim of sex discrimination is otherwise valid, it should not be rendered invalid because the discrimination does not run against the sex of the Complainant. In this case, the Complainant has stated a viable claim upon which relief could be granted when he alleged that his position was eliminated along with the position of a female friend when that female friend failed to "respond positively to sexual harassment" by the Respondent. The Complainant is alleging that his position was eliminated as a direct result of an illegal act of sexual harassment against his female friend. Christensen v. UW-Stevens Point (Wis. Pers. Comm'n, 01/24/92).

Unions may file complaints on behalf of their members under the Wisconsin Fair Employment Act. Racine Unified School Dist. v. Racine Educ. Ass'n, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991); GTE v. LIRC Communications Workers of America) (Ct. App. Dist. IV, unpublished opinion, 10/26/81); Hartford Educ. Ass'n v. Hartford Sch. Dist. (LIRC, 05/14/79); Sosnowski v. Uniroyal (LIRC, 05/14/79).

Members of the Wisconsin National Guard are state employees under the Wisconsin Fair Employment Act. Aries v. DMA (Wis. Pers. Comm'n, 11/06/91).

A military member of the Wisconsin National Guard is an employee of the state. A decision to separate someone from guard service falls within the jurisdiction of the Personnel Commission. (Note: The Commission did not address any question of federal supremacy). Hazelton v. DMA (Wis. Pers. Comm'n, 03/14/89).

The Complainant, an inmate in a pre-release work training program, was not in an employment relationship. As part of the program, the Complainant was paid less than the prevailing wage to perform work at a county mental health center. He received on-site supervision and worker's compensation coverage, but he did not have access to an employee grievance procedure, and he was not provided any other benefits. The program agreement covering the Complainant specifically provided that the inmates that were not to be considered permanent employees. Dalton v. Wis. DHSS. (Wis. Pers. Comm'n, 09/26/88).

While professors involved in a faculty exchange technically remain on the faculties of their respective universities, numerous incidents of the employment relationship are present. To deny status as an employee under the Wisconsin Fair Employment Act would be inconsistent with the liberal construction policy of the Act. McFarland & Joubert v. UW-Whitewater (Wis. Pers. Comm'n, 09/08/88).

The Personnel Commission lacks subject matter jurisdiction over a complaint filed by an inmate who alleged discrimination based on conviction record with respect to actions taken by the prison's education director. Richards v. DHSS (Wis. Pers. Comm'n, 09/04/86).

The Wisconsin Fair Employment Act does not cover the right to purchase a proprietary interest in a business. The Complainant was not an employee or a potential employee of Montgomery Ward and Company in connection with his attempts to purchase a catalog sales outlet. Keys v. LIRC (Polk Co. Cir. Ct., 07/01/85).

The Personnel Commission has jurisdiction over a complaint charging that the Complainant's status as a military member of the National Guard was terminated because of handicap. Military members of the Guard are employees of the states. However, the Complainant had dual status as a federal civil service technician and as a Guard member, and those aspects of the complaint relating to his technician status are outside of the Personnel Commission's jurisdiction. Schaeffer v. DMA (Wis. Pers. Comm'n, 11/07/84).

112.2 Covered employment relationships; independent contractors

There is no rule that an individual who performs services as a member of a corporation or LLC must be considered an independent contractor per se. LIRC applies the "economic realities" test (a/k/a Spirides test) to determine whether the Complainant is an employee or an independent contractor. Denman v. Wis. Water Well Ass'n (LIRC, 11/21/19).

The Equal Rights Division has jurisdiction over a claim that the Department of Corrections deliberately intervened in the terms of an outside employment relationship by colluding with a private employer to discriminate against a Complainant who was participating in a work release program. Lofton v. State of Wis. Dep't of Corr. (LIRC, 09/27/18).

The Complainant's allegation that the employer would not allow him to submit comments into his personnel file two years after the termination of the employment relationship had no connection to a future employment opportunity and was not covered by the WFEA. Shi v. UW Sys. Bd. of Regents (LIRC, 01/30/18).

A determination as to whether an individual is an employee or an independent contractor is so fact-intensive that a hearing is generally warranted. Williams v. State of Wis. Dep't of Vocational Rehab. (LIRC, 06/08/17).

Complainant alleged that he was refused re-entry into a master's degree program in the Respondent-university's English department because of his religion and sexual orientation. In order for an allegation of discrimination to come within the scope of the WFEA, it must show a nexus between the discrimination complained of and the denial or restriction of some real employment opportunity. There was no employment relationship or potential employment relationship between the Complainant and the Respondent here, only a hypothetical connection to an unidentified future employment opportunity. This is not a sufficient nexus on which to state a claim under the WFEA. Wilde v. UW-Milwaukee (LIRC, 02/27/15), *aff'd*, Wilde v. UW Milwaukee (Milwaukee Co. Cir. Ct., 3/28/16).

The Complainant performed services for the Respondent, for which he was paid. The fact that the Complainant was not licensed as an apprentice funeral director does not necessarily mean that he was not an employee of the Respondent, a mortuary. While the record does not contain sufficient evidence to permit an analysis of all the factors used to determine whether an individual is an employee or an independent contractor, the evidence presented indicated that the Respondent had the right to control the means and manner of the Complainant's job performance, that he was paid by the week and not by the job, that the services he performed for the Respondent were integral to its business, and that it was the intention of the parties that the Complainant work

for the Respondent as an apprentice funeral director (a job which is usually done under the direction of a supervisor). This was sufficient to warrant a conclusion that the Complainant was an employee of the Respondent, without regard to whether he had a license. Jackson v. New Pitts Mortuary (LIRC, 10/31/12).

In cases decided under Title VII, the Seventh Circuit Court of Appeals has determined that a plaintiff must prove the existence of an employment relationship in order to maintain a Title VII action against a defendant. In these cases, the federal court recognized that the employer's right to control is the most important factor when determining whether an individual is an employee or an independent contractor. The federal court has focused on the following five factors: (1) The extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature and skill required, including whether skills are obtained in the work place; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, work place, and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations. Using this test, the Complainant in this case failed to prove the existence of an employment relationship. Ingram v. Bridgeman Mach. Tooling & Packaging (LIRC, 06/27/05).

There can be instances in which the Department will have jurisdiction over a claim of discrimination even in the absence of an actual or potential employment relationship between the parties. However, in this case the Complainant did not allege that the Respondent engaged in actions which were directly related to her employment opportunities such as would fall within the purview of the Wisconsin Fair Employment Act. The Complainant's allegations were that she was subjected to harassing conduct on the part of her fellow students, which led her to drop a class, and that the Respondent further harassed her by giving her a failing mark in a class she dropped rather than indicating that she had withdrawn. The Complainant's allegations do not fall within the types of discriminatory conduct prohibited by the Wisconsin Fair Employment Act under sec. 111.322(1), Stats. Hinkforth v. Milwaukee Area Tech. College (LIRC, 02/23/04).

Determination of whether an individual is an employee or an independent contractor for purposes of the Fair Employment Law involve analysis of the "economic realities" of the work relationship. All of the circumstances surrounding the work relationship should be considered. The most important factor is the employer's right to control the "means and manner" of the workers' performance. Additional matters of fact that may be considered include the following: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor, (2) the skill required in the particular occupation, (3) whether the "employer" furnishes the equipment used and the place of work, (4) the length of time during which the individual has worked, (5) the method of payment (whether by time or by the job), (6) the manner in which the work relationship is terminated, (7) whether annual leave is afforded, (8) whether the work is an integral part of the business of the "employer," (9) whether the worker accumulates retirement benefits, (10) whether the "employer" pays social security taxes, and (11) the intention of the parties. Sneed v. Milwaukee Bd. of Sch. Dir. (LIRC, 06/17/03).

The test for determining whether an individual is an employee under the Wisconsin Fair Employment Act is the test set forth in Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979), which was adopted by the Wisconsin Court of Appeals in Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 287 (Ct. App. 1993). The test in Revenue Ruling 87-41, 1987-1 CB 296, in which the Internal Revenue Service sets forth several factors it uses to determine whether a worker is an independent contractor, is not applicable. The factors utilized by the IRS focus on the common law concept of right to control the services of the worker for purposes of determining taxpayer status. However, Wisconsin has adopted the Spirides test for determining whether an individual is an employee under the WFEA. Sneed v. Milwaukee Bd. of Sch. Dir. (LIRC, 06/17/03).

The Complainant, who delivered newspapers for the Respondent, had an "Independent Carrier Contract" with the company. There were some facets of the relationship between the Complainant and the Respondent that

might tend to suggest that the relationship was one of employee-employer. However, on balance, considering the total circumstances surrounding the working relationship, it appears that the relationship must be considered that of an independent contractor relationship and, therefore, not covered under the Wisconsin Fair Employment Act. Berglund v. Post Crescent (LIRC, 01/31/01).

Where the Complainant was the owner of a general contracting business who performed work at the direction of the Respondent school district, he was not an employee of the school district since the school district did not control the means and manner of his work. Omegbu v. Mequon-Thiensville Sch. Dist. (LIRC, 12/21/95), aff'd sub nom. Omegbu v. LIRC (Milwaukee Co. Cir. Ct., 07/01/96); aff'd (Ct. App., Dist II, unpublished opinion, 07/17/96).

The Wisconsin Fair Employment Act prohibits acts of unlawful employment discrimination; however, it does not define the term "employment" for purposes of determining employee status, and thus entitlement to the protections afforded under the Act. The Labor and Industry Review Commission has adopted the "hybrid" standard which combines the common law "right to control" and "economic realities" tests cited in Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 289 (Ct. App. 1993). In this case, the Complainant failed to establish that the owner of a real estate company exercised the type of control over her in the performance of her work as a real estate broker that would support a finding of employee status. A real estate broker is a specialist and a professional working without supervision by the very nature of the work. Schaefer v. New Berlin Realty (LIRC, 11/17/95).

A hospital was an "employer" for purposes of the Wisconsin Fair Employment Act where it allowed physicians to practice there, where it granted staff privileges, and where it provided terms and conditions and privileges of employment through contracts either directly or indirectly with physicians through a separate Medical Center. Bourque v. LIRC (Marathon Co. Cir. Ct., 11/16/95), aff'd on other grounds, Ct. App., Dist. III, unpublished opinion, 11/26/96.

The language in Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86) which states that independent contractors are covered under the Wisconsin Fair Employment Act is dicta and has been effectively overturned by the Wisconsin Court of Appeals' decision in Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 289 (Ct. App. 1993). Schaefer v. New Berlin Realty (LIRC, 06/10/93).

A stockholder of a corporation is not automatically precluded from filing a discrimination complaint against the corporation where she was also an employee. Schaefer v. New Berlin Realty (LIRC, 06/10/93).

The determination of whether an individual is an employee or an independent contractor involves an analysis of the "economic realities" of the work relationship. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative.

Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor. Other factors which may be considered include: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor, (2) the skill required in the particular occupation, (3) whether the "employer" of the individual in question furnishes the equipment used and the place of work, (4) the length of time during which the individual has worked, (5) the method of payment, i.e. whether by time or by the job, (6) the manner in which the work relationship is terminated, (7) whether annual leave is given, (8) whether the work is an integral part of the business of the "employer," (9) whether the "employer" pays social security taxes, and (10) the intention of the parties. Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 287 (Ct. App. 1993).

LIRC found no merit in the Respondent's contention that the Complainant, who worked under a contract to provide services to the Respondent, was not an employee of the Respondent for purposes of the Wisconsin Fair Employment Act. Jackson v. City of Milwaukee (LIRC, 12/14/90).

The Wisconsin Fair Employment Act covered an allegation that a cooperative organization of taxicab owners, which used membership fees to operate a central office which provided dispatching and clerical services, discriminated against the Complainant, who drove a cab for a member-owner of the co-op on a lease basis. The Act is at least as inclusive in its coverage of relationships as is Title VII. Russ v. City Veterans Cab Co. (LIRC, 12/04/87).

Where the employer continued to have the right to control the means and manner of the Complainant's work performance and retained the right to unilaterally terminate the relationship, and where the Complainant continued to be covered under group insurance paid in part by the Respondent and was given a health insurance conversion notice upon termination, the Complainant was an employee of the Respondent and not an independent contractor. Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86).

Even if a Complainant is considered to have been an independent contractor, as opposed to an employee, the Complainant was still covered by the Wisconsin Fair Employment Act. Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86).

The Wisconsin Fair Employment Act does not cover the right to purchase a proprietary interest in a business. Keys v. LIRC (Polk Co. Cir. Ct., 07/01/85).

Whether a Respondent is an employer within the meaning of the Act must be determined on an individualized basis looking at the totality of the circumstances which bear upon the degree of direction and control exercised over the Complainant. Where a person had almost no control over the details of his employment and was subject to the rules, regulations, procedures, authority and evaluation of the Respondent, an employer/employee relationship has been shown. Lohse v. Western Express (LIRC, 10/19/84).

The relationship between a hospital and a staff physician is not an employee/employer relationship where a doctor seeking staff privileges is not hired by the hospital and is not on its payroll and the hospital does not dictate his treatment or admission of patients. Sergeant v. Holy Family Hosp. (LIRC, 02/17/81).

A long-haul freight company which leases tractors and trailers from owner-operators of such equipment is an employer and the truck drivers are employees within the meaning of the Act. The Act does not provide an exemption for independent contractors, but even if it did, such an exemption would not be applied in this case because the company controlled not only the result of the truck driver's services, but also the manner in which they were to be performed. Lyon v. Pirkle Refrigerated Freight (DILHR, 11/02/73); also, Kollath v. Madison Pub. Sch. (LIRC, 07/25/77).

112.3 Standing

A union is an entity which may file a complaint of discrimination under the Wisconsin Fair Employment Act. This is true even if the record did not establish that the membership of the union had given the union the authority to file the charge. Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/30/10).

A union had standing to file a charge of discrimination. However, by filing an action pursuant to sec. 111.322(1), Stats., the union had the burden of establishing that at least one of its members had been injured. That statute provides a cause of action for acts of discrimination which have already occurred. In this case, at least one individual must have been denied the type of medication which the Respondent declined to cover

under its health insurance plan (i.e., Viagra or other erectile dysfunction drugs). The failure by the union to identify any individual who had been denied coverage was fatal to its claim under the Wisconsin Fair Employment Act. The union's reliance on cases filed under sec. 111.322(2), Stats. (which creates a cause of action for statements printed or circulated by the employer which proclaim its present or future intent to discriminate) was misplaced. That section applies to prospective harm. It does not require that an individual has actually been harmed. Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/30/10).

Pursuant to the plain and unambiguous language of Wis. Stat. §111.36(1)(c), only females have standing to bring a pregnancy/childbirth under the WFEA. Neither the commission nor the courts have recognized an association discrimination claim under Wis. Stat. §111.36(1)(c). Carerros v. Charter Mfg. (LIRC, 05/07/2010).

Standing is not an issue of any significance when commencing complaints of public accommodations discrimination, because there is no statutory provision which imposes a standing limitation on who may bring complaints. Malecki v. Vic Tanny Int'l of Wis. (LIRC, 08/07/92).

The concept of standing has no place in determining who may file complaints of discrimination with an administrative agency. Standing is, in federal law, a matter of subject matter jurisdiction arising from the case or controversy restriction contained in Article III of the U.S. Constitution. There is no similar case or controversy limitation in the Wisconsin Constitution. Helton v. Wesbar Corp. (LIRC, 03/19/92).

The president of a local union, a male, was a duly authorized representative and had authority to file a complaint and was acting for the Local which was asserting that female employees of the Respondent had been discriminated against by the Respondent because of their sex. The president was not filing the complaint "on behalf of any specific female employee of Respondent." He was filing the complaint on behalf of the Local. The Local had the right to bring a complaint of discrimination and to do so by its duly authorized representative, its president. Helton v. Wesbar Corp. (LIRC, 03/19/92).

The rules governing standing before an administrative agency are not necessarily the same as the rules governing standing to seek judicial review. The question of standing to initiate and pursue a matter before an administrative agency is entirely dependent on the statutes and rules establishing the scope of that agency's jurisdiction. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91).

Where the Complainant did not score high enough on a competitive examination to be certified for employment, and where the State refused to include the Complainant in the certification under its expanded handicap certification program because it concluded that the Complainant's vision problems were not severe enough to constitute a handicap, the Complainant lacked standing to attack the vision standards used in the expanded handicap certification program. Wood v. DNR (Wis. Pers. Comm'n, 04/15/87).

A union does not have standing with respect to an individual member's claim for back pay. Wis. Fed'n of Teachers v. Wis. Dep't of Pers. (Wis. Pers. Comm'n, 04/02/82).

A union has a right to proceed before DILHR to enforce its members' rights under a collective bargaining agreement when those rights conform to rights under the Act. Gen. Tel. of Wis. v. LIRC (Communication Workers of Am.) (Ct. App., Dist. IV, unpublished opinion, 10/26/81).

A union has standing to bring a complaint under the Act on behalf of one of its members. Hartford Elementary Educ. Ass'n v. Hartford Sch. Dist. (LIRC, 05/14/79).

A union local is a proper party and a person aggrieved within the meaning of Chapter 227, and it has standing to represent the class of all female employees who were denied pregnancy-related disability benefits pursuant to an employer's sickness and accident plan. Sosnowski v. Uniroyal (LIRC, 05/14/79).

112.9 Miscellaneous

The Complainant was subject to an order of the Wisconsin Personnel Commission prohibiting him from filing WFEA complaints with the Equal Rights Division against specific state agencies, including the Department of Corrections, until he satisfied court judgments. The complaint was dismissed on the grounds that the Complainant failed to show that he paid all outstanding judgments. Balele v. State of Wis. Dep't of Corr. (LIRC, 06/13/18).

An Administrative Law Judge's order that the Respondent should cease and desist from discriminating against the Complainant or any of its employees was modified to apply only to the Complainant. Neither the Equal Rights Division nor the Labor and Industry Review Commission have the authority to entertain a class action under the Wisconsin Fair Employment Act. Metzger v. UGD Auto. (LIRC, 02/28/08).

The Complainant alleged that she had been discriminated against by the Respondent on the basis of age and sex when it failed to hire her for a position as a librarian. By offering evidence relating to the unsuccessful applications for promotion of other females over the age of forty within the Respondent's library system, the Complainant appeared to be attempting to prosecute her charge as a class action. Neither the Equal Rights Division nor the Labor and Industry Review Commission have the authority under the Wisconsin Fair Employment Act to entertain a class action. Rosneck v. UW-Madison (LIRC, 08/10/06), aff'd sub nom. Rosneck v. LIRC and UW-Madison (Dane Co. Cir. Ct., 01/22/07); aff'd (Ct. App., Dist. IV, unpublished opinion, 01/10/08).

The Equal Rights Division does not have the authority to entertain a class action under the Wisconsin Fair Employment Act. Rowser v. Upper Lakes Foods (LIRC, 10/29/04).

The class action procedure is not available in the administrative processes provided for in the Wisconsin Fair Employment Act. Jones v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

In a licensing discrimination case, the Complainant must initially show that he applied for the license in question. Where the Complainant never applied for a license (to practice dentistry, in this case), he cannot proceed on a complaint alleging that he would have been denied a license had he applied. Jones v. Cent. Reg'l Dental Testing Serv. (LIRC 02/29/96).

A case may be brought under sec. 111.322(2), Wis. Stats., even though no individual has suffered actual injury as a result of a printed statement which implies an intent to discriminate. This statute addresses the evil of employment discrimination on the two fronts where it obviously is practiced –against existing employees and against prospective employees. The violation is complete when the policy is in place and then printed or circulated. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

A cause of action under the Wisconsin Fair Employment Act survives the death of the Complainant. The Estate of Kaluza v. Gross Common Carrier, Inc. (LIRC, 03/05/86).

A cause of action under the Wisconsin Fair Employment Act survives death and may be pursued by a decedent's estate. Szamocki v. Gilbert Shoe Co. (LIRC, 07/31/78).

113 Against whom a complaint may be filed

113.1 Employers

Because the Respondent was not a current or prospective employer of the Complainant, nor a union or licensing agency, there was a question as to whether it had the ability to directly engage in any of the enumerated acts of discrimination laid out in the WFEA. LIRC has repeatedly found that a complaint may be stated under the Act, even in the absence of an actual or potential employment relationship between the parties, provided the complaint has alleged that a Respondent engaged in an action that directly relates to an employment opportunity. The Complainant alleged that the Department of Corrections ("DOC") colluded with the third-party employer to discriminate against him in terms of compensation and stated a claim for relief. The commission distinguished this case from Jackson v. State of Wis. Dep't of Corr. (LIRC, 11/14/16), stating "there are meaningful distinctions" between this case and the Jackson case. The action at issue in Jackson was the DOC's decision to remove the Complainant from the work release program altogether based upon an infraction of DOC rules – a matter of internal prison policy that was completely separate from the actual terms and conditions of his employment with the third-party employer. In this case, the Complainant claimed that the DOC colluded with the third-party employer to discriminate against him in terms of compensation. Lofton v. State of Wis. Dep't of Corr. (LIRC, 09/27/18).

The Complainant alleged that the Respondent DOC violated the WFEA when it terminated his employment in an off-site work release program. Because the Respondent is not a prospective or actual employer, nor a union or licensing agency, it is unable to engage directly in any of the enumerated acts of discrimination laid out in the statute. The commission recognizes that the WFEA has been broadly interpreted to cover actions that may affect employment opportunities taken by employers or persons with whom the Complainant has no current or potential employment relationship. However, the decisions that take this approach have involved situations that are distinguishable from this case. The Respondent's actions in ending the Complainant's participation in a prison program that would have permitted him to obtain outside employment with a third-party employer do not fit within the definition of discrimination provided in the Act. "It strains common sense to find that a prison inmate whose only employment-related connection to the Respondent is due to the fact of his incarceration would be covered by the Act..." Jackson v. State of Wis. Dep't of Corr. (LIRC, 11/14/16)

The Complainant sought redress for the loss of her employment as a caregiver for her mother, the recipient of Medicaid-eligible in-home care services administered through the Department of Health Services ("DHS"). The program through which the Complainant's mother received caregiving services was referred to as Include, Respect, Self-Direct (IRIS). DHS contracted with a fiscal service agency, the Milwaukee Center for Independence ("MCFI"), to perform certain functions for the IRIS program including obtaining employees' criminal histories. MCFI was not a "person" under the WFEA as it was not in a position to engage in a discriminatory act that had a connection with the denial or restriction of the Complainant's employment opportunities. MCFI had no control over the Complainant's loss of employment and had no authority to reinstate her or tap her mother's Medicaid funds to pay her. MCFI simply gathered information for the background check that revealed the Complainant's conviction for theft. Haynes v. IRIS (LIRC, 11/07/14).

Adverse actions taken against the Complainant by an individual who at the time was not an employee or agent of the named Respondent fails to state a cause of action. DeMoya v. Wis. Dep't of Veterans Affairs (LIRC, 12/12/13).

The State Department of Corrections did not act as an employment agency within the meaning of the Wisconsin Fair Employment Act when it assigned the Complainant, an inmate, work under its work-release program. It is not part of the mission of the Department of Corrections to provide workers for business enterprises. Instead, the DOC develops associations with businesses willing to accept inmate workers, and places eligible inmates with these businesses for rehabilitation and other correctional purposes. (The DOC was subject to the Act as a "person," however.) Monroe v. Birdseye Foods (LIRC, 03/31/10).

The State of Wisconsin is not considered a single employing entity. Wongkit v. UW-Madison (Wis. Pers. Comm'n, 10/21/98).

The Personnel Commission's jurisdiction under the Wisconsin Fair Employment Act is over employment actions by a state agency acting in the capacity of an employer. The state agency that was a defendant in previous litigation in which a garnishment order was obtained and an agency which defended various other agencies in lawsuits filed by the Complainant did not act in the capacity of an employer within the meaning of the WFEA. Balele v. DOA (Wis. Pers. Comm'n, 06/04/97); aff'd sub nom. Balele v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 02/13/98).

The discharge of an employee because of disability after a potential business partner of the employer demanded it as a condition of entering into partnership with the employer was discriminatory. Swanson v. State St. Stylists (LIRC, 11/26/97).

The decision by the Department of Workforce Development to deny the Complainant unemployment compensation benefits after her discharge from employment with the University of Wisconsin Hospital Clinics Board related to the regulatory authority of the Respondent, rather than to its authority as an employer. The Personnel Commission lacked jurisdiction to review the Complainant's Wisconsin Fair Employment Act claim arising from the denial of benefits. Mosley v. DWD (Wis. Pers. Comm'n, 09/24/97).

The Complainant prevailed on her complaint that she had been sexually harassed by the Respondent (a company) and that the Respondent had terminated her employment because of her sex and because she had opposed a discriminatory practice under the Act. However, the Complainant's supervisor and the owner of the Respondent were appropriately dismissed as Respondents. The Complainant argued that her supervisor should be held liable because he was acting as an agent of the company. However, sec. 111.39(4)(c), Stats., expressly provides that, "If the examiner awards any payment to an employee because of a violation of s.111.321 by an individual (i.e., agent) employed by the employer, under s.111.32(6), the employer of that individual is liable for the payment." The Complainant argued that the owner of the company should be held liable since he exercised complete authority over all decision-making related to the corporation, including the decision to terminate her employment. One of the underlying purposes of the corporate structure is the advancement of limited liability of corporate investors. Exceptions to the general rule of limited shareholder liability exist where "applying the corporate fiction would accomplish some fraudulent purpose . . . or defeat some strong equitable claim." However, in this case there was no evidence which supported piercing the corporate veil and imposing personal liability on the owner of the Respondent. Burton v. Marketing Technologies (LIRC, 05/10/96).

The Complainant argued that while the Respondent was not directly his employer, it controlled his access to employment with a third party. However, the Respondent in this case did not have significant control over the Complainant's employment opportunities and did not interfere with his employment opportunities with third parties. The Complainant was able to and did freely contract to perform work with other employers without any interference by the Respondent. Omegbu v. Mequon-Thiensville Sch. Dist. (LIRC, 12/21/95).

While it is unlawful for a "person" to discriminate, the Personnel Commission's jurisdiction under the Wisconsin Fair Employment Act runs only to the state agency as the employer, and not to individual agents of the agency in their individual capacities. Goetz v. DOA (Wis. Pers. Comm'n, 11/13/95).

The Lesbian, Gay and Bisexual Campus Center, a registered student organization, is not sufficiently outside the control and governance of the University of Wisconsin-Madison to be considered in legal effect an independent agency such that it would have a capacity as an employer independent of the University of Wisconsin-Madison. While the center can independently make decisions regarding its own operation (including the employment of

students), such decisions are subject ultimately to the authority of the Chancellor and the Board of Regents. Haselow v. UW-Madison (Wis. Personnel Comm'n, 06/09/95).

A manager who discharged a Complainant for an unlawful reason should probably not be named as a separate Respondent where there was no allegation in the complaint that the manager was acting outside of the scope of her apparent authority and the evidence in fact showed that she had the authority to discharge employees. The appropriate Respondent in such cases is the employer, and the employer is liable for the violation of the Act. Koll v. Hair Design (LIRC, 04/27/95).

A complaint arising from the action of the Respondent finding that the Complainant did not possess the requisite qualifications for status as a mental health professional related to the regulatory authority exercised by the State, rather than its authority as an employer. Mehler v. DHSS (Wis. Pers. Comm'n, 12/22/94).

The Personnel Commission lacks jurisdiction to hear a claim of discrimination brought by a student who alleged that the Respondent failed him for a doctoral qualifying exam. The Complainant's allegations did not relate to the Respondent's role as an employer. Hassan v. UW-Madison (Wis. Pers. Comm'n, 03/29/94).

An unincorporated proprietorship has no legal identity distinct from that of its owners. Therefore, an amended complaint purporting to add the owners as Respondents, in addition to the business itself, would make no real legal change in the parties, or in the allegations of the complaint. If a Respondent is a corporation, rather than an unincorporated proprietorship, there is no basis for separately naming owners (i.e., owners of the corporation's stock) as Respondents in their individual capacities based simply on their stock ownership. The corporation is a separate legal entity. Liability for actions taken by the corporation (acting through its agents) is liability of the corporation. The liability of stockholders for actions taken by the corporation is limited. While there may be cases in which the law will "pierce the corporate veil" to impose liability of a corporation directly on its owners on a personal basis, whether this is appropriate or necessary must be determined on a case-by-case basis, and it cannot be automatically achieved merely by naming the owners as Respondents. Sinclair v. Mike's Towne & Country (LIRC, 10/15/93).

If the constitution or a law creates both an agency and one or more subdivisions within that agency, each such subdivision is not considered a separate, exclusive employer under the Wisconsin Fair Employment Act. Schilling v. UW-Madison (Wis. Pers. Comm'n, 11/06/91).

The Respondent was an employer of the Complainant for purposes of the Wisconsin Fair Employment Act where: (1) the Complainant was at least nominally a county employee, but worked in a program that was a cooperative venture of the county, and (2) the Respondent and the Complainant's supervisor, on behalf of the Respondent, exercised the authority to exert significant control over the incidents of the Complainant's employment. The fact that the supervisor did not have final authority to discipline the Complainant was not critical. Betz v. UW-Extension (Wis. Pers. Comm'n, 02/08/91).

There is little authority construing the definition of "employer" in the Wisconsin Fair Employment Act. The definition of employer in Title VII is quite similar to the definition in the Wisconsin Fair Employment Act. Case law under Title VII has given the definition of "employer" a broad construction that focuses on control over conditions of employment. Entities which exercise significant control over an employment situation may be proper defendants in a Title VII action even though they are not the immediate employer. Betz v. UW-Extension (Wis. Pers. Comm'n, 02/08/91).

The Supreme Court was not an employer with respect to certain positions filled by the Wisconsin Equal Justice Task Force. The fact that the WEJTF was in effect created by the court was an insufficient basis for finding that the court held employer status in the absence of both a traditional employment relationship and any alleged

input into or control over the hiring process by the court. Novak v. Wis. Supreme Ct. (Wis. Pers. Comm'n, 02/07/91).

The Wisconsin Fair Employment Act and Title VII address the type of entity that is considered an employer, but they do not address the functional nature of the employment role. Title VII case law establishes that status as an employer can be based on control over the opportunity for and conditions of employment and does not require a traditional or common law employment relationship. Novak v. Wis. Supreme Ct. (Wis. Pers. Comm'n, 02/07/91).

The following factors may be considered in determining whether technically separate corporate entities may be consolidated in an employment discrimination matter: (1) the interrelationship of operations, (2) common management, (3) centralized control of labor relationships, and (4) common ownership or financial control. Novak v. Wis. Supreme Ct. (Wis. Pers. Comm'n, 02/07/91).

The court granted an Absolute Writ of Prohibition prohibiting the Equal Rights Division from taking any further proceedings against the Wisconsin Winnebago Business Committee, the duly authorized governing body of the Wisconsin Winnebago Indian Tribe, because that entity possessed sovereign immunity from suit. State ex rel. Wis. Winnebago Business Comm. v. DILHR (Dane Co. Cir. Ct., 04/16/90).

The Department of Justice was not acting as an employer, but merely acted as a conduit for federal funding which ultimately found its way to the organization which had employed the Complainant. Therefore, the complaint was dismissed. Murchison v. DOJ (Wis. Pers. Comm'n, 10/04/89).

Three business entities were a joint employer where their operations were interrelated, they had common management, and one person had the final decision on employment matters for each of the three corporations. Gustafson v. C.J.W., Inc. (LIRC, 03/21/89).

Where the Complainant worked as an employee of Kelly Services at Madison Area Technical College, MATC could be found to be an employer of the Complainant under the Wisconsin Fair Employment Act when, because of the Complainant's arrest record, MATC caused the person's work assignment at its workplace to be terminated. Collins v. MATC (LIRC, 12/19/86).

A public employer can be found liable for discrimination if it caused a temporary employment agency to terminate the assignment of an employee of that agency who worked at the public employer's workplace. Collins v. MATC (LIRC, 12/19/86).

The Personnel Commission lacked jurisdiction to consider the Complainant's allegation that the Commission discriminated against him by delaying the investigation of a charge of discrimination, since there was no employment relationship between the Complainant and the Personnel Commission. Poole v. DILHR (Wis. Pers. Comm'n, 12/06/85).

The Department of Military Affairs is not exempt from the Wisconsin Fair Employment Act when making decisions to terminate the employment of military members of the National Guard. Schaeffer v. DMA (Wis. Pers. Comm'n, 11/07/84).

In assigning a classification to a salary range, the administrator is acting as an employer as the term is used in the Wisconsin Fair Employment Act, as he is controlling an aspect of the employees' compensation and is involved in the total employment process, even though the Complainants were employed in agencies other than the Division of Personnel. WFT v. Wis. Div. of Pers. (Wis. Pers. Comm'n, 04/02/82).

A nonprofit corporation exempt from federal and state income taxes and organized for the purpose of promoting social activities among the club's members is not an employer within the meaning of the Act. Victoreen v. Milwaukee Athletic Club (LIRC, 10/13/81).

The UW-Press was not an employer of the Complainant with respect to a complaint of discrimination regarding its refusal to publish a manuscript. Acharya v. UW (Wis. Pers. Comm'n, 10/01/79).

A complaint against the Director of the Bureau of Grain Regulation was dismissed because he is not an employer within the meaning of the Act. Wis. Dep't of Agric. v. LIRC (Anderson) (Dane Co. Cir. Ct., 05/25/78).

113.2 Labor organizations

A union representative was not a necessary party where the collective bargaining agreement excluded pregnancy disability from the employer's disability plan because the employer was solely responsible for paying disability benefits and there was no evidence that the union induced the employer's action. Gen. Tel. Co. v. LIRC (Kraczek) (Ct. App., Dist. IV, unpublished opinion, 12/09/81).

Although a no probable cause finding had been made regarding a Co-Respondent union, its motion to be dismissed from the action was denied on the basis that it was a representative of its members' interests regarding the retroactive seniority claim of the complaining party. Milwaukee County v. DILHR (Lade) (Dane Co. Cir. Ct., 09/07/78).

An employer's motion to compel joiner of a union was denied, even though the union was a party to a collective bargaining agreement providing for less disability coverage for pregnancy, because the union was not needed to aid in the interpretation of the agreement. Sorgel Elec. v. LIRC (Dobson) (Milwaukee Co. Cir. Ct., 08/10/79); also, Hall v. Ripon Foods (LIRC, 08/09/78); Appleton Papers v. DILHR (Schmitz) (Dane Co. Cir. Ct., 06/26/75).

A black employee failed to show that he was denied proper union representation after his discharge where his union demonstrated that he and other black employees were given representation that was similar to that given white employees. Beamon v. Kiekhaefer Mercury (DILHR, 02/21/75).

The denial by a trade union local of full membership to a black tradesman from an out-of-state sister local was discriminatory, as was the local's subsequent grant to him of limited membership while his skills were investigated. Blue v. Schaffer (Milwaukee Co. Cir. Ct., 02/13/54).

113.3 Licensing and employment agencies

A police department which suspended a Complainant's taxicab permit fits the definition of a licensing agency under sec. 111.32(11), Stats. (which specifically includes a department within a political subdivision such as a city). However, the police department and the city of which it is a subdivision are the same legal entity for purposes of the employment discrimination laws, and only the city should be named as a Respondent. Rathbun v. City of Madison (LIRC, 12/19/96).

A third-party organization (the Central Regional Dental Testing Service) that made determinations concerning what it believed to be the fitness of certain persons to engage in certain remunerative activities, but which did not make those determinations under the control of or as an agent for the licensing agency, was properly dismissed as a Respondent. The licensing agency used the determinations of the third-party organization in making licensing decisions. But the third-party organization did not actually control the legal right of individuals to engage in the remunerative activity in question (in this case, licensure as a dentist). Thus, the

proper Respondent was the licensing agency itself. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

Refusing to license an individual is not the only prohibited act of employment discrimination related to licensing. The Wisconsin Fair Employment Act also prohibits discrimination by licensing agencies with respect to other actions, such as applying different standards and procedures, even if in a particular case they do not happen to result in the denial of licensure to a particular person. Johnson v. Dental Examining Bd. (LIRC, 02/29/96).

In a licensing discrimination case, the Complainant must initially show that he applied for the license in question. Where the Complainant never applied for a license (to practice dentistry, in this case), he cannot proceed on a complaint alleging that he would have been denied a license had he applied. Jones v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

113.4 Other persons, joint employers, and de facto employers

Liability of a "person" who is not an employer or other entity named as a Respondent under the WFEA, Wis. Stat. §111.321 depends on showing that that person engaged in some discriminatory act that has a connection with the denial or restriction of the Complainant's employment opportunities. Heart v. UW-Superior Found. (LIRC, 02/28/20).

The Commission contemplates situations in which an individual may have one or more employers, each of whom in concert exercises control over some aspect of that individual's hiring, firing, or terms and conditions of employment. Bach v. Easter Seals Se. Wisc. (LIRC, 10/09/14).

The Department of Corrections was subject to the Wisconsin Fair Employment Act as a "person" within the meaning of the Act with respect to its work-release program for inmates. The concept of "person" is a very broad one. Monroe v. Birdseye Foods (LIRC, 03/31/10); *But see; Jackson v. State of Wis. Dep't of Corr. (LIRC, 11/14/16). The Complainant alleged that the Department of Corrections violated the WFEA when it terminated his employment in an off-site work release program. Because the Respondent is not a prospective or actual employer, nor a union or licensing agency, it is unable to engage directly in any of the enumerated acts of discrimination laid out in the statute. LIRC recognizes that the WFEA has been broadly interpreted to cover actions that may affect employment opportunities, taken by employers or persons with whom the Complainant has no current or potential employment relationship. However, the decisions that take this approach have involved situations that are distinguishable from this case. The Respondent's actions in ending the Complainant's participation in a prison program that would have permitted him to obtain outside employment with a third-party employer do not fit within the definition of discrimination provided in the Act.*

A "person" other than an employer, labor organization or licensing agency can violate the Wisconsin Fair Employment Act if it engages in discriminatory conduct which has a sufficient nexus with the denial or restriction of an individual's employment opportunity. In this case, the Respondent did not directly employ the Complainant. The Complainant worked as a commercial truck driver for another company which leased its trucks and drivers exclusively to the Respondent. The Respondent had the authority to approve or reject drivers. It also oversaw driver safety, including drivers' federally required Department of Transportation certifications. The Respondent's actions had a sufficient nexus with the denial or restriction of the Complainant's employment opportunities. Even if it was not an employer, it was, at the very least, an "other person" under the Wisconsin Fair Employment Act. Szleszinski v Transhield Leas. Co. et al (LIRC, 02/04/04); Szleszinski v. LIRC, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345, *aff'd* Szlezinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

While secs. 111.321 and 111.325 of the Wisconsin Fair Employment Act provide that no "person" may engage in an act of employment discrimination, the Act also expressly provides for employer liability for any financial remedies ordered as a result of a violation of the law "by an individual employed by the employer." Sec. 111.39(4)(c), Stats. Thus, individual supervisors acting as agents of the employer should not be named as separate Respondents in discrimination complaints. Yaekel v. DRS Ltd. (LIRC, 11/22/96).

Notwithstanding the general suggestion in some decisions by the Labor and Industry Review Commission that the "person" language in sec. 111.325, Stats., might reach non-employer entities that affect employment opportunities, this possibility does not exist in the case of non-governmental organizations which make determinations affecting decisions of governmental licensing organizations. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

The Wisconsin Fair Employment Act is not limited to discrimination by "employers" against their own "employees." While sec. 111.325, Stats., provides that it is unlawful for "any employer . . . or person to discriminate against any employee or any applicant for employment," the disjunctive use of the term "person" clearly implies that the "person" doing the discriminating can be someone or something other than an "employer" and therefore can be something or someone other than the employer of the person being discriminated against. In this case, the City of Milwaukee is a person within the meaning of sec. 990.01(26), Stats. The Complainant is clearly an "individual," and he is also an "employee," in that he was an employee of an agency which contracted to provide security guard services for the City. Therefore, the Wisconsin Fair Employment Act is applicable to the Complainant's claim of discrimination against the City. Jackson v. City of Milwaukee (LIRC, 10/28/93).

A "person" other than an employer, labor organization or licensing agency can violate the Wisconsin Fair Employment Act if it engages in discriminatory conduct which has a sufficient nexus with the denial or restriction of an individual's employment opportunities. Olivares v. UW-Oshkosh (DILHR, 10/23/73).

113.5 Respondent's responsibility for acts of agent

A staffing service forwarded the Complainant's application to the employer, which opted not to hire him. Even if it could be determined that the employer discriminated against the Complainant based upon his conviction record, there would be no basis to impute liability to the staffing service which played no role in the selection process and was not the employer's agent. Doughty v. Kelly Servs. (LIRC, 07/31/18).

The Complainant claimed that a corporation had printed or circulated a discriminatory policy. However, his claim was filed against a different entity, a subsidiary of that corporation. Where the named Respondent is a corporate subsidiary of another entity, there is no basis to conclude that actions taken by that entity can be imputed to its subsidiary such that the subsidiary bears legal responsibility for those actions. Jackson v. Klemm Tank Lines (LIRC, 03/26/15).

An employer cannot be found responsible for discriminatory conduct unless it is carried out by the employer or, if carried out by the Complainant's co-employees, the employer knows or should reasonably know of it and fails to take reasonable action to prevent or address it. Wagner v. Superior Serv. (LIRC, 12/16/03).

Where a supervisor has acted under color of his or her authority as an agent of an employer, the employer is properly held liable for their conduct. The essential question is not whether the act in question was authorized by the employer, but whether it took place in the scope of the agent's employment. Thus, for example, where an agent of an employer discharges an employee for an unlawful reason, it is not relevant that the owner of the business is unaware of the factors leading to the discharge; the manager is an agent of the employer and the employer is, therefore, liable for the manager's conduct. However, if the individual who engaged in the

discrimination was a coworker, rather than a supervisor, of the Complainant, the employer would not be responsible unless it knew or should reasonably have known of the discriminatory conduct and failed to take reasonable action to prevent it. Ferguson v. Buechel Stone Corp. (LIRC, 04/24/01).

In determining whether an employee's coworkers are supervisors for purposes of imputing liability for alleged discriminatory acts, LIRC looks to the test for supervisory status as set forth in City Firefighters Union v. Madison, 48 Wis. 2d 262, 179 N.W.2d 800 (1970). The criteria for deciding whether supervisory capacity exists include: (1) the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; (2) the authority to direct and assign the workforce; (3) the number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees; (4) the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees; (5) whether the supervisor is primarily supervising an activity or is primarily supervising employees; (6) whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees, and (7) the amount of independent judgment and discretion exercised in the supervision of employees. Ferguson v. Buechel Stone Corp. (LIRC, 04/24/01).

While it might be satisfying to hold the individual who committed the sexual harassment of the Complainant financially responsible for his actions, the law does not sanction such a result. In this case, that individual was the manager of the business; he acted as an agent and was not an employer in his own right. Therefore, there was no legal basis for making him financially liable. The employer is liable for any financial remedies ordered as a result of a violation of the law by an individual employed by that employer. (sec. 111.39(4)(c), Stats.). Powell v. Salter (LIRC, 07/11/97).

Where an individual person has acted under color of his or her authority as an agent of an employer, the employer rather than the individual person is properly held liable as the Respondent. Hoey v. County of Fond du Lac (LIRC, 07/09/97).

Where an individual person has acted under color of his authority as an agent of an employer, the employer (rather than the individual person) is properly held liable as the Respondent. The same reasoning applies to cases involving licensing agencies. In this case, where there was no evidence which would show that two individuals named as Respondents had acted outside of their authority as agents of the City of Madison's Police Department, they could not be held liable to the Complainant even if unlawful discrimination were found. Liability would rest with the City. Rathbun v. City of Madison (LIRC, 12/19/96).

Individual supervisors should not be named separately as Respondents where the alleged violation arose out of actions taken by them as agents of the employer. The essential question in applying agency principles to cases where, for example, the Complainant has alleged sexual harassment by her supervisor, is not whether the act in question was authorized by the employer, but whether it took place in the scope of the agent's employment. In this case, given that the alleged sexual harassment occurred at the work place, during work hours, and was perpetrated by a supervisor against a subordinate employee, there was no basis for finding that it was outside of the scope of the supervisor's employment. Yaekel v. DRS Ltd. (LIRC, 11/22/96).

While secs. 111.321 and 111.325 of the Wisconsin Fair Employment Act provide that no "person" may engage in an act of employment discrimination, the Act also expressly provides for employer liability for any financial remedies ordered as a result of a violation of the law "by an individual employed by the employer." Sec. 111.39(4)(c), Stats. Thus, individual supervisors acting as agents of the employer should not be named as separate Respondents in discrimination complaints. Yaekel v. DRS Ltd. (LIRC, 11/22/96).

The Complainant prevailed on her complaint that she had been sexually harassed by the Respondent (a company) and that the Respondent had terminated her employment because of her sex and because she had

opposed a discriminatory practice under the Act. However, the Complainant's supervisor and the owner of the Respondent were appropriately dismissed as Respondents. The Complainant argued that her supervisor should be held liable because he was acting as an agent of the company. However, sec. 111.39(4)(c), Stats., expressly provides that, "If the examiner awards any payment to an employee because of a violation of s.111.321 by an individual (i.e., agent) employed by the employer, under s.111.32(6), the employer of that individual is liable for the payment." The Complainant argued that the owner of the company should be held liable; however, in this case there was no evidence which supported piercing the corporate veil and imposing personal liability on the owner of the Respondent. Burton v. Mktg. Technologies (LIRC, 05/10/96).

The Labor and Industry Review Commission's decision in Sinclair v. Mike's Towne & Country (LIRC 10/15/93), should be understood as having been concerned with the narrow question of whether individual persons who were employed by an employer should be separately named as Respondents in a discrimination complaint against that employer. Because the statute provides expressly for liability on the part of the principal (the employer) in such cases, having an individual employee-agent named as a party unnecessary complicates the proceeding (not to mention the case caption). Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

A supervisor who was found to have sexually harassed a Complainant is not liable for payment of the Complainant's attorney's fees and costs. Section 111.39(4)(c), Stats., provides that "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" (emphasis added). Olson v. Servpro of Beloit (LIRC, 08/04/95).

Where an agent of the employer discharged the Complainant for an unlawful reason, it was not relevant that the owner of the business establishment was unaware of the factors leading to the discharge. The manager was an agent of the employer and the employer is, therefore, liable for the manager's conduct. Koll v. Hair Design (LIRC, 04/27/95).

It is not clear whether individuals who acted as agents of an employer can or should be made additional Respondents in a proceeding against the employer under the Wisconsin Fair Employment Act. Where the alleged violation by the agent was within the scope of their agency, they should not be separately named as a Respondent since sec. 111.39(4)(c), Stats., provides for employer liability for remedies ordered as the result of a violation of the Act by an employee (i.e., an agent) of the employer. It is not clear whether the Wisconsin Fair Employment Act would allow imposition of liability directly on an employer's agent rather than on the employer where the employer's agent had acted outside the scope of their agency. Sinclair v. Mike's Towne & Country (LIRC, 10/15/93).

Where a person has acted under color of their authority as an agent of an employer, it is the employer rather than the individual that is properly viewed as the Respondent. Nelson v. Waybridge Manor (LIRC, 04/06/90).

The social workers who allegedly discriminated against the Complainant were not her supervisors. In determining whether an employee's co-workers were supervisors, the court looks to the more restrictive definition of that term as set forth in City Firefighter's Union v. Madison, 48 Wis. 2d 262, 179 N.W.2d 800 (1970). Because the social workers did not supervise the Complainant, the Respondent, which neither knew of nor should have known of any discrimination by them, was not liable for racial discrimination against the Complainant. Crear v. LIRC, 114 Wis. 2d 537, 339 N.W.2d 350 (Ct. App. 1983).

A county is responsible for the discriminatory conduct of a county judge by virtue of the theory of *respondeat superior*, and the judge waived his right to judicial immunity by failing to raise it earlier in the litigation. Drecktrah v. LIRC (Donaldson) (Jackson Co. Cir. Ct., 04/06/82).

A complaint charging an employer with retaliation was dismissed because the author of the alleged retaliatory job reference was not acting as an agent of the employer. Pedersen v. Cepek Constr. (LIRC, 01/17/80).

113.6 Indian Tribes and related business entities

Tribal immunity was not conferred on an existing for-profit corporation when all of the shares of the corporation were purchased by an Indian tribe. An Indian tribe's purchase of a corporation's stock does not normally confer tribal immunity on the corporation. The Court of Appeals listed and analyzed nine relevant factors to determine whether sovereign immunity extended to the corporation that had been purchased by the Indian tribe. The Court of Appeals specifically emphasized that this is a narrow holding and is limited to the specific facts of the case. McNally CPA's & Consulting, S.C. v. DJ Hosts, Inc., 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247.

A multiple factor balancing test is the correct way to determine whether tribal immunity has been relinquished for an entity which is established under Wisconsin law and which is owned and controlled by an Indian tribe or a group of tribes. The commission applied the factors set forth in McNally CPA's and Consulting, S.C. v. DJ Hosts, Inc., 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247 and determined that, under principles of tribal immunity, LIRC lacked jurisdiction to determine a case involving WFEA claims against the Great Lakes Inter-Tribal Council. Danforth v. Great Lakes Tribes Inter-Tribal Council, Inc. (LIRC, 06/22/20), aff'd sub nom Danforth v. LIRC, *(Brown Cty. Cir. Ct. 01/13/21).*

113.9 Miscellaneous

The rationale that the Supreme Court relied upon in City of Madison v. DWD, 262 Wis. 2d 652, 664 N.W.2d 584 (2003), to find that the Madison Police and Fire Commission has exclusive jurisdiction to hear complaints of discriminatory discharge or discipline under sec. 62.13(5), Stats., applies equally to the treatment of WFEA claims arising out of actions by the Milwaukee Police and Fire Commission under sec. 62.50(11), Stats. Section 62.50, Stats., which applies to police and fire departments in first-class cities, contains a provision that is strikingly similar to sec. 62.13(5), Stats., which was the provision discussed by the Supreme Court in City of Madison. Section 62.50(11), Stats., provides that no member of a police or fire department may be discharged except for just cause and after a trial, at which the officer may present evidence, cross-examine witnesses, and be represented by counsel. As in the City of Madison case, "just cause" is determined by reference to seven factors, including whether the chief is applying the rule or order fairly and without discrimination against the subordinate. Similarly, the statute provides that the police officer or firefighter can appeal the decision of the Police and Fire Commission ("PFC") to circuit court. The statute further provides that, if the decision of the PFC is reversed by the court, the officer will be reinstated to his or her former position. If, on the other hand, the decision is sustained, it shall be final and conclusive. Koch v. City of Milwaukee (LIRC, 06/09/11).

The mere fact that two companies share a relationship with a parent company does not make them a joint employer for employment discrimination complaint purposes. In this case, each company under the umbrella of the parent company had its own officers and board and operated on a stand-alone basis. The Complainant failed to present sufficient evidence to show that the two companies essentially made joint employment decisions such that they should be subject to joint employment discrimination liability. Jackson v. LIRC (Ct. App., Dist. IV, 06/13/08, summary decision).

The Respondent's claim that its common council decisions are immune from scrutiny is refuted by the Wisconsin Fair Employment Act, which defines the entities included and excluded from its coverage as follows:

> (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, a 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. (Emphasis added).

It is doubtful that the legislature would specifically include itself as a body covered by the Act's anti-discrimination provisions yet exclude municipal common councils from the Act's coverage. Gunty v. City of Waukesha (LIRC, 03/29/07).

The Department of Workforce Development does not have jurisdiction over a WFEA claim arising out of an action by a police and fire commission under sec. 62.13(5), Stats. However, while it is appropriate to dismiss the Complainant's WFEA-based discrimination claims, the order of dismissal does not apply to a Complainant's discrimination claims under federal law. Engel v. Town of Brookfield (LIRC, 05/25/04).

The Department of Workforce Development may not take jurisdiction over a WFEA complaint arising out of a decision of a police and fire commission. City of Madison v. DWD, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

The Complainant's claim of discrimination involving alleged discriminatory action by the Ho-Chunk Casino that took place entirely on tribal lands was properly dismissed for lack of jurisdiction. State courts (and, consequently, state administrative forums) have no jurisdiction over Indian entities. The Supreme Court of the United States has determined that state court jurisdiction over tribal activities that took place within Indian country would undermine the Congressional aim of encouraging self-government and self-determination by the dependent tribes and "infringe on the rights of the Indians to govern themselves." (Citing Williams v. Lee, 358 US 217, 223 (1959).) Kocian v. Ho-Chunk Casino (LIRC, 03/26/04).

A complaint filed against a hotel and convention center which is owned by the Ho-Chunk Nation was properly dismissed for the following reasons: (1) Indian Tribes are immune from suit under the Wisconsin Fair Employment Act because of their sovereign status; (2) business entities owned and operated by Indian Tribes enjoy the same immunity the Indian Tribe itself does; (3) where a claim arises entirely on tribal land, this gives the Indian Tribe another defense (lack of subject matter jurisdiction); (4) the Complainant had a claim pending in the tribal courts and the U.S. courts have long held that for the sake of comity matters should not be prosecuted in U.S. courts while jurisdiction lies in tribal courts and should not be relitigated if resolved in those courts. Cichowski v. Ho-Chunk Hotel & Convention Ctr. (LIRC, 08/17/01).

The determination of eligibility for unemployment benefits and the calculation of the amount of those benefits does not affect employment or employment opportunities in the manner contemplated in sec. 111.322, Stats. Therefore, a complaint alleging that the Unemployment Insurance Division had discriminated against the Complainant on the basis of age was properly dismissed for lack of jurisdiction. Moreover, even if the determination of benefit eligibility could be said to fall within the purview of the Wisconsin Fair Employment Act, complaints of discrimination against state agencies are to be filed with the Personnel Commission and are not within the jurisdiction of the Equal Rights Division. Sholtes v. Unemployment Ins. (LIRC, 01/19/01).

The Equal Rights Division did not have jurisdiction over a case which involved an action by a person acting as an agent of a state agency with respect to employment with a State agency. Such issues are under the jurisdiction of the Personnel Commission. Greffin v. Wis. Power & Light (LIRC, 12/18/96).

The State of Wisconsin should not be separately designated as a Respondent in the caption of Equal Rights Division proceedings in which an agency of the State of Wisconsin is already a Respondent. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

The concept of mandatory joinder is not recognized in proceedings before the Equal Rights Division. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

The Equal Rights Division does not have jurisdiction over Fort McCoy because it is a "federal reservation" within which the federal government has exclusive jurisdiction. A federal military reservation is in legal contemplation not actually a part of the state in which it is located. Hatfield v. Aurora Bldg. Maint. (LIRC, 11/17/95).

Where liability rests with the predecessor or the successor in the case of a transfer of ownership of the Respondent depends on a number of factors, including (1) whether the successor had prior notice of the claim against the predecessor; (2) whether the predecessor is able, or was able prior to the purchase, to provide the relief requested; and (3) whether there has been a sufficient continuity in the business operations of the predecessor and the successor. The tests presented by successorship cases are fact specific and must be evaluated in light of the facts of each case and the particular legal obligations at issue. Sinclair v. Mike's Towne & Country (LIRC, 10/15/93).

The complaint was properly dismissed where it named "the Sampson Jewish Community Center," a building at which the Complainant worked, as the Respondent. The named Respondent is neither an employer nor an individual covered under the Wisconsin Fair Employment Act. Reed v. Sampson Jewish Cmty Ctr. (LIRC, 05/21/93).

The Wisconsin Fair Employment Act does not provide any right to file a discrimination complaint against staff members of the Equal Rights Division. Thompson v. Milwaukee Bd. of Sch. Dir. (LIRC, 03/26/93).

The state may exercise jurisdiction over an Indian tribe under the Wisconsin Fair Employment Act only if the tribe or the state legislature expressly waived tribal sovereign immunity from such suits. Public Law 280 does not abolish tribal immunity from state jurisdiction. Although tribal officials do not have the same immunity as the tribe itself, tribal immunity does extend to tribal officials when acting in their official capacity and within the scope of their authority. In addition, where the relief sought would operate directly against the tribe, unless the suit would in substance be against the tribe rather than against the tribal official, tribal immunity applies. Ninham v. Oneida Tribe of Indians of Wis. (LIRC, 06/25/91).

The Wisconsin Winnebago Business Committee, the duly authorized governing body of the Wisconsin Winnebago Indian Tribe, possesses sovereign immunity from suit. State ex rel. Wis. Winnebago Bus. Comm. v. DILHR (Dane Co. Cir. Court, 04/16/90).

The Personnel Commission lacked subject matter jurisdiction over a complaint against the Personnel Commission and the Equal Rights Division of the Department of Industry, Labor and Human Relations which alleged that those agencies discriminated against Complainant by failing to expeditiously process complaints against third parties concerning discrimination. Ozanne v. Pers. Comm'n (Wis. Pers. Comm'n, 12/18/87).

A Police and Fire Commission is a statutorily-created body which is totally independent from the police department. The Police and Fire Commission has been granted the express statutory authority to remove police officers. The Equal Rights Division inappropriately concluded that a police officer's discharge was retaliation for having filed a previous discrimination complaint because the chief of police and a management labor relations consultant acted with a retaliatory motive. Neither the chief of police nor the management labor relations consultant has the authority to discharge a police officer. It is the exclusive role of the Police and Fire Commission to determine whether a police officer should be discharged. City of River Falls Police Dept. v. LIRC (Pierce Co. Cir. Ct., 01/30/86).

The Personnel Commission has no jurisdiction to consider a Complainant's allegation that the Personnel Commission itself had discriminated against the Complainant in violation of the law by delaying the investigation of a charge of discrimination. Poole v. DILHR (Wis. Pers. Comm'n, 12/06/85).

A joint management-labor apprenticeship and training committee was neither an employer, a labor organization, a licensing agency, nor a person within the meaning of the Wisconsin Fair Employment Act. Flowers v. South Central Wis. Joint Apprenticeship & Training Comm. (LIRC, 06/21/85).

114 Geographical coverage of WFEA

For purposes of determining subject matter jurisdiction, discrimination occurs where the Complainant was employed. In Peterson v. RGIS Inventory Specialists (LIRC, 10/19/01), the commission took jurisdiction of a complaint in which the Complainant performed much of her job out-of-state but spent more than a de minimis amount of time in Wisconsin. Jurisdiction did not turn on whether the alleged acts of discrimination occurred in Wisconsin, only on whether enough of her employment occurred in Wisconsin. Danforth v. Great Lakes Inter-Tribal Council, Inc. (LIRC, 06/22/20), aff'd sub nom Danforth v. LIRC, *(Brown Co. Cir. Ct., 01/13/21).*

The Complainant stated no connection between his employment with Goodwill and Wisconsin, other than the fact that he lives in Wisconsin. He was not employed by Goodwill in Wisconsin, did not apply to become employed by Goodwill in Wisconsin, and did not and would not have worked for Goodwill in Wisconsin. Therefore, there is no jurisdiction under the WFEA as to the Complainant's employment issues in Wisconsin. Brantner v. Goodwill Indus. (LIRC, 02/19/10).

There is "geographical jurisdiction" where the Respondent (a business engaged in conducting inventories for other retail businesses) is organized into districts which cover a number of states and where the Complainant performed services in a district that conducted inventories in several states. The extent of the Complainant's employment occurring within the state of Wisconsin was clearly not *de minimis*. Therefore, the Complainant was engaged in employment occurring in part within the State of Wisconsin, and the Respondent's decision to discharge her affected that employment because it put an end to it. It is therefore appropriate for the State of Wisconsin to assert its jurisdiction to determine whether that discharge decision was contrary to the Wisconsin Fair Employment Act. Discrimination is deemed to occur in the place where the employment which is affected by it occurs. Peterson v. RGIS Inventory Specialists (LIRC, 10/19/01).

Discrimination must be deemed to occur in the place where the employment which is affected by it occurs. The location of the employment is the most important factor. Jurisdiction will be found where the activities of the employee which constituted his employment appear to have taken place to some significant degree within the state of Wisconsin. Hatfield v. Aurora Bldg. Maint. (LIRC, 11/17/95).

The controlling factor in determining whether the Wisconsin Fair Employment Act applies to a particular employment action is where the action took place. Here, the Complainant was an employee in Wisconsin who was told at the time he accepted a transfer to Georgia that his wife would have to join him in Georgia by a certain date. The Complainant was discharged after working four days in Georgia because his wife failed to join him. The Complainant's W-2 forms for that year showed that his entire salary was taxable in Wisconsin. It is reasonable to conclude that the employment action occurred both in Wisconsin and Georgia. Therefore, the Wisconsin Fair Employment Act does apply. Birk v. Georgia-Pacific (LIRC, 08/03/90), aff'd sub nom. Birk v. LIRC, (Milwaukee Co. Cir. Ct., 01/04/91).

Although the employer's parent company is incorporated outside of Wisconsin, it is a wholly owned subsidiary whose operation is based in Wisconsin and it, therefore, comes within the coverage of the Act. Johnson v. Tel-Page Corp. (LIRC, 09/26/83).

The Personnel Commission has jurisdiction over a complaint of discrimination with respect to filling a position in the State of Wisconsin Budget Office within the Department of Administration, located in Washington, D.C., where the appointing authority who was responsible for all appointments within the agency, wherever the work site, could be presumed to exercise his authority within the confines of the State. Leverette v. DOA (Wis. Personnel Comm'n, 09/03/82).

The controlling factor in determining whether the Wisconsin Fair Employment Act applies is the place where the discrimination took place. Gray v. Walker Mfg. (LIRC, 07/21/82).

The Equal Rights Division has jurisdiction over a complaint where the Complainant (1) was a truck driver who was a resident of Wisconsin, who worked for a division of the Respondent which was located in Wisconsin, (2) had his "home base" at the employer's Chicago terminal, and (3) was terminated by a representative of the employer who was in Chicago when he notified the Complainant (who was in Wisconsin) of the discharge over the telephone. The Complainant apparently drove in a number of states, including Wisconsin. The controlling factor in determining whether there is jurisdiction under the Wisconsin Fair Employment Act is where the discrimination took place. Buyatt v. C.W. Transport (LIRC, 07/25/77).

115 Express exceptions from coverage

An employer's health insurance program is not exempt from the Act's prohibition against pregnancy discrimination merely because its insurer is a fraternal society. Wis. Elec. Power v. LIRC (Dane Co. Cir. Ct., 10/01/79).

Whether support can be found for the conclusion that a practice is covered under the Act is not pertinent. What is pertinent is whether support exists to except something from coverage. It is not the function of the Department to carve out additional exceptions to coverage of the Act. Milwaukee Web Pressmen v. Journal Co. (DILHR, 06/12/75).

116 Exclusivity of WFEA remedy

Common law torts recognized before the adoption of the Wisconsin Fair Employment Act, if properly pled independently of an employment discrimination claim, are not barred by the Act and such actions may be brought in Circuit Court. However, a claim of sexual harassment was properly dismissed by the Circuit Court because claims for sexual harassment did not exist at common law. Becker v. Automatic Garage Door Co., 156 Wis. 2d 409, 456 N.W.2d 888 (Ct. App. 1990).

Filing an administrative complaint with DILHR is the exclusive remedy to enforce the anti-discrimination provisions of the Act, and neither state nor federal courts have jurisdiction to consider the merits of such complaints unless by appeal from a final DILHR or LIRC order. Bachand v. Connecticut Gen. Life Ins., 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981).

A Complainant could not seek tort damages in court for mental anguish arising out of her Wisconsin Fair Employment Act claim for employment discrimination based on sex. Yanta v. Montgomery Ward Co., 66 Wis. 2d 53, 224 N.W.2d 389 (1974).

117 Effect of other laws on WFEA rights and remedies

117.1 Title VII

While it has long been recognized that it can be appropriate to look at federal court decisions interpreting Title VII as guidance for interpretations of the Wisconsin Fair Employment Act, it has also been recognized there are limits to this, and that there can be situations in which Wisconsin should adhere to its own path, which may diverge from the course the federal authorities have taken. Mack v. Rice Lake Harley Davidson (LIRC, 02/07/13), aff'd sub. nom Rice Lake v. LIRC, aff'd in part, reversed in part, and remanded with directions, Rice Lake v. LIRC, 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882.

It is appropriate to consider federal decisions where the WFEA and Title VII serve identical purposes, although such decisions are not binding and must be disregarded if they conflict with the Wisconsin's Legislature's intent in enacting the WFEA. Federal case law has long been considered when determining back pay issues under the WFEA. Erwin v. Don & Cary's Nokomis Inn (LIRC, 09/28/07).

Because Title VII does not contain any language similar to sec. 111.36(1)(b), Stats., federal cases addressing the question of hostile work environment sexual harassment are not helpful to an analysis of whether the Respondent has violated the Wisconsin Fair Employment Act. Anderson v. MRM Elgin (LIRC, 01/28/04).

Considering that the Wisconsin Fair Employment Act and Title VII serve identical purposes, it is appropriate to consider federal decisions, although such decisions are not binding and must be disregarded if they conflict with our legislature's intent in enacting the Wisconsin Fair Employment Act. Marten Transp. v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

As a general principle, Wisconsin courts look to federal decisions interpreting Title VII for guidance in applying the state employment law. However, the state court must construe Wisconsin statutes as it is believed the Wisconsin legislature intended, regardless of how Congress may have intended that comparable statutes be interpreted. Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 289 (Ct. App. 1993).

It is particularly appropriate to look to federal case law for guidance in applying the religious accommodation provision in the Wisconsin Fair Employment Act. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

Wisconsin courts have at times looked to federal employment law for guidance in considering discrimination claims under the Wisconsin Fair Employment Act. However, the courts are not bound to do so. The court will refuse to interpret provisions of the Wisconsin Fair Employment Act in accordance with analogous federal laws where the statutory language differs from that of the federal legislation. Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

Wisconsin courts must construe Wisconsin statutes as it believes the Wisconsin Legislature intended, regardless of how comparable federal statutes are interpreted. Goodyear Tire & Rubber v. DILHR, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978); McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988).

Remedies under Title VII and the Wisconsin Fair Employment Act are to be pursued separately and, in applying the WFEA, the provisions of Title VII should not be automatically incorporated. AMC v. DILHR (Bartell), 101 Wis. 2d 337, 305 N.W.2d 62 (1981).

The Wisconsin courts will look to federal case law for guidance in applying the Wisconsin Fair Employment Act. Hamilton v. DILHR, 94 Wis. 2d 611, 288 N.W.2d 857 (1980); Bucyrus-Erie v. DILHR, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

117.2 Equal Pay Act (EPA)

In evaluating complaints of sex discrimination in compensation under the WFEA, the commission looks to the analysis followed under the federal Equal Pay Act. Under that analysis, a Complainant must show that the employer pays employees of different sexes differently for jobs requiring equal skill, effort and responsibility, which are performed under similar working conditions. If that showing is made, the employer is liable unless it proves the pay differential is the result of one of the following: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex. Under the Equal Pay Act analysis, it is not necessary for a Complainant to prove intent to discriminate; an employer who pays different wages is automatically liable unless it proves one of the four defenses. The Respondent provided evidence of a merit-based pay system, and the Complainant did not show that reason was a pretext for discrimination. Hayes v. Home Care Med. (LIRC, 08/12/14).

The payment of pregnancy-related disability benefits to women does not violate the federal Equal Pay Act. Kimberly-Clark v. LIRC, 95 Wis. 2d 395, 291 N.W.2d 584 (Ct. App. 1980).

117.3 Age Discrimination in Employment Act (ADEA)

Sec. 633(a) of the federal Age Discrimination in Employment Act (ADEA) provides that the commencement of an action under the ADEA "shall supercede any state action." The language of the statute, as well as the legislative history of the Act, makes it clear that state judicial review proceedings, as well as state agency proceedings, are to be stayed. Maynard v. LIRC (Brown Co. Cir. Ct., 07/13/04).

LIRC declined to review a non-final order by an Administrative Law Judge which denied the Respondent's motion to strike the Initial Determination of probable cause. The Respondent had argued that the Initial Determination was improperly issued because the Complainant had commenced a court action against the Respondent under the ADEA prior to the issue of the Initial Determination, and the ADEA provides that once an action is commenced under the Act, it supersedes any state proceeding on the same matter. Mattson v. Green Bay Broad. (LIRC, 08/28/90).

After the hearing, but before a decision was issued, an action was commenced in Federal Court by the employee under the Age Discrimination in Employment Act. The Age Discrimination in Employment Act required the Commission to stay its proceedings with respect to the employee's age discrimination claim even though it had already held a hearing on that claim, although the Commission could proceed to issue a decision on the aspects of the employee's complaint which alleged handicap discrimination and retaliation. Harris v. DHSS (Wis. Pers. Comm'n, 08/18/87).

An age discrimination complaint commenced in federal court supersedes the identical complaint filed at the state agency level, and the state proceedings should be stayed pending the disposition of the federal action. Rynski v. Price-Waterhouse (LIRC, 12/02/78); also, Schwartz v. Univ. of Wis. (Wis. Pers. Comm'n, 10/02/79).

117.4 ERISA, Labor relations laws (NLRA, LMRA)

The Complainant alleged that her employer improperly influenced the third-party administrator of its short-term disability plan to deny benefits. The Complainant's eligibility for short term disability benefits was governed by the federal Employment Retirement Security Income (ERISA), 29 U.S.C. sec. 1001 et seq. The Complainant presented no evidence to substantiate her claim that the employer exercised any influence over the third-party administrator's denial of disability benefits. Harris v. Charter Commc'ns, LLC (LIRC, 03/13/20).

The Complainant alleged that the Respondent discriminated her when it assigned (or "mapped") her position to an office assistant classification rather than the account analyst classification. The Respondent contended that the Complainant's claim under the Wisconsin Fair Employment Act was preempted by operation of sec.

301 of the federal Labor Management Relations Act (LMRA). Although the process for mapping positions was a creation of the collective bargaining process, the individual mapping decisions depended not on an interpretation of a union contract term, but instead on an expert analysis of the classification strength of the duties and responsibilities of each position. Therefore, the Complainant's claim was not preempted. Estes v. Wis. Gas (LIRC, 05/25/04).

The Equal Rights Division appropriately dismissed a complaint in which the Complainant alleged that he had been retaliated against by the Respondent for having filed previous complaints when the Respondent denied him disability retirement benefits. The Complainant's claim was pre-empted by ERISA. ERISA pre-empts a state law claim if the claim requires a court to interpret or apply the terms of an employee benefit plan. Because the Complainant's claim in this case was that, according to the terms of the ERISA plan, he was entitled to the company's disability benefits, his claim was pre-empted by ERISA. Reich v. Ladish Co. (LIRC, 06/30/99).

Section 301 of the federal Labor Management Relations Act preempts certain kinds of claims relating to labor agreements. However, the significant question is not merely whether a collective bargaining agreement is involved in a case, but whether it would be necessary to interpret the provisions of such a collective bargaining agreement in order to decide the issues presented by the case. Atkins v. Pepsi Cola Gen. Bottlers (LIRC, 12/18/96).

Sec. 301 of the Federal Labor Management Relations Act preempts questions relating to interpretations of labor agreements as well as legal consequences that were intended to flow from breaches stemming from such agreements. However, an employee has a substantive right to file a complaint under the Wisconsin Fair Employment Act, notwithstanding a collective bargaining agreement. In this case, the Complainant's equal rights claim did not require an interpretation of the collective bargaining agreement. Although the contract was applicable to the equal rights controversy, the Administrative Law Judge did not have to interpret the contract, but rather had to determine the parties' application of the contract. Therefore, the Complainant's equal rights claim was not federally preempted. Seeman v. Universal Foods (LIRC, 03/30/92).

Section 111.33(2)(b), Stats., insofar as it prohibits age discrimination against persons over 70, is pre-empted by the Employee Retirement Income Security Act of 1974 to the extent that it applies to employee benefit plans covered by ERISA. Dresser Indus. v. DILHR, 619 F. Supp. 1310 (W.D. Wis., 1985).

The prohibition against sex discrimination contained in the Wisconsin Fair Employment Act is not preempted by the Employee Retirement Income Security Act (ERISA) or the National Labor Relations Act. Goodyear Tire & Rubber v. DILHR, 87 Wis. 2d 56, 273. N.W.2d 786 (1978); also, Bucyrus-Erie v. DILHR, 599 F.2d 205 (7th Cir. 1979), cert denied, 444 U.S. 1031 (1980); Brown v. DILHR, 476 F. Supp. 209 (W.D. Wis. 1979); Gen. Tel. of Wis. v. LIRC (Ct. App., Dist. IV, unpublished opinion, 10/26/81); Sorgel Elec. v. LIRC (Dobson) (Milwaukee Co. Cir. Ct., 08/10/79).

The Industrial Commission was not preempted by the Labor Management Relations Act from hearing a complaint that a pension agreement violated the age discrimination prohibition of the Act. Walker Mfg. v. Indus. Comm'n, 27 Wis. 2d 669, 135 N.W.2d 307 (1964).

117.5 Secs. 118.195-118.20, Stats. (Teachers)

The state superintendent of schools does not have exclusive jurisdiction over civil rights issues in schools, including teacher complaints of employment discrimination. Waukesha Joint Sch. v. DILHR (Kurtz) (Waukesha Co. Cir. Ct., 06/25/78), aff'd sub nom. Kurtz v. City of Waukesha, 91 Wis. 2d 103, 280 N.W.2d 757 (1979).

117.6 Worker's Compensation Act (Ch. 102, Stats.)

The fact that redress might be available to the Complainant under either the Workers' Compensation Act or the Wisconsin Open Personnel Records Law would not prohibit the Complainant from stating a claim under the Wisconsin Fair Employment Act, provided the conduct alleged was otherwise covered under the Act. Ferguson v. Buechel Stone Corp. (LIRC, 10/31/01).

The exclusive remedy provision in the Wisconsin Worker's Compensation Act does not bar a claimant whose claim is covered under that Act from pursuing a claim under the Wisconsin Fair Employment Act for discrimination in employment. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997).

Where an employee enters into a compromise settlement under sec. 102.16(1), Stats., of the Worker's Compensation Act, the employee is barred by the exclusivity provisions of the Worker's Compensation Act from seeking additional relief under the Wisconsin Fair Employment Act for handicap discrimination. Marson v. LIRC, 178 Wis. 2d 118, 503 N.W.2d 582 (Ct. App. 1993). [Ed. note: In Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), the Supreme Court overruled this case "to the extent that it stands for the proposition that '(t)he right of the employee to recover compensation provided for by worker's compensation is exclusive of all remedies against the employer.'" (emphasis included)].

The Complainant alleged that the Respondent refused to rehire him because of mental retardation and because of a back injury suffered at work. The Worker's Compensation Act provides the exclusive remedy for the Respondent's refusal to rehire the Complainant because of his back injury, but the claim that the Respondent refused to rehire the Complainant because of his mental retardation should not have been dismissed. The mental retardation handicap claim was not related to his work-related back injury. Norris v. DILHR, 155 Wis. 2d 337, 455 N.W.2d 665 (Ct. App. 1990). [Ed. note: The Supreme Court disavowed the reasoning of Norris in Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997)].

Because sec. 102.35(3), Stats. provides a remedy under the Worker's Compensation Act for a refusal to rehire after a work-related injury, and because sec. 102.03(2), Stats. provides that remedies under the Worker's Compensation Act are the exclusive remedy for the employee, the Equal Rights Division has no jurisdiction in cases arising out of a refusal to rehire after a work-related injury. Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W.2d 906 (Ct. App. 1988). [Ed. note: This decision was overruled by Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997)].

117.7 Federal Family and Medical Leave Act

One difficulty with an interpretation with the Wisconsin Fair Employment Act which holds that an employer who discharges an employee because of absences caused by a disability may satisfy their duty to "reasonably accommodate" the employee by merely allowing the employee to seek to have his absences qualified as covered under the federal Family and Medical Leave Act, is that it makes the substantive meaning of Wisconsin's "reasonable accommodation" requirement dependent on distinctions and classifications inherent in the federal law which may have no sensible relationship to the intended scope and purpose of the state law. Therefore, it is preferable to interpret the "reasonable accommodation" provision of the Wisconsin Fair Employment Act by reference to Wisconsin statutes and court decisions, rather than to the law of other jurisdictions. Geen v. Stoughton Trailers (LIRC, 09/11/03), aff'd sub nom. Stoughton Trailers, Inc. v. LIRC (Dane Co. Cir. Ct., 05/13/04); aff'd, Stoughton Trailers v. LIRC, 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102; aff'd, Stoughton Trailers v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.117.9

117.9 Miscellaneous

The issue of whether a police officer or firefighter who is discharged after a just cause hearing before the Police & Fire Commission (PFC) pursuant to Wis. Stat. §62.13(5) may pursue a discrimination complaint under the WFEA was considered and resolved by the Wisconsin Supreme Court in City of Madison v. DWD, 262 Wis. 2d 652, 664 N.W.2d 584 (2003). The Court concluded that the Equal Rights Division could not exercise jurisdiction over WFEA claims arising out of actions by the PFC under §62.13(5). The Commission concluded that the rationale relied upon in City of Madison to find exclusive PFC jurisdiction to hear complaints of discriminatory discharge or discipline under Wis. Stat. §62.13(5) applies equally to the treatment of WFEA claims arising out of actions by the PFC under Wis. Stat. §62.50(11). Koch v. City of Milwaukee (LIRC, 06/09/11).

The Wisconsin Fair Employment Act does not require individuals to exhaust other administrative remedies prior to initiating an action under the Act. The Complainant was discharged from his job as a truck driver based upon a report from a physician that recommended that he be barred from driving. The physician's report was based primarily on a federal Department of Transportation medical conference report which concluded that a diagnosis of Wilson's Disease should unequivocally indicate disqualification. The Complainant was not required to exhaust the federal administrative process for appealing his denial of a medical certification in order to establish a violation of the Wisconsin Fair Employment Act. Szleszinski v. LIRC, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345, aff'd Szleszinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

Municipalities with populations above 4,000 are required to maintain a police and fire commission with jurisdiction over the hiring, promotion, discipline, and discharge of members of the police and fire departments. The police and fire commissions have the authority to evaluate whether employment actions under their review are fair and without discrimination. The Department of Workforce Development may not take jurisdiction over a WFEA complaint arising out of a decision of a police and fire commission. City of Madison v. DWD, 2003 WI 76, 262 Wis. 2d 652, 664 N.W.2d 584.

The work-sharing agreement between the United States Equal Employment Opportunity Commission and the Equal Rights Division of the Wisconsin Department of Workforce Development does not superimpose federal substantive and procedural law on the Department. A work-sharing agreement does not change laws or administrative rules. Matis v. LIRC (Ct. App., Dist. III, unpublished opinion, 05/07/02).

The fact that redress might be available to the Complainant under either the Worker's Compensation Act or the Wisconsin Open Personnel Records Law would not prohibit the Complainant from stating a claim under the Wisconsin Fair Employment Act, provided the conduct alleged was otherwise covered under the Act. Ferguson v. Buechel Stone Corp. (LIRC, 10/31/01).

There is nothing in the Wisconsin Fair Employment Act which provides, or even implies, that the authority of the Equal Rights Division to interpret and apply the provisions of the Act is in any respect subordinated to the authority of any other administrative agency, or that a decision by any other administrative agency must be given weight in the interpretation and application of the provisions of the Act. Borum v. Allstate Ins. Co. (LIRC, 10/19/01).

The Notice of Claims statute, sec. 893.80, Stats., does not apply to claims of discrimination under the Wisconsin Fair Employment Act. Schiller v. City of Menasha Police Dept. (LIRC, 01/14/93).

Federal regulation of the National Guard preempts the application of the Wisconsin Fair Employment Act's anti-discrimination provisions with respect to the discharge of an HIV-positive National Guard member. Federal law preempts the enforcement of the Wisconsin Fair Employment Act in this area because Congress and the framers of the Constitution intended that the federal government exclusively occupies the field of

regulation of personnel criteria for the national guard. Hazelton v. Wis. Pers. Comm'n, 178 Wis. 2d 776, 505 N.W.2d 793 (Ct. App. 1993).

The Respondent contended that it prohibited a deaf employee from driving tuggers and scooters in its lant pursuant to OSHA regulations and that federal law preempted state law in this matter. However, the OSHA regulations cited by the Respondent did not clearly regulate driver qualifications for tuggers and scooters. Willett v. Delco Electronics (LIRC, 01/17/90).

Although there is a statutory method to appeal Department of Employee Trust Fund coverage determinations, such appeals are not the exclusive means of challenging those decisions. The Personnel Commission has concurrent jurisdiction to deal with violations of the Wisconsin Fair Employment Act. Phillips v. DHSS (Wis. Pers. Comm'n, 03/15/89).

118 Constitutional issues

The freedom of exercise clause of the First Amendment of the United States Constitution and the freedom of conscience clauses of the Wisconsin Constitution preclude employment discrimination claims under the Wisconsin Fair Employment Act for employees whose positions are important and closely related to the religious mission of a religious organization. The Equal Rights Division did not have jurisdiction to consider the Complainant's age discrimination complaint in this case because it impinged on the Respondent's right to religious freedom. Coulee Catholic Schools v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

If the Equal Rights Division concludes that a position is "ministerial" or "ecclesiastical," further enforcement of the Wisconsin Fair Employment Act against the religious association is constitutionally precluded, even if there is no religious justification for the alleged discrimination. Because the ministerial exception precludes further inquiry into the reasons for the employment action, if the exception applies, the stated reason for the employment action should not be considered. If, on the other hand, the ministerial exception does not apply, the court may then address the issue of excessive entanglement by the State in matters of religious doctrine. In this case, the Complainant was a first grade teacher at an elementary school which is part of the Coulee Catholic Schools Association, and is owned and operated by the Roman Catholic Diocese of La Crosse, Wisconsin. The Complainant's position was not ministerial. Coulee Catholic Schools v. LIRC, 2008 WI App 68, 312 Wis. 2d 331, 752 N.W.2d 342, reversed, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

An administrative agency is not empowered to determine whether the statutory provisions that it administers are constitutional. Salley v. Nationwide Mortgage & Realty Corp. (LIRC, 12/13/07).

The Salvation Army is a church, and its officers serve a ministerial or ecclesiastical function. The Equal Rights Division does not have jurisdiction to resolve a discrimination complaint involving an officer position in the Salvation Army. To allow the Complainant to proceed with such a case would cause the state to intrude upon matters of church administration and government which are matters of ecclesiastical concern and, as such, would violate the Free Exercise and Establishment Clauses of the First Amendment. Coryell v. The Salvation Army (LIRC, 09/27/99).

The Respondent's decision to discharge the Complainant because she married outside the Catholic Church was ecclesiastically based. The Complainant maintained that the Respondent should have been required to demonstrate what a non-sacramental marriage was, according to an objective Catholic text, before the complaint could be dismissed. However, the question of whether the Complainant's marriage was truly "non-sacramental" pursuant to the tenets of the Catholic faith is the very type of issue which the Equal Rights Division may not reach. In order to decide this question it would be necessary to assess, evaluate and possibly challenge aspects of the Respondent's religious philosophy in a manner that would clearly be inconsistent with the mandates of the

Free Exercise Clause and the Establishment Clause of the First Amendment of the Constitution of the United States. Newton v. St. Gregory Educ. & Christian Formation Comm'n (LIRC, 12/10/97).

An administrative agency is not empowered to rule on the constitutionality of the statutory provisions it administers. Rathbun v. City of Madison (LIRC, 12/19/96).

The legislature conferred upon the Department subject matter jurisdiction over all complaints that are brought under the auspices of the Wisconsin Fair Employment Act. Non-profit religious associations are considered "employers" under the Wisconsin Fair Employment Act. Hence, the Act empowers the Department to review and investigate employment discrimination complaints filed against religious associations. However, notwithstanding the agency's legislatively created authority and jurisdiction, constitutional religious protection may preclude the State and the courts from enforcing secular mandates on religious organizations. The State is prevented from enforcing the State's employment discrimination laws against religious associations when the employment position at issue serves a "ministerial" or "ecclesiastical" function. Jocz v. LIRC, 196 Wis. 2d 273, 538 N.W.2d 588 (Ct. App. 1995).

The right to free speech is not absolute and the courts have consistently found that harassing speech in the workplace is not protected by the first amendment. Similarly, the state's interest in providing non-discriminatory public accommodation may justify slight incursions into free speech. In this case, the Respondent was found to have violated the Wisconsin Public Accommodations Act because she repeatedly used the term "nigger" in the presence of black restaurant patrons. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

The Department's decision finding that a newspaper violated the Wisconsin Open Housing Act by publishing advertisements in connection with the rental of housing did not violate the newspaper's rights to freedom of speech and press as protected by the United States and Wisconsin Constitutions. Metro. Milwaukee Fair Housing Council v. Hartford Times Press (LIRC, 08/31/93).

The Equal Rights Division did not violate the free exercise clause of the First Amendment of the U.S. Constitution by holding a hearing to determine whether a religious school's asserted religious-based reason was in fact the real reason for discharging the Complainant. Sacred Heart School Bd. v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990).

Wisconsin Administrative Code Section IND 88.08, providing for hearings on the issue of probable cause upon appeal of initial determinations of no probable cause, was validly promulgated under the statutory authority of the Equal Rights Division and is constitutional. Sections 111.375(1) and 111.39(2), Stats., both empower the Division to hold hearings necessary to perform its functions, and the no probable cause hearing is thus a proper exercise of the Division's authority to investigate complaints to determine if probable cause exists. Black & Decker v. DILHR (Ct. App., Dist. IV, unpublished opinion, 09/15/88).

The Equal Rights Division would have jurisdiction to hear a case in which a Complainant alleged that a Catholic university refused to hire her because of her sex. It is not clear how far into the process the Department may proceed before running into First Amendment issues and violations, but the Supreme Court has indicated that a state administrative body violates no constitutional rights by investigating and determining whether a religious employer's asserted religious reason for its alleged discriminatory action was the real reason. Maguire v. Marquette Univ. (LIRC, 08/18/88).

It would be an unconstitutional infringement of first amendment rights to freedom of religion for the Equal Rights Division to assert jurisdiction over the practice of a Catholic school of requiring that one of its lay teachers, once divorced, would not be allowed to remarry. Kovach v. Marinette Catholic Cent. High Sch. (LIRC, 06/12/86).

The Act does not provide for a jury trial in discrimination cases and the failure of Wisconsin's Administrative Code to so provide is not unconstitutional. Traywick v. LIRC (Pabst Brewing) (Milwaukee Co. Cir. Ct., 01/27/83).

LIRC's order that the employer cease from excluding pregnancy from its sick leave compensation policy and pay the employee all sick leave due her does not constitute an impairment of contract in violation of the Constitution. Vocational, Technical & Adult Educ. v. LIRC (Nelson) (Milwaukee Co. Cir. Ct., 08/09/80).

DILHR is without jurisdiction to decide the validity of granting veteran preference points under the Equal Protection clause. Nettleson v. DOA (LIRC, 04/01/80).

The Act does not give LIRC jurisdiction to decide whether a hiring process violates constitutional or other statutory rights; and such claim cannot be joined with a court action to review a LIRC decision. Cooper v. LIRC (Martin Serv. Bureau) (Dane Co. Cir. Ct., 10/22/79).

A school district has no standing to make state and federal constitutional law arguments because of the long-standing rule that, in a suit between arms of the state, neither party can question the constitutionality of a statute. Joint District No. 1, City of Nekoosa v. DILHR (Hinrichsen) (Dane Co. Cir. Ct., 10/20/78); also, Waukesha Public Sch. v. DILHR (Coulson) (Dane Co. Cir. Ct., 07/06/78).

119 Relationship to other litigation: claim preclusion (res judicata); issue preclusion (collateral estoppel); judicial estoppel

119.1 General principles

No prejudice arises when the decision-maker raises the matter of issue preclusion, sua sponte, provided the Complainant's attorney is given an opportunity to brief the issue and show why issue preclusion would not be appropriate. Lofton v. State of Wis. Dep't of Corr. (LIRC, 09/27/18).

The party asserting issue preclusion has the burden of establishing: 1) that the issue was actually litigated and determined in the prior proceeding by a valid judgment, and the determination was essential to the judgment; and 2) that applying issue preclusion comports with principles of fundamental fairness. The Complainant argued that his case in federal court was not actually litigated because he did not know how to respond to the Respondent's motion for summary judgment. That fact is immaterial to whether the case was actually litigated. The material question is whether the court decided liability after affording the parties an opportunity to present factual assertions on the merits of the Complainant's claims. That is what happened in this case. One of the five factors indicating whether issue preclusion comports with fundamental fairness is whether the legal questions in the two forums involved distinct claims or intervening contextual shifts in the law. The Complainant argued that federal and state laws were different in the areas of age discrimination and disability discrimination. While it is true that the federal and state laws are not identical, they were similar enough to make it apparent that the federal court's acceptance of the Respondent's proposed findings of fact in federal court rendered the Complainant's state-based claims not viable. McKnight v. Milwaukee Pub. Sch. (LIRC, 04/19/18).

Issue preclusion may be waived if not timely raised. In this case it was waived when not raised until after the Equal Rights Division hearing, in a post-hearing brief. Even if timely raised, however, application of issue preclusion based on a prior decision between the parties before the Wisconsin Employment Relations Commission (WERC) would not pass the fundamental fairness test. See Aldrich v. LIRC, 2012 WI 53, 341 Wis. 2d 36. The proceedings before the Equal Rights Division and the WERC concern different claims - discrimination in the former and just cause for termination in the latter. There are also significant differences in proceedings in the Equal Rights Division and the WERC. Sortedahl v. St. Croix Dist. Attorney's Office (LIRC, 08/07/17).

The Complainant's disability discrimination complaint in federal court was functionally the same as her ERD complaint, and both complaints involved the same parties. Claim preclusion operates as a bar to subsequent legal action between the same parties or their privies regarding all matters that were litigated or might have been litigated in the initial action. The Complainant lost her claim in federal court on summary judgment, but claim preclusion cannot bar her ERD complaint because it is well settled that the Complainant could not have litigated her WFEA claims in the federal court action. *See,* Aldrich v. LIRC, 2008 WI App 63, 310 Wis. 2d 796, 751 N.W.2d 866. Issue preclusion, however, would require dismissal of the ERD complaint. The federal court's determination that no reasonable jury could have inferred that the Respondent was aware of the Complainant's alleged physical restrictions or was aware that such restrictions amounted to a disability, if applied to her ERD case, would make it impossible for her to prevail in her ERD case. The five-factor test to determine whether application of issue preclusion comported with fundamental fairness was satisfied. Williams v. Milwaukee Health Srvs. (LIRC, 10/20/15).

The Complainant's allegation of discrimination based on conviction record was precluded by a prior decision involving the same parties in which a court found that the Complainant's criminal record was substantially related to the job of truck driver for the Respondent. Jackson v. Klemm Tank Lines (LIRC, 03/26/15).

The Complainant had a full opportunity to litigate her claim before the federal district court and to appeal to the federal court of appeals. However, given the unique circumstances of this case, the doctrine of issue preclusion should not have been applied to prevent the Complainant from re-litigating the issue of whether her claim was timely filed in the administrative forum. The Complainant was not represented by legal counsel at the time that she filed her charge with the EEOC. Further, the United States Supreme Court changed the law affecting the timeliness of EEOC charges after the Complainant filed her charge. Fundamental fairness requires that this case be remanded to LIRC with instructions for LIRC to remand the cause to the Equal Rights Division for further proceedings. Aldrich v. LIRC, 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433. (Aldrich II).

The Complainant could not have litigated her Wisconsin Fair Employment Act claims in federal court. The exclusive means of asserting a claim under the Wisconsin Fair Employment Act is through the Equal Rights Division. Therefore, the doctrine of claim preclusion did not prevent the Complainant from bringing her claims before the Equal Rights Division. However, where appropriate, the narrower doctrine of issue preclusion (which applies only to issues which were actually litigated and decided in a prior action) will prevent re-litigation of identical issues which have been decided in federal court. Aldrich v. LIRC, 2008 WI App 63, 310 Wis. 2d 796, 751 N.W.2d 866 (03/18/08). (Aldrich I).

The first step in analyzing whether issue preclusion applies is to determine whether the issue was actually litigated in the prior proceeding by a valid judgment and whether the determination was essential to the judgment. The fact that the outcome in the federal court proceeding came in a ruling on a motion for summary judgment, rather than after a trial, does not matter. The second step in the analysis is determining whether applying issue preclusion comports with principles of fundamental fairness. This decision should be made with special attention to guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively, and evidentially to pursue the claim before a second litigation will be precluded. In this case, the conditions for the application of issue preclusion were all met. The Complainant could have obtained a review of the judgment as a matter of law. Second, this is not a case where there were two distinct and different types of claims or intervening contextual shifts in the law. Third, there were not significant differences in the quality or extensiveness of the proceedings between the two tribunals which would warrant re-litigation. Fourth, there was no shift in the applicable burdens of persuasion such that the party seeking preclusion had a lower burden of persuasion in the first proceeding. Finally, there were no matters of public policy or individual circumstances involved which would make application of issue preclusion fundamentally unfair. Banty v. Dings Co. Magnetic Group (LIRC, 07/31/12).

For the Equal Rights Division to give preclusive effect to an EEOC investigation result and to dismiss a complaint on that basis without providing an opportunity for hearing would be improper as a matter of law. This is because EEOC investigations are ex parte. They do not allow for any form of confrontation or examination of adverse witnesses, and they are not, standing alone, sufficient to satisfy the requirements of due process. Banty v. Dings Co. Magnetic Group (LIRC, 07/31/12).

In Kruckenberg v. Harvey, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879, the Supreme Court indicated that when the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters which were litigated or which might have been litigated in the former proceedings. The Court noted that in Wisconsin the doctrine of claim preclusion has three elements: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. In this case, all of the elements required for application of claim preclusion on the Complainant's claim of race discrimination before the Equal Rights Division were satisfied. The parties in the Equal Rights Division case were the parties in the prior federal court action. The prior federal court action resulted in a final judgment on the merits of the Complainant's race discrimination claim which he pursued in federal court. (A summary judgment in favor of a defendant is sufficient to meet the requirements of a conclusive and final judgment.) Finally, since the Complainant's claim of race discrimination in the Equal Rights Division was based on the same facts underlying his federal court action, an identity of the causes of action or claims existed between his action in federal court and the instant claim before the Equal Rights Division. Rogers v. Wis. Knife Works (LIRC, 12/22/05).

Unlike claim preclusion, which may bar all matters which were litigated or which might have been litigated in the former proceedings, an element of issue preclusion is that the issue was actually litigated in a prior action. A "fundamental fairness" standard exists when applying issue preclusion. That standard requires consideration of the following factors: (1) Could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment? (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law? (3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant re-litigation of the issue? (4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second? and (5) Are matters of public policy and individual circumstances involved that would render the application of issue preclusion to be fundamentally unfair? Rogers v. Wis. Knife Works (LIRC, 12/22/05).

A summary judgment order issued by a federal court is a bar to the Complainant proceeding under state law in a case involving the same parties and claims. The Complainant had an opportunity to litigate his complaint in federal district court and to obtain a review of the district court's decision by the Court of Appeals. The fact that he disagreed with the federal court decisions issued in his case did not entitle him to relitigate the same claims before the Equal Rights Division. Reed v. Great Lakes Co. (LIRC, 11/21/05).

The burden of proving claim preclusion is upon the party asserting its applicability. Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings. In order for the earlier proceedings to act as a claim-preclusive bar in a subsequent action, the following three factors must be present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation which resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. For purposes of claim preclusion, privity exists when a person is so identified in interest with a party to the former litigation that he represents precisely the same legal right in respect to the subject matter involved. In this case, the UW-Madison was the sole Respondent, while the Board of Regents of the University of Wisconsin System was the defendant in the federal proceedings. Because UW-Madison is a unit within the larger University of Wisconsin System, there is identity between the parties or their privies in the two proceedings. Because a final judgment was entered in the prior litigation, and because

there was an identity of causes of action, claim preclusion applied in this case. Delgadillo v. UW-Madison (Wis. Pers. Comm'n, 04/30/03).

Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. In order for an earlier action to act as a claim preclusive bar to a subsequent action the following factors must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. Issue preclusion, on the other hand, refers to the effect of a judgment in foreclosing re-litigation in a subsequent action on an issue of law or fact that has been actually litigated and decided in a prior action. A "fundamental fairness" standard exists when applying issue preclusion and requires consideration of the following factors: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) did significant differences in the quality or extensiveness of proceedings between the two courts warrant re-litigation of the issue; (4) have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of issue preclusion to be fundamentally unfair? Under the doctrine of issue preclusion, the prior judgment precludes re-litigation of issues actually litigated and determined by the prior suit, regardless of whether it was based on the same cause of action as the second suit. Taylor v. St. Michael Hosp. (LIRC, 05/31/01).

The Equal Rights Division provides the exclusive remedy to enforce the anti-discrimination provisions of the WFEA. Therefore, a WFEA claim could not be brought in a federal court action. Thus, federal judgments do not have claim preclusive effect on claims under the Wisconsin Fair Employment Act. Taylor v. St. Michael Hosp. (LIRC, 05/31/01).

The doctrine of judicial estoppel did not preclude the Complainant from denying that he was unable to perform the job of printer/press operator for the Respondent, which was an essential element of his age discrimination claim. The Complainant's claim before the Social Security Administration (an agency which determines an individual's qualifications for benefits based upon the extent of the individual's inability to work) that he was unable to work was denied. Even a determination of disability by the Social Security Administration cannot be construed as a judgment that an employee is unable to do his job. Harrison v. LIRC (Sheboygan Co. Cir. Ct., 03/20/96).

Judicial estoppel is an equitable determination and should be used only when the positions taken are clearly inconsistent. The doctrine of judicial estoppel has certain identifiable boundaries. First, the later position asserted by a party must be clearly inconsistent with the earlier position asserted by that party. Second, the facts at issue should be the same in both cases. Finally, the party to be estopped must have convinced the first court to adopt its position -- a litigant is not forever bound to a losing argument. In this case, the doctrine of judicial estoppel should not be applied. The Complainant had stated in his application for SSI benefits that he was disabled from performing any work. He also testified at a hearing that he doubted whether he was physically able to do certain work. Later, in a complaint filed with the Equal Rights Division, the Complainant testified that he was capable of performing his job. These statements are not necessarily inconsistent, because they do not address the question of whether the Complainant would have been able to perform his job had there been an accommodation of his disability. Harrison v. LIRC, 187 Wis. 2d 490, 523 N.W.2d 138 (Ct. App. 1994).

An un-reviewed finding of no probable cause by the Personnel Commission barred an employee from bringing a claim for discrimination under sec. 42 U.S.C. 1983 in state court. The hearing before the Personnel Commission provided the employee with a full and fair opportunity to litigate her complaint. She was,

therefore, barred by the doctrine of issue preclusion from bringing the same allegations in state court. Lindas v. Cady, 183 Wis. 2d 547, 515 N.W.2d 458 (Ct. App. 1994).

The doctrine of res judicata should not be applied where the Complainant, a security guard employed by a private security agency, was not a party or privy of a party to the lawsuit between the Respondent and the private security agency for which he worked. Jackson v. City of Milwaukee (LIRC, 10/28/93).

A complaint was properly dismissed on res judicata grounds where a federal court dismissed the Complainant's federal retaliation claim on its merits. The Complainant chose not to bring a Wisconsin Fair Employment Act retaliation claim as a pendant state claim in the federal action although all of his claims arose out of the same set of facts. In this case, there is substantial doubt as to whether a federal court in Wisconsin would have dismissed a pendant WFEA claim in May of 1984. When the federal claim was filed, federal courts were divided as to whether they would entertain or dismiss private rights of action under the WFEA. In cases of doubt, the plaintiff should bring forward his state theories in the federal action in order to make it possible to resolve the entire controversy in a single lawsuit. Bourque v. LIRC (Marathon Co. Cir. Ct., 09/08/93).

Equitable estoppel consists of action or non-action on the part of one party that induces reliance thereon by another to the latter's detriment. Even when one of the doctrines of res judicata and election of remedies are inapplicable, under proper circumstances equitable estoppel may be used to bar a second cause of action on a different theory. In the case where a Complainant alleged in a worker's compensation action that his injury was work-related and that case was settled, the Complainant should not then be allowed to pursue another claim against the same employer on the theory that the injury was not work-related. Marson v. LIRC, 178 Wis. 2d 118, 503 N.W.2d 582 (Ct. App. 1993).

Some or all of the following factors may be considered in determining whether the doctrine of collateral estoppel should be invoked: (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of the proceedings between the two courts warrant re-litigation of the issue; (4) have the burdens of per-suasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of the doctrine to be fundamentally unfair? Moore v. LIRC, 175 Wis. 2d 561, 499 N.W.2d 289 (Ct. App. 1993).

Judicial estoppel arises from sworn statements made in the course of judicial proceedings, generally in a former litigation, and are based on the public policy upholding the sanctity of an oath and not on prejudice to the adverse party by reason thereof, as in the case of equitable estoppel. There are two limitations on the doctrine of judicial estoppel. One is that the estoppel may be applied only where a clearly inconsistent position is taken. The second limitation is the requirement that the party to be estopped has convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained. Gilbertson v. Sajec Co. (LIRC, 02/19/93).

The Wisconsin Personnel Commission declined to give collateral estoppel effect to a circuit court decision where the findings by the court were tentative and subject to possible change or addition. Further, because the court retained jurisdiction over part of the case, there apparently was no appealable order. Finally, the Commission could not conclude that the findings by the court were findings which were essential to the decision reached by the court. Balele v. UW-Madison (Wis. Personnel Comm'n, 06/11/92).

For purposes of res judicata, a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. Res judicata will not be defeated regardless of the number of primary rights that have been invaded and regardless of the variations in the evidence needed to support the

theories or rights. Further, federal case law refutes the theory that, for purposes of res judicata, causes of action are not the same if one cause requires proof of an element that another cause does not. Local 322, Allied Indus. Workers of America v. Johnson Controls (LIRC, 03/30/92).

It is implicit in the principle of res judicata that a contention that the first tribunal erred in some respect is irrelevant. The point of res judicata is to preclude re-litigation and redetermination of issues. Whether the first tribunal's decision was correct is not something which enters into the determination of whether the decision should be given res judicata effect. Moore v. American Family Mutual Ins. Co. (LIRC, 11/22/91).

Collateral estoppel will only be applied against a party who was also a party in the previous case. The party must have had a full and fair opportunity to present its claim in the first proceeding, and facts to be given collateral estoppel effect must have been fully litigated in the first proceeding. The decision in the first proceeding must have made a valid and final determination as to those facts. The determination of the facts must have been essential to the decision in that case, and the burden of proof must be the same in the first proceeding as in the second proceeding. Guel v. Cooper Power Sys. (LIRC, 11/15/91), aff'd, (Ct. App., Dist. II, summary decision, 12/09/92).

The Personnel Commission follows the basic principles of res judicata which were set forth in Schaeffer v. State Personnel Comm'n, 150 Wis. 2d 132, 138-139, 441 N.W.2d 292 (Ct. App. 1989). A complaint will be dismissed if there was a final judgment in the federal court proceedings if the same parties are involved in both proceedings and if there is identity of claims. The Complainant cannot challenge the validity of what the federal court did. Oreido v. Wis. DER (Wis. Pers. Comm'n, 10/05/91).

The fact that the Complainant appealed the final judgment dismissing her claim in a federal court action does not prevent the application of the doctrine of res judicata. The pendency of an appeal does not deprive a judgment of its effect as a bar to another action between the same parties on the same cause of action. Byrne v. West Allis-West Milwaukee Sch. Dist. (LIRC, 09/18/91).

119.2 Title VII, ADEA, other federal court decisions

A federal district court ruling granting summary judgment had issue preclusion effect on complaint filings with the Equal Rights Division, as they rested on the same allegations as those disposed of in federal district court litigation, and there was no fundamental unfairness by preventing a second hearing on those issues in the Equal Rights Division. Balele v. State of Wisc., Dep't of Corr. (LIRC, 06/13/18).

The Complainant claimed discrimination because of age and disability in both the Equal Rights Division and the EEOC. The investigative unit of the Equal Rights Division put his state complaint in abeyance while he pursued his federal claims in U.S. District Court. The court granted summary judgment against the Complainant, making extensive findings and concluding there was no evidence of age or disability discrimination. The Equal Rights Division then dismissed the state complaint based on the federal court's dismissal. The Complainant's allegations were actually litigated in federal court even though disposed of by summary judgment as opposed to an evidentiary trial, and the fundamental fairness analysis of Aldrich v. LIRC, 2012 WI 53, para. 110, favored application of issue preclusion. Puent v. Croell Redi-Mix (LIRC, 08/07/17).

The Complainant had a full opportunity to litigate her claim before the federal district court and to appeal to the federal court of appeals. However, given the unique circumstances of this case, the doctrine of issue preclusion should not have been applied to prevent the Complainant from re-litigating the issue of whether her claim was timely filed in the administrative forum. The Complainant was not represented by legal counsel at the time that she filed her charge with the EEOC. Further, the United States Supreme Court changed the law affecting the timeliness of EEOC charges after the Complainant filed her charge. Fundamental fairness requires

that this case be remanded to LIRC with instructions for LIRC to remand the cause to the Equal Rights Division for further proceedings. Aldrich v. LIRC, 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433. (Aldrich II).

The Complainant could not have litigated her Wisconsin Fair Employment Act claims in federal court. The exclusive means of asserting a claim under the Wisconsin Fair Employment Act is through the Equal Rights Division. Therefore, the doctrine of claim preclusion did not prevent the Complainant from bringing her claims before the Equal Rights Division. However, where appropriate, the narrower doctrine of issue preclusion (which applies only to issues which were actually litigated and decided in a prior action) will prevent re-litigation of identical issues which have been decided in federal court. Aldrich v. LIRC, 2008 WI App 63, 310 Wis. 2d 796, 751 N.W.2d 866 (03/18/08). (Aldrich I).

The Equal Rights Division does not have the authority to adjudicate claims of violations of federal laws. Therefore, the Complainant's contention that his failure to be hired was in violation of federal laws was properly dismissed. Bedynek-Stumm v. State of Wis. (LIRC, 02/08/08), aff'd sub nom. Bedynek-Stumm v. LIRC (Dane Co. Cir. Ct., 10/10/08).

Subsequent to the filing of the complaint in the Equal Rights Division, a separate decision was issued in a suit filed by the Complainant against the Respondent (a labor union) in federal court, involving the same set of facts. The federal court granted the Respondent's motion for summary judgment on the ground that no reasonable jury could find that the Respondent's decision not to take the Complainant's grievance to arbitration was arbitrary, discriminatory, or in bad faith. Thus, the issue presented in the Complainant's Equal Rights complaint was fully litigated and determined by a final judgment of the federal district court. The district court's judgment precluded re-litigation of the same issues before the Equal Rights Division. Mack v. AFSCME Local 366 (LIRC, 07/24/02), aff'd sub nom. Mack v. LIRC (Milwaukee Co. Cir. Ct., 03/24/03).

Where a federal court had dismissed the Complainant's Title VII and ADEA retaliation claims, such dismissal was res judicata and precluded the Complainant from pursuing retaliation claims against the same Respondent under the Wisconsin Fair Employment Act where those claims arose out of the same basic factual situation. Bourque v. Wausau Hosp. Ctr. (LIRC, 04/02/92).

For purposes of res judicata, a basic factual situation generally gives rise to only one cause of action, no matter how many different theories of relief may apply. Neither the details of the claim nor the facts, evidence or theories of recovery need to be identical in order for the former action to bar the latter. Imposing res judicata as a bar to resumption of the Personnel Commission proceedings after an adverse federal decision does no violence to the independent action principles underlying Title VII where all of the elements of the doctrine of res judicata are met, i.e., identity of parties and issues and, most importantly, the opportunity to litigate them in the former proceedings. Schaeffer v. State Pers. Comm'n, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct. App. 1989).

LIRC has adopted the "transactional view" of a cause of action, as set forth in DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306 (1983). The test of whether two suits are based on the same cause of action is whether both suits arise out of the same basic factual situation. Maguire v. Marquette Univ. (LIRC, 08/18/88).

For the doctrine of res judicata to apply, there must be: (1) a judgment on the merits, (2) an identity of parties, and (3) an identity of causes of action. A decision by a federal court dismissing a Complainant's case on the basis of the pleadings was a judgment on the merits. The Complainant's argument that she should nevertheless be allowed to pursue her state action on the same claim on "fairness" grounds is unfounded. Fairness to the Respondent is a fundamental basis underlying the doctrine of res judicata. Further, the Supreme Court of the United States has directed that the doctrine of res judicata be strictly enforced. Maguire v. Marquette Univ. (LIRC, 08/18/88).

A federal court judgment in a Title VII action may be given preclusive effect against subsequent claims raised under the Wisconsin Fair Employment Act. This is true even though Title VII will still be available as a remedy to a litigant even after a state proceeding has been completed. Haynes v. Pressed Steel Tank Co. (LIRC, 05/23/89).

Some of the Complainant's claims were not precluded by the judgment of the federal court in the Complainant's Title VII action because the claims were not fully litigated in federal court and it was doubtful whether the Complainant would have been allowed to litigate those issues by the trial judge. Haynes v. Pressed Steel Tank Co. (LIRC, 05/23/89).

A federal court decision dismissing a complaint of sex discrimination based on the Court's conclusion that the complaint itself established that the Complainant was not entitled to a finding of discrimination, was a judgment on the merits, and had res judicata effect as to the Complainant's claim of sex discrimination against the same employer pending before the Equal Rights Division. Maguire v. Marquette Univ. (LIRC, 08/18/88).

LIRC will not assert jurisdiction over a white employee's complaint that he was discriminated against because of race when his employer complied with a consent decree issued by a Federal District Court requiring that employer to give retroactive seniority to certain minority class members. The complaint constituted an impermissible collateral attack against the consent decree. Wolterstorff v. Milwaukee County (LIRC, 03/29/88).

Where the employee moved for summary judgment on a number of issues on the basis of a special verdict in a federal court action under section 1981 and the employer moved to dismiss on the ground that the federal court had res judicata effect, the Personnel Commission found that the judgment of the federal court had res judicata effect, and dismissed the employee's complaint. Weatherall v. DHSS (Wis. Pers. Comm'n, 10/07/87).

The Complainant litigated her claim under Title VII before the U.S. District Court, lost on the merits, and lost on appeal to the U.S. Court of Appeals. Because of the identity of parties and issues, the Personnel Commission held that the Complainant was precluded from relitigating her complaint before the Commission, and Respondent's motion to dismiss on grounds of res judicata and collateral estoppel was granted. Namenwirth v. UW-Madison (Wis. Pers. Comm'n, 02/13/86).

An individual who has fully litigated a discrimination claim under the ADEA in federal court may not subsequently pursue in a state administrative proceeding remedies which were available in federal court. Syvock v. Milwaukee Boiler Mfg. Co. (LIRC, 08/28/84).

Litigation of a state discrimination claim which has been reviewed by state court may bar subsequent litigation of the same claim under Title VII. Kremer v. Chemical Constr. Corp., 456 US 461, 28 FEP Cases 1412 (1982).

Parties must be identical before either collateral estoppel or res judicata applies. In this case, LIRC was not a party to the federal action nor in privity. Sanchez v. LIRC (Dane County Cmty. Action Comm.) (Dane Co. Cir. Ct., 11/20/80).

The decision reached by a federal court in a Title VII suit is not res judicata in a complaint filed under the Act. The statutes express an intent to accord parallel or overlapping remedies and the identity of issues necessary for res judicata is absent when the two laws have not been similarly interpreted. Rubenstein v. LIRC (UW Bd. of Regents) (Dane Co. Cir. Ct., 08/15/80).

Although an action involving the same parties and subject matter was dismissed in federal court on an employer's motion, DILHR was not barred by res judicata, by election of remedies or by federal preemption

from proceeding to hear the complaint at the state level. State ex. rel. Opportunities Indus. Ctr. v. DILHR (Sharma) (Dane Co. Cir. Ct., 11/06/75).

119.3 State court decisions

Where the examiner placed a proceeding in abeyance, directing that a circuit court action pending between the same parties would, when a decision was issued, be given res judicata effect unless the losing party submitted persuasive written authority to the examiner to the contrary within 20 days after the issuance of the decision, it was appropriate for the examiner to thereafter decide the case on the basis of the circuit court decision when it was issued, when the Complainant submitted no argument or authority to the examiner within 20 days after that date as to why the decision should not be given res judicata effect. Kloth v. Schultz (LIRC, 03/27/86).

A decision on the merits of a wrongful discharge suit in circuit court, in which the court concluded that the Respondent had just cause to terminate the Complainant, should be accorded collateral estoppel effect to preclude the Complainant from asserting before the Equal Rights Division that his discharge was based on discriminatory grounds. Welch v. LIRC (Marathon Co. Cir. Ct., 04/15/85).

A reviewing court's finding in a separate proceeding that there was just cause for dismissing an employee did not preclude a finding by an Equal Rights examiner that the employer retaliated against the employee where the court did not consider the employer's motives for dismissing the employee. Hennekens v. River Falls Police Dept. (LIRC, 01/29/85).

A complaining police officer is not entitled to reassert charges under the Act which have already been fully litigated under another Chapter before the Circuit Court. State of Wis. ex. rel. City of Racine Police Dept. v. DILHR (Racine Co. Cir. Ct., 09/11/84).

Where an employee filed both a civil service appeal and a complaint of discrimination regarding the same parties and presenting the same issue, a final decision on the merits of the civil service appeal acts to bar the complaint of discrimination. Jacobson v. DILHR (Wis. Pers. Comm'n, 06/03/81).

119.4 Other FEP agency decisions

The work-sharing agreement between the Equal Rights Division and the Madison Equal Opportunities Commission does not require the Equal Rights Division to accept the MEOC's probable cause determination instead of conducting its own investigation. Lee v. Nat'l Conf. of Bar Examiners (LIRC, 10/31/08).

Where a Complainant had received a final decision from the Madison Equal Opportunity Commission after a full and fair hearing under a city ordinance that was virtually identical to the Wisconsin Fair Employment Act in wording and remedy, he was not entitled to pursue the same complaint before the Equal Rights Division. McFadyen v. Univ. Book Store (LIRC, 07/23/81).

119.5 Arbitration decisions and agency rights clauses

On March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 was signed into law. The Act amends Title 9 of the United States Code (Federal Arbitration Act) and invalidates "predispute" arbitration agreements that preclude a party from filing a lawsuit in a court of law regarding sexual harassment or sexual assault. The forum (court verses arbitration) is "at the election of the person" alleging such conduct, or the named representative of a class or collective action alleging such conduct. 9 U.S.C. (§§ 401 – 402) (Added Pub. L. 117–90, § 2(a), Mar. 3, 2022, 136 Stat. 26, 27.) https://www.congress.gov/117/plaws/publ90/PLAW-117publ90.pdf.

The commission interpreted an employment agreement and concluded that the agreement did not make arbitration mandatory and protected the Complainant's right to file a claim with the ERD. The commission also concluded that the employment agreement gave the Respondent the right to require submission of that claim to arbitration, in place of adjudication, in order to resolve the claim. In this case, unlike in Ionetz v. Menard, Inc (LIRC, 03/03/18), the arbitration agreement specifically provided in a separate paragraph outside the agency rights clause which was titled "Remedy," that one of the ways the employee may try to resolve a dispute was to bring a claim with the EEOC, NLRB or "comparable state or local agencies." Reed v. Menard, Inc., (LIRC, 10/31/19), later set aside on procedural grounds Reed v. Menard. Inc. (LIRC, 12/05/19.)

Based on LIRC's decision in Ionetz v. Menard, Inc. (LIRC, 03/13/18), which occurred after Xu v. Epic Sys. Corp. ("XU I") (LIRC, 10/24/17), the equal rights officer issued a preliminary determination dismissing the Complainant's complaint for lack of jurisdiction. LIRC agreed with the dismissal of the complaint for lack of jurisdiction and stated that the dismissal did not affect or undermine LIRC's prior order in XU I for the Respondent to return the severance payment to the Complainant. Xu v. Epic Sys. Corp. ("XU II") (LIRC, 06/04/18).

An employment agreement contained an agreement to submit disputes to binding arbitration, along with an express waiver of the employee's right to have disputes heard by a court, jury, or administrative body, or to participate in a class action. The employment agreement also contained an "agency rights'" clause which provided, in pertinent part: "Nothing in this Manual infringes on your ability to file a claim or charge of discrimination with the Equal Opportunity Commission or comparable state or local agencies." The DWD, unlike the EEOC, is an adjudicative agency and not an investigative agency. ERD's statutory authority is limited to that of an "adjudicative body" charged with deciding particular disputes that are filed with it. Once an individual claim is waived, for example by an arbitration agreement, there is no additional investigative, enforcement or other function for ERD to perform. Insofar as XU I suggested the Division had authority to proceed with a Complainant's complaint notwithstanding the waiver he had signed, the XU I decision was overruled. Ionetz v. Menard, Inc. (LIRC, 03/13/18).

Severance agreement's "agency rights" clause provided: "Nothing in this release is a waiver of a right to file a charge or complaint with administrative agencies such as the federal EEOC, and I cannot be prohibited from or punished for filing as a matter of law, but I waive any right to recover damages or obtain individual relief that might otherwise result from the filing of such a charge with regard to any released claim." LIRC determined that the language in the severance agreement was intended to preserve the Complainant's right to file a complaint with the ERD. LIRC remanded the case for investigation into the merits of the complaint and further proceedings that may be warranted. In addition, LIRC noted that if discrimination was found, the Complainant's remedies would not include back pay, reinstatement, or any other type of individual relief that might ordinarily be awarded as a result of a finding of such discrimination, due to the waiver of the right to relief. Finally, LIRC ordered the Respondent to return the severance payment to the Complainant because the severance agreement remained in effect, pending a decision by the ALJ with respect to whether the agreement was entered into knowingly and voluntarily. Xu v. Epic Sys. Corp. ("XU I") (LIRC, 10/24/17). Overruled, Ionetz v. Menard, Inc. (LIRC, 03/13/18).

*Employment agreement's "agency rights" clause, provided that "Nothing in this Agreement infringes on your ability to file a claim or charge of discrimination with the U.S. Equal Opportunity Commission or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in your own name, or taking any other action authorized under these statutes. You understand that you have the right to participate in such action." The court decided that this language did not preclude DWD's adjudication of the employee's WFEA claim from the agreement's arbitration clause, which provided that "**any and all** claims shall be resolved by binding arbitration. . . pursuant to the National Rules of the Resolution of Employment Disputes of the American Arbitration Association. **This provision shall supersede any contrary rule or provision of the forum state. This***

***provision constitutes an express waiver of the right to court, jury or administrative review or to participate in class action.*"** *The agency-rights clause merely preserves the DWD's statutory rights. However, any adjudication of an employee's claims by the DWD would not be binding on the parties because resolution is subject to binding arbitration. Menard v. Dep't of Workforce Dev. & Fenhouse, No. 2015AP87 (Wis. Ct. App. July 26, 2016) (unpublished).*

The Labor and Industry Review Commission declined to adopt an Administrative Law Judge's holding that an interest arbitrator's decision had a preclusive effect on an action under the Wisconsin Fair Employment Act. The Commission reviewed the underlying merits of the Complainant's case. Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/30/10).

If the "Acknowledgment of Conditions of Employment" document signed by the Complainant when he began work for the Respondent had stated that arbitration was the final, binding, and exclusive means for resolving all state claims, it would be arguable that the Complainant's subsequent complaint to the Equal Rights Division should be dismissed, consistent with Supreme Court decisions upholding the enforceability of provisions in employment contracts specifying binding arbitration as the exclusive and final remedy for claims under state law, including discrimination claims. However, in this case, the agreement signed by the Complainant made a distinction between claims filed in court (for which arbitration was the exclusive and final remedy) and those, as here, filed in an administrative forum, for which there is no provision for binding arbitration. As a result, the Complainant never agreed that binding arbitration would be the exclusive and final remedy of the claims at issue. Carrington v. Gen. Elec. (LIRC, 04/30/10).

The Respondent's request that the proceedings before the Equal Rights Division be held in abeyance pending the outcome of the Respondent's arbitration process was denied. Although an arbitrator's decision may have some persuasive value under certain circumstances, it would not preclude the Equal Rights Division from examining de novo the issue of whether an employee has been discriminated against within the meaning of the Wisconsin Fair Employment Act. Since the completion of the Respondent's arbitration process would not relieve the Equal Rights Division of its responsibility to resolve this case, further delay was not merited. Carrington v. Gen. Elec. (LIRC, 04/30/10).

An arbitrator's decision should not preclude the Equal Rights Division from examining de novo the issue of whether or not an employee was the victim of discrimination. It is, however, appropriate to admit the arbitration decision as evidence and to accord it such weight as may be appropriate under the facts and circumstances of each case. Betters v. Kimberly Area Sch. (LIRC, 11/28/07).

There is reason to be hesitant about giving issue preclusion effect to a grievance arbitration award in a subsequent litigation of an employment discrimination claim. The best approach is to accord the arbitration award such weight as may be appropriate under the facts and circumstances of each case. Betters v. Kimberly Area Sch. (LIRC, 07/30/04).

The issue of whether or not a Respondent violated the Wisconsin Fair Employment Act when it placed the Complainant on disability leave was not foreclosed by an adverse arbitration decision which found that the Respondent did not violate the collective bargaining agreement when it placed the Complainant on disability leave. Lee v. Dane County Highway Dept. (LIRC, 07/24/98).

An arbitration decision may be admitted in an Equal Rights hearing and given such weight as is appropriate under all the facts and circumstances of the case. It was appropriate to give an arbitration decision some weight where the following circumstances existed: the parties appeared at the arbitration hearing with counsel; the arbitration hearing focused very specifically on the factual issue of whether the Complainant had called in (which was an issue in the Equal Rights hearing); the Complainant and other witnesses who had

testified in the Equal Rights hearing testified in the arbitration hearing; transcription of the arbitration hearing and briefing presumably allowed detailed arguments to be submitted to the arbitrator; and the arbitrator's lengthy and reasoned decision reflected careful consideration of all of the evidence. Moncrief v. Gardner Baking (LIRC, 07/01/92).

The doctrine of collateral estoppel prevents both parties from re-litigating relevant factual disputes already decided at an arbitration hearing. In this case, the doctrine of collateral estoppel prevented the re-litigation of facts surrounding the Complainant's permanent light duty classification. Seeman v. Universal Foods (LIRC, 03/30/92).

When an arbitration hearing addressed facts regarding the Complainant's permanent partial disability, his medical restrictions, his job duties and functions and comparisons of the employee's ability vis-a-vis others' abilities, and where the case was litigated by both parties, the decision of the arbitrator collaterally estops the Complainant from re-litigating the dispute surrounding the medical evidence. Seeman v. Universal Foods (LIRC, 03/30/92).

A Complainant is not collaterally estopped from introducing evidence that her termination was not for just cause because she received an adverse arbitration decision. Dohve v. DOT (Wis. Pers. Comm'n, 11/03/88).

An adverse arbitration decision does not preclude a Complainant from pursuing a discrimination complaint where the discriminatory aspects of the complaint were not addressed at the arbitration. Massenberg v. UW-Madison (Wis. Pers. Comm'n, 07/21/83).

An arbitration decision may be admitted at a hearing and given appropriate weight. Krueger v. DOT (LIRC, 10/04/82).

LIRC was not deprived of jurisdiction by the outcome of an arbitration instituted under a union contract since the Wisconsin Fair Employment Act provides a distinct procedure for determining questions of employment discrimination. Winnebago County v. LIRC (Brehm and Boutin) (Dane Co. Cir. Ct., 09/18/78); also, Nielson Iron Works v. LIRC (Oliver) (Racine Co. Cir. Ct., 03/22/82); Jones v. DNR (Wis. Pers. Comm'n, 11/08/79).

119.6 Unemployment compensation decisions

[NOTE: See sec. 108.101(1), Stats., for effect of unemployment compensation decisions on other proceedings.]

Unemployment insurance testimony can be admitted into evidence for the purpose of showing that a witness's testimony was consistent or inconsistent to his/her testimony in the Equal Rights Division hearing. See, Vaserman v. Lakeshore Med. Clinic, Ltd. (LIRC, 10/30/15).

Documents/statements submitted to the Unemployment Insurance Division can be admitted into evidence at an Equal Rights hearing to impeach the credibility of a witness. Here, the individual accused of sexual harassment told the Unemployment Insurance Commission that the Complainant quit for family and time constraints, when he knew that the Complainant quit because she believed he had sexually assaulted her at work, and she had never said anything about family or time constraints. See, Rhyner v. Veterinary Med. Servs. (LIRC, 02/25/16).

An Unemployment Insurance determination or decision is not admissible or binding in a proceeding before the Equal Rights Division. Sec. 108.101(1), Stats. Neulreich v. US Bank (LIRC, 04/11/08).

It was not improper for an Administrative Law Judge to refuse to consider documents relating to the Complainant's application for unemployment benefits, including a determination by the Unemployment

Insurance Division of the Department of Workforce Development. Sec. 108.01(1), Stats., provides that findings and determinations under the unemployment insurance benefits law are not admissible or binding in any administrative proceeding not arising under that law. Valdes v. Harley Davidson Motor Co. (LIRC, 10/27/06).

An Administrative Law Judge did not abuse his discretion by excluding from the hearing record a decision in a related Unemployment Insurance (UI) proceeding. Given the different allocations of burdens of proof in these two types of proceedings, and the different statutory schemes under which they are decided, as well as the fact that the two forums are relying upon different record evidence in reaching their decisions, UI decisions should not be given preclusive effect, or even accorded significant weight in cases before the Equal Rights Division. Josellis v. Pace Indus. (LIRC, 08/31/04).

The Complainant stated a claim for which relief could be granted under the Wisconsin Fair Employment Act where she alleged that the Respondent discriminated against her with respect to her unemployment compensation benefits because of her age. While an employer cannot determine which employees will ultimately receive unemployment benefits, the act of furnishing disqualifying information to the Department is a matter over which the Respondent does have control. If the Complainant is able to prove that the Respondent selectively supplied the Department with disqualifying information based upon the ages of its workers, then her complaint will have stated a claim under the Act. Baurichter v. Admanco, Inc. (LIRC, 06/26/96).

The Administrative Law Judge erred in relying on the Unemployment Compensation Appeal Tribunal Decision. Sec. 108.101, Stats., clearly has as its purpose the elimination of the practice of using unemployment compensation decisions as preclusive determinations in other forums. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

Where the allocation of burdens of proof differ, it is not appropriate to give collateral estoppel effect in an Equal Rights proceeding to an Unemployment Compensation determination. The fact that an employer did not meet its burden of proving by a preponderance of the evidence in an Unemployment Compensation proceeding that an employee did not call in does not necessarily mean that the employee must be considered to have met his burden of proving by a preponderance of the evidence that he did call in. Moncrief v. Gardner Baking (LIRC, 07/01/92).

Sec. 108.101, Stats., limits the extent to which unemployment compensation determinations can be given preclusive effect in other litigation. The statute became effective with respect to unemployment compensation determinations issued on or after January 7, 1990. Where the statute is applicable, it will effectively displace most of the legal considerations relating to the issue of collateral estoppel in the past. Guel v. Cooper Power Sys. (LIRC, 11/15/91).

[Wis. Stat. Sec 108.01 became effective with respect to unemployment compensation determinations issued on or after January 7, 1990. The following cases related to collateral estoppel are included for historical purposes only.]

Where a Complainant was denied the opportunity to present evidence of discrimination at an unemployment compensation hearing, the ruling in the unemployment compensation matter cannot be res judicata on the discrimination claim. The application of collateral estoppel can be avoided when the party against whom it is sought establishes that he did not have a fair opportunity procedurally, substantively and evidentially to present the claim in the initial proceeding. Rucker v. LIRC (LIRC, 07/16/87); aff'd, Milwaukee Co. Cir. Ct., 07/07/88; aff'd, (Ct. App., Dist. I, unpublished opinion, 05/15/90).

Where a final decision of the Unemployment Compensation Appeal Tribunal found that an employee quit, but for good cause due to sexual harassment attributable to the employer, the doctrine of collateral estoppel was

applied to prevent re-litigation of the findings of fact and law made in the unemployment compensation decision. Carlson v. Three Star (LIRC, 08/27/86).

A discharged Complainant's successful outcome at an unemployment compensation hearing does not impact on her handicap discrimination charge before the Equal Rights Division because the evidentiary standards are different. Christianson v. LIRC (City of Eau Claire) (Eau Claire Co. Cir. Ct., 03/02/83).

DILHR's denial of the unemployment compensation claim of an employee with rheumatoid arthritis because she was unavailable for work was not probative of her inability to perform her job duties at the time of her discharge. J. C. Penney v. DILHR (Mitchell) (Dane Co. Cir. Ct., 03/22/76).

119.9 Miscellaneous

A Complainant's appeal of a decision finding no discrimination was barred by a final order of the federal Bankruptcy Court in proceedings on the Respondent's Chapter 11 petition. The complaint included allegations of discrimination and rate of pay. This was a "claim" cognizable in the bankruptcy proceedings because payment of a monetary remedy was possible. Under the Bankruptcy Code, holders of disputed and unliquidated claims who fail to file timely proofs of claim are not allowed claims against a bankrupt estate and are not entitled to receive a distribution under the reorganization plan. The exception for claims for "willful and malicious injury" was not applicable here because that exception applies only to individual debtors. The Respondent here was a corporate entity. The Complainant's claim was, therefore, barred by the final order of the Bankruptcy Court. Vanderwulp v. USG Interiors (LIRC, 07/19/07).

A non-final decision of an Administrative Law Judge in another case where the ALJ had found discrimination, but the matter had been settled prior to an attorney's fees determination having been made and the decision being issued in final, appealable form would not have any preclusive effect. Moncrief v. Gardner Baking (LIRC, 07/01/92)

When an employer seeks to interpose a federal consent decree against claims of reverse discrimination, the employer must prove that consideration of race was: (1) justified by the existence of a manifest imbalance that reflected under-representation of minorities in traditionally segregated jobs; and (2) the decree did not unnecessarily trammel the rights of non-minority employees or create an absolute bar to their advancement. Samolinski v. Milwaukee County (LIRC, 01/05/90).

Where two employees filed similar complaints, LIRC rejected the Respondent's argument that the finding of no discrimination by one Administrative Law Judge in one employee's case was res judicata in the other employee's case, since res judicata requires that the party against whom it is being asserted had an opportunity to litigate the issue in the first proceeding. Taylor v. Hampton Shell (LIRC, 06/27/88).

Where complaints of sex discrimination were settled by a stipulation which necessitated shift changes, an affected employee who was not a party to or represented in the first complaints and who had no notice of the settlement agreement could file a separate complaint of sex discrimination. Chadwick v. DHSS (Wis. Pers. Comm'n, 04/02/82.)

120 PROHIBTED BASES OF DISCRIMINATION

121 AGE DISCRIMINATION

121.1 Coverage, exceptions

121.11 Lower age limit; comparative ages of employees

The fact that the Complainant's comparators were also in the protected age group does not defeat her claim of age discrimination where there was a significant age difference between the Complainant and the employees she claims were treated more favorably. *Waldvogel v. DC Everest Area Sch. Dist.* *(LIRC, 03/22/19).*

The fact that the individual hired for the job was also a member of the protected age group does not defeat an allegation of age discrimination where there is a significant age difference between the Complainant and the successful candidate. *Butler v. UW Madison Sch. of Educ.* *(LIRC, 07/31/17).*

There is no absolute rule that a Complainant cannot prevail on an age discrimination claim where the age difference between the Complainant and his comparators is only five years. However, a five-year age difference is not so significant that, standing on its own, it gives rise to an inference of age discrimination. *Ebner v. Dura Tech* *(LIRC, 04/23/09).*

The Respondent was not immunized from a complaint of age discrimination because it replaced the Complainant with another person over the age of forty, where there was a significant difference in age between the Complainant and the individual who replaced the Complainant. Felsman v. Northwest Airlines (LIRC, 06/06/96).

A complaint alleging age discrimination does not state a cause of action where the complaining party is 36 years old. Gray v. Asbestos Workers, Local No. 19 (DILHR, 04/15/75).

121.12 Upper age limit

Sec. 111.33(2)(b), Stats., insofar as it prohibits age discrimination against persons over age 70, is pre-empted by the Employee Retirement Income Security Act of 1974 to the extent that it applies to employee benefit plans covered by ERISA. Dresser Indus. v. DILHR, 619 F. Supp. 1310 (W.D. Wis., 1985). [Ed. note: The ADEA has since been amended to remove the age 70 upper age limit.]

121.13 Hazardous occupations

In light of legislative history and general rules of statutory construction, the wording of the exception from liability with respect to hazardous occupations requires that a factual determination be made concerning whether a Complainant's job actually exposed him to physical danger or hazard. One's employment in law enforcement or firefighting comes under the exception or not depending on the particular characteristics of the employment. A remand is necessary where the ALJ failed to make a factual determination. Ohrmundt v. Town of Maine (LIRC, 02/10/15).

The Administrative Law Judge properly dismissed a complaint of age discrimination because the employment involved, firefighting, was a hazardous occupation which is exempt from the prohibition against discrimination based on age pursuant to sec. 111.33(2)(f), Stats. It is obvious that the legislature deemed age to be a bona fide occupational qualification reasonably necessary in jobs such as firefighting where the employee is exposed to physical danger or hazard. The Administrative Law Judge's dismissal

of the case was appropriate even though the Respondent never raised the statute as a defense by motion or in its answer. Johnson v. LIRC, 200 Wis. 2d 715, 547 N.W.2d 783 (Ct. App. 1996).

"Officer" positions at a camp for youthful offenders are covered by the hazardous occupations exception to the Act. Employees over age 55 were not discriminated against when they were denied transfers to those positions. Bunde v. LIRC (Wis. DHSS) (Dane Co. Cir. Ct., 07/09/81).

The age complaint of a firefighter did not state a cause of action because the Act specifically exempts hazardous occupations. Diedrich v. City of Kaukauna (DILHR, 12/01/76).

All law enforcement occupations are within the hazardous occupations exception, regardless of the degree of actual hazard in a particular position. Wold v. City of Eau Claire (DILHR, 11/26/76).

121.14 Preemption

Sec. 111.33(2)(b), Stats., insofar as it prohibits age discrimination against persons over age 70, is preempted by the Employee Retirement Income Security Act of 1974 to the extent that it applies to employee benefit plans covered by ERISA. Dresser Indus. v. DILHR, 619 F. Supp. 1310 (W.D. Wis. 1985). [Ed. note: The ADEA has since been amended to remove the age 70 upper age limit.]

121.2 Hire

The Complainant, at age 59, was twice denied a job with the Respondent as a public works laborer. On both occasions, younger men in their early twenties were offered the job. There was testimony that the Public Works Committee wanted to hire a young man that they could train themselves and who would be there awhile. A comment was made that, given the Complainant's age, "you kind of assume he is not going to be working real long anymore." One of the decision-makers testified that he viewed one of the younger men selected for the position as a desirable candidate because he was a "down-to-earth kid, young." This gives rise to an inference of unlawful age discrimination. Kalsto v. Village of Somerset (LIRC, 10/03/00).

Rejection of a job applicant because of a genuine belief that he is overqualified for the position at issue is not age discrimination. Although "over-qualification" might be correlated with advanced age, when an employer makes a decision on the basis of a criterion that is correlated with age, as opposed to age itself, the employer does not violate the laws against age discrimination. Schmidt v. Zimpro Envtl. Sys. (LIRC, 01/30/98).

The distribution of ages within the group of people who are moving into the job market and seeking entry-level positions is significantly skewed towards younger ages. Therefore, a pattern of hiring results that shows a tendency towards younger ages is not necessarily probative of discrimination based on age. Schmidt v. Zimpro Envtl. Sys. (LIRC, 01/30/98).

Stray remarks, when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue. In this case, the comment by a regional vice president of the Respondent that he couldn't "get rid of [the Complainant] because [he was] too damn old" was not persuasive evidence that the Complainant's age was a factor in his failure to be hired. The remark was made at some unspecified time five years earlier, and the Complainant himself conceded that no other comments were made which implicated his age. Jacobs v. Glenmore Distilleries (LIRC, 07/27/95).

The Complainant failed to establish that there was probable cause to believe that he was discriminated against on the basis of age, even though it was undisputed that the Respondent failed to extend him an offer based upon his display of memory lapses during the interview process. It does not necessarily follow that

the Respondent's decision was motivated by the Complainant's age. Harris v. Milwaukee County Mental Health Complex (LIRC, 05/13/94).

The Complainant failed to establish that he was discriminated against on the basis of age despite testimony from an individual within the Respondent's personnel department that the Complainant was rejected for a position because he was "part of the older management group." There was no evidence that this group was "older" by age. In fact, it was clear from the context of the testimony that what was meant was "older" simply in terms of being previous in time to the current management group. Roeseler v. E.R. Wagner Mfg. Co. (LIRC, 05/13/94).

The ultimate burden of persuading the trier of fact that age was a determining factor in a hiring decision remains at all times with the Complainant. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

The Complainant failed to show that an employer's reasons for failing to hire him were a pretext for age discrimination where (1) the employer notified the job applicant that the position available was for both a custodial and a maintenance person, and (2) the employer allowed all of the candidates an unrestricted opportunity to discuss their qualifications during the interview. An employer is not required to list all of its hiring criteria in a one-paragraph job announcement. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

The Complainant's use of the employer's data regarding the ages of people who had been hired for a custodial maintenance position during a seven-year period was insufficient to establish age discrimination since the statistical sample was too small to be of any significance and the Complainant failed to provide evidence of the number and distribution of older persons in the applicant pool. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

The use of the term "new blood" by a manager for the Respondent was not evidence of age bias where the manager explained the term by saying that he thought that the company needed new theories and new ideas. The term "new blood" has been recognized as being nothing more than an expression of a desire to change employees, whether they be younger or older. Wygant v. Form Servs. North (LIRC, 04/29/93).

Evidence that an employer has more young people than old people, without more, will not support a claim of age discrimination. The only kind of statistic which could potentially carry any significant weight in this area would compare, not overall numbers of younger versus older persons hired, but overall success rates of younger versus older applicants. Here, given the proportion of applicants who were in the protected category, the low number of hires in that category is not significant. What is significant is that older workers were at least as successful, if not more successful, than younger workers in getting employment with the Respondent. Wygant v. Form Servs. North (LIRC, 04/29/93).

It was not proper for an ALJ to dismiss a claim of age discrimination on the grounds essentially that the Complainant could not show he was qualified for a sales manager position for a liquor company where the Complainant asserted, among other things, that he had informed the employer that he could have sold his tavern business within 30 days (state law essentially precluded the Complainant's owning a tavern if he were at the same time a liquor company sales manager), and that it appeared that the individual who had been hired was at least seventeen years younger than the Complainant. Jacobs v. Glenmore Distilleries Co. (LIRC, 11/25/92).

A Complainant who testified before the social security administration that he was permanently disabled and unable to perform the job duties of a printer/press operator on the date that the Complainant alleges the Respondent failed to hire him as a printer/press operator because of his age failed to prove a prima facie case of age discrimination. A prima facie case of age discrimination with respect to hire requires a Complainant to establish that he was qualified for the job which he alleges he was discriminatorily denied. Harrison v. Friends Professional Stationery, Inc. (LIRC, 09/18/92).

It was reasonable, and not evidence of age discrimination, for the Respondent to be concerned about the reliability of an applicant who, after an impressive start to his career, did not account in his job history for six of the twelve years prior to his application. Watson v. WPS (LIRC, 09/06/89).

Consideration of an applicant's recent gaps in teaching experience is not evidence of age or sex discrimination, unless it is shown that such a consideration actually has a disparate impact on women or people over the age of 40. Chandler v. UW-La Crosse (Wis. Pers. Comm'n, 08/24/89).

The Respondent did not discriminate against the Complainant by failing to hire him as a sales manager because of age, since the Complainant was not interested in the sales manager position, said he would not have taken it if it had been offered to him, and failed to show that the Respondent's stated reasons for not offering that position were pre-textual. Kumpf v. LIRC (Ct. App., Dist. IV, unpublished decision, 02/23/89).

Where the percentage of job applicants over age 40 matched the percentage of those who passed the initial screening, a 56-year-old applicant did not show that his failure to pass was related to his age even though the screening procedure did not follow merit selection standards. Schleicher v. LIRC (City of Janesville) (Rock Co. Cir. Ct., 07/14/83).

Where two candidates were otherwise equally qualified, a 53-year-old applicant did not prove that the Respondent's decision to hire an 18 year old was age discrimination, despite showing that the employer wanted someone who would remain for a long time, even if he was told that age would be the deciding factor. Protogere v. Appleton Mills (LIRC, 05/11/83).

A job applicant for a laborer position established a prima facie case of age discrimination in hire by showing that he had previously performed many of the job duties and that the two persons hired were not within the protected age group; but he was unable to rebut the employer's statement that his non-hire was based on his previous inability to properly operate motor vehicles. Hogenson v. City of Prairie du Chien (LIRC, 12/10/82).

It was not age discrimination to fail to select a job applicant who was over 40 who passed an exam and was certified for a number of positions where there were legitimate non-discriminatory reasons for each hiring decision and each decision was made separately. Markham v. DHSS (Wis. Pers. Comm'n, 02/09/82).

A 50-year-old applicant for an accounting position established a prima facie case of age discrimination by showing that he applied and was qualified for the position, that a younger person was selected, and that the selecting official stated he was looking for a "long term investment" and had passed over another over age 40 applicant whom he could have selected on a competitive basis. Anderson v. Whitewater (LIRC, 12/03/80).

The employer prevailed in an age discrimination case where the job applicant for a pharmacist position did not have prior work experience in the preparation and use of intravenous drugs. Zimmerman v. Milwaukee County (LIRC, 01/16/80).

Subjective judgments about the relative merits of job applicants are a necessity but an employer's hire of four applicants under 40 years of age while bypassing a 55-year-old applicant was discrimination where the older applicant was equally or better qualified than those hired and the job interviewer could not adequately explain his need to write in code the age of the 55 year old. Bjork v. DHSS (LIRC, 09/22/77).

An employer's refusal to hire a 47-year-old job applicant with excellent office skills was age discrimination where the employer had indicated to the job placement office a preference for someone under age 40

because of problems with employee benefits and training programs caused by hiring an older person. Pierson v. Indus. Elec. Wire (LIRC, 08/25/77).

121.3 Compensation, benefits

Although an employer paid 90% of the insurance premiums, it did not discriminate against a 56-year-old teacher who was rejected for the insurance program because of high blood pressure where the employer's only role was to pass out the insurance applications. King v. Wausau Sch. (LIRC, 12/08/78).

The grant of a merit increase to all custodial workers except two who were close to retirement and "non-retainable" was age discrimination. Risler v. First Wis. Nat'l Bank (DILHR, 06/26/75).

121.4 Terms or Conditions of employment

The fact that some newly hired younger employees started at salary levels that were slightly higher than that of some older, existing employees was the result of external market forces and was not evidence of age discrimination. Kates v. State of Wis. Emp. Trust Fund (LIRC, 05/17/19).

Differing handling of disciplinary situations was warranted where, although younger employees engaged in more offensive conduct, they did so on only one occasion, while the Complainant's unacceptable conduct was sustained and pervasive, and she was resistant to change. Waldvogel v. DC Everest Area Sch. Dist. (LIRC, 03/22/19).

Proof that the Complainant was called "Old Man" by co-workers on a regular basis, that he disliked it, and that he complained to management about it, and Respondent's concession it knew about the problem but took no steps to resolve it, was sufficient to warrant a finding of probable cause regarding harassment based on age. Gallagher v. Blain Supply Inc. (LIRC, 03/28/14).

Even if the Complainant's supervisor referred to the Complainant as an "old man" on one occasion, this would not be sufficiently severe or pervasive to support a conclusion that the Respondent engaged in illegal harassment on the basis of age. Josellis v. Pace Indus. (LIRC, 08/31/04), aff'd sub nom. Josellis v. LIRC (Sauk Co. Cir. Ct., 09/15/05).

A complaint was properly dismissed for failure to allege facts sufficient to support a claim for relief for age discrimination under the Wisconsin Fair Employment Act. The Complainant indicated in his complaint that he was forty-two years old. In correspondence to the Equal Rights Division, the Complainant asserted that he was at least twenty years older than individuals who called him "old man." At his deposition, the Complainant testified that being called an old man made it hard for him to work or have a good attitude. The Complainant failed to establish a prima facie case of age-based hostile work environment because he did not allege the existence of some basis for liability on the part of the employer. At no time did he allege or assert that he had complained to the Respondent about his co-workers calling him an old man. Mroczkowski v. Belmark, Inc. (LIRC, 04/28/05).

The Complainant did not establish that she was discriminated against with respect to her terms and conditions of employment on the basis of age when the Respondent changed her teaching assignment from that of teaching fifth grade language arts and math to teaching seventh and eighth grade math. The school principal had made several comments to the Complainant inquiring about when she was going to retire. The principal's asking the Complainant about her retirement plans on the last day of school, without more, was not evidence of age discrimination because the employer had a legitimate interest in learning of its employees' plans for the future in order that the employer itself might plan for the future. In addition, the Complainant had herself initiated several conversations with management staff regarding retirement.

Furthermore, the principal was a proponent of the benefits available under the retirement system, and he spoke to many teachers about the financial benefits available to them under the retirement system. The Complainant's contention that her assignment change was an attempt to force her to resign was undermined by several factors. These included the school's need for someone to teach eighth grade math, and the principal's view that the Complainant was a good choice to fill the eighth-grade position. Post v. Mauston School Dist. (LIRC, 08/28/02), aff'd sub nom. Post v. LIRC (Juneau Co. Cir. Ct., 01/28/03).

In a case in which the Complainant alleged that he had been denied a promotion because of age, it was not significant that the Administrative Law Judge incorrectly found that the person hired instead of the Complainant was forty years old when the person was in fact thirty-nine years old when hired. Ryals v. Milwaukee County (LIRC, 02/5/88).

The Complainant established a prima facie case of age discrimination by showing that he was in a protected age class, that he had a reasonable expectation of promotion, and that the two persons promoted instead of him were in their twenties. Dreva v. Soo Line R.R. (LIRC, 09/24/82).

Where a professor claimed that the use of student evaluations for merit increases favored teachers under age 40, the employer met its burden of proof by demonstrating that the evaluations were not the sole criterion and that the overall process of determining merit increases did not involve consideration of age. Pollnow v. LIRC (UW-Oshkosh) (Winnebago Co. Cir. Ct., 02/05/81).

An employer discriminated against a 57-year-old assistant credit collection manager by hiring younger, less skilled people, putting them in a position to supervise him, requiring him to perform duties such as getting sandwiches for younger staff members, and discharging him without a legitimate reason. Pon v. Niss Furniture (DILHR, 09/14/76).

121.5 Termination

The Complainant, a male assistant district attorney (ADA) over age 40, alleged that his hours were reduced and then he was laid off, in favor of three females who ranged in age from 28 to 33. The Respondent articulated a non-discriminatory reason for the employment actions, that they were based on the Complainant's weaker job performance. The Complainant failed to show this reason to be a pretext for discrimination. As to his claim of age discrimination, the Complainant pointed to the district attorney's statement referring to the females as the future of the office. That statement credibly referred not to the females' ages, but to their excellent capabilities. The fact that the DA retained older male ADAs and hired an older male ADA showed a lack of animus based on age or sex. Sortedahl v. St. Croix Dist. Attorney's Off. (LIRC, 08/07/17).

The Complainant's employment with the Respondent for over 20 years, and his advancement in the ranks of the Respondent during that time, satisfy the element of a prima facie case that the Complainant be qualified for the job. But the question of whether the Complainant made a prima facie case was no longer relevant, because the employer articulated a legitimate, nondiscriminatory reason for terminating his employment. When that happens, the case proceeds to consideration of the ultimate factual inquiry, whether the Respondent's act had a discriminatory motive. The Complainant did not show that the Respondent's proffered reason, poor performance, was a pretext for discrimination. Kelly v. Sears Roebuck & Co. (LIRC, 05/30/14).

The Respondent produced evidence of a nondiscriminatory reason for the Complainant's discharge. The Complainant was unable to establish that the Respondent's proffered reason was untrue, was not the Respondent's actual motive for discharge, or was an insufficient motive for discharge. In addition, circumstantial evidence did not support an inference of age discrimination: the Complainant was 58 years old when hired; there was no comparative evidence showing favorable treatment of younger employees;

there was no evidence of age-related comments by anyone with influence over discharge decision; the decision-makers were in their 50s; and the person hired to replace the Complainant was in her 50s. Perkins v. Rogers Mem'l Hosp. (LIRC, 02/28/14).

An inference of age discrimination in termination is weakened by the fact that the employer hired the Complainant at age 54 and discharged him only a few weeks later. Huston v. Piggly Wiggly/Lena's Food Mkt. (LIRC, 02/28/13).

The Complainant was informed that his position was being eliminated because it was not essential. However, after the Complainant was discharged, his duties continued to be performed by significantly younger workers. The evidence indicated that the Respondent considered the retirement status of its older workers in deciding who to lay off, and that the Respondent erroneously designated the Complainant as someone who was planning to retire, (although he had never expressed an interest in retiring). The Complainant established that he was unlawfully discriminated against because of his age. Anchor v. DWD (LIRC, 01/04/12).

The Complainant was over the age of 40 when he was hired by the Respondent, just two years before his discharge. All of the individuals who participated in the decision to terminate the Complainant were over the age of 40 at the time. These circumstances tend to undermine the Complainant's contention that the Respondent was motivated by a discriminatory animus based upon his age (47). Rudd v. Watson Pharm. (LIRC, 05/27/10).

The Complainant's position was selected for layoff for reasons unrelated to his age. The Respondent explained to the Complainant that his layoff would result in his forfeiture of a significant sick leave conversion benefit, but that he would not forfeit this benefit if he retired instead. The forfeiture of sick leave policy was one which applied to all employees in state service, regardless of age or proximity to retirement. The fact that the Complainant felt compelled to retire rather than be laid off was not a function of age discrimination. Empereur v. DOA (LIRC, 09/23/05).

It is plausible that the Respondent would have chosen to time the Complainant's discharge with a larger layoff in order to conceal the fact of age discrimination in the Complainant's case. Two of the three decision-makers involved in the decision to discharge the Complainant had commented unfavorably about the Complainant's age and suitability for the job shortly before he was discharged. Under the circumstances in this case, these remarks were not mere "stray" remarks. The discriminatory remarks were directly related to the Respondent's decision to discharge the Complainant. Stern v. RF Tech. (LIRC, 02/06/04).

An employer does not violate the Wisconsin Fair Employment Act when it discharges an age-protected employee because of a physical limitation. In this case, the Complainant could not perform some of the tasks required (such as lifting heavy loads) without assistance. Therefore, the Complainant was not "qualified for the job" and he did not establish a *prima facie* case of age discrimination. Harrison v. LIRC, 211 Wis. 2d 680, 565 N.W.2d 572 (Ct. App. 1997).

While one of the four workers hired after the Complainant was over the age of 40, this did not immunize the employer when the difference in age was significant. In this case, the Complainant was 63 years old, and the person hired to replace her was 41 years old. Rutherford v. J&L Oil (LIRC, 06/06/97).

Even if wages were used as a factor in selecting employees for layoff, the Complainant failed to establish that there was a correlation between length of service and one's wages. The Respondent established that some employees with less seniority earned more than those with greater seniority. Further, there was evidence that there were employees in their twenties who were being paid higher wages who were among those selected for layoff. Rose v. Indep. Media Group (LIRC, 01/31/95).

The Respondent's president made a number of comments which, while evidence of possible age bias, did not inevitably lead to a conclusion that age was a factor in the decision to lay off the Complainant, who was 58 years old. His comment that, "they're just a bunch of old guys, we should get some young blood in - people that aren't set in their ways," did not establish age bias where there was no testimony about when the comment was made or the context in which the comment was made. Rose v. Indep. Media Group (LIRC, 01/31/95).

The Complainant's age was a substantial factor in the Respondent's decision to discharge her where there was evidence that the Respondent desired to replace some of its older employees with younger employees in an effort to attract younger and more professional women as customers. Agents of the Respondent had made remarks relating to age as it affected the business of the store, specifically by their desire to gear the store toward younger women and to attract younger customers by replacing older employees with younger employees because the store was perceived as a store for older women and because younger employees were easier to deal with. Bormann's v. LIRC (Dane Co. Cir. Ct., 01/21/94).

The Respondent did not discriminate against the Complainant on the basis of age where the Complainant failed to prove that there was a correlation between years of service, salary level, and age. Sullivan v. Sacred Heart Sch. Bd. (LIRC, 03/30/93).

The Respondent did not discriminate against the Complainant because of his age when, in response to a decision to eliminate 800 jobs outside of the Complainant's department, it ranked all supervisors and laid off the three lowest ranked supervisors, including the Complainant, who did not have special skills which the Respondent wished to retain. Murray v. Gen. Elec. Co. (LIRC, 08/07/92).

In age discrimination cases, the Complainant has the ultimate burden of proving that age was a determining factor in the employment decision complained of. The intent of the Wisconsin Fair Employment Act is to protect the right of individuals to be free from employment discrimination because of age. However, the Act is not a guarantee of tenure for the older worker. Hagberg v. Nordson Corp. (LIRC, 06/26/91).

The Complainant failed to establish that he stopped making derogatory remarks about the Respondent and its president after being warned that continuing to make such comments would result in his discharge, or that his subsequent discharge for continuing to make such comments was a pretext for age discrimination. Binder v. Nercon Eng'g & Mfg. (LIRC, 12/18/90).

The Complainant's discharge was not because of age where the Respondent had a good faith belief that a position had to be eliminated because of a decline in work, and where the Respondent did not replace the Complainant. Gentilli v. Badger Coaches (LIRC, 07/12/90), aff'd sub nom. Gentilli v. LIRC, (Dane Co. Cir. Ct., 01/15/91), aff'd, (Ct. App. Dist. IV, unpublished decision, 10/24/91).

There is no legal significance, per se, underage discrimination laws, to the retention of less senior employees while more senior employees are laid off. Length of service with an employer is not necessarily an indicator of age. De Kalver v. Magna Graphics Corp. (LIRC, 03/20/90).

There was no probable cause to believe that the Respondent terminated the Complainant's employment because of age where: (1) there was a downturn in business which led the Respondent to consider staff reductions, (2) the Respondent's criticisms of the Complainant showed no age bias, (3) the Respondent's criticisms of the Complainant's performance were legitimate, and (4) the impact of the layoffs was heaviest on younger workers. De Kalver v. Magna Graphics Corp. (LIRC, 03/20/90).

The Complainant failed to prove he had been discharged because of age where the testimony established that: (1) he had problems with his performance, particularly with respect to cooperativeness and amount

of supervision required; (2) he had received a final warning; (3) he resisted training on newer products; (4) he continued to call and question other management staff after stating he was ill; and (5) he serviced an important client in a fashion which was against the specific instructions of both the client and his supervisor. Klaffka v. TRW (LIRC, 02/16/90).

The Complainant's discharge was not because of age where the evidence indicated that the Complainant was in a position calling for greater expertise than he possessed, resulting in "below requirements" ratings at a time when the Respondent decided to cut back personnel by terminating the employment of people with "below requirements" ratings. Johnson v. Trane Co. (LIRC, 01/22/90).

Age was not a factor in the Complainant's discharge where: (1) a recession had a severe impact on the Respondent's business, (2) the Respondent had responded to that recession by a reduction in its work force which continued through the time the Complainant was discharged, (3) the Complainant's position was eliminated as part of an effort to save expenses, and (4) the Respondent made a reasonable and objective judgment that two younger individuals were more qualified than the Complainant to perform the positions that remained after the re-organization. Erickson v. DEC Int'l (LIRC, 01/18/90).

The Complainant established she was discharged because of age where the supervisor who discharged her: (1) admitted having difficulty managing older employees, (2) believed older employees resisted her authority, (3) gave negative evaluations to the Complainant when she had a history of positive evaluations from her other supervisors, (4) was unable to identify specific instances of the Complainant's alleged failure to accept supervisory authority or to comply with company policies, and (5) criticized the Complainant for not completing her work when it had been recognized that the workload could not be completed by one person. Leick v. Menasha Corp. (LIRC, 08/17/89).

There was no probable cause to believe that the Respondent terminated the Complainant because of her age where the evidence showed that the Respondent had first hired the Complainant for one temporary job when she was 59 years old, that it hired her thereafter for a second job, and that it replaced her (after terminating her for unsatisfactory performance) with a woman in her fifties. Frederick v. Madison Metro. Sch. Dist. (LIRC, 11/04/87).

The elements of a prima facie case in a reduction in workforce case are flexible. A Complainant may make such a showing by demonstrating that he was of an age protected by the Act at the time of his layoff and that his layoff was an adverse action taken by the Respondent, if he can also show some evidence from which age discrimination could be inferred. One typical way to raise the required inference is to show that the Complainant applied for a vacant position for which he was qualified, but the Respondent hired a younger person. Another method is to show that the Respondent engaged in a pattern of unfavorable treatment of workers in the protected age group. Fluekiger v. Mathey Constr. Co. (LIRC, 05/14/87).

In a claim of discriminatory discharge on the basis of age, the Complainant must show that she was in the protected age group, that she was discharged, that she was qualified for the job, and that she was replaced by someone not within the protected class or that others not within the protected class were treated more favorably. Schenck v. Northwest Fabrics (LIRC, 02/20/87).

In order to establish a prima facie case of age discrimination in her removal from one position and demotion to another, the Complainant must show that she was a member of a protected age group, that her removal and transfer to another position constituted a demotion, that she was qualified to remain in the position she was removed from, and that she was replaced by someone who was not in the protected age class. Hatlen v. Gizette Printing Co. (LIRC, 02/12/87).

The fact that a terminated Complainant was in the protected age group and that her replacement was not is not sufficient, standing alone, to support a finding of probable cause that age discrimination occurred. Sanrope v. Hillsboro Pub. Sch. (LIRC, 08/22/86).

There was no discrimination in a review commission's decision to modify a supervisor's recommendation of discharge in favor of layoff, because four of the five commission members were themselves in the protected age group and there was evidence that the employee did not work well with co-workers. Pitschler v. Kohler (LIRC, 08/14/84); aff'd, Sheboygan Co. Cir. Ct., 10/08/85.

In a claim of discriminatory discharge on the basis of age, the Complainant must show that he was age 40 or older, that he was discharged, that he was qualified for the job, and that either he was replaced by someone not within the class or others not in the protected class were treated more favorably. Here, however, the fact that the Complainant was not replaced by a younger employer is not dispositive, as the necessary elements of a prima facie case are not fixed in stone but vary with the facts of each case. It is enough that the Complainant established facts which raise an inference of age discrimination. The Complainant did so in this case by establishing that he was laid off while a much younger and less experienced employee was retained in a position for which the Complainant was fully qualified and which was in fact essentially a sub-set of the position the Complainant had held. Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

An employee in the protected group who was laid off from work and not recalled, in favor of two younger employees and two new hires, raised an inference of age discrimination. Graham Mfg. Corp. v. LIRC (Williams) (Wood Co. Cir. Ct., 02/23/84).

An employee failed to demonstrate that his discharge in a company reorganization was discriminatory by submitting statistical evidence that the employer dismissed a slightly higher percentage of older employees. Bentson v. Weathershield Mfg. (LIRC, 01/06/84).

Comments to an employee that his age would make it difficult for him to heal after an injury and to find other work show that his employer was encouraging him to quit, but the evidence as a whole, including the hiring of other persons over age 50, showed that the employee was discharged for poor performance and not his age. Michaud v. Midwest Breeder's Co-op (LIRC, 03/09/83); aff'd sub nom. Michaud v. LIRC (Midwest Breeder's Coop.) (Dane Co. Cir. Ct., 01/19/84).

Where the employer showed that it did not replace a 54-year-old truck driver who was transferred as part of a reorganization, and where one of its two remaining drivers was 61 years old, the 54 year old could not establish probable cause to support his claim that the transfer was related to his age. Reimann v. LIRC (Curative Rehab. Ctr.) (Milwaukee Co. Cir. Ct., 06/17/83).

A person alleging that his discharge was caused by his age established a prima facie case by showing that he was over age 39, that he was performing at a level that met his employer's reasonable expectations and that, after his discharge, his employer sought a replacement. He does not have to show that the person hired to replace him was under age 40. (The Complainant was 62 years old, and his replacement was 45). Wagner v. Rockford Mfg. Assoc. (LIRC, 12/20/82); also, St. Vincent DePaul Soc'y v. MEOC (Dane Co. Cir. Ct., 03/30/83).

Although a discharged employee showed that he had consistently received above average performance ratings and never been disciplined, he did not prove age discrimination where the employer's general manager, who the employee called as a witness, genuinely believed he was not performing satisfactorily. Fellman v. Mercury Marine (LIRC, 12/10/82).

A discharged employee met his initial burden of proving age discrimination by showing that: (1) he was within the protected age group; (2) his work performance was satisfactory; (3) he was discharged despite his satisfactory performance; and (4) he was replaced by a younger person of equal or inferior qualification. However, the employer ultimately prevailed where the employee failed to show that the employer's concern for the age of its work force was not legitimate planning for the future. Henry v. Andrews Roofing & Siding (LIRC, 11/20/81).

There was no age discrimination where the employer told the laid off employee that he was seeking younger, more experienced men in order to avoid informing him that his skills were unsatisfactory. Lloyd v. Hoffman Constr. (LIRC, 08/05/80).

Age discrimination was found in the discharge of four teachers where the average age of the staff was lowered after the discharges and the assistant superintendent, who recommended the termination, made derogatory comments about older teachers. Melrose-Mindoro Area Sch. Dist. v. DILHR (Ct. App., Dist. IV, unpublished opinion, 05/27/80).

In order to establish a prima facie case of discharge based on age, the Complainant must show replacement by a person not in the protected age group. Dixon v. A & P (LIRC, 07/12/79).

Where the employer offers a non-discriminatory business justification for replacing a 58-year-old employee with a 50-year-old, a finding of age discrimination must be supported by a finding in the record that the 58-year-old had superior qualifications and that the employer's business justification was a pretext. Ladish v. DILHR (Bode) (Milwaukee Co. Cir. Ct., 06/14/78).

A 58-year-old employee established a prima facie case of age discrimination in his demotion and discharge by establishing that he was qualified to do the work, he was not considered for other engineering positions which were given to employees under age 40, and a company executive thought he was too old to adjust to a new company plan. The employer could not rebut his claim because it failed to show that the employee was unable to efficiently perform his job duties at the standards set by the employer. Michels v. Giddings & Lewis Machine Tool (DILHR, 12/06/77).

An employer has no duty to attempt to retain an employee who is unable to perform her duties because of age. Kronberg v. DILHR (Lakeshore Tech) (Dane Co. Cir. Ct., 09/13/76).

121.6 Retirement plans

The offer of an early retirement opportunity, by itself, does not constitute age discrimination. For example, an offer of an early retirement opportunity, without evidence that workers were pressured to accept it, does not constitute age discrimination. Vick v. Marshfield Door Sys. (LIRC, 01/31/07).

Generally, an employer may offer eligible employees an incentive to retire without creating a prima facie case of age discrimination, provided that the incentive plan does not irrevocably alter the status quo for employees who reject the option. In this case, the risk to employees rejecting the incentive plan was that their jobs might be eliminated because of economic pressures. This is not sufficient to suggest constructive discharge or age discrimination. Thompson v. A.O. Smith Corp., (Ct. App., Dist I, unpublished opinion, 10/19/94).

Interpreting the Act as it existed in 1976, LIRC holds that Walker Mfg. v. Industrial Comm'n, 27 Wis. 2d 669 (1964) compels the conclusion that the Act allowed forced retirement of employees if there is a retirement policy or system which provides for payment of substantial benefits which are not in jeopardy. Kozlowski v. Doehler-Jarvis Div. (LIRC, 06/29/81). [Ed. Note - Subsequent amendments have effectively reversed this holding; see, sec. 111.33(2)(b), Stats.]

121.7 Waivers [See also, section 717]

The Complainant made a voluntary and knowing waiver of her right to bring an employment discrimination complaint against the Respondent under the Wisconsin Fair Employment Act. There was no showing that she was induced to sign the agreement through any fraud. The Complainant was aware of facts sufficient to lead her to suspect age discrimination at the time of her termination, and the release did not hide the fact that the Respondent was seeking to protect itself from any possible age discrimination claims. Moreover, the Respondent did not obtain the Complainant's termination in exchange for the benefits it was giving her under the agreement; the termination was something the employer (in the absence of any contractual right to a term of employment) had the power to carry out regardless of the agreement. What the Respondent obtained was the release of claims in exchange for the benefits it gave the Complainant, and there was no fraud in connection with that exchange. The Complainant had the opportunity to consult with an attorney of her own choosing. She was given forty-five days to consider the release agreement. Following execution of the agreement, she was given seven days to revoke her acceptance of the agreement. Semandel v. Briggs & Stratton (LIRC, 02/24/05).

The Complainant's refusal to sign a severance or termination agreement containing a release of any claims against the employer did not constitute "opposition" to a discriminatory practice. Nor did the Complainant's contacting an attorney demonstrate that he opposed a discriminatory practice since the employer had encouraged him to do so before signing the release. Accordingly, the Complainant failed to establish that the employer had retaliated against him by refusing to enter into an independent contractual relationship with him because he had opposed a discriminatory practice under the Act. Weier v. Heiden, Inc. (LIRC, 02/05/98).

A Complainant's offer to return previously received pension benefits to the employer, even where the monies had not yet actually been returned, was sufficient to allow him to challenge the validity of a release of claims arising out of his employment including, but not limited to, any alleged violation of state or federal measures which prohibit employment discrimination. Grahl v. Mercury Marine (LIRC, 12/04/92).

The totality of the circumstances should be used in determining whether there has been a knowing and voluntary waiver of rights under the WFEA. Although giving an employee an opportunity to negotiate the terms of a release and encouraging the employee to consult with an attorney are factors to consider in determining whether a release was knowing or voluntary, such factors are not mandatory requirements, and a release could be found valid even in their absence. In this case, a release was determined to have been knowing and voluntary where the release was clear in its language, where a reasonable amount of time was allowed to consider whether or not to sign it, where the consideration given exceeded the amount of pension benefits the employee was otherwise entitled to receive, and where the employee had a high school education and had been a management employee who had many years of business experience and who had signed or had been a party to numerous contracts. Grahl v. Mercury Marine (LIRC, 12/04/92).

121.9 Miscellaneous

The Complainant proved that he was called "Old Man" by his co-workers on a regular basis, that he disliked it, and that he complained to management about it. The Respondent conceded it knew about the problem but took no steps to resolve it. This evidence is sufficient to warrant a finding of probable cause on the issue of whether the Complainant was harassed based upon his age. Gallagher v. Blain Supply, Inc. (LIRC 03/28/14).

There is no absolute rule that a Complainant cannot prevail on an age discrimination claim where the age difference between the Complainant and his comparator is only five years. However, a five-year age difference is not so significant that, standing on its own, it gives rise to an inference of age discrimination. Ebner v. Dura Tech (LIRC, 04/23/09).

A Complainant can establish a prima facie case of an age-based hostile work environment claim by showing that: (1) the Complainant is age 40 or over; (2) the Complainant was subjected to harassment, either through words or actions, based on age; (3) the harassment had the effect of unreasonably interfering with the Complainant's work performance and creating an objectively intimidating, hostile or offensive work environment; and (4) the existence of some basis for liability on the part of the employer. Mroczkowski v. Belmark, Inc. (LIRC, 04/28/05), citing Crawford v. Medina Gen.l Hosp., 96 F.3d 830, 834-835 (6th Cir. 1996).

Sec. 633(a) of the federal Age Discrimination in Employment Act (ADEA) provides that the commencement of an action under the ADEA "shall supercede any state action." The language of the statute, as well as the legislative history of the Act, makes it clear that state judicial review proceedings, as well as state agency proceedings, are to be stayed. Maynard v. LIRC, Brown Co. Cir. Ct., 07/13/04.

The complaint was properly dismissed for failure to state a claim upon which relief could be granted where the Complainant alleged that his performance was criticized by the Respondent because the Respondent expected him to work as productively as younger employees. The Wisconsin Fair Employment Act guarantees the equality of opportunity to qualified workers over age forty, but nowhere does it suggest that individuals in the protected age group are entitled to more favorable treatment than younger workers. Dunn v. City of Burlington Eng'g Dept. (LIRC, 07/28/95).

The prohibition on discrimination because of age did not enact a statutory seniority-based layoff system with "bumping" rights. De Kalver v. Magna Graphics Corp. (LIRC, 03/20/90)

Anecdotal evidence provided by former employees as to their own situations and their allegations that they were discharged because of their age, offered to prove a pattern of age discrimination, can more convincingly be shown by statistics that show unexplained disparities in the treatment of classes of employees apparently distinguished by age. Erickson v. DEC Int'l (LIRC, 01/18/90).

122 ARREST OR CONVICTION RECORD DISCRIMINATION

122.1 Coverage, exceptions

122.11 General

In a claim of discharge based on conviction record, the employer proffered a non-discriminatory reason, namely, that it discharged the Complainant because he failed to present requested documentation about his conviction record in a timely fashion. The Complainant showed this reason was pretextual. The Complainant provided undisputed evidence that he told his employer that he attempted to obtain court transcripts requested by the employer but was told it would take 30 days to receive them. Nevertheless, the employer discharged the Complainant two days later. The employer's testimony revealed its concern about the Complainant's past conviction for sexual assault as a motivating factor and revealed inconsistent statements about the employer's motivations. Johnson v. Rohr Kenosha Motors, Inc. *(LIRC, 04/29/20), aff'd sub nom.* Rohr Kenosha Motors, Inc. v. LIRC and Johnson *(Kenosha Co. Cir. Ct., 02/04/21).*

The Complainant's deferred prosecution agreements were not part of his "conviction record" but part of his "arrest record" and therefore the Respondent could independently investigate the facts of such offenses pursuant to Onalaska v. LIRC*, 120 Wis. 2d 363, 354 N.W.2d 223 (Ct. App. 1984). Although the Respondent wrongfully discriminated against the Complainant on the basis of his conviction record by terminating him based on his status as a sex offender, the Respondent successfully showed it would have terminated the Complainant anyway based on his admissions during its investigation. Thus, the Complainant was not entitled to reinstatement or back pay as a remedy.* Vega v. Preferred Sands of WI, LLC *(LIRC, 01/17/20), reversed sub nom.* Vega v. LIRC *(Dunn Co. Cir. Ct., 11/19/20), reversed* Vega v. LIRC*, 2022 WI App 21, 402 Wis. 3d 233, 975 N.W.2d 249.*

The statute does not provide separate protections for individuals with conviction records who are prison inmates, as opposed to those who are "civilians." Lofton v. State of Wisc. – Dep't of Corr. *(LIRC, 09/27/18).*

An employer cannot deny an applicant a job based on an arrest record unless there are pending criminal charges. Where the Complainant had an arrest record, but no pending criminal charges at the time he applied for the job, the Respondent could not lawfully rescind its employment offer based upon his arrest record. Wiechert v. City of Shawano Hous. Auth. (LIRC, 07/22/15).

The only exception to the prohibition against arrest record discrimination applies if the individual is subject to a pending criminal charge that is substantially related to the job. The Commission rejected an argument that the term "subject to" indicates that an actual charge is not required under the WFEA. The exception does not apply unless there is actually a pending charge, meaning a charge that has already been filed but has not yet been fully resolved. Marcin v. Charter Commc'ns, LLC (LIRC, 07/14/15).

The Respondent's suspension of the Complainant in reliance on a statement from a prosecuting attorney that charges were about to be filed and that a request was going to be made for a number of bond restrictions, including a request for an order forbidding the Complainant from contact with children, amounted to reliance on the Complainant's arrest record. There was, then, a causal relationship between the arrest record and the suspension. The Respondent argued that there was a substantial relationship between the arrest record and the duties of the job, but the Complainant was only expected to have occasional, incidental contact with children, and at the time the Respondent suspended the Complainant there was not yet any order in place prohibiting contact with children. There was no substantial relationship between the arrest record and the duties of the job at the time of the suspension. The suspension decision, then, violated the WFEA. Once the no-contact order was in place, however, even incidental contact with children was prohibited, and the Respondent then had a non-discriminatory

reason for maintaining the suspension, namely the court order prohibiting contact with minors. Months later the Respondent terminated the employment of the Complainant because the Complainant's inability to come to work due to the no-contact rule left the Respondent short-handed. The termination, then, was not a discriminatory act. Moreno v. Cnty. of Racine (LIRC, 06/27/14).

With respect to a claim of termination based on conviction record, an employer's past tolerance of a Complainant's conviction record does not make it invulnerable to a claim. Each addition to an employee's conviction record gives the employer a new opportunity to make an adverse decision based on the addition to the record. Monpas v. MRS Machining Co., Inc. (LIRC, 04/08/13).

The statutory exception allowing an employer to suspend an employee's performance during an arrest only applies where the employer has pending charges against him that are substantially related to the job. In this case, it was undisputed that although the Complainant was arrested, he was never charged with a crime. It was unlawful for the employer to suspend his employment based upon the arrest. Kraemer v. County of Milwaukee (LIRC, 10/11/12), aff'd sub nom. Kraemer v. LIRC (Milwaukee Co. Cir. Ct., 08/13/13), aff'd (Ct. App. Dist. I, unpublished opinion, 05/20/14).

The proper inquiry in an arrest and conviction record case is what actually motivated the employer's decision to take the action it did. In this case, the Respondent was aware of the Complainant's conviction, but this was not the reason for her discharge. The Respondent continued to employ the Complainant for eight months after learning about the conviction and only terminated the employment relationship because of a sincere (if mistaken) belief that it was no longer permitted to employ the Complainant as a caregiver because of the law relating to Caregiver Background Checks. Williams v. Med. Coll. of Wis. (LIRC, 10/10/11).

The Wisconsin Fair Employment Act permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job. Therefore, it is not a violation of the Act to request conviction record information from a job applicant. A question about an applicant's conviction record on an employer's employment application would not, therefore, constitute prohibited discrimination within the meaning of sec. 111.322(2), Stats., which prohibits printing or circulating any statement, advertisement or publication or using any form of application for employment which implies or expresses any limitation or discrimination with respect to an individual. Lee v. LIRC (Ct. App., Dist. I, unpublished opinion, 05/27/10). Lee v. D.J.'s Pizza (LIRC, 05/20/09); Lee v. Wendy's (LIRC, 05/20/09); Lee v. Speedway Super America (LIRC, 05/20/09).

An employer must be able to ascertain information on an applicant's conviction record or pending charges in order to determine whether that conviction or pending charge substantially relates to the position that the applicant seeks. Therefore, a question on an employment application asking if the applicant had ever been convicted of an offense or whether the applicant had charges pending does not violate the Wisconsin Fair Employment Act. Lee v. LIRC (City of Milwaukee) (Milwaukee Co. Cir. Ct., 03/02/09).

The WFEA permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job. Accordingly, it is implicit that it is not a violation of the WFEA to request conviction record information from an applicant. Lee v. City of Milwaukee (LIRC, 09/26/08), aff'd sub nom. Lee v. LIRC (Milwaukee Co. Cir. Ct., 03/02/09); Lee v. Milwaukee County (LIRC, 09/26/08), aff'd sub nom. Lee v. LIRC (Milwaukee Co. Cir. Ct., 03/31/09).

Because the Wisconsin Fair Employment Act permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job, it is implicit that it is not a violation of the Wisconsin Fair Employment Act to request conviction record information from an applicant. Therefore, a question on the Respondent's employment application inquiring about the applicant's conviction record did not constitute prohibited discrimination under sec. 111.322(2), Stats. Lee v. McDonald's (LIRC, 12/26/08); Lee v. Office Depot (LIRC, 12/26/08).

Although the Wisconsin Fair Employment Act allows employers to *suspend* the employment of workers who are charged with, but not yet convicted of, certain offenses, it is illegal to *discharge* an employee because of an arrest. Nunn v. Dollar General (LIRC, 03/14/08).

A Complainant's conviction for an offense estops him from subsequently trying to call into question his culpability in any of the material elements of the offense. Any alleged problems surrounding an individual's criminal conviction must be addressed by way of an appeal from that conviction. Holze v. ADT Security Serv. (LIRC, 09/23/05).

A question on an employment application asking if an applicant has been convicted of a felony in the preceding five years is not prohibited by the Wisconsin Fair Employment Act. The Act provides that it is not employment discrimination because of conviction record to refuse to employ any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. The Act presupposes that an applicant's criminal record is known to the employer and does not prohibit an employer from asking questions about criminal records. Also, nothing in the Act prohibits an employer from conducting background checks. Jackson v. Klemm Tank Lines (LIRC, 04/29/05).

Employers do not violate the Wisconsin Fair Employment Act by requiring job applicants to document that an arrest did not, in fact, result in a conviction. Wozniak v. Bank One (LIRC, 10/10/03).

The concept of conviction record under the Wisconsin Fair Employment Act is not limited only to situations where absolute proof exists that an actual conviction exists. An employment decision based on information indicating that an individual has a conviction record, even if the individual has no conviction record, is a decision based on conviction record within the meaning of the Act. Miles v. Regency Janitorial Serv. (LIRC, 05/31/01), Rev. on other grounds sub nom. Regency Janitorial Serv. v. LIRC (Milwaukee Co. Cir. Ct., 03/12/02).

Discharging someone because of negative publicity over a conviction is precisely what the prohibition on conviction record discrimination was intended to prevent. Murray v. Waukesha Mem'l Hosp. (LIRC, 05/11/01).

The Complainant was arrested on a charge of criminal damage to property. The Respondent suspended the Complainant's employment because one of the conditions of her bond was that she have no contact whatsoever with two of her fellow employees. The Respondent's decision to suspend the Complainant's employment was not based upon discriminatory animus or bias associated with the fact that the Complainant had pending criminal charges against her, but upon a legitimate assessment that, while the Complainant was subject to the "no contact" order, she was effectively barred from coming to work and performing her job. Schmid-Long v. Hartzell Mfg. (LIRC, 03/26/99).

The fact that criminal charges are dismissed, or that an employee is acquitted of the charges, does not prove that a prior action taken on the basis of an arrest for those charges was unlawful discrimination. In this case, the Respondent, a licensing authority, temporarily suspended the Complainant's taxicab

driver's license pending the resolution of criminal charges against him. The charges against the Complainant (which included sexual assault and threatening to injure another while in possession of a dangerous weapon) were dismissed approximately two months later. The Respondent then re-issued the Complainant's taxicab driver's permit. While the Complainant provided evidence tending to show that he was damaged because of the denial of his taxicab driver's permit for two months based on criminal charges that were later dismissed, he did not establish probable cause to believe that the Respondent unlawfully discriminated against him under the Wisconsin Fair Employment Act. Rathbun v. City of Madison (LIRC, 12/19/96).

The fact that the Complainant was eventually acquitted of the charges against him had no bearing on the question of whether there was unlawful arrest record discrimination. Paxton v. Aurora Health Care (LIRC, 10/21/93).

An employer may reassign an employee who is arrested on a charge the circumstances of which substantially relate to the circumstances of the particular job, although the employer should not be allowed to try to evade the purpose of the law by reassigning an employee to onerous duties in an effort to induce that employee's resignation. In this case, the employer reassigned the Complainant, rather than suspending her outright, in order to preserve her employment. Delapast v. Northwoods Beach Home Caring Homes (LIRC, 02/17/93).

Although an individual had received a full and unconditional pardon from the Governor, an employer was not precluded from taking into account the historical facts of his criminal behavior and its consequences, including his dismissal from previous employment. Cieciwa v. County of Milwaukee (LIRC, 11/19/92).

An employer who had no knowledge that the reason an employee was absent for three days without calling work was due to the employee's incarceration did not discharge the employee because of his arrest record. The employer terminated the employee's employment due to the employee's failure to follow the employer's procedure that the employee notify the employer of the employee's absence before the employee's shift begins. The employer had no duty to call the employee to inquire about the employee's whereabouts. Kessner v. Dairy Sys. (LIRC, 09/30/92).

An employer is entitled to know whether an applicant has a conviction record, so that the employer can determine if the conviction record is substantially related to the applicant's prospective job duties. An employer may lawfully refuse to hire an applicant who falsifies an employment application with respect to a conviction record. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

Where an employee has been unlawfully discharged because of an arrest, his subsequent conviction for that offense is irrelevant. There are no exceptions to the illegality of discharging an employee because of arrest record. Maline v. Wis. Bell (LIRC, 10/30/89).

Where the employer terminated an employee because she had been arrested, it violated the Act. Neither the fact that the conduct for which the employee was arrested was substantially related to the circumstances of her job, nor the fact that she was subsequently convicted of the charges, save the termination from illegality. Under the Act, the only action that an employer may take in response to the arrest of an employee for acts substantially related to the employee's job is suspension pending the outcome of the criminal charges. Shipley v. Town & Country Rest. (LIRC, 07/14/87).

The Personnel Commission lacks subject matter jurisdiction over a complaint filed by an inmate who alleged discrimination based on conviction record with respect to actions taken by the prison's education director. Richards v. DHSS (Wis. Pers. Comm'n, 09/04/86).

The purpose of the prohibition against arrest and conviction record discrimination is to prevent employment decisions from being made based on the stigma of an arrest or conviction record. Miller Brewing Co. v. DILHR, 103 Wis. 2d 496, 308 N.W.2d 922 (Ct. App. 1981).

122.12 Definition of arrest record and conviction record

A deferred judgment of conviction agreement, like a deferred prosecution agreement, is an "arrest record," and not a "conviction record," within the meaning of the WFEA. Vega v. LIRC, 2022 WI App 21, 402 Wis. 2d 233, 957 N.W.2d 249.

The fact that the Complainant pleaded guilty to a crime in a deferred prosecution agreement does not make his record on the offense a conviction record instead of an arrest record. The agreement required the withdrawal of the guilty pleas at the successful conclusion of the agreement. The purpose of the deferred prosecution agreement is to provide a negotiated path for a charged party to avoid having a conviction and for the prosecution to efficiently obtain corrective conduct from the charged party. Vega v. Preferred Sands of WI, LLC (LIRC, 01/17/20), aff'd sub nom. Vega v. LIRC (Dunn Co. Cir. Ct., 11/19/20), reversed sub nom. Vega v. LIRC (Dunn Co. Cir. Ct., 11/19/20), reversed Vega v. LIRC, 2022 WI App 21, 402 Wis. 3d 233, 975 N.W.2d 249.

A domestic temporary restraining order against the Complainant resulting from an action brought by a private party, is not a record of an offense "pursuant to a law enforcement authority" under the definition of conviction record; likewise, a record of an action to obtain such an order is not an arrest record. The employer rejected the Complainant's application for employment based in part on its perception that the Complainant was not honest when he failed to fully disclose his temporary restraining orders, and in part on the fact of the orders themselves. The Respondent was not motivated by any actual arrests or convictions of the Complainant. Immel v. Arbor Vitae Woodruff Sch. Dist. (LIRC, 06/27/19), aff'd sub. nom, Immel v. LIRC (Marathon Co. Cir. Ct., 07/31/20).

The Complainant, a truck driver, was issued a warning ticket for following too close to another vehicle and was assessed points for unsafe driving. This constituted an arrest record under the WFEA, but not a conviction record. The Complainant was not convicted of any offense, and was not adjudicated to be delinquent, assessed a fine, or subject to any other statutory penalties. A warning is not a conviction, even though it resulted in points on the Department of Transportation's CSA system. Hunter v. WEL Companies, Inc. (LIRC, 05/21/15).

With respect to arrest record discrimination, the legislature's primary concern was about employment decisions being made on the basis of an assumption about an individual's guilt merely on the basis of an individual's contact with law enforcement or military authorities. With respect to the term conviction record, however, the question of whether the individual convicted of an offense was actually guilty of committing the offense for which he or she was convicted would never arise. It appears that the legislature's concern in conviction record cases is whether or not the individual has been convicted of an offense that is substantially related to the job that an employer has to offer. Swanson v. Kelly Servs. (LIRC, 10/13/04).

The definition of conviction record suggests that there is coverage against discrimination on the basis of perceived conviction record. Stroede v. Federal Express (LIRC, 08/14/96).

The affirmative defense set forth in sec. 111.335(1)(b), Stats., provides that it is not employment discrimination because of arrest record to suspend from employment any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the

job. That section is not applicable where the charge for which the Complainant was arrested is not a "criminal charge." In this case, the Complainant was charged with driving while under the influence of alcohol, as defined by sec. 346.63, Stats. Case law provides that a first offense under that section is not a criminal offense. Gustafson v. C.J.W., Inc. (LIRC, 03/21/89).

Being questioned by police and then issued a civil citation charging damage to property in violation of a municipal code constituted an arrest record within the meaning of the Wisconsin Fair Employment Act. Levanduski v. Visiting Nurse Ass'n of Sheboygan (LIRC, 02/10/88).

The affirmative defense contained in sec. 111.335(1)(b), Stats., allowing employment decisions where the individual is subject to a pending criminal charge which is substantially related to the job, is not available where the charge in question is not a criminal charge. Springer v. Town of Madison (LIRC, 09/22/87).

The affirmative defense set forth in sec. 111.335(1)(b), Stats., allowing suspension from employment of 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, is not available to a Respondent in a case in which the employee in question is subject to a charge of a municipal ordinance violation, since such a violation is not criminal. Hart v. Wausau Ins. Co. (LIRC, 04/10/87).

An employee discharged because of the employer's belief that he was stealing from the company had not been "arrested" within the meaning of the Act where the employer questioned the employee on its own as part of an internal investigation. Holliday v. Trane Co. (LIRC, 04/21/83).

122.13 Employer's investigation of underlying act as reason for employment action

The employer engaged in an "independent investigation" within the meaning of Onalaska v. LIRC, 120 Wis. 2d 363, 354 N.W.2d 223 (Ct. App. 1984), when it presented the Complainant with documents from his two criminal cases, including the complaints and deferred prosecution agreements, and asked the Complainant if the statements and allegations in the documents were true. Vega v. LIRC, 2022 WI App 21, 402 Wis. 2d 233, 957 N.W.2d 249.

The employer's questions to the Complainant were intended to elicit, and did elicit, statements from him admitting conduct he was charged with in investigative reports related to felony prosecutions. The Complainant's argument that the questioning was unnecessary because he had already been convicted of misdemeanor sexual assault failed, because the convictions were not based on the same specific conduct as the felony charges under investigation. The Complainant's argument that the employer's questioning was unnecessary because the felony charges were subject to deferred prosecution agreements in which he had pleaded guilty also failed. The Complainant's admission of guilt to the employer could reasonably be taken by the employer as a more credible indication of the Complainant's guilt than the fact that he entered into a plea agreement as part of a deferred prosecution agreement. Vega v. Preferred Sands of WI, LLC (LIRC, 01/17/20),), reversed sub nom. Vega v. LIRC (Dunn Co. Cir. Ct., 11/19/20), reversed Vega v. LIRC, 2022 WI App 21, 402 Wis. 3d 233, 975 N.W.2d 249.

The Onalaska defense was rejected where, although the Respondent conducted its own investigation, the decision to discharge the Complainants was made only after the D.A. cited the Complainants for municipal theft and told the Respondent that he believed the Complainants were guilty and that they would be entering into a plea agreement and paying restitution. This amounted to arrest record information, and the decision to discharge the Complainants based upon that information was in violation of the WFEA. Cota v. Oconomowoc Area Sch. Dist. (LIRC, 07/30/21).

The Onalaska defense was rejected where, although the employer determined the employee engaged in certain conduct based upon its own investigation, the decision to discharge him was not because of that conduct. Smith v. State of Wis. Dep't of Workforce Dev. (LIRC, 01/04/19).

Onalaska requirements were satisfied where the employer used a police report as a basis for questioning the employee but based the ultimate decision to discharge the employee on his own statement, including an admission that he was driving while under the influence of alcohol, which the employer regarded as unacceptable behavior. Cisewski v. City of Marshfield (LIRC, 02/13/18).

The "*Onalaska* defense" applies if an employer takes an action because it believes, based on its own investigation, that the employee has engaged in an illegal or unacceptable activity. Police reports are a component of an employee's arrest record and may not be relied upon by the employer as a part of an independent investigation as to whether an adverse action should be taken against the employee. Where the employer's investigation consisted almost entirely of attempting to collect arrest record information, the *Onalaska* defense could not be used. Marcin v. Charter Commc'ns, LLC (LIRC, 07/14/15).

An employee's arrest does not prohibit his or her employer from taking a subsequent adverse employment action if that action is not taken because of the arrest. Here, the employer terminated the Complainant based on a belief that she engaged in unacceptable conduct, which was formed independently of the Complainant's arrest record. The arrest record corroborated the employer's belief that the employee had engaged in shoplifting, but the belief arose from the employer's own investigation. The corroborative fact of the Complainant's arrest was not significant enough to create liability even under a mixed-motive theory. In order for an illegal factor to create liability it must by a determining factor. Foley v. Cost Cutters (LIRC, 01/15/15).

Arrest record discrimination discharge was within the rule of the Onalaska case where it was not because of the fact of the Complainant's arrest but rather because the Respondent believed the Complainant had engaged in sexual harassment at the workplace based upon interviews with employees. The WFEA does not require that an employer conduct any specific type of investigation; it requires only that no employment decision be based solely upon the fact of the employee's arrest. In this case, the Respondent interviewed the two female employees who complained about the Complainant in the first instance and spoke with the Complainant to get his version of events. The Respondent then interviewed the two female employees who came forward with additional allegations. The Respondent also attempted to contact two former employees whom it had some reason to believe were subjected to similar conduct on the part of the Complainant but was unable to locate these individuals. While the Respondent did not re-interview the Complainant after the second set of allegations was brought to its attention, it reasonably believed at that point that it had sufficient information to warrant a conclusion that the Complainant had engaged in sexual harassment. Decker v. Biewer Wis. Sawmill, Inc. (LIRC, 09/16/13).

The Respondent decided not to hire the Complainant in this case because he pleaded guilty to a charge of having received stolen property, notwithstanding the fact that the charge was later dismissed, and no conviction ever resulted. The Respondent argued that it did not make its decision based upon the Complainant's arrest record, but that it independently concluded that he had knowingly received stolen property and that he had been dishonest with the Respondent about the matter. This is the so-called "Onalaska defense," articulated in City of Onalaska v. LIRC, 120 Wis. 2d 363 (Ct. App. 1984), in which the court held that it is not arrest record discrimination for an employer to decide not to hire an applicant because it concludes from its own investigation and questioning of the individual that he or she has committed an offense. However, in this case the Respondent did not really conduct an independent investigation. The only information the Respondent reviewed prior to deciding not to hire the Complainant was the CCAP report, which merely confirmed the procedural facts about the Complainant's

arrest record. When the fact of the arrest is the only source for the Respondent's belief in the employee's guilt, Onalaska does not apply. Lovejoy v. Auto-Wares Wis. (LIRC, 02/24/11).

The Respondent decided to terminate the Complainant's employment after receiving verification from the Complainant's wife that he had engaged in a violent assault upon her and a co-worker. The Complainant's termination was not because of his arrest record. The "*Onalaska* defense" does not require that the Respondent have no knowledge or familiarity with an employee's arrest record, but instead requires that this not be the sole or primary basis upon which the Respondent formed its belief that the Complainant had engaged in the conduct underlying the arrest. The employer's reliance upon the alleged victims' verification of certain details set forth in the criminal complaint in this case did not constitute reliance upon the Complainant's arrest record per se. Sanford v. Luther Midelfort (LIRC, 10/01/10).

In applying the Onalaska defense, the question is whether the belief formed by the employer after its investigation that the Complainant had in fact engaged in the underlying conduct had a factual basis other than the arrest record itself, and whether that belief was reasonably consistent with the information the employer obtained during its investigation. Sanford v. Luther Midelfort (LIRC, 10/01/10).

Under the "*Onalaska* defense," the employer's investigation is not required to be optimal or exhaustive. Although the Complainant is one possible source of independent information, it is not a required source. Sanford v. Luther Midelfort (LIRC, 10/01/10).

The evidence in this case failed to establish that the Respondent obtained a significant amount of information through its own investigation independent of the arresting authorities which led it to conclude that the Complainant had engaged in the conduct with which he was charged. The Complainant was discharged from his position as a supervising officer at the Milwaukee Secure Detention Facility of the Department of Corrections after he was arrested and charged with the sexual assault of a child. After the Complainant was discharged, the criminal charges against the Complainant were dismissed. The warden decided to terminate the Complainant based upon looking at everything that he could, which included matters defined as part of the Complainant's arrest record. Given that the warden could not identify what was more or less important in his decision to discharge the Complainant, it is impossible to conclude that the decision would have taken place in the absence of the impermissible motivating factor of the Complainant's arrest. Suttle v. Dept. of Corrections (LIRC, 05/22/09), aff'd sub nom Dept. of Corrections and Suttle v. LIRC (Dane Co. Cir. Ct., 06/02/10).

Under the "*Onalaska* defense," there is no discrimination on the basis of arrest record if an employer refuses to hire an individual because the employer concludes *from its own investigation and questioning of the individual that he has committed an offense*. In short, the employer has not acted on the basis of the individual's arrest record. On the other hand, where an employer has acted on the basis of an individual's arrest record, the employer may avoid liability if the circumstances of the individual's pending criminal charge substantially relate to the circumstances of the job. It was error for an Administrative Law Judge to hold both that: (1) the employer did not act on the basis of the Complainant's arrest record, and (2) the employer did act on the basis of his arrest record but that such action fell under the exception to the prohibition against discrimination on the basis of arrest record. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

Where the Respondent elected to await a court's determination on the Complainant's pending criminal charges before it made a hiring decision on his application for employment, there was no basis to support a conclusion that the action the Respondent had taken was because it had determined from its own investigation and questioning of the Complainant that he had committed an offense. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom. Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

A plant manager saw the Complainant operating a vehicle and reported him to the police for not having a valid driver's license, resulting in an officer pulling the Complainant over and fining him for operating a vehicle after his license had been revoked. The Complainant's subsequent discharge was based on his underlying conduct, rather than his arrest record. Where the information an employer relies on to draw its conclusion that an employee engaged in unacceptable conduct was information independent from that of the arresting authority, the employer does not rely on the employee's arrest record. Ardell v. Alliant Energy (LIRC, 01/31/08).

The Respondent in this case had some information that the Complainant had been arrested. The Respondent also had a copy of an arrest report containing what purported to be information provided by a law enforcement officer to the effect that the Complainant had made certain admissions in the jail. Such information coming from an arresting authority would not constitute information independent of the arrest and of the arresting authorities but would be part and parcel of the Complainant's "arrest record." However, the fact that the Respondent had this information did not in and of itself prove that there was a violation of the prohibition against discrimination because of arrest record. The evidence showed that the Respondent had obtained a significant amount of information through its own investigation, independent of the arresting authorities, which led it to conclude that the Complainant had used illegal drugs and had been dishonest with the Respondent in a number of respects relating to or arising out of that drug use. The Respondent's beliefs and conclusions regarding this conduct by the Complainant were the result of the information the Respondent had obtained independent of the arresting authorities and the fact of the arrest. The actions the Respondent took because of its beliefs and conclusions, including its discharge of the Complainant, were thus not "because of" the Complainant's arrest record. Betters v. Kimberly Area Sch. (LIRC, 11/28/07).

The underlying rationale in City of Onalaska v. LIRC, 120 Wis. 2d 363, 354 N.W.2d 22 (Ct. App. 1984), regarding employment actions which are based upon an employer's independent investigation, does not extend beyond arrest record cases to conviction record cases. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

The Respondent failed to show that it discharged the Complainant because it concluded from its own investigation and questioning of him that he had committed an offense. The evidence indicated that the Respondent's "own investigation" primarily consisted of consideration of the criminal complaint against the Complainant, and that the limited questioning it undertook of him was insufficient to support a conclusion that he had committed the offense of marijuana possession. Evidence of the Respondent's primary reliance on the criminal complaint was apparent, based upon its repeated requests for the Complainant to furnish it with the paperwork documenting what he was arrested for. It was also apparent based on the statement in the termination letter that the Complainant had admitted to the possession of marijuana, which was a conclusion which could only be drawn from the criminal complaint against the Complainant. During the investigation conducted by the Respondent, the Complainant was never asked if the marijuana in question was his, and he never admitted to possession of marijuana on the date in question. None of the Complainant's statements constituted an admission that he had committed the offense of possession of marijuana. The Respondent, therefore, violated the prohibition against termination on the basis of arrest record. However, the employee (who ultimately pleaded guilty to the charge) was still not entitled to any remedy for that violation because the circumstances of the charged offense were substantially related to his employment as a youth counselor such that his suspension would have been legal. Blunt v. DOC (LIRC, 02/04/05).

In arrest record cases it can be concluded that an employer "does not rely on information indicating the individual has an arrest record" because the employer has concluded from its own investigation and questioning of the individual that the individual has committed an offense. In all but the most unusual case, in a conviction record case the question of whether an individual that has been convicted of an

offense was actually guilty of committing the offense for which he has been convicted would never arise. Even if such a case were to arise, an employer that learned through its own investigation and questioning of the individual that the individual was convicted of some offense would not properly be held to have made an unwarranted assumption regarding the individual's guilt. An employer cannot escape liability under the Wisconsin Fair Employment Act merely by undertaking its own investigation and by questioning the individual if he has committed the offense for which he was convicted. An employer that had the unfettered authority to decide for itself that an individual's conviction is substantially related to the particular job just because it concluded from its investigation and questioning of the individual that the individual committed the offense for which the individual was convicted would be to subject such individuals to the very arbitrary treatment the WFEA was enacted to prevent. Swanson v. Kelly Servs. (LIRC, 10/13/04).

Where the information upon which the employer relied to draw its conclusion that the employee engaged in unacceptable conduct was information that came from the arresting authority, this does not constitute information independent of the arrest and of the arresting authorities. Things such as police reports from the arresting authority, the criminal complaint, and statements made by or other information provided by the arresting or prosecuting authority, are all part and parcel of an "arrest record" itself. "Independent" sources of information which an employer may use to form a belief that an employee engaged in an offense of some kind which is also the subject of an employee's arrest include: (1) an admission by the employee; (2) statements to the employer by others who witnessed the conduct; (3) direct observations made by the employer while joining in a police search; or (4) an investigation by the employer that made use of information obtained from a contemporaneous police investigation. The Labor and Industry Review Commission no longer chooses to be guided by its prior decisions in Ponto v. Grand Geneva Resort & Spa (LIRC, 08/22/96), or Springer v. Town of Madison (LIRC, 09/22/87), where it concluded that the employer had not violated the WFEA when it made employment decisions based upon information that the employee engaged in unacceptable conduct that came from the arresting authority. Rather, the question to be resolved is whether the employer's conclusion that the employee had engaged in unacceptable behaviors was based on information "independent of the arrest and of the arresting authorities." Betters v. Kimberly Area Sch. (LIRC, 07/30/04).

The critical question which needs to be answered to properly apply the Onalaska principle in a case where an employer has both learned about an employee's arrest from the arresting authorities and learned things about the employee's conduct independently of the arresting authorities, is the question of the employer's motivation. The question is whether the employer made the decision to discharge the employee because of the information it acquired from the arrest and the arresting authorities, or because of the information it acquired through its own investigation independent of the arresting authorities. The employer's subjective intent and motivation in arriving at the challenged decision is a question of ultimate fact. Betters v. Kimberly Area Sch. (LIRC, 07/30/04).

It is not arrest record discrimination if an employer undertakes its own investigation and bases the subject employment decision on the results of that investigation. In this case, it was not until the employer received a final investigative report concluding that the Complainant had used his work computer to access and download pornography that he was terminated. There was no probable cause to believe that the Complainant was discriminated against based on arrest record. Speltz v. Trane Div. of Am. Standard (LIRC, 05/25/04).

The Respondent failed to establish that it discharged the Complainant because she violated its alcohol and drug abuse policy, rather than because she was arrested for knowingly keeping and maintaining a dwelling which is resorted to by persons manufacturing controlled substances, contrary to sec. 961.42(1), Stats. The Complainant informed management that she had been arrested, and that she had known that an individual living in her home was growing hallucinatory mushrooms in his room. The

Complainant's statements to management did not constitute an admission that the Complainant had violated the Respondent's alcohol and drug abuse policy, which provided, in part, that "the use, possession, sale, transfer, acceptance, or purchase of illegal drugs at any time is strictly prohibited." The Respondent simply assumed that the Complainant was guilty of possessing illegal drugs in violation of company policy, and that assumption was based entirely on the fact of her arrest record. Garton v. Wal-mart Stores (LIRC, 01/27/00), aff'd sub nom. Wal-mart Stores v. LIRC (Dane Co. Cir. Ct., 08/21/00).

The Respondent suspended the Complainant when it learned through the newspaper that he had been charged with second degree sexual assault of a child and exposing a child to harmful materials. It then discharged the Complainant when it learned through another newspaper article that the employee had been charged with sexually assaulting his "little brother" in the "Big Brother" program. The second newspaper article stated that the criminal complaint indicated that "[the employee] allegedly admitted to police" that he had sexual contact with the boy. The suspension was not unlawful arrest record discrimination, because the Wisconsin Fair Employment Act allows an employer to suspend an employee based on an arrest for an offense which is substantially related to the employee's job, and the offense charged here was substantially related to the employee's job as director of the fitness center at a resort. With respect to the discharge, while the WFEA does not provide a "substantially related" exception for discharge because of arrest, the discharge here was not unlawful since the reason that the employer discharged the employee was that it believed, based on what it read in the newspaper articles, that the employee had confessed to the conduct involved. Ponto v. Grand Geneva Resort & Spa (LIRC, 08/22/96). [Ed. note: LIRC expressly stated that it no longer chooses to be guided by this decision in Betters v. Kimberly Area Sch. (LIRC, 07/30/04).]

Although the Complainant's general manager and the area supervisor were aware of her arrest, the Complainant had also admitted to the Respondent during its investigation that she had been involved with the conduct of selling controlled substances. It was this admission of unacceptable conduct that led to the Complainant's discharge. Since the Respondent discharged the Complainant because she admitted to having engaged in conduct unacceptable to the employer, and not because of her arrest record, the question of whether the Complainant's actions were substantially related to her employment did not have to be addressed. Lamb v. Happy Chef of Sparta (LIRC, 09/29/95).

The employer did not discharge the Complainant because of arrest record where its belief as to the Complainant's guilt was based on its own investigation and was independent of the mere fact of his arrest. When the employer interviewed the Complainant, he admitted that he had marijuana in his car (which was the offense for which he was arrested). Additionally, when the Complainant was arrested he told the employer that he would not be able to get to work on time due to "car problems." The Respondent subsequently learned that the Complainant had been untruthful and that the real reason that he was unable to report to work on time was because he was incarcerated. Both of these contacts were independent of the arrest and of the arresting authorities because they were communications directly from the employee to the employer. Greene v. Air Wisconsin (LIRC, 02/02/95), aff'd sub nom. Greene v. LIRC (Monroe Co. Cir. Ct., 08/25/95).

The Respondent continued to employ the Complainant long after his manager learned of his conviction record, and even after other employees began complaining that the Complainant was stealing tips from them. The eventual discharge decision was made by a regional manager who was unaware of the Complainant's conviction record. That decision was based on the Respondent's belief, formed after investigation, that the Complainant was indeed stealing tips from other employees. Thus, the Complainant failed to demonstrate that his conviction record played any role in the Respondent's decision to discharge him. Bradley v. Exel Inn of America (LIRC, 02/02/95).

Where a Complainant was discharged because of the Respondent's reasonable, good faith belief (based upon its own investigation) that he had engaged in conduct for which he was arrested, it is immaterial whether the Complainant in fact engaged in that behavior. What matters is the question of the employer's motivation, not whether the employer was objectively correct. Here, the Complainant was eventually acquitted of the charges against him however this has no bearing on the question of whether there was unlawful arrest record discrimination. The employer came to a good faith belief based on its investigation that the Complainant had committed some type of sexual assault against a co-worker. It is irrelevant that a jury, which may have heard different evidence, and which was required to apply a stringent burden of proof, arrived at a different conclusion. Paxton v. Aurora Health Care (LIRC, 10/21/93).

An employer's decision to discharge an employee is not because of an arrest when it is motivated by the employer's belief that the employee has in fact engaged in certain unacceptable conduct and when that belief arises from some source other than the mere fact of the arrest. Delapast v. Northwoods Beach Home Caring Homes (LIRC, 02/17/93).

The Complainant was arrested on charges of aggravated battery for throwing acid in a woman's face. The day after the arrest, the Respondent received information from a brother of the victim that the Complainant had claimed that he got the acid from his workplace. The employer spoke to both the victim and her brother in investigating the matter. Through its own investigation, the Respondent concluded that the Complainant had committed the offense, using materials obtained from the workplace, and it discharged him. Since the Respondent made its decision based upon what it came to believe about the facts of the incidents through its own investigation, there was no violation of the prohibition on arrest record discrimination. Redmon v. Dept. of City Dev. (LIRC, 02/22/90).

The Respondent violated the Act when a significant and determining factor in its decision to discharge the Complainant was its belief that the employee had sold illegal drugs out of a company vehicle, a belief that was based solely on the Complainant's arrest on those charges. Maline v. Wis. Bell (LIRC, 10/30/89).

Where an employee has told the employer that he engaged in the conduct for which he was arrested or convicted, the situation must be analyzed to determine whether the subsequent action taken by the employer was taken because of the employer's belief about the conduct or because of the arrest or conviction itself. Here, the termination of the Complainant's employment was based on his arrest record, despite the Complainant's admission of the underlying conduct, because the Respondent's general manager stated that the Complainant was being discharged because the employer did not want anyone working for it who had a "driving while intoxicated" offense on his record. Gustafson v. C.J.W., Inc. (LIRC, 03/21/89).

Employers are not prohibited from taking an adverse employment action against an employee for improper actions on the job simply because the employee has also been arrested as a result of those actions. However, if the employer is motivated even in part by the arrest itself (as opposed to the underlying job-related misconduct) this should result in a finding of liability. Ames v. UW-Milwaukee (Wis. Pers. Comm'n, 12/23/88).

Where the employee, after having been arrested for unlawful damage to property in connection with a domestic disturbance at her home, admitted to her employer that she had engaged in the violent conduct in question, and the employer thereafter terminated her, the termination was not because of "arrest record," but was because of the employer's beliefs about the Complainant's conduct. Levanduski v. LIRC (Sheboygan Co. Cir. Ct., 09/15/88).

The purpose of the prohibition on discrimination because of arrest record is to prevent an employer from making an employment decision solely on the basis of an employee's contact with the criminal justice system, not to prevent an employer from acting on the employee's own admission of conduct inimical to the employer's interests. Therefore, where, as here, the evidence showed that the employer discharged the employee, not because of the fact that he had been charged with an offense, but because of the employee's subsequent direct admission to the Respondent that he had engaged in the conduct with which he had been charged, there was no violation on the prohibition against discrimination because of arrest record. Mielke v. Orkin Exterminator Co. (LIRC, 04/11/88).

The Complainant, a nuclear plant security guard, was charged with misdemeanor possession of marijuana for having five marijuana plants growing near his residence. He pled guilty and was convicted and fined. Upon learning of this through the newspaper, the Respondent began an investigation, obtaining written and oral statements from the Complainant. Under the Respondent's policies, which called for discharge of employees convicted of a felony, the Complainant's conviction for misdemeanor possession would not necessarily require his discharge. In his initial statements to the Respondent, the Complainant admitted that he had marijuana plants growing near his home. He was not discharged at that time. In a subsequent interview with the Respondent, the Complainant disclosed that in addition to having grown marijuana plants at his residence, he used marijuana during off-duty hours and had done so for some time. He was then discharged. It was the Complainant's admitted possession and use of marijuana, rather than his conviction record, which caused his discharge. The Complainant was discharged only after the Respondent's investigation disclosed that he had been using marijuana for a number of years. Even if the discharge was considered to have been "because of" the Complainant's conviction record, the offense was substantially related to the job, considering the nature of the Complainant's duties as a guard at a nuclear power plant. McClellan v. Burns Int'l Sec. (LIRC, 03/31/88).

The employer did not base its employment decision on the Complainant's arrest record where it based its action on its conclusion, based on its own investigation and questioning of the employee, that the employee committed an offense. Springer v. Town of Madison (LIRC, 09/22/87); aff'd sub nom. Springer v. LIRC (Jefferson Co. Cir. Ct., 06/13/88). [Ed. note: LIRC expressly stated that it no longer chooses to be guided by this decision in Betters v. Kimberly Area Sch. (LIRC, 07/30/04)].

If an employer discharges an employee because it concludes from its own investigation and questioning of the employee that the employee had committed an offense, the employer does not discriminate because of an arrest record within the meaning of the Wisconsin Fair Employment Act. In this case, the Respondent learned of certain conduct the Complainant had been involved in (stealing a vehicle and stealing a flag) through information provided to it by a co-worker of the Complainant who had also been involved. The Respondent learned more about the incident by questioning the Complainant himself, who admitted to the conduct. It also eventually came to learn through the Complainant that he had been arrested and charged in connection with the incident. The Complainant was not discharged because of the arrest but was discharged only because the Respondent believed on the basis of what it learned from the admissions of the involved co-employee and the Complainant himself during its investigation, that the Complainant had engaged in acts of theft which the Respondent equated with dishonesty. Himmel v. Copps Corp. (LIRC, 10/29/86).

To discharge an employee because of information indicating that the employee has been questioned by a law enforcement or military authority is to rely on an assertion by another person or entity. If the employer discharges an employee because the employer concludes from its own investigation and questioning of the employee that he has committed an offense, the employer does not rely on information indicating that the employee has been questioned, and therefore does not rely on an arrest record. In this case, the Complainant was a police trainee. The Complainant's brother-in-law was arrested for speeding, eluding a police officer, and racing. In response to a question by an officer, the

Complainant said that he supposed he was the person with whom his brother-in-law was racing. The police chief told the Complainant that if he did not agree to resign, he would be fired immediately. The Complainant was subsequently charged with racing and was found not guilty. The Complainant's discharge was not discrimination. City of Onalaska v. LIRC, 120 Wis. 2d 363, 354 N.W.2d 223 (Ct. App. 1984).

An employee was not terminated on the basis of his "arrest" where his employer discharged him because he brought a concealed weapon to work, not because he was arrested at work based on the employer's call to police. Buller v. Univ. of Wis. (Wis. Pers. Comm'n, 10/14/82).

122.19 Miscellaneous

An employer's perception that an employee has an arrest or conviction record is not covered by the WFEA. A temporary restraining order is not an arrest or conviction record because it is not an action taken pursuant to any "law enforcement or military authority." Immel v. Arbor Vitae Woodruff Sch. Dist. (LIRC, 06/27/19), aff'd sub. nom, Immel v. LIRC (Marathon Co. Cir. Ct. 07/31/20).

The substantial relationship defense in arrest or conviction record cases may not be based upon an offense that has been expunged from the Complainant's record. Expungement allows offenders to wipe the slate clean, and an expunged offense may not be used as a reason to deny the Complainant future employment opportunities. Staten v. Holton Manor (LIRC. 01/30/18).

Where the Complainant never applied for the job in question and made no effort to follow up with the Respondent when he did not receive a reply to his letter requesting an application, there is no basis to conclude that he was "barred from employment" based upon conviction record. Jackson v. Ruan Transp. (LIRC, 06/21/17).

An employer may not discriminate simply because some third-party urges or pressures it to do so. An employer may be liable for discrimination if: (1) it knew, or believed, that a third party either had or would have a negative attitude about an employee based on that employee's protected status under the WFEA; and (2) even though the employer had the ability to not acquiesce to the perceived discriminatory animus by the third party, the employer submitted to the pressure by the third party by taking an adverse action against the employee. Sloan v. Human Dev. Ctr. (LIRC, 08/29/14).

The Complainant's prima facie case of discrimination because of conviction record went unrebutted where the employer's only witness could offer no details about the hiring decision and provided no explanation for it. In addition, the Respondent's concession that it would not have considered the Complainant for certain jobs because of conviction record was direct evidence of discrimination. Zunker v. RTS Distrib. (LIRC, 06/16/14).

The Wisconsin Fair Employment Act does not require that an employer take affirmative steps to accommodate individuals convicted of felonies. Holze v. Security Link (LIRC, 09/23/05).

A Respondent is not required to "accommodate" a Complainant's criminal conviction by placing him in an assignment not substantially related to the circumstances of his conviction. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

The Complainant's suggestion that the Respondent engage in risk management by way of a fidelity bond or insurance, constitutes, in essence, an assertion that the Respondent could have taken steps to accommodate the Complainant's felony convictions. A similar argument was rejected in Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998). There, the court found that there is nothing in the

language of the Wisconsin Fair Employment Act which states that employers must take affirmative steps to accommodate individuals convicted of felonies. Accordingly, the Respondent was not obliged to engage in risk management by seeking a fidelity bond as a form of insurance against any monetary or property losses it may have incurred through the employment of the Complainant, who had been convicted of several felonies which included robbery, burglary, and theft. Jackson v. Summit Logistics Serv. (LIRC, 10/30/03).

The Complainant argued that the fact that he was issued a license to sell insurance by the Wisconsin Commissioner of Insurance established that the Commissioner of Insurance had made a determination that his convictions were not substantially related to the occupation at issue in the case. The Equal Rights Division was not required to give weight to the determination of the Commissioner of Insurance. It is the responsibility of the Equal Rights Division to determine whether the Wisconsin Fair Employment Act has been violated. Borum v. Allstate Ins. Co. (LIRC, 10/19/01).

The Respondent did not unlawfully discriminate against the Complainant where it reasonably concluded that it was unable to employ the Complainant while she was under court order to have no contact with two of her coworkers. The Respondent was under no legal obligation to consider alternate placements for the Complainant, nor was it required to determine whether the court would permit any exceptions to the "no contact" order. Schmid-Long v. Hartzell Mfg. (LIRC, 03/26/99).

The Wisconsin Fair Employment Act does not impose a duty upon employers to take affirmative steps to accommodate individuals with felony convictions. In this case, the Complainant was not qualified for the position of district agent with an insurance company because his felony conviction statutorily disqualified him from registration with the National Association of Securities Dealers (NASD). NASD requires that all employees who participate in a company's registered securities business must be individually registered with NASD. The Respondent did not have a duty to allow the Complainant to pursue an alternate registration process which might have allowed him to become registered with NASD. Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998).

A statement by the Respondent's executive director conceding that under certain circumstances the Respondent would not hire individuals with conviction records is nothing more than a layman's statement of what is contained in the statute; i.e., that it is not employment discrimination because of conviction record to terminate from employment an individual if the circumstances of the conviction are substantially related to the circumstances of the employment. Konrad v. Dorchester Nursing Ctr. (LIRC, 06/10/98).

If an applicant has a record of convictions that are substantially related to the job in question, the employer is not prohibited from treating the applicant differently from other applicants. In this case, the Respondent, a licensing agency, was entitled to test the Complainant's general knowledge more rigorously than it tested the knowledge of other applicants, once it determined that the Complainant had convictions which were substantially related to the position for which she sought a license (in this case, occupational therapist assistant). Deshon v. Dep't of Regulation & Licensing (LIRC, 01/12/96).

Where, one day prior to her scheduled initial appearance date on a shoplifting ordinance violation, the Complainant told her employer that she had been "arrested, convicted and paid a fine" for shoplifting, the subsequent action of the Respondent in terminating her was because of conviction record within the meaning of the Act. The Commission's conclusion, that because she had not yet actually been convicted the law on arrest record discrimination governed, was erroneous. It is reasonable for an employer to rely on information provided by the employee concerning the employee's own conviction record. Employers Ins. of Wausau v. LIRC (Marathon Co. Cir. Ct., 02/10/88), aff'd, (Ct. App., Dist. III, unpublished opinion, 10/11/88).

122.2 The "substantial relationship" defense

122.21 Generally

The substantial relationship test is applied to a domestic violence conviction the same way it is applied to any other conviction. In applying the substantial relationship test, a court must look beyond any immaterial identity between the circumstances – such as the domestic context of the offense or an intimate relationship with the victim – and instead examine the circumstances material to fostering criminal activity. In applying this framework, the first question is whether there are opportunities in a workplace that would allow a domestic violence perpetrator to recidivate, such as isolation of victims. The second question is the character traits revealed by the elements of a crime of domestic violence. In addition to character traits, a court will consider other relevant and readily ascertainable circumstances of the offense, such as the seriousness and number of offenses, how recent the conviction is, and whether there is a pattern of behavior. Applying this framework, the circumstances of the Complainant's domestic violence conviction substantially related to the circumstances of his job with Respondent. The nature of the challenges and demands of the employment position could cause the Complainant to react, consistent with past behavior, in a violent manner in order to exert his own power or control. In addition, the absence of regular supervision creates opportunities for violent encounters. Furthermore, the seriousness of the convictions, the recentness of the convictions, and the emerging pattern of the domestic violence all weigh in favor of finding a substantial relationship. Cree v. LIRC*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837.*

The test set out in County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987) does not require the employer to factor in the personal characteristics of the employee or applicant for employment, including characteristics that indicate personal rehabilitation from past offenses, in order to reach a conclusion about the relationship between the conviction record and the job.* Billings v. Right Step, Inc. *(LIRC, 06/10/20).*

The substantial relationship defense may not be based upon an offense that has been expunged from the Complainant's record. Expungement allows offenders to wipe the slate clean, and an expunged offense may not be used as a reason to deny the Complainant future employment opportunities. Staten v. Holton Manor *(LIRC. 01/30/18).*

A substantial relationship existed between a child abuse conviction and a cylinder driver position where the latter involved residential deliveries and deliveries to events where children were present. Specifically, the traits of the offenses (including a willingness to create a situation of unreasonable harm to a child) and the circumstances of the job (including unannounced and unscheduled deliveries to residences and gatherings where children were present) would provide the Complainant an opportunity to re-offend. Bechard v. Ferrellgas, Inc. (LIRC, 07/29/16).

In determining whether an employer could lawfully suspend an employee based upon her arrest record, events occurring after the suspension were not relevant to the question of whether a substantial relationship existed between the circumstances of the charge and the circumstances of the job. Just as prior satisfactory job performance is not germane to the inquiry that must be conducted in applying the substantial relationship test, neither are incidents occurring in the future. Nathan v. Wal-Mart (LIRC, 10/20/15).

As a general rule, the circumstances of an offense are gleaned from a review of the elements of the crime, and an inquiry into the factual details of the specific offense is not required. However, this does not mean that it is never appropriate to look at the factual circumstances of the crime if doing so will help elucidate whether the crime is related to the job. For example, the decision-maker may take into account the fact

that the criminal conduct at issue occurred in the context of a personal relationship or in a domestic setting, rendering it less likely to be repeated at the workplace. In this case, the Complainant was convicted of third-degree sexual assault, use of a dangerous weapon, first-degree recklessly endangering safety, and false imprisonment. The convictions were based upon a single incident with another individual with whom the Complainant had a personal relationship. The context of the Complainant's crimes was distinct from the context of his work environment. Moreover, the Complainant's job did not provide him with a significant opportunity to re-offend. Knight v. Walmart Stores East (LIRC, 10/11/12).

The question in a conviction record case is whether the circumstances of the crime and the circumstances of the job are substantially related. The question is not whether the Complainant had a significant opportunity to engage in a crime which was identical to that for which he was previously convicted. In this case, the circumstances of the Complainant's three prior convictions for retail theft demonstrated an inclination to steal. These circumstances were substantially related to the circumstances of an associate systems analyst position. Lahey v. Kohler Co. (LIRC, 10/28/11).

The only exception to the injunction against discriminating against an individual with an arrest record is that an employer may not discriminate because of arrest record by refusing to employ or by suspending from employment 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. Where a Complainant was discharged based upon his arrest record, the substantial relationship defense is unavailable. It is unlawful to discharge an employee based upon an arrest record, whether or not the circumstances of the charge are substantially related to the circumstances of the job. Kammers v. Kraft Foods (LIRC, 08/11/11).

As a general rule, the circumstances of the offense for which the Complainant was convicted are to be determined based upon a review of the elements of the crime. A detailed inquiry into the facts of the offense is not required. There may be times when the fostering circumstances of the crime require some factual exposition (e.g., in a disorderly conduct case where the type of offensive circumstances are not explicit). However, the fostering circumstances of a conviction such as public assistance fraud are fairly clear. The elements of that crime are set forth in the statute. Featherston v. Roehl Transp. (LIRC, 07/23/10).

The Complainant had a conviction record consisting of eight driving citations for speeding accrued over a four-year period. The Complainant spent much of his time on the road, logging at least 36,000 miles a year in company-owned vehicles, and the Respondent had an interest in employing safe drivers. The relationship of the offense to the job was clear. The Complainant argued that other people with poor driving records were not discharged. However, if the Complainant's conviction record was substantially related to the job then it was not discrimination to discharge him based upon that record, regardless of how other employees were treated. Lefever v. Pioneer Hi Bred Int'l (LIRC, 05/14/10).

An employer is not required to accommodate an employee's conviction record by placing him in an assignment which would not be substantially related to the circumstances of his conviction. The fact that it may have done so for others does not mean that it discriminated against the Complainant by refusing to do so for him. Lefever v. Pioneer Hi Bred Int'l (LIRC, 05/14/10).

In County of Milwaukee v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), the Court stated that the purpose of the "substantially related" test is to assess whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. The Court noted that it is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. The Court indicated that its definition of the proper "circumstances" inquiry may be employed in

situations arising under either the exception to the prohibition against conviction record or the prohibition against arrest record discrimination. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom. Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

The appropriate method for evaluating the substantially related question is to look first and foremost at the statutory elements of the offense involved. The rationale for this approach is that frequently the only person at the discrimination case hearing with any personal knowledge of the underlying factual circumstances of the offense is the person who was charged with or convicted of the offense. Frequently that person describes a version of the underlying factual circumstances that is self-exculpatory and inconsistent with the charge or the fact that the person was convicted. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom. Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

The Respondent placed the Complainant's job application on hold and did not continue the hiring process until the court made a determination on his pending arrest charges. This would have been a violation of the Wisconsin Fair Employment Act, except that the Complainant's arrest record in this case was substantially related to the position in question. Even assuming that the Respondent had hired the Complainant but had effectively suspended him from employment based on his arrest record, there would be no violation of the Act because the Complainant's arrest record is substantially related to the job in question. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom. Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

The amount of time which has elapsed since the Complainant's conviction is not relevant. The relevant concern is whether the circumstances of the conviction are substantially related to the circumstances of the particular job. Jackson v. Klemm Tank Lines (LIRC, 02/19/10). [Ed. Note: LIRC expressly stated that it no longer chooses to be guided by this decision in Johnson v. Rohr Kenosha Motors, Inc. (LIRC, 04/29/20), aff'd sub nom. Rohr Kenosha Motors, Inc. v. LIRC and Johnson (Kenosha Co. Cir. Ct., 02/04/21).]

The test in Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), is not whether it is "likely" that the convicted person will re-offend, but whether there is an "unreasonable risk" of this occurring. That determination is not limited exclusively to concerns that the individual will commit another similar crime on the physical premises of the employer. The Court's description of the relevant concern describes risks presented to "individuals" generally, and to "the community at large." The impact of a further offense on the individuals victimized, and on the community at large, will be equally severe regardless of when or where any further crime takes place. This reading of the Court's decision is supported by that decision's description of the purpose of the "substantial relationship" test. The Court stated that, "[a]ssessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test." In other words, the test is not limited to asking simply whether certain criminal behaviors will or will not recur in a workplace in which someone may find employment. Rather, it asks whether having that individual in that workplace will likely result in reappearance of the *tendencies and inclinations to behave in a certain way*. The cause for concern is that *if* such tendencies and inclinations do arise, another crime may be committed. It is that possibility that another crime may be committed, rather than the matter of exactly where and when it may be committed, that is significant. In analyzing whether the circumstances of a job would place a Complainant in a position where he could re-offend, a certain degree of speculation is involved. It is the very *nature* of the substantial relationship test that it involves speculation. Any assessment of risk necessarily does so. Matousek v. Sears Roebuck & Co., decision on remand from Milwaukee Co. Circuit Court (LIRC, 02/28/07).

The Complainant's argument that the substantial relationship defense had not been established because none of the crimes for which he was convicted occurred in an employment setting was rejected. The

substantial relationship test does not require any identity between the context in which the offenses were committed and the context in which the job duties are carried out. Weston v. ADM Milling (LIRC, 01/18/06).

The Complainant's argument that there was not a substantial relationship between the crimes for which he had been convicted and his job because he had successfully performed the duties of the job without incident for a period of months was rejected. Prior satisfactory job performance is not germane to the inquiry that must be conducted in applying the substantial relationship test. Weston v. ADM Milling (LIRC, 01/18/06).

The Complainant anticipated that the Respondent would raise the defense that his conviction was substantially related to the circumstances of the job. The Complainant was not prejudiced by the Respondent's failure to raise that defense in an answer. Ward v. Home Depot (LIRC, 10/21/05).

In evaluating whether there is a substantial relationship between a conviction and a particular job, it is useful to consider the question of what job would be suitable for the Complainant given his criminal record, if not the job at hand. The substantial relationship provision of the statute seeks to strike a balance between society's interest in rehabilitating those who have been convicted of a crime and its interest in protecting citizens. The rehabilitative purpose of the statute is not furthered by a finding which suggests that a person with a conviction record can be excluded from future employment based upon the barest of possibilities that he could re-offend, when there is no reason to believe that the job in question presented any particular or significant opportunity to do so. Robertson v. Family Dollar Stores (LIRC, 10/14/05)

The question is whether the circumstances of the employment provide a greater than usual opportunity for criminal behavior or a particular and significant opportunity for such criminal behavior. It is inappropriate to deny a Complainant employment opportunities based upon mere speculation that he might be capable of committing a crime in the workplace, absent any reason to believe that the job provides him with a substantial opportunity to engage in criminal conduct. The mere possibility that a person could re-offend at a particular job does not create a substantial relationship. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

The Respondent contended that the Complainant's convictions were substantially related to the position of stocker at one of its retail stores. The Respondent had the burden of establishing that such a substantial relationship existed. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

It was proper for an Administrative Law Judge to exclude the testimony of the Complainant's treating psychologist as to the Complainant's individual character traits and his likelihood of re-offending. It is not the individual's unique character traits which are relevant to determining whether the substantial relationship test is satisfied, but instead the character traits necessarily exhibited by an individual who commits a particular offense, as gleaned from an examination of the elements of the offense. Moreover, the likelihood that an employee will re-offend is generally immaterial to this analysis. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

The substantial relationship test is an objective one, and evidence regarding post-conviction actions is irrelevant to its application. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

An Administrative Law Judge properly excluded a circuit court judge's order as to the conditions of the Complainant's probation. According to the Complainant's unrebutted testimony, this order permitted the Complainant to continue in his delivery driver position for the Respondent following his convictions for sexual assault of a child, causing mental harm to a child and misdemeanor to a child and misdemeanor

with a child sixteen or older. However, the circuit court judge was not interpreting the Wisconsin Fair Employment Act when he issued his probation order. The legal issue of whether a substantial relationship exists between the convictions and the circumstances of the job is to be determined by the Equal Rights Division. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

The substantial relationship affirmative defense as it relates to allegations of arrest record discrimination is only available to employers when a charge is pending at the time the subject action was taken. Rowser v. Upper Lakes Foods (LIRC, 10/29/04).

The appropriate method for evaluating the "substantially related" question is to look first and foremost at the elements of the statutory offense involved to determine the character traits revealed by violation of that criminal statute. Zeiler v. DOC (LIRC, 09/16/04).

It is immaterial whether the Respondent failed to carefully consider whether the Complainant's conviction was substantially related to the job. The substantial relationship defense does not require the employer to demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job. To the contrary, the substantial relationship test is an objective legal test which is meant to be applied after the fact by a reviewing tribunal. Zeiler v. DOC (LIRC, 09/16/04).

The "substantially related" defense to a claim of conviction record discrimination constitutes an affirmative defense. The failure to raise the statute of limitations defense in a timely manner does not constitute a waiver of that defense if the failure to raise it was not unfair or prejudicial to the Complainant. In this case, the Complainant was well aware of the defense and he was not prejudiced by the Respondent's failure to raise the defense in its answer. Jackson v. Summit Logistic Serv. (LIRC, 10/30/03).

The elements or contexts of the criminal offense and the job need not be identical, and a common sense approach is to be taken when determining whether the substantial relationship test has been satisfied. Vanderkin v. Community Bio Resources (LIRC, 09/30/03).

Although the quality of the Complainant's work performance may be relevant to his ability to perform the job, the proper inquiry with respect to the substantial relationship test relates not to the Complainant's ability to carry out the job, but instead to the nature of the assigned duties and responsibilities of the job, the setting in which they are to be carried out, and the opportunity that these duties and responsibilities provide for the Complainant to engage in criminal activities similar to those in which he engaged in carrying out the subject offense. Vanderkin v. Community Bio Resources (LIRC, 09/30/03).

The "substantial relation" test is an objective, legal test, not a test of the employer's motives. It is an affirmative defense. If it is demonstrated at hearing to have been applicable to a challenged decision as a matter of law, it operates as a bar to any finding of liability whether or not, at the time of the challenged decision, the employer had a conscious intention or belief that it was acting because of a "substantial relationship" between the offenses and the job. Wilson v. New Horizon Ctr. (LIRC, 09/11/03).

The length of time that has elapsed since an offense is not relevant to deciding whether a conviction is substantially related to the job. Villereal v. S.C. Johnson & Son (LIRC, 12/30/02).

The substantial relationship defense does not require the employer to demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job. To the contrary, the substantial relationship test is an objective legal test which is meant to be applied after-the-fact by a reviewing tribunal. Thus, the relevant question is not

whether the Respondent made an independent determination that the Complainant had engaged in conduct prohibited under its rules and policies, but whether there was an objective basis for the Administrative Law Judge to conclude that the circumstances of the offenses with which the Complainant was charged were related to the circumstances of his job. Schroeder v. Cottage Grove Coop. (LIRC, 06/27/01), aff'd sub nom. Schroeder v. LIRC (Dane Co. Cir. Ct., 01/31/02).

The length of time that has elapsed since an offense is not relevant to deciding whether a conviction is "substantially related" to the job. Borum v. Allstate Ins. Co. (LIRC, 10/19/01). *[Ed. Note: LIRC expressly stated that it no longer chooses to be guided by this decision in Johnson v. Rohr Kenosha Motors, Inc. (LIRC, 04/29/20), aff'd sub nom. Rohr Kenosha Motors, Inc. v. LIRC and Johnson (Kenosha Co. Cir. Ct. 02/04/21).]*

A conviction for conduct which an employee has engaged in on the job is *per se* "substantially related" to that job. In such cases, the person's own conduct evidences the fact that the job is apparently a circumstance predisposing him to commit the type of offense for which he was convicted. Murray v. Waukesha Mem'l Hosp. (LIRC, 05/11/01).

In determining the substantial relatedness of the offense and the Complainant's job duties, the Department need not consider the factual circumstances of the offense as asserted by the convicted person, since that would place the Department in the position of re-evaluating the question of criminal liability, which has already been resolved by the conviction. Young v. Wal-mart Distrib. Ctr. (LIRC, 10/27/00).

The appropriate method for evaluating the "substantially related" question is to look first and foremost at the statutory elements of the offense involved. The Department need not consider the factual circumstances of the offense as asserted by the convicted person. This would place the Department in the position of reevaluating the question of criminal liability, which has already been resolved by a conviction. The Department must be able to rely on the fact of conviction as establishing, beyond dispute, that the convicted person engaged in the elements of the crime and that there were no mitigating factors or circumstances which would have made a lesser charge (or no charge) more appropriate under the circumstances. Lillge v. Schneider Nat'l (LIRC, 06/10/98).

A general policy precluding consideration of all applicants with criminal records, without regard to the nature of the conviction or its relation to the job, is clearly contrary to the spirit of the Wisconsin Fair Employment Act's prohibition of discrimination because of arrest or conviction record. However, in a particular case, if the circumstances of the individual's conviction are substantially related to the circumstances of the job, there will be no basis for finding a violation of the law because the substantial relationship test is an objective legal test applied after the fact by a reviewing tribunal, not a test of the subjective intent of the decision-maker at the time it made the decision. Lillge v. Schneider Nat'l (LIRC, 06/10/98).

A licensing agency is not required to determine whether a Complainant's conviction on pending criminal charges is likely before basing a licensure decision on those pending charges. Rathbun v. City of Madison (LIRC, 12/19/96).

The Complainant's argument that because his criminal conviction was based solely upon circumstantial evidence there was no evidence to determine whether it was substantially related to the circumstances of his job was without merit. A criminal conviction may be based upon circumstantial evidence. In determining whether a conviction is substantially related to the circumstances of a particular job, the statute does not contemplate an inquiry into the evidence presented at the criminal trial. Rather, the question to consider is whether the circumstances of the offense for which the employee has been

convicted relate to the particular circumstances of the job. Harris v. Berlin Chamber of Commerce (LIRC, 12/04/96).

Where a Complainant's arrest record is substantially related to his job, the employer does not violate the Wisconsin Fair Employment Act when it suspends the Complainant on the basis of such arrest record. Ponto v. Grand Geneva Resort & Spa (LIRC, 08/22/96).

A Complainant's ability to successfully perform the job is not relevant in ascertaining whether his convictions are substantially related to the position. Nelson v. The Prudential Ins. Co. (LIRC, 05/17/96).

There is nothing in the statutory language of the conviction record provision which indicates that the length of time between a conviction record and the alleged discrimination is a relevant consideration. Nelson v. The Prudential Ins. Co. (LIRC, 05/17/96). [Ed. Note: LIRC expressly stated that it no longer chooses to be guided by this decision in Johnson v. Rohr Kenosha Motors, Inc. (LIRC, 04/29/20), aff'd sub nom. Rohr Kenosha Motors, Inc. v. LIRC and Johnson (Kenosha Co. Cir. Ct., 02/04/21).]

While a Complainant's post-conviction employment record may be a mitigating factor which an employer is entitled to consider in evaluating his suitability for the job, the law contains no affirmative requirement that an employer undergo such an assessment. It is the circumstances of the conviction and the circumstances of the position that are to be considered. Ford v. Villa Maria Home Health Nursing Servs. (LIRC, 11/17/95).

Where an employer has discharged an employee not because of an arrest, but because the employee admitted engaging in unacceptable conduct, it is unnecessary to determine whether the Complainant's actions were substantially related to her employment. Lamb v. Happy Chef of Sparta (LIRC, 09/29/95).

The substantial relationship defense does not require that the employer show that it had concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the particular job. The failure of an employer to make its own inquiry into the existence of a substantial relationship is not relevant to the applicability of sec. 111.335(1)(c)1, Stats. Moore v. Overnite Transp. Co. (LIRC, 10/13/94).

An employer is not prohibited from considering the length of time that an applicant has remained crime free following his most recent conviction. The time elapsed since a person's conviction can be a significant factor in balancing the overall goal of preventing discrimination on the basis of conviction record against the goal of protecting the employer against unreasonable risks. Thomas v. DHSS (Wis. Pers. Comm'n, 04/30/93).

The Complainant's conviction for an offense estops her from subsequently trying to call into question her culpability in any of the material elements of the offense. Thayer v. Home Health United (LIRC, 04/08/93), aff'd, Dane Co. Cir. Ct., 04/19/94.

While post-conviction behavior may be relevant to one's ability to perform the job, post-conviction events are not relevant under sec. 111.335(1)(c)(1), Stats., in determining whether the substantial relationship test has been met. The circumstances of the conviction and the circumstances of the position are to be considered. Further, the law does not require the employer to prove that there is an unreasonable risk of the applicant repeating his criminal behavior. Collins v. LIRC (Ct. App., Dist. I, unpublished opinion, 12/15/92).

Whether the circumstances of a criminal offense are substantially related to a particular job requires assessing whether the tendencies and inclinations to behave in a certain way in a particular context are

likely to reappear later in a related context, based on the traits revealed. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. Goerl v. Appleton Papers (LIRC, 10/05/92).

The substantial relationship test is an objective legal test applied after the fact by a reviewing tribunal. It is not a test of the subjective intent of the decision maker. Santos v. Whitehead Specialties (LIRC, 02/26/92).

Although the record in the hearing was devoid of any evidence as to the definition of the crime of burglary, the Administrative Law Judge may take official notice of the state statute which defines the crime of burglary when determining if the crime of burglary is substantially related to a particular job. Santos v. Whitehead Specialties (LIRC, 02/26/92).

Application of the "substantially related" exception does not require a detailed inquiry into the facts of the offense and the job. In this case, the Complainant's job as an assistant manager responsible for handling cash and depositing funds was substantially related to his conviction for grand theft. The Complainant's conviction indicates a propensity toward being untrustworthy when he has access to someone else's money. These traits are inconsistent with the reasonable expectation of responsibility and trustworthiness associated with managing a retail establishment. Neither the particular details of the behavior underlying the conviction nor the distinctions between the Complainant's employment as a "consultant" in the job leading to his conviction and his current job as an assistant manager, alter this conclusion. Jorgensen v. HMI, Ltd. (LIRC 10/25/91).

An employer may rely on the "substantially related" exception in defense of a complaint of conviction record discrimination regardless of whether the employer considered that exception at the time when the employer denied employment to the Complainant because of a previous felony conviction. The "substantially related" exception is not a test by which one measures the subjective intent of the employer at the time it makes the challenged decision. It is, rather, a test by which the legal correctness of the employer's decision is measured by the reviewing tribunal. Jorgensen v. HMI, Ltd. (LIRC 10/25/91).

The "substantially related" test is intended to be a legal test, applied after the fact by the reviewing tribunal, not a test of the subjective intent of the decision maker. The employer need not show that it had concluded at the time of the employment decision that the circumstances of the offense substantially related to the circumstances of the particular job. The failure of a Respondent to make its own inquiry into the existence of a "substantial relationship" is not relevant to the applicability of sec. 111.335(1)(c)(1), Stats. Collins v. Milwaukee County Civil Serv. Comm'n (LIRC, 03/08/91), aff'd sub nom. Collins v. LIRC (Ct. App., Dist. I, unpublished opinion, 12/15/92).

The "substantial relationship" test is an objective, legal test, not a test of the employer's motives. It is an affirmative defense and if it is demonstrated at hearing to have been applicable as a matter of law to a challenged decision, it operates as a bar to any finding of liability whether or not, at the time of the challenged decision, the employer had conscious intention or belief that it was acting because of "substantial relationship" between certain offenses and the job. Black v. Warner Cable Communications Co. of Milwaukee (LIRC, 07/10/89).

The "substantial relationship" test in arrest and conviction discrimination cases does not require that the context of the offense and the job duties be identical. Benna v. Wausau Ins. (LIRC, 07/10/89).

An employer is not always required to consider those facts which would be found in a criminal information when considering whether to hire a person with a conviction record. Perry v. UW-Madison (Wis. Pers. Comm'n, 05/18/89).

The burden of showing a substantial relationship between the circumstances of a conviction and the circumstances of a particular job rests with the Respondent. Perry v. UW-Madison (Wis. Pers. Comm'n, 05/18/89).

In determining whether the substantially related standard is met, society's interest in rehabilitating a criminal must be balanced against its interest in protecting its citizens from an unreasonable risk that the convicted person will commit a similar offense if placed in an employment situation offering temptations or opportunities for criminal activity similar to that for which he was convicted. Halverson v. LIRC (Ct. App., District III, unpublished opinion, 08/09/88).

It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. McClellan v. Barnes Int'l Sec. (LIRC, 03/31/88).

Actions taken by an employer which might normally constitute discrimination are, by definition, deemed not to be "unlawful" if it can be shown that the circumstances of the offense substantially relate to the circumstances of the particular job. By enacting this statutory exception, the legislature sought to balance society's interest in rehabilitating one who has been convicted of crime and, on the other hand, society's interest in protecting its citizens. This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have a "propensity" to commit similar crimes long recognized by courts, legislatures and social experience. In balancing the competing interests, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances of the offense and the particular job are substantially related. This test does not, in all cases, require a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. The "circumstances" inquiry required under the statute refers to the circumstances which foster criminal activity e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

The full assessment of what may be termed the "fostering" circumstances of a conviction may, at times, require some factual exposition. Such factual inquiry would have as its purpose ascertaining the relevant, general, character-related circumstances of the offense or the job. Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

An "essential concomitant" in an armed robbery case is the propensity of the robber to use force or the threat of force to accomplish one's purposes, along with thievery. This is the type of "circumstances" the court highlighted in Gibson v. Transp. Comm'n, 106 Wis. 2d 22, 315 N.W.2d 346 (1982), when it employed the so-called "elements only" test. The "elements only" test is not a test distinct from the statutory test. Rather, focusing on the elements helps to elucidate the circumstances of the offense. Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

Whether an individual can perform a job up to the employer's standards is not the relevant question. This does not constitute a proper inquiry into the "circumstances" of the conviction and the job in question. Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

Where an employee is arrested for conduct engaged in while on duty for his employer, the circumstances of the arrest are automatically related to job performance, and it is not discrimination for the employer to suspend the employee. Kozlowicz v. Augie's Pizzaria (LIRC, 12/07/83).

An applicant for a school social worker position was discriminated against because his non-hire was based on a conviction for manslaughter where the employer did not explore the extenuating circumstances which the applicant stated were involved in the conviction. Johnson v. Milwaukee Pub. Sch. (LIRC, 06/28/83).

In a case of armed robbery, the Act requires only that a licensing agency determine the elements of the criminal offense for which the applicant was convicted because that offense by itself constitutes circumstances substantially relating to the duties of school bus driver. An inquiry into the specific factual circumstances of a crime may sometimes be relevant to a licensing (or employment) decision. Gibson v. Transp. Comm'n, 106 Wis. 2d 22, 315 N.W.2d 346 (1982).

122.22 Circumstances not substantially related

The commission has focused on two variables affecting whether an individual's past criminal conduct would be likely to reappear in the workplace -- the propensity to exhibit that conduct in the work environment, and the opportunity to do so. As to opportunity, the commission has required that the circumstances of the employment offer more than the possibility that an individual could repeat criminal conduct. Here, the Complainant's opportunity to engage in sexual assault was not particular or significant. There was insufficient evidence that the Complainant would have opportunities to encounter female employees on the premises in situations where a sexual assault would go undetected. As to propensity, the commission has recognized that some factual exposition regarding certain sexual assault offenses is helpful to ascertaining substantial relationship. Sexual assault in a domestic setting or within a personal relationship, as existed here, would tend to create a weaker propensity to repeat that conduct in the workplace, compared to a sexual assault committed outside that context. Finally, the commission finds that in this case, the age of the Complainant's commission of his crime, approximately 16 years prior to his employment, without any re-offense, is relevant to substantial relationship. The commission no longer interprets County of Milwaukee v. LIRC, *139 Wis. 2d 805, 407 N.W.2d 908 (1987), or* Law Enforcement Standards Board v. Village of Lyndon Station, *101 Wis. 2d 472, 305 N.W. 2d 89 (1981), to prohibit consideration of the amount of time that has elapsed since the last crime was committed as a factor that may bear a reasonable relationship to the individual's propensity to commit a similar crime in the workplace. It is a factor that may be relevant in a particular case. To the extent that past commission decisions are inconsistent with this (e.g., Nelson v. The Prudential Ins. Co. (LIRC, 05/17/96); Borum v. Allstate Ins. Co. (LIRC, 10/19/01); Villarreal v. S.C. Johnson & Son, Inc. (LIRC, 12/30/02); and Jackson v. Klemm Tank Lines (LIRC, 02/19/2010), the commission intends not to follow them. Johnson v. Rohr Kenosha Motors, Inc. (LIRC, 04/29/20), aff'd sub nom. Rohr Kenosha Motors, Inc. v. LIRC and Johnson (Kenosha Co. Cir. Ct., 02/04/21).*

The employee's conviction for second degree sexual assault of a minor was not substantially related to the job of employment training specialist at a job center where the employee did not work with minors and had no unsupervised contact with minors. The employer argued that the employee could engage in "grooming" of vulnerable young adults; however, while such conduct might be inappropriate or unethical, it would not be criminal. Smith v. State of Wis. Dep't of Workforce Dev. (LIRC, 01/04/19).

There was no substantial relationship found between the Complainant's job as a cashier at a large department store and a charge of misdemeanor battery. Nathan v. Wal-Mart (LIRC, 10/20/15).

The Complainant's conviction for "computer crimes" was not substantially related to the job as manager of a retail store. Although the Complainant was barred from any contact with minors as part of the terms

of his probation, that was not related to the computer crimes charge for which the Complainant was convicted and could not be considered in the substantial relationship analysis. Ionetz v. Dolgencorp, LLC (LIRC, 08/6/15), rev'd on other grounds sub nom. Ionetz and Dolgen Corp., LLC v. LIRC (Jefferson Co. Cir. Ct., 08/25/16), aff'd (Ct. App. Dist. IV, 07/14/17, summary decision).

No substantial relationship was established between a conviction record for disorderly conduct, public urination, and DUI, and the job of Executive Director of the Housing Authority. Wiechert v. City of Shawano Hous. Auth. (LIRC, 07/22/15).

The Respondent's belief that the Complainant's arrest and conviction record taken as a whole reflected bad choices and showed a lack of judgment and maturity did not establish a substantial relationship between the offenses and the job. The law requires an analysis of whether and how a specific offense is related to the circumstances of the job, and it does not permit an employer to deny an individual an employment opportunity based upon generalized conclusions about his character gleaned from a broad reading of his arrest and conviction record. Wiechert v. City of Shawano Hous. Auth. (LIRC, 07/22/15).

Drug convictions are not substantially related to the job of cleanup worker/custodian in a UW athletic facility. There was no evidence presented to indicate that students in general, or student athletes in particular, are more vulnerable to drug use than the general population, nor is there any reason to believe that the job of cleaning up during or after events would provide the Complainant with a particular opportunity to supply these individuals with illegal drugs, even assuming such vulnerability was established. The mere fact that the Complainant would have occasional contact with students or other workers is not, standing alone, considered to be a circumstance that would foster criminal activity. Moran v. UW-Madison (LIRC, 09/16/13).

Battery conviction was not substantially related to the job of cleanup worker/custodian in a UW athletic facility. A battery conviction may be substantially related to a job which entails working in a position of trust with vulnerable people. However, the Complainant's job was primarily to clean bathrooms and floors. The mere presence of other human beings in the workplace is not enough to support a finding of a substantial relationship. Moran v. UW-Madison (LIRC, 09/16/13).

The Complainant's conviction for third-degree sexual assault, use of a dangerous weapon, first-degree recklessly endangering safety and false imprisonment were not substantially related to the job as a lift driver in the Respondent's warehouse. The Complainant was not subject to direct, over-the-shoulder supervision. However, there were job coaches and others who went through the warehouse at random times during the day observing the performance of workers. The Complainant was required to log each completed task into a computer system that made the Respondent aware of his actions. The warehouse and employee parking lot were monitored by cameras, which served as a deterrent to criminal activity. While the majority of the plant was not covered by cameras, the evidence established that the employees did not know where all the cameras were located or what portions of the warehouse they covered. It is hard to envision a circumstance where the Complainant might re-offend in the workplace. The Respondent's warehouse provided little or no opportunity for even the most committed sex offender to engage in criminal activity. Knight v. Walmart Stores East (LIRC, 10/11/12).

The Complainant was arrested but was never charged with a crime. Even if there had been pending charges against the Complainant based upon crimes involving child pornography or physical or sexual abuse of a child, the record would not establish a substantial relationship between those alleged crimes and the circumstances of the job of deputy director of operations/maintenance for an international airport. There was no evidence that the Complainant had any contact with the general public, let alone unaccompanied children. Kraemer v. County of Milwaukee (LIRC, 10/11/12), aff'd sub nom. Kraemer v. LIRC (Milwaukee Co. Cir. Ct., 08/13/13), aff'd (Ct. App. Dist. I, unpublished opinion, 05/20/14).

The Complainant's conviction of the offenses of first-degree sexual assault of a child and bail jumping were not substantially related to the position of assistant manager of a store. The Complainant's crime was one of opportunity, and there was nothing in the record to suggest that the sporadic or incidental presence of children in the workplace was a circumstance that would cause him to re-offend. Fink v. Sears Roebuck & Co. (LIRC, 03/01/07), aff'd sub nom. Fink v. LIRC (Sheboygan Co. Cir. Ct., 02/29/08).

The Respondent failed to establish that the Complainant's conviction for repeated sexual assault of a child was substantially related to a customer service position in the Respondent's store. The job primarily involved waiting on customers at a counter in the customer service area of a store which provided parts, repairs and service for appliances, power tools and other related items. The Respondent's argument that the Complainant would have had an opportunity for contact with children in the store rested upon unproven assumptions about such things as how large the store area was, where the service counter was in relation to a display area where a television was, whether there were clear lines of sight between those areas, and whether there would be other customer service employees on duty at the same time as the Complainant was waiting on customers, thus freeing the Complainant to move around the store. At most, the Complainant came into incidental contact with children at the store and had little opportunity to engage in the type of conduct for which he was convicted. Matousek v. Sears Roebuck & Co. (LIRC, 02/17/06); vacated and remanded for further proceedings sub nom. Sears Roebuck and Co. v. LIRC (Milwaukee Co. Cir. Ct., 09/29/06). (See sec. 122.23 for decision on remand).

The Complainant's conviction for second-degree recklessly endangering safety was not substantially related to the position of order puller at the Respondent's home improvement store. There was no evidence in the record as to the specific duties and responsibilities of an order puller; the type of equipment used; the proximity and frequency of contact with other employees or with customers; the level of supervision; the degree of independence; or other factors relevant to determining the circumstances of the subject position. Moreover, it is not necessary to conclude that the elements of the defense of second-degree recklessly endangering safety (i.e., reckless disregard for the physical safety of others) bears a substantial relationship to any and all positions working with customer orders in a retail home improvement establishment. For example, a position which does not utilize potentially dangerous equipment or materials and which has closely supervised contact with others would probably not satisfy the substantial relationship test here. Ward v. Home Depot (LIRC, 10/21/05).

The Complainant's conviction for possession with intent to deliver a controlled substance indicated a propensity to unlawfully possess and sell illegal drugs. This conviction was not substantially related to the position of stocker at a store. The evidence indicated that the Complainant was never alone in the workplace, and that the Respondent always had a security guard and a manager present. In addition, the Respondent's stores were monitored by security cameras, and the Respondent failed to explain how the Complainant would know how to engage in illegal acts outside the range of the cameras. This was not an environment which was particularly conducive to criminal activity. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

The Complainant was convicted of second-degree sexual assault. The statutory definition of second-degree sexual assault encompasses a wide range of offenses which could reflect a variety of character traits, depending in part upon which portion of the statute was violated. The record contained no evidence as to which subsection of the statute was violated, and nothing about the fostering circumstances of the crime, other than it occurred in the Complainant's home and involved his girlfriend. There was no evidence as to the severity of the assault, whether it involved the use or threat of force, or whether the Complainant's girlfriend was a minor or otherwise presumed incapable of consent. While there are some common character traits evidenced by having violated any of the enumerated statutory subsections (including, most obviously, a willingness to engage in a non-consensual sexual act), it cannot

be assumed based upon a mere reading of the statutory elements that the character traits revealed by having committed an act of second-degree sexual assault include an inclination to engage in sexual conduct by use of force or threat, or an inclination to prey upon individuals who are especially vulnerable, and it is difficult to arrive at any general conclusions as to the dangerousness of the individual who has committed such a crime. The mere fact of the Complainant's conviction for second-degree sexual assault did not warrant the Respondent's conclusion that he might lure a female customer or co-worker into a stockroom and assault her. Even assuming that the Complainant had such inclinations, the mere fact that there could conceivably be a scenario in which he could assault someone without being heard does not warrant a conclusion that the job presented a substantial opportunity to do so. The work environment, in which a manager and armed security guard were always present and where there were security cameras, offered no significant opportunity for criminal behavior. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

The Complainant's conviction for misdemeanor disorderly conduct/domestic abuse, was not substantially related to the duties and responsibilities of a driver hired to deliver food products to fast food restaurants. Although drivers have unsupervised access to the employer's assets and customers, the elements of the offense for which the Complainant was convicted do not include theft or destruction of property, or violence towards individuals with whom the Complainant has no personal relationship. Rowser v. Upper Lakes Foods (LIRC, 10/29/04).

The Complainant's non-criminal conviction for disorderly conduct (which resulted from a domestic violence case where she defended herself against the father of her child with a knife) was not substantially related to a position as a certified nursing assistant at a long-term care nursing home facility with clients who are elderly and defenseless, and who cannot care for themselves. McKnight v. Silver Spring Health & Rehab. (LIRC, 02/05/02).

The Complainant's conviction for injury by conduct regardless of life (which resulted from his throwing a pan of hot grease at his girlfriend and severely burning the girlfriend's 20-month old daughter, who was standing between them) was not substantially related to the Complainant's job as Boiler Attendant Trainee in a public school. The criminal traits displayed by the Complainant's conviction included a lack of concern for the safety and well-being of others, a disregard for human life, and extremely poor judgment. While it is conceivable that an individual with a tendency to act recklessly and without regard to the consequences of his actions could engage in harmful behavior in virtually any job, there was nothing about a janitorial position that poses a greater than usual opportunity for criminal behavior. Further, while sec. 48.65, Wis. Stats., prohibits persons convicted of injury by conduct regardless of life from being able to operate licensed daycare facilities in Wisconsin or from working in regular contact with children at a licensed daycare center, that statute does not bar such individuals from employment at elementary schools. Moore v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/23/99), aff'd in part sub nom. Milwaukee Bd. of Sch. Dir. v. LIRC (Ct. App., Dist. I, unpublished opinion, 06/12/01).

The Complainant's conviction for second degree sexual assault of a child was not substantially related to the position of machine operator. Thorson v. Rockwell Int'l (LIRC, 08/13/98).

The Complainant's conviction for possession of marijuana was not substantially related to her position as a stocker. That position provided little opportunity for the Complainant to distribute drugs or to use drugs at the workplace. If the Complainant is considered unsuitable for the stocker position based upon the potential to distribute drugs, then it would appear that she could be lawfully excluded from essentially every job which placed her in contact with other workers or with the public. Such a result would be inconsistent with the goals of the Wisconsin Fair Employment Act. Herdahl v. Wal-Mart Distrib. Ctr. (LIRC, 02/20/97), aff'd sub nom. Wal-Mart Stores v. LIRC (Ct. App., Dist. IV, unpublished opinion, 06/04/98).

The mere fact that an employee works somewhere in the vicinity of potentially dangerous equipment or machinery is insufficient to warrant a finding that a drug-related arrest or conviction record is substantially related to the circumstances of the job, absent other evidence establishing an actual safety risk. Herdahl v. Wal-Mart Distrib. Ctr. (LIRC, 02/20/97), aff'd sub nom. Wal-Mart Stores v. LIRC (Ct. App., Dist. IV, unpublished opinion, 06/04/98).

There was probable cause to believe that the Complainant was discriminated against on the basis of conviction record where there was evidence that his job as a resident caretaker/manager of the Respondent's housing units was not substantially related to the circumstances of his conviction for driving while intoxicated. The Respondent had not documented that a driver's license was a necessity for the job. The previous caretaker/manager did not possess a driver's license. Further, the Complainant's wife performed job duties for the Respondent, including driving the Complainant between job sites. Valla v. Augusta Hous. Co. (LIRC, 02/28/90).

122.23 Circumstances substantially related

Prior convictions for retail theft were substantially related to the job of inbound customer resolution specialist, which would give the Complainant access to social security numbers and banking information belonging to vulnerable clients. Although the Complainant had no past history of identity theft, the context of the offense and the particular job duties need not be identical. Rucker v. Milwaukee Ctr. for Independence (LIRC, 05/31/22).

A person's willingness to threaten and to inflict bodily harm and willingness to use force or threat of force to take others' property, make it less likely that that person would faithfully execute the authority to drill students at a military school, lead physical trainings of them, search them, and investigate their conduct for alleged security breaches. Billings v. Right Step, Inc. (LIRC, 06/10/20).

The Respondent proved a substantial relationship between drug convictions and the job of carpentry repair. The circumstances of the job involved solitary travel to work sites that were usually empty houses, and there was no contemporaneous tracking of the Complainant's location or time on the job. The performance of services was largely without supervision or customer oversight. These circumstances offered a particular opportunity for the Complainant to engage in conduct such as the sale of illegal drugs. Kelly v. Multi-Serve, Inc. (LIRC, 08/13/19).

A disorderly conduct conviction that was based upon the Complainant's actions in "losing it" and repeatedly striking her boyfriend out of anger while in a public place was substantially related to the job of caregiver for vulnerable elderly or disabled individuals. Staten v. Holton Manor (LIRC. 01/30/18).

The offense "sexual exploitation of a child" is substantially related to the job of clerk/cashier at a convenience store that is frequented by unaccompanied minors and where the Complainant would sometimes be the only employee working in the store. Kaufman v. Consumer's Coop. Ass'n (LIRC, 09/28/17).

There is no discrimination where the Respondent has offered the "Caregiver" law, sec. 48.685, as a defense to a conviction record discrimination claim, and where the parties stipulated that the Respondent believed the Complainant was a "caregiver" and believed that the law prohibited it from continuing to employ her. However, the mere assertion of such belief is not necessarily conclusive and depends on the facts of each case. Strayhorn v. Soc. Dev. Comm'n (LIRC, 11/21/13).

Convictions for possession of marijuana and drug paraphernalia were substantially related to the circumstances of the Complainant's job as an assistant debate coach. While the Complainant's

opportunity to re-offend in the circumstances of his job was limited, that is only one aspect of whether a substantial relationship exists. The question is whether the character traits and tendencies revealed by the crime are likely to reappear in the context of the job. The circumstances of the Complainant's job included the duty to supervise and monitor students to ensure a drug-free environment. The Complainant's drug convictions, showing the character trait of a propensity for illegal drug use, were fundamentally inconsistent with this duty. Manning v. Cedarburg High Sch. (LIRC, 10/31/13).

The character trait exhibited by someone convicted of misappropriation of identifying information and theft by false representation is a willingness to make a dishonest representation in order to obtain money or something of value. The critical fostering circumstances were that the Complainant at times was alone at the workplace and was expected to provide rental vehicles to customers during those times. Even though in most situations this did not involve the customer giving credit card information or other sensitive information to the Complainant, the Complainant had the leverage to request such information because he was in sole control of deciding whether to turn over a rental vehicle to a customer and might be inclined to falsely state that he needed to see a credit card or some other valuable information as a condition of turning over the vehicle. Therefore, a substantial relationship exists between the circumstances of the conviction and the circumstances of the job. Flick v. Ryder Rental & Leasing (LIRC, 10/03/13).

In applying the substantial relationship test in a case involving a theft conviction, it is not the specific type of item stolen that matters, but rather the character traits revealed by having committed a crime of theft. The relevant consideration is the fact that an individual has demonstrated untrustworthiness and a willingness to misappropriate an item belonging to someone else. Unsupervised access to private offices and lounges containing expensive equipment and personal items could pose a significant opportunity for criminal behavior for someone already inclined to theft. Moran v. UW-Madison (LIRC, 09/16/13).

There is a substantial relationship between the job of truck driver and the Complainant's convictions, which include home invasion, armed robbery, and residential burglary. The Complainant's conviction record is substantially related to the job of hauling freight for the Respondent, a trucking company, either as an over-the-road driver or as a "house haul" driver. Jackson v. W.H. Transp. (LIRC, 11/30/12).

The Complainant's conviction for felony child abuse was substantially related to her job as an associate professor of teacher education, a position in which she instructed college students in the best methods for teaching reading to elementary and middle school students, as well as supervising the students in elementary/middle school settings with children under 12 years of age. Character traits associated with the Complainant's conviction included an inability to control anger, frustration, or other emotions towards children; disregard and failure to accept responsibility for the health and safety of children; poor self-control; lack of judgment; lack of trustworthiness with children; and the use of violence to achieve control over children or to resolve conflicts with them. Although the Complainant's crime took place in a domestic setting, that does not mean that the character traits associated with that crime disappear outside of the domestic context. Another factor is that a college professor may serve as a role model for her students. In this case, the Complainant placed herself in the position of teaching her students to "do as I say, not as I do," which is an inappropriate message from a college professor as it relates to conduct towards children her students are learning to teach. Hoewisch v. St. Norbert Coll. (LIRC, 08/14/12).

The Complainant's convictions for retail theft were substantially related to the circumstances of the position as an associate systems analyst for the Respondent. Although associate systems analysts are subject to a high degree of supervision, they are not constantly monitored, and they have opportunities to access confidential information without the employer's knowledge. The Respondent has security measures in place. Some of those measures are designed to make it more difficult for an employee to engage in fraud; however, others appear to be aimed at only detecting fraud after the fact. The focus of

the statute is not whether an individual with a criminal record would be easily caught if he were to re-offend in the course of the job, but whether he would be likely to re-offend in the first place. Here, the Complainant would have had access to all of the software applications used by the Respondent. He would also have had the ability to print out customer credit card numbers undetected. Such credit card numbers in the hands of one inclined towards theft could pose a significant opportunity for criminal behavior. Lahey v. Kohler Co. (LIRC, 10/28/11).

The Complainant's convictions for possession of an illegal substance with intent to deliver and sell that substance, as well as two convictions for driving while intoxicated, were substantially related to the position of a relationship manager for the Respondent, which was in the business of providing credit card processing services and payroll processing services to small and medium-sized businesses throughout the United States. The relationship manager position required the employee to work out of his home, to use his personal vehicle, and to develop sales leads to find business clients who would buy the Respondent's services. This job involved an unusual lack of supervision, an enormous amount of freedom and discretion in scheduling and traveling, and access to business locations with the potential for encountering many members of the public. This job would provide a greater than usual opportunity for criminal behavior, and therefore, a substantial relationship exists between these circumstances and the Complainant's drug conviction. Further, the large amount of unsupervised and unstructured time spent driving from business to business would provide a greater than usual opportunity and temptation for a relationship manager to drink alcohol, to become intoxicated, and to drive while intoxicated (something for which the Complainant has demonstrated an inclination, having been convicted of driving while intoxicated on two separate occasions). Thus, there is also a substantial relationship between the circumstances of the relationship manager position and the Complainant's two convictions for driving while intoxicated. Mamayek v. Heartland Payment Sys. (LIRC, 08/22/11).

The Complainant's conviction for public assistance fraud was substantially related to a job which entailed checking the previous employment and criminal backgrounds of applicants for driver positions for the Respondent. The elements of public assistance fraud are set forth in sec. 49.95, Stats. The circumstances of the criminal offense of public assistance fraud are, basically, dishonesty and a willingness to engage in fraud for financial gain. In this case, the Respondent was concerned about identity theft. The Complainant would have access to Social Security numbers, birth dates, driver's license numbers and other personal identification information in circumstances that could facilitate criminal activity by someone predisposed to engage in fraud for economic gain. Featherston v. Roehl Transp. (LIRC, 07/23/10).

A conviction for fraud or theft is substantially related to virtually any job which provides the employee an opportunity for new acts of fraud or theft. Although the Complainant's job in this case did not entail handling money, he did have access to identity information, and this is equivalent to money in the hands of individuals who are inclined to engage in fraudulent activity. Featherston v. Roehl Transp. (LIRC, 07/23/10).

The Complainant was discharged based upon his conviction record for multiple instances of speeding, some of which occurred while on the job. The circumstances of the Complainant's conviction record were substantially related to the circumstances of a job requiring a great deal of driving. Lefever v. Pioneer Hi Bred Int'l (LIRC, 05/14/10).

The circumstances of the Complainant's pending charges were substantially related to the job of an Eligibility Specialist. The Complainant had pending charges for disorderly conduct, battery to law enforcement officers, and resisting or obstructing arrest at the time he applied to work for the Respondent. The character traits revealed by these charges included a tendency to become engaged in conflict with others, to become violent, to exhibit poor self-control, lack of judgment, and a refusal to

follow orders. The qualifications for the Eligibility Specialist position for which the Complainant had applied included the ability to handle stress and conflict, the ability to implement decisions that one might disagree with, and the ability to follow directions. Johnson v. Kelly Servs. (LIRC, 04/21/09), aff'd sub nom. Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

The Respondent did not consider the Complainant for employment because it found him to be very belligerent, rude and threatening during a telephone call, because he did not meet the Respondent's required minimum 250,000 driving mile requirement, because he had no significant tanker experience, and because of a concern about the Complainant's "job hopping" history. Further, there was a substantial relationship between the Complainant's conviction record and the circumstances of the tanker driver job. The Complainant had been convicted of armed robbery, aggravated battery, home invasion, residential burglary, unlawful restraint, and armed violence. The Respondent has to deal with concerns regarding driver theft of petroleum (which is difficult to track) and a driver having access to customer sites 24 hours per day, often making deliveries when there is only one gas station attendant present at the location. Jackson v. Klemm Tank Lines (LIRC, 02/19/10), aff'd sub nom. Jackson v. LIRC (Rock Co. Cir. Ct., 07/23/10).

The Complainant's conviction record included armed robbery, aggravated battery, home invasion, residential burglary, unlawful restraint and armed violence. The Complainant's convictions were substantially related to the job of a tanker truck driver for the Respondent. Jackson v. Klemm Tank Lines (LIRC, 02/19/10), aff'd sub nom. Jackson v. LIRC (Rock Co. Cir. Ct., 07/23/10).

The Complainant's conviction on one count of repeated sexual assault of a child in violation of sec. 948.025(1), Wis. Stats., was substantially related to the direct customer service position in a retail establishment patronized by members of the general public. The particular circumstances of this job presented too great a risk that the Complainant's tendencies and inclinations to behave in a certain way would be likely to reappear if he were employed in those circumstances. The evidence regarding the physical layout of the store indicated that there were a number of locations in the store where a child, and an adult bending over or kneeling down beside them, would be out of the line of sight of others in the store. It would be entirely possible that the Complainant would expose himself to a child or have improper physical contact with a child in such a shielded location. Similarly, the Complainant could engage in such contact out of the sight of others if he was able to induce a child to go with him through the doors to the warehouse space adjacent to the sales floor. This could occur in a very brief period of time. The law does not require that it is "likely" that a convicted person will re-offend, but rather that there is an "unreasonable risk" of this occurring. Matousek v. Sears Roebuck & Co., Decision on remand from Milwaukee Co. Circuit Court (LIRC, 02/28/07).

Concern over the risk of recidivism by child sexual offenders has expressed itself in legislative action and in the jurisprudence of the Wisconsin courts. The Supreme Court has upheld the constitutionality of the "two-strikes" law pertaining to serious sexual offenders. Legislative concern regarding recidivism and the need to protect the community from sexual offenders is also embodied in the creation of the Sex Offender Registry and the enactment of ch. 980, Stats. The courts also grant "greater latitude" for proof regarding similar acts in cases involving sexual assault, particularly those involving children. All of these considerations should serve to alert the Labor and Industry Review Commission and the Equal Rights Division to the degree of concern and attention appropriate when considering the risk of recidivism by child sexual offenders. There is no indication in Wisconsin law reflecting an inclination to elevate society's interest in the rehabilitation of offenders above that of protecting children. LIRC's decision in this case failed to reference the elements of child sexual assault and especially the issue of recidivism inherent in an offense that requires proof of repeated acts. The case was remanded to LIRC for further proceedings where the record failed to reflect consideration of the elements of the crime, and consideration of what an extraordinarily long period of probation may reveal about the sentencing

court's concerns regarding recidivism by the Complainant. Further, the LIRC decision did not address the most salient and dangerous character traits revealed by the Complainant's sexual assault of a prepubescent child. That is that child sexual assault of young children is rooted in an unhealthy, perverse attraction that is often pathological, and that the damage to its victims is frequently profound and lifelong. Sears Roebuck & Co. v. LIRC (Milwaukee Co. Cir. Ct., 09/29/06), reversing Matousek v. Sears Roebuck & Co. (LIRC, 02/17/06).

The Complainant's convictions for second-degree sexual assault, aggravated battery and felony theft were substantially related to the position of pack and load employee at a large production facility which produced corn meal, flour and other products. The elements of the crime of second-degree sexual assault are the commission of a non-consensual sexual act through the use of force or violence. The elements of the crime of aggravated battery are the intentional infliction of bodily harm on another person. The elements of the crime of felony theft are the taking of the property of another without their knowledge or consent. There is a substantial relationship between the elements of these crimes, and the traits associated with them, and the circumstances of the pack and load position, which entailed unrestricted access to unsecured property of significant value; work with little supervision in close proximity to others (including female employees); and location in a vast facility with many possible hiding places and with a high noise level which could prevent detection. Weston v. ADM Milling (LIRC, 01/18/06).

The Complainant's conviction for possession of child pornography was substantially related to a job which required him to service burglar alarm systems in homes, day care centers, and schools. These are all places where children would be present. Holze v. Sec. Link (LIRC, 09/23/05).
The Respondent discharged the Complainant only after learning of media publicity and customer complaints relating to the Complainant's convictions for second degree sexual assault of a child, causing mental harm to a child and misdemeanor with a child sixteen or older. The Complainant's termination on that basis was "because of" the convictions. However, although the Complainant was terminated because of his conviction record, the Respondent was not liable for discrimination because the circumstances of the Complainant's convictions were substantially related to the circumstances of his delivery driver position. In regard to the offense of second degree sexual assault of a child, the character traits revealed by having engaged in this crime are untrustworthiness with children, lack of judgment, inability to accept responsibility over children, and placing of one's own selfish desires ahead of the welfare of children. These traits, considered in conjunction with the fact that the Complainant had unsupervised contact with children in his delivery driver position (including children alone in their homes), establishes the existence of a substantial relationship within the meaning of sec. 111.335(1)(c), Stats. Sheridan v. United Parcel Serv. (LIRC, 07/11/05).

The circumstances of the Complainant's pending criminal charge for possession of marijuana were substantially related to the circumstances of his job as a youth counselor. There was evidence that approximately seventy-five percent of the youth offenders at the facility had drug and alcohol problems. Clearly, the Complainant was in no position to credibly provide leadership and training to other counselors, or to provide instruction and training to the youthful offenders at the institution, many of whom had problems with drugs. Thus, the Respondent could legally suspend the Complainant from employment for his arrest on the criminal charge of felony possession of marijuana. When the Complainant eventually pled guilty to the possession of marijuana charge, the Respondent could have legally terminated his employment because his conviction demonstrated that he was unwilling to accept the responsibility of obeying the law and his behavior was not conducive to that of serving as a role model or providing counseling to young people who had been adjudicated as juvenile offenders by the court system. Blunt v. DOC (LIRC, 02/04/05).

The Complainant's conviction for possession of a controlled substance under sec. 961.41(3g)(c), Stats., was substantially related to the position of teacher's assistant in a medium security prison. The character

traits revealed by violation of this criminal statute include a tendency to possess illegal drugs, and, presumably, to engage in unlawful drug use. It might be said that a conviction for such an offense demonstrates an unwillingness to comply with laws and rules. The job the Complainant sought would have put her in unsupervised contact with inmates. The question to ask then, was whether, given the character traits demonstrated by the Complainant's conviction for possession of a controlled substance, the circumstances of the job of teacher's assistant would provide a potential temptation and a significant opportunity for her to re-offend. A high percentage of prison inmates have a history of drug abuse and are likely to have a strong incentive and desire to manipulate and obtain favors from staff members. This would be a circumstance that could foster a repeat offense for an individual with a demonstrated propensity to possess illegal drugs. Zeiler v. DOC (LIRC, 09/16/04).

The Complainant was convicted of possession with intent to deliver a controlled substance. She was subsequently hired as a teacher at a facility which provides childcare for children between the ages of six weeks and twelve years of age. Given the availability of prescription drugs at the Respondent's daycare facility (including Ritalin, which is a drug that is valued among illegal drug users and drug dealers), plus the Complainant's opportunity for after-hours access to the Respondent's daycare facility, her conviction for possession with intent to deliver a controlled substance is substantially related to her employment with the Respondent. The Complainant's discharge did not violate the WFEA. Flores v. Kindercare Learning Ctrs. (LIRC, 05/27/04).

The Complainant's convictions for home invasion, two counts of aggravated battery, two counts of residential burglary and misdemeanor theft and robbery were substantially related to the position as a truck driver for the Respondent. Drivers for the Respondent drive alone and have access to the freight they are hauling. They are not closely supervised. Drivers also have access to the company office where various office equipment, including computers, printers and pagers, are located. The Complainant had no legal authority to support his contention that the recidivism rates of former prisoners with particular characteristics are relevant to the substantial relationship test. The length of time that has passed since an offense is not relevant in deciding the substantial relationship test. Jackson v. Summit Logistic Serv. (LIRC, 10/30/03), aff'd sub nom. Jackson v. LIRC (Rock Co. Cir. Ct., 03/02/04).

There is a substantial relationship between the circumstances of the Complainant's conviction for theft in a business setting and the circumstances of a job as a phlebotomist. In the phlebotomist position, the Complainant would have relatively easy access to a large amount of cash, providing him an opportunity to engage again in the same type of criminal activity which led to his conviction. Opportunity and access, even without control, are sufficient, given the circumstances present here, to provide the required nexus between the offense and the job. Vanderkin v. Community Bio Res. (LIRC, 09/30/03).

There was a substantial relationship between the Complainant's convictions for being a party to possession with intent to deliver/manufacture controlled substances and his job as a counselor at a group home residential center for youth that have criminal, emotional or mental health problems. Wilson v. New Horizon Ctr. (LIRC, 09/11/03).

The circumstances of the Complainant's convictions for armed robbery, aggravated battery, unlawful restraint, home invasion and residential burglary were substantially related to the job of a truck driver. The connection between the Complainant's convictions and the likelihood of recidivism are obvious. Were he to be hired, he would routinely be given dominion and control over valuable assets to be freighted; he would be given special ingress and egress privileges to facilities of customers where valuable property is warehoused; and he would be given a truck from which to operate and in which to conceal criminal activity. Jackson v. Transport America (LIRC, 05/06/02); aff'd sub. nom. Jackson v. LIRC (Rock Co. Cir. Ct., 01/07/03); aff'd (Ct. App., Dist. IV, unpublished opinion, 07/01/04).

The Complainant's conviction for conspiracy to possess with intent to distribute in excess of 500 grams of cocaine, and possession with intent to distribute cocaine are related the position of general factory worker. It is immaterial that ten years have passed since the offense. In fact, the Complainant had been released from prison less than six months at the time he sought rehire at the Respondent. The Respondent's work environment would present a substantial opportunity for the Complainant to engage in criminal behavior similar to that present in the crimes for which he had been previously convicted. Villarreal v. S.C. Johnson & Son (LIRC, 12/30/02). [Ed. note: LIRC expressly stated that it no longer chooses to be guided by this decision in Johnson v. Rohr Kenosha Motors, Inc. (LIRC, 04/29/20), aff'd sub nom. Rohr Kenosha Motors, Inc. v. LIRC and Johnson (Kenosha Co. Cir. Ct., 02/04/21).

The Complainant's convictions for theft, armed robbery, unlawful restraint, aggravated battery, residential burglary, armed violence, and home invasion are substantially related to the job of a truck driver, whether over-the-road or local. Jackson v. Transport America (LIRC, 05/06/02).

The Complainant's conviction of felony theft in violation of sec. 943.20, Stats., involved a calculated course of alteration and misuse of records and documents through which money was stolen by fraud. This conviction was substantially related to the occupation of selling insurance and investment products for an insurance company. Borum v. Allstate Ins. Co. (LIRC, 10/19/01).

The Complainant was arrested and charged with the manufacture of a controlled substance; possession with intent to manufacture, distribute or deliver a controlled substance; and knowingly keeping and maintaining a dwelling which was resorted to by persons using controlled substances. The circumstances of these criminal charges were substantially related to the Complainant's job, which entailed driving a bulk fuel truck containing up to 2,800 gallons of gasoline, diesel fuel or kerosene, and delivering and loading this fuel into private residences. The hazardous nature of the job, with its attendant risk of explosion and contamination, requires a degree of alertness and care which renders it unsuitable for an individual with a propensity to use unlawful drugs. Moreover, work which entails unsupervised, door-to-door contact with the public offers an opportunity for criminal behavior and presents a potential temptation for a person with an inclination to engage in conduct such as the sale of illegal drugs. Schroeder v. Cottage Grove Coop. (LIRC, 06/27/01), aff'd sub nom. Schroeder v. LIRC (Dane Co. Cir. Ct., 01/31/02).

The circumstances of the Complainant's conviction for uttering a forged document in violation of sec. 943.38(2), Stats., was substantially related to the circumstances of her position as break pack order filler at a retail distribution center. Forgery requires a lie relating to the genuineness of a document. One convicted of forgery exhibits the character traits of dishonesty and deceitfulness. Although somewhat limited, employment at the Respondent's distribution center does present the opportunity for an employee to forge documents. The most significant opportunity for this to occur is presented in connection with an employee's timekeeping responsibilities. Further, forgery is just a variation of theft. Based on the character trait of dishonesty exhibited by her forgery conviction, employment for Respondent certainly offered the Complainant temptations or opportunities for criminal activity similar to the crime of forgery. Young v. Wal-mart Distrib. Ctr. (LIRC, 10/27/00).

The Complainant's conviction for aiding and abetting a felon was substantially related to the position of store clerk at the Milwaukee County House of Corrections, a position which required regular contact with inmates. Yokofich v. LIRC (Milwaukee Co. Cir. Ct., 12/08/99).

The circumstances of the Complainant's convictions for bail jumping and communicating with jurors were substantially related to the circumstances of the licensed activity of a certified public accountant. Farr v. Dep't of Regulation & Licensing (LIRC, 11/15/99).

The Complainant's conviction for forgery and being party to a crime were substantially related to her prospective job duties as a direct mail specialist. Jackson v. Direct Supply, Inc. (LIRC, 07/08/98).

A Complainant's convictions for violation of the law on tavern closing hours and for obstructing a police officer were substantially related to the position of truck driver in interstate commerce. The "hours of operation" offense demonstrated an inclination to disregard applicable safety-related regulations. The conviction of obstructing an officer had a very distinct relationship to situations the Complainant would likely confront as a truck driver. Truck drivers encounter regulatory authority frequently in the process of complying with weighing requirements and they are more likely to encounter police authority on the job than most employees are because the activity of driving is routinely patrolled by police. Lillge v. Schneider Nat'l (LIRC, 06/10/98).

The elements of the crimes with which the Complainant was charged (sexual assault and threatening to injury another while in the possession of a dangerous weapon) were substantially related to the Complainant's position as a cab driver. A cab driver obviously has the opportunity to commit such acts while transporting a passenger, if the two are alone in a vehicle the cab driver controls. Rathbun v. City of Madison (LIRC, 12/19/96).

The Complainant's criminal conviction for mail fraud, bank fraud and interstate transportation of forged securities was substantially related to the circumstances of the position of coordinating promotional activities for the Respondent, which was a job that entailed fund raising and the collection of dues. Harris v. Berlin Chamber of Commerce (LIRC, 12/04/96).

The Complainant's conviction for illegally possessing a firearm was substantially related to the circumstances of his employment as a line specialist in the assembly department of a company engaged in the business of making and distributing pizzas. The Respondent was aware that the possession of a firearm was unlawful for the Complainant because he was a felon. Perhaps in the case of an employee in the Complainant's job who had good relations with his co-workers, there would be some question with the connection between the job and a conviction for illegal possession of a firearm. However, in this case, the Complainant himself made his firearms possession conviction particularly related to the circumstances of his employment, because the circumstances of his employment included his simmering anger against and his threats of physical violence against co-workers. Kort v. Tombstone Pizza (LIRC, 10/23/96).

The Complainant's arrest and conviction for first degree sexual assault and exposing a child to harmful material was related to his job as the Respondent's fitness center director. Ponto v. Grand Geneva Resort & Spa (LIRC, 08/22/96).

A conviction for lewd and lascivious behavior is substantially related to the job of courier. The position of courier requires a high degree of responsibility and trustworthiness. A conviction for lewd and lascivious behavior demonstrates a lack of good judgment and concern for the welfare of others. The Respondent's electronic monitoring system only meant that the Complainant would be caught after the fact, not that it would prevent the conduct from occurring or that it would decrease the circumstances that foster criminal activity. Stroede v. Federal Express (LIRC, 08/14/96).

The Complainant's convictions for forgery and burglary were substantially related to the circumstances of the job of a district agent for an insurance company. This job would require the Complainant to handle funds in the form of checks and cash and to regularly deal with forms that could be subjected to forgery for personal gain. Nelson v. The Prudential Ins. Co. (LIRC, 05/17/96).

The Complainant's felony conviction for knowingly permitting a motor vehicle to be used for delivery of a controlled substance is substantially related to the circumstances of the position of district agent for an insurance company. Knight v. Prudential Ins. Co. of Am. (LIRC, 10/30/95), aff'd sub nom. Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998).

The Complainant's conviction for delivering cocaine was substantially related to his employment as a youth counselor for emotionally disturbed juveniles, many of whom have problems related to chemical dependency. Sellars v. Sunburst Youth Homes (LIRC, 07/18/95).

Circumstances of a charge for possession of a controlled substance substantially relate to the job of school bus driver. Motel v. Lake Shore Buses (LIRC, 10/21/93).

A conviction for arson was substantially related to the position of Food Service Worker at a juvenile offender institution, where the employee would have responsibilities for the safety, direction and discipline of juvenile offenders. Even in a job where the circumstances are not particularly conducive to committing the particular crime of which the employee has been convicted, the employer may consider the incompatibility between the personal traits important for a particular job and the personal traits exhibited in connection with the criminal activity in question. Here, the commission of the crime of arson indicates a disregard of the welfare of people who may be unable to protect themselves, which is inconsistent with the expectations of responsibility associated with the position in question. Thomas v. DHSS (Wis. Pers. Comm'n, 04/30/93).

Application of the substantially related test does not require a detailed inquiry into the facts of the offense and the job. The Complainant was convicted for knowingly maintaining a dwelling which was used for keeping controlled substances in violation of sec. 161.42, Stats. The specific facts of the offense were never developed in the Complainant's criminal trial because she pled no contest. However, a violation of sec. 161.42, Stats., shows an inclination towards trafficking in controlled substances as a way of earning an income. This was substantially related to the Complainant's position as a home health aide, which provided her with unsupervised access to the homes of impaired adults with numerous potent prescription drugs, thereby providing a clear opportunity for drug trafficking. Thayer v. Home Health United (LIRC, 04/08/93), aff'd, Dane Co. Cir. Ct., 04/19/94.

An allegation of felony delivery of controlled substances is clearly substantially related to a job caring for dependent adults which includes responsibility for access to, and control and distribution of medication and prescription drugs. Delapast v. Northwoods Beach Home Caring Homes (LIRC, 02/17/93).

It was not unlawful conviction record discrimination to remove the name of an individual--who had received a full and unconditional Governor's pardon--from an eligibility list for deputy sheriff's vacancies where it was established that the employer's action was because the individual had been dismissed from a previous public service job and because the employer had concluded that the individual's conduct exhibited during previous employment as a police officer with respect to truthfulness made him unsuitable for the position of deputy sheriff. Cieciwa v. County of Milwaukee (LIRC, 11/19/92).

The Complainant's conviction of a crime involving the delivery of drugs was substantially related to his employment as a machine operator at a paper mill where the opportunity for criminal behavior was significant in light of the large amount of free time available to the employee, the presence of only intermittent supervision, and the enormity of the workplace. In addition, the Complainant's reaction to responsibility and character traits revealed by the conviction made it reasonable to conclude that the workplace would provide a potential temptation for a person with a demonstrated inclination to engage in conduct such as the illegal sale of drugs. Goerl v. Appleton Papers (LIRC, 10/05/92).

The Complainant's welfare fraud conviction was substantially related to the Complainant's job as automotive department manager, which involved access to all cash registers, maintaining inventory, stocking shelves, watching for shoplifters, and recording price markdowns on merchandise. Mullikin v. Wal-Mart Stores (LIRC, 08/27/92).

A trucking company did not discriminate against a prospective employee when it refused to consider him for future employment because he was convicted of a felony. The company was able to prove at the hearing that the prospective employee's burglary conviction was substantially related to being a truck driver for the company. Santos v. Whitehead Specialties (LIRC, 02/26/92).

The Complainant had an extensive criminal record which included convictions for forgery, theft, and resisting or obstructing an officer. The circumstances of the Complainant's employment as a janitor working in the offices of a police department were such as to create great opportunities for theft, because of the unsupervised nature of the work. Additionally, multiple convictions for resisting or obstructing an officer raised questions about the wisdom of allowing the Complainant to have unsupervised access to offices of a police department. Davidson v. Town of Madison Police Dep't (LIRC, 10/15/91).

The circumstances of the offense of armed robbery are substantially related to the circumstances of the position of Juvenile Correctional Worker. The characteristics of extreme patience, level-headedness, and avoidance of the use of force are necessary in what is in effect a job as a prison guard for juvenile detainees. Collins v. Milwaukee County Civil Serv. Comm'n (LIRC, 03/08/91), aff'd sub nom. Collins v. LIRC (Ct. App., Dist. I, unpublished opinion, 12/15/92).

Even if LIRC accepted the Complainant's argument that the Respondent was aware of his conviction record before it discharged the Complainant, the Respondent would not have violated the Wisconsin Fair Employment Act because the circumstances of the Complainant's conviction for theft were substantially related to the circumstances of his job as a bartender. Sherwood v. 306 Pearl, Inc. (LIRC, 05/10/91).

The offenses of possession of cocaine with intent to distribute and distribution of cocaine are substantially related to the occupation of being a door-to-door salesman not merely because both the offenses and the job involved selling activity, but principally because the circumstances of the job are such that it would present a particular opportunity, and thus a potential temptation, for a person with a demonstrated inclination to engage in conduct such as the sale of illegal drugs. This finding is based on a consideration of the offense and the job which focuses on the circumstances that may foster criminal activity, e.g., the opportunity for criminal behavior, the reaction to responsibility, and the character traits of the person. Black v. Warner Cable Communications Co. of Milwaukee (LIRC, 07/10/89).

A conviction for shoplifting substantially relates to the position of processing and distributing payment checks, the job duties of which include the exercise of supervisory control and the expenditure of large amounts of money for an employer and its clients. Benna v. Wausau Ins. (LIRC, 07/10/89).

A conviction for retail theft is substantially related to the job of relief security person, where the employee is unsupervised most of the time and where he has access to campus buildings. Perry v. UW-Madison (Wis. Pers. Comm'n, 05/18/89).

The offense of shoplifting was substantially related to the employee's position as a customer representative for a power company, which involved the employee going on residential and commercial customers' premises at times when the customers were not there, presenting temptations and opportunities similar to those present in his shoplifting conviction. Halverson v. LIRC (Ct. App., Dist. III, unpublished opinion, 08/09/88).

The offense of possession of marijuana, a misdemeanor, was substantially related to the circumstances of the Complainant's job as a security guard. The Complainant's admission to possession and prior use of marijuana gave Respondent ample reason to doubt his devotion to the task of prohibiting the use and possession of drugs at the job site. McClellan v. Barnes Int'l Security (LIRC, 03/31/88).

Conviction of a municipal ordinance violation for shoplifting was substantially related to the employee's job as a group insurance claims technician, where she processed claims under group insurance policies and had authority to release up to $15,000.00 in payment of medical claims without supervisory approval. Employers Ins. of Wausau v. LIRC (Marathon Co. Cir. Ct., 02/10/88), aff'd (Ct. App. Dist. III, unpublished opinion, 10/11/88).

The substantial relationship inquiry does not turn on superficial matters such as the distinctions between an administrative job and a "direct care" job. In this case, the Complainant was apparently unwilling to accept his legal and professional responsibility for an extremely vulnerable population. The responsibilities of his job as an administrator of a nursing home and his subsequent job as a crisis intervention specialist were such that the circumstances of his misdemeanor convictions for patient neglect while he was an administrator were substantially related to the crisis intervention specialist job. Milwaukee County v. LIRC, 139 Wis. 2d 805, 407 N.W.2d 908 (1987).

The Complainant was convicted of shoplifting in 1979 and was warned by his employer that if a similar event occurred his position might be in jeopardy. In 1981 the Complainant engaged in four incidents of theft from his employer and was a given a warning that he might thereafter be terminated for any "unsatisfactory conduct of a serious nature." In 1982, the Complainant admitted to an offense of shoplifting, off duty, and was discharged. Although the Complainant's conviction for shoplifting in 1982 was a factor in the Respondent's decision to discharge him, his previous history of on and off duty offenses were part of the circumstances of his final offense of shoplifting and, accordingly, the circumstances of the shoplifting offense in 1982 were "substantially related" to the circumstances of the Complainant's job, since the circumstances of the Complainant's job involved a warning that he not engage in conduct such as that for which he was terminated. Halverson v. Northern States Power Co. (LIRC, 10/02/86).

A history of four convictions for speeding in less than a two-year period was substantially related to the circumstances of a job in a body shop which would require the employee involved to drive customer's cars on a daily basis in the course of his employment. Gumbert v. Ken Loesch Oldsmobile-Pontiac-Cadillac-Buick (LIRC, 07/09/85).

The circumstances surrounding a job applicant's pending arrest for false representation on medical assistance claims were substantially related to the children's probation officer position which she sought because those circumstances suggested she would not convey to youthful offenders the necessity of reforming their conduct. McVicker v. Milwaukee County (LIRC, 06/28/83).

The Complainant had been convicted of armed robbery under Indiana law. A conviction under that law required that the person be found to have participated in the taking of another person's property by threatening to harm him with a dangerous weapon. This indicated a disregard for both the personal and property rights of other persons. It also indicated a propensity to use force or the threat of force to accomplish one's purposes. The armed robbery conviction indicated personal qualities which were contrary to the extreme patience, level-headedness, and avoidance of the use of force which are essential in a school bus driver. Because the Complainant's conviction for armed robbery was substantially related to the position of school bus driver, the Respondent did not violate the Wisconsin Fair Employment Act

when it refused to grant the Complainant a school bus driver's license. Gibson v. Transp. Comm'n, 106 Wis. 2d 22, 315 N.W.2d 346 (1982).

Common sense dictates that a conviction of the felony of misconduct in public office for falsifying traffic tickets bears a substantial relationship to the duties of a police officer who is called upon to issue traffic citations. Law Enforcement Standards Bd. v. Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981).

122.3 Other affirmative defenses

A licensing committee's denial of a bartender's license did not violate the Act where the applicant's convictions for operating a motor vehicle while intoxicated, for resisting and obstructing an officer, and for vandalism and disorderly conduct are substantially related to the circumstances of bartending and to the statutory requirement of good moral character. Gulbrandson v. City of Franklin (LIRC, 07/02/81).

122.4 Bondability

The Respondent failed to prove that bondability was a factor that actually motivated it to refuse to hire the Complainant. The bonding requirements for the Respondent's drivers provided that coverage was not available to individuals who have committed dishonest acts. The Complainant's conviction record does not establish that he ever committed a dishonest act. (The Complainant had been convicted of misdemeanor disorderly conduct/domestic abuse). Furthermore, the Respondent failed to prove that the bonding company would have concluded that the Complainant was not bondable under its standard fidelity bond or that, if it had, no other equivalent bond would have been available from that bonding entity or some other bonding entity. Rowser v. Upper Lakes Foods (LIRC, 10/29/04).

The Complainant's suggestion that the Respondent engage in risk management by way of a fidelity bond or insurance, constitutes, in essence, an assertion that the Respondent could have taken steps to accommodate the Complainant's felony convictions. A similar argument was rejected in Knight v. LIRC, 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998). There, the court found that there is nothing in the language of the Wisconsin Fair Employment Act which states that employers must take affirmative steps to accommodate individuals convicted of felonies. Accordingly, the Respondent was not obliged to engage in risk management by seeking a fidelity bond as a form of insurance against any monetary or property losses it may have incurred through the employment of the Complainant, who had been convicted of several felonies which included robbery, burglary, and theft. Jackson v. Summit Logistics Serv. (LIRC, 10/30/03).

The Respondent has the burden of proving the affirmative defense that the Complainant is not bondable because of a conviction record. Regency Janitorial Serv. v. LIRC (Milwaukee Co. Cir. Ct., 03/12/02).

The Respondent has the burden to establish the affirmative defense of lack of bondability established by sec. 111.335(1)(c), Stats. That particular exception does not turn on the question of whether or not a particular employee is no longer covered under a particular blanket bond which an employer may have in force; rather it turns on whether or not the employee is bondable, which means capable or worthy of being bonded. Where the Respondent made no effort to determine whether or not the Complainant was bondable under some other equivalent bond, after her bondability under the company's blanket bond ceased, the Respondent failed to establish that the Complainant was not bondable within the meaning of the affirmative defense. Therefore, that defense was unavailable to the Respondent. Hart v. Wausau Ins. Co. (LIRC, 04/10/87), reversed on other grounds sub nom. Employers Ins. of Wausau v. LIRC (Marathon Co. Cir. Ct., 02/10/88), aff'd Ct. App., Dist. III, unpublished opinion, 10/11/88.

122.5 Falsification of employment application with respect to prior conviction

The Complainant failed to disclose a disorderly conduct conviction on his background check form. He denied that his failure to do so was intentional. The critical question, however, is the employer's motivation. Did it sincerely believe that the Complainant gave a false answer on his disclosure form, and did that belief motivate the decision not to hire him? The employer maintained that a belief that the Complainant falsified his application motivated the decision not to hire him. The Complainant failed to show this was a pretext for conviction record discrimination. The employer appears to have treated the Complainant like others who failed to disclose information requested in their application materials. *Foston v. Time Warner Cable (LIRC, 01/30/20).*

Where the employer genuinely believed that the Complainant was dishonest in stating on her application that no criminal charges were pending against her, the fact that this belief was mistaken and no criminal charges were actually pending does not make that motive unlawful. The focus of a pretext inquiry is whether the employer's stated reason is honest, not whether it is accurate, wise or well-considered. Although the employer's termination decision was unlawful because it was based partly on the Complainant's arrest record, the only remedy was a cease-and-desist order where the employer would have discharged the Complainant anyway because of the genuine, albeit mistaken, belief that the Complainant had been dishonest on her application. Rase v. Interim Health Care (LIRC, 07/16/13).

There was probable cause to believe that the Respondent had violated the Wisconsin Fair Employment Act where it failed to hire the Complainant after he provided credible evidence that he reasonably understood that having his conviction expunged meant that it had been removed. There was reason to believe that the Respondent violated the Act by basing its decision not to hire the Complainant on his criminal record and not on his lack of candor in filling out his employment application. Hogans v. Milwaukee Bd. of Sch. Dir. (LIRC, 06/19/12).

The employment application that the Complainant filled out specified that failure to honestly, completely and accurately provide the information requested would result in a denial of employment. The Complainant checked the box "no" when asked if she had been convicted of a misdemeanor in the last ten years, although in fact she had been convicted of a misdemeanor four years earlier. It was not credible that the Complainant was unaware of her conviction record, particularly given her testimony that she served ten days in jail for unpaid traffic citations and driving without a license. Moreover, even if it could be found that the Complainant did not deliberately lie on her application, the fact that the Respondent genuinely believed that she had done so provided a legitimate, non-discriminatory reason for its refusal to hire her. The Complainant's complaint was appropriately dismissed. Bonds v. Roundy's Supermarkets (LIRC, 09/30/11).

Falsification of an employment application by failing to disclose one's criminal history constitutes misconduct sufficient for discharge from employment. As explained in Miller Brewing Co. v. DILHR, 103 Wis. 2d 496, 308 N.W.2d 922 (Ct. App. 1981), the Wisconsin Fair Employment Act does not prohibit an employer from asking questions about criminal records. Nor does it create a license in the employee to lie about those records. Lee v. LIRC (Ct. App., Dist. I, unpublished opinion, 05/25/10).

The Wisconsin Fair Employment Act allows discrimination on the basis of conviction record or pending criminal charges which substantially relate to the position. An employer must legally be able to ascertain information on an applicant's conviction record, or pending charges, in order to determine whether that conviction, or pending charge, substantially relates to the position sought by the applicant. The Wisconsin Supreme Court has stated that, "the WFEA prohibits arbitrary discrimination. It does not prohibit an employer from asking questions about criminal records; it does not create a license in the employee to lie about those records." (Citing Miller Brewing Co. v. DILHR, 103 Wis. 2d 496, 504, 308 N.W.2d 922 (Ct. App. 1981)). Lee v. LIRC (Milwaukee Co. Cir. Ct., 03/02/09).

There was enough evidence in the record to support a finding that the Complainant provided misleading information about the circumstances surrounding his conviction, or that the Respondent believed in good faith that he had done so, and that he was discharged for that reason. However, there was also evidence that, even in the absence of misleading information from the Complainant, the Complainant's employment would nonetheless have ended when the Respondent learned about his conviction. The Respondent began its investigation of the Complainant based solely on the knowledge of his conviction record, before it was aware of any issue involving the Complainant's honesty. Thus, it was clear that the fact of the conviction record alone was of concern to the Respondent. Therefore, the Complainant's criminal conviction record played a part in the decision to discharge the Complainant. Because the decision to discharge the Complainant was made "in part" because of a discriminatory motive (and because the Respondent did not establish that the circumstances of the crimes for which the Complainant was convicted were substantially related to the circumstances of his job) a finding of discrimination was made in this case. Fink v. Sears Roebuck & Co. (LIRC, 03/01/07), aff'd sub nom. Fink v. LIRC (Sheboygan Co. Cir. Ct., 02/29/08).

Where it is the Respondent's policy to terminate an individual for falsification of their employment application, it does not matter whether the Complainant actually falsely stated that he had no conviction record on the application. The Complainant cannot prevail if the Respondent had a good faith belief that the Complainant had a conviction record. Miles v. Regency Janitorial Serv. (LIRC, 09/26/02).

If the Respondent genuinely believed that the Complainant had concealed his criminal convictions, this would be a legitimate non-discriminatory reason for the Complainant's discharge. Even if the Complainant had no crimes on his record, the critical question is whether the Respondent believed that he did. Turner v. Manifold Servs. (LIRC, 01/31/02).

The Complainant was discharged because he failed to report all of his convictions in response to a question on his employment application asking whether he had ever been convicted of a crime. The Complainant argued that he did disclose his criminal convictions, but that he was not required to report other civil adjudications for disorderly conduct because they are not considered to be crimes. Yet, disorderly conduct is a Class B misdemeanor, and a misdemeanor is considered to be a crime. The Complainant also failed to indicate his motor vehicle convictions for speeding, operating a motor vehicle while a license was suspended, failure to return suspended license plates, and improper use of vehicle registration. Sec. 343.44, Wis. Stats., which addresses driving after license suspension or revocation, provides for penalties for habitual traffic offenders which include fines and imprisonment. This suggests that in certain circumstances this offense is considered to be a crime. Accordingly, the Respondent did not violate the Wisconsin Fair Employment Act when it discharged the Complainant because he failed to truthfully complete his employment application. Turner v. Manifold Servs. (LIRC, 01/31/02).

An employer is entitled to know whether an applicant has a conviction record, so that the employer can determine if the conviction record is substantially related to the applicant's prospective job duties. An employer may lawfully refuse to hire an applicant who falsifies an employment application with respect to a conviction record. Haynes v. Nat'l School Bus Serv. (LIRC, 01/31/92).

The Complainant failed to establish that he had been discharged by the Respondent because of conviction record where the evidence showed that the Respondent believed that the Complainant had falsified his employment application by indicating that he had no prior convictions when it received reliable evidence that he did in fact have prior convictions. Luckman v. Western-Southern Life (LIRC, 02/16/90), aff'd sub nom. Luckman v. LIRC (Milwaukee Co. Cir. Ct., 09/04/90).

122.6 Remedies

The Wisconsin Fair Employment Act makes it unlawful to discharge an individual based upon arrest record. The Respondent in this case argued that it did not discharge the Complainant based on the fact of his arrest record, but because he violated its Use of Technologies Policy. However, while the Complainant's alleged violation of the policy was a factor in the discharge, the evidence also indicated that the Respondent was unhappy about the Complainant's arrest and the attendant publicity and that a decision to discharge the Complainant was made before the Respondent discovered inappropriate material on the Complainant's computer. The Respondent's actions were in violation of the Wisconsin Fair Employment Act. However, the Respondent was genuinely concerned about inappropriate materials it found on the Complainant's computer and his employment would have been terminated once those materials were discovered, even in the absence of the Complainant's arrest record. Because the Complainant was discharged both for an impermissible reason (his arrest record) and a permissible reason (his violation of the Use of Technologies Policy), the only remedy awarded to the Complainant was an order for payment of reasonable attorney's fees. Kraemer v. County of Milwaukee (LIRC, 10/11/12), aff'd sub nom. Kraemer v. LIRC (Milwaukee Co. Cir. Ct., 08/13/13), aff'd (Ct. App. Dist. I, unpublished opinion, 05/20/14).

The Respondent violated the Wisconsin Fair Employment Act by discharging the Complainant because of his arrest record. However, the Respondent established that it would have discharged the Complainant in any event based upon the fact that his driver's license was suspended, and a valid driver's license was a requirement for the job. This was, therefore, a "mixed motive" case. The Complainant would have been discharged even absent the Respondent's consideration of his arrest record. He was only entitled to a cease-and-desist order. He was not entitled to reinstatement or back pay. Kammers v. Kraft Foods (LIRC, 08/11/11).

The Respondent violated sec. 111.322(2), Stats., when it posted a job advertisement that specific "no felonies," because this expressed an intention to discriminate against individuals with conviction records. However, in this case, there was no basis to conclude that the Complainant would have received the job at issue but for the Respondent's unlawful publication of a discriminatory advertisement. The evidence established that the Respondent ultimately never filled this job. Under the circumstances, the appropriate remedy was an order requiring the Respondent to cease and desist from printing or circulating such advertisements. Jackson v. Dedicated Logistics (LIRC, 07/29/11).

The Respondent was found to have violated the Wisconsin Fair Employment Act by discharging the Complainant because of arrest record; however, because the underlying criminal charges against the Complainant were not yet resolved, the Complainant was not entitled to a monetary remedy. The Respondent could have suspended the Complainant without pay or other benefits until the charges against him were resolved. The appropriate remedy was to order the Complainant reinstated to "suspended" status. Maline v. Wis. Bell (LIRC, 10/30/89).

Where the employer violated the Act by terminating an employee because of arrest, but where the acts the employee was arrested for were substantially related to her job so that suspension of the employee would have been permitted, and where the employer permanently went out of business prior to the resolution of the charges against the Complainant, no remedy of any sort was granted. No back pay was appropriate since the Complainant would have appropriately been on suspension for all time periods up to the closing of the business, and neither reinstatement nor a cease-and-desist order would be appropriate since the Respondent was permanently out of business. Shipley v. Town & Country Rest. (LIRC, 07/14/87).

122.9 Miscellaneous

An employer may be liable for discrimination under the WFEA if: (1) it knows, or believed, that a third party either had or would have a negative attitude about an employee based on that employee's protected status under the WFEA, and (2) even though the employer had the ability to not acquiesce to the perceived

discriminatory animus, it submitted to it by taking an adverse action against the employee. In this unique case, the Respondent was not liable for arrest or conviction record discrimination because it had divided authority with a third party in such a way that the Respondent did not have the ability to control whether an adverse was taken against the Complainant based on arrest or conviction record. Sloan v. Human Dev. Ctr. (LIRC, 08/29/14).

The Respondent engaged in an act of employment discrimination in violation of sec. 111.322(2), Stats., when it posted a job advertisement that specified "no felonies," because this expressed an intention to discriminate against individuals with conviction records. Jackson v. Dedicated Logistics (LIRC, 07/29/11).

It is not employment discrimination because of arrest record to suspend an employee pending the outcome of criminal charges where the circumstances of the pending charges substantially relate to the circumstances of the employee's position. The Complainant's argument that it would have been possible for the Respondent to change his schedule so that he would not come in contact with his wife (who was also an employee of the Respondent and who had a restraining order against him) was rejected. The arrest record law does not impose a duty to accommodate pending charges upon employers. Sanford v. Luther Midelfort (LIRC, 10/01/10).

There is nothing in the language of the Wisconsin Fair Employment Act which states that employers must take affirmative steps to accommodate individuals convicted of felonies. The Complainant's argument that the Respondent could have shielded itself from liability by engaging in risk management through a bonding program to eliminate concerns regarding the substantial relatedness of his criminal activity to the job was rejected. Jackson v. Klemm Tank Lines (LIRC, 02/19/10).

Sec. 111.335(1)(cm), Wis. Stats., provides that it is not employment discrimination because of conviction record to refuse to employ a person who has been convicted of a felony as an installer of burglar alarms unless that person has been pardoned for that felony. In this case, the Complainant had been convicted of felony possession of child pornography. He had not been pardoned. The Respondent did not violate the law when it refused to hire him to the position of banking service technician, which was a position that involved providing security systems, including burglar alarms for banks. Holze v. ADT Sec. Serv. (LIRC, 09/23/05).

The Complainants established that their arrest records played a role in the Respondent's decision to discharge them where, among other things, a representative of the Respondent testified at the Complainants' unemployment compensation hearing that her decision to discharge the Complainants was based upon the fact of their arrest records and upon her beliefs about the behavior leading up to the arrests. Further, the Respondents' own personnel records indicate that the reason for the Complainants' termination was "jail." Finally, the fact that the Respondent did not discharge other employees who had arrest records does not mean that it did not discriminate against the Complainants, where the arrests were for different types of offenses. Schneider v. Stoughton Trailers (LIRC, 02/24/95).

The fact that an employer may choose to retain one individual with a conviction record, the circumstances of which substantially relate to a particular job, but to discharge another does not violate the Act's prohibition against arrest or conviction record discrimination. Mullikin v. Wal-Mart Stores (LIRC, 08/27/92).

123 DISABILITY DISCRIMINATION

[Ed. note: The Wisconsin Fair Employment Act was amended to substitute the term "disability" for the term "handicap" in 1998.]

123.1 Coverage

The Complainant alleged disability discrimination due to reduction in her pay for home care services she provided for her disabled son. The complaint failed to state a cause of action under the WFEA because the Complainant is not an individual with a disability, and the WFEA does not cover allegations of discrimination based on a Complainant's association with an individual with a disability. The Complainant's retaliation claim for having filed a federal lawsuit fails to state a claim because the lawsuit did not allege any violation recognized by the WFEA as a basis for a retaliation complaint. Bach v. Cnty. of Milwaukee (LIRC, 10/09/14), aff'd, Bach v. LIRC (Milwaukee Co. Cir. Ct., 04/16/15).

Although the ADA contains a provision expressly prohibiting discrimination against an individual with a disability based on his or her relationship with a disabled person ("association discrimination"), the WFEA contains no analogous provision. The Complainant's claim of disability discrimination because of her association with a disabled individual does not state a cause of action under the WFEA. Bach v. Easter Seals Sw. Wis. (LIRC, 10/09/14).

Discrimination against an individual "because of" disability may involve an employer acting on the basis of actual discriminatory animus against an employee because that employee was an individual with a disability; it may also involve the employer acting on the basis of dissatisfaction with an employee's behavior or performance problem which is caused by the employee's disability. If an employee is discharged because of bad behavior which was caused by a disability, the discharge is, in legal effect, because of that disability. Maeder v. UW-Madison, UW Police (LIRC, 06/28/13).

123.11 Definition of disability, generally

The fact that the Complainant was not diagnosed with a disabling condition until after his employment relationship with the Respondent ended did not prevent him from establishing that he is an individual with a disability for purposes of the WFEA. The statute does not require a contemporaneous diagnosis in order for the Complainant to establish that he has a disability. Gilbertson v. Wingra Red-Mix, Inc. (LIRC, 12/10/2020), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct., 10/21/21). (appealed to Court of Appeals and awaiting decision as of 03/10/23.)

The commission questioned the reasonableness of an administrative law judge's pre-hearing ruling that the Complainant must disclose her expert medical witnesses six months prior to the hearing. However, any error was harmless where the Complainant nonetheless submitted sufficient evidence to establish that she has a disability within the meaning of the statute. Potts v. State of Wis. – Dep't of Health Servs. (LIRC, 05/18/21).

The Complainant failed to show she was an individual with a disability because her medical evidence did not establish, through credible and competent evidence, how or to what degree her symptoms made achievement unusually difficult or limited her capacity to perform the job in question. In addition, her medical evidence did not show that her impairment was permanent. Harris v. Charter Comm., LLC (LIRC, 03/13/2020).

The Complainant's impairment did not limit his capacity to work within the meaning of the WFEA, nor did the employer perceive the Complainant to be disabled. The Complainant's impairment involved a very mild restriction in his ability to perform a task that arose about 1-2% of the Complainant's work time, requiring little accommodation. Schultz v. Cnty. of Manitowoc (LIRC, 10/31/16), aff'd sub nom. Schultz v. LIRC (Manitowoc Co. Cir. Ct. 05/10/17), aff'd 2018 WI App 66, 384 Wis. 2d 414 (per curiam).

The Americans with Disabilities Act's definition of disability is similar to that in the WFEA, in including a virtually identical "record of such an impairment" clause. The EEOC defines an individual with "a record of such an impairment" as someone who has "a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." Looking at these sources, the Commission believes that the concept of "having a history of" an impairment implies actually having had that impairment in the past. In this case, LIRC found that the Complainant did not actually have the impairment she asserted and did not establish that she had that impairment in the past. It would be anomalous to find a "has a record of" disability here based on a "misclassification" theory, when the Complainant asserted that she was correctly diagnosed with that impairment. Thus, support for a finding of a "has a record of" disability within the meaning of § 111.32(8)(b), is lacking here. Hendon v. Wis. Bell, Inc. d/b/a AT&T (LIRC, 11/13/14), aff'd sub nom. Hendon v. LIRC (Milwaukee Co. Cir. Ct., 08/12/2015).

Where the Complainant presented medical evidence of rheumatoid arthritis and multiple sclerosis, she established an actual disability. Thus, there was no need to decide whether there was a "perceived disability." Cave v. Cnty. of Milwaukee (LIRC, 1/30/14).

An impairment that requires little accommodation and does not interfere with the employee's ability to perform the job is not one which can be said to limit the capacity to work. Tschida v. UW-River Falls (LIRC, 12/30/08).

Missing work occasionally is not sufficient to demonstrate that an impairment limits the capacity to work. Tschida v. UW-River Falls (LIRC, 12/30/08).

The Complainant suggested that the Respondent regarded him as being disabled by virtue of his narcotic drug use. However, narcotic drug use does not constitute an impairment in its own right. The Complainant neither alleged nor established that he has a substance addiction which might be covered under the statute. Tschida v. UW-River Falls (LIRC, 12/30/08).

To find that the Complainant's condition was not permanent because there was surgery available that could correct it was wrong as a matter of law. It was also unreasonable where the only evidence in the record on this point indicated that the Complainant was given no assurances that the surgery would work, and that he was told that his condition might have been made worse by the surgery. Reiter v. Waukesha Engine Div. (LIRC, 11/30/07).

There are many types of impairments for which treatments are available. The mere fact that a potential treatment exists is not reason enough to conclude that the impairment is only a temporary one, thus denying the individual the coverage of the Wisconsin Fair Employment Act. It was inappropriate for the Administrative Law Judge to find that the Complainant was not disabled because he could correct his shoulder problem with surgery. Reiter v. Waukesha Engine Div. (LIRC, 11/30/07).

Not every impairment is a disability. The Complainant has the burden of proving that an impairment satisfies the stated requirements of sec. 111.32(8), Stats. The Complainant must establish that the claimed disability made achievement unusually difficult or limited her capacity to work. Wucherpfennig v. Personal Dev. Ctr. (LIRC, 06/29/06).

It is not enough for a Complainant to state a diagnosis or to list symptoms in order to establish that he has a disability. The Complainant must explain through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult. The Complainant argued that a diagnosis of asthma alone, supported a conclusion that he was disabled, consistent with the ruling in Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. DILHR, 62 Wis. 2d 392, 215 N.W.2d 443 (1974). Even if such a diagnosis had been established at hearing, a conclusion of disability was not required. The Supreme Court did not hold in the cited decision that every diagnosis of asthma would result in a conclusion of disability. Instead, it held that conditions such as asthma (which, unlike physical disorders such as paraplegia, do not result in incapacity from normal remunerative occupations or require rehabilitative training) may constitute disabilities under the Wisconsin Fair Employment Act. It would be inconsistent with both the language and the policy underpinnings of the Act for the continuum of asthma conditions to be held to be disabilities even if some did not make achievement unusually difficult or limit the capacity to work. Doepke-Kline v. Ameritech/SBC (LIRC, 05/25/04); aff'd sub nom. Doepke-Kline v. LIRC, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605.

The term "limited capacity to work" refers to the particular job in question. A Complainant is not required to show that an impairment limits his or her capacity to perform a wide variety of jobs. Roytek v. Hutchinson Technology (LIRC, 01/28/02), aff'd sub nom. Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.

The Complainant testified that she had medical restrictions, but that she did not claim to be disabled. However, the Complainant's perception of herself is not controlling in this matter. The critical question is whether she satisfies the conditions to be considered an individual with a disability, as that term is defined in the statute. Where the Complainant's doctors have diagnosed her with a condition which constitutes an impairment under the Act, and where the Complainant's ability to perform her job was adversely affected as a result, the Complainant is considered to be an individual with a disability without regard to her own characterization of her status. Jones v. United Stationers (LIRC, 01/25/01).

Adverse action taken by an employer because of conduct attributable to the Complainant's handicap is in legal effect because of the individual's handicap. Staats v. County of Sawyer (LIRC, 10/27/97), aff'd sub nom. Staats v. LIRC (La Crosse Co. Cir. Ct., 08/21/98).

Even when the symptoms of a condition can be controlled by medication, the condition may constitute a disability. Salzer v. Briggs & Stratton (LIRC, 07/26/96).

The Labor, Industry and Review Commission is aware of no authority which suggests that a Complainant is not considered to have a handicap because his symptoms can be controlled by medication. Salzer v. Briggs & Stratton (LIRC, 07/26/96).

Sec. 111.32(8), Stats., provides the definition of the term "handicapped individual." "Impairment" for purposes of the Act is a real or perceived lessening or deterioration or damage to the normal bodily function or bodily condition, or the absence of such bodily function or condition. The test to determine whether an impairment makes achievement unusually difficult is concerned with the question of whether it is a substantial limitation on life's normal functions or on a major life activity. By contrast, the "limits the capacity to work" test refers to the particular job in question. Further, the inquiry concerning the effect of an impairment is not about mere difficulty, but about unusual difficulty. In this case, the Complainant did not establish that his impairment (cataracts and diabetes) made achievement unusually difficult for him or limited his capacity to work. The Complainant's physician testified that the Complainant had no physical limitations. The only problem associated with his cataracts was difficulty

driving at night or reading with insufficient light, and his only symptom from diabetes was occasional dryness of the mouth. These amounted to very minor limitations which cannot be said to substantially limit life's normal functions or to make achievement unusually difficult. Flores v. Amcast Corp. (LIRC, 10/13/94).

One purpose of the "unusually difficult/limits the capacity to work" language is to exclude from coverage those physical impairments that are so insubstantial that it makes no sense to afford them special status as handicaps. In this case, the Complainant's condition of chronic peptic syndrome is in effect a condition of excess stomach acid. This is a prevalent condition which does not rise to the same level as impairments which make achievement unusually difficult or limit the capacity to work--particularly where the condition causes no work restrictions and does not appear to generate unusual absenteeism. Murphy v. Roundy's (LIRC, 10/21/93).

It is not an act of handicap discrimination under the Wisconsin Fair Employment Act to discharge an employee in order to avoid payment for medical expenses of that employee's child. Heinritz v. Lawrence Univ. (LIRC, 09/30/93), aff'd sub nom. Heinritz v. LIRC (Outagamie Co. Cir. Ct., 05/11/94).

Persons with diseases may be deemed handicapped under the Wisconsin Fair Employment Act, even if the disease is in remission or the person is not otherwise actively suffering from the effects of the disease. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

An impairment may constitute a handicap under the Wisconsin Fair Employment Act even if the condition causing the impairment is contagious or communicable to others. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 08/11/89), aff'd, sub nom. Racine Educ. Ass'n v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The fact that the Complainant was hospitalized does not necessarily mean that he was handicapped. Since the Respondent indicated that the Complainant did "fine work," there was no basis for the Complainant's claim that he had an impairment which hindered his capacity to work; therefore, he was not handicapped within the meaning of the Wisconsin Fair Employment Act. Dealer's Office Equip. v. LIRC (Herling) (Waukesha Co. Cir. Ct., 04/09/90).

There is a two-step process of analysis in determining whether an individual has established a handicap within the meaning of the Act. The first step is determining whether or not there is a real or perceived impairment. An impairment for purposes of the Act 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. The second step is determining whether or not the impairment makes, or is it perceived to make, achievement unusually difficult or whether it limits the capacity to work. Either the claimant must show that the real or perceived impairment makes achievement unusually difficult, or the claimant must show that the real or perceived impairment limits the capacity to work. An employer's perception of either satisfies this element as well. City of La Crosse Police & Fire Comm'n v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987).

The test to determine whether a condition makes achievement unusually difficult is concerned not with the specific job but with the question of whether there is a substantial limitation on life's normal functions or on a major life activity. By contrast, the "limits the capacity to work" test refers to the particular job in question. The inquiry concerning the effect of an impairment on achievement is not about mere difficulty, but unusual difficulty. AMC v. LIRC (Basile), 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

A handicap is a mental or physical disability or impairment that a person has in addition to his or her normal limitations that makes achievement not merely difficult, but unusually difficult, or that limits the capacity to work. AMC v. LIRC (Basile), 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

In determining whether a condition is a handicap, weight is given to the fact that it is medically diagnosable and is non-volitional. Connecticut Gen. Life v. DILHR, 86 Wis. 2d 393, 273 N.W.2d 206 (1979).

If an employee's illness or defect makes it harder to find work, then it certainly operates to make achievement unusually difficult and it is a handicap. Chrysler Outboard v. DILHR (Ninke) (Dane Co. Cir. Ct., 11/01/76).

The term handicap does not mean that one must be disabled to the extent that one is barred from all remunerative occupation. Rather, a handicapped person is one who, despite being different from the average employee in one or more ways, might nevertheless function efficiently on the particular job. Chicago, Milwaukee, St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

123.12 Perceived disability

The fact that the Respondent granted the Complainant's accommodation requests did not indicate that the Respondent perceived the Complainant to be disabled. The requests were granted because they were minimal. Gruss v. Cnty. of Dane (LIRC, 08/13/2019).

The fact that the Complainant had an emotional meltdown in the presence of the Respondent on one occasion three years prior to her discharge does not warrant a conclusion that the Respondent perceived the Complainant as having a mental disability. Berton-Train v. Woodman's (LIRC, 05/31/2017).

Medical documentation that spoke of the Complainant's recovery from an illness and return to work did not provide a sufficient basis to conclude that the employer perceived the Complainant as disabled. Mueller v. Chart Energy & Chemicals, Inc. (LIRC, 01/15/15).

The requirement of reasonable accommodation does not apply to situations in which a Complainant is determined to be an individual with a disability based solely on being "perceived as having ... an impairment" under Wis. Stat. § 111.32 (8)(c). Hendon v. Wis. Bell, Inc. d/b/a AT&T (LIRC, 11/13/14), aff'd sub nom. Hendon v. LIRC (Milwaukee Co. Cir. Ct., 08/12/2015).

There being absolutely no medical evidence of any kind in the record, the Complainant failed to show she actually had a disability; thus, her case rested on showing she was perceived as having one. The Complainant rested her claim on her having been injured in an accident. But even where a Respondent is aware an employee had injuries for which she sought treatment, there must still be evidence that the Respondent believed the Complainant had an impairment that would be permanent. The record here tends to affirmatively suggest that the Complainant's injuries were perceived as being subject to healing and that eventual recovery, without permanent restrictions, was still a possibility. Thus, she failed to establish that she was perceived as having a permanent disability. Tohl v. CUSA ES, LLC (Express Shuttle) (LIRC, 11/21/13).

Even crediting the Complainant's testimony that she told the owner of the Respondent that she suffered from panic attacks for which she took medication, this was insufficient to establish that the Respondent perceived the Complainant as being an individual with a disability. The only manifestations of this condition of which the Respondent had reason to be aware were two days when the Complainant was

absent from work. This could not reasonably communicate to the employer that the Complainant suffered from a permanent condition which limited her capacity to work in any significant way. Further, the Complainant downplayed the impact of her condition on her life or work activities to the Respondent's owner, and she never presented any work restrictions to the Respondent based upon her panic attack disorder. The fact that the Respondent was aware that the Complainant was under a physician's care and taking prescription medications did not establish that the Respondent necessarily would have perceived the Complainant to be disabled since medical treatment is sought and medications are prescribed for conditions which are disabling as well as those for which are not. Rybicki v. DJ Convenience (LIRC, 08/20/10).

A Complainant demonstrated probable cause to believe that the Respondent perceived him as being disabled where he testified that he told the Respondent when he was hired that he had diabetes, that his supervisor was aware of his diabetes, and that he had provided the Respondent with notes from his doctors indicating that he should work on the day shift because of his diabetes. Cappelletti v. OceanSpray Cranberries, Inc. (LIRC, 02/15/08).

It was not appropriate for an Administrative Law Judge to conclude in his decision that "the Complainant does not have a perceived disability." The language in the Wisconsin Fair Employment Act used to define "individual with a disability" contemplates an individual as being perceived by another person as having an impairment which makes achievement unusually difficult or limits the capacity to work. Sec. 111.32(8)(c), Stats. This statute does not contemplate a classification or status independent of another person's perception of the individual. Berg (Riegler) v. Franciscan Woods (LIRC, 12/19/06).

The fact that the Respondent was aware that the Complainant was seeking medical treatment and taking prescription medications did not establish that the Respondent necessarily or reasonably would have perceived the Complainant to be disabled. Medical treatment is sought, and medications are prescribed, for conditions which are not disabling as well as for conditions which are disabling. In addition, the fact that the Complainant in this case never presented any medical restrictions to the Respondent supported a conclusion that she would not have been perceived as being disabled. Wucherpfennig v. Personal Dev. Ctr. (LIRC, 06/29/06).

The fact that the Respondent's managers were aware that the Complainant was seeing a psychiatrist and taking prescription medications did not establish that the Respondent perceived the Complainant to be disabled. Medical treatment is sought, and medications are prescribed, for conditions which are not disabling as well as for conditions which are disabling. Schultz v. CNH Capital Corp. (LIRC, 05/08/06).

While the Respondent was aware that the Complainant had been diagnosed with multiple sclerosis (MS), not every health condition constitutes a disability within the meaning of the Wisconsin Fair Employment Act. Here, the record contained nothing to indicate to what extent, if at all, the Complainant's MS would affect her major life activities or limit her capacity to work. Further, the record contained no evidence as to the Respondent's owner's personal beliefs or perceptions on this subject. Absent such evidence, one cannot speculate that the Respondent perceived the Complainant's MS as a disability. Prior to the time that she was diagnosed with MS, the Complainant suffered a variety of health conditions, including the loss of vision in her left eye. At that time, she explained to the Respondent's owner that her eye problem might be a precursor to MS. However, there was no reason to find that the Respondent's owner perceived the Complainant as having a disability prior to the time that the Complainant received her diagnosis. Draeger v. Kliss Quick Serv. (LIRC, 09/30/05).

Even if the evidence the Complainant could have offered at hearing would have been insufficient to establish the existence of an actual impairment, he may have been able to establish that the Respondent

had reason to perceive him as being disabled. In her statements on the hearing record, the Administrative Law Judge appeared to be under the impression that no duty of reasonable accommodation arises as a result of a perceived disability. However, given the unsettled nature of the law in this regard, it was inappropriate for the ALJ to grant the motion to dismiss the complaint on this basis. Grell v. Bachmann Constr. (LIRC, 07/15/05).

The Respondent had no reason to perceive that the Complainant was disabled where he had been released to return to work without restriction by his physician. Cramer v. Woodman's Food Mkt. (LIRC, 01/14/05).

Although the Complainant did not present medical documentation about breast cancer, or about her particular condition so as to establish that she had an actual impairment, the evidence supported a credible inference that the Respondent perceived the Complainant's breast cancer as an impairment that limited her ability to perform the job in question, and that the Respondent rejected her employment application because of this perception. Huber v. The Meat Mkt. (LIRC, 07/16/04).

The Respondent received contradictory information from the Complainant's doctor regarding the Complainant's restrictions and the extent and nature of his back problem. It is difficult to argue that the Respondent perceived the Complainant as being disabled where it received extremely contradictory information about his condition, and where its own physician advised that the Complainant was not disabled. Although the Respondent's witnesses evidently believed the Complainant had some sort of back condition, based on his repeated insistence that he had work restrictions and had difficulty performing the job, there was nothing to indicate that they considered this condition to constitute an impairment within the meaning of the Wisconsin Fair Employment Act. To the contrary, the evidence suggested that the Respondent believed that the Complainant suffered from a temporary back injury which had not yet healed. Erickson v. QuadGraphics (LIRC, 05/25/04); aff'd sub nom. Erickson v. LIRC, Washington Co. Cir. Ct., 10/27/04; aff'd, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398.

The record did not support a conclusion that the Respondent had reason to be aware that the Complainant had a prosthetic eye or suffered from glaucoma or cataracts, but only that the Respondent was aware that the Complainant wore glasses. This fact alone would not be sufficient to support a conclusion that the Respondent perceived the Complainant to be disabled. Aman v. Kindred Nursing Centers East (LIRC, 12/16/03).

Even though the Complainant did not establish that he had a disability, he was perceived as having a mental disability by the employer. The Complainant's supervisor knew, at a minimum, that the Complainant was in therapy, that the Complainant was taking what was referred to in the workplace as his "nut pills," and that the Complainant required a leave of absence from work in order to adjust his medications. Schneider v. Wal-Mart Stores (LIRC, 01/12/99).

The Complainant failed to establish that he was discriminated against on the basis of "perceived communication disability." The Complainant did not suffer from any speech, communication, or personality disorder. The Complainant produced no authority for his assertion that the Respondent's calling him "goofy" or "screwed up" or comparing him to a fictional character on a television show meant that the person making those comments perceived him as disabled. The Complainant's discomfort with the Respondent's comments does not transform those remarks into a perception of disability. Kriegl v. Sauk Co. (LIRC, 08/26/98).

The Respondent's aggressiveness in seeking to get the Complainant back to work meant that the Respondent did not perceive the Complainant as having an impairment. Stanford v. Time Ins. (LIRC, 06/27/95).

Where the Complainant failed to offer any competent expert evidence that he actually suffers or suffered from a handicapping condition he could only prevail if he showed that the employer acted on the basis of a belief that he suffered from such a condition. This would allow invocation of the "perceived as having such an impairment" branch of the definition of "handicapped individual" in sec. 111.32(8)(c), Stats. Roncaglione v. Peterson Builders (LIRC, 08/11/93), aff'd sub nom. Roncaglione v. LIRC (Dane Co. Cir. Ct., 05/06/94).

A person who has problematical personality characteristics, but whose psychiatric diagnosis is "well within the normal range," does not appear to fit within the concept of a handicapped individual within the meaning of the Wisconsin Fair Employment Act. Since the Complainant's personality characteristics do not fall within the meaning of the term "impairment," there can be neither an actual nor a perceived handicap. The Complainant's condition consisted of certain personality characteristics that were part of his psychological makeup that was within normal limits. From a factual standpoint, the Respondent's perception of this condition was not different from his actual condition. The employer did not perceive a nonexistent condition that would have constituted an impairment if it did exist, but rather perceived that a condition that did not constitute an impairment was interfering with the Complainant's capacity to function appropriately in the workplace. This did not constitute unlawful handicap discrimination. Jacobsen v. DHSS (Wis. Pers. Comm'n, 10/16/92).

An employer's knowledge that an employee was engaging in outrageous conduct does not necessarily mean that the employer perceived that the employee was mentally ill. Boldt v. Gen. Motors (LIRC, 10/19/90), aff'd sub nom. Boldt v. LIRC (Rock Co. Cir. Ct., 09/18/91).

In order to find that an individual is handicapped within the meaning of the Act, it is not necessary to find that the individual has an actual impairment. It is sufficient to find that the employer perceived that the individual was handicapped. For purposes of the statute, the element of impairment can be satisfied by showing that the condition perceived by the employer would constitute an actual impairment if it did exist. City of La Crosse Police & Fire Comm'n v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987).

Where there is an actual impairment which is regarded by the prospective employer as limiting the ability to work, it is a perceived handicap and is to be treated as a handicap which makes achievement unusually difficult or limits the capacity to work, even if, in fact, it does neither. Brown County v. LIRC, 124 Wis. 2d 560, 369 N.W.2d 735 (1985).

Just because an employer concludes that a job applicant is unqualified (e.g., too short or too slight) for a particular job does not mean that the applicant is perceived as having a physical or mental disability that makes achievement unusually difficult. AMC v. LIRC (Basile), 119 Wis. 2d 706, 350 N.W.2d 120 (1984).

A rejected job applicant for a drill press operator position was handicapped because the employer believed the applicant's eczema would be aggravated by exposure to oils and solvents. Mercury Marine v. LIRC (Ct. App., Dist. IV, unpublished opinion, 10/04/83).

A job applicant who was not an epileptic was nevertheless discriminated against on the basis of handicap within the meaning of the Act where the employer believed him to be so and refused to hire him as an assistant foreman and trackman, a position which he was otherwise qualified to perform. Wooldridge v.

Chicago & N.W. Transport (LIRC, 12/17/82), aff'd sub nom. Chicago & N.W. Transport v. LIRC (Dane Co. Cir. Ct., 09/28/83).

Where a job applicant was rejected because of a physical impairment and the employer perceived that impairment as limiting the capacity to work, the applicant was a "handicapped individual." City of Madison Fire & Police Comm'n v. LIRC (Scott) (Dane Co. Cir. Ct., 10/22/69).

123.13 Permanent versus temporary conditions

The Complainant failed to establish that she had a permanent disability. She could not provide a name for her condition, and her medical experts could not and did not opine that the condition – swelling and pain in her left forefoot - was permanent. Rather, the most recent opinions from the Complainant's medical providers reflected uncertainty on the status of her foot and what the prospects were for it; uncertainty is not proof by a preponderance. The commission distinguished this case from Rutherford v. Wackenhut Corp. (LIRC,05/13/11), explaining a significant factual difference. Specifically, in Rutherford, there were expert medical opinions expressly finding that the Complainant had reached a healing plateau and had a specific percentage of permanent disability. Burge-Milner v. Dep't of Veterans Affairs (LIRC, 11/11/15).

An injury, by its very nature, is generally regarded as a temporary condition that will heal over time. However, in this case, the Complainant presented persuasive evidence to indicate that her injury was not going to fully heal and that the damage sustained was permanent. In addition to information supplied by her doctor, the Complainant was ultimately determined to have a permanent partial disability under the Worker's Compensation Law and she was determined to qualify for Social Security Disability benefits. It was error for the Administrative Law Judge to find that only those facts known by the Respondent at the time it discharged the Complainant were relevant. To base a decision on whether an impairment is permanent strictly on the information that was available at the time of discharge would effectively allow an employer to discharge an injured or sick employee with impunity, provided that the employer did so prior to any assessment of the permanency of the injury or illness. Rutherford v. Wackenhut Corp. (LIRC, 05/13/11).

The Complainant's heart surgery and her recovery from heart surgery were temporary conditions. The Complainant's cardiologist considered her to have fully recovered from her heart surgery. The Administrative Law Judge properly found that the Complainant's heart surgery did not constitute a disability (although the Respondent did perceive that the Complainant had a disability because of her heart disease and diabetes). Lundstad v. Management Computer Support (LIRC, 12/26/08).

The Complainant's impairment in this case resulted from a work-related injury to his shoulder. An injury, by its very nature, is generally regarded as a temporary condition that will heal over time. The Complainant's medical records, in which his doctor described the condition as a "shoulder strain," contained nothing to suggest that the condition was likely to be permanent. To the contrary, the Complainant testified that his doctor had told him that if he resumed performing all of his former job duties, he would risk permanent damage in the future. This suggests that the injury was not thought to be a permanent one. Thus, the Complainant did not meet his burden of demonstrating that he had a permanent impairment. Reiter v. Waukesha Engine Div. (LIRC, 11/30/07).

There are many types of impairments for which treatments are available. The mere fact that a potential treatment exists is not reason enough to conclude that the impairment is only a temporary one, thus denying the individual the coverage of the Wisconsin Fair Employment Act. It was inappropriate for the Administrative Law Judge to find that the Complainant was not disabled because he could correct his shoulder problem with surgery. Reiter v. Waukesha Engine Div. (LIRC, 11/30/07).

The Complainant's condition could not be considered a temporary condition. The Complainant was first diagnosed with depression and anxiety several years before the complaint in this matter. The Complainant's physician testified that the Complainant continued to have these symptoms at the time of hearing. The only thing temporary about the Complainant's condition was that there was a period of a few months when he needed to adjust his medication to remedy the side effects that medication was having on him. Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06).

A physical impairment must be permanent in order to constitute a disability under the Wisconsin Fair Employment Act. There is nothing in the decision in Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998) which suggests, either implicitly or explicitly, that temporary impairments may be covered disabilities. The Complainant in that case had sleep apnea. Although she was exploring treatments that may have resolved some of her symptoms, the fact that her symptoms might be treated did not render her medical condition a temporary one. There was no indication that the Complainant's sleep apnea would ever go away. Hermann v. Cellu Tissue Holdings (LIRC, 11/14/05).

Disabilities which are merely temporary do not fall within what is intended to be covered by the prohibition on discrimination because of disability. In this case, the Complainant had degenerative arthritis of the left ankle joint, which was a permanent impairment. However, there was no limitation on her capacity to work as a direct result of that impairment. The Complainant had a temporary restriction related to her recent ankle surgery; however, this would no longer be in effect after she completed her recovery from the surgical procedure. Therefore, her impairment did not make achievement unusually difficult for her or limit her capacity to work. Rauls-Hepp v. J.L. French Corp. (LIRC, 09/30/05).

A disability must be permanent in order to be actionable under the Wisconsin Fair Employment Act. Erickson v. LIRC, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398.
The Complainant's alleged disability was "a back impairment due to slow recovery from surgery." This does not constitute a disability within the meaning of the Wisconsin Fair Employment Act. The Complainant's alleged impairment, by its very terms, indicates that it was a temporary condition. Disabilities which are merely temporary do not fall within what is intended to be covered by the Act's prohibition on discrimination because of disability. Falk v. WIPC (LIRC, 12/18/03).

Disabilities which are merely temporary do not fall within what is intended to be covered by the Wisconsin Fair Employment Act's prohibition on discrimination because of disability. Reinke v. Pick 'n Save Mega Food Centers (LIRC, 01/28/00).

A temporary eye irritation caused by exposure to chemicals did not constitute a handicap. Wollenberg v. Webex (LIRC, 11/08/91).

A short-term illness is not considered a handicap. Keith v. AFK Corp. (LIRC, 08/14/81); Terrell v. Pabst Brewing Co. (LIRC, 03/04/81).

A temporary disability incurred while on the job is not considered a handicap. Lockington v. La Crosse Rubber Mills (LIRC, 04/08/81); Pizl v. Waukesha Bearing (LIRC, 03/09/83).

Under some circumstances, a temporary disability may constitute a handicap. Goldberg v. Dep't of Pers. (Wis. Pers. Comm'n, 10/17/80).

123.14 Cases in which it was established that the Complainant was an individual with a disability

[Ed. Note: The Complainants in the following cases were found to be individuals with disabilities. That does not mean that every individual who has one of these conditions meets the legal definition of an individual with a disability. Depending on how the impairment affects the individual, it might or might not be considered a disability. A Complainant must establish through credible and competent evidence how or to what degree their symptoms make achievement unusually difficult in order to establish that they have a disability. Sections 123.3 & 123.11 of this Digest summarize cases regarding the requirements for establishing that an individual has a disability within the meaning of the Wisconsin Fair Employment Act.]

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)	Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).
ALCOHOLISM	Squires v. LIRC, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980). Bachand v. Connecticut Gen. Life, 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981). Connecticut Gen. Life v. DILHR, 86 Wis. 2d 392, 273 N.W.2d 206 (1979).
ALLERGIES	*Wodack v. The Evangelical Lutheran Good Samaritan Soc. (LIRC, 08/05/05).* (perceived disability) Fellie v. Cent. Colony (LIRC. 12/06/77), aff'd sub nom. Fellie v. LIRC (Dane Co. Cir. Ct., 10/20/78).
ANXIETY/PANIC DISORDER	*Castro v. Cnty. Of Milwaukee (LIRC, 12/20/11).* *Kinion v. Portage Comm. Schs. (LIRC, 0919/03).*
ARM CONDITION	*Bartle & Conlon v Jack Links Beef Jerky (LIRC, 02/09/06).* Nord v. City of Milwaukee (LIRC, 10/06/83).
ARTHRITIS	*Cave v Milwaukee Cnty. (LIRC, 01/30/14).*
ASTHMA	Chicago, Milw., St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).
ATTENTION DEFICIT DISORDER (ADD)	Geller v. Heartland Lakeside Joint #3 School Dist. (LIRC, 03/27/09). Stone v. UW System (Wis. Pers. Comm'n, 03/12/03)
BACK CONDITION	*Gilbertson v. Wingra Red-Mix, Inc. (LIRC, 12/10/2020), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct., 10/21/21). (appealed to Court of Appeals and awaiting decision as of 03/10/23.)* Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343. Janz v. Jos. Schlitz Brewing (LIRC, 09/10/81). Broesch v. Fall River Foundry (LIRC, 05/19/81).

Marathon Elec. Mfg. v. LIRC (Thompson) (Marathon Co. Cir. Ct., 07/01/80).
Nesovanovic v. A.C. Spark Plug (LIRC, 04/17/80).
See v. Vollrath (LIRC, 09/11/79).
City of Appleton v. LIRC (Parker) (Dane Co. Cir. Ct., 07/09/79).
Kram v. Milwaukee County (LIRC, 02/23/79).
Bucyrus-Erie v. DILHR, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).
Kropiwka v. Olin (DILHR, 10/23/75), aff'd on other grounds sub nom. Kropiwka v. DILHR, 87 Wis. 2d 709, 275 N.W.2d 881 (1979).
Wippert v. Jaeger Baking (LIRC, 12/09/77).
Coates v. High Ridge Hosp. (LIRC, 11/04/77).
Hoadley v. Olin (DILHR, 10/23/75), aff'd sub nom.
Olin v. DILHR (Dane Co. Cir. Ct., 07/11/77).
Ham v. Int'l Harvester (LIRC, 06/14/77).
Mears v. Western Weighing (DILHR, 09/04/75), aff'd sub nom. Western Weighing v. DILHR (Dane Co. Cir. Ct., 05/09/77).
Karcheski v. Jim's Arctic Locker (DILHR, 10/05/76).
Gill v. Wetzel Bros. (DILHR, 09/20/76).
Stanke v. Int'l Wire (DILHR, 08/18/76).
Johnson v. Milwaukee Police & Fire Comm'n (DILHR, 10/23/75).

BALANCE ISSUES

Staudinger v. Cnty. of Manitowoc (LIRC, 12/11/18).

BIPOLAR DISORDER

Carlson v Wis. Bell, Inc. (LIRC, 02/19/15).
Maeder v Univ. of Wis.-Madison et al (LIRC, 06/28/13)
Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06)

BLINDNESS (see **"Vision Impairments"**)

CANCER

Ninke v. Chrysler Outboard (DILHR, 12/30/75), aff'd sub nom. Chrysler Outboard v. DILHR (Dane Co. Cir. Ct., 11/01/76).
Esch v. Milwaukee County (DILHR, 09/06/74).

CEREBRAL PALSY

Tews v. Public Service Comm'n (Wis. Pers. Comm'n, 06/29/90).

DEAFNESS (see **"Hearing Impairments"**)

DEPRESSION

Castro v Cnty of Milwaukee Sheriff's Dep't (LIRC, 12/20/11) (depression, anxiety, and post traumatic stress disorder)
Kinion v Portage Comm. Schs. (LIRC, 09/19/03).

DIABETES	*Lehr v. The Salvation Army (LIRC, 04/16/13).* *Goldsworthy v. Elite Marble Co. (LIRC, 10/15/04.)* Tofte v. DOT (LIRC, 10/03/77). Carter v. Wis. Elec. (LIRC, 12/20/76). Seim & Hammer v. Fraser Shipyards (DILHR, 12/18/75), aff'd sub nom. Fraser Shipyards v. DILHR, (Dane Co. Cir. Ct., 11/29/76).
DYSLEXIA	Horner v. Village Square Apts. (LIRC, 05/21/91), aff'd Horner v. LIRC (Dane Co. Cir. Ct., 10/01/1992).
ECZEMA (see **"Skin Conditions"**)	
EPILEPSY	*Ewerdt v. Bruswick Corp. (LIRC, 04/29/20).* *Alt v Meriter Hosp., Inc. (LIRC, 03/27/96).* Samens v. LIRC, 117 Wis. 2d 646, 345 N.W.2d 432 (1984). Reddick v. Snap-On-Tools (LIRC, 09/02/82). Nordstrom v. LIRC (City of West Allis) (Milwaukee Co. Cir. Ct., 09/24/80). Alt v. DOA (LIRC, 05/23/80). Chicago & N.W. R.R. v. LIRC (Pritzl), 98 Wis. 2d 592, 297 N.W.2d 819 (1980).
EYE SIGHT (see **"Vision Impairments"**)	
FIBROMYALGIA	Ford v. Lynn's Hallmark (LIRC, 06/27/05).
HAND CONDITION	Boynton Cab v. DILHR, 96 Wis. 2d 396, 291 N.W.2d 850 (1980). Duesterbeck v. Pinkerton's (DILHR, 06/14/77), aff'd sub nom. Pinkerton's v. DILHR (Dane Co. Cir. Ct., 08/14/78).
HEADACHES	Chicago, Milw., St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).
HEARING IMPAIRMENTS	*Parker v Dane Cnty. (LIRC, 11/10/03).* Willett v. Delco Electronics (LIRC, 01/17/90). Loy v. Copps Dept. Store (LIRC, 10/15/82). Martin v. Consolidated Papers (LIRC, 02/22/79). Buyatt v. C.S. Transport (LIRC, 07/25/77). Karcheski v. Jim's Arctic Locker (DILHR, 10/05/76).
HEART CONDITION	Pokrass v. LIRC (Applied Power) (Waukesha Co. Cir. Ct., 08/20/81). Colovic v. Wis. Elec. (LIRC, 08/30/78). Chunat v. Olin (LIRC, 11/04/77). Adams v. Soo Line R.R. (LIRC, 06/23/77). Eggers v. Soo Line R.R. (DILHR, 12/19/75), rev'd on other grounds sub nom. Soo Line R.R. v. DILHR (Dane Co. Cir. Ct., 02/25/77).

	Berndt v. City of Wis. Rapids (DILHR, 07/03/76), aff'd sub nom. City of Wis. Rapids v. DILHR (Wood Co. Cir. Ct., 07/08/76). Lienhardt v. Pacon (DILHR, 01/21/76).
HERNIAS	Stevens v. Nat'l Cash Register (LIRC, 08/30/77).
HERNIATED DISC	Fields v. Cardinal TG Co. (LIRC, 02/16/01).
HYPERTENSION (high blood pressure)	Green v. Bucyrus-Erie (LIRC, 11/23/83). Lade v. Milwaukee County (LIRC, 10/05/77), aff'd sub nom. Milwaukee County v. LIRC (Dane Co. Cir. Ct., 09/07/78). Janssen v. Milwaukee County (DILHR, 10/12/76, aff'd sub nom. Milwaukee County v. DILHR (Dane Co. Cir. Ct., 10/20/77). Carter v. Wis. Elec. (DILHR, 12/20/76).
KIDNEY CONDITION	Lowenberg v. LIRC (UW-Parkside) (Ct. App., Dist. II, unpublished opinion, 08/26/83). Dairy Equip. v. DILHR, 95 Wis. 2d 319, 240 N.W. 330 (1980). Von Haden v. Univ. Meats (LIRC, 10/23/78).
KNEE CONDITION	Novotny v. DOT (LIRC, 07/30/80), dismissed on other grounds sub nom. Novotny v. LIRC, (Waukesha Co. Cir. Ct., 01/28/82). Chicago & N.W. R.R. v. LIRC (Fish), (Ct. App., Dist. I, unpublished opinion, 02/13/81). Burgner v. LIRC (Fraser Shipyards), (Ct. App., Dist. III, opinion, 08/26/80).
MENTAL IMPAIRMENT	Stats v. County of Sawyer (LIRC, 10/27/97). Jacobus v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 01/11/93). Jacobus v. UW-Madison (Wis. Pers. Comm'n, 03/19/92). Norris v. DILHR, 155 Wis. 2d 337, 455 N.W.2d 655 (Ct. App. 1990). Fruewald v. City of Milwaukee (LIRC, 12/18/81). Broeske v. American Can (LIRC, 02/16/79).
MIGRAINE HEADACHES	*Satorius v. Wis. Dep't of Corr. (LIRC, 01/31/17).* Stelloh v. Wauwatosa Savings Bank (LIRC, 06/19/12). Geen v. Stoughton Trailers (LIRC, 09/11/03).
MULTIPLE SCLEROSIS	Cave v. Cnty. of Milwaukee (LIRC, 1/30/14).
NARCOLEPSY	Salzer v. Briggs & Stratton (LIRC 07/26/96). City of River Falls v. LIRC (Pierce Co. Cir. Ct., 01/07/86).
NECK CONDITION	Eberhart v. Pepsi-Cola (DILHR, 11/03/76).

NOSE CONDITION	Milwaukee Web Pressman's Union v. Journal (DILHR, 11/24/75), aff'd sub nom. Journal v. DILHR (Dane Co. Cir. Ct., 11/01/76).
OBSESSIVE-COMPULSIVE DISORDER	Wal-Mart Stores v. LIRC, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633.
PARAPLEGIA	Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.
PSYCHONEUROSIS WITH DEPRESSION	Colloton v. Prudential (DILHR, 03/31/75).
RHEUMATOID ARTHRITIS	Cave v. Cnty. of Milwaukee (LIRC, 1/30/14). Hammersley v. Packerland Packing (LIRC, 04/14/77). Stark v. Westmoreland Manor (DILHR, 08/06/76). Mitchell v. J.C. Penney (DILHR, 08/12/75), aff'd sub nom. J.C. Penney v. DILHR (Dane Co. Cir. Ct., 03/22/76).
SEIZURES	Kirch v. LIRC (Germania Dairy) (Iowa Co. Cir. Ct., 07/12/83).
SHOULDER CONDITION	DHSS v. LIRC (Johns) (Dane Co. Cir. Ct., 11/28/79).
SKIN CONDITION	Mercury Marine v. DILHR (Poeschl), (Ct. App., Dist IV, unpublished opinion, 10/04/83).
SLEEP APNEA	Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App., 1998) Tews v. Pub. Serv. Comm'n (Wis. Pers. Comm'n, 06/29/90).
SPASMS	MacWhyte v. LIRC (Hix) (Kenosha Co. Cir. Ct., 07/03/79).
STUTTERING	Johnson v. Milwaukee Fire & Police Comm'n (DILHR, 11/18/76).
TRAUMATIC BRAIN INJURY	*Oldenburg v. Triangle Tool Corp. (LIRC, 02/20/18), aff'd sub. nom. Triangle Tool Corp. v. LIRC and Oldenburg (Milwaukee Co. Cir. Ct. 02/18/19).*
TRANSIENT ISCHEMIC ATTACK ("TIA")	Purnell v. Wilderness Walk (LIRC, 09/20/95), aff'd sub nom. Purnell v. LIRC, (Ct. App., Dist. III, unpublished decision, 01/14/97).
TUBERCULOSIS	Anderson v. Dep't of Agric. (LIRC, 09/29/77) aff'd sub nom. Dep't of Agric. v. LIRC (Dane Co. Cir. Ct., 05/25/78).
UVEITIS	Williams v. All Saints Healthcare Sys. (LIRC, 08/14/09).

VISION IMPAIRMENTS	Grinkey v. Brown County Sheriff's Dep't (LIRC, 02/08/88). Brown County v. LIRC, 124 Wis. 2d 560, 369 N.W.2d (1985). Frito-Lay v. LIRC, 101 Wis. 2d 169, 303 N.W.2d 668 (1981). Krueger v. A.C. Spark Plug (LIRC, 10/24/79), dismissed on other grounds, (LIRC, 06/12/80). Walther v. County of Waukesha (LIRC, 03/05/80). City of Madison Police & Fire Comm'n v. LIRC (Scott) (Dane Co. Cir. Ct., 10/22/79). Fischer v. Alma Center Dist. No. 3 (DILHR, 11/01/76), rev'd on other grounds sub nom. Fischer v. DILHR, (Dane Co. Cir. Ct., 02/14/79). Teggatz v. DHSS (LIRC 10/03/77), rev'd on other grounds sub nom. Teggatz v. LIRC (Dane Co. Cir. Ct., 08/18/78). Doetze v. Chicago & N.W. Transp. (DILHR, 12/13/76), aff'd sub nom. Chicago & N.W. Transp. v. DILH (Dane Co. Cir. Ct. (05/12/78). Graf v. Babcock & Wilcox (DILHR, 12/14/76). Freiberg v. Wis. Elec. (DILHR, 10/01/76). Heath v. Briggs & Stratton (DILHR 04/14/76). Anderson v. Pinkerton's (DILHR, 07/17/73).
WRIST CONDITION	Bullock v. Milwaukee County (LIRC, 10/15/82).

123.15 Cases in which certain conditions were found not to be disabilities

[Ed. Note: The Complainants in the following cases failed to establish that they were individuals with disabilities within the meaning of the Wisconsin Fair Employment Act. This does not mean that other individuals with these conditions may not be able to establish that they are persons with a disability within the meaning of the Act. A Complainant must establish through credible and competent evidence how or to what degree their symptoms make achievement unusually difficult in order to establish that they have a disability. Sections 123.3 & 123.11 of this Digest summarize cases regarding the requirements for establishing that an individual has a disability within the meaning of the Wisconsin Fair Employment Act.]

ALLERGIES	*Fair v Basic Metals, Inc. (LIRC, 12/21/06).* *Gramza v Kwik Trip, Inc. (LIRC, 02/20/03).*
ATRIAL FIBRILLATION	*Sikorski v Amtek Gears, Inc. et al (LIRC, 12/10/12).*
ASTHMA	*Gruss v. County of Dane (LIRC, 08/13/2019).* Doepke-Kline v. LIRC, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605.
CANCER	*Polinski v Hypro, Inc. (LIRC, 08/08/15).* *Kaye v. City of Milwaukee (LIRC, 09/30/08).*
CATARACTS	Flores v. Amcast Corp. (LIRC, 10/13/94).
CERTAIN ARM CONDITIONS	*Kaye v City of Milwaukee (LIRC, 09/30/08).* Parrish v. DHSS (Wis. Pers. Comm'n, 10/23/90).

BROKEN RIBS	Pierson v. A & E Mfg. (LIRC, 05/03/79).
BRONCHITIS	*Doepke-Kline v. LIRC, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605.* Terrell v. Pabst Brewing (LIRC, 03/04/81).
CHIPPED ELBOW	Pizl v. Waukesha Bearing (LIRC, 03/09/83).
CONGESTIVE HEART FAILURE	Kanter v. Ariens Co. (LIRC, 09/23/05).
DEGENERATIVE/RHEUMATOID ARTHRITIS	*Valdes v Harley Davidson Motor Co., Inc. (LIRC, 10/27/06).* Rauls-Hepp v. J.L. French Corp. (LIRC, 09/30/05).
DIABETES	*Alamilla v City of Milwaukee (LIRC, 06/28/13).* *Seil v. Dairy Farmers of America (LIRC, 08/26/05).* *Ford v. Lynn's Hallmark, Inc. (LIRC, 06/27/05).* Flores v. Amcast Corp. (LIRC, 10/13/94).
DEPRESSION	*Harris v Charter Comm., LLC (LIRC 03/13/20).* *Engelbert v. Humana, Inc. (LIRC, 09/28/10).* *Valdes v Harley Davidson Motor Co., Inc. (LIRC, 10/27/06).* *Sobrofski v Taco Bell of America, Inc. (LIRC, 05/27/05).*
FIBROMYALGIA	*Berton-Train v Woodman's (LIRC, 05/31/17). (fibromyalgia and other claimed impairments)* *Kubiak v. Child & Family Consultants of Green Bay (LIRC, 01/19/07).*
FOOT CONDITION	*Burge-Milner v Dep't of Veterans Affairs (LIRC, 11/11/15).* *Smith v Actuant Corp. (LIRC, 07/27/07).* *Lester v. Compass Group USA (LIRC, 03/22/05).*
GESTATIONAL DIABETES	Goodrich v. Duro Paper Bag Mfg. Co. (LIRC, 02/14/92).
HAND INJURY	Lockington v. La Crosse Rubber Mills (LIRC, 04/08/81).
HEARING IMPAIRMENTS	Esau v. Interconnect Communications (LIRC, 04/30/12). *Gouge v. Randy's Family Restaurant (LIRC, 06/27/08).* *Bader v. Stokely USA, Inc. (LIRC, 04/23/01).*
HEIGHT AND WEIGHT	Elmhorst v. Sch. Dist. of Neillsville (LIRC, 10/31/05). Alexander v. Aldridge, Inc. (LIRC, 10/21/91). AMC v. LIRC (Basile), 119 Wis. 2d 706, 350 N.W.2d 120 (1984). Lade v. Milwaukee County (LIRC, 10/05/77), aff'd on other grounds sub nom. Milwaukee County v. LIRC (Dane Co. Cir. Ct., 09/07/78).

MIGRAINE HEADACHES	*Berton-Train v Woodman's (LIRC, 05/31/17) (migraines and other impairments).* Besaw v. Winnebago Co. Landfill (LIRC, 11/30/12). *Fields v. State of Wis. UW Hosp. & Clinics Auth. (LIRC, 02/12/07).* Wucherpfennig v. Personal Dev. Ctr. (LIRC, 06/29/06).
MULTIPLE SCLEROSIS	Draeger v. Kliss Quick Serv. (LIRC, 09/30/05).
MUSCULOSKELETAL STRAIN OR SPRAIN	Reinke v. Pick 'n Save Food Centers (LIRC, 01/28/00). Plizka v. A.O. Smith (DILHR, 08/09/75). Rick v. Fore Way Express (LIRC, 07/25/85).
OCCASIONAL HEADACHES, EARACHES and BREATHING DIFFICULTIES	Rasmussen v. DHSS (Wis. Pers. Comm'n, 12/29/82).
PANIC DISORDERS	*Ryback v. Wis. Phys. Serv. (LIRC, 05/31/13).* *Rybicki v DJ Convenience, LLC (LIRC, 8/20/10).* Schultz v. CNH Capital Corp. (LIRC, 05/08/06). *Smith v. Aurora Health Care (LIRC, 08/25/00.)*
PEPTIC SYNDROME	Murphy v. Roundy's (LIRC, 10/21/93).
PNEUMONIA	Keith v. AFK (LIRC, 08/14/81).
PREGNANCY	Goodrich v. Duro Paper Bag Mfg. Co. (LIRC, 02/14/92). Kimberly-Clark Corp. v. LIRC, 95 Wis. 2d 558, 291 N.W.2d 584 (Ct. App. 1980).
PROBLEMATICAL PERSONALITY CHARACTERISTICS	Jacobsen v. DHSS (Wis. Pers. Comm'n, 10/16/92).
VENEREAL DISEASE	Johnson v. Dutchland Dairy (LIRC, 10/11/79).

123.16 Preemption by Worker's Compensation Act

(See Section 117.6)

123.19 Miscellaneous

Although the ADA contains a provision expressly prohibiting discrimination against an individual with a disability based on his or her relationship with a disabled person ("association discrimination"), the WFEA contains no analogous provision. The Complainant's claim of disability discrimination because of her association with a disabled individual does not state a cause of action under the WFEA. Bach v. Easter Seals Sw. Wis. (LIRC, 10/09/14).

The definition of handicap utilized by the Division of Vocational Rehabilitation is not identical to the definition of handicap in the Wisconsin Fair Employment Act. Determinations by the DVR as to whether a person is handicapped are not binding in hearings on complaints brought under the Wisconsin Fair Employment Act. Jacobus v. UW-Madison (Wis. Pers. Comm'n, 03/19/92).

123.2 Particular disabilities

123.21 Acquired immune deficiency syndrome (AIDS)

A school district violated sec. 111.322(2), Stats., by publishing a policy barring individuals with Acquired Immune Deficiency Syndrome (AIDS) from attendance at-work. AIDS is a handicap within the meaning of the Wisconsin Fair Employment Act. The school district failed to establish that there was a reasonable probability that all individuals with AIDS or ARC would pose a risk of transmission of AIDS in the classroom. The school district also failed to establish that an individual with AIDS in the classroom would pose a risk to the health of that individual. Therefore, the school district was ordered to rescind its policy. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 08/11/89), aff'd sub nom. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

123.22 Alcoholism, drug addiction

The perceived disability of alcoholism requires that an employer perceive an individual to have a condition that would constitute medically assessed alcoholism if it did exist. A perception of an undefined drinking problem is not sufficient. Here, the Respondent did not perceive the Complainant to be disabled where there was no evidence that any board member perceived the Complainant to be dependent on alcohol in a clinical sense or perceived his drinking to be non-volitional. Kostner v. Cochrane Coop. Tel. Co. (LIRC, 11/30/15).

The fact that the Respondent required the Complainant to undergo a drug test fails to establish that it perceived him as having a physical or mental impairment. The Respondent had a substance abuse policy and required the Complainant to undergo a drug test for cocaine after learning of his arrest for possession of cocaine. A Complainant cannot prove a "perceived" substance problem adequate to meet the statutory test of a disability unless there is evidence that the Respondent had actually been provided (and accepted) information that what the person was suffering from was medically assessed as non-volitional and, thus, within the standard for a disabling substance abuse problem. Mork v. Archer Daniels Midland (LIRC, 03/31/10).

A positive drug test alone is insufficient to establish that the Respondent perceived the Complainant as being an individual with a disability. A positive drug test indicating a use of drugs by an individual fails to provide the necessary level of diagnosis as to whether the individual's use of drugs had progressed to the point that such use had become non-volitional. To constitute a disability as defined by the Wisconsin Fair Employment Act, the individual's drug use must have progressed to the point that such use had become non-volitional. This is a determination which requires the expert medical opinion of a physician. A Complainant cannot prove a "perceived" substance abuse problem adequate to make the statutory test unless there is direct evidence that the agents of the Respondent alleged to have had the "perception" that there was such a problem had actually been provided information that what the person was suffering from was medically assessed as non-volitional and potentially within the legal standard for a disabling substance abuse problem. The absence of evidence that the Respondent had information that the Complainant's use of drugs had been medically diagnosed as non-volitional precludes any basis for concluding that the Respondent perceived her as having a disability. Ranson v. Milwaukee Ctr. for Independence (LIRC, 01/29/09).

A drinking or alcohol abuse problem may or may not be a disability, depending on whether it has progressed to the state that it is non-volitional. Establishing that such a non-volitional condition exists requires that the Complainant introduce competent, expert medical evidence to that effect. In this case, the Complainant presented no admissible evidence to establish that he suffered from the disability of alcoholism. The Administrative Law Judge properly refused to receive medical records relating to an alcohol and drug treatment program the Complainant went through at a hospital. The certification for those records stated that the records consisted of eighteen pages, while they were actually nineteen pages, thus calling into question the reliability of these records in their entirety because they was no way of knowing which page of those documents was not part of the originally certified documents. Even had these records been received at the hearing, there was no medical documentation in the records that the Complainant's drinking problem had progressed to the state that it was non-volitional and that he, thus, suffered from the disability of alcoholism. The consultation report of the physician who examined the Complainant at the beginning of his treatment listed as his impression, "Alcohol abuse with possible early alcohol dependence." The physician's final diagnosis, listed on the Complainant's discharge summary, was simply, "alcohol abuse." Nothing in those reports in any way indicated that the Complainant's drinking or alcohol abuse problem had progressed to the state that it was non-volitional. Hoffman v. City of Fond du Lac (LIRC, 11/21/05).

The Complainant did not establish that the Respondent perceived him as having the disability of alcoholism. The Complainant never provided the Respondent with a definitive report from a health professional about the nature of his substance abuse problem, for which he had been using sick leave. The Complainant could not prove a "perceived" substance problem unless there was direct evidence that the Respondent had actually been provided with information that what he was suffering from was medically assessed as non-volitional and thus potentially within the legal standard for a disabling substance abuse problem. Hoffman v. City of Fond du Lac (LIRC, 11/21/05).

The Complainant did not show that she had an actual disability where her counselor testified that her drug use had never reached the level of addiction or dependency or that her use of an illegal drug had otherwise been non-volitional. Nor did the Complainant present evidence that would create reason to believe that the Respondent terminated her employment because it perceived her as having a disability due to illegal drug use. An outside company had performed a drug test which concluded that the Complainant tested positive for methamphetamines. That company sent a report to the Respondent with the results of its test. Consistent with the express terms of a return-to-work agreement that the Complainant had with the company that a positive drug test would be considered grounds for immediate termination, the Respondent terminated the Complainant's employment. This did not amount to disability discrimination. Sevals v. Luther Midelfort Clinic (LIRC, 07/16/04).

The fact that the Respondent was aware that the Complainant had been arrested and convicted of driving under the influence of alcohol, and that he had spent three days undergoing inpatient treatment relating to his use of alcohol is not sufficient to establish either that the Complainant was disabled, or that the Respondent perceived him to be disabled. A drinking or alcohol abuse problem may or may not be a disability, depending on whether it has progressed to the state that it is non-volitional. Establishing that such a non-volitional condition exists requires that the Complainant introduce competent, expert medical evidence to this effect. Schleicher v. County of Dodge (LIRC, 10/17/03).

The employer knew that the Complainant had problems with cocaine or alcohol, or both, and that he had received treatment for these problems. However, the Respondent was not provided with a definitive report from a qualified practitioner diagnosing the Complainant with a non-volitional substance abuse problem, or drug addiction. The absence of such a report establishing that the Complainant's substance abuse problem rose to the level of a disability establishes that the Complainant neither has, nor was

perceived by the employer as having, a non-volitional substance abuse problem or a substance addiction, or that the employer perceived him as having a history of such a condition. Bailey v. St. Michael Hosp. (LIRC, 06/30/00).

The Complainant was discharged because of a positive drug test. The Respondent had no reason to believe that the Complainant was under the influence of drugs or that he possessed drugs while on the job. Further, the Respondent's human resources manager believed the Complainant when he denied engaging in illegal drug use. Nevertheless, the Complainant was discharged. The Respondent's decision to discharge the Complainant in blind adherence to its drug policy was both unreasonable and counterproductive. However, it did not amount to disability discrimination. The record did not establish that the Respondent regarded the Complainant as having a disabling substance abuse problem. Xiong v. Hoffers, Inc. (LIRC, 05/31/00), aff'd sub nom. Xiong v. LIRC (Marathon Co. Cir. Ct., 12/01/00).

To label or perceive someone as an alcoholic is a very serious judgment and requires behavior on the individual's part which reveals that the individual drinks consistently and frequently. The Complainant's two OWI convictions and the instance in which he called in sick and then appeared at the Respondent's premises under the influence of alcohol may have led the Respondent to believe that he had a drinking problem. However, there was no evidence to suggest that the Respondent perceived the Complainant as suffering from the disease of alcoholism. The Respondent's actions in referring the Complainant to counseling and requiring that he abstain from the use of alcohol on or off duty merely established that the Respondent believed the Complainant had a drinking problem. These actions do not warrant a conclusion hat the Respondent actually perceived the Complainant as having the disease of alcoholism, such as would render him "an individual with a disability," within the meaning of the Wisconsin Fair Employment Act. Chilikas v. Con-way Central Express (LIRC, 04/19/00).

The evidence at hearing did not establish that the Complainant was an alcoholic and, thus, handicapped within the meaning of the Wisconsin Fair Employment Act since no expert medical opinion by a physician was presented. The only evidence in the record regarding alcoholism was assessment reports from Department of Human Services personnel showing that the Complainant suffered from "alcohol abuse," and "suspected alcohol dependency." Hansen v. AKZO (LIRC, 03/23/94).

A Complainant failed to establish that she suffered from the handicap of alcoholism where she did not provide any direct expert medical evidence that she had been diagnosed as having alcoholism. A letter from a psychiatrist to the Respondent indicating that the Complainant had been involuntarily admitted to inpatient AODA treatment was insufficient. The commitment order discloses that the allegations of the petition were stipulated to rather than having been proven by evidence offered in a hearing. The fact that the party prosecuting the commitment action was willing to stipulate that the Complainant was an alcoholic is not an adequate substitute for competent expert proof that she was. Geske v. H.C. Prange Co. (LIRC, 12/09/93).

Whether a drinking problem is or is not a handicap depends on whether it has progressed to the stage that it is "non-volitional." This is a subjective point which must be determined by a medical expert. It is difficult to apply the "perceived handicap" theory in substance abuse cases because the nature of the problem as it appears to lay persons witnessing it may be the same whether it is simply a "drinking problem," or "non-volitional alcoholism." A Complainant cannot prove a "perceived" substance abuse problem adequate to meet the statutory test definition of perceived handicap unless there is direct evidence that the agents of the Respondent alleged to have had the "perception" that there was such a problem had actually been provided with (and accepted), information that what the person was suffering from was medically assessed as non-volitional and, thus, potentially within the Connecticut General standard for a handicapping substance abuse problem. Geske v. H.C. Prange Co. (LIRC, 12/09/93).

There was no probable cause to believe that the Complainant was unlawfully discharged because of his alcoholism. The Complainant's drinking had clearly reached the point where it was affecting his work performance and was, thus, substantially related to his ability to adequately undertake his job-related responsibilities. The Respondent had attempted to accommodate the Complainant's condition by, among other things, counseling him on alcohol problems. Nelson v. Massey Ferguson (LIRC, 02/02/89).

The Respondent had attempted to accommodate the Complainant's alcohol problem by, among other things, counseling him and relieving him from some responsibilities. The Respondent would have employed further accommodation but for the Complainant's denial of having any problem. Nelson v. Massey Ferguson (LIRC, 02/02/89).

Although the Complainant testified that he had gone to a rehabilitation hospital for treatment and had been diagnosed as an alcoholic, the hearing examiner was entitled to give no weight to this testimony, since no expert testimony was received on the subject. Alcoholism is a disease, the diagnosis of which is matter of expert medical opinion proved by a physician and not a layman. Where the Complainant additionally failed to prove that the Respondent perceived him as being an alcoholic, or believed he had a record of alcoholism, the Complainant failed to prove that he was handicapped. Schaafs v. Schultz Sav-O-Stores (LIRC, 11/06/86).

Where the Respondent was aware that the Complainant suffered from alcoholism, and that he had past convictions for drunk driving, but never took any kind of disciplinary or other adverse action against him based on this knowledge, the Respondent did not violate the Act when it eventually terminated the Complainant. The evidence showed that the termination was based on the Respondent's belief that the Complainant was under the influence of alcohol while at work on the day of the discharge. Deltour v. Gilbert Paper Co. (LIRC, 06/20/86).

A rule against drunkenness does not have a discriminatory impact on alcoholics because recovering alcoholics are able to refrain from drinking. Even if it did, however, the rule is related to the legitimate business purpose of job performance. Mittlestadt v. LIRC (City of Appleton) (Outagamie Co. Cir. Ct., 11/28/85).

It was not discrimination to discharge an alcoholic employee who failed to report for work on two consecutive days because of his alcoholism. Benson v. Bumper and Auto of Milwaukee (LIRC, 01/06/84), aff'd sub nom. Benson v. LIRC (Milwaukee Co. Cir. Ct., 09/19/84).

It was not discrimination to discharge an alcoholic employee who came to work under the influence of alcohol and who was unable to perform his duties. Squires v. LIRC, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980).

An employee who might seek treatment for his alcoholism was discriminated against when his employer discharged him after learning of the treatment, and when the employer failed to establish its claims of unsatisfactory performance. Bachand v. Connecticut Gen. Life (LIRC, 06/20/80).

Since alcoholism is a disease, its diagnosis is a matter of expert medical opinion by a physician and not by a layperson. Connecticut Gen. Life v. DILHR, 86 Wis. 2d 393, 273 N.W.2d 206 (1979).

123.23 Back problems, lifting restrictions
[Also see sec. 123.13 re: Permanent vs temporary conditions]

The Complainant established that she had a disability where she proved that she had damage to a normal bodily condition (i.e., back pain related to degenerative disc problems) and she was limited in her capacity to work in her job (i.e., she was limited in the amount of static standing and sitting she could endure before experiencing pain, she could not work the employer's standard 12-hour shifts, and she could no longer perform some job functions). The Respondent failed to establish that no reasonable accommodations could be made to enable the Complainant to perform her job, or that it would experience hardship in making such accommodations. Clearly, a reasonable accommodation was available, since the Respondent had accommodated the Complainant working 8-hour shifts (rather than the 12-shifts required of other employees) for several months without any problems. Although the Respondent hypothesized that certain problems could arise in the future, it presented no evidence that any ever did. The Respondent did not establish that accommodating the Complainant's disability would have been a hardship. Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.

The Respondent's claim that the Complainant, who had a back ailment, was transferred to another department because he was the least qualified employee in the department was a pretext for handicap discrimination. Roberson v. Cudahy Canning (LIRC, 05/30/90).

In a hearing on the issue of probable cause, Complainant met his burden of establishing that he had a real or perceived handicap by showing that Respondent had concluded that the Complainant's back condition necessitated a 15-20 pound lifting restriction, that he would be unable to perform the responsibilities assigned to the position for which he applied because of that restriction, and that the Respondent, as a result, decided not to employ the Complainant in the position he desired. Lauri v. DHSS (Wis. Pers. Comm'n, 11/03/88).

It was discrimination to refuse to rehire an employee with a hernia who had a weight lifting condition restriction of twenty pounds at the time of his termination, and a restriction of sixty pounds after his surgery, when the position he wanted to be rehired to did not involve lifting more than sixty pounds. Kappel v. Consolidated Papers (LIRC, 12/18/84).

The employer failed to show that a thirty-five-pound lifting restriction, imposed by its physician on a job applicant who had had a laminectomy (back surgery), was justified as necessary to avoid future risk or re-injury to the back. Janz v. Joseph Schlitz Brewing (LIRC, 09/10/81).

There was no discrimination in discharging a truck laborer who had spondylitis and spondylolisthesis of the lumbar spine, where the only medical evidence presented showed that performance of the duties of a truck laborer would be hazardous to the employee's future health. Nadolski v. Chicago & N.W. Transport Co. (LIRC, 08/29/80).

It was discrimination to refuse to hire an applicant with a 10 percent permanent disability to his right shoulder and a 100-pound lifting restriction, where the refusal was based on conjecture and not reasonable probability. DHSS v. LIRC (Johns) (Dane Co. Cir. Ct., 11/28/79).

It was not discrimination to discharge an employee where he sustained a back injury and was unable to perform a job that required lifting 100-pound bags. Kropiwka v. DILHR (Olin) (Dane Co. Cir. Ct., 11/15/76).

123.24 Epilepsy, seizure disorders

There was reason to believe that the Respondent violated the Wisconsin Fair Employment Act by placing the Complainant, an epileptic, on an involuntary disability leave of absence where the Respondent could

not establish that there was a reasonable probability that the Complainant's seizures posed a risk of injury to herself or others. Although the Respondent demonstrated that the Complainant, a food service worker, worked near hot equipment, it did not present reliable evidence to establish to any reasonable probability that the Complainant could potentially sustain a burn during the course of a seizure. Moreover, the fact that the Complainant had performed the same job duties for fourteen years without sustaining any significant injury, in spite of the fact she experienced numerous seizures during this time, suggested that the Respondent's concerns were not legitimate. Alt v. Meriter Hosp. (LIRC, 03/27/96).

LIRC correctly concluded that the Complainant's epileptic condition, which had involved four grand mal seizures while on the job, sometimes causing injury, was reasonably related to his ability to adequately perform the duties of his job so that it was not discrimination for the Respondent to transfer the Complainant to a different position. Reddick v. LIRC (Kenosha Co. Cir. Ct., 03/12/86).

An employer did not discriminate in dismissing an employee from a position as traveling sales manager after the employee suffered a seizure and was ordered by his physician to refrain from driving for nine months. Kirch v. LIRC (Germania Dairy Automation), (Ct. App., Dist. IV, unpublished opinion, 08/28/84).

An employee with grand mal epilepsy whose medication had not totally controlled his seizures and who had been at work during a seizure could be transferred away from the employer's drill press operation. A doctor's recommendation that the employee could safely continue in his job was not conclusive because the doctor had no knowledge of the operation of a drill press and had never visited the employer's plant. Reddick v. Snap-On-Tools (LIRC, 09/02/82).

The employer could not prove that its rule against hiring epileptics for welder positions was justified, where it failed to show that it was reasonably probable that the particular applicant would suffer a future seizure. Chicago & N.W. R.R. v. LIRC (Pritzl), 98 Wis. 2d 592, 297 N.W.2d 819 (1980).

It was not discriminatory to discharge an arborist after he suffered several epileptic seizures, injuring himself and city property. Nordstrom v. LIRC (City of West Allis) (Milwaukee Co. Cir. Ct., 09/24/80).

123.25 Mental impairments

The fact that the Complainant had an emotional meltdown in the presence of the Respondent on one occasion three years prior to her discharge does not warrant a conclusion that the Respondent perceived the Complainant as having a mental disability. Berton-Train v. Woodman's (LIRC, 05/31/2017).

At hearing, the Complainant established that he was an individual with a disability. The Complainant presented competent medical evidence from his psychiatrist and psychologist identifying mental disorders, their chronic nature, and the ways in which the disorders affected the Complainant over the years. Those effects included, among other things, debilitating sadness, lack of energy, excessive sleeping, failure to perform certain basic self-care tasks, concentration difficulties, and the resultant inability to work. In addition, on several occasions, the Complainant had to take weeks of medical leave because of his impairment. He also intermittently experienced substantial limitations in his ability to carry on major life activities of thinking, sleeping, self-care and maintaining personal relationships. Carlson v. Wis. Bell, Inc. d/b/a AT&T (LIRC, 02/19/15), remanded sub nom. Carlson v. LIRC (Milwaukee Co. Cir. Ct. 01/08/16), reversed and remanded with instructions, Wis. Bell, Inc. v. LIRC, 2017 WI App 24, 375 Wis. 2d 293, 895 N.W.2d 57, reversed Wis. Bell v. LIRC, 2018 WI 76, 382 Wis. 2d 624, 914 N.W.2d 1.

If an employee is discharged because of bad behavior which was caused by a disability, the discharge is, in legal effect, because of that disability. Whether an individual's bad behavior is caused by a mental

disorder from which the individual suffers, though, is a question of medical/scientific fact on which expert testimony is required. It cannot simply be presumed that every act of bad behavior engaged in by a person who has a mental disorder, is caused by that mental disorder; it may or may not have been. The question is to be resolved by weighing the expert evidence in the record on that question. Maeder v. UW-Madison, UW Police (LIRC, 06/28/13).

Medical documentation of the Complainant's panic and anxiety disorder did not show that it caused the degree of limitation necessary to establish a disability under the WFEA. The medical opinion offered in evidence was that the Complainant maintained the ability to perform her job. Lay testimony concerning the Complainant's functioning on the job did not serve to prove disability; laypersons are not competent to connect observations of a Complainant's conduct to a particular mental health condition. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633. Even so, lay opinion, consistent with medical opinion, was that the Complainant maintained the ability to perform her job. Ryback v. Wis. Physicians Serv. (LIRC, 05/31/13).

The Complainant did not establish that the Respondent perceived him to be mentally impaired. The record simply showed that the Respondent was concerned about whether the Complainant posed a safety threat to others or himself and referred the Complainant to its employee assistance program because the Complainant had made inquiries about serial killers and had commented about "going postal," and because it had received a call from the sheriff's office relating the Complainant's parents' concern about his well-being. The evidence failed to show that the Respondent perceived the Complainant as having a mental impairment of chronic or indefinite duration that substantially limited a major life activity or limited his capacity to work. An EAP referral alone is not evidence that the Respondent perceived that the Complainant had a mental disability. Mork v. Archer Daniels Midland (LIRC, 03/31/10).

The Complainant was an individual with a disability within the meaning of the Wisconsin Fair Employment Act. The Complainant's bipolar II disorder placed a substantial limitation on life's normal functions of sleeping, getting out of bed in the morning, thinking and even caring for himself. The disorder also limited his capacity to work as a sales associate since at times it limited his ability to even get to work. The Complainant's condition could not be considered a temporary condition. The Complainant was first diagnosed with depression and anxiety several years before the complaint in this matter. The Complainant's physician testified that the Complainant continued to have these symptoms at the time of hearing. The only thing temporary about the Complainant's condition was that there was a period of a few months when he needed to adjust his medication to remedy the side effects that medication was having on him. Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06).

The fact that the Respondent's managers were aware that the Complainant was seeing a psychiatrist and taking prescription medications did not establish that the Respondent perceived the Complainant to be disabled. Medical treatment is sought, and medications are prescribed, for conditions which are not disabling as well as for conditions which are disabling. Schultz v. CNH Capital Corp. (LIRC, 05/08/06).

The Complainant contended that her comment to her supervisor that she was going to take a "mental health day" should have put him on notice that she had a mental disability. However, given that this is a phrase used in common vernacular by both disabled and non-disabled employees to refer to a day free from the universal stressors of work, her statement did not establish that her employer would have had reason to be aware that she was disabled. Wester v. Charter Media/Communications (LIRC, 10/15/04).

The Complainant failed to show that her request to have a new supervisor would have been a reasonable accommodation for her disability, which was borderline personality disorder. The record established

that the condition from which the Complainant suffers would prevent her from working effectively with any of the Respondent's supervisors. A doctor testified that once the Complainant developed a negative view of a supervisor, this view would not change, and she was unlikely to have a positive relationship with that supervisor in the future. Wester v. Charter Media/Communications (LIRC, 10/15/04).

The Complainant was required to present expert testimony to establish that his vociferous reaction to the announcement that another employee was being promoted to the position he sought was caused by his obsessive-compulsive disorder. In situations where the factual question of causation is complex or technical so that a lay fact finder would be speculating without the assistance of expert testimony, the absence of expert testimony constitutes an insufficiency of proof. OCD is a complex and baffling medical illness. There is nothing in the record from which one might conclude that the symptoms and manifestations of OCD are within the realm of the ordinary experience of mankind. Thus, the question of whether the Complainant's OCD caused him to react angrily and vociferously to the news that he had been passed over for promotion, and thereby to commit the alleged insubordination for which he was fired, is sufficiently complex or technical that a lay fact finder would be speculating on the matter without the assistance of expert testimony. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633.

The Respondent inquired whether the Complainant's bipolar disorder was under control by medication, and the Complainant responded that it was. The Respondent also contacted some of the Complainant's references prior to hiring him and was advised that the Complainant was a "capable employee." Thus, the Respondent had no reason to suspect that there was anything about the Complainant's condition that warranted any particular accommodation. Further, there was nothing about the Complainant's work performance that should have alerted it to the fact that the Complainant required some form of accommodation because he was bipolar. Chaffee v. Wyalusing Academy (LIRC, 09/27/00).

The Complainant had a diagnosed mental impairment. As a result of her mental impairment, the Complainant experienced symptoms including tearfulness, negative thoughts, difficulty concentrating and relating to people, racing heartbeat and difficulty sleeping. However, the Complainant did not present sufficient evidence to warrant a conclusion that she was substantially restricted in her ability to function or that achievement was unusually difficult for her. Further, there was no reason to conclude that her mental impairment limited her capacity to perform her job. The Complainant's therapist/social worker testified that the Complainant could work for the Respondent so long as she did not have frequent contact with an individual who had sexually harassed her in the past. Yet this individual was located in a different building, so his contact with the Complainant was limited to occasional meetings. Smith v. Aurora Health Care (LIRC, 08/25/00).

A Complainant's suggestion that his employer should have helped him stay in treatment and on medication for depression was rejected. An employer is not required to assume responsibility for a worker's psychiatric treatment by way of reasonable accommodation, even if it were feasible for it to do so. Sampson v. S & S Distrib. (LIRC, 11/19/99).

The Complainant's depression caused him to react violently towards his managers and coworkers, screaming, swearing, and hurling clipboards at them, and ultimately threatening to kill himself and others. A disability which causes such conduct is reasonably related to the Complainant's ability to adequately undertake the job-related responsibilities of his job. Sampson v. S & S Distrib. (LIRC, 11/19/99).

The Complainant's mental illness tolls the statute of limitations only if the illness in fact prevents the sufferer from managing his affairs and, thus, from understanding his legal rights and acting upon them. Osegard v. Wis. Physicians Serv. (LIRC, 08/13/98).

Even if the Complainant's mental disorders caused her to engage in unsatisfactory behaviors which prompted the Respondent to discharge the Complainant, there was no unlawful discrimination because the Complainant's handicap was reasonably related to her ability to adequately undertake the job-related responsibilities of her employment and because the Respondent fully discharged its duty to attempt to accommodate the Complainant's handicap. Walk v. Ansul Fire Protection (LIRC, 07/20/98).

The Complainant was not "adequately undertaking the job-related responsibilities of [her] employment" when she spent most of the day engaging in bothersome, disruptive and sometimes threatening interactions with coworkers. The employer repeatedly tolerated unsatisfactory behavior because of a concern that it might be a remediable product of a mental illness. The Respondent attempted to accommodate the Complainant; however, for the accommodations to be successful, the Complainant's participation in treatment was essential. Once the Complainant decided that she would not cooperate in treatment recommendations, there was no further accommodation the employer could make that would eliminate the problem which interfered with her ability to do her job. Walk v. Ansul Fire Protection (LIRC, 07/20/98).

The Complainant's discharge from his employment as a driver's license examiner was in connection with his acting out in the presence of members of the public certain behavior related to what was diagnosed as an "immature personality disorder in association with a sexual paraphilia," but which was not diagnosed as a psychiatric illness or impairment, but rather a personality disorder which did not limit his capacity to work. The Complainant was not a handicapped individual within the meaning of the WFEA since his sexual impulses were not uncontrollable and his behavior did not result from an uncontrollable or irresistible urge or impulse. Miller v. DOT (Wis. Pers. Comm'n, 11/23/93).

The Complainant failed to show that his employer knew or should have known that he was mentally handicapped at the time he was terminated from employment. The Complainant's mother and other individuals spoke to the employer about the Complainant being a "slow learner." However, no mention was made of any mental handicap or the type of mental impairment which makes achievement of basic life activities unusually difficult. Further, the Complainant's poor job performance could have been explained by any number of factors other than mental handicap (e.g., lack of interest, lack of motivation, distraction, ineptitude, or boredom). Jacobus v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 01/11/93).

A person who has problematical personality characteristics, but whose psychiatric diagnosis is "well within the normal range," does not appear to fit within the concept of a handicapped individual within the meaning of the Wisconsin Fair Employment Act. Since the Complainant's personality characteristics do not fall within the meaning of the term "impairment," there can be neither an actual nor a perceived handicap. The Complainant's condition consisted of certain personality characteristics that were part of his psychological makeup that was within normal limits. From a factual standpoint, the Respondent's perception of this condition was not different from his actual condition. The employer did not perceive a nonexistent condition that would have constituted an impairment if it did exist, but rather perceived that a condition that did not constitute an impairment was interfering with the Complainant's capacity to function appropriately in the workplace. This did not constitute unlawful handicap discrimination. Jacobsen v. DHSS (Wis. Pers. Comm'n, 10/16/92).

The Complainant exhibited symptoms characteristic of a psychotic-manic episode at work. The Complainant's position involved reprocessing and decontaminating surgical implements for a health care

facility. The Complainant would pose a danger to himself and others in his work setting if he suffered another manic episode. Therefore, the Respondent's actions fell under the exception to prohibited discrimination set forth in sec. 111.34(2)(a), Stats. Schilling v. UW-Madison (Wis. Pers. Comm'n, 11/06/91).

An employer's knowledge that an employee was engaging in outrageous conduct does not necessarily mean that the employer perceived that the employee was mentally ill. Boldt v. General Motors (LIRC, 10/19/90), aff'd sub nom. Boldt v. LIRC (Rock Co. Cir. Ct. 09/18/91).

Where the Complainant was terminated for misconduct, including improper work performance and threatening statements and gestures to co-workers and non-employees, and where that behavior may have been related to his organic mental disorder, the termination was "tied to" the Complainant's handicap. However, there was no discrimination based on handicap since that handicap is reasonably related to the Complainant's ability to adequately undertake his job-related responsibilities. Brummond v. UW-Madison (Wis. Pers. Comm'n, 04/01/87).

It is not enough for the Complainant to show that his co-workers and supervisors had doubts about his judgment and that some co-workers knew he was seeing a psychiatrist, where the employer was otherwise unaware of his mental handicap. Buller v. Univ. of Wis. (Wis. Pers. Comm'n, 10/14/82).

It is not enough for the Complainant to show that his co-workers and supervisors had doubts about his judgment and that some co-workers knew he was seeing a psychiatrist, where the employer was otherwise unaware of his mental handicap. Buller v. Univ. of Wis. (Wis. Pers. Comm'n, 10/14/82).

123.26 Visual, hearing impairments

Although the Complainant demonstrated the existence of a hearing impairment, he did not show that that impairment made achievement unusually difficult for him or limited his capacity to work. Wearing a hearing aid does not, by itself, establish the existence of a hearing disability. The Complainant never complained that his hearing impairment was interfering with his ability to do his job. The Complainant was able to position himself so that he could hear those who were speaking to him. In fact, he asserted that he performed his job well, and that he received a raise for doing good work during his employment. Esau v. Interconnect Communications (LIRC, 04/30/12).

The Complainant was profoundly deaf. The Complainant proposed several accommodations that he believed would have allowed him to perform successfully as an assembler in a plant that assembles truck trailers. The Respondent considered the following proposed accommodations but rejected them as ineffective: (1) tapping the Complainant on the shoulder, (2) the addition of flashing lights on moving equipment, (3) hand signals, (4) flashlights/laser pointers, (5) written notes and (6) reliance upon vibrations. The Complainant cited no authority for his argument that the Respondent was required to either conduct further research on the accommodation of deaf workers, to have hired a vocational expert, or to have contacted the Job Accommodation Network as part of its duty to engage in an interactive process. Even if the Respondent had been required to consider other possible accommodations raised later on appeal by the Complainant, the Complainant did not prove that any of them would have enabled him to safely and effectively perform the duties of the assembler position. Willis v. Stoughton Trailers (LIRC, 09/04/09).

The record did not support a conclusion that the Respondent had reason to be aware that the Complainant had a prosthetic eye or suffered from glaucoma or cataracts, but only that the Respondent was aware that the Complainant wore glasses. This fact alone would not be sufficient to support a

conclusion that the Respondent perceived the Complainant to be disabled. Aman v. Kindred Nursing Centers East (LIRC, 12/16/03).

The Complainant has severe/profound hearing loss. The Respondent denied her the opportunity to "bump" into the marriage license clerk position, as well as related positions on her bumping list because of her disability. The record showed that the Complainant could perform without accommodation those duties of the marriage license clerk position which did not involve the use of the telephone, and that, with the addition of certain office technology, the Complainant could perform certain of the position's phone-related duties. Removing the phone-related responsibilities of this position or removing certain of these responsibilities and modifying the remainder in concert with the addition of certain office technology, would enable the Complainant to perform sufficient job-related functions of the marriage license clerk position to support a conclusion that these accommodations would have been reasonable ones. Parker v. Dane County (LIRC, 11/10/03).

There was probable cause to believe that the Respondent had discharged the Complainant because of handicap where the Respondent was aware that the Complainant was deaf and that the deafness was causing some problems, and where the Complainant was discharged based on a claim that there was not enough work, while at the same time the Respondent sought new employees. Buska v. Central Bldg. Maint. (LIRC, 09/28/95).

The Respondent discriminated against the Complainant on the basis of handicap when it prohibited him from driving scooters and tuggers in the plant because he was deaf. Willett v. Delco Electronics (LIRC, 01/17/90).

The Respondent failed to demonstrate that there was a reasonable probability that a person with uncorrected 20/200 vision, correctable with lenses to 20/20 vision, would be unable safely to perform the duties of a traffic officer in the Sheriff's Department. The Respondent's general standard precluding employment of persons with certain vision deficiencies failed to meet the individual evaluation requirement of the statute. The standard was not entitled to automatic deference merely because it was based upon a Law Enforcement Standards Board administrative rule or because it was established with the help of a medical consultant. Grinkey v. Brown Co. Sheriff's Dep't (LIRC, 02/08/88).

The Complainant was handicapped within the meaning of the Wisconsin Fair Employment Act where he was perceived as being handicapped because he had visual impairment of 96.7% diminution of visual acuity correctable to 20/20 vision which Respondent believed would limit his ability to perform the duties of a traffic patrol officer. Brown County v. LIRC, 124 Wis. 2d 560, 369 N.W.2d 735 (1985).

An employer discriminated in laying off an employee who was legally blind, and who was safely and adequately performing his job duties, without requiring an examination to determine the extent of the employee's visual abilities. Heisel v. Mfr's Box Co. (LIRC, 10/04/84).

It was handicap discrimination to refuse to rehire a yardman who had a corrective lens which allowed him to meet the visual acuity standards of the small switchyard where he worked because the railroad was applying standards applicable to larger rail yards and did not periodically test the vision of its other employees. Chicago & N.W. R.R. v. LIRC (Roessler) (Eau Claire Co. Cir. Ct., 09/08/82).

Where an employee met the employer's standards for safely and efficiently driving trucks on intrastate runs, it was discrimination to discharge him because of an eye condition because he did not meet federal standards for interstate trucking. Frito-Lay v. LIRC, 95 Wis. 2d 395 (Ct. App. 1980), aff'd, 101 Wis. 2d 169, 303 N.W.2d 668 (1981).

It was not discrimination for an employer to refuse to hire an applicant with less than 20/40 uncorrected vision for the position of firefighter where the employer showed that the applicant's use of contact lenses would keep him from getting up and dressed within thirty seconds of an alarm. However, it was discrimination to refuse to process the same person's application for police officer where the applicant met the minimum vision requirements with the aid of those lenses. City of Madison v. LIRC (Scott) (Dane Co. Cir. Ct., 10/22/79).

An employee who was denied consideration for a job transfer because he failed a hearing exam was discriminated against where his employer could not explain the need for the exam and the employee had normal hearing with a hearing aide. Martin v. Consolidated Papers (LIRC, 02/22/79).

An employer could not justify the vision standards it used to discharge a probationary employee where it did not introduce any statistical or medical study to validate its use of a less stringent standard for current employees. Chicago & N.W. Transport v. DILHR (Doetze) (Dane Co. Cir. Ct., 05/12/78).

An employer's testing procedure did not adequately evaluate a welder applicant's visual impairment. A.O. Smith v. LIRC (Perry) (Milwaukee Co. Cir. Ct., 12/13/79); also, Graf v. Babcock & Wilcox (DILHR, 12/12/76).

123.27 Other conditions

An overweight condition cannot be considered a disability where there was no indication of a glandular or other physiological disorder, and the Complainant's weight was totally within the Complainant's control. Elmhorst v. Sch. Dist. of Neillsville (LIRC, 10/31/05).

123.3 Complainant's burden of proof

123.31 Generally
[Also see sec. 123.6 re: Proof of medical facts]

Proof of disability is not meant to be onerous. The Complainant need not establish what caused the condition, and the fact that doctors disagree about causation does not change the fact that she suffers from long term dizziness and poor balance. Staudinger v. Cnty. of Manitowoc (LIRC, 12/11/18).

A Complainant can establish that she had a disability during her employment with the Respondent, regardless of whether there was a definitive diagnosis made at the time. Dahl v. Kewaunee Care Ctr, LLC and Riche Health Care (LIRC 10/22/18).

While the Complainant may be required to submit medical records showing the existence of an impairment, she is not required to submit medical evidence establishing that the impairment makes achievement unusually difficult or limits her capacity to work. An individual is generally competent to testify about how an impairment affects her ability to perform major life activities or limits the capacity to perform the job. Berton-Train v. Woodman's (LIRC, 05/31/2017).

Even in a hearing where the Complainant's burden is only to show probable cause, the Complainant still bears the burden to show that she was an individual with a disability, to the degree necessary to support a determination of probable cause. Mueller v. Chart Energy & Chemicals, Inc. (LIRC, 01/15/15).

disability; it may also involve the employer acting on the basis of dissatisfaction with an employee's behavior or performance problem which is caused by the employee's disability. If an employee is discharged because of bad behavior which was caused by a disability, the discharge is, in legal effect, because of that disability. Maeder v. UW-Madison, UW Police (LIRC, 06/28/13).

The fact that the Complainant received Social Security Disability Benefits did not by itself establish that she was disabled for purposes of the WFEA. Even granting that one's eligibility for Social Security Disability may help to establish disability under the WFEA, the Complainant offered no medical records showing how her condition was disabling for purposes of social security disability, thus she presented no basis for inferring disability under the WFEA based on her qualification for Social Security Disability. Alamilla v. City of Milwaukee (LIRC, 06/28/13).

The Complainant's diagnosis of diabetes by itself does not establish a disability. Diabetes may be a disability, depending on an individualized showing of how it makes achievement unusually difficult or limits the capacity to work. The Complainant's own listing of symptoms is not a competent showing that those symptoms were related to her impairment. Competent medical evidence is required to establish the existence, nature, extent, and permanence of an impairment, if disputed as a matter of fact. Alamilla v. City of Milwaukee (LIRC, 06/28/13).

Medical documentation of the Complainant's panic and anxiety disorder did not show that it caused the degree of limitation necessary to establish a disability under the WFEA. The medical opinion offered in evidence was that the Complainant maintained the ability to perform her job. Lay testimony concerning the Complainant's functioning on the job did not serve to prove disability; laypersons are not competent to connect observations of a Complainant's conduct to a particular mental health condition. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633. Even so, lay opinion, consistent with medical opinion, was that the Complainant maintained the ability to perform her job. Ryback v. Wis. Physicians Serv. (LIRC, 05/31/13).

The Complainant's doctor's notes indicated that she had a permanent five-pound lifting restriction. This is a significant restriction that would render an individual unable to perform many of life's normal functions, such as lifting a bag of groceries or taking out the trash. Similarly, while the record was silent with regard to how or whether the Complainant's ankle injury affected a major life activity, it can be presumed that a person who must walk with a cane is limited in the performance of major life activities. The evidence was sufficient to warrant a finding of probable cause to believe that the Complainant had a disability. Rutherford v. Wackenhut Corp. (LIRC, 05/13/11).

The Complainant contended that wearing a hearing aid should be enough evidence that a person has a hearing disability. While the use of a hearing aid may be indicative of a hearing impairment, in order to establish that an impairment constitutes a disability under the Wisconsin Fair Employment Act, the Complainant must demonstrate that it makes achievement unusually difficult for her or limits her capacity to work. Gouge v. Randy's Family Rest. (LIRC, 06/27/08).

The fact that the Veterans Administration had classified the Complainant's foot condition as a forty percent disability did not establish the existence of a disability under the Wisconsin Fair Employment Act since the record did not show that the criteria utilized by the Veterans Administration for identifying disabilities was essentially identical to those set forth in the Wisconsin Fair Employment Act. Smith v. Actuant Corp. (LIRC, 07/27/07).

There are two distinct ways in which disability discrimination may occur. The first would be if the employer took an adverse action against an employee due to a discriminatory animus against the

employee because the employee was an employee with a disability. The second would be if the employer took an adverse action against an employee because of a performance deficiency caused by the employee's disability. Fields v. UW Hospitals & Clinics Auth. (LIRC, 02/12/07).

Competent medical evidence is required to establish the existence, nature, extent, and permanence of an impairment, if whether the Complainant has a disability is disputed. It is not enough to state a diagnosis or to list symptoms. The Complainant must establish through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult or limited his capacity to work. As a result, the fact that a physician rendered a diagnosis of panic disorder was insufficient alone to establish that the Complainant had a disability within the meaning of the law. Schultz v. CNH Capital Corp. (LIRC, 05/08/06).

The Complainant's argument that a diagnosis of asthma alone was sufficient to establish that she had a disability under the Wisconsin Fair Employment Act was rejected. The Complainant relied on a sentence in a Supreme Court decision that stated that "handicapped. . .must be defined as including such diseases as asthma which make achievement unusually difficult." (Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. DILHR, 62 Wis. 2d 392, 398, 215 N.W.2d 443 (1974)). However, the analytical framework for determining whether an individual has a disability has been clarified in the years since that decision was issued. A Complainant must now establish that there is a real or perceived impairment, and that the impairment actually makes (or is perceived as making) achievement unusually difficult or limits the capacity to work. The proper reading of the relevant case law establishes that asthma can be a disability under the Wisconsin Fair Employment Act if the Complainant establishes the elements articulated in City of La Crosse Police & Fire Comm'n v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). Doepke-Kline v. LIRC, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605.

It is not enough for a Complainant to state a diagnosis or to list symptoms in order to establish that he has a disability. The Complainant must explain through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult. The Complainant argued that a diagnosis of asthma alone, supported a conclusion that he was disabled, consistent with the ruling in Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. DILHR, 62 Wis. 2d 392, 215 N.W.2d 443 (1974). Even if such a diagnosis had been established at hearing, a conclusion of disability was not required. The Supreme Court did not hold in the cited decision that every diagnosis of asthma would result in a conclusion of disability. Instead, it held that conditions such as asthma (which, unlike physical disorders such as paraplegia, do not result in incapacity from normal remunerative occupations or require rehabilitative training) may constitute disabilities under the Wisconsin Fair Employment Act. It would be inconsistent with both the language and the policy underpinnings of the Act for the continuum of asthma conditions to be held to be disabilities even if some did not make achievement unusually difficult or limit the capacity to work. Doepke-Kline v. Ameritech/SBC (LIRC, 05/25/04); aff'd sub nom. Doepke-Kline v. LIRC, 2005 WI App 209, 287 Wis. 2d 337, 704 N.W.2d 605.

The proximity in time between the Complainant's termination and her notice to the Respondent that she had been diagnosed with fibromyalgia and that this condition interfered with her ability to work did not necessarily establish pretext. Although proximity in time may be a relevant factor, it is not necessarily a dispositive one. Ford v. Lynn's Hallmark (LIRC, 06/27/05).

The Complainant presented no medical evidence on his behalf, either in the form of physician testimony or competent medical records upon which a fact finder could base a conclusion about the nature of his back condition. Even if it was determined that the Complainant was competent to testify about his own medical condition and that no additional medical evidence was necessary, the Complainant's testimony would not be sufficient to meet his initial burden where it was limited to a description of his symptoms

and an explanation of the difficulties these symptoms posed with regard to his ability to perform the job. Such testimony, even if offered by a physician, would not establish an impairment within the meaning of the Wisconsin Fair Employment Act, where there was no indication as to: (1) what, if any diagnosis was made, (2) what the nature and extent of the condition was, or (3) whether the condition was a permanent one. Erickson v. QuadGraphics (LIRC, 05/25/04); aff'd sub nom. Erickson v. LIRC, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398.

As an initial matter, an employee must show that he or she is an individual with a disability under Wis. Stat. §111.32(8) and that his or her employer took one of the several actions listed in Wis. Stat. §111.322. Once the employee meets the initial burden, then the employer has the burden of proving a defense under Wis. Stat. §111.34. Crystal Lake Cheese Factory v. LIRC 2003 WI 106, ¶42, 264 Wis. 2d 200, 664 N.W.2d 651.

The Complainant's initial burden in a disability discrimination case is to establish that he is an individual with a disability within the meaning of the Wisconsin Fair Employment Act. It is not enough to merely state a diagnosis or to list symptoms. The Complainant must explain, through credible and competent evidence, how or to what degree these symptoms made achievement unusually difficult. Gramza v. Kwik Trip, Inc. (LIRC, 02/20/03).

The fact that the Complainant qualified for a disabled parking permit was insufficient to establish a disability under the Wisconsin Fair Employment Act where it was not shown that the requirements for the parking permit were identical to the requirements for establishing a disability under the Act. Kirk v. Neenah-Menasha YMCA (LIRC, 02/14/03).

The Complainant had a diagnosed mental impairment. As a result of her mental impairment, the Complainant experienced symptoms including tearfulness, negative thoughts, difficulty concentrating and relating to people, racing heartbeat and difficulty sleeping. However, the Complainant did not present sufficient evidence to warrant a conclusion that she was substantially restricted in her ability to function or that achievement was unusually difficult for her. Further, there was no reason to conclude that her mental impairment limited her capacity to perform her job. The Complainant's therapist/social worker testified that the Complainant could work for the Respondent so long as she did not have frequent contact with an individual who had sexually harassed her in the past. Yet this individual was located in a different building, so his contact with the Complainant was limited to occasional meetings. Smith v. Aurora Health Care (LIRC, 08/25/00).

Where the Complainant had recovered from Graves' disease sufficiently to have been released to return to work by his physician, he did not have a physical impairment making achievement unusually difficult or limiting his capacity to work. Further, the Respondent's aggressiveness in seeking to get the Complainant back to work meant that the Respondent did not perceive the Complainant as having an impairment. Therefore, the Complainant was not handicapped under the Wisconsin Fair Employment Act. Stanford v. Time Ins. (LIRC, 06/27/95).

In a handicap discrimination case, the burden is on the individual to prove that he was refused employment, terminated or otherwise discriminated against because of his handicap. The question of an employer's motivation presents a question of ultimate fact. Haynes v. Nat'l School Bus Serv. (LIRC, 01/31/92).

The Complainant established a prima facie case of handicap discrimination by testifying that when he furnished the Respondent with a doctor's statement indicating that wearing an athletic shoe would help his back, the Respondent told him such shoes had to be black and steel-toed, while other workers had

previously been allowed to wear athletic shoes to work. Ninabuck v. Consol. Freightways (LIRC, 01/31/92).

The Complainant failed to establish that he had a handicap, which he alleged was an eye problem, because the only evidence which he presented at the hearing was his own description of the symptoms he suffered when working around chemicals in the Respondent's workplace. This does not constitute competent medical evidence of a handicap. The Complainant established that he has suffered temporary eye irritation when exposed to certain chemicals, but he did not establish that this irritation constituted some "lessening or deterioration or damaging to a normal bodily function or bodily condition or the absence of such bodily function or condition." Further, the Complainant failed to establish that the employer perceived him to have a handicap. The evidence merely supported a finding that the employer perceived the Complainant to be suffering from eye irritation and that this was a temporary condition. Wollenberg v. Webex, Inc. (LIRC, 11/08/91).

There are three essential elements in a handicap discrimination claim. First, the Complainant must establish that the condition at issue is a handicap within the meaning of the Wisconsin Fair Employment Act. Second, the Complainant must show that the employer's discrimination was on the basis of handicap. Third, it must appear that the employer cannot justify its alleged discrimination under the exception set forth in sec. 111.34(2), Wis. Stats. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991); Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

Where the Respondent decided, based on the Complainant's statement that she was physically handicapped and could not read the menu, that the Complainant could not do the job because reading was a vital part of the job, the Complainant established that she was discriminated against because of her handicap. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

The elements of proof of handicap discrimination require that the Complainant prove that he is handicapped within the meaning of the Act and that the adverse employment action was based upon that handicap. The burden of proof then shifts to the Respondent to prove that the Complainant's handicap is reasonably related to the Complainant's ability to adequately under-take the job-related responsibilities of the employment. If this is proven, in order to avoid liability, the Respondent must still show that accommodation of the employee's handicap would pose a hardship on the employer's business. Copus v. Village of Viola (LIRC, 12/10/87).

Although the Complainant testified that he had gone to a rehabilitation hospital for treatment and had been diagnosed as an alcoholic, the hearing examiner was entitled to give no weight to this testimony, since no expert testimony was received on the subject. Alcoholism is a disease, the diagnosis of which is matter of expert medical opinion proved by a physician and not a layman. Schaafs v. Schultz Sav-O-Stores (LIRC, 11/06/86).

A police officer met his initial burden of proof by showing that the restrictions placed upon his job duties and classification were prompted by his supervisor's belief that he could not carry out his job responsibilities as a result of his narcolepsy. Hennekens v. River Falls Police Dep't (LIRC, 01/29/85).

An employee met his initial burden of proof by offering evidence that the employer failed to hire him for a position of truck driver/groundman because of his epilepsy. Samens v. LIRC, 117 Wis. 2d 646, 345 N.W.2d 432 (1984).

A Complainant's initial burden of proof does not include proving that he was able to do the work at the time of his application for the job. Janz v. Joseph Schlitz Brewing (LIRC, 09/10/81).

The initial burden of proof for the employee is to show that he was handicapped and was refused employment because of that handicap. Boynton Cab v. DILHR, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

The applicant has the burden of showing that the employer's refusal to hire him was due to his past medical history. He met that burden where he was notified by letter from his employer that he would not be hired as a result of a physical exam. The "legitimate" reasons offered by the employer at the hearing to explain the refusal to hire the Complainant were a pretext where the only reason given at the time of the refusal was the Complainant's physical exam. Dept. of Agric. v. LIRC (Anderson) (Dane Co. Cir. Ct., 05/25/78).

The state of being handicapped under the Act is a conclusion of law not amenable to lay testimony. A layperson's belief that he was not handicapped is entitled to no weight whatsoever. Bauman v. Specialties (DILHR, 10/03/75).

123.32 Employer's knowledge of disability

In disability cases, an employer does not engage in employment discrimination when it bases an adverse employment action on an employee's problematic conduct allegedly caused by a disability unless the employee proves the employer knew the employee's disability caused the conduct. An employer does not automatically know of a causal connection between an employee's problematic conduct and a disability, even if the employer is generally aware of the disability. Intentional discrimination cannot be inferred based on the sole fact that the employer discharged the employee for conduct proven at hearing to be caused by a disability. Wis. Bell, Inc. v. LIRC, 2018 WI 76, 382 Wis. 2d 624, 914 N.W.2d 1.

For purposes of establishing that the Complainant is an individual with a disability, it does not matter what the Respondent knew or when it knew it. Staudinger v. Cnty. of Manitowoc (LIRC, 12/11/18).

There was no need to decide whether the Complainant was an individual with a disability, since she did not establish that she told the employer she had a disability and there was no reason to believe that the employer understood this to be the case. Where the employer was unaware of the Complainant's asserted disabilities, it could not have undertaken the discriminatory course of action the Complainant alleged. Volkmann v. Colonial Management Group LP (LIRC, 01/30/15); aff'd sub nom. Volkmann v. LIRC and Colonial Management Group, LP (Chippewa Co. Cir. Ct. 09/09/15).

The Complainant contended that her comment to her supervisor that she was going to take a "mental health day" should have put him on notice that she had a mental disability. However, given that this is a phrase used in common vernacular by both disabled and non-disabled employees to refer to a day free from the universal stressors of work, her statement did not establish that her employer would have had reason to be aware that she was disabled. Wester v. Charter Media/Communications (LIRC, 10/15/04).

If an employer's decision is based on certain limitations or inabilities of an employee that could be the result of something other than a disability, and the employer is not shown to have been aware that they were in fact the result of a disability, the employer cannot be found to have made its decision because of disability. In this case, there was no prohibited discrimination in view of the fact that the Complainant had no diagnosed permanent disability at the time of the challenged actions by the employer. The employer believed that the Complainant's physical problems were temporary consequences of an injury. This was thus a situation where the problems affecting the ability to work were things that could be caused by something other than a "disability" within the meaning of the Wisconsin Fair Employment Act. Greco v. Snap-On Tools (LIRC, 05/27/04).

While a conclusion of liability normally requires that the employer be aware of the employee's disability, when the employee's supervisors are aware of the obvious physical manifestations of an actual disability subsequently established at hearing, there is no requirement that they be aware of the employee's actual diagnosis or have reached a subjective conclusion that the employee was disabled under the Wisconsin Fair Employment Act, at the time of the alleged discriminatory act. Stone v. UW System (Wis. Pers. Comm'n, 03/12/03).

Not every medical condition rises to the level of a disability protected under the Wisconsin Fair Employment Act. Therefore, an employer's knowledge of the Complainant's medical condition does not necessarily mean that the Respondent knew that the Complainant was disabled. Lane v. DOC (Wis. Pers. Comm'n, 06/07/01).

The Respondent did not violate the Act when it discharged the Complainant because she refused to provide it with information from a medical doctor regarding her symptoms and treatment. The Respondent needed this information to evaluate the Complainant's ability to undertake the job-related responsibilities of her position. Garlie v. St. Francis Home, (LIRC, 06/29/98).

The Complainant failed to show that his employer knew or should have known that he was mentally handicapped at the time he was terminated from employment. The Complainant's mother and other individuals spoke to the employer about the Complainant being a "slow learner." However, no mention was made of any mental handicap or the type of mental impairment which makes achievement of basic life activities unusually difficult. Further, the Complainant's poor job performance could have been explained by any number of factors other than mental handicap (e.g., lack of interest, lack of motivation, distraction, ineptitude, or boredom). Jacobus v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 01/11/93).

An employer does not discriminate because of handicap, even where it takes an action with respect to an employee because of some physical or mental inability of that employee, where the inability is one that can result from conditions or causes which are not disabilities within the meaning of the Wisconsin Fair Employment Act, and the employer does not know that the inability results from a condition which is a disability. In this case, the Complainant was not diagnosed as having dyslexia with a learning disability until several months after leaving his employment with the Respondent. There was no evidence that the Respondent believed that the Complainant had a condition which would constitute an actual impairment. Although the Respondent was aware that the Complainant could not read and write at normal levels, it had no reason to suspect that the cause was anything other than lack of education. Some adults are unable to read and write at normal levels. This does not mean that all of these individuals are handicapped within the meaning of the Wisconsin Fair Employment Act. Horner v. Village Square Apts. (LIRC, 05/21/91), aff'd sub nom. Horner v. LIRC (Dane Co. Cir. Ct. 10/01/92).

It is not handicap discrimination to discharge an employee for deficiencies in work performance where the employer is unaware that the employee has a handicap that is allegedly the cause of those deficiencies. Menzner v. LIRC (Family Service Ass'n of Fox River Valley) (Calumet Co. Cir. Ct., 02/05/85); Lowenberg v. LIRC (UW-Parkside) (Ct. App., Dist. II, unpublished opinion, 08/26/83).

It is not enough for the Complainant to show that his co-workers and supervisors had doubts about his judgment and that some co-workers knew he was seeing a psychiatrist, where the employer was otherwise unaware of his mental handicap. Buller v. Univ. of Wis. (Wis. Pers. Comm'n, 10/14/82).

123.4 Employer's burden of proof; affirmative defenses

123.41 Generally

When a dispute exists between the physician for a truck driver and the physician for a trucking company regarding the driver's physical and medical qualifications, it is the company, not the driver, that bears the burden of seeking a determination under the Department of Transportation (DOT) dispute resolution procedure (49 CFR 391.47) if the company intends to offer a qualification-based defense against the driver's claim of disability discrimination under the Wisconsin Fair Employment Act. A requirement that the driver seek a DOT determination before filing a state discrimination claim would be contrary to the burden-shifting scheme of the Wisconsin Fair Employment Act. Further, such a requirement would prevent some drivers from filing legitimate claims under the Act before the statute of limitations had run. In some cases, it may be unnecessary to obtain a determination regarding the driver's medical qualifications from the DOT if the issue is easily resolved by facial application of the DOT regulations. However, where a dispute over a driver's medical qualifications cannot be resolved by facial application of the DOT regulations, the Administrative Law Judge must either give the company the opportunity to seek a determination from the DOT regarding the driver's medical qualifications or seek *sua sponte* a determination from the DOT regarding the driver's medical qualifications. Szleszinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

In order to establish a claim of disability discrimination, a Complainant must establish that he is an individual with a disability, and that a challenged employment action was made because of that disability. If those things are established, the question then becomes whether the employer can justify its actions under the exception set forth in sec. 111.34(2), Stats., for situations in which a disability is reasonably related to an employee's ability to adequately undertake the job-related responsibilities of his employment. If the applicability of that exception is established, the question then becomes whether the employer can establish that it did not refuse to reasonably accommodate the Complainant's disability, or that any accommodation which might have been made would have posed a hardship on the employer's business within the meaning of sec. 111.34(1)(b). The question of whether a reasonable accommodation was refused, or whether it would have posed a hardship, comes into play only if it appears that a challenged employment decision was made because of a disability, and that the disability which was the reason for the challenged employment action was reasonably related to the Complainant's ability to do the job. Cook v. Community Care Resources (LIRC, 01/13/03).

A Respondent was not required to ignore evidence of a Complainant's violent and threatening behavior. It could conclude that continued employment of the Complainant would pose a safety risk in the workplace, even though the Complainant's psychologist and a police officer held an opinion to the contrary. Sampson v. S & S Distrib. (LIRC, 11/19/99).

The Complainant in a handicap discrimination case must show that: (1) he or she is handicapped within the meaning of the WFEA, and (2) the employer took one of the enumerated actions on the basis of handicap. The employer then has the burden of proving a defense under §111.34, Stats. Under §111.34(2)(a), it is not a violation of the WFEA to take an employment action based on an individual's handicap if the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment. However, if an employer refuses to reasonably accommodate an employee's or prospective employee's handicap and is unable to demonstrate that the accommodation would pose a hardship, then the employer violates the WFEA. Reading the two paragraphs of §111.34 together, once the employee has met the first two showings, the employer must show either that a reasonable accommodation would pose a hardship or that, even with a reasonable accommodation, the employee cannot adequately undertake the job related responsibilities. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (1998).

Where a Complainant has established that the Respondent has refused to hire him for a janitorial position because of his lifting restrictions, the burden shifts to the Respondent to prove that the Complainant's handicap is reasonably related to his ability to adequately undertake the job-related responsibilities of the job. If the Respondent meets its burden, it must further demonstrate that accommodating the Complainant would pose a hardship on the Respondent's business in order to avoid liability. Charles v. Milwaukee Bd. of Sch. Dir. (LIRC, 06/23/93).

An employer's decision that a handicapped employee is unable to effectively perform, and that no accommodation is feasible is measured by an objective standard. Evidence which postdates the personnel transaction in question (including such things as medical evaluations) may have no relevance to the issue of the employer's intent at the time of the transaction, yet it may have some relevance to issues such as the employee's capacity to perform and accommodation. Although an employer must gather substantial facts to support a decision that it cannot accommodate an employee, the determination of whether the employer violated the Act is made by the trier of fact. A good faith belief on behalf of the employer will not be a sufficient defense to an act of discrimination. Keller v. UW-Milwaukee (Wis. Pers. Comm'n, 03/19/93).

The mere fact that the employer has made its employment decision in reliance upon the opinion of a doctor does not protect the employer from a finding of discrimination. Where there is conflicting medical evidence, the trier of fact conclusively determines which view of the evidence it will accept. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

Employers are required to evaluate handicapped applicants without initially considering their handicap. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

When an employer reaches the conclusion that a handicapped job applicant who is otherwise in line to be hired faces a problem in performing a job because of handicap, the employer has a duty to consider accommodation options. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

123.42 Inability to perform job-related responsibilities

The Complainant was blind and diabetic. Based on its expert's recommendation, the Respondent refused to allow the Complainant to work for a year and a half while it gathered medical information. The Respondent eventually allowed the Complainant to return to work. However, medical evidence showed that the Complainant could have safely worked during the entire time period she was suspended. While the Respondent may have acted in good faith, there is no "good faith" exception where discrimination has occurred; if an employer decides an employee cannot work safely because of a disability, the responsibility for having been incorrect lies with the employer. Lehr v. The Salvation Army (LIRC, 04/16/13).

In this case, the Respondent made its decision not to allow the Complainant to return to work based entirely on the opinion of a doctor on whom it relied. However, the fact that an employer has acted in reliance upon the opinion of a doctor does not protect the employer from a finding of discrimination. Where there is conflicting medical evidence, the trier of fact conclusively determines which view of the evidence it will accept. Here, the Commission found the opinion of the Complainant's doctor that the Complainant could adequately and safely return to work, to be more persuasive than the opinion of the Respondent's doctor that she could not. Thus, the Respondent failed to carry its burden of establishing an "[in]ability to adequately undertake job-related responsibilities" defense. Shea v. Chrysler Group LLC (LIRC, 02/28/13), aff'd, Chrysler Group v. LIRC (Kenosha Co. Cir. Ct., 11/26/13); aff'd, Ct. App., Dist. II, 02/25/15 (not recommended for publication).

The evaluation of whether a worker can work safely is to be made on a case-by-case basis. The Respondent in this case had a reasonable basis for concern that the Complainant's disability was related to his ability to perform the job safely. It was therefore not unlawful for the Respondent to temporarily suspend the Complainant's employment in order to conduct an individualized evaluation of that question. It was not an act of discrimination for the Respondent to require the Complainant to take a leave of absence without pay pending his examination by an independent medical examiner. Tschida v. UW-River Falls (LIRC, 12/30/08).

The Complainant suffered a transient ischemic attack (which presents the same symptoms as a stroke but causes no permanent damage). His physician had released him to return to work without restrictions. However, the Respondent established that the Complainant's physician had an incomplete understanding of the Complainant's strenuous job duties as a groundskeeper, and that the Complainant had complained of dizziness and headaches and seemed to have some memory and speech problems. The Respondent established that the Complainant was not capable of performing his job-related responsibilities. Purnell v. Wilderness Walk (LIRC, 09/20/95).

It is not unlawful to apply minimum uniform attendance requirements to persons whose handicaps may cause them to miss work. However, it is unlawful for an employer to assume that an employee's handicap will cause him to fail to meet certain attendance standards in the future, and to preemptively terminate the employee on that basis. An employer who did this would have to be prepared to prove to a reasonable probability that the employee would in the future be unable to efficiently (i.e., to minimum attendance standards) perform his job. Mere speculation that this could happen would not suffice to meet that burden. Gee v. ASAA Technology (LIRC, 01/15/93).

A Respondent reasonably suspended a Complainant until the State Department of Motor Vehicles could determine if her diabetes condition should disqualify her from driving a school bus. Since it is the Department of Motor Vehicles, through its licensing requirement, rather than the employer who determines whether an individual is qualified to operate a school bus safely, an employer fulfills its duty of individual evaluation by suspending the individual driver until the State can make its determination. In essence, the Complainant's diabetes condition was reasonably related to her ability to adequately undertake the job-related responsibilities of a school bus driver during the period of her suspension. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

An employer has a right to know if an employee has a handicap (except to the extent that the Americans with Disabilities Act may provide otherwise) so that the employer can determine whether the handicap is reasonably related to the ability to undertake the job responsibilities. Accordingly, an employer can lawfully refuse to hire or can discharge an individual who falsifies an employment application with respect to a handicap. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

The Respondent did not discriminate because of handicap when it discharged an executive who had Parkinson's Disease where the executive was unable to perform his job-related responsibilities. Whether the medication the Complainant took for his condition caused his inability to perform was unclear. The Complainant's own physician did not believe the medication caused significant mental impairment. Kellow v. Regal Ware (LIRC, 05/10/89), aff'd sub nom. Kellow v. LIRC (Washington Co. Cir. Ct., 04/18/90).

In a hearing on the issue of probable cause, the Respondent failed to establish that the Complainant's handicap was reasonably related to the Complainant's ability to undertake the duties of a new position where there was little evidence supporting a doctor's establishment of lifting, bending, stooping and

twisting restrictions; where the doctor's conclusion was based on the Complainant's notations of his medical history and an examination limited to five minutes which did not include questions regarding the meaning of those notations; and where the doctor was not shown to be aware of how the duties of the Complainant's current position compared to the duties of the position the Complainant desired. Lauri v. DHSS (Wis. Pers. Comm'n, 11/03/88).

Where the Complainant was terminated for misconduct, including improper work performance and threatening statements and gestures to co-workers and non-employees, and where that behavior may have been related to his organic mental disorder, the termination was "tied to" the Complainant's handicap. However, there was no discrimination based on handicap since that handicap is reasonably related to the Complainant's ability to adequately undertake his job-related responsibilities. Brummond v. UW-Madison (Wis. Pers. Comm'n, 04/01/87).

Where the evidence showed that all of the Respondent's available work required lifting in excess of 50 pounds and the Complainant had a restriction against lifting 50 pounds or more, the Complainant was not able to adequately undertake the job-related responsibilities of his employment within the meaning of sec. 111.34(2)(a), Stats. Ellison v. Pomps Tire Service (LIRC, 08/08/86).

An employer has not met its burden of proving that an employee could not carry out the required job duties by offering only its subjective judgment that the employee was incapable of doing so. Hennekens v. River Falls Police Dep't (LIRC, 01/29/85).

An employer could not justify a discharge by showing the possibility that an employee might be moved into a more strenuous job that he could not perform. Mercury Marine v. LIRC (Poeschl) (Ct. App., Dist. IV, unpublished opinion, 10/04/83).

An executive order establishing a work assistance program for alcoholic employees does not prohibit termination where alcoholism renders the employee unable to do the job. Squires v. LIRC, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980).

The burden is on the employer to establish to a reasonable probability that a handicapped individual is physically or medically unable to efficiently perform the required duties. Dairy Equipment v. DILHR, 95 Wis. 2d 319, 290 N.W.2d 330 (1980); Bucyrus-Erie v. DILHR, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

The Act does not require that an employer keep a job open until such time as an employee may be able to perform. The test is whether the employee is presently able to perform. Colovic v. Wis. Elec. (LIRC, 08/30/78).

Where the employer had no medical evidence indicating that its employee was not presently able to perform, it was unlawful to suspend him until the employer received the evidence, even where the purpose of the suspension was to obtain the evidence. Adams v. Soo Line R.R. (LIRC, 06/23/77).

Where an employee was able to perform his job duties at the time of hearing but was unable to do so at the time of his discharge, the discharge was lawful since the Act contemplates present ability to perform. J.C. Penney v. DILHR (Mitchell) (Dane Co. Cir. Ct., 03/22/76).

123.43 Risk of injury to employee or others; reasonable "probability" standard

Objective evidence and expert opinion showed a reasonable probability of substantial harm in the workplace to the Complainant, who had an uncontrolled seizure disorder, based on medical reports, medical history

and work history. The consulting physician retained by the employer was in a better position to render an opinion pertinent to the dangers the Complainant faced on the job because of his visits to the workplace. Ewerdt v. Brunswick Corp. (LIRC, 04/29/20).

In resolving the question of whether a disabled individual's employment in a position would be hazardous to the health or safety of the Complainant or to others, the appropriate test is not whether the Complainant suffers from diabetes or whether she may experience hypoglycemic episodes on the job, but whether the continued employment of the Complainant in her present position poses a "reasonable probability of substantial harm." Where an employer decides that an employee cannot safely perform his or her job because of a disability and takes an adverse action as a result, the responsibility for being correct is with the employer. The commission has consistently held that the fact an employer made an employment decision in reliance on the opinion of a doctor does not protect it from a finding of discrimination. The statute does not contain a "good faith" exception where discrimination has occurred. Lehr v. The Salvation Army (LIRC, 04/16/13).

Where the Respondent has established that a Complainant's disability interfered with his ability to adequately undertake his job-related responsibilities within the meaning of sec. 111.34(2)(a), Wis. Stats., it is unnecessary to determine whether the Complainant also posed a safety risk in the workplace pursuant to sec. 111.34(2)(b), Wis. Stats. Sampson v. S & S Distrib. (LIRC, 11/19/99).

If the evidence shows that the Complainant has a present ability to physically accomplish the tasks which make up the job duties, the Respondent must establish to a reasonable probability that, because of the Complainant's physical condition, employment in the position would be hazardous to the health or safety of the Complainant or others. In arriving at a decision as to whether the employee can perform the job safely, the employer should rely on adequate medical records and on relevant records, such as the employee's work and medical histories. In this case, while the record clearly demonstrated that the Complainant was likely to experience epileptic seizures at work, the evidence did not warrant a conclusion that such seizures would present a risk of harm to the Complainant or others. Alt v. Meriter Hosp. (LIRC, 03/27/96).

It was not unlawful handicap discrimination for an employer to refuse to employ a Complainant with lower back problems where the requirement for the position of youth counselor included physically restraining emotionally disturbed children in order to prevent them from harming themselves. In view of the Complainant's physical condition, the Complainant's attempts to restrain a resident would be hazardous to herself and potentially hazardous to the Respondent's co-workers and residents. Meacham v. Sunburst Youth Homes (LIRC, 02/04/93).

The Complainant exhibited symptoms characteristic of a psychotic-manic episode at work. The Complainant's position involved reprocessing and decontaminating surgical implements for a health care facility. The Complainant would pose a danger to himself and others in his work setting if he suffered another manic episode. Therefore, the Respondent's actions fell under the exception to prohibited discrimination set forth in sec. 111.34(2)(a), Stats. Schilling v. UW-Madison (Wis. Pers. Comm'n, 11/06/91).

The employer was required to show to a reasonable probability that the Complainants, who were denied hire as traffic officers because they did not meet the employer's uncorrected vision standards, would be a hazard to themselves or others. Expert opinion testimony was not necessary to determine that the Complainants did not pose increased safety risks. Brown County v. LIRC (Phillips & Grinkey) (Ct. App., Dist. III, unpublished opinion, 02/27/90).

The reasonable probability standard is applicable for the duties associated with a deaf person driving tuggers and scooters in a manufacturing facility, except for those duties involving transporting toxic waste, for which the reasonably related standard is applicable. Willett v. Delco Electronics (LIRC, 01/17/90).

Where the employment in question was work as a nursing assistant in a nursing home, and where the employee proved by a preponderance of the evidence that the Respondent had terminated her from employment because of a handicap, the burden which thereupon passed to the Respondent to prove by a preponderance of the evidence, that to a reasonable probability and not merely to a reasonable possibility, the Complainant was or would be physically unable to safely or efficiently perform the duties of her job. Warras v. Woodland Health Ctr. (LIRC, 03/14/86).

Where there was no evidence that it was probable that an employee would fall and injure his only kidney, the employer failed to meet its burden of establishing a "future hazard." Dairy Equip. v. DILHR, 95 Wis. 2d 319, 240 N.W.2d 330 (1980).

The burden is on the employer to establish to a reasonable probability that a handicapped individual is physically or medically unable to efficiently perform the required duties. Dairy Equip. v. DILHR, 95 Wis. 2d 319, 290 N.W.2d 330 (1980).

A medical opinion that the employee's working conditions "could" be hazardous is not an adequate defense under the "reasonable probability" standard, since it suggests mere possibility. Western Weighing v. DILHR (Mears) (Dane Co. Cir. Ct., 05/09/77).

Where a job applicant with curvature of the spine has the present ability to perform as a welder, the employer must show that it is reasonably probable that the applicant would not be able to perform that job without risk of future injury to himself or others. Bucyrus-Erie v. DILHR, 90 Wis. 2d 408, 280 N.W.2d 142 (1979); Chicago, Milwaukee, St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

123.44 Risk of injury to employee or others; lesser "possibility" standard

In the case of common carriers, the profession's special duty of care may be considered in evaluating whether an employee can adequately undertake the job-related responsibilities of a particular job. However, this evaluation must be made on an individual case-by-case basis. The Respondent failed to make such a case-by-case assessment in this case. The Complainant, a truck driver, was diagnosed with Wilson's Disease, which can manifest as neurological problems, liver disease, or other symptoms. After receiving two complaints that the Complainant was driving erratically, the Respondent requested that he be medically re-evaluated. A neuro-oncologist concluded that the Complainant had some neurological impairment and suggested further testing, including a road test. However, he indicated that he did not believe that the Complainant's condition should prevent him from operating a motor vehicle. The Respondent then sent the Complainant's medical records, including the physician's report, to a second physician. The second physician did not make an individualized determination about the Complainant's ability to drive, but recommended disqualification simply because of a U.S. Department of Transportation conference report that concluded that all individuals with Wilson's Disease should be disqualified from driving a commercial motor vehicle. However, the federal regulations require a physical examination. Because the second physician did not do a physical examination, his report cannot be considered a valid basis for a determination of the Complainant's fitness to drive. The physician stated that test results would be irrelevant to his determination whether to disqualify the Complainant. The physician's

evaluation was invalid as a matter of law. Szleszinski v. LIRC, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345; aff'd, Szleszinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

Youth counselors who are responsible for performing security work in a juvenile correctional institution have a "special duty" of care for the safety of the general public. Wille v. DOC (Wis. Pers. Comm'n, 01/13/99).

Those engaged in interstate trucking are held to stringent safety standards and the Respondent was obligated, as a result, to investigate any potential basis for the Complainant's apparently erratic driving. The Complainant's qualification to drive as an over-the-road truck driver is governed by the Federal Motor Carrier Safety Regulations. These regulations provide for resolution of disputes over conflicting medical evaluations. A Respondent should not be held to have acted in violation of the Wisconsin Fair Employment Act unless and until there has been a determination under the federal safety regulations that the Complainant is qualified to drive, and the Respondent refuses to permit him to drive. Hermann v. ORT Trucking (LIRC, 12/14/94).

A Respondent reasonably suspended a Complainant until the State Department of Motor Vehicles could determine if her diabetes condition should disqualify her from driving a school bus. Since it is the Department of Motor Vehicles, through its licensing requirement, rather than the employer who determines whether an individual is qualified to operate a school bus safely, an employer fulfills its duty of individual evaluation by suspending the individual driver until the State can make its determination. In essence, the Complainant's diabetes condition was reasonably related to her ability to adequately undertake the job-related responsibilities of a school bus driver during the period of her suspension. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

The stringent "reasonable probability" standard is eased where the employer's line of business is such that a number of persons could potentially be harmed by the handicapped employee. Where the employment involves a "special duty of care for the safety of the general public," the employer need only show that the otherwise discriminatory practice bears a "rational relationship" to its safety obligations to the public and the employee's co-workers. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The burden was on the Respondent to prove that there was a reasonable possibility that the Complainant, who suffered from asthma, proposed a hazard to himself, to co-employees or to the public if he worked as a full-time firefighter EMT. Simply because the Complainant has worked as a paid-per-call firefighter without having had an asthma attack or accounting difficulties using a respirator is not proof that he would not have difficulties in the future. The job duties of a paid-per-call firefighter do not constitute a reliable test of the Complainant's ability to perform as a full-time firefighter. The medical evidence established that there was a reasonable possibility that the Complainant would have to withdraw from a fire scene to medicate himself because of his asthma and, consequently, his performance as a firefighter EMT would pose a reasonable possibility of danger to himself or others. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

The Complainant's position, which involved reprocessing and decontaminating surgical instruments for a health care facility, constitutes employment that involves a special duty of care for the general public. Schilling v. UW-Madison (Wis. Pers. Comm'n, 11/06/91).

The reasonable probability standard is applicable for the duties associated with a deaf person driving tuggers and scooters in a manufacturing facility, except for those duties involving transporting toxic

waste, for which the reasonably related standard is applicable. Willett v. Delco Electronics (LIRC, 01/17/90).

The Respondent, a trucking company, refused to reinstate the Complainant after he was diagnosed as having epilepsy. The Respondent met its burden of proving that the Complainant's handicap was reasonably related to his ability to adequately undertake the job of interstate truck driving, by establishing the applicability of federal regulations prohibiting the epileptics from engaging in such driving. However, the Respondent failed to meet its burden of demonstrating that reasonably accommodating the Complainant by assigning him to driving work not subject to federal regulations, or to yard work not involving driving, would pose a hardship on its program. Federal regulations prohibiting epileptics from driving in interstate commerce were inapplicable to intrastate routes which the Respondent routinely operated. Radloff v. H.F. Dushek Co. (LIRC, 08/18/88).

Work as a prison guard involves a special duty of care for the safety of the general public, and therefore the lesser "rational relationship" standard applies to questions of the handicapped employee's ability to perform the work. Conley v. DHSS (Wis. Pers. Comm'n, 06/29/87).

The Respondent was an electric power company. The Respondent refused to hire the Complainant for the job of truck driver/ground man because he suffered from epilepsy. Because of the nature of the duties of the position of truck driver/ground man for the Respondent, the nature of the work involving a highly hazardous force (electricity), the team efforts required of the ground men, and the close proximity of the public, it was appropriate to use the common carrier standard when reviewing the Respondent's decision not to hire the Complainant. The Respondent had to demonstrate that its refusal to hire the Complainant bore a rational relationship to its safety obligations to the public and its own employees. The evidence in the record clearly demonstrated that the employment of an individual with epilepsy in this position might jeopardize the safety of the individual, the other crew members, and the public. Therefore, the Respondent demonstrated a rational basis to believe that hiring the Complainant posed an unacceptable risk of hazard. Samens v. LIRC, 117 Wis. 2d 646, 345 N.W.2d 432 (1984).

Where the employer is a common carrier, it has a lesser burden of showing only a rational relationship, (i.e., reasonable possibility) between its employment restriction of handicapped individuals and the safety of the general public. A job applicant with one arm was not wrongfully denied work as a cab driver despite a past record of successful cab driving where the employer, a common carrier, showed, through reliance on federal standards, that there was a reasonable possibility of future accidents. Boynton Cab v. DILHR, 96 Wis. 2d 396, 291 N.W.2d 850 (1980).

123.45 Requirement of case-by-case evaluation

The Complainant was denied medical certification as a truck driver. This led to his discharge. The Respondent failed to establish that the Complainant could not safely undertake the responsibilities of the job because it did not meet the statutory requirements that such an evaluation shall be made on an individual case-by-case basis. Instead, the Respondent relied primarily upon a U.S. Department of Transportation conference report that indicated that individuals with Wilson's Disease should, without exception, be disqualified from interstate truck driving. This conference report was never adopted as a rule. There are federal regulations which list some diseases and conditions that will, in fact, result in blanket disqualification. However, Wilson's Disease is not one of the conditions listed in those regulations. Szleszinski v. LIRC, 2005 WI App 229, 287 Wis. 2d 775, 706 N.W.2d 345.; aff'd, Szleszinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

The Complainant indicated at the time she was hired by the Respondent as a registered nurse that she had been diagnosed with epilepsy. In order to make a case-by-case determination as to whether the Complainant's condition posed a risk to the safety of employees or residents, the Respondent requested additional medical information regarding the Complainant's treatment history. The Complainant refused to provide specific, written information about her condition from a treating doctor. When the Complainant hindered the Respondent's ability to evaluate her ability to undertake the job-related responsibilities of the job as a registered nurse, the Respondent did not violate the Wisconsin Fair Employment Act by discharging the Complainant. Garlie v. St. Francis Home in the Park (LIRC, 06/29/98).

Sec. 111.34(2), Stats., requires that any evaluation of a handicapped person's ability to undertake the job-related responsibilities of his employment shall be made on an individual case-by-case basis. Where the employer had a blanket rule prohibiting the employment of individuals with AIDS, the court would not be inclined to consider the employer's affirmative defense that its policy was justified under the "job-relatedness" exception found in sec. 111.34, Wis. Stats. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The Respondent decided not to hire the Complainant as a full-time firefighter based upon its discovery that the Complainant had asthma and based upon the Respondent's perception of that class of persons as being ill-suited for the occupation of a firefighter. The Respondent did not satisfy the requirement of the Wisconsin Fair Employment Act to evaluate the Complainant as an individual, as opposed to simply being a member of a class of persons who suffer from asthma. However, since the Respondent was able to prove at the hearing that it did not unlawfully discriminate against the Complainant on the basis of handicap (because it established that there was a reasonable probability that the Complainant would have an asthma attack at some time while working as a firefighter and, therefore, would pose a hazard to himself and to others) the Complainant was not entitled to any affirmative remedy because of the Respondent's failure to individually evaluate him at the time he was denied employment. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

The 1982 amendments to the Wisconsin Fair Employment Act specified the distinction between those employers having a special duty of care and those employers who do not have such a duty. At the same time, the legislature overruled previous cases insofar as they had failed to require employers to conduct a case-by-case evaluation of the relationship between an individual's handicap and the responsibilities of the particular job. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

The Respondent's failure to hire the Complainants was based on a general rule requiring applicants to meet certain minimum uncorrected vision standards. The individual eye examinations given to Complainants did not constitute an individual case-by-case evaluation of the candidates. The eye examinations accomplished nothing more than to verify that the Complainants' vision did not meet its general rule requiring 20/40 uncorrected vision. Brown County v. LIRC (Phillips & Grinkey) (Ct. App., Dist. III, unpublished decision, 02/27/90).

The statute makes no exceptions to the requirement that the evaluation of whether an individual can perform the job-related responsibilities of a position be done on a case-by-case basis. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 08/11/89), aff'd, sub nom., Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The Respondent had a general rule that it would not employ epileptics as intrastate drivers based on federal regulations prohibiting epileptics from driving in interstate commerce. The Wisconsin Fair Employment Act requires an individual evaluation of the applicant's abilities. The Respondent failed to

produce any evidence that: (1) the Complainant could not work due to his epilepsy, (2) the Complainant's physical condition would constitute a hazard to himself or others, or (3) the Complainant was not competent to work as an intrastate truck driver or yard man. Dushek & Watkins v. LIRC (Radloff) (Brown Co. Cir. Ct., 05/18/89).

Where an individual was denied licensing as a school bus driver because he was a diabetic and was required to use a hypoglycemic agent to control his diabetes, he could not be denied a license without an individual evaluation of whether his particular handicap would prevent him from safely working as a school bus driver. The Department of Transportation was empowered to establish physical standards for the licensing of school bus drivers so long as those standards did not constitute a general rule prohibiting licensure of handicapped individuals in general or a particular class of handicapped individuals within the meaning of sec. 111.32(2)(b), Stats. Botham v. DOT, 134 Wis. 2d 378, 396 N.W.2d 785 (Ct. App. 1986).

123.5 Employer's duty to accommodate and undue hardship

The Respondent considered it important that staff arrive to school on time and it was not required to allow the Complainant to report for work late on a regular basis by way of disability accommodation. Warner v. Green Bay Area Pub. Sch. (LIRC, 12/10/21).

Finding a new job into which the Complainant could be transferred while allowing her to remain on a leave of absence lasting six months was not shown to be a reasonable accommodation, nor was it one the Respondent could provide without hardship. Potts v. State of Wis. Dep't of Health Servs. (LIRC, 05/18/21), aff'd sub nom. Potts v. LIRC (Milwaukee Co. Cir. Ct., 09/08/21).

No specific legal terminology or "magic words" are required in order to request a disability accommodation. Where the Complainant notified the Respondent that he wanted a different truck assignment due to continued back, foot and leg pain, the Respondent should have been aware that he was making a disability accommodation request. Gilbertson v. Wingra Red-Mix, Inc. (LIRC, 12/10/2020), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct., 10/21/21). (appealed to Court of Appeals and awaiting decision as of 03/10/23.)

If the Respondent doubted that the Complainant's condition constituted a disability, it had the right to ask the Complainant to supply medical documentation to support his request but was not justified in completely ignoring the request for an accommodation. Gilbertson v. Wingra Red-Mix, Inc. (LIRC, 12/10/2020), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct., 10/21/21). (appealed to Court of Appeals and awaiting decision as of 03/10/23.)

A conclusion that an employer denied a request for reasonable accommodation does not require a finding of discriminatory intent. It is an affirmative expectation that employers will provide reasonable accommodations if they are able to do so and the employer's lack of deliberate intent to discriminate does not provide a defense to a claim of discrimination. Gilbertson v. Wingra Red-Mix, Inc. (LIRC, 12/10/2020), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct., 10/21/21). (appealed to Court of Appeals and awaiting decision as of 03/10/23.)
A reasonable accommodation does not include keeping a job open for an employee who has been unable to work for an extended period of time and for whom there is not a foreseeable return to work date. Ison v. Sch. Dist. of Crandon (LIRC, 9/28/20).

The Complainant has an initial burden of showing that a reasonable accommodation is available. This can be met by showing at hearing that a particular reasonable accommodation was apparent or should have been apparent to the employer during the Complainant's employment, as in Target Stores, Inc. v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), or by showing at hearing that: 1) the employer failed to engage in an

interactive process with the Complainant to discuss possible accommodations during employment; and 2) a reasonable accommodation would have been discovered if the employer had engaged in that process. The Complainant argued that he met his burden by the second method. The Complainant showed that the employer failed in its duty to engage in an interactive process at the end of the Complainant's employment but failed to show that either accommodation he proposed at hearing, limiting the number of times the Complainant left the relative safety of his work area, and having an escort every time he ventured from his work area, was a reasonable accommodation. The Complainant sought to add one more potential accommodation for the first time on appeal to the commission, that he be required to wear a helmet at work, but there was no competent evidence in the record addressing the reasonableness of that accommodation in the sense that it would have avoided a reasonable probability of substantial harm. Ewerdt v. Brunswick Corp. *(LIRC, 04/29/20).*

The Complainant's refusal to sign a medical release did not constitute a failure to engage in the interactive process. The Complainant had already provided multiple doctor's notes at the employer's request and notified the employer that she could obtain additional information if needed. Staudinger v. Cnty. of Manitowoc *(LIRC, 12/11/2018).*

The employer failed in its duty to engage in the interactive process when it discharged the employee without discussing his accommodation request. Although it is not clear that any one accommodation requested by the employee would have resolved the problem, the point of the interactive process is to work together to identify an accommodation. The WFEA contemplates that employers will try accommodations to see if they are workable and that they will exercise a degree of "clemency and forbearance" when dealing with an individual whose disabilities interfere with job performance, at least while the interactive process of exploring the possibility of accommodation proceeds Oldenburg v. Triangle Tool Corp. *(LIRC 02/20/18), aff'd sub nom.* Triangle Tool Corp. v. LIRC and Oldenburg *(Milwaukee Co. Cir. Ct., 02/18/19).*

Where the evidence established that the Complainant's migraines prevented him from working a five-day-a-week work schedule, and the Complainant and his doctor asked that he be accommodated by continuing to work his schedule of four 10-hour days that he had been working since 2002, the alternative accommodations offered by the Respondent (accommodations that cut back on light, sound, and scent, and the ability to take time off on a flexible, as-needed basis) were not reasonable where the Respondent (1) never contacted the Complainant's doctor, (2) substituted its own judgment as to what accommodations would accommodate the Complainant's migraines, and (3) did not show that the accommodations it offered would have effectively allowed the Complainant to continue performing his job notwithstanding his disability. Satorius v. Wis. Dep't of Corr. *(LIRC, 01/31/17), dismissed on other grounds sub nom.* Satorius v. LIRC *(Eau Claire Co. Cir. Ct., 05/14/17).*

Although an employer has the right to provide an accommodation that is less expensive than the one the employee has requested, that does not necessarily mean that an employer can reasonably require an employee to use up all of his accrued sick leave (a valuable benefit in this case) in order to keep his job, particularly when other accommodations are available. Satorius v. Wis. Dep't of Corr. *(LIRC, 01/31/17), dismissed on other grounds sub nom.* Satorius v. LIRC *(Eau Claire Co. Cir. Ct., 05/14/17).*

The Complainant's failure to do everything possible to obtain alternate employment does not relieve the Respondent of its obligation to provide her with reasonable accommodations that it is able to offer without hardship. Wilson v. County of Milwaukee (LIRC, 09/16/16).

While an employer is generally permitted to reserve light duty assignments for injured workers and is not required to permanently assign a disabled employee to such a position, it is not unreasonable that a disabled employee would be allowed to remain in a light duty position when doing so does not adversely affect the employer's ability to provide temporary accommodations for other workers. Wilson v. County of Milwaukee (LIRC, 09/16/16).

Agoraphobia left a truck driver unable to do his job, and no accommodation would have allowed him to do so. The Respondent did not deny a reasonable accommodation by ending a temporary inside position that was not an existing position but was cobbled together from tasks within the responsibilities of other employees. A temporary leave can be a reasonable accommodation, but a lengthy and indefinite leave of absence is not required. Under the circumstances, where the employer maintained the Complainant's employment for 15 months, continuing him on layoff status was not a denial of a reasonable accommodation. The employer met its requirement to engage in an interactive process. Schultz v. V & H Trucks, Inc. (LIRC, 04/30/15).

The requirement of reasonable accommodation does not apply to situations in which a Complainant is determined to be an individual with a disability based solely on being "perceived as having ... an impairment" under Wis. Stat. § 111.32 (8)(c). Hendon v. Wis. Bell, Inc. d/b/a AT&T (LIRC, 11/13/14), aff'd sub nom. Hendon v. LIRC (Milwaukee Co. Cir. Ct., 08/12/2015).

The Respondent unreasonably delayed, because of a failure to engage in an interactive process, to conduct an ergonomic assessment in connection with accommodating the Complainant's disability. This failure by itself is not a violation of the WFEA, but it raises the question of whether an accommodation could have been identified if the Respondent had engaged in an interactive process. The Complainant did not show evidence of an accommodation that would have been identified as a result of the assessment, so there was no failure to reasonably accommodate on this issue. With respect to the Complainant's request to have a cart to help him perform his job, the Respondent's delay of about three months in providing it, which was in part attributable to the Complainant, was not significant enough to be considered a refusal to reasonably accommodate. Vosen v. Dep't of Revenue (LIRC, 04/25/14).

While an unreasonable delay in providing an accommodation could conceivably constitute a violation of the Act, the four-month delay in this case was not found to constitute a violation given the circumstances. Gallagher v. Blain Supply, Inc. (LIRC, 03/28/14).

The Complainant's request for part-time work was merely a recommendation and not a medically necessary accommodation. However, the Commission noted that if medical necessity of part-time work had been shown, the Respondent would have been required to do more than simply assert that part-time work was not available. It would have had to show that creating a part-time position for the Complainant would have been a hardship. Cave v. Cnty. of Milwaukee (LIRC, 1/30/14).

While transfer to a new job can be a reasonable accommodation for an employee with a disability, the Respondent is not required to place the Complainant in a job for which he lacked qualifications to adequately perform. Further, the Respondent need not place an employee with permanent restrictions in a temporary "light duty" assignment. Nesberg v. County of Marinette (LIRC, 06/14/13).

The question of whether reasonable accommodation was refused or would have posed a hardship becomes important only if it appears that an employment decision was made because of a disability and that the disability was reasonably related to the Complainant's ability to do the job. Where the Respondent fails to establish that the Complainant's disability was reasonably related to her ability to do the job, the question of whether an accommodation was refused or would have posed a hardship does not come into play. Shea v. Chrysler Group LLC (LIRC, 02/28/13), aff'd, Chrysler Group v. LIRC (Kenosha Co. Cir. Ct., 11/26/13); aff'd, Ct. App. Dist. II, 02/25/15 (not recommended for publication).

A Complainant cannot prevail on a claim of disability discrimination by demonstrating that he was treated less favorably in the accommodation process than another employee with a different disability. Valyo v. St. Mary's Dean Ventures (LIRC, 12/28/12).

The Respondent unlawfully discriminated against the Complainant because of her disability (migraine headaches) when it discharged her for poor customer service in her job as a loan officer. The Complainant's

failures in customer service were directly caused by her disability, which prevented her from being at work and receiving and/or responding to contacts from customers. Her discharge for poor customer service was, thus, in legal effect, because of her handicap. The Respondent had failed to provide the Complainant with a reasonable accommodation that would have enabled her to remain employed. The Complainant needed assistance in establishing a system for communicating with clients during her absences and for directing those clients to other bank employees if they required immediate assistance. Further, the Complainant needed an understanding that she would not be able to perform her duties on days she was absent to work due to her disability, and that she should not be discharged as a result of her absences. The Respondent failed to demonstrate that accommodating the Complainant's disability by assisting her to better help her customers and by refraining from discharging her for her absences would have caused a hardship for its business. On the contrary, the evidence in the record suggested that the Respondent was not interested in providing the Complainant with an accommodation. The fact that the Complainant's supervisor issued her an attendance warning even though he was aware that her absences were because of her migraines and were covered by FMLA leave, combined with the fact that he had already obtained legal advice on how to deal with the Complainant's absences, suggests that the Respondent was not genuinely interested in accommodating the Complainant's disability but was paving the way for her discharge. Stelloh v. Wauwatosa Savings Bank (LIRC, 06/19/12).

An employer has an obligation to engage in an "interactive process" aimed at determining the precise job-related limitations imposed by a disability and how those limitations could be overcome with a reasonable accommodation. However, the failure to engage in an interactive process does not, on its own, constitute a violation of the law. The question is whether the Complainant has shown that, if the Respondent had engaged in the process, together they could have identified a reasonable accommodation. Schulz v. Wausau Sch. Dist. (LIRC, 04/30/12).

In this case, the Respondent presented significant evidence establishing that the accommodation it had granted the Complainant for an extended period of time was not working. The Complainant was performing far less than eight hours of productive work, even with the accommodation. Moreover, without regard to how many hours of work the Complainant was performing each day, the evidence showed that permitting the Complainant to perform only those duties she was capable of performing resulted in operational inefficiencies and extra expenses for the Respondent. For example, the Complainant was unable to fill in for absent co-workers. In addition, accommodating the Complainant resulted in morale problems for her fellow custodians who were required to cover for her, sometimes at the expense of completing their own job duties. Where accommodations actually result in significant burdens for other workers, considerations of morale are appropriate. Schulz v. Wausau Sch. Dist. (LIRC, 04/30/12).

A Complainant with Multiple Sclerosis argued that she could do light duty tasks, including those currently performed by two other custodians, and that in this way she could fill her workday. However, the evidence did not establish that there were eight hours of light duty work available for the Complainant to perform. Further, to structure the job in this manner would result in operational inefficiencies and would, in all likelihood, only increase the already poor morale of the other custodians who had been filling in for her. Schulz v. Wausau Sch. Dist. (LIRC, 04/30/12).

An employer has some obligation to engage in an interactive process aimed at determining the precise job-related limitations imposed by a disability and how those limitations could be overcome with a reasonable accommodation. While the failure to engage in an interactive process does not, on its own, constitute a violation of the law, the question is whether the Complainant has shown that, if the Respondent had engaged in the process, together they could have identified a reasonable accommodation. Smith v. Wis. Bell (LIRC, 04/19/12).

An accommodation designed to make it easier for an employee with a disability to commute to and from work (and, in this case, to thereby work with a lesser degree of pain) might be a reasonable accommodation.

However, it is not clear that the accommodation the Complainant requested in this case was either medically necessary or that it would have effectively resolved the problem with his knee pain. The Complainant's testimony regarding his need for an accommodation was not supported by any medical evidence. Further, the Complainant failed to attempt simpler means of resolving the problem with his knee. Young v. DOC (LIRC, 11/30/11).

The Respondent had temporary positions which it designated as light duty positions. It reserved those positions for employees who had suffered a worker's compensation injury. The Respondent was not required to convert one of these positions into a permanent position for the Complainant in order to meet the reasonable accommodation requirements of the Wisconsin Fair Employment Act. To do so would make that position unavailable for the purpose for which it was created. Rousseau v. Appleton Papers (LIRC, 12/03/10).

Wisconsin law has consistently held that it is inappropriate to conclude, as a matter of law, that any particular kind of action is not required as an accommodation under the Wisconsin Fair Employment Act. It cannot be said that a job-related responsibility (even an "essential" one) need never be restructured or removed by way of reasonable accommodation. On the contrary, the Wisconsin Fair Employment Act should be broadly construed such that even the transfer of a worker who can no longer perform his job to another position might be a reasonable accommodation. Englebert v. Humana (LIRC, 09/28/10).

The Respondent was not required to modify an assembler position to such an extent that it effectively created a new position in order to reasonably accommodate the disability of the Complainant, who was a new hire. Willis v. Stoughton Trailers (LIRC, 09/04/09).

There are two elements to the question of whether there was a refusal to reasonably accommodate an individual's disability within the meaning of the Wisconsin Fair Employment Act: (1) did a reasonable accommodation exist, and (2) if so, would providing such an accommodation have worked a hardship on the employer. The initial burden is on the Complainant to prove that a reasonable accommodation is available. A reasonable accommodation is one which would enable the Complainant to perform the duties of his position. Geller v. Heartland Lakeside Joint #3 Sch. Dist. (LIRC, 03/27/09).

Where a job applicant notified the employer that he had medical restrictions which made him unable to perform the job in question, and where there was no reasonable accommodation available which would enable him to do so, the employer could lawfully decline to hire that individual. Schmidt v. Lunda Constr. (LIRC, 12/26/08).

Although an employee cannot always expect to receive the accommodation of his or her choice, transfer to a different position paying substantially less than what the Complainant had been making at his regular job cannot be considered a reasonable accommodation, particularly in light of the availability of an alternative accommodation which would have enabled the Complainant to continue working at his previous position at the same rate of pay. Cappelletti v. Ocean Spray Cranberries (LIRC, 02/15/08).

The Respondent failed to reasonably accommodate the Complainant by failing to allow him sufficient time to submit documentation to avoid being assessed as having an "occurrence" under the Respondent's no-fault attendance policy. The Respondent also informed the Complainant that he had only three days to submit adequate documentation to excuse his absence, even though the Complainant informed the Respondent that he would be unable to get such documentation from his doctor for at least a week. The Respondent thus failed to reasonably accommodate the Complainant by failing to give him sufficient time to submit documentation to avoid being assessed an "occurrence" under its no-fault attendance policy. Stoughton Trailers v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

The Respondent failed to reasonably accommodate the Complainant by failing to extend to him "clemency and forbearance" in the form of temporarily tolerating his absences while the medical intervention that was already under way for his migraine headaches had a chance to resolve the problem of his disability-related absences. "Clemency and forbearance" is not an open-ended requirement mandating that an employer indefinitely suspend its attendance requirements for a disabled employee. Such a mandate would not be a reasonable accommodation within the meaning of the Wisconsin Fair Employment Act. Rather, "clemency and forbearance" requires that an employer "forbear" by temporarily tolerating an employee's disability-related absences under circumstances similar to those presented in this case (i.e., a temporary accommodation was required to permit medical treatment which, if successful, would remove the difficulty in the Complainant performing his job-related responsibilities). Stoughton Trailers v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

Although a temporary leave to permit medical treatment over a relatively short period of time may be a reasonable accommodation, a period of indefinite medical leave would not. In this case, the Complainant's inability to work extended over a period of nearly 18 months. King v. City of Madison (LIRC, 12/21/07).

The Complainant contended that the Respondent should have accommodated her disability by permitting her to displace a worker in another bargaining unit. However, the displacement of another worker is not a reasonable accommodation under the Wisconsin Fair Employment Act. King v. City of Madison (LIRC, 12/21/07).

The Complainant contended that the Respondent's failure to appoint her to vacant positions without requiring her to compete for those positions violated the reasonable accommodation requirement of the Wisconsin Fair Employment Act. Although transfer to a vacant position might constitute a reasonable accommodation, this form of accommodation is not an unlimited one. The positions in question must have more in common than the fact that they are with the same employer. In this case, the Complainant's position as a transit operator was essentially unrelated to any of the vacant administrative/clerical positions for which she applied. Moreover, the Respondent was not required to disregard the merit-based recruitment and selection system mandated by its ordinances and included in its collective bargaining agreement with the union by appointing the Complainant to a vacant position for which she was not the most qualified candidate as a means of accommodating her disability. King v. City of Madison (LIRC, 12/21/07).

The Respondent was not required to permanently assign the Complainant to light duty when she was released to return to work with permanent restrictions. Although the Respondent had certain temporary positions designated as light duty positions, it reserved those positions for employees on workers' compensation. The Respondent was not required to convert one of these temporary positions to a permanent position for the Complainant in order to meet the reasonable accommodation requirements of the Wisconsin Fair Employment Act. To do so would have made the positions unavailable for the purpose for which they were created. This would, in essence, have resulted in the creation of a new position for the Complainant. An employer is not compelled to create new positions in order to accommodate its disabled employees. King v. City of Madison (LIRC, 12/21/07).

An employer does not have the duty to create a position for a disabled employee as a means of accommodating a disability. Rutherford v. Trienda Corp. (LIRC, 07/27/07).

A Complainant has the initial burden of proving that a reasonable accommodation is available. Where the record was insufficient on the question of whether a computer and a scanner would have been a reasonable accommodation for the Complainant in this case, the consequences must fall on the Complainant, in the form of a decision that he did not meet his initial burden to prove that a reasonable accommodation was available. Gamroth v. DOC (LIRC, 10/20/06).

The Respondent unsuccessfully contended that it would not be a reasonable accommodation to allow the Complainant to be excluded from the application of its no-fault attendance policy because he had also incurred absences for reasons that were not disability related. The fact that an individual with a disability incurs absences not related to that individual's disability does not permit an employer to ignore its obligation to reasonably accommodate that individual with respect to disability-related absences over which the individual has no control. The Complainant would not have been discharged if the Respondent had not counted his absences which were caused by his disability. Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06).

The Respondent should have accommodated the Complainant by exempting him from its no-fault attendance policy for a few months while he was having his medications adjusted to control his bipolar II disorder. Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06).

The Respondent failed to establish that it would be a hardship to accommodate the Complainant's absences from work. The Respondent did not provide factual information or specific evidence to show that the Complainant's absences from the workplace actually affected its sales. Further, while other commissioned sales associates would be forced to take care of customers instead of carrying on with their normal duties if the Complainant was not there, some of those people would be happy with the Complainant's absence because it increased their opportunity to make more commissions. Goldsmith v. Sears Roebuck & Co. (LIRC, 06/29/06).

It is axiomatic that where a Complainant has failed to sustain her burden to prove that she was an individual with a disability within the meaning of the Wisconsin Fair Employment Act, no duty of reasonable accommodation would arise. Schultz v. CNH Capital Corp. (LIRC, 05/08/06).

A Complainant has the initial burden of proving that a reasonable accommodation is available. The employer then has the burden of establishing that no reasonable accommodations could be made to enable the Complainant to perform his job, or that it would experience hardship in making such accommodations. In this case, the Complainants met their initial burden of proving that reasonable accommodations for their disabilities were available (e.g., send them home when there was not enough work for them to do in their department, or excuse them from working in other departments they could not work in because of their disabilities.). The Respondent contended that the accommodations requested by the Complainants were not reasonable and that the Complainants were scheduled for lay off because it had to retain employees who were "versatile" and able to go to other departments within the Respondent's warehouse. However, the evidence established that the Complainants had performed jobs in a number of different departments despite their disabilities. Furthermore, the evidence indicated that the Complainants were never afforded the opportunity to discuss or review reasonable accommodation alternatives with the Respondent before the Respondent chose them for layoff. The evidence thus failed to show that no reasonable accommodations could have been made to enable the Complainants to perform their jobs. The Respondent further failed to establish that it would have experienced a financial hardship in making necessary accommodations for the Complainants. Bartle v. Jack Links Beef Jerky (LIRC, 02/09/06).

Sec. 111.34(1)(b), Stats., makes it unlawful for employers to refuse reasonable accommodations that could be provided without hardship. The Respondent in this case was not the Complainant's employer but was a union hiring hall providing job referrals. It is hard to envision any accommodation which a union hiring hall would be able to provide that would enable a disabled worker to perform a job. While the Complainant suggested that the Respondent could disregard its referral procedures and call him for jobs off a different list (a preference which might result in a broader list of jobs for which the Complainant could be considered), this is not the type of accommodation contemplated by the statute, as it is not a measure designed to enable the Complainant to perform a job notwithstanding his disability. Neitzer v. Laborers Local No. 931 (LIRC, 10/31/05).

The employee has the initial burden of proving that a reasonable accommodation is available. In this case, the Respondent discharged the Complainant after it received a note from her doctor indicating that it was medically necessary that she be permitted to sit down or to rest her foot for twenty minutes out of every hour because of degenerative arthritis of her ankle joint. The record failed to establish that some of the accommodations proposed by the Complainant would have allowed her to perform the jobs in question, given her medical restrictions. The Complainant contended that the Respondent could have accommodated her by reorganizing her work area to reduce the amount of movement and increase the amount of time she could rest her foot. However, the Complainant did not explain how such a reorganization could be accomplished, and there was no reason to believe that any such accommodation would have been available. Finally, the Complainant contended that the Respondent could have transferred her to a light duty job, as it does for employees with worker's compensation injuries. While the Respondent might be obligated to modify the Complainant's existing job or to transfer her to another position it has available (provided it could do so without hardship), it is not obligated to create a job for the Complainant. The fact that it has done so for people injured on the job (whose salaries it must pay whether or not they are at work) does not alter this. Rauls-Hepp v. J.L. French Corp. (LIRC, 09/30/05).

Any doubts as to the workability of a proposed accommodation should be resolved against the Complainant where, as here, it was not readily apparent that any accommodation would have been available. The Respondent told the Complainant that it did not believe she could be accommodated, and the Complainant never disputed this or offered suggestions as to ways in which she could perform the job. Rauls-Hepp v. J.L. French Corp. (LIRC, 09/30/05).

An employer is generally not required to indefinitely suspend the application of a reasonable attendance policy in order to accommodate a disability. Seil v. Dairy Farmers of Am. (LIRC, 08/26/05).

The Complainant was unable to work a twelve-hour shift because of chronic migraine headaches with associated chronic neck pain. The Respondent unlawfully refused to provide the Complainant with a reasonable accommodation when it discharged her rather than permitting her to continue working eight-hour shifts (either five days a week, or on her regular schedule of seven days every two weeks) or to share one full-time twelve-hour shift with another worker. The record did not establish that an accommodation would have resulted in additional personnel expenses for the Respondent. There was no evidence to suggest that the Respondent actually incurred any additional payroll expense during the eight-month time period in which it temporarily accommodated the Complainant by permitting her to work an eight-hour shift. Nor was it established that the Respondent's productivity suffered as a result of allowing the Complainant to work only eight hours. The Respondent failed to consider the possibility of permitting two employees to share one job and failed to engage in any analysis of whether this proposed accommodation could have been effective. (Implementing the job-sharing possibility might actually have reduced the Respondent's personnel expenses, since a job-sharing arrangement would have reduced both employees to part-time status, thereby rendering them ineligible to receive health insurance or other benefits.) The Respondent's arguments about morale problems were equally unpersuasive. Even if the Respondent had demonstrated that other workers complained about the Complainant working a shorter shift, the mere fact that some co-workers might think accommodations are unfair does not release an employer from its duty of assisting workers with disabilities to remain employed. Wickstrom v. Hutchinson Technology (LIRC, 08/26/05).

The Complainant was effectively discharged by the Respondent because of her disabilities, which were asthma and allergic rhinitis. The Respondent did not permit the Complainant to continue work because of information it had received from her physicians that she could not work around cats and dogs and would probably not be able to do so for a period of several years, even with appropriate use of medications and immunotherapy. The presence of pets was an integral part of the Respondent's project to provide a more cheerful and home-like environment for residents of its long-term healthcare facility. Given the therapeutic goals of this project and the positive results it had achieved, it would have been a hardship for the Respondent, and for the population it served, to be unable to implement its program of allowing pets in its

facilities. An accommodation's impact on the ability of an employer to achieve legitimate program goals is an appropriate consideration in determining whether the accommodation would impose a hardship. Wodack v. Evangelical Lutheran Good Samaritan Soc. (LIRC, 08/05/05); aff'd sub nom. Wodack v. LIRC (Door Co. Cir. Ct., 03/07/06).

In her statements on the hearing record, the Administrative Law Judge appeared to be under the impression that no duty of reasonable accommodation arises as a result of a perceived disability. However, given the unsettled nature of the law in this regard, it was inappropriate for the ALJ to grant the motion to dismiss the complaint on this basis. Grell v. Bachmann Constr. (LIRC, 07/15/05); aff'd sub nom. Grell v. LIRC (Dane Co. Cir. Ct., 02/22/06).

There are two separate steps to analyzing reasonable accommodation issues: First, it must be determined whether the accommodation is a reasonable one (i.e., whether it effectively enables the disabled individual to perform the job-related responsibilities of her employment). Secondly, it must be determined whether the accommodation imposes a hardship on the employer. However, before those steps can be undertaken, evidence must exist that a request for an accommodation was made, or a need for an accommodation was apparent. Ford v. Lynn's Hallmark (LIRC, 06/27/05).

It is unlikely that the Complainant in this case would have required any special accommodation for his disability, which was left ulnar neuropathy. Assuming, however, that this matter could be considered one in which an accommodation was required, the Respondent failed to demonstrate it could not have provided such an accommodation without hardship. The Respondent argued that it expected that there would be union grievances and that there would be a negative effect on employee morale if the Complainant were permanently provided preferential treatment. However, there was absolutely no evidence to suggest that accommodating the Complainant would adversely affect employee morale. To the contrary, the testimony established that the employees in the bargaining unit were willing to help out if someone needed an accommodation. If the Respondent was concerned about anticipated union grievances, it should have waited until the union contract and the Complainant's need to be accommodated clashed. The Complainant should have been permitted to continue performing his job until such time as his disability rendered him unable to do so and the need for a specific accommodation arose. Clearly, that point would not be reached until such time as the Complainant was required (by virtue of his seniority) to accept work which he was physically unable to perform, and there was no more senior worker willing to voluntary trade jobs with the Complainant in order to enable him to continue working. At that time, it would become necessary to make a determination as to whether discharge was warranted or whether an accommodation might be available that would enable the Complainant to preserve his employment. VanDenElsen v. County of Brown (LIRC, 06/14/05).

The Complainant established that she was an individual with a disability. She was diagnosed with degenerative disc disease. This was an impairment within the meaning of the Wisconsin Fair Employment Act. The Complainant was limited in her capacity to work in her job as a production worker at a manufacturing plant that operated 12-hour shifts. She had back pain that restricted her ability to work a 12-hour shift and to engage in prolonged static standing or sitting. When the Complainant was unable to work 12-hour shifts, the Respondent initially accommodated her for several months by allowing her to work 8-hour shifts. The Respondent's assertions that prolonged continuation of this 8-hour shift schedule for the Complainant would create a hardship were unpersuasive. Although the Respondent hypothesized that certain problems could arise in the future, it presented no evidence that any ever did. For example, it did not submit any evidence that other employees sought to work reduced shifts, that morale problems had arisen among its other employees, or that production had decreased as a result of the Complainant's arrangement. Reasonable accommodation and hardship are two distinct concepts that involve separate inquiries, since an accommodation may be reasonable, but nevertheless work a hardship upon a specific employer. The Respondent in this case failed both tests. It did not establish that it could not reasonably accommodate the Complainant's disability, nor did it introduce any evidence that allowing the Complainant to work 8-hour

shifts would cause a hardship to its business. Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.

Hypothetical difficulties associated with accommodating the Complainant were too speculative to meet the Respondent's burden of proof on the issue of accommodation. Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.

The Respondent did not fail to reasonably accommodate the Complainant's disability where the only potentially applicable accommodation would have been the extension of the Complainant's medical leave for an indefinite period of time. The Respondent had already provided the Complainant with a period of medical leave twice as long as it had ever provided any other employee. The Respondent had no assurance that the Complainant, who had already been on medical leave for four months, would return to work in the near future, if at all. Although a temporary leave to permit medical treatment over a relatively short period of time may be a reasonable accommodation, the period of indefinite leave suggested here would not. Greenwood v. Ross Furniture (LIRC, 12/30/04).

Although the Complainant established that he was discharged because of his disability, the record did not establish that the Respondent failed in its duty of reasonable accommodation. The Complainant, an accountant, is visually impaired. It would have been reasonable for the Respondent to employ another employee to do data entry for the Complainant (i.e., this would have effectively enabled the Complainant to carry out his assigned tasks). However, the record established that the delegation of the Complainant's tasks to another employee would pose a hardship for the Respondent. The Respondent had already provided this accommodation to the Complainant for a significant period of time, and it had not enabled him to achieve the level of productivity of other staff members. It was undisputed that the Respondent's financial situation required that it reduce its workforce. Further, given the Respondent's tenuous financial situation, it would be a hardship for the Respondent to continue to employ the Complainant (who was its highest paid, yet least productive, staff accountant) and to terminate one of its lower paid more productive employees. Walsh v. Tom A. Rothe, S.C. (LIRC, 11/19/04).

The Respondent did not fail to accommodate the Complainant, who is visually impaired, because he did not alert it to new software applications that might have allowed him to continue his work as an accountant. The Respondent had relied upon the Complainant for recommendations for new technology for the visually impaired in the past. Walsh v. Tom A. Rothe, S.C. (LIRC, 11/19/04).

The Complainant's disability was reasonably related to his ability to adequately undertake the job-related responsibilities of his employment, as it caused him to be absent from work for extended periods of time. At the hearing, the Complainant testified that he believed that the Respondent should have paid half of his benefits while he was going through his medical problems, then resume paying full benefits when he was able to work again. However, a reasonable accommodation is an accommodation which is designed to enable the individual to perform the job-related responsibilities of his employment. The payment of the Complainant's fringe benefits bears no relationship to his ability to maintain the employment or to perform the job. Therefore, those benefits did not have to be paid by way of reasonable accommodation. Stroik v. Worzalla Publishing (LIRC, 07/16/04).

The Complainant was discharged for continuing absences related to his disability. Although the Complainant did not make a specific request for an accommodation, it is apparent that the accommodation required was an extended leave of absence so that the Complainant could retain his employment. In this case, the record indicated that the Complainant had been off work for over four months when he told the Respondent that he was going to undergo surgery, which would be followed by eight to twelve weeks of recovery. The Complainant did not tell the Respondent that the operation, if successful, would enable him to return to work, and did not give the Respondent any reason to believe that he would be able to work anytime in the foreseeable future. If, in fact, the Complainant believed that he would be able to return to work in the future,

it was his responsibility to put the Respondent on notice of this fact so that it could determine the appropriateness of extending his leave of absence. There was no reason to believe that permitting the Complainant to continue his medical leave of absence would have been a reasonable accommodation, or that the Respondent's decision to terminate the employment relationship was in violation of the Wisconsin Fair Employment Act. Stroik v. Worzalla Publishing (LIRC, 07/16/04).

The Complainant worked as the head of a four-person department in the Respondent's cheese factory before she was left a quadriplegic following a non-work-related accident. The Complainant eventually regained partial use of her arms. She is required to use a wheelchair to move around. The Complainant could no longer perform some of the duties of her position that required climbing, lifting, or performance in a standing position. The Complainant's disability was reasonably related to her ability to adequately perform her job responsibilities unless accommodations were made. The Respondent did not establish that it would be a hardship to accommodate the Complainant's disability. 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. In determining whether an employer is required to accommodate a disabled employee, the questions of reasonableness of the accommodation and hardship to the employer, while overlapping, are two distinct considerations that are to be addressed independently. In this case, there were reasonable accommodations that the Respondent could have taken in order to keep the Complainant as an employee. The Respondent could have modified the job site to allow the Complainant full access and let her continue to perform those tasks she was still able to perform. Among the accommodations that should have been considered were: a ramp installed at the entrance which would allow wheelchair access; lowering of tables and other fixtures; the modification of the bathroom; and the widening of aisles where necessary. Another way the Respondent could have accommodated the Complainant's disability was by modifying her responsibilities. Everyone in the Complainant's department was cross-trained, and at least two of the three other team members indicated that they could make up for the Complainant's restricted duties. The other employees could divide among themselves those physical tasks that the Complainant was no longer able to do, and she could focus just on the many job responsibilities that she could do. The Respondent failed to establish that it would have been a hardship to make these physical and job modifications. Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.

The "essential functions of the job" analysis, which may be appropriate under the federal Americans with Disabilities Act (ADA), is not employed in reviewing a disability accommodation issue under the Wisconsin Fair Employment Act. Parker v. Dane County (LIRC, 11/10/03), aff'd, sub nom. Dane Co. v. LIRC (Dane Co. Cir. Ct., 07/20/04).

The Complainant, who was deaf, was entitled to "bump" into the position of marriage license clerk pursuant to the terms of the applicable collective bargaining agreement in order to avoid a lay-off. The Respondent contended that a reasonable accommodation was not required because the Complainant had not worked in that position before, except as a back-up worker. This argument was rejected. The Complainant had worked for the Respondent for many years. The Complainant's status was significantly stronger in this regard than that of a new hire or a transfer hire and was more similar to that of a position incumbent. Further, the need to accommodate the Complainant arose not because of a change in her personal circumstances, but because of a change in the responsibilities assigned to the office. Parker v. Dane County (LIRC, 11/10/03), aff'd, sub nom. Dane Co. v. LIRC (Dane Co. Cir. Ct., 07/20/04).

The Respondent contended that reassigning all or most of the phone duties of the marriage license clerk position to two other support staff members as a means of accommodating the Complainant, who was profoundly hearing impaired, would create a hardship. This argument was rejected. The other support staff members would not have to handle many more telephone calls. The Respondent did not prove that assigning the phone duties to other support staff members would cause a morale problem. Testimony of management employees to this effect was hearsay. Finally, although office harmony is a laudable management goal and a

legitimate consideration here, the goals of the Wisconsin Fair Employment Act would not be served if disgruntled coworkers could block reasonable accommodations simply by expressing objection or threatening to file contract grievances. Parker v. Dane County (LIRC, 11/10/03) aff'd, sub nom. Dane Co. v. LIRC (Dane Co. Cir. Ct., 07/20/04).

The Respondent's arguments that it would be a hardship to assign the phone duties of the marriage license clerk position to the remaining two support staff because it could jeopardize the classification of their positions was rejected. The Respondent failed to show that comparable level duties of these other positions which did not involve the use of the phone could not have been assigned to the marriage license clerk position in order to maintain the classification strength of each of these positions. Parker v. Dane County (LIRC, 11/10/03) aff'd, sub nom. Dane Co. v. LIRC (Dane Co. Cir. Ct., 07/20/04).

The Respondent did not establish that it would have been a hardship to modify its business practices through the addition of office technology because it would reduce its responsiveness to the public. Although the use of VCO technology for the Complainant, who was profoundly deaf, would require that the caller be placed on hold or leave a message for a return call, the office already placed callers on hold and returned phone messages. Moreover, the Respondent did not prove that using options such as e-mail would have been less responsive to the public. Many of the Respondent's representations in this regard depend upon speculation. Speculation or theoretical difficulties are insufficient to sustain the Respondent's burden to show hardship. Parker v. Dane County (LIRC, 11/10/03) aff'd, sub nom. Dane Co. v. LIRC (Dane Co. Cir. Ct., 07/20/04).

There are two separate steps to the "reasonable accommodation" analysis. The first step is to determine whether the accommodation is a reasonable one (i.e., whether it effectively enables the disabled individual to perform the job-related responsibilities of his employment). The second step is to determine whether the proposed accommodation imposes a hardship on the employer. Kinion v. Portage Community Sch. (LIRC, 09/19/03).

Although a temporary leave to permit medical treatment over a relatively short period of time may be reasonable accommodation, the indefinite leave suggested in this case would not, particularly given the fact that the employer had already granted the Complainant a series of medical leave requests spanning nearly a year's time period, none of which have had enabled the Complainant to return to work. The Respondent established that it would have been a hardship to place the Complainant on a period of indefinite leave to wait until a suitable transfer vacancy occurred. Vacancies and positions to which the Complainant would have been eligible to transfer occurred relatively infrequently. Kinion v. Portage Community Sch. (LIRC, 09/19/03).

The Respondent failed to reasonably accommodate the Complainant's disability when it discharged him only two days after requesting him to provide medical certification for a disability-related absence. The Respondent argued that it had offered the Complainant a reasonable accommodation by providing him with an opportunity to seek to have his absences qualified as leave covered under the federal Family and Medical Leave Act (FMLA), which would have had the result under its "no fault" attendance plan of having them not count as "occurrences." However, the Respondent failed to properly comply with procedures specified under the FMLA. The FMLA allows an employer to make a request that an employee seeking FMLA leave provide medical certification of the need for the leave. The rule provides that the employer must give the employee at least 15 calendar days after the employer makes the request for medical certification, and, if the employee provides inadequate certification, the employer must give the employee a "reasonable opportunity to cure" the deficiency. Courts have held that termination is not an appropriate response for an inadequate certification. Because the Respondent did not comply with the provisions of the federal FMLA, it refused to reasonably accommodate the Complainant's disability within the meaning of sec. 111.34(1)(a), Stats. Further, whether or not the Complainant was properly offered the opportunity to establish that his absences should be treated as covered under the federal FMLA, the employer should have extended to him the reasonable accommodation of temporarily tolerating the absences which were being caused by the

Complainant's disability. Geen v. Stoughton Trailers (LIRC, 09/11/03), (Decision on remand from the Court of Appeals in Geen v. LIRC, 2002 WI App 269, 258 Wis. 2d 498, 654 N.W.2d 1), aff'd sub nom. Stoughton Trailers v. LIRC, (Dane Co. Cir. Ct., 05/13/04), aff'd 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102; aff'd, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

The Complainant's migraine condition was sometimes causing him to miss work. However, this problem had only recently been diagnosed, and the Complainant was still at a fairly early stage of treating his disorder. He was working with physicians to determine effective medications and to adjust them. It was entirely possible that development of an appropriate treatment regimen would significantly reduce or even eliminate the problem of periodic absences due to migraine attacks. The Respondent should have extended to the Complainant the reasonable accommodation of "clemency and forbearance," temporarily tolerating the absences which were being caused by his disability while the medical intervention which had already begun was allowed to take its course and to potentially resolve the problem of those absences. Geen v. Stoughton Trailers (LIRC, 09/11/03), (Decision on remand from the Court of Appeals in Geen v. LIRC, 2002 WI App 269, 258 Wis. 2d 498, 654 N.W.2d 1), aff'd sub nom. Stoughton Trailers v. LIRC, (Dane Co. Cir. Ct., 05/13/04); aff'd, 2006 WI App 157, 295 Wis. 2d 750, 706 N.W.2d 345, aff'd, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

The question of whether a reasonable accommodation was refused, or whether it would have posed a hardship, comes into play only if it appears that a challenged employment decision was made because of a disability, and that the disability which was the reason for the challenged employment action was reasonably related to the Complainant's ability to do the job. Cook v. Community Care Resources (LIRC, 01/13/03).

The Wisconsin Fair Employment Act differs from the Americans with Disabilities Act in many significant respects. Under the WFEA there is no limit to the type of accommodation an employer may be expected to provide, so long as the accommodation requested is a reasonable one that can be provided without hardship to the employer's business. What is reasonable will depend on the specific facts in each individual case. Waldera v. Coop. Educ. Serv. Agency #11 (LIRC, 10/31/02).

The Complainant, who is visually impaired, applied for a job which required driving between school districts to teach orientation and mobility to visually impaired students. The Respondent established that accommodating the Complainant would pose a hardship for it where the accommodation requested by the Complainant (hiring a driver) would have required the Respondent to hire an additional full-time employee on a permanent basis exclusively for the purpose of assisting the Complainant. This accommodation would have cost the Respondent approximately $20,000 a year, a cost which would have ultimately been passed on to the school districts served by the Respondent. The client school districts, which had the freedom to contract from other sources or pool their resources to provide their own special services, were already complaining about the high costs of services for the visually impaired and had talked to the Respondent about ways in which to keep expenses down. Waldera v. Coop. Educ. Serv. Agency #11 (LIRC, 10/31/02).

The question of whether a particular accommodation is reasonable is resolved on a case-by-case basis. Roytek v. Hutchinson Technology (LIRC, 01/28/02), aff'd sub nom. Hutchinson Technology v. LIRC, Ct. App., Dist. III, unpublished decision, 09/18/03, aff'd *Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 343, 682 N.W.2d 343.*

The Wisconsin Fair Employment Act has been broadly construed so as not to rule out any particular type of accommodation as a matter of law. To the contrary, if an accommodation is reasonable and can be provided by the employer without creating a hardship for its business, the Act contemplates that it do so. Roytek v. Hutchinson Technology (LIRC, 01/28/02), aff'd sub nom. Hutchinson Technology v. LIRC, (Ct. App., Dist. III, unpublished opinion, 09/18/03), aff'd *Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 343, 682 N.W.2d 343.*

The Respondent temporarily accommodated the Complainant by allowing her to work an eight-hour day, rather than the twelve-hour shifts that other employees worked. This accommodation was successful for an extended period of time. There was no evidence to establish that the Respondent would have suffered a hardship had this accommodation been continued. The Respondent failed to establish that the Complainant's shorter work shift caused production or profit losses, or that morale or other problems were created during the ten-month period that the Respondent accommodated the Complainant. The fact that an employer made a temporary accommodation of a Complainant's disability does not shield it from liability when its willingness to provide a reasonable accommodation ceases. Roytek v. Hutchinson Technology (LIRC, 01/28/02), aff'd sub nom. Hutchinson Technology v. LIRC, (Ct. App., Dist. III, unpublished opinion, 09/18/03), aff'd *Hutchinson Technology v. LIRC, 2004 WI 90, 273 Wis. 2d 343, 682 N.W.2d 343.*

There is no rule under the Wisconsin Fair Employment Act which requires a face-to-face encounter between the employer and the employee prior to an employer making an accommodation decision. Lane v. DOC (Wis. Pers. Comm'n, 06/07/01).

The Wisconsin Fair Employment Act contains no reference to "essential job functions" and no injunction against reallocating any specific job functions (unlike EEOC regulations relating to disability cases under the Americans with Disabilities Act). It is inappropriate to conclude as a matter of law that any particular kind of action is not required as an accommodation. The resolution of any case depends upon on whether the facts show that the accommodation would be reasonable and would not work a hardship on the employer. It cannot be said that a job-related responsibility, even an "essential" one, need never be restructured or removed by way of reasonable accommodation. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

A legitimate nondiscriminatory policy does not justify failing to provide a reasonable accommodation where such accommodation can be provided without hardship. Indeed, the Wisconsin Fair Employment Act contemplates that employers may sometimes need to make exceptions to their usual policies in order to provide accommodations to disabled workers. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

It is reasonable to require an employer to restructure the physical demands of the job in order to accommodate a disabled employee, provided this can be achieved without hardship to the employer. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

The Respondent inquired whether the Complainant's bipolar disorder was under control by medication, and the Complainant responded that it was. The Respondent also contacted some of the Complainant's references prior to hiring him and was advised that the Complainant was a "capable employee." Thus, the Respondent had no reason to suspect that there was anything about the Complainant's condition that warranted any particular accommodation. Further, there was nothing about the Complainant's work performance that should have alerted it to the fact that the Complainant required some form of accommodation because he was bipolar. Chaffee v. Wyalusing Acad. (LIRC, 09/27/00).

The Respondent did offer the Complainant a reasonable accommodation prior to discharging him for violating its "no-fault" attendance policy, which prescribes discharge for a certain level of "occurrences" of absence from work. First, the Respondent gave the Complainant the opportunity to avoid incurring an "occurrence" at all in situations in which he was on the job and became unable to work due to migraine problems, by allowing him to stop working or to go to the nurse's station. Secondly, the Respondent gave the Complainant the opportunity to avoid incurring an "occurrence" for all situations in which he was absent from work for periods of time attributable to his migraine condition by taking leave under the Family and Medical Leave Act. Geen v. Stoughton Trailers (LIRC, 08/31/00), rev. sub nom. Stoughton Trailers v. LIRC (Dane Co. Cir. Ct., 08/09/01), modified and remanded sub nom. Geen v. LIRC, 2002 WI App 269, 258 Wis. 2d 498, 654 N.W.2d 1.

The obligation to engage in reasonable accommodation arises only when the employee has a disability within the meaning of the Wisconsin Fair Employment Act. The fact that an employer may have attempted at times to "accommodate" a Complainant's condition which does not constitute a disability, does not serve to prove that the Complainant has a disability within the meaning of the Act. Reinke v. Pick 'n Save Mega Food Ctrs. (LIRC, 01/28/00).

A Complainant's suggestion that his employer should have helped him stay in treatment and on medication for depression was rejected. An employer is not required to assume responsibility for a worker's psychiatric treatment by way of reasonable accommodation, even if it were feasible for it to do so. Sampson v. S & S Distrib. (LIRC, 11/19/99).

A Complainant was discharged when his disability caused him to behave in a violent and threatening manner in the workplace. The Complainant argued that the Respondent should have sought a second opinion concerning his depression and whether it posed a risk to himself or others. Such an action by the Respondent would have been directed at determining whether the Complainant, in fact, posed a safety risk in the workplace, rather than at finding an accommodation that would permit him to perform his job despite his disability. Determining whether an employee has a disability which is reasonably related to his ability to perform the job is not, in and of itself, a form of reasonable accommodation, nor does an employer necessarily have to consult with an employee's physician by way of providing a reasonable accommodation. Sampson v. S & S Distrib. (LIRC, 11/19/99).

The employer did not fail to reasonably accommodate a disability when it refused to allow the Complainant to miss regularly scheduled meetings since the Complainant refused to provide the Respondent with medical information establishing that she had a disabling condition that absolutely required that she attend therapy sessions at the times these meetings were scheduled. Carter v. Milwaukee Bd. of Sch. Dir. (LIRC, 08/16/99).

Although, depending upon the circumstances, a reasonable accommodation might entail holding a job open for a disabled employee who is away from the workplace on a medical leave of absence, an employer cannot reasonably be expected to hold a job open indefinitely when there is no indication that the employee will ever be able to return to work. Lewandowski v. Galland Henning Nopak, Inc. (LIRC, 01/28/99).

The purpose of the reasonable accommodation requirement is to enable employees to adequately undertake the job-related responsibilities. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

In cases where the employer is aware of the employee's handicap and knows what type of accommodation the employee requires, it is reasonable to expect the employer to offer the accommodation even in the absence of a specific request from the employee. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

The employer's obligation to accommodate an employee's handicap is not a static one, but is affected by the information the employer has, which may change over time. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

The Respondent knew that the Complainant dozed off on the job as a direct result of her sleep apnea. Where the Respondent also knew that the Complainant was undergoing medical treatment to prevent her from dozing off, the accommodation which the Complainant required was clemency and forbearance. Given the Respondent's awareness that the Complainant had other treatment options if the first treatment was not effective, it should have refrained from firing her for "loafing" the next time it spotted her dozing. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

An employer need not accommodate an employee with respect to limiting hours of work. The Complainant's job as county personnel director was inherently stressful and required him to work more than forty hours a

week. The Respondent did not refuse to provide a reasonable accommodation for the Complainant's disability (which required him to limit his stress level and to work no more than a forty-hour week) where the job could not feasibly be modified to accomplish those goals. There was no reasonable accommodation available that would enable the Complainant to perform the job of personnel director despite his disability. Staats v. County of Sawyer (LIRC, 10/27/97), aff'd sub nom. Staats v. LIRC (La Crosse Co. Cir. Ct., 08/21/98).

Where the Complainant requested and received a transfer to the position of booking clerk because he could not perform the responsibilities of his correctional officer position due to handicap, the Respondent had every reason to believe that it had arrived upon an accommodation that was satisfactory to the Complainant. The Complainant never told the Respondent that he was only interested in the booking clerk position on a temporary basis. Further, the Respondent's action in placing the Complainant on probation when he was transferred to the booking clerk position was non-discriminatory because the collective bargaining agreement plainly indicated that an employee transferring to a position which did not involve a pay increase was subject to a probationary period. Wall v. Outagamie County Sheriff's Dep't (LIRC, 01/26/95).

The Respondent demonstrated that the Complainant's handicap (kidney transplant) was reasonably related to the job-related responsibilities of his employment since, at least in the short term, it prevented him from performing any work. However, the Respondent failed in its burden of establishing that it could not have provided the Complainant with a reasonable accommodation for his handicap, which in this case would have been a continuation of a leave of absence for the Complainant. The question of whether a leave of absence is a reasonable accommodation will depend upon the specific facts in each case. A medical leave of absence might be considered a reasonable accommodation where there is some reason to believe that the leave of absence will assist the employee in achieving recovery and will ultimately result in the employee's ability to return to work. In this case, the Respondent did not establish any reason to believe that the Complainant's physical difficulties were permanent or that he would not be able to return to work in the foreseeable future. Janocik v. Heiser Chevrolet (LIRC, 11/21/94).

The law contains no requirement that an employee specifically request an accommodation. In this case, there was no doubt that the Respondent was aware of the type of accommodation the Complainant required (an extension of his leave of absence). Janocik v. Heiser Chevrolet (LIRC, 11/21/94).

The question of whether a particular accommodation works a hardship on a specific employer is a factual determination that must be addressed on a case-by-case basis. In this case, the Respondent argued that accommodating the Complainant's handicap by allowing him to take a prolonged leave of absence would pose a hardship because his absence as a service advisor adversely affected its sales and its ability to provide customer service. However, the Respondent discharged the Complainant without attempting to ascertain if or when he would be able to return to work. It is possible that the Respondent could have absorbed the Complainant's absence or provided temporary coverage for the Complainant's position without hardship, particularly if it had known that the Complainant would be able to return to work in only two weeks' time. An employer cannot avoid liability under the Act merely by explaining that being short-staffed adversely affects its business, a proposition which generally goes without saying. The Wisconsin Fair Employment Act is to be liberally construed in order to achieve the broad goal of fostering to the fullest extent practicable the employment of properly qualified individuals, without regard to handicap. Janocik v. Heiser Chevrolet (LIRC, 11/21/94).

The issue of accommodation in a handicap case cannot be addressed unless the Complainant first establishes that he is handicapped within the meaning of the Wisconsin Fair Employment Act and that the employer was motivated by the Complainant's handicap in making the employment decision. In this case, the Complainant established that he was handicapped within the meaning of law, but he did not establish that the Respondent discharged him because of his handicap. Madaus v. Int'l Stamping Co. (LIRC, 09/22/94).

If an employer offers an accommodation which effectively eliminates the conflict between the handicapped employee's abilities and the job requirements, and which reasonably preserves the affected employee's employment status, the accommodation requirement has been satisfied. In this case, the Complainant may have preferred a different kind of accommodation; however, the Respondent's actual treatment of the Complainant served to accommodate his handicap in a way that reasonably preserved his employment status. Norton v. City of Kenosha (LIRC, 03/16/94).

Where an employer failed to consider at the time a job applicant was rejected whether the job applicant's handicap could be accommodated, the employer may still avoid a finding of handicap discrimination if it can demonstrate at the hearing that it could not accommodate the applicant's handicap without an undue hardship. Charles v. Milwaukee Bd. of Sch. Dir. (LIRC, 06/23/93).

The scope for the accommodation of a handicap is much greater than the accommodation of religion because it is not unlawful to discriminate in favor of the handicapped or against the non-handicapped. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

The duty of accommodation does not require an employer to attempt to ascertain the existence of a handicap. In this case, a single OWI arrest is the only indication the employer had that the employee was alcohol dependent. Holding employers responsible for investigating handicaps that employees fail to disclose would give rise to serious potential problems of placing an undue burden on employers and invading employees' privacy rights. Thomas v. DOC (Wis. Pers. Comm'n, 04/30/93).

The Respondent was not required to accommodate the Complainant's handicap of depression by allowing her to take a leave of absence. Even assuming, arguendo, that a leave of absence without pay could be considered conceptually to be an accommodation under certain circumstances, it would not be considered a reasonable accommodation under the circumstances of this case, where the Complainant had a long-standing history of absenteeism, where she had been granted a prior leave of absence that did not resolve her problem, and where all of her absenteeism could not be attributed to her depression. Bell-Merz v. UW System (Wis. Pers. Comm'n, 03/19/93).

Evidence which postdates the personnel transaction in question (including such things as medical evaluations) and which may have no relevance to the issue of the employer's intent at the time of the transaction, may have some relevance to issues such as the employee's capacity to perform and whether the employee's handicap can be accommodated. Keller v. UWM (Wis. Pers. Comm'n, 03/19/93).

The duty of accommodation must be broadly interpreted to resolve the problem it was designed to address and be liberally construed to effectuate the policy and purposes of to conclude as a matter of law that any particular kind of action is not required as an accommodation. Whether the creation of a part-time job for a full-time employee is a required accommodation depends upon the specific facts as to whether it is reasonable and whether it imposes a hardship for the employer. Communication problems and other inefficiencies associated with job sharing and increased total payroll costs may be hardships which make this accommodation unreasonable. An employer's speculation as to additional payroll costs and inefficiencies are not sufficient to establish a hardship. Gartner v. Hilldale, Inc. (LIRC, 05/12/92).

An employer had no duty to accommodate an employee's medical restrictions by creating a new position or discharging another employee where this would have been unreasonable and posed a hardship for the employer. Macara v. Consumer Co-op of Walworth County (LIRC, 02/14/92).

The Respondent has the burden of proof on the issue of reasonable accommodation. The Respondent failed to meet its burden when the evidence indicated that the Respondent failed to consider the possibility of moving the Complainant to another position. Schilling v. UW-Madison (Wis. Pers. Comm'n, 11/06/91).

If an employer offers an accommodation which effectively eliminates the conflict between the handicapped employee's abilities and the job requirements, and which reasonably preserves the affected employee's employment status, the accommodation requirement has been satisfied. In this case, the Respondent adequately attempted to accommodate the Complainant's handicap by offering to arrange with a safety shoe manufacturer for the special adaptation of a safety shoe for the Complainant. The Complainant refused to cooperate with the Respondent's offer and failed to follow through by furnishing the shoe manufacturer with the orthotic device he wanted to insert into the shoes. Owen v. Am. Packaging Co. (LIRC, 02/01/91).

The employer has the burden of proving that it has satisfied its duty of accommodation. The Complainant is not required to show that he broached the issue of accommodation. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

The word "refuse" in sec. 111.34(1)(b), Stats. means to decline to do something that is either requested or required by law. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

Where a Division of Vocational Rehabilitation counselor testified that the Complainant could perform the job if certain accommodations were made and that such accommodations would be reasonable, and where the Respondent did not present evidence to the contrary, it was concluded that the Respondent failed to reasonably accommodate the Complainant's handicap. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

An employer was not required to consult with the Complainant's doctor to determine whether there was some way to accommodate the Complainant's handicap prior to discharging the Complainant for poor performance. Kellow v. LIRC (Washington Co. Cir. Ct., 04/18/90).

The Respondent did not discriminate because of handicap when it discharged an executive who had Parkinson's Disease where the executive was unable to perform his job-related responsibilities. Whether the medication the Complainant took for his condition caused his inability to perform was unclear. The Complainant's own physician did not believe the medication caused significant mental impairment. Under the facts of the case, it is doubtful whether any accommodation would have been possible. Kellow v. Regal Ware (LIRC, 05/10/89), aff'd, Kellow v. LIRC, (Wash. Co. Cir. Ct. 04/18/90).

The Complainant, an attorney, failed to establish that he was handicapped. Even if he was handicapped, the accommodations he requested (reduced litigation, no difficult clients. or transfer to another division when no positions were open in the division) were not reasonable. Shevlin v. Office of the Public Defender (Wis. Pers. Comm'n, 04/17/90).

It is the Respondent's burden to prove it cannot reasonably accommodate the employee's handicap without imposing a hardship on the employer's business. Dushek & Watkins v. LIRC (Radloff) (Brown Co. Cir. Ct., 05/18/89).

The Respondent had attempted to accommodate the Complainant's alcohol problem by, among other things, counseling him and relieving him from some responsibilities. The Respondent would have attempted further accommodation but for the Complainant's denial of having any problem. Nelson v. Massey Ferguson (LIRC, 02/02/89).

The legislative intent and purpose of the reasonable accommodation statute is to encourage and foster, to the greatest extent practicable, the employment of all properly qualified individuals regardless of handicap. The employer's duty of reasonable accommodation may include a transfer of a handicapped employee to another position for which he is qualified, depending on the facts of each individual case. However, such a transfer would have to be reasonable and not pose a hardship on the employer's program, enterprise, or business. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d. 830 (Ct. App. 1988).

The Respondent, a trucking company, refused to reinstate the Complainant after he was diagnosed as having epilepsy. The Respondent met its burden of proving that the Complainant's handicap was reasonably related to his ability to adequately undertake the job of interstate truck driving, by establishing the applicability of federal regulations prohibiting the epileptics from engaging in such driving. However, the Respondent failed to meet its burden of demonstrating that reasonably accommodating the Complainant by assigning him to driving work not subject to federal regulations, or to yard work not involving driving, would pose a hardship on its program. Federal regulations prohibiting epileptics from driving in interstate commerce were inapplicable to intrastate routes which the Respondent routinely operated. Radloff v. H.F. Dushek Co. (LIRC, 08/18/88).

The employer's termination of an employee for excessive absenteeism was not handicap discrimination, even assuming that some of the absences were caused by a heart condition which was a handicap, where the employer uniformly required a certain minimum level of attendance on the job. If the Complainant's handicap actually prevented her from meeting that requirement, her handicap was reasonably related to her ability to adequately undertake the job-related responsibilities of her employment. The only accommodation that would have been possible would have been for the employer to have tolerated less than adequate attendance, and the accommodation requirement does not require an employer to tolerate less than adequate performance of job-related responsibilities. Gordon v. Good Samaritan Med. Ctr. (LIRC, 04/26/88).

The requirement of accommodation of handicapped employees contained in the Wisconsin Fair Employment Act does not require an employer to reassign job duties or transfer a handicapped employee from their job to another job that they can do. However, where the employer regularly exercises a degree of flexibility in assignment of duties among a pool of employees, and in a particular case can do so without hardship in a way that allows the handicapped employee to avoid the job duties they cannot perform, the accommodation requirement is properly invoked. Harris v. DHSS (Wis. Pers. Comm'n, 02/11/88).

There was no probable cause to believe that the Complainant was discriminated against because of the handicap of alcoholism when he was terminated by the Respondent, where the evidence established that he was terminated for excessive absenteeism. Assuming for the sake of argument that the absenteeism was caused by his alcoholism and that the discharge was therefore, partially because of the alcoholism, the refusal of the Complainant to admit to the Respondent that he was an alcoholic and the lack of a genuine desire on the part of the Complainant to be successfully treated, meant that offering or requiring participation in the Respondent's Employee Assistance Program in lieu of termination was not a reasonable accommodation for his handicap. Neese v. Kohler Co. (LIRC, 10/21/87).

In 1978-80 the Complainant had a poor work record and frequent absences because of his alcohol abuse. The employer discharged him in mid-1980 after making efforts to accommodate his condition and to assist him with his alcohol problem through its Employee Assistance Program. The Complainant reapplied for employment with the Respondent in the fall of 1983 and was refused hire at that time. Assuming for the sake of argument that the Respondent failed to rehire him in 1983 because he was perceived to be an alcoholic, this did not constitute a violation of the Act. It would be unreasonable to require the Respondent to ignore the unsatisfactory results of its efforts to accommodate the Complainant's handicap and to require it to rehire the Complainant simply because he asserted that he had recovered from alcoholism. Hart v. Kohler Co. (LIRC, 09/04/87).

The issue of accommodation arises only after it has been determined that there was a handicap, that an employment decision was based on that handicap, and that the handicap is reasonably related to the Complainant's ability to do the job. Schaafs v. Schultz Sav-O-Stores (LIRC, 11/06/86).

Where the Complainant bus driver's physical handicap restricted her to driving buses with power steering, the Respondent adequately accommodated her handicap by allowing her to drive a bus with power steering,

there being no change in the Complainant's rate of pay or other conditions of employment. The Respondent was not required to alter its assignment of buses so that the Complainant could also pick the route she drove. If an employer offers an accommodation which effectively eliminates the conflict between the handicapped employee's abilities and the job requirements, and which reasonably preserves the affected employee's employment status, the accommodation requirement has been satisfied. Hubbard v. Taylor Enter. (LIRC, 08/15/86).

Where the Complainant had been off work for more than eight months because of illness and had voluntarily requested an end to the employment relationship prior to his release from restrictions, and where the Respondent did not have a workload sufficient to justify rehiring the Complainant and where it would have had to terminate one of its existing employees, the duty of accommodation did not extend to requiring the Respondent to rehire the Complainant. Ellison v. Pomps Tire Service (LIRC, 08/08/86).

Even where the evidence shows that a Complainant's handicap is reasonably related to his ability to do the job, the employer still must prove that it did not refuse to reasonably accommodate the handicapped. Ward v. Hydrite Chemical Co. (LIRC, 08/08/86).

Where a Respondent refused to rehire an employee because of his handicap, and the handicap was related to the Complainant's ability to perform certain tasks, the Respondent still could have employed the Complainant in the labor pool position which he sought without any disruption of the work assignment process which prevailed for employees in labor pool positions, without a hardship to its business within the meaning of the accommodation requirement of the Act. Consol. Papers v. LIRC (Kappell) (Ct. App., Dist IV, unpublished opinion, 04/17/86).

Where the Complainant was physically unable to perform the full range of duties of his position as an assistant manager, increased labor costs and interference with the Respondent's training program justified the Respondent's discharge of the Complainant and its refusal to continue to allow the Complainant to perform office work outside of his regular duties. Haman v. Witlock Auto Supply (LIRC, 11/22/85).

Prior to the 1982 amendments, the Wisconsin Fair Employment Act imposed no duty on an employer to accommodate the handicaps of its employees or job applicants. Mittlestad v. LIRC (City of Appleton) (Ct. App., Dist. III, unpublished decision 10/08/84); Christianson v. LIRC (City of Eau Claire) (Eau Clare Co. Cir. Ct., 03/02/83); Champion v. City of Milwaukee (LIRC, 10/07/83); Kirch v. LIRC (Germania Dairy) (Ct. App., Dist. IV, unpublished opinion, 08/28/84).

[Ed. note: The following cases were decided under the theory, then prevailing, that prior to the 1982 amendments, the Act did impose a duty of accommodation.]

The duty to accommodate does not include utilizing other employees to actually perform a job duty for the handicapped individual or transferring the handicapped individual to a different position. McFayden v. MEOC (Univ. Book Store) (Dane Co. Cir. Ct., 11/15/82).

Although the Act does not dictate which reasonable accommodation an employer must make if there are alternatives available, an accommodation which enabled the handicapped employee to perform in a merely passable manner might be unreasonable if a different accommodation which enabled the person to perform on a par with non-handicapped employees was available. Where a Complainant who taught biology, driver's and physical education became blind, his employer could have reasonably accommodated him by hiring adult aides at a de minimus cost ($500 to $700 a term). Fischer v. DILHR (Alma Schools) (Dane Co. Cir. Ct., 02/09/79)

An employer's failure to make a reasonable accommodation can be considered raised by a complaint which charges the employer with handicap discrimination even where the complaint did not specifically allege such

a failure. In addition, the investigation of a handicap discrimination complaint by DILHR must include a determination of whether a prudent person might believe that there has been a failure to reasonably accommodate a handicapped individual. Teggatz v. LIRC (DHSS) (Dane Co. Cir. Ct., 08/18/78).

123.6 Proof of medical facts
[Also see sec. 651]

The Complainant is not necessarily required to present certified medical evidence in order to prove that he has a disability. Mueller v. Pomp's Tire Serv., Inc. (LIRC, 12/21/18).

Proof of disability is not meant to be onerous. The Complainant is not required to bring her doctor to the hearing and can prove her case through her own testimony and competent medical evidence. Staudinger v. Cnty. of Manitowoc (LIRC, 12/11/2018).

Generally, a Complainant lacks the competence to express an opinion about the nature, extent and permanence of a medical condition. The hearsay medical documents in evidence did not add up to a coherent description of the Complainant's impairment. Mueller v. Chart Energy & Chemicals, Inc. (LIRC, 01/15/15).

The Commission has often endorsed the view that competent medical evidence is required to establish the existence, nature, extent, and permanence of an impairment, if disputed as a matter of fact. However, an Administrative Law Judge should not peremptorily refuse to consider medical records simply because they are not certified or are not strictly competent. The prudent course is to consider and evaluate all relevant and material evidence in view of all of the surrounding facts and circumstances, notwithstanding that it may be technically hearsay. Hendon v. Wis. Bell, Inc. d/b/a AT&T (LIRC, 11/13/14), aff'd sub nom. Hendon v. LIRC (Milwaukee Co. Cir. Ct., 08/12/2015).

If an employee is discharged because of bad behavior which was caused by a disability, the discharge is, in legal effect, because of that disability. Whether an individual's bad behavior is caused by a mental disorder from which the individual suffers, though, is a question of medical/scientific fact on which expert testimony is required. It cannot simply be presumed that every act of bad behavior engaged in by a person who has a mental disorder, is caused by that mental disorder; it may or may not have been. The question is to be resolved by weighing the expert evidence in the record on that question. Maeder v. UW-Madison, UW Police (LIRC, 06/28/13).

Medical documentation of the Complainant's panic and anxiety disorder did not show that it caused the degree of limitation necessary to establish a disability under the WFEA. The medical opinion offered in evidence was that the Complainant maintained the ability to perform her job. Lay testimony concerning the Complainant's functioning on the job did not serve to prove disability; laypersons are not competent to connect observations of a Complainant's conduct to a particular mental health condition. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633. Even so, lay opinion, consistent with medical opinion, was that the Complainant maintained the ability to perform her job. Ryback v. Wis. Physicians Serv. (LIRC, 05/31/13).

Uncertified medical records are admissible in proceedings under the Wisconsin Fair Employment Act. However, the letter submitted by the Complainant in this case constituted uncorroborated hearsay evidence. The letter (which the Complainant introduced to establish that she is an individual with a disability) was on the letterhead of a medical provider; however, it was unsigned and unauthenticated. The letter purported to have been created four years prior to the Complainant's employment by the Respondent, so it could not describe the status of the Complainant's medical condition during the time of her employment with the Respondent. Further, the letter did not address the permanence of the Complainant's medical condition. An ultimate or crucial finding of fact may not be based solely on uncorroborated hearsay evidence. Since the

finding as to the existence of a disability in this case would be an ultimate or crucial finding, this letter was insufficient to support such a finding. Rybicki v. DJ Convenience (LIRC, 08/20/10).

It was error for an Administrative Law Judge to exclude medical records solely on the basis that they lacked certification. However, in this case, even if the Administrative Law Judge had not excluded medical records because they lacked certification, the disputed records would not have been sufficient to warrant a conclusion that the Complainant had a disability within the meaning of the Wisconsin Fair Employment Act. The medical documents consisted of an X-ray report, a memo from the Complainant's family practice doctor, an unsigned and difficult-to-read medical report, and general instructions about post-surgical care. These documents suggested that the Complainant was suffering from neck, shoulder and back pain. However, they did not indicate that the Complainant had been diagnosed with any permanent medical condition that would constitute a disability. Thoreen v. Fabco Equip. (LIRC, 11/25/09).

Although the Court of Appeals in Rutherford v. LIRC, 2008 WI App 66, 309 Wis. 2d 498, 752 N.W.2d 897, held that medical records could not be excluded from Chapter 227 administrative hearings simply because they were not certified, the Court did not deal directly with the issue of the probative value of documents created by a medical provider and received into the hearing record if they were not authenticated either through certification or through the testimony of the provider. Any medical opinion stated in such a document would constitute hearsay evidence. Savaglio v. LeBlanc, Inc. (LIRC, 01/30/09).

Where the existence of a disability is in dispute, the Complainant must present competent medical evidence establishing the nature, extent, and permanency of an impairment. The only medical evidence the Complainant presented in this case was uncertified memos and reports prepared with respect to his worker's compensation injuries. He provided no non-hearsay medical evidence showing what tests were performed and what diagnosis was reached. The Complainant contended that the expense of bringing a doctor to a discrimination hearing is burdensome to Complainants, who are often with limited means. The Complainant suggested that there should be a standard medical form which could be used for discrimination hearings. However, a Complainant can meet his burden of establishing a disability through presentation of certified medical documents or documents with "other circumstantial guarantees of trustworthiness." Tschida v. UW-River Falls (LIRC, 12/30/08).

An Administrative Law Judge improperly refused to admit or consider uncertified copies of medical records which the Complainant wished to introduce at hearing. Chapter 227, Stats., requires very relaxed rules of evidence in administrative proceedings. Further, there is no administrative rule which requires the submission of certified copies of medical records. In excluding the uncertified copies, the Administrative Law Judge made no analysis of the factors governing admissibility of evidence in these hearings, which are provided by statute. The Complainant should have been permitted to introduce her treating doctor's opinion that she had a permanent disability, where that opinion was stated in his treatment records, even though the Complainant had not been able to get certified copies of the records. Rutherford v. LIRC, 2008 WI App 66, 309 Wis. 2d 498, 792 N.W.2d 897.

In order to establish that she is an individual with a disability within the meaning of the Wisconsin Fair Employment Act, the Complainant must present competent medical evidence to establish the existence, nature, extent, and permanence of an impairment, if disputed as a matter of fact. It is not enough to state a diagnosis or to list symptoms. The Complainant must establish through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult for her or limited her capacity to work. As a result, the fact that the Complainant's treating physician rendered a diagnosis that she suffered from migraine headaches, or suffered the symptoms of tendonitis, would be insufficient alone to establish the existence of a disability. There was no competent medical evidence in the record to establish that the Complainant's tendonitis was permanent. The medical evidence with respect to migraine headaches indicated that the condition was permanent, but that it did not create any restrictions which would impede the Complainant's ability to perform her assigned duties. Thus, the Complainant failed to sustain her burden

to prove that she qualified as an individual with a disability. Fields v. UW Hospitals & Clinics Auth. (LIRC, 02/12/07).

The Complainant asserted that she had various limitations in her ability to work. However, she did not have a physician testify about her alleged limitations, nor did she present any medical documentation to substantiate her alleged limitations. Absent competent medical evidence of the nature, extent, or permanency of her condition, the Complainant could not prove that she had a disability. Kubiak v. Child & Family Consultants of Green Bay (LIRC, 01/19/07).

To demonstrate that a disability exists under the Wisconsin Fair Employment Act, the Complainant must present competent evidence of a medical diagnosis regarding the alleged impairment. Erickson v. LIRC, 2005 WI App 208, 287 Wis. 2d 204, 704 N.W.2d 398.

The medical evidence of record generally consisted of return-to-work slips, FMLA forms completed by the Complainant's treating physicians, and a letter summarizing the results of an independent medical examination. The physicians who ostensibly authored these documents did not testify at hearing and, as a result, these documents were uncorroborated hearsay evidence. The documents were not certified and had no other circumstantial guarantees of trustworthiness sufficient to qualify for application of the hearsay exception set forth in sec. 908.03(24), Stats. As a result, the Complainant failed to show by competent medical evidence the existence, nature, extent, or permanence of any impairment. The Complainant's testimony that she suffered a heart attack from which she had not fully recovered and that she was diagnosed with diabetes was not sufficient, without more, to satisfy this burden. Moreover, even if competent medical evidence establishing the existence of a cognizable impairment were a part of the record, the evidence did not show that the Complainant's diabetes or heart condition placed a substantial limitation on a major life activity or on her capacity to work. Seil v. Dairy Farmers of Am. (LIRC, 08/26/05).

The Complainant failed to show by competent medical evidence that she suffered from an actual impairment within the meaning of the Wisconsin Fair Employment Act. The records that the Complainant submitted at hearing were ostensibly prepared by physicians who did not testify at hearing. As a result, these documents were uncorroborated hearsay evidence. The documents were not certified, and they had no other circumstantial guarantees of trustworthiness sufficient to qualify for application of the hearsay exception set forth in sec. 908.03(24), Stats. (There was, however, evidence that the Respondent perceived the Complainant as an individual with a disability.) Wodack v. Evangelical Lutheran Good Samaritan Soc. (LIRC, 08/05/05)

Competent medical evidence is required to establish the existence, nature, extent, and permanency of an impairment, if the impairment is disputed as a matter of fact. Grell v. Bachmann Constr. (LIRC, 07/15/05).

Medical treatment is sought for conditions which are disabling as well as for conditions which are not, and the mere fact that an individual sought medical treatment for a condition is insufficient to support a conclusion that this condition necessarily constituted a disability. In this case, the Complainant failed to offer any competent medical evidence establishing that his foot condition placed a substantial limitation on his life functions or activities during the period of his employment for the Respondent. The Complainant also failed to offer competent medical evidence to establish that his foot condition limited his capacity to work. Lester v. Compass Group USA (LIRC, 03/22/05).

Although the Respondent did not dispute that the Complainant had been treated for a neck and back injury and for carpal tunnel syndrome, the Complainant was required to offer competent medical evidence as to the nature, extent, and permanence of these conditions in order to sustain his burden to prove that these conditions constituted impairments within the meaning of the Wisconsin Fair Employment Act. Cramer v. Woodman's Food Mkt. (LIRC, 01/14/05).

While it may not be necessary to have physician testimony in every instance, a party must present some competent evidence of disability. In this case, there was nothing to suggest that the Complainant attempted to submit a doctor's statement at the hearing, and the only evidence related to his alleged impairment came from the Complainant and his wife. Even assuming that the Complainant had presented competent evidence of a physical impairment, he failed to adequately explain how or whether that impairment made achievement unusually difficult for him or limited his capacity to work. Nor did he demonstrate that the Respondent perceived him as having such an impairment. Snyder v. Copps Foods Ctr. (LIRC, 10/13/04).

The testimony of the Complainant, a layperson, could not suffice as proof that she actually had particular medical conditions. Expert testimony must be adduced concerning matters involving special knowledge, skill or experience on subjects which are not within the realm of the ordinary experience of mankind. An employee will be found to have failed to establish that she actually had an impairment constituting a disability where she fails to introduce sufficient expert medical evidence to establish that point. Green-Brown v. Midwest Express Airlines (LIRC, 09/16/04).

The Complainant presented no medical evidence on his behalf, either in the form of physician testimony or competent medical records upon which a fact finder could base a conclusion about the nature of his back condition. Even if it was determined that the Complainant was competent to testify about his own medical condition and that no additional medical evidence was necessary, the Complainant's testimony would not be sufficient to meet his initial burden where it was limited to a description of his symptoms and an explanation of the difficulties these symptoms posed with regard to his ability to perform the job. Such testimony, even if offered by a physician, would not establish an impairment within the meaning of the Wisconsin Fair Employment Act, where there was no indication as to: (1) what, if any diagnosis was made, (2) what the nature and extent of the condition was, or (3) whether the condition was a permanent one. Erickson v. QuadGraphics (LIRC, 05/25/04); aff'd sub nom Erickson v. LIRC, 2005 WI App 208, 287 Wis. 2d 208, 704 N.W.2d 398.

The Complainant failed to sustain his burden of proving that he had been diagnosed with carpal tunnel syndrome or shoulder tendonitis. He offered no competent medical evidence to this effect. The only evidence he offered was his own hearsay testimony that he had obtained this diagnosis from a physician. Moller v. Metavante (LIRC, 11/13/03).

A drinking or alcohol abuse problem may or may not be a disability, depending on whether it has progressed to the state that it is non-volitional. Establishing that such a non-volitional condition exists requires that the Complainant introduce competent, expert medical evidence to this effect. Schleicher v. County of Dodge (LIRC, 10/17/03).

The Complainant failed to show probable cause to believe that he was suffering from a disability in 1999 (a pinched nerve in his kidneys which caused him to have to wait five or six minutes for his urine to flow). The Complainant only offered a hearsay document that purported to show the results of a test concerning urine flow in 1997. He offered no expert interpretation of the 1997 test, no medical evidence of the extent of the injury or its degree of permanence, and no medical evidence regarding his condition in 1999. (Alternatively, even assuming the Complainant was suffering from a disability, he failed to provide reason to believe that the Respondent treated him adversely because of a real or perceived impairment). Thompson v. Ashley Furniture Indus. (LIRC, 07/16/03).

Where there is conflicting medical evidence, the finder of fact determines which view of the evidence it will accept. Gramza v. Kwik Trip, Inc. (LIRC, 02/20/03).

The Complainant submitted sufficient competent evidence to warrant a conclusion that she suffers from carpal tunnel syndrome. She submitted a signed "Physician's Statement of Disability," in which her attending physician certified that she was hospitalized with bilateral carpal tunnel syndrome. In addition, she

submitted two different independent medical evaluations, both showing a diagnosis of carpal tunnel syndrome. These reports, while not certified, had sufficient circumstantial guarantees of trustworthiness so as to fall under the hearsay exception contained in Sec. 908.03(24), Stats. Jones v. United Stationers (LIRC, 01/25/01).

Even assuming that a pamphlet describing the disability suffered by the Complainant was accepted as "expert testimony" regarding the nature and manifestations of the condition, the pamphlet did not provide direct evidence as to whether the Complainant's behavior was influenced by his disability under the fact situation which led to his discharge. Expert testimony was required to establish that the conduct which formed the basis for the employer's action in terminating the Complainant's employment was caused by his disability. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633.

Even though the Complainant suffered from the disease of obsessive-compulsive disorder (OCD), he was not an "expert" on OCD, since there is no indication in the record that he possessed scientific, technical or other specialized knowledge that would qualify him to give an expert opinion on whether certain behavior was caused by his OCD. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633.

Expert testimony should be adduced concerning matters involving special knowledge, skill or experience on subjects which are not within the realm of the ordinary experience of mankind. Expert medical testimony was required to establish that the Complainant's vociferous reaction to the announcement that another employee was being promoted to a position for which he had sought promotion was caused by his obsessive-compulsive disorder (OCD). Without expert medical testimony, the Department would be speculating as to whether a causal link existed between the Complainant's disability and the conduct which triggered his ultimate discharge. Wal-Mart Stores v. LIRC, 2000 WI App 272, 249 Wis. 2d 209, 621 N.W.2d 633.

An Administrative Law Judge concluded that while the Complainant testified about some effects he experienced as a result of bipolar disorder, he failed to present expert medical evidence at the hearing which supported a conclusion that his condition constituted a disability. However, prior to the issuance of the ALJ's decision in this matter there does not appear to have been any question that the Complainant's bipolar condition constituted a disability. Also, at the hearing itself it was never contested that the Complainant had a disability. The various features of bipolar disorder as described in a standard medical text indicates that a bipolar disorder could very well substantially limit a major life activity, and/or limit the Complainant's ability to perform the job in question. Chaffee v. Wyalusing Acad. (LIRC, 09/27/00).

In a disability discrimination case, the Complainant can be ordered to execute a medical records release as part of the discovery process. Michalzik v. Time Ins. Co. (LIRC, 01/16/98).

An expert medical witness was not necessary to establish that a Complainant was handicapped where the Complainant had an accident at a previous job and where she had been off of work for about a year. These facts, plus the fact that the Complainant was seeing a doctor and that she was wearing a TENS unit, were things about which the Complainant was competent to testify herself. Swanson v. State St. Stylists (LIRC, 11/26/97).

The evidence at hearing did not establish that the Complainant was an alcoholic and, thus, handicapped within the meaning of the Wisconsin Fair Employment Act since no expert medical opinion by a physician was presented. The only evidence in the record regarding alcoholism was assessment reports from Department of Human Services personnel showing that the Complainant suffered from "alcohol abuse," and suspected alcohol dependency." Hansen v. AKZO (LIRC, 03/23/94).

The Complainant failed to establish that he had a handicap, which he alleged was an eye problem, because the only evidence which he presented at the hearing was his own description of the symptoms he suffered

when working around chemicals in the Respondent's workplace. This does not constitute competent medical evidence of a handicap. Wollenberg v. Webex, Inc. (LIRC, 11/08/91).

The mere fact that the employer has made its employment decision in reliance upon the opinion of a doctor does not protect the employer from a finding of discrimination. Where there is conflicting medical evidence, the trier of fact conclusively determines which view of the evidence it will accept. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

The employer was required to show to a reasonable probability that the Complainants, who were denied hire as traffic officers because they did not meet the employer's uncorrected vision standards, would be a hazard to themselves or others. Expert opinion testimony was not necessary to determine that the Complainants did not pose increased safety risks. Brown County v. LIRC (Phillips & Grinkey) (Ct. App., Dist. III, unpublished opinion, 02/27/90).

The Respondent's general standard precluding employment of persons with certain vision deficiencies was not entitled to automatic deference merely because it was based upon a Law Enforcement Standards Board administrative rule or because it was established with the help of a medical consultant. Grinkey v. Brown County Sheriff's Dep't (LIRC, 02/08/88), aff'd sub nom. Brown County v. LIRC (Phillips and Grinkey), (Ct. App., Dist. III, unpublished opinion, 02/27/90).

Although the Complainant testified that he had gone to a rehabilitation hospital for treatment and had been diagnosed as an alcoholic, the hearing examiner was entitled to give no weight to this testimony, since no expert testimony was received on the subject. Schaafs v. Schultz Sav-O-Stores (LIRC, 11/06/86).

An employee with grand mal epilepsy whose medication had not totally controlled his seizures and who had been at work during a seizure could be transferred away from the employer's drill press operation. A doctor's recommendation that the employee could safely continue in his job was not conclusive because the doctor had no knowledge of the operation of a drill press and had never visited the employer's plant. Reddick v. Snap-On-Tools (LIRC, 09/02/82).

Since alcoholism is a disease, its diagnosis is a matter of expert medical opinion by a physician and not by a layperson. Connecticut Gen. Life v. DILHR, 86 Wis. 2d 393, 273 N.W.2d 206 (1979).

An employer could not justify the vision standards it used to discharge a probationary employee where it did not introduce any statistical or medical study to validate its use of a less stringent standard for current employees. Chicago & N.W. Transport v. DILHR (Doetze) (Dane Co. Cir. Ct., 05/12/78).

Where the employer had no medical evidence indicating that its employee was not presently able to perform, it was unlawful to suspend him until the employer received the evidence, even where the purpose of the suspension was to obtain the evidence. Adams v. Soo Line R.R. (LIRC, 06/23/77).

A medical opinion that the employee's working conditions "could" be hazardous is not an adequate defense under the "reasonable probability" standard, since it suggests mere possibility. Western Weighing v. DILHR (Mears) (Dane Co. Cir. Ct., 05/09/77).

The state of being handicapped under the Act is a conclusion of law not amenable to lay testimony. A layperson's belief that he was not handicapped is entitled to no weight whatsoever. Bauman v. Specialties (DILHR, 05/15/75).

123.9 Miscellaneous

The employer's decision to discharge the employee the day after receiving a letter from him requesting disability accommodations raises a suspicion that it acted out of discriminatory animus. Oldenburg v. Triangle Tool Corp. *(LIRC 02/20/2018), aff'd sub nom.* Triangle Tool Corp. v. LIRC and Oldenburg *(Milwaukee Co. Cir. Ct., 02/18/19).*

Although the ADA contains a provision expressly prohibiting discrimination against an individual with a disability based on his or her relationship with a disabled person ("association discrimination"), the WFEA contains no analogous provision. The Complainant's claim of disability discrimination because of her association with a disabled individual does not state a cause of action under the WFEA. Bach v. Easter Seals Sw. Wis. *(LIRC, 10/09/14).*

An independent medical examiner characterized his opinion that the Complainant was discharged for "medical reasons" as a medical one. However, in the absence of any evidence that the Complainant had an impairment which caused him to be involved in accidents, the IME's opinion was a personal judgment that the Complainant was an unsafe, accident-prone worker. That the Respondent adopted the IME's language and characterized the discharge as being for "medical reasons" did not alter the fact that the discharge was due to reasons not directly related to a medical problem. Tschida v. UW-River Falls (LIRC, 12/30/08).

A driver need not seek a determination of medical qualification from the Department of Transportation (DOT) prior to filling a disability discrimination claim under the Wisconsin Fair Employment Act. When a person's medical and physical qualifications to be an interstate commercial driver are material to a claim under the Wisconsin Fair Employment Act, and a dispute arises concerning those qualifications that cannot be resolved by facial application of the DOT regulations, such a dispute shall be resolved by the DOT under its dispute resolution procedure. The carrier, not the driver, is the party that must seek a determination of medical and physical qualification from the DOT if the carrier intends to offer a defense that the driver was not qualified for medical reasons. Szleszinski v. LIRC, 2007 WI 106, 304 Wis. 2d 258, 736 N.W.2d 111.

The Respondent violated its own no-fault attendance policy in terminating the Complainant. The Respondent's policy allowed its employees 15 days from the date of receipt of a form letter (which indicated that the employee would need to submit a completed FMLA form to ensure that his absences were not counted as an occurrence) to submit FMLA documentation to ensure that a medically-related absence would not be counted as an "occurrence" under the Respondent's no-fault attendance policy. In this case, the Respondent gave the Complainant only two days from the date it provided him with the form letter to submit the FMLA form to ensure that the absence was not counted as an "occurrence" before terminating him. Because the Respondent did not follow the requirements of its own no-fault attendance policy in terminating the Complainant, it could not claim the protection that might be available to it under the policy. The Complainant had not accrued the requisite number of "occurrences" necessary for termination. The Respondent was aware that the Complainant was receiving medical treatment for migraine headaches when it terminated him. Based on these unique circumstances, the Complainant was terminated "because of" his disability. Stoughton Trailers v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

The Supreme Court declined to address the issue of whether a termination for exceeding the maximum number of absences permitted under a no-fault attendance policy is because of disability under the Wisconsin Fair Employment Act when some of the absences were caused by disability and others were not, since it was not necessary to decide this legal issue in this particular case. Stoughton Trailers v. LIRC, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

Use of the mixed motive test in analyzing a claim of discrimination does not prevent an employer from applying its "no fault" attendance policy to an employee who is absent for reasons not related to a disability. Not all absences are related to a person's disability. Not every illness is a disability within the meaning of the statute. Similarly, just because a disabled person is absent does not mean that the absence is necessarily due to the person's disability, thereby triggering reasonable accommodation requirements. An employer may

continue to apply its "no fault" attendance policy as long as the policy does not result in an adverse employment action taken because of an employee's disability, and as long as the policy is otherwise compliant with the law. In this case, the Complainant was discharged, in part, because of absences caused by his disability and, in part, because of absences not caused by his disability. His discharge would not have occurred but for his last two absences, which were caused by his disability. Stoughton Trailers v. LIRC, 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102. [Note: See decision on appeal, above].

At some point the application of a "no-fault" attendance policy to a person who is experiencing absences caused by a disability will constitute taking action against that person "because of" a disability. However, in some cases the mere presence of *some* disability-caused absences in an overall, accumulated record of absences will not be significant enough to justify the conclusion that adverse action pursuant to a "no-fault" attendance policy is taken "because of" disability. There is no bright-line rule as to where these different points fall. Geen v. Stoughton Trailers (LIRC, 08/31/00), rev. sub nom. Stoughton Trailers v. LIRC (Dane Co. Cir. Ct., 08/09/01), modified and remanded sub nom. Geen v. LIRC, 2002 WI App 269, 258 Wis. 2d 498, 654 N.W.2d 1. Decision on remand, Geen v. Stoughton Trailers (LIRC, 09/11/03); aff'd sub nom. Stoughton Trailers v. LIRC (Dane Co. Cir. Ct., 05/13/04); aff'd 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102. [Note: See decision on appeal, above].

The discharge of an employee because of disability after a potential business partner of the employer demanded it as a condition of entering into partnership with the employer was discriminatory. Swanson v. State St. Stylists (LIRC, 11/26/97).

The Complainant, who was employed as an interstate truck driver for the Respondent, has diabetes mellitus. When the Complainant underwent a physical examination to obtain certification required by the Department of Transportation, a physician indicated that he had an unacceptable level of glucose in his urine. Under sec. 391.41 of the Federal Motor Carrier Safety Regulations, indications of uncontrolled diabetes disqualify an individual from operating a motor vehicle. Consequently, the Respondent would not permit the Complainant to drive until he got this blood sugar level under control. The Complainant subsequently saw another doctor, who considered his blood sugar level to be acceptable and certified him as qualified to drive. The Respondent refused to accept this certification. Sec 381.47 of the Federal Motor Carrier Safety Regulations provides a resolution mechanism for disputes regarding medical evaluations. The Respondent should not be held to have acted in violation of the Wisconsin Fair Employment Act unless and until there has been a determination under the federal safety regulations that the Complainant is qualified to drive, and the Respondent refuses to permit him to drive. Hermann v. Ort Trucking Co. (LIRC, 12/13/94).

The Complainant was not unlawfully discharged because of poor eyesight; she was discharged because the Respondent reasonably believed that she had not been honest when responding to questions about her medical condition. A Respondent need not be correct in its assessment that a Complainant falsified her medical statement; it need only have acted upon a good faith belief that she had. Plears v. Perlick Corp. (LIRC, 02/12/93).

A Respondent reasonably suspended a Complainant until the State Department of Motor Vehicles could determine if her diabetes condition should disqualify her from driving a school bus. Since it is the Department of Motor Vehicles, through its licensing requirement, rather than the employer who determines whether an individual is qualified to operate a school bus safely, an employer fulfills its duty of individual evaluation by suspending the individual driver until the State can make its determination. In essence, the Complainant's diabetes condition was reasonably related to her ability to adequately undertake the job-related responsibilities of a school bus driver during the period of her suspension. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

An employer has a right to know if an employee has a handicap (except to the extent that the Americans with Disabilities Act may provide otherwise) so that the employer can determine whether the handicap is

reasonably related to the ability to undertake the job responsibilities. Accordingly, an employer can lawfully refuse to hire or can discharge an individual who falsifies an employment application with respect to a handicap. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

The Complainant filed a complaint of handicap discrimination based upon the Respondent's removal of its uncorrected vision standard, under which the Complainant had qualified for certification to the list of people to be considered for a conservation warden position. The complaint did not constitute a claim under the Wisconsin Fair Employment Act, but the Complainant was given thirty days to amend the complaint to allege that the Respondent's deletion of the uncorrected vision standard was motivated by an intent to discriminate. Wood v. DNR (Wis. Pers. Comm'n, 05/18/89).

124 NATIONAL ORIGIN AND ANCESTRY DISCRIMINATION

124.1 Coverage; distinction between national origin and ancestry

It is not uncommon for people to identify themselves with one part, even a minor part, of their ethnic background. Further, the Wisconsin Fair Employment Act does not require a Complainant to prove ancestry through documentary evidence since, for many of us, no such documents exist. Schramm v. Farm & Fleet (LIRC, 05/14/03).

The term "ancestry" does not include the concept of kinship. Mazzari v. LIRC (Ozaukee Co. Cir. Ct., 125.4

Ancestry is generally understood in the area of civil rights as referring to ethnic groups. It refers to the country, nation, tribe, or other identifiable population from which one's forebears came or to which they belonged. Ancestry is not a matter of membership in a particular family or of having a particular person as a family member. Cook v. Therapy & Support Servs. (LIRC, 11/08/91).

It is not discrimination based on "ancestry" to refuse to hire a person because her father works for the same employer. Kawczynski v. DOT (Wis. Pers. Comm'n, 11/04/80).

124.2 Harassment because of national origin or ancestry

The evidence failed to establish probable cause to believe that the Respondent violated the Act by discriminating against the Complainant on the basis of his race and/or ancestry. The Respondent immediately began an investigation into the Complainant's complaint that he was being harassed when he brought his allegation to the attention of management. The investigation failed to uncover any evidence that employees were pointing to the Complainant and saying he smelled. Even if the Complainant's co-workers had engaged in the conduct that he claims they did, there is no reason to believe they did so because of his race or ancestry. The Respondent employed a significant number of other Hmong employees in the Complainant's work area, and no Hmong employees other than the Complainant had complained of being harassed. Lee v. Packerland Packing Co. *(LIRC, 02/16/00)*

The Complainant did not prevail on a claim of harassment where he told his supervisor of one occasion on which a co-worker told him that he did not want to have anything to do with Hispanics. A single instance of a statement of this type would not rise to the level of harassment. A finding of liability on the part of the employer could not be premised on its supposed failure to take adequate action in response to once being told of one such statement. Abaunza v. Neenah Foundry (LIRC, 03/30/93), aff'd Winnebago Co. Cir. Ct., 10/27/93.

An employer was not liable for national origin harassment which was sporadic, remote in time and which was carried out by persons who had little or no connection to the employer. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

An employer cannot be found liable for national origin harassment unless the harassment is carried out directly by the employer or, if carried out by co-employees, the employer knows or should reasonably know about the harassment and fails to take reasonable action to prevent it. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

Where the Complainant's foreman had referred to the Complainant's fiancee as a "hot tamale" some months before the Complainant was discharged and the Complainant never notified the Respondent that the remark was offensive, the remark was too remote in time and lacking in intent to establish that the Complainant's discharge was based on his national origin. Molinar v. Larsen Co. (LIRC, 02/04/92).

Slurs about an employee's national origin which continued for a period of years constituted discriminatory working conditions even where the employee did not notify other supervisors of the remarks because the remarks were made by a management official. Polasik v. Astronautics Corp. (LIRC, 04/08/83).

124.3 Cases

Evidence of a single offensive comment made to another employee seven years earlier regarding that employee's national origin does not warrant a conclusion that the Respondent's owner made offensive comments to the Complainant about his national origin or that it discharged him for that reason. If offensive comments about the Complainant's national origin were made to the Complainant, it stands to reason he would have told his supervisor about them when asked what transpired between himself and the Respondent's owner. Robles v. Thomas Hribar Truck & Equip., Inc. (LIRC 11/30/18), rev'd (Racine Co. Cir. Ct. 06/20/19), rev'd sub nom. Robles v. Thomas Hribar Truck & Equip., Inc. and LIRC, 2020 WI App. 74, 394 Wis. 2d 761, 951 N.W.2d 853.

The commission held in Obasi v. Milwaukee Sch. of Eng'g (LIRC, 10/14/13) that an employer may make a decision based on an individual's foreign accent, "but only to the extent that the accent interferes materially with the ability to perform job duties, and when effective oral communication in English is a job requirement." However, a caller's inability to understand the Complainant's name is not a sufficient factual basis to support the conclusion that the Respondent made an accurate and honest assessment that the Complainant's accent materially interfered with her ability to perform her phone-answering duties. Richards v. Our House Senior Living (LIRC 03/24/16).

The Complainant failed to sustain his burden to establish a prima facie case of discrimination based on his race, color, or national origin. He did not prove that similarly situated workers (who the Respondent reasonably concluded had used excessive force with a patient) were not discharged, or that he had been replaced by an individual of a different race, color, or national origin. Ogbeide v. State of Wis. Dep't of Health & Family Servs. Mental Health Inst. (LIRC, 09/19/08).

The individual who discharged the Complainant was not aware that the Complainant was one-eighth Native American. Although she and the Complainant had discussions about Native American culture and customs, this did not establish that she had reason to be aware of the Complainant's Native American ancestry. Furthermore, the record showed that the individual who discharged the Complainant did not hold any discriminatory animus toward Native Americans. On the contrary, she had devoted much of her career to working with Native Americans and, in fact, she had a deep appreciation and respect for their culture. Wucherpfennig v. Personal Dev. Ctr. (LIRC, 06/29/06).

The word "gypsy" is used in the United States to refer not only to an ethnic group, but also to a type of criminal activity. An expert witness at the hearing testified that it is not possible to identify Romanys or gypsies by any physical characteristics. "Gypsy crime" and "gypsy activity" are terms of art used in law enforcement to refer to certain types of retail theft activities carried out by groups who refer to themselves as "gypsy groups" or "gypsies" and who travel from community to community to carry out these activities. This terminology is used independent of the race or ethnicity of the members of these groups. Schramm v. Farm & Fleet (LIRC, 05/14/03).

The Complainant provided sufficient proof that Romany should be recognized as a separate ancestry/ethnic group for purposes of the Wisconsin Fair Employment Act. Schramm v. Farm & Fleet (LIRC, 05/14/03).

Federal court cases that have gone the furthest in recognizing Title VII claims concerning English-only rules are premised on the effects of such rules on Hispanic individuals whose primary language is not English. In

this case, the Complainant was a non-Hispanic American-born individual whose first language is English. The Complainant did not have a viable national origin claim under the Wisconsin Fair Employment Act where he was threatened with discipline if he did not comply with the Respondent's admonition to cease speaking Spanish in the work place. Wilson v. Wis. State Assembly (Wis. Pers. Comm'n, 02/20/03).

With the exception of the Complainant's testimony that a co-worker stated, "Poland is bullshit," there was no reason to believe that the Complainant's national origin was a factor in any harassment that may have occurred. Although the Complainant testified that he told his supervisor that he was being harassed, he did not elaborate upon the substance of this conversation. Even if he had complained to his supervisor about harassment based upon his national origin, there was nothing in the record to suggest that the Respondent was ever made aware of this complaint. Pioterek v. Scott Worldwide Food Serv. (LIRC, 01/12/96).

A Hispanic employee was not treated differently than a white employee when the Hispanic employee was discharged for taking home more finished product than he had been authorized to take. Although a white co-employee took home finished product which he was given by the Complainant, the co-employee did not have a history of taking excessive product and it was reasonable to assume that the co-employee thought the Complainant had the employer's permission to take the product home. Molinar v. Larsen Co. (LIRC, 02/04/92).

When an agency which provided employment services for Cubans contacted the owner of the Respondent and told him that they wanted to refer two qualified individuals to him, the owner responded, "If they are Cuban, no way." The Respondent was prejudiced against Cubans; however, it did not violate the Act because when the attempt was made to refer the Complainants for assembly positions, those positions had already been filled and there were no longer any openings for which the Complainants could apply. Dominguez v. Lawrence (LIRC, 01/30/91).

The Personnel Commission declined to dismiss a complaint where it could not conclude as a matter of law that there was no possibility that the Respondent's policy of denying faculty exchanges with the Republic of South Africa could be deemed an action taken on the basis of national origin. McFarland and Joubert v. UW-Whitewater (Wis. Pers. Comm'n, 09/04/86).

A well-qualified Mexican-American could not establish national origin discrimination in failing to be selected for four salaried positions with his union where the national origin of three of the persons selected was not in the record and the union's rationale for his non-selection was not shown to be a pretext for discrimination. Sosa v. Distr. 10 (LIRC, 10/07/83).

Although the Complainant was discharged after only his first violation of a work rule, the employer showed that non-Hispanic employees were also discharged for similar violations and the union's decision not to arbitrate the case was made in good faith after a thorough investigation. Agron v. Pioneer Container (LIRC, 06/17/83).

To establish a *prima facie* case of national origin discrimination in regard to discharge, an employee must show that: (1) he is a member of a protected class; (2) he was qualified for the job he was performing; and (3) he was satisfying the normal requirements of the job. A person of Cuban national origin who was discharged while in a training program for a position requiring accurate measurement of radiation failed to meet elements (2) and (3) where she could not grasp basic math concepts and refused to take a test designed to measure her level of math competency. Canto v. State of Wis. (LIRC, 05/19/81).

An employer offered no evidence other than student preference to demonstrate that a person of Latino extraction was necessary to teach a bilingual/bicultural program. It was national origin discrimination to fail to offer a qualified non-Latino teacher a full-time position where she had substituted for two months

before being replaced by a person of Latino descent and later by a person whose spouse was of Latino descent. Richter v. Milwaukee Bd. of Sch. Dir. (LIRC, 10/14/77).

125 RACE AND COLOR DISCRIMINATION

125.1 Coverage; generally

The WFEA covers claims of discrimination because of the race of a person with whom the Complainant associates. Much v. Les Stumpf Ford, Inc. (LIRC, 07/31/14).

The Complainant is a multiracial female. She is part black, part white, and part Native American. It was error for the Administrative Law Judge to require that the Complainant show what race the Respondent perceived her as being, or that she show that she was of a race that was obvious to others. Since the Complainant is multiracial, she could not possibly know what race the Respondent perceived her to be. The fact that she is multiracial was a possible basis for race discrimination. Raven v. Shopko Stores (LIRC, 02/28/06).

Discrimination against a person because he is engaged in an interracial marriage is race discrimination. Miner v. Blunt, Ellis & Loewi (LIRC, 05/29/91).

125.2 Hire

It was not discrimination based upon race to tell a Native American job applicant that he would need to cut his long hair if hired. There was no reason to believe that applicants of other races were permitted to have long hair, and another Native American applicant was hired when he agreed to cut his hair. Breu v. Guardsmark, LLC (LIRC, 03/28/14). *(not available on LIRC's website)*

The fact that two minority candidates were ranked first and second on a certification list but were not selected for further consideration following the interview process, did not establish race discrimination. A candidate's pre-certification ranking did not carry over into the post-certification process, i.e., all candidates on the certification list were considered to be competing on an equal basis. There was no showing of any bias in the interview process. In particular, the record showed that the interview panel was balanced as to race, that there was consistency among the interviewers as to the scoring of the interviews, that there was consensus among the panel members as to the ranking of the top two candidates, and that the interview questions and scoring criteria were reasonably job related. Martin v. Milwaukee Bd. of Sch. Dir. (LIRC, 02/26/03).

The Wisconsin Department of Corrections announced an opening for a Regional Chief position. It invited candidates with career executive status to submit applications, and it further indicated that candidates without career executive status could submit an application and examination materials. The Complainant, an African-American man who previously had been certified for other career executive positions in state service, submitted application materials. Another individual, a white male who held a career executive position in the Department of Corrections, also applied. He was the only career executive to apply. The supervisor of the Regional Chief position had known the white male candidate for over 20 years and was well acquainted with his work record. Upon learning of the white male candidate's interest, the supervisor inquired whether he could be hired for the Regional Chief position. A human resources employee who (unlike the supervisor) was aware of the racial identity of all of the candidates, informed the supervisor that the reassignment of the white male candidate to the Regional Chief position would be acceptable. The supervisor then approved the career executive reassignment of the white male individual without reviewing the application materials of any of the non-career executive candidates. The Complainant argued that the Department of Corrections had a duty to examine all of the applicants before making a hiring decision, pursuant to its delegation agreement from the Division of Merit Recruitment and Selection. However, that delegation agreement applies only to competitive hiring processes, and the successful right candidate was hired through a career executive reassignment rather than through a competitive

process. Moreover, even assuming that there was anything irregular about the cancellation of the competitive hiring process, the Complainant failed to show that the motive for canceling the hiring process was to discriminate against minority candidates. It was undisputed that the supervisor who made the hiring decision was African-American himself, and that he had no knowledge of the race of any of the non-executive candidates. Oriedo v. Wis. Pers. Comm'n (Ct. App., Dist. IV, unpublished opinion, 04/25/02).

When an employer seeks to interpose a federal consent decree against claims of reverse discrimination, the employer must prove that consideration of race was: (1) justified by the existence of a manifest imbalance that reflected under-representation of minorities in traditionally segregated jobs; and (2) the decree did not unnecessarily trammel the rights of non-minority employees or create an absolute bar to their advancement. Samolinski v. Milwaukee County (LIRC, 01/05/90).

Asking a black applicant whether he is comfortable supervising white female workers when that question was not asked of other candidates established that the Complainant's race was a factor in his not being selected. Jenkins v. DHSS (Wis. Pers. Comm'n, 06/14/89).

The Respondent's hiring procedures were designed to maintain a segregated workforce. The Respondent deliberately screened blacks out of the application process by voice identification over the phone. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

Where the Complainant, a white man, was not ranked among the top candidates by any of the interviewers, and where other white candidates were ranked higher than the Complainant by all the interviewers, the Complainant's point by point comparison of himself to the successful black candidate was not relevant. Whether or not the successful candidate's race was a factor in his being awarded the position (a question not dealt with in the decision) the evidence showed that the Complainant's race was not a factor in his failing to get the position. Strickland v. Milwaukee Bd. of Sch. Dir. (LIRC, 10/13/88).

Where the Administrative Law Judge concluded that the Respondent did not know of the Complainant's race at the time he failed to consider his application for employment, she also appropriately rejected the argument of the Complainant that official notice could be taken of the fact that the Complainant spoke with a recognizable "black dialect" and that therefore it could be inferred, based on his telephone conversation with the person who made the hiring decision, that the person must have known he was black. This was not a proper subject for official notice under sec. 227.45(3), Stats. Ealy v. Roundy's (LIRC, 03/12/87).

A Complainant who made out a *prima facie* case of race discrimination in hiring failed to prove that the Respondent's reason (that the hired candidate was most qualified) was pretextual, where the Complainant argued that the selection process utilized subjective criteria. Criteria of a subjective nature are sometimes necessary in hiring, especially in hiring supervisory personnel, and there is nothing discriminatory *per se* about the use of such criteria. However, the use of such criteria will be closely scrutinized where applied by a non-minority decision-maker to a minority candidate. Howard v. City of Madison (LIRC, 02/24/87).

Evidence that an employer had marked an application with a "B" does not show that its stated reason for failing to hire a black applicant was a pretext for discrimination. Ewing v. James River-Dixie Northern (LIRC, 10/19/84).

Although a Complainant established a prima facie case, he did not prevail after the employer showed strong reasons for preferring another applicant, because the Complainant's own Statistical evidence was weak and there was no evidence of race discrimination in the hire of three other white applicants. Long v. DILHR (Wis. Pers. Comm'n, 11/24/82).

A black applicant for a Bicentennial Aide position established a *prima facie* case of discrimination by showing better qualifications than the four white persons hired, and the employer's claim of her inferior writing ability was found to be a pretext for race discrimination. Kirck v. Bicentennial Comm'n (LIRC, 11/23/77), aff'd sub nom. City of Milwaukee v. LIRC (Dane Co. Cir. Ct., 02/06/79).

There was no race discrimination where the employer hired a white male who agreed to give a two year commitment to the job over a black male who refused to make such a commitment. Cooper v. LIRC (Youth Services Bureau), (Dane Co. Cir. Ct., 10/22/79).

Where a black person and a white person applied on the same day, at the same place and to the same person for a welding job, the black person established race discrimination in his failure to be hired by showing that the white person with less welding experience was hired with the promise to be trained later and was assigned to jobs for which he had no previous experience. Buchanan v. Barkow (DILHR, 03/11/77).

Although the practice of permitting appointment from among the top three candidates on a promotional exam without establishing selection criteria creates ample opportunity for subjective hiring decisions, discrimination must still be proven. Green v. DOA (DILHR, 09/21/76).

125.3 Conditions of employment, harassment because of race

A supervisor comparing the work of an African American employee to something "an orangutan could do" was either intentionally degrading, or at the very least, callously disregarding the racist overtones of the comment. Comments like these could be part of a pattern of racist conduct, but in this case the single isolated comment that "an orangutan could do groups" did not establish a racially hostile work environment. King v. State of Wis. Dep't of Corr. (LIRC 11/19/20).

A single incident of racially offensive name-calling by a coworker, although inexcusable, does not alone constitute unlawful harassment based upon race, color, or national origin in violation of the WFEA. Omowaye v. Wis. Built (LIRC, 4/30/13), aff'd, Omowaye v. LIRC (Dane Co. Cir. Ct., 06/03/14).

The occasional and sporadic use of racial slurs, albeit deplorable, may not rise to the level of a violation of the Wisconsin Fair Employment Act. Acevedo v. Oshkosh Corp. (LIRC, 03/29/12).

An employer cannot be held responsible for racial or religious harassment unless the harassment is carried out directly by the employer or (if carried out by co-employees of the Complainant) the employer knew or should reasonably have known of the harassment and failed to take reasonable action to prevent it. Acevedo v. Oshkosh Corp. (LIRC, 03/29/12).

The Respondent unlawfully discriminated against the Complainant in his terms and conditions of employment on the basis of race where it maintained websites on a company computer of "skinheads" having violent sex with black women, and "white supremacy." This created an intimidating, racially hostile work environment. The Respondent's manager knew about this material on the company's computer and did not either delete the material or discourage the viewing of such websites. Salley v. Nationwide Mortgage & Realty Corp. (LIRC, 12/13/07).

In order to prove a racially hostile work environment, an employee must show that: (1) he was subject to unwelcome harassment; (2) the harassment was based on his race; (3) the harassment was severe or pervasive so as to alter the conditions of his environment and create a hostile or abusive work environment; and (4) there is a basis for employer liability. Clark v. Plastocon (LIRC, 04/11/03).

Occasional or sporadic instances of the use of racial slurs do not in and of themselves constitute a violation of the law. To prevail on a racially hostile environment claim, the employee must show that his work environment was both subjectively and objectively hostile. Whether a work environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency of the conduct; its severity; whether it was physically threatening or humiliating; or whether it was merely an offensive utterance; and whether it unreasonably interfered with the employee's work performance. Clark v. Plastocon (LIRC, 04/11/03).

The Complainant was called a "black ass" by a white coworker on three occasions. The infrequency of these utterances, the fact that these utterances were made by a single employee, and the fact that these racial remarks came in the context of a dispute over how the work they were performing was to be done all militate against a showing that the Complainant established the existence of a hostile work environment. Moreover, an employer is only liable for a hostile work environment created by an employee's coworkers when the employee shows that the employer has been negligent in either discovering or remedying the harassment. In this case, the Respondent was unable to determine who was at fault in causing the verbal disputes between the Complainant and the white coworker. The Complainant had called the white coworker a "fat ass." In spite of the inability to determine who was at fault during the verbal disputes, the supervisor verbally warned both of the employees that their conduct was inappropriate. Ultimately, the Respondent terminated both the Complainant and the white coworker. The evidence failed to establish a basis for employer liability. Clark v. Plastocon (LIRC, 04/11/03).

It is sometimes the case that the display of a noose is intended as – and is perceived as – a racially offensive provocation. This understanding of the object's "message" grows directly out of its connection to this country's long and horrendous history of racially-motivated lynching. However, when a noose is found to represent a racist intention, it is usually the case that it has been used in direct association with some other powerful and more directly racist symbol, such as the initials "KKK" or a KKK costume or something of that nature. In some cases, the meaning of a noose is by no means as clear cut and does not necessarily suffice to establish, or even evidence, racial animus. For a number of reasons, people sometimes make and display nooses in workplaces. Their motivations and intentions in such cases are generally crude, threatening, aggressive, juvenile, or some combination of these, in most cases, but they do not necessarily arise out of racial animus. In this case, it was not established that the fact that a full-sized noose was kept in the manager's office was intended by the people who were involved to have any particular racial connotation. Wells v. Roadway Express (LIRC, 05/13/02).

In determining the pervasiveness of harassment, the trier of fact may aggregate evidence of racial hostility with evidence of sexual hostility. Harsh v. County of Winnebago (LIRC, 11/06/98).

The term "nigger" is commonly understood to be racially derogatory, particularly when used by white people in reference to black people. The word is intimidating by its nature and shows an intent to discriminate on the basis of race. The use of the term cannot be excused on the ground that black employees sometimes use it themselves. In this public accommodation case, even if the Complainant (a black person) responded by calling someone a "honky bitch," this would not neutralize the Respondent's racially derogatory remarks or render them inoffensive to the Complainant. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

Occasional or sporadic instances of the use of racial slurs do not, in and of themselves, rise to the level of a violation of the Wisconsin Fair Employment Act. Rodgers v. Western Southern Life (LIRC, 10/12/89). [Ed. note: see, Rodgers v. Western Southern Life Ins., 12 F.3d 668 (7th Cir., 1993) for a contrary result].

Occasional or sporadic instances of the use of racial slurs by co-workers do not, in and of themselves, constitute unlawful discrimination. Saltarikos v. Charter Wire Corp. (LIRC, 07/31/89).

In order to establish racial harassment, the Complainant must establish that: (1) more than a few isolated incidents of harassment have occurred; and (2) the employer failed to take reasonable steps to prevent racial harassment. Sheridan v. UW-Madison (Wis. Pers. Comm'n, 02/22/89).

The Complainant argued that he was constructively discharged when, about ten days before his last day of work, a co-worker called him "boy" and "nigger," and that on another occasion that employee told a derogatory joke about blacks. The evidence showed that the Complainant never complained to management about the joke. He did complain to management about the other incident, and the employee was counseled and cautioned by the employer. Occasional or sporadic instances of the use of racial slurs do not in and of themselves constitute discrimination. The two incidents cited by the Complainant would not be sufficient to establish that conditions were so intolerable that a reasonable person would be compelled to resign. Kennedy v. Pick 'n Save (LIRC, 09/22/88).

An employer is not responsible for alleged racial comments made to an employee by her co-workers unless it knew or should have known about them. Crear v. LIRC, 114 Wis. 2d 537, 339 N.W.2d 350 (Ct. App. 1983).

The prohibition against racial discrimination in conditions of employment encompasses racial harassment by co-workers where an employer who is, or should be, aware of the harassment fails to take reasonable steps to prevent it. Hyde v. LIRC (Rock County) (Ct. App., Dist. IV, unpublished opinion, 09/15/81).

125.4 Promotion, compensation, terms of employment

Discrimination was not established where the Complainant failed to demonstrate that the duties and responsibilities of his job were similar to his comparators or required the same skill level and where the evidence demonstrated that the individuals hired to replace the Complainant, who were not part of the protected class, were paid less than the Complainant. Lozano v. The Carlson Co. (LIRC 12/30/19).

The fact that one of the managers involved in disciplining the Complainant was the same race as the Complainant does not compel a finding that race discrimination did not occur but does tend to render it less likely. Boyd v. Goodwill Indus. of Se. Wis., Inc. (LIRC 09/27/19).

The Complainant's compensation claim was based on national origin/ancestry and not sex. As a result, it did not qualify for an "Equal Pay Act analysis." Gallardo v. Accurate Specialties, Inc. (LIRC, 09/06/19).

Showing that the employer's decision-makers are of a different race, national origin or religion than the Complainant is not enough to support an inference of discrimination. Shi v. Univ. of Wis. Sys. Bd. of Regents (LIRC 09/11/15).

Where the selection device at issue was not pass/fail but involved the ranking of candidates, a balanced bottom line could be considered as a defense and a disproportionate distribution of blacks in the seniority rankings was not found to have a per se disparate impact. The Complainant did not establish unlawfully discriminatory disparate impact where he failed to present expert statistical evidence to demonstrate that the distribution of blacks (in terms of relative seniority) was different to a statistically significant degree from what might be expected to arise by chance. Moncrief v. Gardner Baking (LIRC, 07/01/92).

In a case alleging a failure to promote because of race, the Complainant's initial burden is to show that: (1) he belongs to a protected group, (2) he was qualified and applied for a promotion, (3) he was considered for and denied a promotion, and (4) other employees of similar qualifications who were not in the protected group were promoted. Krueser v. City of Madison (LIRC, 06/30/92).

Race discrimination was established when the supervisor's credibility as a witness was placed in doubt because he told the Respondent's employee relations manager that the Complainant did not want full-time hours when the supervisor knew the opposite to be the case and when it was shown that "concern about the Complainant's paperwork" was pretext. Smith v. Condere Corp. (LIRC, 03/27/90).

The Complainant was denied a promotion to route driver in part because of his race. However, even in the absence of discrimination, he would not have been promoted because of his work performance problems. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

An employer's stated reason for not promoting a black employee, slow performance, was a pretext for race discrimination where his evaluations had been "completely satisfactory" and the employer's evaluation process overall was subjective and utilized an evaluation from one supervisor who was admittedly biased. Bolden v. Wis. Tel. (LIRC, 08/04/81).

The transfer of a less senior white employee who had heard of a job opening by word of mouth did not discriminate against a black employee where the employer did not customarily post job openings or have a transfer policy based on seniority. Harris v. Color Corp. of America (DILHR, 08/18/76).

It was a violation of the Act to transfer a white security guard from a position in Milwaukee's inner city because of a customer request based on the employee's race. Waldo v. Milwaukee Metro Security (DILHR, 04/08/76).

125.5 Termination

The Complainant established a prima facie case of race discrimination at a probable cause hearing. He established that he was black/African-American, that he was discharged as soon as he reached eight points under the Respondent's attendance policy, and that a white/Caucasian employee who reached eight points was not discharged, but instead had a half point removed from her record. Garrison v. Neenah Foundry, Co. (LIRC 12/29/21).

The commission found the Complainant did not meet his burden of proof to establish that he was discharged because of his race or national origin. The commission expressed concern that, although the Complainant testified that there were a number of potential witnesses to the alleged racist remarks, none of these individuals testified on the Complainant's behalf. Robles v. Thomas Hribar Truck & Equip., Inc. (LIRC 11/30/18), rev'd (Racine Co. Cir. Ct. 06/20/19), rev'd sub nom. Robles v. Thomas Hribar Truck & Equip., Inc. and LIRC, 2020 WI App. 74, 394 Wis. 2d 761, 951 N.W.2d 853.

The Complainant alleged that she was the victim of race/color discrimination soon after her hire. However, it is unlikely that an employer (who was obviously aware of the Complainant's race and color when she was interviewed and then hired) would suddenly decide to discriminate against her on that basis and to discharge her three months after she was hired. Knight v. Schneider Family Dentistry (LIRC, 10/29/10).

The Complainant was discharged from his position as a correctional officer during his probationary period. The Respondent contended that the Complainant experienced significant performance issues, primarily by not interacting appropriately with inmates. The Complainant attempted to establish pretext for race discrimination by showing that most of the complaints about his performance were phony. However, even if the Respondent had been mistaken in the conclusion that the Complainant's performance was problematic enough to warrant the termination of his probation, this does not mean that the Respondent discriminated against the Complainant on the basis of race, so long as the Respondent had a good faith belief in the conclusions it reached about the Complainant's performance. Further, there was no indication

that the Respondent treated the Complainant any different from white probationary officers. Hood v. DOC (Wis. Pers. Comm'n, 02/21/03).

The Complainant was not constructively discharged because of race where the racial epithets and racially offensive remarks, combined with the Complainant's supervisor's efforts to dissuade him from taking a voluntary demotion, were not such that a reasonable person in this situation would have felt that he had no other alternative but to quit his employment. Rodgers v. Western Southern Life (LIRC, 10/12/89). [Ed. note: see, Rodgers v. Western Southern Life Ins., 12 F.3d 668 (7th Cir. 1993) for a different result].

The Respondent did not violate the Act by dismissing an employee after a finding of misconduct based on the observations of white co-workers involving the only black employee of a unit or by bypassing ordinary grievance channels by expediting her grievance to a top level administrative review where most matters are eventually received. Lathon v. Family Hosp. (LIRC, 05/15/84).

A black saleswoman established that her discharge was racially motivated by showing that: (1) she had been given no warnings, (2) she had received several compliments from customers, (3) her employer did not have good cause for terminating her, and (4) her employer had asked her several questions about her race during her interview for the job. Johnson v. Tel-Page Corp. (LIRC, 09/26/83).

An employee established a *prima facie* case of race discrimination in his discharge by showing that he was a member of a protected group, qualified for the job he was performing, met the normal requirements of his work, was discharged and that his employer requested a replacement. Bowers v. Wis. Correctional Servs. (LIRC, 09/23/83).

A *prima facie* case may be established where a black employee, who is fired for fighting, shows that the white participant in the fight was merely suspended. Riley v. LIRC (Gen. Elec.) (Ct. App., Dist. I, unpublished opinion, 12/28/82).

An employer's decision to lay off five of its seven black employees, but none of the five white workers, was not race discrimination where the employer showed that the five blacks were not as well qualified based on performance, attendance and seniority. McKee v. DILHR (Wis. Pers. Comm'n, 07/24/82).

It was race discrimination to terminate a black probationary employee who was experiencing discomfort on her new job and had asked for different work, where the employer usually attempted to find lighter work for probationary employees and the employer's determination that the employee's work was too slow was based on a subjective evaluation influenced by race. Briggs & Stratton v. LIRC (Collins) (Milwaukee Co. Cir. Ct., 12/18/81).

Although progressive discipline was the usual practice, it was not race discrimination to treat the employee's initial suspension and discharge, together with his reinstatement on probation, as progressive disciplinary steps leading to his discharge. Hyde v. LIRC (Rock County) (Ct. App., Dist. IV, unpublished opinion, 09/15/81).

It was race discrimination for an employer's all white supervisory committee to suspend and then discharge a black employee for absenteeism where they were not guided by any formal guidelines or other objective criteria and where a white employee with a similar record of absenteeism was never suspended. James v. Giddings & Lewis (LIRC, 09/12/79).

Even though an inference of discrimination in the firing of a black employee could be drawn from the facts, a finding of no discrimination was supportable on the basis that he had a bad relationship with his supervisor and fellow employees, had incurred a serious physical ailment and had often been

accommodated in the past, and where the employer's work force was 10% black in a labor market of 2% black. Walker v. DILHR (Snap-on Tools) (Dane Co. Cir. Ct., 12/06/77).

125.9 Miscellaneous

When a Complainant has established a *prima facie* case that race or sex has been taken into account in an employment decision, the employer may meet its burden of articulating a non-discriminatory rationale for its decision by pointing to the existence of an affirmative action plan. That reliance on an affirmative action plan is not to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan; the burden of proving its invalidity remains on the Complainant. Where the Complainant offered no evidence regarding the percentage of women in the labor market, the Commission concluded that the Complainant could not meet his burden of proving the invalidity of an affirmative action plan favoring women. Gordon v. City of Milwaukee (LIRC, 10/16/87).

126 CREED (RELIGION) DISCRIMINATION

126.1 General coverage

The Complainant's system of beliefs about labor unions was not part of his religious creed of Lutheranism and was not itself a creed under the WFEA, but rather a system of philosophical, social and political values held by the Complainant apart from his Lutheran religious views. Leal v. Int'l United Auto Workers (LIRC, 03/19/15); aff'd, Leal v. LIRC (Fond du Lac Co. Cir. Ct., 01/05/15).

An employee's burden of demonstrating the sincerity of a belief system is not a heavy one. The fact that an employee's religious belief does not directly correspond to that of a particular Christian denomination with which the employee is associated is not a basis for finding that her belief is either not religious or not sincere. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

The fact that an employee initially accepted an employer's offer to work one Sunday out of four per month did not show that her belief in not working on Sunday was not a sincerely held religious belief, where the employee has studiously abstained from working on Sunday since 1978 and she only agreed to work on Sunday because she was under considerable pressure to find employment and obtain new housing. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

Sec. 111.31(3m), Stats., defines creed as "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." Where there was evidence in the record regarding the Complainant's beliefs as to a supreme being, moral imperatives governing conduct towards others, and ceremonies and observances, the Complainant demonstrated that her adherence to WICCA is a creed subject to the protection of the Wisconsin Fair Employment Act. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

The term "creed" is not defined in the Act, but should be interpreted to refer to a "system of religious beliefs." AMC v. DILHR (Bartell), 101 Wis. 2d 337, 305 N.W.2d 690 (1981).

The term "creed," as used in the Wisconsin Fair Employment Act, means not a system of political philosophy or beliefs, but a system of religious beliefs. Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis. 2d 207, 249 N.W.2d 547 (1977).

The refusal to hire a member of the Ku Klux Klan did not constitute discrimination based on "creed" because that term does not mean a system of political philosophy or beliefs. Health v. West Cap (LIRC, 08/03/77).

126.2 Exception allowing religious associations to give preference to adherents to their creed

A home for delinquent and dependent children operated as a non-profit venture, "founded on Christian principles and carrying out operations in a Christian context," is a religious association within the meaning of sec. 111.32(3)(a), Stats. Sack v. Christ the King Home (DILHR, 02/27/75), aff'd sub nom. Sack v. DILHR, (Dane Co. Cir. Ct., 07/28/76).

A restaurant managed by the Phoenix Fellowship Society was not a religious organization and therefore not exempt from the Act and its demotion of an employee and reduction of her wages because of her refusal to become a member of the Society was discrimination based on creed. Belle v. Ovens of Brittany (DILHR, 08/29/75).

126.3 Constitutional issues

In order to determine whether an individual is considered to work in a "ministerial" position, the ERD must apply the "functional" approach articulated by the Wisconsin Supreme Court in *Coulee Catholic*, which focuses on whether a position is "important to the spiritual and pastoral mission of the church," and requires a two-step analysis. Having concluded that the Complainant's position was ministerial in nature, the ERD may not adjudicate her complaint that she was discriminated against by the Respondent based upon her age. A decision that the ministerial exception applies to her position means that the Complainant may not pursue a claim of discrimination under the WFEA, no matter what the basis. Goralski v. Archdiocese of Milwaukee & Saint Adalbert Sch. (LIRC, 2/27/15), aff'd Goralski v. LIRC, (Waukesha Co. Cir. Ct., 10/2/15).

The Equal Rights Division lacked jurisdiction over the Complainant's age discrimination complaint. The freedom of exercise clause of the First Amendment of the United States Constitution and the freedom of conscience clauses of the Wisconsin Constitution preclude employment discrimination claims under the Wisconsin Fair Employment Act for employees whose positions are important and closely related to the religious mission of a religious organization. Two factors must be considered in determining whether the function of an employee is part of the spiritual and pastoral mission of the church: (1) Does the organization have a fundamentally religious mission? and (2) How closely linked is the employee's work to the fundamental mission of the organization? In this case, the Respondent had a fundamentally religious mission, and the Complainant's position as a first grade teacher was closely linked to the religious mission of the school. The Complainant led her students in prayer, she taught Catholic doctrine and practice, she took her students to Mass every week, and she tried to incorporate Catholic values and to encourage spiritual growth in all of her classes. The Complainant's age discrimination complaint impinged upon the Respondent's right to religious freedom. The Equal Rights Division had no jurisdiction over this matter, and could not interfere with the Respondent's employment decision in this case. Coulee Catholic Sch. v. LIRC, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

The concept of the ministerial exception has been a judicial shorthand for determining the constitutional question of whether a particular adjudication interferes with the free exercise rights of a religious association. The inquiry in this case was whether or not to renew the Complainant's teaching contract was based on her age. This was a limited inquiry. The Respondent did not assert a religious reason for its termination of the Complainant's employment. Therefore, an adjudication under the Wisconsin Fair Employment Act would not cause unconstitutional governmental entanglement with religion. Ostlund v. Coulee Catholic Sch. (LIRC, 02/28/06); aff'd sub nom. Coulee Catholic Sch. v. LIRC (La Crosse Co. Cir. Ct., 01/12/07); aff'd 2008 WI App 68, 312 Wis. 2d 331, 752 N.W.2d 342. Rev'd, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

The "primary duties" test is a useful guide to determine whether a position is ministerial. In this case, the Complainant was a first-grade teacher at an elementary school which is part of the Coulee Catholic Schools Association and is owned and operated by the Roman Catholic Diocese of La Crosse, Wisconsin. For several reasons, the position in this case was not ministerial. First, a general exemption for teachers in religious schools would be more expansive than warranted when considered in light of the magnitude of the State's interest in the enforcement of anti-discrimination laws. Second, a religious teacher's duty to model and support particular religious values does not in itself constitute teaching or spreading the faith. Third, there were few specific findings of religious content in the courses taught by the Complainant. Fourth, the religious class, prayers, and the Complainant's participation with her students in liturgies did not constitute the primary part of the Complainant's workday, and they were not the primary focus either of the job description or the job evaluation. Fifth, because the Complainant's primary duties did not implicate matters of Church, faith, and doctrine, the prospect that employment decisions would implicate those matters was

significantly diminished. Coulee Catholic Sch. v. LIRC, 2008 WI App 68, 312 Wis. 2d 331, 752 N.W.2d 342. Reversed, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868.

The Salvation Army is a church, and its officers serve a ministerial or ecclesiastical function. The Equal Rights Division does not have jurisdiction to resolve a discrimination complaint involving an officer position in the Salvation Army. To allow the Complainant to proceed with such a case would cause the state to intrude upon matters of church administration and government which are matters of ecclesiastical concern and, as such, would violate the Free Exercise and Establishment Clauses of the First Amendment. Coryell v. The Salvation Army (LIRC, 09/27/99).

The Respondent's decision to discharge the Complainant because she stopped participating in Catholic worship activities and because she married outside the Catholic Church was ecclesiastically based. The Complainant maintained that the Respondent should have been required to demonstrate what a non-sacramental marriage was, according to an objective Catholic text, before the complaint could be dismissed. However, the question of whether the Complainant's marriage was truly "non-sacramental" pursuant to the tenets of the Catholic faith is the very type of issue which the Equal Rights Division may not reach. In order to decide this question, it would be necessary to assess, evaluate and possibly challenge aspects of the Respondent's religious philosophy in a manner that would clearly be inconsistent with the mandates of the Free Exercise Clause and the Establishment Clause of the First Amendment of the Constitution of the United States. Newton v. St. Gregory Educ. & Christian Formation Comm. (LIRC, 12/10/97).

Neither the Free Exercise Clause of the United States Constitution nor the Freedom of Worship Clause of the Wisconsin Constitution deprive the Equal Rights Division of subject matter jurisdiction to review and investigate whether evidence supports an employment discrimination complaint filed against a religious association. If the employment position at issue, however, is inherently "ministerial" or "ecclesiastical" the religious protection embodied in the federal and state constitutions precludes the state and its agencies from enforcing the mandates of the Wisconsin Fair Employment Act against the religious association. In this case, the Complainant alleged that a seminary failed to renew her employment contract, and thereby discriminated against her because of sex and her opposition to discriminatory practices. A state agency or court confronting the issue of whether a position is ministerial or ecclesiastical must immediately resolve the question before further investigating or reviewing the employment discrimination complaint. As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered ministerial or ecclesiastical. This test should provide a basic framework to follow when addressing the *prima facie* question of whether a position is entitled to constitutional protection from state interference. Jocz v. LIRC, 196 Wis. 2d 273, 538 N.W.2d 588 (Ct. App. 1995).

The Commission does not have to address the issue of whether interpreting the Wisconsin Fair Employment Act as prohibiting harassment of employees because of religion would violate the first amendment free speech rights of the harasser because there was no unlawful harassment in this particular case. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

The Equal Rights Division did not violate the free exercise clause of the First Amendment of the U.S. Constitution by holding a hearing to determine whether a religious school's asserted religious-based reason was in fact the real reason for discharging the Complainant. Sacred Heart School Bd. v. LIRC, 157 Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990). The Department would have jurisdiction to hear a case in which a Complainant alleged that a Catholic university refused to hire her because of her sex. It is not clear how far into the process the Department may proceed before running into First Amendment issues and violations, but the Supreme Court has indicated that a state administrative body violates no constitutional rights by investigating and determining whether a religious employer's asserted religious reason for its alleged discriminatory action was the real reason. Maguire v. Marquette Univ. (LIRC, 08/18/89).

The Equal Rights Division would have jurisdiction to conduct a hearing on a complaint alleging that the Respondent, a Catholic University, discriminated against an employee because of sex in regard to hire, notwithstanding the school's claim that its constitutional rights to freedom of religion would be interfered with by inquiry into its reasons for its decision. Maguire v. Marquette University (LIRC, 08/18/88).

It would be an unconstitutional infringement of the first amendment right to freedom of religion for the Equal Rights Division to assert jurisdiction over the practice of a Catholic school of forbidding divorced teachers to remarry. Kovach v. Marinette Catholic Cent. High Sch. (LIRC, 06/12/86).

126.4 The employer's duty to accommodate

The Respondent allowed the Complainant to take twelve of her forty hours of accrued paid vacation time to observe the Jewish high holy days. This permitted the employee to fulfill her obligations both to her employer and to her religion, i.e., it successfully eliminated the conflict between her duties and her religious needs and, as a result, constituted a reasonable accommodation. The Complainant's contention that the Respondent's requirement that she use a significant percentage of her paid annual vacation time was not a reasonable accommodation was rejected. Feiler v. Midwest Express Airlines (LIRC, 06/06/03).

Allowing an employee to trade shifts in order to participate in religious observances has been held to be a reasonable accommodation even if the employee is unable to locate anyone willing to trade. Feiler v. Midwest Express Airlines (LIRC, 06/06/03).

The undue hardship issue arises only when the employer fails to reasonably accommodate the employee. Feiler v. Midwest Express Airlines (LIRC, 06/06/03).

The Complainant failed to state a claim for which relief could be granted under the Wisconsin Fair Employment Act where she alleged that she did not have a social security number due to her religious beliefs, and that she was discharged by the Respondent for not obtaining and providing the Respondent with a social security number. The Respondent was required to obtain a social security number from the Complainant, and it would have caused an undue hardship on the Respondent to accommodate the Complainant's religious belief. Deguire v. Swiss Colony (LIRC, 08/17/01).

A Respondent cannot be legally required to accommodate an employee's religious beliefs if the accommodation sought would compel it to contravene a contractually agreed upon seniority system. Brackemyer v. Wis. State Employees Union (LIRC, 04/18/97).

An employee cannot expect an accommodation where there is no legitimate conflict between the employee's religious practice and the employment. In this case, the Complainant volunteered to staff a booth for a Christian Fellowship event on a day she was scheduled to work. It would not have been burdensome for her to engage in that activity at a time that did not conflict with her employment. Her religious beliefs did not require her to engage in the particular activity in question on the particular day in question. Therefore, the Respondent was not required to accommodate her request to have time off on that particular day. Kramer v. Leath Furniture (LIRC, 03/26/97), aff'd sub nom. Kramer v. LIRC (Dane Co. Cir. Ct., 12/03/97).

To avoid undue hardship to an employer, the impact upon the employee of an accommodation can be no more than de minimus. In this case, the Respondent offered an adequate accommodation to the Complainant, whose belief system was at odds with several of the standard chiropractic principles articulated by the Respondent in daily staff meetings. The Complainant could have had language she objected to taken out of the purpose statement the Respondent's employees recited every morning. The

Complainant also could have excused herself from the meditation and relaxation portions of the afternoon meetings the Respondent held with her employees. Feirer v. Marshfield Chiropractic Ctr. (LIRC, 08/20/96).

Where an employee's religious beliefs prohibit performing work on Sundays, it is not a reasonable accommodation to offer to allow the employee to only work one Sunday per month. A reasonable accommodation is one which eliminates the conflict between employment requirements and the religious practices by allowing the employee to fully observe religious holidays. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

Asking an employee to forego their religious practices is not an accommodation of those practices. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

An employer is required to make reasonable efforts to help employees avoid conflicts between their work schedules and their religious beliefs through swapping shifts. If an employer makes such efforts and no other employee can be found to swap shifts, there would be no violation if the employer required an employee with religious beliefs to work the scheduled hours uniformly imposed on all employees of that classification. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

It is particularly appropriate to look to federal case law for guidance in applying the religious accommodation provision in the Wisconsin Fair Employment Act. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

An employer may not be required to bear more than a de minimis cost to give an employee certain days off for religious reasons. To require an employer to bear more than a de minimis cost would impose an undue hardship on the employer. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

An employer may not require other employees to take work assignments that they would not otherwise be required to take solely to accommodate another an employee's religious need for time off from work. Such a requirement would constitute religious discrimination against the employees whom the employer forced to work. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

An Administrative Law Judge erred in determining that an employer should have accommodated an employee's request to be off from work for religious reasons by requiring co-workers to work for the employee. However, a finding of discrimination was upheld where the evidence established that the employer failed to accommodate the employee's request for accommodation by informing the employee of the employer's policy of allowing and assisting employees to find co-employees who would voluntarily work for an employee on a particular shift. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

An employer need not accommodate an employee's religious need for time off from work by doing any of the following: (1) breaching a seniority system contract, (2) paying a premium wage for substitutes, (3) using overqualified supervisors to substitute for the absent employee, (4) leaving the employee's position vacant, or (5) discriminating against co-employees. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

In determining what is a "reasonable accommodation" and a "hardship" in the area of religious discrimination, it is not a valid guide to look to the law regarding "hardship" and "reasonable accommodation" under the area of handicap discrimination. The scope for the accommodation of a handicap is much greater than the accommodation of religion because it is not unlawful to discriminate in favor of the handicapped or against the non-handicapped. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

Where an employee temporarily tolerated employment requirements inconsistent with the employee's religious beliefs, she is still entitled to reasonable accommodation at a later date as though the employee

had insisted on full accommodation from the beginning of her employment. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

The Respondent did not violate the Wisconsin Fair Employment Act by failing to provide the Complainant, an adherent of the Christian Science religious faith, with health insurance coverage encompassing payment for treatments administered by Christian Science practitioners. The Respondent's failure to grant a religiously-motivated request for a fringe benefit not provided for by its personnel and management procedures to any employee does not create a conflict between an employee's religious practices and the employer's personnel and management procedures. Lazarus v. DETS (Wis. Pers. Comm'n, 09/21/92).

A collective bargaining agreement in force at the Respondent's place of business provided that employees who were willing to accept work assignments on any hours on any days were paid more than employees who restricted their availability for work. The Complainant, a member of Jehovah's Witnesses, attended church meetings on Tuesday and Thursday nights and Sunday mornings. She was not willing to take work assignments on those days and she was, therefore, placed in a lower salary scale than she would have been had she not placed these restrictions on the times when she was available for work. This did not constitute discrimination on the basis of religion. The policy that employees who will not make themselves available for work assignments at particular times will be paid less than employees who will make themselves available is completely neutral in terms of religion. Green v. Woodman's Food Mkts. (LIRC, 01/30/91).

The Wisconsin Fair Employment Act does not require accommodation of employees' religious practices. AMC v. DILHR (Bartell), 101 Wis. 2d 337, 305 N.W.2d 62 (1981). [Ed. note: The Fair Employment Act was amended in 1982 to specifically provide that employers have a duty of reasonable accommodation.]

[Ed. note: The following cases were decided under the theory, then prevailing, that the pre-amended Act did impose a duty of accommodation of religious practices.]

The employer reasonably accommodated Jewish teachers by permitting them to use unpaid personal leave days for their religious observances. To expect the employer to provide paid leave days would cause undue hardship to the school district and would give an unlawful preference to Jewish teachers over others whose holidays occur during unpaid vacations. Meltzer v. LIRC (Kenosha Co. Cir. Ct., 01/08/81).

It was the responsibility of employees to inform the employer of their religious creed so that the employer could carry out its responsibility to accommodate them. Godfried v. Parts Mart (DILHR, 03/05/76).

When an employee advised his employer that he could not work after sundown on Fridays because of his religion, and there was no question that the employer could have accommodated the employee's religious need without hardship, his discharge for leaving work before sundown on two consecutive Fridays after nine months of consistent attempts to get his employer's permission to start a half hour earlier was religious discrimination. Liberty Trucking v. DILHR (Carnahan) (Dane Co. Cir. Ct., 09/24/75).

It was not reasonable to require a union to excuse a member from Sunday morning union meetings so that he could attend church services where such an accommodation would have created an undue hardship on the conduct of the union's functions. Rau v. Int'l Ass'n of Machinists (DILHR, 01/25/74).

126.5 Harassment because of creed

An employer cannot be found liable for religious harassment unless it is carried out directly by the employer or, if carried out by co-employees, the employer knows or should reasonably know of it and fails to take reasonable action to prevent it. An employer has fairly wide latitude to address allegations of harassment as it sees fit, provided its actions are reasonably calculated to remedy the situation and prevent future harassment.

The Respondent did not permit harassment to occur when it was not aware of the harassment the Complainant was experiencing until she told the Respondent about it and, when the Respondent learned of the harassment, it issued a written warning to the co-worker who had engaged in the most egregious harassment and transferred the Complainant to a different production line in a different part of the building where she would not have to work with the two co-workers who engaged in the harassment. *Sanchez v. Eillien's Candies, Inc. (LIRC, 07/31/15).*

The Complainant was not subject to unlawful religious harassment where there were no acts of disparagement of the Complainant because of his beliefs. While a supervisor's proselytizing of its employees could in some circumstances rise to the level of harassment if it were persistent, unwelcome, and created either a hostile environment or a perception on the part of an employee that a quid pro quo was contemplated, this case does not approach that level. The topic of religion and religious belief arose between the Complainant and the Respondent only sporadically, and without any significant pressure being applied to the Complainant. Brye v. Brakebush Bros. (LIRC, 01/11/93).

An employer cannot be found liable for religious harassment unless it is carried out directly by the employer or, if carried out by co-employees, the employer knows or should reasonably know about the harassment and fails to take reasonable action to prevent it. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

Occasional and sporadic use of religious slurs, albeit deplorable, may still not rise to the level of a violation of law. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

An employer can violate the Wisconsin Fair Employment Act's prohibition on discrimination because of creed if it either engages directly in religious harassment of an employee (through its management or supervisory personnel) or if it tolerates religious harassment of an employee by co-workers. However, in order to constitute a violation of the Act, harassment must rise above the level of occasional and sporadic use of slurs or epithets. In this case there was some evidence of hostility directed toward the Complainant, whose creed is WICCA, by her co-workers. In some instances the Complainant's self-identification as a witch was referred to. However, the inconsistencies in the Complainant's evidence as to the extent of this type of conduct and her general lack of credibility left no basis for deciding how extensive that conduct may have been. The Complainant, therefore, failed to meet her burden of proving that she was subject to religious harassment that rose to a level of a violation of the Act. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

An employer was not aware of a Jewish employee's religion at the time he was discharged on the basis of his job performance, although there was evidence that a supervisor had made anti-Semitic comments in the employee's presence. Ugent v. Gilbert's Liquor Store (LIRC, 08/14/84).

126.6 Cases

The Complainant argued that the requirement that candidates for the job of principal have five years of experience in the public schools had a disparate impact on Catholics and/or people with religious school experience. The Complainant's evidence of disparate impact consisted solely of a list of private schools in Wisconsin that were in operation during the year 2012, along with a designation as to which of those schools are religious. The Complainant's disparate impact claim failed as he failed to present any evidence with respect to the religious creed of other applicants, and the record contains no statistical evidence, expert or otherwise, to suggest that the requirement of five years of public school experience has the effect of eliminating applicants of any particular creed, including Catholicism, from being selected by the Respondent. *Stanke v. Holmen Sch. Dist.* (LIRC, 02/13/14), aff'd sub nom. *Stanke v. LIRC* (St. Croix Co. Cir. Ct., 09/24/14)

The mere fact that the Complainant's discharge occurred shortly after the Complainant requested and was denied a day off for her religious observance is not a sufficient basis to warrant a conclusion that the discharge was discriminatory. The timing of the discharge could just as easily be explained by the fact that the Complainant's probationary period was about to expire. Felix v. Milwaukee Cnty. Behavioral Health (LIRC, 04/19/11).

The Complainant asserted that the extension of his probationary period by six hours to account for his observance of Yom Kippur was direct evidence of discrimination because of creed. However, the disputed employment action in this case was the Complainant's discharge, not the extension of his probation period. The Complainant's probation would have been extended even if Yom Kippur had not been included in the calculation because he missed 194 hours of work for non-religious purposes. Further, the Respondent would have assessed hours taken off by a Christian worker to observe Good Friday in the same manner. Stern v. LIRC (Dane Co. Cir. Ct., 06/05/09).

The Respondent violated the Wisconsin Fair Employment Act when it terminated the Complainant's employment because he refused to work on Sundays for religious reasons. The Complainant's work-related problems were also a factor in the Respondent's decision to discharge him; however, the Complainant would not have been terminated for these work-related problems if his religious observance had not been a motivating factor in the employer's decision to terminate him. Tolibia Holdings, Inc. v. DILHR (Ct. App., Dist. II, unpublished opinion, 02/15/95).

LIRC found unpersuasive the Complainant's contention that evidence she offered concerning the dismissal by the Respondent of two other employees proved a pattern and practice of discrimination against Jewish employees. Forman v. Cardinal Stritch College (LIRC, 06/08/92), aff'd, sub nom. Forman v. LIRC (Milwaukee Co. Cir. Ct., 11/19/93), aff'd (Ct. App., Dist. I, unpublished opinion, 08/15/95).

A Respondent's failure to recognize the Star of David or identify the flag of Israel may be surprising, as was his ignorance about a kibbutz; however, such lack of knowledge is not affirmative proof of prejudice against members of the Jewish faith. Vaisman v. LIRC (Milwaukee Co. Cir. Ct., 01/25/93).

The fact that the Complainant's actions offended the values and standards of the Respondent's owners, which they saw as part of their Christian religious beliefs, does not mean that they discharged him for a religious reason. The Complainant was terminated for engaging in conduct which would generally be considered unacceptable for entirely secular reasons. Brye v. Brakebush Bros. (LIRC, 01/11/93).

Where the gist of the complaint was that the Respondent discharged the Complainant on the basis of false reports made to the Respondent by others, and where the complaint failed to allege that the false reports concerned, or were motivated by, the Complainant's religious beliefs, that the Respondent knew or believed that the complaining individuals disliked the Complainant's religious beliefs, or that the employer itself shared any dislike others may have held for his religious beliefs, the complaint failed to state a claim upon which relief could be granted on a theory of religious or creed discrimination. Furthermore, the Complainant expressly stated that he was terminated, not because of his creed, but upon receipt by his employer of anonymous complaints about him. Hallingstad v. A.B. Dick Products (LIRC, 11/05/87).

To establish a *prima facie* case of disparate treatment, a Jewish job applicant must prove that he applied for an available position for which he was qualified, but was rejected under circumstances which gave rise to an inference of unlawful discrimination. The Complainant's case was properly dismissed where he failed to demonstrate his qualifications for the police officer job for which he had applied. Cohen v. City of Madison (LIRC,12/18/81).

127 SEX DISCRIMINATION

127.1 Coverage, exceptions

127.11 Sex as bona fide occupational qualification ("BFOQ")

Whether the BFOQ exception can be invoked has to be determined on a job-by-job basis. In this case, sex was a bona fide occupational qualification for one youth care worker of each sex for each shift in the secure and non-secure sections of the Respondent's juvenile detention facility. This is reflected in the staffing structure developed by the Respondent and the union, in which there was to be, for each of the two wings of the facility, one care worker position on each shift which would be male-only and one care worker position on each shift which would be female-only. However, sex was clearly not a bona fide occupational qualification for the particular job which was at issue in this case. That position, a split-shift care worker position, was specifically designated as a gender-neutral position. The county and the union could therefore not invoke the BFOQ exception as a defense of their direct and explicit discrimination based on sex in the filling of the gender-neutral split-shift position. Schmocker v. County of La Crosse (LIRC, 03/31/04).

There are two types of cases in which the bona fide occupational qualification (BFOQ) defense arises. In one situation, an employer refuses to hire members of one class because of its perception of the physical capacity of members of that class to perform the job. In the second situation, the employer refuses to hire any members of one sex due to its perception of the privacy interests of its customers. When an employer discriminates on the basis of sex or gender, but raises a BFOQ defense based on the privacy concerns of the employer's customers or clients, the employer bears the heavy burden of showing: (1) a factual basis for its assertion that hiring a member of one sex would undermine the essence of the employer's business operation, and (2) that due to the nature of the business, it would not be feasible to assign job responsibilities in a selective manner (or to take alternative action) so as to avoid a collision with the privacy rights of the clients and customers. In this case, the Respondent did establish that having a woman fill a janitor position at its county Expo Center was a BFOQ. Vyse v. Dane Co. Human Relations Dep't (LIRC, 07/16/98), aff'd sub nom. Vyse v. LIRC (Dane Co. Cir. Ct., 03/03/99).

Due to the narrow interpretation of the BFOQ exception, the burden put on the defendant to establish the exception is very heavy. The employer must show that it had a factual basis for believing that hiring any members of one sex would undermine the business operation. When the BFOQ defense is based on privacy interests of the customer, the employer must show that it would not be feasible to assign job responsibilities in a selective manner so as to avoid a collision with the privacy rights of customers. Moore v. Cedar Grove-Belgium Sch. Dist. (LIRC, 04/29/92).

A school district failed to establish that a bona fide occupational qualification justified its decision to reduce a male with more seniority to a forty percent position while allowing a female with less seniority to remain full time. The school district's contention that it was legally required to provide supervision in the girls' locker and shower rooms and that its concern for the invasion of privacy of female students justified assignment of a female teacher to supervise the girls' locker and shower rooms was unconvincing. Moore v. Cedar Grove-Belgium Sch. Dist. (LIRC, 04/29/92).

The requirement that a male fill the position of youth counselor was a BFOQ. The position required a same-sex role model in the treatment of pre-delinquent boys. Robinson v. Kenosha Youth Found. (LIRC, 04/30/82).

An employer met the statutory requirements for a BFOQ where it designated a limited number of positions based upon the privacy and role model needs of its patients. Chadwick v. DHSS (Wis. Pers. Comm'n, 04/02/82).

The practice of hiring child care workers in a co-educational juvenile detention center on the basis of sex to maintain a sexually balanced staff was justified in order to provide role models and personal counseling, and to insure the juvenile's right to privacy. Stonecipher v. DILHR (Dane County) (Dane Co. Cir. Ct., 05/28/76).

Sex was not a BFOQ for a position with a youth camp for boys only, and the refusal to consider a qualified female applicant because of her sex violated the Act. Griesbach v. State (DILHR, 04/13/76).

Where all female employees were excluded from the higher paying and longer lasting seasonal work in a nursery because it involved heavy manual labor, the employer failed to show that the character of its seasonal work required limiting the positions to males. Wellner v. DNR (DILHR, 02/12/75).

The burden of demonstrating the applicability of a BFOQ rests with the employer. An employer could not justify its policy of hiring only males for a hotel manager position on the basis that it was unsafe for women to enter the rooms of males. Kurber v. Ramada Sands (DILHR, 07/19/71).

DILHR looks to the interpretations of the federal Title VII BFOQ clause in interpreting the corresponding exception in the Wisconsin Act, and it is well settled that both exceptions are to be narrowly construed. Kurber v. Ramada Sands (DILHR, 07/19/71); City of Milwaukee v. DILHR (Williams) (Dane Co. Cir. Ct., 02/24/71).

127.12 Pregnancy, childbirth, maternity leave or related medical condition

The Respondent discharged the Complainant for lying on a job application by not disclosing a conviction that had been expunged from her record. The Respondent's belief that the Complainant was obligated to disclose an expunged conviction was incorrect but was not shown to be a pretext for discrimination based upon the Complainant's pregnancy. Mussatto v. Acceptional Minds, LLC (LIRC, 04/29/21).

The WFEA contains no accommodation requirement for pregnancy. All that is required is that the pregnant employee be treated the same as employees with short term disability not related to pregnancy. Peterson v. Alter Trading Corp. (LIRC, 06/27/19).

The Complainant failed to establish that there was probable cause to believe that she was discriminated against on the basis of her pregnancy and related medical conditions in regard to the terms and conditions of her employment. The Complainant had alleged that the Respondent discriminated against her when she was not offered a sedentary position after her feet and ankles became swollen and painful due to pregnancy. The Complainant did not establish that her treating physician had ever advised the Respondent that she was experiencing swollen and painful feet and ankles, or that she ever requested assignment to different duties or a different position. Further, the Complainant did not establish that it was the Respondent's policy or practice to accommodate other employees who had temporary medical conditions or restrictions by assigning them to other duties or positions. Schultz v. Get, Inc. (LIRC, 12/08/06).

The Respondent unlawfully discriminated against the Complainant when the Respondent's owner required her to go home and stay home until after her baby was born, even though the Complainant was physically able to perform her work responsibilities. The owner's attitude toward the Complainant's pregnancy and maternity leave was that, consistent with the practice in the owner's native culture, the Complainant should stay home at least three months before her baby was born and at least three months after the baby was born. This attitude accounted for the Respondent's reluctance to recall the Complainant from maternity leave when the Complainant called the Respondent about returning to work approximately a week after her child was born. The Respondent refused to allow the Complainant to

return to work because of her pregnancy and related medical conditions. Hill v. Chinni, Inc. (LIRC, 05/26/06).

Although the Complainant was no longer pregnant at the time she was discharged, she could still be considered a member of a protected class because she had recently been pregnant. Blahnik v. IBEW Local 158 (LIRC, 01/13/06).

It is not unlawful per se under the Wisconsin Fair Employment Act to treat medical conditions related to pregnancy poorly or callously. It is only unlawful to treat medical conditions related to pregnancy differently from medical conditions related to other causes. Michno v. Pizza Hut (LIRC, 08/11/98), aff'd sub nom. Michno v. LIRC (Lincoln Co. Cir. Ct., 02/23/99).

The Complainant failed to prove discrimination on the basis of pregnancy, childbirth or maternity leave where the Respondent failed to hire her because it believed that she needed to take time to care for her sick newborn child. The Complainant had already given birth without complication at the time she sought employment with the Respondent. Paul v. Fox Point Sportswear (LIRC, 02/04/93).

There is no discrimination because of pregnancy in a policy that employees with non-work-related disabilities will be placed on leave of absence if they cannot perform their regular duties, while employees with work-related disabilities which prevent them from performing their regular duties will whenever possible be given modified duties or light work so as to allow them to continue to be employed. In such a case, the distinction is not between pregnancy-related disability and other kinds of disability. Rather, it is between work-related disability and non-work-related disability, this being a distinction which is facially neutral (and there was no evidence that such a distinction had a statistically significant impact on the employment opportunities of pregnant females). Hager v. Heide Health Sys.-Eagleton Homes (LIRC, 04/29/92).

Assuming only for the sake of discussion that the term "pregnancy, childbirth, maternity leave or related medical conditions" in sec. 111.36(1)(c), Stats., encompasses medical conditions of newborn infants such that an absence from work of the mother necessitated by her role in caring for the infant is a disability which the employer must treat equally with other disabilities, the Complainant in this case did not establish a violation of the Act because she did not demonstrate that it was medically necessary for her to stay home with her children rather than attending a manager's meeting as her employer directed. Egger v. Sterling Optical (LIRC, 03/26/92).

Pregnancy and pregnancy-related medical conditions are not covered by the handicap discrimination provisions of the WFEA. The WFEA prohibits discrimination on the basis of pregnancy as a form of sex discrimination. Goodrich v. Duro Paper Bag Mfg. Co. (LIRC, 02/14/92).

Where the employer included absences caused by pregnancy in computing total use of accident and sickness leave benefits and disciplined all employees who used excessive amounts of these benefits, there was no violation of the Act. The Complainants failed to prove disparate impact on females since the statistical evidence was insufficient to demonstrate that females were affected by this discipline policy at a rate greater than that which would normally be expected. Also, it was not illegal for the employer to treat pregnancy disability in the same fashion that it treated all other disabilities when disabilities were a factor with disciplinary rather than benefit consequences. The Act simply requires that disability connected to pregnancy be treated the same as other disabilities; it does not require that no negative consequences ever be allowed to flow from pregnancy-related disabilities. Lane v. Uniroyal Tire Co. (LIRC, 04/26/88).

The denial of accrued sick leave solely to women on maternity leave is sex discrimination. Gen. Tel. Co. v. LIRC (Kraczek) (Dane Co. Cir. Ct., 02/06/81), aff'd, (Ct. App., Dist. IV, unpublished opinion, 12/09/81).

A disability pay plan which withholds benefits from pregnancy-disabled employees violates the Wisconsin Fair Employment Act. Kimberly-Clark v. LIRC, 95 Wis. 2d 558, 291 N.W.2d 584 (Ct. App. 1980).

A woman who becomes disabled because of an operation peculiar to her sex must be given the same scope of disability benefits as the man who is disabled because of an operation peculiar to his sex. It does not matter that women, as a class, may in one year receive more in dollar benefits than men as a class, or that the average woman may receive more than the average man. It does matter that individuals are treated as individuals and are treated equally in terms of compensation for disability, even if they may have disabilities arising out of factors peculiar to their sex. Goodyear Tire & Rubber v. DILHR, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978).

It was unlawful to deny a teacher use of her accumulated sick leave for pregnancy absences where other employees were permitted to use accumulated sick leave toward absences for other disabilities. Waupun Area Sch. v. DILHR (Lyon) (Dane Co. Cir. Ct., 12/13/78).

An employee benefits plan which excludes pregnancy disability from its coverage is discriminatory even where the plan also excludes disabilities predominantly affecting males and even where female employees averaged more in total yearly benefits received than male employees. Sears v. LIRC (Demeny) (Dane Co. Cir. Ct., 12/04/78).

A denial of disability benefits to pregnant employees is sex discrimination where an employer's sickness and accident plan makes benefits generally available for other types of disabilities. Ray-O-Vac v. DILHR, 70 Wis. 2d 919, 236 N.W.2d 209 (1975).

127.13 Sex discrimination against males

The Complainant established probable cause to believe that he was discriminated against on the basis of sex when the Respondent advised him that only female employees were permitted to wear earrings and that he must remove his earring or lose his job. Differences in male and female uniforms may be permitted if they have some justification in commonly accepted social norms and if they are reasonably related to business needs. However, earrings for males have become commonplace and acceptable. Moreover, at the hearing on probable cause, the Respondent did not demonstrate that its rules allowing only female employees to wear earrings was reasonably related to its legitimate business needs. Vernon v. Wackenhut Corp. (LIRC, 10/18/11).

A union's claim that the Milwaukee Board of School Directors had discriminated against its members on the basis of sex by denying coverage for Viagra and other drugs used for the treatment of erectile dysfunction, impotence or sexual dysfunction or inadequacy would constitute sex discrimination under the Wisconsin Fair Employment Act. However, this claim was dismissed on procedural grounds relating to the union's failure to identify any individual who had been denied coverage. Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/30/10).

The Complainant, a male, alleged that he had been sexually harassed by his lead worker, another male, when the lead worker hit him in the groin on several occasions. This conduct did not amount to sexual harassment. The alleged assault on the Complainant lacked sexual implications. Indeed, the Complainant testified that the lead worker never made any sexual advances or comments towards him, and that he was a bully. Markgren v. Hartzell Mfg. (LIRC, 09/02/99).

The sex discrimination provisions of the Wisconsin Fair Employment Act may be applied in cases involving a claim of sex discrimination by a male. Naill v. Western Wis. Tech. College (LIRC, 02/12/99).

The discharge of a male employee for a rule infraction, for which female employees were only suspended, violated the Act and was based upon a belief that male employees should be held to a higher standard of conduct than females. Evidence that the employer refused to allow the male to transfer to a position where the employer believed females performed more efficiently supported the finding. Rathsack v. Crescent Woolen Mills (LIRC, 09/25/84).

It was sex discrimination to discharge a male because of an alleged anti-nepotism policy, where the employer retained a female who would have been similarly disqualified by such a policy. Scheidel v. Am. Council of the Blind (LIRC, 04/06/82).

127.2 Hire

Consideration of an applicant's recent gaps in teaching experience is not evidence of age or sex discrimination, unless it is shown that such a consideration actually has a disparate impact on women or people over the age of 40. Chandler v. UW-LaCrosse (Wis. Pers. Comm'n, 08/24/89).

In the context of a hiring decision, the elements of a *prima facie* case are that the Complainant: (1) is a member of a protected class, (2) applied for and is qualified for the position, and (3) was rejected under circumstances which gave rise to an inference of unlawful discrimination. Larson v. DILHR (Wis. Pers. Comm'n, 01/22/89).

In a case of alleged hiring discrimination in which the Respondent claimed that the male candidate hired had better educational qualifications, the issue is not whether the male actually had better educational qualifications but whether the Respondent's hiring committee sincerely believed, at the time they made the hiring decision, that the male candidate's education satisfied the stated requirements. The issue, in other words, is the Respondent's motivation for its conclusion and not the objective basis in fact for that conclusion. If the Respondent formed a sincere belief, then that judgment does not reflect a discriminatory motive, regardless of whether it is correct. Wilbert v. City of Sheboygan (LIRC, 04/15/86).

No inference of discrimination was raised where the employer did not know that an applicant was interested in a position and was available during the required hours, where the employer had treated her favorably during her period of employment. Smith v. Power Transmission Co. (LIRC, 03/02/84).

A judge discriminated against a female applicant for a court reporter position by hiring a male applicant because the judge did not want to ask a woman to carry items and feared that an adverse inference might be drawn from a man traveling with a woman. Drecktrah v. LIRC (Donaldson) (Jackson Co. Cir. Ct., 04/06/82).

Discriminatory attitudes are not unlawful unless they result in discriminatory treatment. Although an employer may not have wanted to hire women for an executive position, and so stated, a female job applicant who did not establish that she was qualified for the job failed to set forth a *prima facie* case of sex discrimination. Way v. Merchants Fed. (Dane Co. Cir. Ct., 01/22/80).

An employer's statement that a female applicant for the police force was rejected because she wore glasses and had a restricted Wisconsin driver's license was a pretext for sex discrimination where no attempt was made to test her vision and other members of the all-male force had restricted driver's licenses. Ruffin v. Village of West Milwaukee (DILHR, 02/02/77).

A female applicant established a *prima facie* case of discrimination by showing that the position she sought had no qualifications and that males without prior experience had been hired. The employer's justification that women could not handle the job and did not work well with men was given no credence where the employer had never hired a female for the job. Antin v. Barnaby's Rest. (DILHR, 09/16/76).

Where an employer repeatedly stated that it wanted either a very inexperienced young female or else a middle-aged housewife for the job of bookkeeper, its refusal to hire a male who was the best qualified applicant was discriminatory. Wroblewski v. Univ. Nat'l Bank (DILHR, 09/16/76).

127.3 Sexual harassment

Harassing conduct occurring outside of work time can be part of a hostile environment claim where the conduct is connected to a course of harassing conduct that affects the work environment. Lamont v. Nelson Glob. Prods. (LIRC, 06/10/19).

The employer's isolated comment about wearing jeans "tight to your ass" was not considered "verbal conduct of a sexual nature" given the context of the conversation and was not repeated or severe enough to constitute sexual harassment under § 111.32(13). Hodge v. Brunner Wire Prods., Inc. (LIRC, 10/15/17), aff'd sub nom. Hodge v. LIRC (Juneau Co. Cir. Ct., 04/17/19).

The store manager where the Complainant worked was in a position of responsibility such that it was appropriate to apply the rule of respondeat superior and treat his actions as the actions of the employer. His comments toward the Complainant did not, however, amount to sexual harassment as defined in the WFEA. Some of his comments were not sexual in nature. For those that were, the Complainant did not establish that they were unwelcome. Whether conduct is unwelcome presents a question as to the state of mind of the person to whom the conduct is directed. The Complainant raised several complaints about the store owner's conduct, but they were not predicated on his sexual conduct. If she had found any of his sexually related comments to be unwelcome it stands to reason she would have raised them as well. Weber v. Vapin USA-WI, LLC (LIRC, 05/05/17), rev'd sub nom. Weber v. LIRC and Vapin USA-WI, LLC (Marinette Co. Cir. Ct., 03/16/18). The Circuit Court reversed, finding that there is nothing in the statutes that requires the Complainant to offer a prior complaint about the conduct in order for conduct to be unwelcome. The Complainant's testimony was clear that she found it unwelcome and offensive.

After receiving a Complainant's report of sexual harassment by a co-employee, the employer interviewed the alleged harasser, who denied the allegations. The employer, however, made efforts to keep the Complainant and co-employee separate by giving them different work assignments and then approved the co-employee's transfer to a different shift from that of the Complainant. The Complainant experienced no further harassment from the co-employee. The employer's actions met its obligation to take appropriate action within a reasonable time. Jedrzejewski v. Signicast, LLC (LIRC, 09/16/16), aff'd sub nom. Jedrzejewski v. LIRC and Signicast, LLC (Jefferson Co. Cir. Ct. 05/02/17).

A co-worker's nearly daily greeting of the Complainant and other female workers with a hug and a kiss on the cheek was unwelcome to the Complainant but was not shown under the circumstances to be severe enough to create an intimidating, hostile, or offensive work environment. For a period of time, the Respondent did not have reason to know that the Complainant objected to the co-worker's conduct; once it did, it acted promptly, within five days, to investigate and take appropriate action. Wilder v. Goodwill Indus. of Se. Wis. (LIRC, 01/30/14).

Sexual conduct by an employer towards an employee is not a "strict liability" offense. The conduct must be unwelcome to be considered unlawful. Whether conduct is "unwelcome" presents a question as to the subjective state of mind of the person to whom the conduct is directed. In this case, the Complainant did not object to the conduct and was a willing participant in much of what she alleges constituted sexual harassment. Rhinehart v. A & M Plumbing & Servs., LLC (LIRC 6/7/13), aff'd, Rhinehart v. LIRC (Adams Co. Cir. Ct., 12/12/13).

A Respondent has fairly wide latitude to address allegations of sexual harassment as it sees fit, provided that its actions are reasonably calculated to remedy the situation and to prevent further harassment. While the Respondent in this case did investigate many of the allegations of harassment that were brought to its attention, it did not investigate all of the allegations, and it took no disciplinary action against any of the individuals involved. It did not provide its employees with training or retraining on its sexual harassment policy. Instead, it chose to treat the harassing conduct as mere "horseplay" or "childishness." Moreover, the Respondent did not provide the Complainant with any assurances that his complaints would be dealt with, and it made no attempt to follow up with him to find out whether the situation had improved. The Respondent's response was insufficient. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

The Complainant contended that she had opposed sexual harassment in the workplace when she told one of the Respondent's owners that he needed to "watch it with these girls," and that he was making them "uncomfortable." This statement was too vague to put the Respondent on notice that the Complainant believed that he was engaging in any conduct that violated the law. Freeman v. Animal Motel (LIRC, 07/18/11).

Where sexual harassment is engaged in by the employer itself (meaning the owner or an agent in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as being the actions of the employer), the conduct of the employer need not be severe or pervasive in order to create a hostile work environment. Employment discrimination based on sex occurs if the employer engaged in conduct that meets the definition of sexual harassment, whether or not that conduct created a hostile work environment. Krushek v. Trane Co. (LIRC, 12/23/10).

An employer is obliged to take steps to prevent or terminate sexual harassment in the workplace, even if the employer is itself not engaging in the sexual harassment, if the harassment engaged in by other employees is such that it interferes with work or creates a hostile, intimidating environment. However, a Respondent is liable for the harassing acts of the Complainant's co-worker only if it knew or should have known about the harassment but failed to take adequate measures to prevent or eradicate it. A Respondent has fairly wide latitude to address allegations of sexual harassment as it sees fit, provided that its actions are reasonably calculated to remedy the situation and prevent further harassment. Guerrero v. UW Hosp. & Clinics (LIRC, 06/04/10).

The Wisconsin Fair Employment Act recognizes two ways in which an employer may be liable for sexual harassment. The first is where the harassment is perpetrated by an owner or an agent of the employer who is in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as the actions of the employer. The other category applies to the actions of co-workers who are not considered to be agents of the employer. Where the alleged sexual harasser is a co-worker, the co-worker's actions can only be imputed to the employer if the employer permitted sexual harassment to occur. In other words, a Respondent is liable for the sexually-related acts engaged in by a co-worker only if the individual informs the Respondent of the harassment and the Respondent fails to take appropriate action within a reasonable time. Monroe v. Birdseye Foods (LIRC, 03/31/10).

Where the employer or an agent of the employer has perpetrated sexual harassment, it is actionable even if the harassment would not be considered sufficiently severe or pervasive as to create a hostile work environment. Harper v. Menard, Inc. (LIRC, 09/18/09).

A constructive discharge is not found in every sexual harassment case. A constructive discharge is only found where the conduct made working conditions so intolerable that a reasonable person would feel compelled to resign. A smattering of sexually-tinged comments made over the course of a year and a half, while certainly unpleasant and distasteful, is not sufficient to create a hostile working environment or to render working conditions so intolerable that a reasonable person would feel compelled to resign. Harper v. Menard, Inc. (LIRC, 09/18/09).

The sexual harassment in this case was not severe enough to drive a reasonable person to quit. The Complainant's argument that the "in part" analysis should be applied because the sexual harassment was part of her reason for quitting was rejected. If working conditions were rendered so intolerable due to sexual harassment as to compel the employee to quit, she would not have waited to tender her resignation until other adverse, but non-discriminatory, incidents occurred. Harper v. Menard, Inc. (LIRC, 09/18/09).

Where the alleged sexual harasser is a co-worker, the co-worker's actions can only be imputed to the employer if the employer permitted the sexual harassment to occur. That is, a Respondent is liable for the sexually-related acts engaged in by a co-worker only if the individual informs the Respondent of the harassment and the Respondent fails to take appropriate action within a reasonable time. Abel v. Dunn County Health Care Ctr. (LIRC, 04/21/09).

The Respondent took adequate remedial steps to ensure that the Complainant's return to work would be free of sexual harassment. A remedial action is not inadequate simply because it does not accord with the Complainant's expectations or desires. An employer is not required to discharge every worker accused of sexual harassment in order to avoid liability in the event that that individual should ever engage in further acts of harassment. Abel v. Dunn County Health Care Ctr. (LIRC, 04/21/09).

Although sexual harassment is a type of sex discrimination, it is distinct from sex discrimination as to terms and conditions of employment. Therefore, it was inappropriate for an investigator to specify the issues as sex discrimination as to terms and conditions of employment (and other issues) where the Complainant had alleged that she was harassed because she was a female. Matson v. Aurora Health Care (LIRC, 03/21/08).

The Complainant alleged that the Respondent constantly belittled her because she was female. This language conveyed an allegation of sexual harassment. Such harassment does not have to have a sexually offensive component but includes unwelcome verbal or physical conduct of any kind directed at an individual because of that individual's gender. Sec. 111.36(1)(br), Stats. Matson v. Aurora Health Care (LIRC, 03/21/08).

It is not necessary that an action have a sexual component in order to be considered sexual harassment. Sec. 111.36(1)(br), Stats., prohibits engaging in harassment consisting of unwelcome verbal or physical conduct of any kind directed at an individual because of that individual's gender. Engen v. Harbor Campus (LIRC, 02/22/08).

None of the conduct alleged by the Complainant in this case meets the definition of sexual harassment because none of the alleged conduct was sexual in nature. Although referring to the male Complainant as "a woman" might reasonably be perceived as offensive, the content of this reference was not sexual in nature. Further, although the Complainant referred to a cardboard figure of a well-known female athlete as a "girly cut-out," the display was of a fully clothed woman in a neutral position in a soccer uniform advertising a sports drink. This would not qualify as sexually graphic material or be otherwise sexual in nature. Braunschweig v. SSG Corp. (LIRC, 08/31/06).

The Complainant failed to establish that the acts engaged in by a co-worker constituted prohibited sexual harassment within the meaning of the Wisconsin Fair Employment Act. Even if she had established that the acts of the co-worker constituted sexual harassment, she failed to prove that the Respondent was liable. The individual who engaged in these acts was not the Complainant's supervisor. Therefore, the Respondent would be liable only if the Complainant had informed the Respondent of the harassment and the Respondent had failed to take appropriate action within a reasonable time. In this case, the Respondent acted immediately to separate the Complainant from the alleged harasser and to investigate the Complainant's allegations. Upon completion of its investigation, the Respondent reprimanded the alleged

harasser, required him to undergo additional sexual harassment training, and removed his eligibility to hire female drivers. This response by the Respondent was immediate and reasonably appropriate. Skilling-Vukich v. Swift Transp. (LIRC, 01/31/06).

A female employee could logically and rationally interpret repeated comments about the size of her buttocks and slaps on the buttocks by her male employer to be sexual in nature, whether or not they were accompanied by other overt sexual language or conduct. Whether or not the employer intended the conduct to be sexual in nature is not the controlling factor. The Complainant perceived his conduct as being sexual in nature, and this perception was reasonable. Therefore, there was probable cause to believe that the Complainant was subjected to sexual harassment. Miller v. Greenfield Veterinary Clinic (LIRC, 04/28/05).

Sexual harassment perpetrated by an employer or its agent is unlawful without regard to whether the Complainant has availed herself of an opportunity to complain. In this case, it is hard to imagine to whom the Complainant could have complained, where the person engaging in the harassment was both the owner of the business and her direct supervisor. Baron v. Darboy Family Chiropractic (LIRC, 04/13/05).

There are three ways in which an employer may be liable for sexual harassment under the Wisconsin Fair Employment Act. The first is where the harassment is perpetrated by an owner or an agent of the employer who is in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as being the actions of the employer. The second is where there has been quid pro quo sexual harassment. The third is where sexual harassment is permitted to create a hostile work environment. The third category applies to the actions of co-workers who are not considered to be agents of the employer. Sanderson v. Handi Gadgets (LIRC, 03/31/05).

If a harasser is a co-worker, his actions can only be imputed to the employer if the employer permitted the sexual harassment to occur. On the other hand, if the harasser is an agent of the employer, any sexual harassment on his part is attributable to the employer. The theory that there is an affirmative defense available to employers when sexual harassment is perpetrated by a supervisor is inapplicable in a proceeding under the Wisconsin Fair Employment Act. Federal court decisions which so state, such as Burlington Indus. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2268 (1998) and Faragher v. City of Boca Raton, 542 U.S. 775, 118 S. Ct. 2275 (1998), involve interpretations of Title VII of the Civil Rights Act of 1964, not the WFEA. The statutory language contained in sec. 111.36(1)(b), Stats., with respect to sexual harassment is substantially different from that in Title VII, and federal cases addressing the question of hostile work environment sexual harassment thus do not necessarily provide guidance in cases involving the WFEA. The Labor and Industry Review Commission will not follow the Burlington Indus. and Faragher decisions, or any previous commission decisions (including Baier v. J & J Elec. (LIRC, 12/16/03) and Harsh v. County of Winnebago (LIRC, 11/06/98)), which may have relied upon such an analysis. Sanderson v. Handi Gadgets (LIRC, 03/21/05).

The test for determining whether an employee's co-workers are supervisors for purposes of imputing liability for alleged discriminatory acts to the employer was set forth in City Firefighters Union Local No. 311 v. City of Madison, 48 Wis. 2d 262, 270-71, 179 N.W.2d 800 (1970). That test provides for consideration of the following criteria: (1) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; (2) the authority to direct and assign the workforce; (3) the number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees; (4) the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees; (5) whether the supervisor is primarily supervising an activity or is primarily supervising employees; (6) whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and (7) the amount of independent judgment and discretion exercised in the supervision of employees. These factors are not to

be considered in the disjunctive such that any one factor is determinative. Rather, the totality of the criteria must be considered. Sanderson v. Handi Gadgets (LIRC, 03/31/05).

For purposes of the Wisconsin Fair Employment Act, an individual is either an agent of the employer, such that any sexual harassment on his part is attributed to the employer, or he is considered a co-worker, whose actions can only be imputed to the employer if the employer permitted the sexual harassment to occur. The law does not contemplate an interim status for supervisors who are not agents of the employer, but yet are more than mere co-workers. Sanderson v. Handi Gadgets (LIRC, 03/31/05).

A threshold question in the interpretation and application of the prohibition against sexual harassment is whether the alleged harassment was carried out by the employer or an agent of the employer, or whether it was carried out by a coworker. In this case, the alleged harasser was not acting as an agent of the employer at the time of the alleged harassment because he had no supervisory authority over the Complainant (i.e., he did not have the authority to effectively recommend her hire, promotion, transfer, discipline, discharge or to assign or direct her work activities). Flanagan v. Wis. Bistros (LIRC, 11/04/04).

A threshold question in determining whether the prohibition against sexual harassment has been violated is whether the allegedly harassing act was connected with the Complainant's employment within the meaning of sec. 111.36(3), Stats. (i.e., whether the act occurred while the Complainant was at her place of employment or while the Complainant was performing duties related to her employment). In this case, one allegedly harassing act occurred during a dinner hosted by the employer; however, the other remaining acts, which the Complainant characterized as the more egregious acts, occurred after the dinner was concluded and the Complainant and two of her coworkers decided to go to a bar together. The actions which occurred at the bar and later had only a tenuous connection, if any, to the Complainant's performance of duties related to her employment. Even assuming that a sufficient connection existed between the acts of sexual harassment and the Complainant's employment, the Respondent would only be liable if it knew or should have known about the harassment but failed to take adequate measures to prevent or eradicate it. Flanagan v. Wis. Bistros (LIRC, 11/04/04).

The Respondent took actions that were reasonably calculated to remedy the situation and to prevent future harassment of the Complainant by a co-worker. It conducted an immediate investigation, counseled, and warned the Complainant's co-worker about his offending conduct, and took reasonable action to assure that the Complainant would not come into contact with that co-worker in the future. Although the Complainant contended that the co-worker should have been terminated, a remedial action is not inadequate simply because it does not accord with the Complainant's expectations or desires. Furthermore, an employer is not required to discharge every worker accused of sexual harassment in order to avoid liability in the event that that individual should ever engage in further acts of harassment. Flanagan v. Wis. Bistros (LIRC, 11/04/04).

Whether compliments on a Complainant's looks are of a sexual nature depends upon the context in which they were made. Harper v. Menard, Inc. (LIRC, 09/18/09) (Anderson v. MRM Elgin Corp., 01/28/04).

Because Title VII does not contain any language similar to sec. 111.36(1)(b), Stats., federal cases addressing the question of hostile work environment sexual harassment are not helpful to an analysis of whether the Respondent has violated the Wisconsin Fair Employment Act. Anderson v. MRM Elgin (LIRC, 01/28/04).

There are three categories of prohibited conduct under the Wisconsin Fair Employment Act: (1) sexual harassment by an employer, (2) quid pro quo sexual harassment, and (3) hostile environment sexual harassment. Under the first category, employment discrimination based on sex occurs if the employer (meaning the owner, or an agent in a position of responsibility such that it is appropriate to apply the rule of *respondeat superior* and treat the actions of the agent as being the actions of the employer) engages in conduct that meets the definition of sexual harassment, whether or not that conduct creates a hostile work

environment. Thus, where the employer or an agent of the employer is perpetrating the sexual harassment, it will be actionable even if the harassment is not considered sufficiently severe or pervasive as to create a hostile work environment. Anderson v. MRM Elgin (LIRC, 01/28/04).

An agent of the Respondent engaged in physical conduct of a sexual nature when he swatted the Complainant on the backside with a paycheck. Unlike verbal contact, nothing in the statute prohibiting sexual harassment suggests that physical contact must be "repeated" in order to constitute prohibited sexual harassment. Even a single instance of unwelcome physical contact of a sexual nature is a violation of the Wisconsin Fair Employment Act. Anderson v. MRM Elgin (LIRC, 01/28/04).

Sexual harassment must be "unwelcome" to be unlawful. Conduct is unwelcome where the Complainant did not solicit or invite it, and where the Complainant regards the conduct as undesirable or offensive. Whether conduct is "unwelcome" presents a question as to the subjective state of mind of the person to whom the conduct is directed. In this case, the Complainant clearly did not solicit or incite the sexual harassment. The Complainant testified that the actions of the Respondent's agent left her numb from fear. Her witness testified that the Complainant appeared to be an "emotional wreck" and was almost shaking after the employer's agent shared his sexual fantasies with her. Such testimony supports a conclusion that the agent's conduct was unwelcome to the Complainant. Anderson v. MRM Elgin (LIRC, 01/28/04).

Any suggestion that, because the Complainant tolerated physical and verbal conduct of a sexual nature for some time, the conduct was not "unwelcome" is meritless. A failure to object might, depending upon the circumstances, be indicative of welcomeness. However, once it has been determined that the sexual contact or comments were unwelcome, the fact that the Complainant failed to object to such conduct has no effect on the employer's liability under the statute. The statute makes it unlawful for an employer to engage in sexual harassment, without regard to whether the Complainant has objected. Anderson v. MRM Elgin (LIRC, 01/28/04).

The Labor and Industry Review Commission has recognized and applied the vicarious liability holding of the U.S. Supreme Court in Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 77 F.E.P. Cases 1 (1998) and Faragher v. Boca Raton, 118 S. Ct. 2275, 77 F.E.P. Cases 14 (1998). An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may be appropriately addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use the complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment. Baier v. J & J Elec. (LIRC, 12/16/03). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

If a Complainant has a reasonable opportunity to complain but chooses not to do so, this will operate against her in determining the Respondent's liability. Baier v. J & J Elec. (LIRC, 12/16/03). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

The lack of a formal sexual harassment policy may be reasonable for an employer of a small workforce, as distinguished from a larger employer or one with a decentralized operation. Baier v. J & J Elec. (LIRC, 12/16/03). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

There was no probable cause to believe that a male Complainant was unlawfully discharged on the basis of sex when the Respondent terminated his employment because he retaliated against a female subordinate who had filed a complaint of sexual harassment against him. Meisinger v. Perfecseal (LIRC, 07/16/03).

The Wisconsin Fair Employment Act does not impose an affirmative reporting requirement on employees who believe they are being sexually harassed; however, this does not mean that the employee never has any duty to report harassment. The circumstances of each case must be evaluated individually. To do otherwise would result in dismissal in situations where the reason the employee failed to complain was because the employer completely lacked a procedure to do so, where a grievance procedure existed but was inadequate to deal with sexual harassment problems, or where an adequate reporting procedure existed but was not sufficiently published by the employer. However, if the Complainant had a reasonable opportunity to complain but chose not to do so, this would operate against her in determining the Respondent's liability. Rusniak v. Fagan Chevrolet-Cadillac (LIRC, 05/23/02).

An employer is not expected to be omniscient and to foresee that a particular individual who has been disciplined for sexual harassment will offend again. Nor is it expected to discharge every worker accused of sexual harassment in order to avoid liability in the event that individual should ever engage in further acts of harassment. In this case, the Respondent did not violate the Wisconsin Fair Employment Act because once the Complainant notified the Respondent that an individual had once again engaged in sexual harassment, that individual was immediately discharged. Rusniak v. Fagan Chevrolet-Cadillac (LIRC, 05/23/02).

In cases involving sexual harassment by coworkers, an employer only becomes liable when it knows or should have known about the harassment and fails to take adequate measures to prevent it. An employer has fairly wide latitude to address allegations of sexual harassment as it sees fit, provided its actions are reasonably calculated to remedy the situation and prevent future harassment. In this case, the action of the coworker constituted a sexual assault for which the harasser ultimately pleaded guilty to a criminal charge. This is a serious matter warranting a serious response on the part of the Respondent. The Respondent only gave the harasser a three-day suspension. It did nothing to counsel the harasser about his behavior or to receive any assurances from him that he would not engage in such conduct again. Nor did the Respondent do anything to address the Complainant's reasonable concerns about working with the harasser in the future. The Respondent did not meet its obligation of undertaking appropriate remedial action. Krienke v. Ramada Inn Conference Ctr. (LIRC, 10/29/02).

While the Respondent may have believed that the Complainant consented to his actions, the Complainant never solicited or invited his sexual contact or remarks, nor indicated by word or deed that she liked them. The fact that the Respondent made his advances openly has no bearing on their welcomeness to the Complainant, nor was her failure to run away tantamount to consent. The burden is not on the employee to run away, but on the employer not to subject her to harassment in the first place. The Respondent violated the Act by engaging in a pattern of unwelcome sexual harassment which ultimately led the Complainant to quit her job. Mackey v. ICR, Ltd. (LIRC, 01/31/02).

The terms "sexual harassment," and "unwelcome verbal or physical conduct of a sexual nature," are expressly defined in the Wisconsin Fair Employment Act. The Act does not make it necessary for a Complainant to show that conduct "actually harassed" her. The prohibition relating to sexual harassment is straight forward. It defines "sexual harassment" and makes it unlawful for an employer to engage in it. Osell v. Schedulesoft (LIRC, 10/27/00).

Sec. 111.32(1)(b), Stats., provides three separate categories of prohibited conduct: (1) an employer engaging in sexual harassment; (2) an employer explicitly or implicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment or the basis of any part of a decision affecting the employee ("quid pro quo"); and (3) permitting sexual harassment to substantially interfere with an employee's work performance or to create an intimidating, hostile or offensive work environment (collectively, "hostile environment"). The first category is directed to conduct the employer itself engages in. The second category is directed to conduct the employer either engages in or permits. The third category is directed to conduct the employer permits. Jim Walter Color Separations v. LIRC, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999).

Unwelcome physical contact of a sexual nature and unwelcome verbal or physical conduct of a sexual nature may constitute sexual harassment without regard to whether they meet the "hostile work environment" standard, when they are engaged in by a business owner. Haas v. Sark (LIRC, 12/29/99).

The Complainant, a male, alleged that he had been sexually harassed by his lead worker, another male, when the lead worker hit him in the groin on several occasions. This conduct did not amount to sexual harassment. The alleged assault on the Complainant lacked sexual implications. Indeed, the Complainant testified that the lead worker never made any sexual advances or comments towards him, and that he was a bully. Markgren v. Hartzell Mfg. (LIRC, 09/02/99).

Conduct is considered unwelcome where the employee did not solicit or invite it, and regards it as undesirable or offensive. The Complainant failed to establish that the Respondent's actions (which consisted primarily of kissing, hugging, hand holding and "occasional statements of passion") were unwelcome, although it appeared from the record that the Respondent initiated the majority of the touching and was the party most interested in maintaining the personal relationship. The Respondent testified that the Complainant occasionally hugged him in the workplace and that she sometimes kissed him "good morning" or "good night" at the beginning and end of the day. This conduct on her part belied any notion that she found the Respondent's advances undesirable or offensive, regardless of whether she occasionally told him to "stop it." Fluhr v. James Magestro, DDS (LIRC, 04/01/99).

While the fact of a prior consensual relationship does not excuse future unwelcome harassment, common sense dictates that allegations of sexual harassment based upon conduct which was once acceptable must be subjected to closer scrutiny than ordinary allegations of sexual harassment. When a consensual relationship has existed between the parties, but then comes to an end, the "unwelcomeness" issue assumes special importance. Courts may well impose a greater duty upon the employee feeling harassed to signal that sexual conduct and attention, once a part of the relationship, is no longer welcome. Fluhr v. James Magestro, DDS (LIRC, 04/01/99).

In determining whether conduct is "unwelcome" it is appropriate to consider the subjective state of mind of the person to whom the conduct is directed. Fluhr v. James Magestro, DDS (LIRC, 04/01/99).

When no tangible employment action was taken against an employee, the employer is vicariously liable for the supervisor's harassing conduct unless it can prove by a preponderance of the evidence that: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. McCartney v. UW Hosp. & Clinics (Wis. Pers. Comm'n, 03/24/99).

Determination of whether conduct was or was not unwelcome can be a difficult and sensitive undertaking. Whether conduct is "unwelcome" presents a question as to the subjective state of mind of the person to whom the conduct is directed. Sexual conduct by an employer towards an employee is not a "strict liability"

offense. It is explicit in the applicable statutory prohibitions that the conduct must be "unwelcome" to be considered unlawful. Where an employer directs conduct with sexual overtones at an employee, and that employee does not expressly object to or attempt to avoid that conduct, it may be that the conduct was not "unwelcome." On the other hand, it may be that the employee's toleration of sexual overtures reflects that the employee feels coerced into accepting them in order to retain the benefits to which her employment relationship entitles her. All of the circumstances of the relationship must be considered in determining whether the conduct was "unwelcome." Lass v. Sawyer (LIRC, 12/28/98).

In a sexual harassment case, testimony by the Complainant's coworkers that their supervisor, who was accused of sexual harassment, had acted inappropriately towards them could not be used to show the supervisor's proclivity for bad conduct or bad character. However, this testimony was relevant and admissible for purposes of establishing a generally hostile work environment. Harsh v. County of Winnebago (LIRC, 11/09/98). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

Even though no tangible employment action is taken, an employer is still subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee, unless the employer can prove by a preponderance of the evidence an affirmative defense with two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the Complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. However, it should first be determined whether or not the Complainant has established an actionable hostile environment claim. Harsh v. County of Winnebago (LIRC, 11/06/98). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

In determining the pervasiveness of harassment, the trier of fact may aggregate evidence of racial hostility with evidence of sexual hostility. Harsh v. County of Winnebago (LIRC, 11/06/98). [Ed. note: In Sanderson v. Handi Gadgets (LIRC, 03/21/05), LIRC stated that it would no longer follow this decision].

The exclusive remedy provision of the Worker's Compensation Act does not bar a sexual harassment claim under the Wisconsin Fair Employment Act when the Complainant alleges a work injury stemming from the alleged sexual harassment. Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997).

In determining whether the evidence establishes a hostile work environment based on gender, the decision-maker must consider the alleged incidents in context, including incidents of violence and hostility that do not have a sexual expression. In this case, there was substantial evidence that the hostility of two male employees – expressed as it was in non-sexual terms – had origins in personality conflicts rather than in their attitudes towards the Complainant because of her gender. Kannenberg v. LIRC, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997).

An employer's liability for sexual harassment by its supervisors or agents will hinge on the particular circumstances of the case. Where a Complainant seeks to hold the employer responsible for a hostile environment created by her supervisor or co-worker, she must show that the employer knew or should have known of the harassment and failed to take prompt remedial action. Yaekel v. DRS Ltd. (LIRC, 11/22/96).

A Complainant does not need to establish that sexual harassment seriously affected her psychological well-being in order to prevail on a claim of hostile environment sexual harassment. Baker v. Dadco Divers. (LIRC, 01/18/96).

It is not unreasonable for a Complainant to feel disturbed by sexually offensive comments or other actions by persons with supervisory authority over her even while tolerating or not being offended by similar comments by co-employees who did not have supervisory authority. A Complainant's use of vulgar language or sexual innuendo in the company of other workers does not waive her legal protections against unwelcome harassment. Olson v. Servpro of Beloit (LIRC, 08/4/95).

A Complainant who has been harassed on only a few occasions may be allowed to offer evidence of harassment suffered by other employees in order to show that harassment was pervasive. An employee can be intimidated or oppressed by witnessing an employer harass her co-workers, or by hearing about such behavior. Olson v. Servpro of Beloit (LIRC, 08/4/95).

An employee who laughs at the occasional off-color joke does not waive her legal protections against unwelcome sexual harassment. Miller v. Oak-Dale Hardwood Products (LIRC, 12/13/94), aff'd sub nom. Oak-Dale Hardwood Products v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

A Complainant was constructively discharged when she quit during an argument with her supervisor. The argument occurred immediately after the supervisor made a crude remark about the Complainant's sexual activities. The Complainant's quitting was, therefore, directly related to the sexual harassment. Given the pervasiveness of the sexual harassment in this case and the Respondent's complete failure to take any remedial action, the Complainant reasonably concluded that she had no alternative but to quit her employment. Miller v. Oak-Dale Hardwood Prod. (LIRC, 12/13/94)), aff'd sub nom. Oak-Dale Hardwood Prod v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

The Complainant failed to establish a case of quid pro quo sexual harassment where the son of the owner of the car wash where she worked (who also worked at the car wash and had some supervisory responsibilities) engaged in a single instance of sexual touching. The Complainant's refusal to submit to the sexual advance resulted in no tangible job detriment. Although the Complainant did not return to work after the incident of sexual harassment occurred, this was not a result of any threat by the harasser, but was a voluntary decision on the Complainant's part. Riegert v. Novy's Car Wash (LIRC, 04/26/94).

The fact that a Complainant's discharge closely followed a letter to her supervisor rejecting his sexual advances permits the drawing of an inference of quid pro quo sexual harassment. The Complainant's testimony that the supervisor referred to her letter stating that he had been reading it over and over immediately prior to her discharge was direct evidence of a causal connection between her rejection of his sexual advances and her discharge. Biggers v. Isaac's Lounge (LIRC, 10/21/93), aff'd sub nom. Isaac's Lounge v. DILHR (Milwaukee Co. Cir. Ct.), aff'd (Ct. App., Dist. I, unpublished opinion, 04/25/95).

Even if it was true that the Complainant had a single sexual encounter with the Respondent prior to the beginning of her employment in 1983, this does not mean that the Respondent's sexual advances to her in 1990 were welcome. This was especially true in view of the Complainant's testimony that when the Respondent touched her in 1984, she made it known that she did not appreciate his action. Biggers v. Isaac's Lounge (LIRC, 10/21/93), aff'd sub nom. Isaac's Lounge v. DILHR (Milwaukee Co. Cir. Ct.), aff'd (Ct. App., Dist. I, unpublished opinion, 04/25/95).

To establish a case of hostile environment sexual harassment, the following elements must be proved: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on the employee's sex; (4) the harassment affected a term, condition or a privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial measures. Roden v. Federal Express (LIRC, 06/30/93).

To prove that sexual harassment created a hostile environment, the Complainant must prove that sexual harassment was so pervasive as to alter the conditions of employment and create an abusive working

environment. In assessing this two-pronged element, one must employ a dual standard which considers (1) the likely effect of the defendant's conduct upon a reasonable person's ability to perform his or her work and upon his or her well-being and (2) the actual effect upon the particular employee bringing the claim. The determination of the existence of sexual harassment must be made in light of the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. Roden v. Federal Express (LIRC, 06/30/93).

The mere existence of a grievance procedure and a policy against sex discrimination coupled with the Complainant's failure to invoke that procedure will not automatically insulate an employer from liability for sexual harassment, since valid reasons may exist to explain a Complainant's failure to invoke the employer's procedure. Some valid reasons for an employee's failure to inform the employer of sexual harassment may be that the employer does not have a procedure to address sexual harassment, the employer's procedure is inadequate, or the employer's procedure has not been sufficiently publicized. Roden v. Federal Express (LIRC, 06/30/93).

To establish a case of quid pro quo sexual harassment, the Complainant must establish four factors: (1) the Complainant is a member of a protected group; (2) the Complainant was subjected to unwelcome sexual harassment; (3) the harassment was based on the Complainant's sex; and (4) the acceptance or rejection of sexual harassment by Complainant was an express or implied condition to the receipt of a job benefit, or the cause of a tangible job detriment. Roden v. Federal Express (LIRC, 06/30/93).

In a quid pro quo sexual harassment case, an employer is strictly liable for sexual harassment by a supervisor that causes a tangible job detriment. Roden v. Federal Express (LIRC, 06/30/93).

An employee who failed to establish a claim of sexual harassment still established a claim of retaliation where she opposed conduct she reasonably believed to be unlawful sexual harassment. Roden v. Federal Express (LIRC, 06/30/93).

In sexual harassment hostile working environment cases, federal case law suggests that before an employer can be held liable for sexual harassment by a supervisor, the employer must have actual or constructive knowledge of the sexual harassment and must have failed to remedy the situation. Roden v. Federal Express (LIRC, 06/30/93).

There is a distinction between discrimination based on gender, and actions by one person towards another person with whom they have had an intimate personal relationship and which occur because of that relationship (or the failure of that relationship). The same principles and observations relevant to negative treatment by a former lover are relevant to preferential treatment by a present lover. The hostility or preference in some cases may be presumed to arise not from the categorical status of gender ("male" or "female"), but from the singular, individual status of lover or former lover. This presumption cannot be considered to have been rebutted where the records show that the relationship is consensual and, thus, non-coercive. Crosby v. Intertractor Am. Corp. (LIRC, 05/21/93).

A Complainant did not present a claim of sexual harassment where she alleged that she had to open mail for her boss, and that the mail sometimes included cards from his lover. Exposure to a few offensive documents when opening the employer's personal mail falls far short of a "deliberate, repeated, display of offensive sexually graphic materials" which is required to state a claim for sexual harassment. Erdmann v. UW Sys. (Stevens Point) (Wis. Pers. Comm'n, 04/23/93).

Where employment opportunities are granted because a person has a sexual relationship with a supervisor, the employer is liable for unlawful discrimination against others who were qualified but denied the opportunity if there was an element of coercion in the sexual relationship between the employer and the employee who was granted favoritism. Podemski v. St. Francis Home (LIRC, 05/22/90).

The Complainant established a successful claim of sexual harassment under the "hostile environment" theory by establishing that she was a woman and that she was subjected to unwelcome sexual advances by her supervisor which were sufficiently pervasive to create an offensive and hostile working environment, considering the totality of the circumstances. Whether the supervisor's conduct and the Complainant's reaction are gauged subjectively (the effect upon this particular Complainant) or objectively (the effect upon a reasonable person other than the Complainant in the same situation) the result in this case is the same. Nelson v. Waybridge Manor, Inc. (LIRC, 04/06/90).

The Complainant established a successful claim of sexual harassment under the "quid pro quo" theory by establishing that she was subjected to harassment by a supervisor based upon her sex, and that she suffered tangible job detriments (unfair comments, unusually frequent evaluations of her job performance, and pressure to obtain professional help for what her supervisor mischaracterized as her "sex problem") when she rebuffed her supervisor's advances. Nelson v. Waybridge Manor, Inc. (LIRC, 04/06/90).

There was probable cause to believe that the Respondent had violated the Act by sexually harassing the Complainant despite a finding that the Complainant had not complained to the Respondent until after it was decided that the Complainant would be laid off, because: (1) the person who allegedly sexually harassed the Complainant was the Complainant's supervisor, and (2) the Complainant was a Manpower employee and it was not clear whether the Respondent's policy prohibiting sexual harassment and setting forth procedures for reporting incidents of sexual harassment applied to her. Even without prior notice, employers may be liable for sexual harassment in some hostile environment cases. Mahoney v. S.C. Johnson & Son (LIRC, 03/21/89).

In some cases, prior notice to the employer of a supervisor's sexual harassment may not be necessary to hold the employer liable. Here, a line chief who had the authority to recommend the transfer and discharge of employees, who regularly rated employees, who directed and assigned the workforce under him, who was paid more because of his responsibility for running the line, and who did not have any specific job assignment other than overseeing the line was a supervisor. Mahoney v. S.C. Johnson & Son (LIRC, 03/21/89).

The Complainant was not sexually harassed or discharged from her employment because of sex where, despite proof that a manager subjected her to verbal sexual harassment, she was found not to have told management about the harassment before she was discharged and where there was evidence that she was discharged for performance problems. Schoenhofen v. LIRC (Ct. App., Dist IV, unpublished opinion, 01/26/89).

The dismissal of the Complainant's sexual harassment claim was affirmed when the Complainant was found not to have told the Respondent about the harassment until after her termination, since the employer cannot be found liable unless it authorized, knew or should have known of the harassment. Schoenhofen v. LIRC (Ct. App., Dist. IV, unpublished opinion, 01/26/89).

A Complainant must prove five elements to establish a "hostile work environment" case: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment in question and failed to take appropriate remedial action within a reasonable time. Vervoort v. Central Paper (LIRC, 01/25/89).

The Complainant's use of sexually neutral expletives, such as "damn" and "shit," does not indicate that sexually derogatory expletives, such as "whore" or "cunt," are welcome. Vervoort v. Central Paper (LIRC, 01/25/89).

The Respondent did not act within a reasonable time when it failed to take appropriate action in response to the Complainant's allegations of sexual harassment for more than a year before the Complainant filed her complaint. Vervoort v. Central Paper (LIRC, 01/25/89).

The existence of a grievance procedure and a policy against discrimination, coupled with a Complainant's failure to invoke that procedure, does not insulate employers from liability for sexual harassment. Vervoort v. Central Paper (LIRC, 01/25/89).

In order to establish the existence of sexual harassment under the Wisconsin Fair Employment Act, a Complainant must show that she was a member of a protected group, was subjected to unwelcome harassment, that the harassment was based upon her sex, that the harassment was sufficiently pervasive so as to alter conditions of employment and create an abusive working environment, and that the Respondent knew or should have known about the harassment. Carlson v. Three Star (LIRC, 08/27/86).

There is no absolute requirement that an employee must report incidents of sexual harassment to his or her employer before the employer may be held liable for such harassment. The statute merely creates a presumption of liability in situations in which the employee has informed the employer. San Filipo v. N. Cent. Sec. Agency (LIRC, 08/15/86).

In light of the decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Commission rejects both the notion that the employers are strictly liable for sexual harassment by their supervisors regardless of notice, and the notion that employers cannot be liable for sexual harassment by their supervisors absent actual notice. The circumstances of each case must be evaluated. One element of the circumstances that must be evaluated is whether the situation is such that a Respondent should have known of the harassment. San Filipo v. N. Cent. Sec. Agency (LIRC, 08/15/86).

Sec. 904.04, Stats., does not preclude the admission, in a proceeding concerning allegations of sexual harassment, of evidence that the accused harasser engaged in sexual harassment towards others on other occasions. Schwantes v. Orbit Resort (LIRC, 05/22/86).

Sexual harassment may be found to have occurred, based on the facts of a particular case, even absent the aid of the statutory presumption allowed by the second sentence of sec. 111.36(1)(b), Stats. Giessel v. Glaze Dental Lab (LIRC, 11/20/85).

Sexual harassment within the meaning of the Act must be "unwelcome" to the Complainant. Such conduct is not unwelcome where a Complainant is found to have encouraged or participated in sexual conduct at work. Winter v. Madison Home Juice Co. (LIRC, 07/19/85).

An employer convincingly asserted that an employee's dismissal was a result of unsatisfactory job performance, despite the employee receiving at her work place a package of sexual material a few days prior to her dismissal, where she was unable to establish either who sent the package or that her employer had any reason to know of her receipt of that package of sexual material. Stock v. Clark Lift of Northern Wis. (LIRC, 02/08/85).

There was no violation of the Act where a supervisor flirted with an employee without conditioning the terms of his employment upon his response to her advances, and where the employer took appropriate action to halt the objectionable conduct within a reasonable amount of time after hearing of it. Demro v. Packerland Packing Co. (LIRC, 08/31/84).

Where a female security guard transferred shifts because of sexual harassment by her co-worker, but failed to put her complaints about him in writing on the employer's forms and failed to inform her employer of

the reason for her transfer, her quitting when asked to return to the original shift was not a constructive discharge. Orgill v. Guardsmark (LIRC, 08/05/83).

Where the owner of the Complainant's place of work continuously sexually harassed her, the Complainant's quitting constituted a constructive discharge. Dumas v. American Companies (LIRC, 07/13/83).

Comments with sexual overtones made to a female employee were not enough, by themselves, to constitute sexual harassment. Where all alleged incidents of harassment stopped after a company investigation, no finding of sex discrimination was warranted. Arenas v. Ladish (LIRC, 03/30/83).

An employer that knows or should know of sexual harassment by its employees and takes no corrective action discriminates against the affected employees. Glasser v. DHSS (Wis. Pers. Comm'n, 07/21/81).

127.4 Harassment because of gender

The Complainant's contention that the Respondent tolerated a sexist work environment, in violation of the WFEA, was rejected. The Act prohibits sexual harassment and harassment of employees based upon sex, as well as discrimination in the terms and conditions of employment based upon sex, but does not specifically protect employees from working in an environment that could be considered "sexist." Neither the fact that the Respondent employs more men than women nor the fact that it does not require sexual harassment training is a circumstance that can be said to constitute a violation of the Act, nor does the fact that some female employees may have considered the workplace a "man's world" compel a different conclusion. While some employees may perceive a specific work environment as being more male-oriented than female-oriented, or vice versa, this is not a sufficient basis upon which to rest a finding that there has been a violation of the Act, in the absence of evidence that the employee was subjected to harassment or discriminatory terms and conditions of employment. Holmes v. Manitowoc Cnty. Sheriff's Dep't (LIRC, 09/30/14).

Sec. 111.36(1)(br), Wis. Stats., prohibits engaging in harassment that consists of unwelcome verbal or physical conduct directed at another individual because of that individual's gender 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 the individual's work performance. The first requirement is that the conduct be directed at the individual claiming harassment. The evidence in this case shows that some of the comments the male Complainant complained of were directed in jest to another employee and had nothing to do with the Complainant. Another comment referred to the Complainant but was not directed at him. The action of another employee (putting the employee's own name on a sign and placing it around a cut-out of a female athlete) was done as a humorous reference to that employee's own failure to attend an office Halloween party. A reasonable person similarly situated to the Complainant would not have considered this labeled cut-out to be offensive. The next question is whether the remaining conduct was directed at the Complainant because of his gender. The record established that the woman who made the comments which the Complainant objected to raised her voice and was antagonistic to males and females alike. As a result, her comments were not shown to be related to the Complainant's gender. The final two remarks the Complainant objected to, although at least arguably directed at the Complainant because of his gender, did not come close to establishing the level of severity or pervasiveness required for the creation of an intimidating, hostile or offensive work environment. Braunschweig v. SSG Corp. (LIRC, 08/31/06).

127.5 Compensation, benefits, equal pay

The Complainant argued that the Respondent paid different wages to employees of the opposite sex for substantially equal work. However, she did not establish that the "Customer Service Representative" and "Producer" jobs were substantially equal, notwithstanding the similarity of the written job descriptions, because testimony indicated that the job descriptions did not accurately reflect the job duties. The jobs

entailed significant enough differences to explain the differing pay structures. Wittmer v. Leitch Ins. Agency, Inc. (LIRC, 05/21/15).

Under the Equal Pay Act analysis, the Complainant's initial burden is to show that the Respondent pays employees of different sexes differently for jobs requiring equal skill, effort and responsibility, which are performed under similar working conditions. This burden does not require the Complainant to show that her job is identical to that of her comparator; the crucial question is whether they have a common core of tasks and whether any of the additional tasks make the jobs substantially different. The Complainant met her initial burden, so the Respondent had the burden to show one of the four defenses. Here, the Respondent showed that the difference was the result of a merit pay system, defined as an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. Hayes v. Home Care Med., Inc. (LIRC, 08/12/14).

When a Complainant's allegation of discrimination in compensation because of sex depends on a comparison to the compensation of a male coworker, proof of a disparity in compensation between the Complainant and comparator is crucial to the Complainant's *prima facie* case, and therefore must be made by more than uncorroborated hearsay evidence. Stephens v. Renaissance Place (LIRC, 12/12/13).

The Commission believes that its reliance on AMTRAK v. Morgan and other federal court decisions on the application of the statute of limitations to compensation discrimination, was misplaced. The Commission will return to the interpretation reflected in the Wisconsin Court of Appeals' 1996 Abbyland decision, that "[s]alary discrimination is an ongoing matter and can be challenged if the result of the discrimination occurs both within and outside the statute of limitations." Mack v. Rice Lake Harley Davidson (LIRC, 02/07/13), aff'd, Rice Lake Harley Davidson v. LIRC (Barron Co. Cir. Ct., 11/12/13); 2014 WI APP 104, 357 Wis. 2d 621, 855 N.W.2d 882, rev. denied, 01/13/15.

The Complainant showed that she was paid differently from a male employee for equal work in a salesperson job, the performance of which requires equal skill, effort, and responsibility and which were performed under similar working conditions. She, thus, made out a *prima facie* case of pay discrimination under the Equal Pay Act analysis. The employer sought to rely on the "factor other than sex" defense, that factor being an explanation that the male was given a high initial rate of pay based on expectations that he would function as a sales manager, expectations which were not met. The employer's explanations for maintaining the male's higher pay when he ended up simply doing sales work, were inconsistent, and are rejected as a "factor other than sex." Mack v. Rice Lake Harley Davidson (LIRC, 02/07/13), aff'd, Rice Lake Harley Davidson v. LIRC (Barron Co. Cir. Ct., 11/12/13); 2014 WI APP 104, 357 Wis. 2d 621, 855 N.W.2d 882, rev. denied, 01/13/15.

The parties in this case agreed that there were men and women in the materials attendant job position who received different pay for jobs which required the same skill, effort and responsibility and that work was performed under the same working conditions. The question presented under the equal pay analysis was whether the employer had carried its burden of establishing that the differences in pay were the result of: (a) a seniority system, (b) a merit system, (c) a system which measures earnings by quantity or quality of production or (d) any factor other than sex. The "any factor other than sex" exception is a broad exception that embraces an almost limitless number of factors, so long as they do not involve sex. The factor need not be related to the requirements of the particular job in question, nor must it even be business-related. The only question is whether the factor is bona fide, whether it has been discriminatorily applied, and (in some circumstances) whether it may have a discriminatory effect. The question under this exception is whether the reason for the Respondent's determination of the Complainant's starting pay was gender-neutral The evidence in this case indicated that the determination of the Complainant's starting pay was gender-neutral because the Respondent awarded males and females alike credit for experience when determining their starting pay. This credit is determined based on their job application, résumé and interview. The

Complainant was not given experience credit in this case because she did not have experience which was relevant to the job. Bialk v. Aurora Health Care (LIRC, 04/23/10).

The Equal Pay Act specifies three separate elements that are to be considered in comparing job duties: skill, effort and responsibility. Each of these elements must be met individually to establish a *prima facie* case. In this case, the Complainant could establish a *prima facie* case of wage discrimination by showing that she (an elementary school principal) and a male junior/senior high school principal were paid different salaries for equal work on jobs the performance of which required equal skill, effort and responsibility, and which were performed under similar working conditions. There was evidence in the record that the junior/senior high school principal had several additional responsibilities that were not required of the elementary principal. With respect to the effort required to perform the job duties, there was evidence of how many eight-hour days the junior/senior high school principal typically worked each year; however, the record was silent with respect to the typical number of eight-hour days logged each year by the Complainant to perform the duties of elementary principal. The Complainant thus failed to meet each of the necessary elements to establish a *prima facie* case. Gaulke v. Sch. Dist. of Stratford (LIRC, 12/08/06).

In evaluating complaints of sex discrimination in compensation under the Wisconsin Fair Employment Act, it is appropriate to consider the analysis followed by the courts under the federal Equal Pay Act. Under the Equal Pay Act analysis, a Complainant must show that the employer pays employees of different sexes differently for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions. If that showing is made, an employer is liable unless it proves that the pay differential is the result of: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) any factor other than sex. The Equal Pay Act analysis has been described as a strict liability test, in which it is not necessary to prove intent to discriminate. An employer that pays men and women different wages for similar work is automatically liable unless it proves one of the defenses. Reddin v. Neenah Joint Sch. Dist. (LIRC, 08/24/04).

The Complainant did not state a claim under the Wisconsin Fair Employment Act where she did not compare her wage to the wage of males who were in the same classification, or who were performing equal or substantially similar work. The Complainant was, in effect, raising a comparable worth claim that the positions in her job category lost salary gains as compared to jobs in another category which was primarily made up of male employees. This is not a viable theory of discrimination under the Wisconsin Fair Employment Act. However, the door is still open for cases where the employee alleges that although the employer claims it was driven by market considerations, it in fact was motivated by an intent to discriminate against females. Henry v. DER (Wis. Pers. Comm'n, 09/10/02).

In order to establish a claim of sex discrimination with respect to compensation, a Complainant must prove either: (1) that the Respondent paid different wages to employees of the opposite sex for substantially equal work on jobs the performance of which required equal skill, effort, and responsibility, and which are performed under similar working conditions, or (2) that the Respondent was motivated by gender discrimination in setting her compensation or other terms and conditions of employment. Buran v. Menomonee Falls Sch. Dist. (LIRC, 03/17/00).

In evaluating complaints of sex discrimination in compensation under the Wisconsin Fair Employment Act the Department may look to the analysis followed under the federal Equal Pay Act. However, it is also appropriate to apply the conventional analysis on the issue of discrimination, particularly where the wage differential is sequential rather than simultaneous. Under the conventional analysis, the Complainant must make a *prima facie* case by showing she was a qualified worker treated less favorably with respect to pay than workers of the other gender. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the pay difference. If such a reason is articulated, the Complainant must

prove by a preponderance of the evidence that the proffered nondiscriminatory reason was not the real reason for the discrimination in pay but merely a pretext for discrimination. The conventional and Equal Pay Act analyses differ not only in terms of allocation of proof, but also on the issue of employer intent, which is the central focus of the conventional analysis. (The Equal Pay Act analysis has been described as a strict liability test in which it is not necessary to prove intent to discriminate). Schwinn v. Dodge Co. Coop. (LIRC, 10/13/98).

The Complainant established that the Respondent discriminated against her because of her sex and her marital status in regard to compensation through testimony that the Respondent's owner made overtly discriminatory statements when approached about increasing the Complainant's pay to bring it more in line with the pay of male sales representatives. Comments made by the owner included the following: (1) that "between [the Complainant] and her husband, they made enough money"; (2) that "a 'snatch' didn't need to make that much money"; (3) that the Complainant had gotten good results from some accounts because "she was probably screwing the meat manager"; (4) that he was "paying her husband enough and she's a woman and she's compensated properly and she doesn't need any more, any additional compensation;" and (5) that the Complainant "was a good heifer or a good cow and she would produce but we don't have to give her any more." Forster v. Abbyland Processing (LIRC, 03/22/95), aff'd sub nom. Abbyland Processing v. LIRC, 206 Wis. 2d 309, 557 N.W.2d 419 (Ct. App. 1996).

Where the higher wage payment that was given to a male employee was made pursuant to the Respondent's apprenticeship program, it fell within the meaning of the "other factor other than sex" exception for payment of unequal wages. Although the apprenticeship program was operated in an informal manner, the Complainant's suggestion at hearing that the program was a mere sham could not be sustained in this case. Hoffmann v. Scan Graphics, Inc. (LIRC, 02/25/94).

A part-time female employee could not prove sex discrimination in compensation by comparing herself to a male employee who worked full time and whose job duties were not substantially similar to her own duties. The appropriate comparison group for such a female employee was the other part-time employees who performed similar job duties. Meisner v. Gervasi (LIRC, 09/30/92).

The analysis of complaints of sex discrimination in pay under the Wisconsin Fair Employment Act involves the question of whether employees of different sexes are paid differently for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions. There are four defenses which will negate liability: that the differential payments are made pursuant to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) "any other factor other than sex." Foss v. P.A. Bergner & Co. (LIRC, 03/04/91).

In evaluating complaints of sex discrimination in pay under the Wisconsin Fair Employment Act, the Commission looks to the analysis which is followed under the federal Equal Pay Act. This analysis involves the question of whether employees of different sexes are paid differently for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions. There are four defenses which will negate liability if proven by the employer: that the differential payments are made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production, or any other factor other than sex. This analytical method essentially establishes a type of strict liability in which there need not be proof of intent to discriminate. However, a conventional analysis is appropriate in a case in which the wage differential is sequential rather than simultaneous. A conventional analysis, which goes beyond the strict liability concept of the Equal Pay Act, is concerned at all times with the ultimate question of whether the Respondent intentionally discriminated against the Complainant. Under a conventional analysis, the discrimination does not occur when a subsequently employed male is paid more than a previously employed female. Rather, the

discrimination occurs when sex is considered as a factor by the employer when it makes the decision on what to pay a female. Sahr v. Tastee Bakery (LIRC, 01/22/91).

A Respondent's statement that he paid females less because they had "someone at home to take care of them," demonstrates an unfortunately traditional attitude sometimes held towards working women which is essentially a matter of sex discrimination, not a matter of a distinction between persons because they are married, single, divorced or separated. Sahr v. Tastee Bakery (LIRC, 01/22/91).

While it is possible (given statements by the Respondent's owner that the Complainant didn't need more pay because she had a husband who was working) that the Respondent would have denied the Complainant health insurance benefits because of her sex had it been confronted with the necessity of making a decision on that point, no decision was ever made, and thus no discrimination ever occurred. Discriminatory attitudes are not unlawful unless they result in discriminatory treatment. Sahr v. Tastee Bakery (LIRC, 01/22/91).

The Complainant, a lesbian, failed to state a claim upon which relief could be granted when she alleged that the Wisconsin Fair Employment Act was violated when her companion was denied insurance benefits which would have been available to spouses of male heterosexual married individuals. Phillips v. DHSS (Wis. Pers. Comm'n, 03/15/89, 04/28/89, 09/08/89), aff'd sub nom. Phillips v. WPC (Dane Co. Cir. Ct., 11/08/90).

Sex discrimination was not shown where craft classifications were predominantly male and clerical classifications were predominantly female, and the Respondent paid employees promoted from craft positions more than employees promoted from clerical positions. The Respondent's use of market forces to pay craft employees, whether male or female, more initially in order to induce them to accept managerial positions was not discrimination in compensation because of sex. There was no showing that the Respondent paid women less merely because they were women and, therefore, willing to accept less compensation. Davis v. Wis. Bell (LIRC, 04/05/89).

In evaluating a complaint of wage discrimination because of sex, cases decided under the federal Equal Pay Act should be looked to for guidance because the Wisconsin Fair Employment Act's prohibition on sex discrimination in compensation is co-extensive with the EPA. Anderson v. LIRC (Dane Co. Cir. Ct., 02/12/88).

A *prima facie* case of wage discrimination because of sex may be established by showing that an employer pays different wages to employees of the opposite sex for equal work. The burden of proof then shifts to the employer to show that the wage differential falls within one of the four statutory exceptions to the ban on unequal compensation provided for in the Federal Equal Pay Act, one of which is "any other factor than sex." Where historical developments - specifically, the elimination of certain formerly distinguishing duties from one position as a result of a legislative change - led to two essentially similar positions having different wage rates, the "any factor other than sex" affirmative defense was demonstrated. The "factor other than sex" exception is a broad general category available as an affirmative defense; the "factor" in question does not have to be an acceptable business reason. Anderson v. LIRC (Dane Co. Cir. Ct., 02/12/88).

Wisconsin's wage discrimination statute is similar to the federal Equal Pay Act, and the same analysis is utilized under both enactments. Bradfish v. LIRC (Marathon Co. Cir. Ct., 10/17/87).

In a wage discrimination claim involving an allegation of unequal compensation for work that is substantially similar to work performed by someone of the opposite sex, the Wisconsin Fair Employment Act is properly construed by reference to the standards developed under the federal Equal Pay Act. One of those standards creates a type of strict liability. No intent to discriminate need be shown if the essential

elements of an Equal Pay Act claim are made out. Anderson v. City of Sheboygan Health Dep't (LIRC, 08/20/87).

Even where the Complainant was performing the same work as higher paid males the dispositive question of fact on the equal pay issue was whether her sex was a motivating factor in the Respondent's decision to pay her less. Where the evidence showed that the employer was motivated by factors other than sex, there was no violation of the law, regardless of whether the pay arrangement was fair. Vollendorf v. Norco Windows (LIRC, 08/22/86).

Where the Complainant's duties as a Clerk-Typist and a male's duties as Administrative Clerk II did not involve equal work the performance of which required equal skill, effort and responsibility, and where the pay range of the newly created Clerk-Typist position was established before the position was filled and before the Respondent could have known that the Complainant, a female, would be in the position, there was no discrimination because of sex in regard to wages. Bresnehan v. City of Madison/Motor Equipment (LIRC, 01/22/86).

In determining the legality of pay differentials under the Act, DILHR looks to cases decided under the federal Equal Pay Act of 1963. Ealey v. Wis. Brick & Block (LIRC, 02/28/83), aff'd sub nom. Ealey v. LIRC (Wis. Brick and Block) (Dane Co. Cir. Ct., 05/30/84).

In interpreting the exception for "any other factor other than sex," the employer must show a reasonable business purpose for use of such a factor. Ealey v. Wis. Brick & Block (Dane Co. Cir. Ct., 05/30/84).

The Act does not contemplate that the Department will engage in job evaluation for the purpose of deciding what is a proper wage differential for unequal work. Laux v. Dixon (LIRC, 05/07/81), aff'd sub nom. Laux v. LIRC (Winnebago Co. Cir. Ct., 10/15/82).

In order for an employee to demonstrate sex discrimination in regard to payment of wages, she must show: 1) that a significant wage differential exists for men and women performing substantially similar jobs, and 2) that the work she performs is equal or substantially similar to that performed by higher paid males. To prove the latter, the employee must show that her work requires equal skill, effort and responsibility, and is performed under similar working conditions. Laux v. Dixon (LIRC, 05/07/81), aff'd sub nom. Laux v. LIRC (Winnebago Co. Cir. Ct., 10/15/82).

"Equal effort" includes consideration of both mental and physical exertion. "Equal responsibility" is concerned with the degree of accountability required in the performance of the job. "Equal skill" involves such factors as training, education and ability, measured in terms of the performance requirements of the job. Laux v. Dixon (LIRC, 05/07/81), aff'd sub nom. Laux v. LIRC (Winnebago Co. Cir. Ct., 10/15/82).

Even though the Complainant did not have the title of credit manager, she established wage discrimination by showing that: (1) she was considered by the store manager to be the replacement for the previous male credit manager who received a higher wage; (2) she performed substantially similar duties; and (3) the repossessions she did not perform were incidental to her primary responsibilities. Christensen v. Goodyear Tire & Rubber (LIRC, 10/07/82).

The employer could not justify a pay difference between female matrons/custodial aides and male custodians who performed equal work on the basis of hours per month where it was responsible for restricting their hours. Krawcy v. Greenfield Sch. Dist., No. 6 (LIRC, 04/15/82).

Evidence of experience or training actually possessed by job incumbents is not directly relevant to the question of equal skill. The issue is the experience, training, education and ability which an employee needs to competently perform the particular job in question. Valen v. Mortgage Guarantee (LIRC, 03/24/81).

It is not enough to show a difference in time spent on particular tasks to justify a differentiation in pay. The employer must show that the higher paid job involves additional tasks which: 1) require extra effort, 2) consume a significant amount of time, and 3) are of an economic value commensurate with the pay differential. Valen v. Mortgage Guarantee (LIRC, 03/24/81).

It was sex discrimination to pay a female adjuster less than a male assistant manager where: 1) there was no evidence that his supervisory experience and college education were necessary to performance of his job, 2) the additional duties he performed did not consume a significant amount of time and effort or yield any greater financial recovery for the company, and 3) the company accepted a survey which recommended that his job be changed to adjuster. Moreover, although he was paid more at a previous job than was the female, there was no evidence that his present employer found it necessary to pay him at a certain level to induce him to change jobs. Valen v. Mortgage Guarantee (LIRC, 03/24/81).

Although a female employee was hired through the employer's special high school program, it was sex discrimination to continue to employ her at the same pay after the program was discontinued and she held duties and responsibilities substantially identical to male security guards. Harris v. Milwaukee Area Dist. (LIRC, 06/05/80).

Where a female bookkeeper had less educational training and work-related experience than males subsequently hired as office managers, and had fewer work-related responsibilities, the female failed to establish that she was discriminatorily paid less for equal or substantially equal work. Helgesen v. Sparta Oil (LIRC, 08/07/78).

Where a female bar manager was paid less but performed better than her higher paid male predecessor, and where her male successor was also given a higher salary, the denial of equal wages to her was discriminatory because the employer could show no business justification for her lower salary. Vick v. Appleton Labor Ctr. (LIRC, 10/05/77).

Where a female machine operator was temporarily promoted but paid less than the male who later replaced her, the pay inequity was sex discrimination because the female proved that she and her male successor performed the same or substantially similar work. Ferguson v. Greb Plastics (LIRC, 09/19/77).

Equal does not mean "identical." Insubstantial or minor differences in the degree or amount of skill, effort or responsibility required for the performance of jobs will not render the law inapplicable. If the employee must have essentially the same skill in order to perform either of the two jobs, the jobs will qualify as requiring equal skill. Allison v. Jensen's Cleaners (DILHR, 06/14/74).

The occasional performance of incidental duties by male employees does not justify their higher wages. Biermann v. Larson Pallet (DILHR, 11/02/73).

If the Complainant meets her initial burden, the employer must then show that the pay differential was based on a factor other than sex, such as a seniority or merit system, or any other bona fide system for measuring earnings by quality or quantity of production. Nekoosa-Edwards Paper v. DILHR (Balogh) (Dane Co. Cir. Ct., 10/01/70).

127.6 Promotion, job assignments, and terms and conditions of employment

In this sex discrimination case, the employer's asserted nondiscriminatory reasons for assigning female employee jobs as a loader/packer rather than a driver and for sending her to Class B truck driver training

rather than Class A truck driver training were not shown to be a pretext. Burt v. Skaleski Moving & Storage, Inc. (LIRC, 4/8/13).

The Complainant, a female, was the first woman to hold the position of patrol officer in the sheriff's department. The Complainant was unlawfully discriminated against on the basis of her sex when she was denied a promotion to the position of patrol sergeant. One of the members on the selection committee was biased against the Complainant because he did not want a woman in a superior role to the male patrol officers. He recommended that a male candidate be selected. The selection committee accepted the recommendation of the detective captain, as was its practice. The sheriff also accepted the captain's selection, as was customary. The Respondent's subsequent attempt to use its anti-nepotism policy to justify not promoting the Complainant (who was married to a fellow police officer) was a pretext for unlawful discrimination. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

In a failure to promote case, the Complainant need not prove at the initial stage that she was the most qualified person for the promotion in order to make out a *prima facie* case. Foust v. City of Oshkosh Police Dep't (LIRC, 04/09/98).

Discriminatory attitudes are not unlawful unless they actually result in discriminatory treatment. In this case, there was evidence that the Respondent's operation's manager stated that he thought that men made better managers. However, no unlawful discrimination was established where the record indicated that the operation manager's selection of store managers was in fact not limited to males and that he retained a number of female store managers. Currie v. Garrow Oil Corp. (LIRC, 06/16/95).

A Complainant failed to prove that a police chief's decision to demote her back to police officer from sergeant was motivated by her sex or sexual orientation where (1) the police chief initially sought out the Complainant for promotion, knowing the Complainant's sex and sexual orientation; (2) the chief had a history of hiring and promoting females and lesbians; and (3) the chief had information which supported his conclusion that the Complainant lacked the interpersonal skills necessary to supervise other employees. Kemmerer v. City of Madison Police Dep't (LIRC, 06/30/93).

There was nothing inherently unfair or inequitable in the Respondent's practice of promoting candidates in rank order based on a composite score reflecting three factors: a written examination, performance ratings, and seniority. The Complainant in this case did not prove that the Respondent's method of weighting seniority was adopted with the purpose and intent of impairing the Complainant's promotional opportunities because she is female. Schiller v. City of Menasha Police Dep't (LIRC, 01/14/93).

A part-time female employee could not prove sex discrimination in job assignments by comparing herself to a male employee who worked full time and whose job duties were not substantially similar to her own duties. The appropriate comparison group for such a female employee was the other part-time employees who performed similar job duties. Meisner v. Gervasi (LIRC, 09/30/92).

A *prima facie* case of sex discrimination involving promotion includes the following elements: (1) that the Complainant is a woman, (2) that the Complainant was not selected for the promotion, and (3) that a male who was less qualified than the Complainant received the promotion. In this case, the Complainant did not establish that the male who was selected for the promotion was less qualified than she to receive the promotion. Sobkowiak v. Trane Corp. (LIRC, 09/06/91).

An employer discriminated by promoting a male with greater experience to a position in which a female employee had been performing favorably for three years. The male's engineering degree did not justify the selection because it was not required for the position. Gehrke v. 3M Co. (LIRC, 06/28/84).

Where a female was bypassed for several promotions and job opportunities but failed to show that she met the qualifications for the positions, there was not probable cause to find sex discrimination. Although the woman's immediate supervisor did express negative attitudes toward women, she failed to show that these attitudes were ever a part of the employment decisions. Tomaszek v. Western Publ'g (LIRC, 06/16/82).

A female hospital administrator was discriminatorily denied promotion where the negative performance evaluations she received were done by a male supervisor, were subjective in nature, were not shared by other hospital administrators, were inconsistent with her previous appraisals and were used to select a male who had already been informally chosen. Williams v. County of Milwaukee (LIRC, 04/15/81).

It was discrimination to deny female employees the opportunity to do jobs involving moving heavy objects and driving forklift trucks, where the employer made that decision on the basis of sex stereotypes unrelated to the actual ability of any one individual to perform the particular job. Veach v. WARF Vitamin Concentrates (LIRC, 04/01/80).

The job assignment of a female inspector to the heaviest and least desirable job constituted sex discrimination, where her supervisor assigned newly hired male inspectors to lighter jobs to discourage women from coming into, or remaining in, his department. Rau v. Mercury Marine (LIRC, 05/19/77).

An employer discriminated against a female employee where promotional opportunities were not posted in the building in which five of the seven female custodians worked and where no male custodians were similarly disadvantaged. Haug v. Ohio Med. Prod. (DILHR, 08/05/75).

An employer discriminated against a female employee where it removed the sexual connotation from job titles but did not discontinue its practice of placing women in the lowest paid positions. Haug v. Ohio Med. Prod. (DILHR, 08/05/75).

127.7 Termination

127.71 Termination because of sex, generally

While there were few females in the Complainant's department, that fact alone does not warrant an inference that the Complainant was subjected to a discriminatory work environment. Zerzanek v. City of Kenosha (LIRC, 04/27/06).

The Complainant asserted that statistical evidence regarding the number of full-time women in her department provided evidence of gender discrimination. Statistical evidence may constitute some evidence to support a showing of intentional discrimination. However, the Complainant's statistical evidence did not have any probative value due to the absence of any examination of underlying employment decisions and the motives of the decision-makers involved in those decisions. Talley-Ronsholdt v. Marquette Univ. (LIRC 02/13/01).

It was sex discrimination to discharge a female employee where she was offered and accepted privileges from a male supervisor with whom she was having an affair, where the relationship caused a disruption in the workplace of which the supervisors of both individuals were aware, and the male employee was not discharged. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

A school district failed to establish that a bona fide occupational qualification justified its decision to reduce a male with more seniority to a forty percent position while allowing a female with less seniority to remain full time. The school district's contention that it was legally required to provide supervision in the girls' locker and shower rooms and that its concern for the invasion of privacy of female students

justified assignment of a female teacher to supervise the girls' locker and shower rooms was unconvincing. Moore v. Cedar Grove-Belgium Sch. Dist. (LIRC, 04/29/92).

The Respondent had a legitimate basis for terminating a female substitute teacher where she had a pattern of excessive discipline. The female teacher made 47 disciplinary referrals during a 16-month period while two other male substitute teachers together made only 15 disciplinary referrals during that period. Roberge v. Sch. Dist. of Stanley-Boyd (LIRC, 02/05/92).

When an employer penalizes an employee after the termination of a consensual sexual relationship between the employer and the employee, a presumption arises that the employer acted not on the basis of gender, but on the basis of the failed interpersonal relationship. This presumption is rebuttable only if the employee can demonstrate that the employer demanded further sexual relationships before the decision to terminate was made. Podemski v. St. Francis Home (LIRC, 05/11/90).

There was no probable cause to believe that the Respondent discriminated against the Complainant by terminating his employment because of sex where the Complainant had acted in a fashion that led female employees to believe that he was exposing himself to them and where female employees had reported that he made obscene phone calls to them. Hammer v. G.E. Med. Sys. (LIRC, 08/29/89).

The Complainant was not sexually harassed or discharged from her employment because of sex where, despite proof that a manager subjected her to verbal sexual harassment, she was found not to have told management about the harassment before she was discharged and where there was evidence that she was discharged for performance problems. Schoenhofen v. LIRC (Ct. App., Dist IV, unpublished opinion, 01/26/89).

It was sex discrimination for an employer to discharge a female employee because a male employee insisted that he would not continue to work for the employer, as long as the female with whom the male employee had been having a relationship was allowed to work there after their relationship broke up. The discharge decision relied at least in part on the Complainant's gender, and was thus unlawful. Abbeyland Processing v. LIRC (Ct. App., Dist. III, unpublished opinion, 02/02/87).

A female employee was discriminated against when she was discharged several months earlier than a male employee with whom she was having an affair, where the two employees were equally responsible for the resulting disruption to the employer's business. Pike v. Pierson-Pelzman Sweetener Supply (LIRC, 01/16/85).

The discharge of a male employee for a rule infraction, for which female employees were only suspended, violated the Act and was based upon a belief that male employees should be held to a higher standard of conduct than females. Evidence that the employer refused to allow the male to transfer to a position where the employer believed females performed more efficiently supported the finding. Rathsack v. Crescent Woolen Mills (LIRC, 09/25/84).

It was sex discrimination to discharge a male because of an alleged anti- nepotism policy, where the employer retained a female who would have been similarly disqualified by such a policy. Scheidel v. Am. Council of the Blind (LIRC, 04/06/82).

A faculty committee's decision not to recommend tenure for a female professor because of her lack of published materials was not sex discrimination where she did not possess qualifications superior to a male who was tenured, where the only other persons rejected during the period were males and where the committee's vote was almost evenly split between members of each sex. Rubenstein v. LIRC (UW Bd. of Regents) (Dane Co. Cir. Ct., 02/06/81).

It was not discriminatory to discharge a female employee who, in violation of a notice rule, failed to notify the employer that she would not be returning to work. Hamilton v. DILHR, 94 Wis. 2d 611, 288 N.W.2d 857 (1980).

It was not sex discrimination to discharge the male but not the female employee who had become involved in an affair together because, unlike the female, the male caused management to become directly involved in the affair and had a poor work record. Peterson v. Cent. Paving (LIRC, 10/09/79).

Where two female employees violated a work rule by leaving the premises without permission during working hours, their discharge was not the result of sex discrimination. Cariganan v. Schlitz Container (LIRC, 06/22/79).

In a legitimate reduction of staff, minimal reasons such as physical stamina were sufficient to support an employer's decision to choose the male employee over the female where both were closely matched in terms of competence. Olson v. Community Mem'l Hosp. (DILHR, 07/23/76).

An employer's discharge of a female because of its aversion to women working in the auto service department was sex discrimination. Yanta v. Montgomery Ward (DILHR, 03/07/72), aff'd, Yanta v. Montgomery Ward, 66 Wis. 2d 53, 224 N.W.2d 389 (1974).

127.72 Termination because of pregnancy, childbirth, maternity leave or related medical condition [Also see sec. 844 re: remedies]

The imposition of medical restrictions by the Complainant's treating health care professional led to her lay-off. However, this would not constitute sex (pregnancy) discrimination unless it was shown that the Respondent either failed to follow its own policies regarding such restrictions, or that it treated the Complainant differently than it had treated employees with non-pregnancy related temporary medical restrictions. In this case, other employees were allowed to use accrued leave to cover a temporary absence for medical reasons. The Complainant failed to show that she had accrued leave sufficient to cover her absence for the duration of her pregnancy. Therefore, she failed to show that she was similarly situated to these employees. In addition, the Complainant failed to show that the Respondent did not follow its own policies in regard to her lay-off. Slife v. Mt. Morris Mutual Ins. Co. (LIRC, 11/03/05).

The Respondent failed to offer to place a fan or air conditioner in its vault in order to make the Complainant more comfortable while she was pregnant. Nor did it offer her the opportunity to temporarily trade duties with another employee. The record does not show that the Respondent accommodated other employees with temporary medical restrictions not related to pregnancy by physically modifying their work environments or by allowing them to temporarily trade duties with other employees. Therefore, the Respondent's failure to accommodate the Complainant in this matter did not demonstrate sex (pregnancy) discrimination. Slife v. Mt. Morris Mutual Ins. Co. (LIRC, 11/03/05).

The Complainant failed to prove a *prima facie* case of sex discrimination with respect to discharge where she was unable to show that she was meeting the employer's legitimate job performance expectations at the time of her termination and where she was unable to show any direct or indirect evidence that the employer's termination decision was motivated by her pregnancy. Levenhagen v. Woodward Communications (LIRC, 09/30/92).

The Respondent, a school of dentistry, did not unlawfully discriminate against the Complainant on the basis of pregnancy when it did not allow her to take a few weeks off work at the beginning of the fall semester to have her baby. Instead, the Respondent gave the Complainant the option of taking a leave for the entire fall semester and then returning for the second semester, but as a junior clinic supervisor, rather than as a regular clinical faculty member. The Respondent established that appointing someone

else as the clinical supervisor for only the first semester and then re-appointing the Complainant as the supervisor for the second semester would present the problem of not providing for continuity in the students' development of clinical skills. Krause v. Marquette Univ. (LIRC, 06/30/92).

A salad bar employee failed to show that she was terminated because of her pregnancy where the employer showed that it had eliminated the salad bar for financial reasons. Although her supervisor had expressed concern over the employee's pregnancy, the Complainant failed to subpoena the manager to testify at the hearing. Without additional testimony, the manager's comments about her pregnancy were insufficient to demonstrate that they were connected to her termination. Yerke v. Wood River Inn (LIRC, 02/05/92).

There was no evidence of sex discrimination where a non-pregnant laid-off salad bar worker was rehired for a short time to do salad and computer work and a pregnant laid-off salad bar worker was not rehired since the pregnant laid-off employee could not perform the computer work required by the employer. Yerke v. Wood River Inn (LIRC, 02/05/92).

In order to establish a *prima facie* case of discrimination based on pregnancy, the Complainant must establish: (1) that she was pregnant, (2) that she was capable of doing the job, and (3) that she was discharged from the job. Although the Complainant established a *prima facie* case, she failed to offer sufficient evidence that the Respondent's reasons for discharge were pre-textual. The individuals who discharged her did not know that she was pregnant at the time of the discharge. Further, the Respondent has employed several women who became pregnant while working for the Respondent. Martin v. Mars Cheese Castle (LIRC, 07/02/91).

The Respondent violated the Wisconsin Fair Employment Act when it laid the Complainant off because it anticipated that her pregnancy would cause future absenteeism. Frostman-Messier v. Nancy Lee Employment Agency (LIRC, 02/22/91).

The Respondent discharged the Complainant because of marital status and pregnancy where the employer displayed prejudgment that pregnancy would limit the Complainant's ability as a waitress and told her that termination would save her from embarrassment. Howard v. The Cloisters (LIRC, 08/24/90).

The Respondent's argument that a back pay award should not have extended until the date the Complainant (who was discharged because of pregnancy) delivered because it was not "logical" to believe she would have worked up to her delivery date embodies the same type of preconceptions about the effects of pregnancy on the employee's abilities as was found to have violated the Wisconsin Fair Employment Act. Howard v. The Cloisters (LIRC, 08/24/90).

The Administrative Law Judge erred in dismissing the complaint at the close of the Complainant's case where the Complainant had made out a *prima facie* case by proving that she had been pregnant, that she had been capable of performing her job as evidenced by having passed her probationary period less than two weeks before she was fired, that she had only been criticized for her performance by her foreman on one occasion and that after that occasion she performed her job as required, and that she was discharged about two weeks after she first informed the employer she was pregnant. Although evidence concerning the Respondent's asserted reasons for terminating the Complainant - that she was slow and bossy - apparently was received into the record during the Complainant's case in chief, the Complainant offered evidence to show that the reasons were pre-textual. Matthes v. Schoeneck Containers (LIRC, 03/11/88).

Concerns about the safety of allowing a pregnant employee to work in certain situations may be a valid reason to transfer that employee to another position, but in each case an objective analysis of the Complainant's actual physical capabilities and the job requirements is necessary. An employer's good

faith or subjective belief will not save an otherwise discriminatory decision. Bartelt v. Brakebush Bros. (LIRC, 10/20/87).

Discharging an employee for failing to disclose her pregnancy is not substantially different from discharging an employee because of her pregnant condition. City of Watertown Pub. Library v. LIRC (Jefferson Co. Cir. Ct., 04/14/86), aff'd (Ct. App., Dist. IV, unpublished opinion, 04/02/87).

An employer had a valid business reason for filling the position of an employee during her maternity leave. Even though the pregnancy played a part in her subsequent termination when she declined the relief position offered to her, the employer's policy pertaining to medical and maternity leave treated similarly-situated temporarily disabled men and women equally. DeLisle v. LIRC (L'eggs Prod./Hanes Corp.) (Milwaukee Co. Cir. Ct., 03/29/84), aff'd, (Ct. App., Dist. I, unpublished opinion, 12/11/84).

An employee failed to show discrimination where she had returned to work after her maternity leave, found that her old job had been eliminated, and was given a new job with the same responsibilities and pay as her old job. An employer's comment to the effect that "you are not really going to come back to work with those two babies" was not enough to show an unlawful motive. Luecking v. Winnebago County (LIRC, 03/12/84).

It was discrimination to terminate an employee on the basis of an unfounded expectation that her doctor would order her to quit work because of her pregnancy. Molitor v. Schauer Enterprises (LIRC, 02/21/84).

It was not discrimination to fail to reinstate a nursing assistant who had taken maternity leave where the employer did not guarantee reinstatement to any employee who took leaves for any reason, where others returning from maternity leave had been reinstated and the only position available upon her return required qualities she did not possess. Forseth v. St. Michael Hosp. (LIRC, 12/14/83).

Discharge of a store manager for lateness and excess telephone charges which began after her announced pregnancy was not a pretext for sex discrimination where the Complainant was the only store employee and her employer endeavored to otherwise accommodate her pregnancy. Szczerbiak v. Forest Labs (LIRC, 07/06/83).

A waitress alleging that her discharge was due to her pregnancy established a *prima facie* case of discrimination by showing that her work was acceptable and that her employer told her she was being fired because she could no longer lift heavy weights. The employer's last-minute allegations of poor appearance and attitude were a pretext for its decision to fire her when she became pregnant. Lenich v. Dana's Deli (LIRC, 03/29/83), aff'd sub nom. Dana's Deli v. LIRC (Lenich) (Waukesha Co. Cir. Ct., 01/20/84).

An employer's rule requiring an employee to terminate her employment at the end of her third month of pregnancy was discriminatory. Mill Fab v. LIRC (Knight) (Dane Co. Cir. Ct., 07/30/81).

Where an employee did not refute an employer's contentions that she was discharged for breach of confidentiality, failure to properly keep records and complaints from persons supervising the people she dealt with, she was not discriminated against on account of sex merely because the decision to discharge her took place while she was on maternity leave. N.W. Community Action v. DILHR (Foster) (Douglas Co. Cir. Ct., 04/25/78).

A rule requiring pregnant employees to take a leave in their fifth month regardless of their physical or medical condition was arbitrary and sex-biased where the employer could not demonstrate a compelling interest in the rule, and an employee discharged for violating the five month rule should be reinstated

even where the employer could also have discharged her for unsatisfactory work performance. Nursing Homes v. DILHR (Dane Co. Cir. Ct., 01/22/74).

127.9 Miscellaneous

Differences in male and female uniforms are permitted if they have some justification in commonly accepted social norms and if the standards are reasonably related to business needs. It is a commonly accepted social norm that, for females, a skirt or dress is a more formal article of clothing than pants. In this case, the Respondent's requirement that females wear skirts was part of its marketing strategy to emphasize a more formal dining atmosphere than that offered in what are general characterized as "fast food" eateries. Furthermore, there was insufficient evidence that the job was made any more physically difficult by the requirement of wearing a skirt. Raczek v. Pizza Hut (LIRC, 05/11/94).

If a claim of sex discrimination is otherwise valid, it should not be rendered invalid because the discrimination does not run against the sex of the Complainant. In this case, the Complainant has stated a viable claim upon which relief could be granted when he alleged that his position was eliminated along with the position of a female friend when that female friend failed to "respond positively to sexual harassment" by the Respondent. The Complainant is alleging that his position was eliminated as a direct result of an illegal act of sexual harassment against his female friend. Christensen v. UW-Stevens Point (Wis. Pers. Comm'n, 01/24/92).

The employer was responsible for paying the Complainant's reasonable attorney's fees and costs because it responded inadequately when it learned of a supervisor's acts of sexual harassment against the Complainant and because the supervisor was acting under color of his authority. Nelson v. Waybridge Manor, Inc. (LIRC, 04/06/90).

Despite the fact that the evidence raised serious questions about the attitude of the Respondent towards women as employees and raised the suggestion of discriminatory conduct in respects other than those raised by the complaint, the Complainant failed to demonstrate a causal connection between the apparent attitude of the department towards women as employees and the two day suspension she received for abuse of sick leave. Stephens v. City of Marinette Police Dep't (LIRC, 11/06/87).

An employer need not have been found guilty of past discrimination before it can make a sex-conscious hiring decision. It need only point to a conspicuous imbalance in traditionally segregated job categories. For jobs that require no special expertise, the percentage of minorities or women in the employer's work force may be compared with the percentage in the area labor market or general population, and where the job requires special training, the comparison should be with those in the labor force who possess relevant qualifications. Gordon v. City of Milwaukee (LIRC, 10/16/87).

128 SEXUAL ORIENTATION DISCRIMINATION

The Wisconsin Court of Appeals, in Bowen v. LIRC, 2007 WI App 45, ¶14, 299 Wis. 2d 800, 812, 730 N.W.2d 164, implicitly recognized a cause of action under the Wisconsin Fair Employment Act for harassment on the basis of sexual orientation. Harassment by a co-worker created a hostile work environment for the Complainant, and the employer failed to take effective remedial action, but because the Complainant did not prove termination due to sexual harassment or opposition to discrimination, remedy is limited to a cease-and-desist order and attorney's fees. The Complainant's attorney's fees, based on her brief to the Commission, were reduced in proportion to the number of pages in the brief devoted to the issue on which the Complainant prevailed. Cooper v. Options for Cmty. Growth, Inc. (LIRC, 07/29/13).

The Respondent observed, or the Complainant brought to the Respondent's attention, incidents in which: (1) the Complainant was told to call his "boy toy lawyer," (2) a "Honk If You're Gay" sticker was placed on the Complainant's toolbox, (3) a "Queer" or "Queen" sign was placed on the Complainant's locker, and (4) workers chanted "Rudy, Rudy" in a high-pitched voice in the Complainant's presence (the Complainant's middle name is Rudolf). While the Complainant did not specify that he was complaining about sexual harassment or harassment based on sexual orientation (other than to tell the owner of the company that he was a "fag,") the types of incidents that were taking place should have put the Respondent on notice that this was the case. A Respondent is liable for the harassing acts of the Complainant's co-workers if it knew or should have known about the harassment and failed to take adequate measures to prevent or eradicate the harassment. Once an employer has been put on notice that an employee is being harassed, it is obliged to take remedial action to improve the work environment, whether or not it is aware of each and every allegation of harassment. The Complainant's complaints to the Respondent that he was being harassed daily by his co-workers were invitations for the Respondent to investigate further. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11). [Ed. Note: In a dissenting opinion, a LIRC Commissioner contended that the Wisconsin Fair Employment Act does not provide a cause of action for harassment based upon sexual orientation. This contention was rejected in the majority opinion in the case.]

In order for harassment by co-workers to be actionable under the Wisconsin Fair Employment Act, it must be sufficiently severe or pervasive so as to have altered the conditions of the Complainant's employment and created an abusive work environment. The conduct by co-workers at issue in this case was not occasional or sporadic. It was frequent, it occurred over an extended period of time, and it created an abusive environment. The harassment included the following incidents: (1) a co-worker commented to the Complainant during the course of an argument that he should go ahead and call his "boy toy lawyer," (2) someone propped a newspaper article with a picture of Liberace up against the Complainant's locker, (3) someone put a sticker on the Complainant's toolbox with a picture of a hunting bullseye that said, "Honk If You're Gay," (4) someone left a printed joke on the Complainant's toolbox that said, "Medical authorities have announced that AIDS can be contracted through the ears by listening to assholes," (5) someone left a sign on the Complainant's locker that said either "Queer" or "Queen," (6) a co-worker commented that the Complainant and a member of management to whom the Complainant was talking were "butt buddies," (7) two or more co-workers made hand gestures imitating fellatio that were directed at the Complainant, (8) a co-worker repeatedly called the Complainant "fag," (9) a co-worker called the Complainant a "maricon" (a Spanish word for "fag"), (10) on one or more occasions several workers chanted, "Rudy, Rudy," in a high-pitched voice in the presence of the Complainant (the Complainant's middle name is Rudolph), (11) in response to a newspaper article about homosexuals, a co-worker stated that, "All gays, queers and niggers should be put in a big pit and shot," and (12) a co-worker commented to another worker that the Complainant was grumpy and that he wondered if it was because the Complainant did not get a "piece of ass" at Pride Fest. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11). [Ed. Note: In a dissenting opinion, a LIRC Commissioner contended that the Wisconsin Fair Employment Act does not provide a cause of action for harassment based upon sexual orientation. This contention was rejected in the majority opinion in the case.]

The Complainant's theory was that she was discriminated against because her commanding officer, a female, was jealous of the Complainant's relationship with another female employee with whom she had a homosexual relationship. The Wisconsin Fair Employment Act would protect the Complainant from discrimination based upon her status as a homosexual individual; however, it does not protect her from an adverse employment action taken because of the identity of the Complainant's homosexual partner. Gustavus v. DOC (LIRC, 05/08/08).

The Complainant failed to establish that he was subjected to unlawful hostile environment sexual harassment. The evidence established that a co-worker offered the Complainant the only pink donut in a box of assorted donuts. The Complainant further testified that on one occasion the word "queer" or "queen" was written on his locker, and on another occasion a picture of Liberace was placed on his locker. However, the Complainant failed to demonstrate when these incidents took place. Assuming, without deciding, that the "pink donut" incident was in reference to the Complainant's sexual orientation and that the other two incidents were timely, the Complainant's evidence was not sufficient to warrant a conclusion that he was subjected to harassing conduct which was sufficiently severe or pervasive as to create an intimidating, hostile or offensive work environment. Moreover, the Complainant failed to demonstrate that he notified the Respondent that he was being sexually harassed, or that the Respondent had reason to believe that this was the case. Bowen v. Stroh Die Casting Co. (LIRC, 06/30/05), remanded for further hearing sub. nom Bowen v. LIRC (Milwaukee Co. Cir. Ct., 03/14/06). Order of remand affirmed, 2007 WI App 45, 299 Wis. 2d 800, 730 N.W.2d 164.

What is protected under the law is the employee's general preference for heterosexuality, homosexuality, or bisexuality. The Act provides no protection for an individual who was discriminated against based upon his or her actions in maintaining a sexual relationship with a specific person. Bammert v. Don's Super Valu (LIRC, 03/06/98), aff'd sub nom Bammert v. LIRC, 2000 WI App 28, 232 Wis. 2d 365, 606 N.W.2d 620.

In a case brought under the Wisconsin Public Accommodations and Amusements Act, the Complainant, a lesbian, alleged that she and the members of her baseball team, which played in games sponsored by the Respondent, experienced verbal harassment from both spectators at the game and players on other teams who shouted comments such as "fag," "dike," "queer," "go home," and "she's got AIDS." The heckling that occurred in this case created a hostile environment which had the effect of denying the full and fair enjoyment of a public accommodation to the Complainant. However, the Respondents were not liable in this case because they did not exercise a degree of control over the persons engaging in the harassment. Neldaughter v. Dickeyville Athletic Club (LIRC, 05/24/94).

A Complainant failed to prove that a police chief's decision to demote her back to police officer from sergeant was motivated by her sex or sexual orientation where (1) the police chief initially sought out the Complainant for promotion, knowing the Complainant's sex and sexual orientation; (2) the chief had a history of hiring and promoting females and lesbians; and (3) the chief had information which supported his conclusion that the Complainant lacked the interpersonal skills necessary to supervise other employees. Kemmerer v. City of Madison Police Dep't (LIRC, 06/30/93).

Where a Respondent asserted that it prevented the Complainant from being hired as a live-in attendant for a disabled woman because of reports of prior abuse and neglect of that women by the Complainant, the Department was not required to determine whether the Complainant had in fact been guilty of abuse and neglect in the past. The issue before the Department was whether the Respondent genuinely believed the reports of abuse and neglect and whether the Respondent acted on that belief rather than on an invidious prejudice against the Complainant because of her sexual orientation. Vandeveer v. Brown County (LIRC, 06/28/93).

The Complainant, a lesbian, failed to state a claim upon which relief could be granted when she alleged that the Respondent had violated the Wisconsin Fair Employment Act by denying her application for family health insurance coverage for her lesbian companion. The Respondent's policy distinguishes between married and unmarried employees, not between homosexual and heterosexual employees. Family coverage for the Complainant's companion would be denied even if the Complainant were an unmarried heterosexual. While the Complainant complains that she is not married to her companion only because she may not legally marry another woman, this is a claim that the marriage laws are unfair because of their failure to recognize same-sex marriages. Any change in that policy is for the legislature, not the courts. Phillips v. Wis. Pers. Comm'n, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

A finding that seventy-three percent of individuals with AIDS/ARC are homosexual and bisexual men was insufficient to support a finding that a school district which adopted a policy prohibiting individuals with AIDS from the classroom constituted discrimination on the basis of sexual orientation. Furthermore, the public remark by a school board member that he voted in favor of the policy because he did not believe homosexuals should be allowed to teach in the school district was insufficient to support a claim of discrimination on the basis of sexual orientation. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

129 MARITAL STATUS DISCRIMINATION

129.1 Coverage, generally

The Complainant argued that her marital status was that of a divorced parent (as opposed to that of simply being divorced). The Wisconsin Fair Employment Act provides no special protections for divorced parents. Gersmehl v. Acuity Mutual Ins. Co. (LIRC, 07/29/11).

The proscription against discrimination on the basis of marital status does not prohibit employer action that is triggered by the employee's conduct, rather than the employee's status as a married individual. The Wisconsin Fair Employment Act is not intended to protect an employee's right to engage in an extramarital affair. The evidence in this case overwhelmingly showed that the Respondent terminated the Complainant's employment as a sales manager due to its concerns regarding the effect his relationship with a part-time employee was having on its employees and business, as well as a concern regarding the potential risk of a sexual harassment lawsuit against the Respondent. Dobberstein v. NSight Telservices (LIRC, 02/23/07).

The WFEA creates an exception to marital status discrimination by allowing anti-nepotism policies, despite their disparate impact on married people as a class. The prohibition against marital status discrimination under the Wisconsin Fair Employment Act is intended to protected 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.

The Complainant failed to state a cause of action upon which relief could be granted where the basis of her claim was that the Respondent refused to pay her for providing personal and medical care to her husband, who was severely disabled. Mack v. Waushara County (LIRC, 05/08/96).

An employer who demands that an employee place work before his or her personal life does not discriminate on the basis of marital status. Perrett v. CPI Corp. (LIRC, 11/15/95).

It was not unlawful discrimination on the basis of marital status for the Respondent to object to the Complainant submitting medical excuses for absences which were signed by her husband, who was a physician. The Respondent's objection was premised not on the marital relationship per se, but on the inherent conflict of interest involved. Earnhart v. DHSS (Wis. Pers. Comm'n 11/19/92).

Discrimination against a person because he is engaged in an interracial marriage is race discrimination. Miner v. Blunt, Ellis & Loewi (LIRC, 05/29/91), aff'd sub nom. Miner v. LIRC (Rock Co. Cir. Ct., 04/07/92).

An anti-nepotism policy might be subject to attack as having a disparate impact on the employment opportunities of married persons as a class. A blanket anti-nepotism policy might also be considered a direct imposition on the right to marry and, thus, on the marital relationship, such as to constitute marital status discrimination under the Wisconsin Fair Employment Act. Miner v. Blunt, Ellis & Loewi (LIRC, 05/29/91), aff'd sub nom. Miner v. LIRC (Rock Co. Cir. Ct., 04/07/92).

A company policy prohibiting employees from dating or living together does not constitute marital status discrimination because the policy applies equally to all employees, regardless of marital status, and attempts to regulate conduct rather than the status of being married or single. Vaisman v. Aldridge, Inc. (LIRC, 10/21/91).

"Going through a divorce" cannot be equated with the statutory definition of marital status, which is defined as "the status of being married, single, divorced, separated or widowed." The Complainant's act of

filing for divorce did not change her marital status as being married. Therefore, in order to prevail on her claim of marital status discrimination, she would have had to establish that the Respondent treated married people differently. Scheife v. Apple Chevrolet (LIRC, 09/11/91).

A Respondent's statement that he paid females less because they had "someone at home to take care of them," demonstrates an unfortunately traditional attitude sometimes held towards working women which is essentially a matter of sex discrimination, not a matter of a distinction between persons because they are married, single, divorced or separated. Sahr v. Tastee Bakery (LIRC, 01/22/91).

The Respondent did not violate the Wisconsin Fair Employment Act when it discharged the Complainant because the Complainant's wife did not move with him to another state within a certain length of time after the Complainant was transferred there. The Wisconsin Fair Employment Act does not prohibit an employment act simply because it is unfair or arbitrary and involves the individual's spouse. Rather, it prohibits discrimination based on an individual's marital status. Birk v. Georgia-Pacific (LIRC, 08/03/90), aff'd sub nom. Birk v. LIRC, (Milwaukee Co. Cir. Ct., 01/04/91).

A rule prohibiting the romantic association of any employee with a married employee of the opposite sex does not discriminate on the basis of marital status. The rule prohibits single and married employees equally from forming romantic associations with married employees. Federated Elec. v. Kessler, 131 Wis. 2d 189, 388 N.W.2d 553 (1986).

129.2 Spousal identity

Adverse actions which were taken not because the Complainant was married per se, but instead because of the identity of the person to whom he was married (i.e., a subordinate employee in the same facility) were not unlawful. Moreover, although the Complainant argued that the Respondent enforced its nepotism policy less favorably in regard to married persons than it did in regard to employees in other types of family relationships, he failed to present sufficient evidence to support this claim. Whiting v. County of Shawano (LIRC, 03/15/04).

Discrimination based upon the identity of one's spouse is not covered by the Wisconsin Fair Employment Act, which is meant to protect 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.

The Complainant did not establish that she was discriminated against because of marital status where what the Complainant complained of was not that she was discharged because she was married, but that she was discharged because she was married to a particular person. The prohibition on discrimination on the basis of marital status does not extend to the particular identity, personal characteristics or actions of one's spouse. Andree v. C.T. & I. Corp. of Wis. (LIRC, 08/29/91).

The prohibition against discrimination because of marital status does not extend to prohibiting actions by an employer that are based upon the identity or particular characteristics of an employee's spouse. Whether or not such employment actions might be deemed unfair, the fact remains that they do not discriminate against persons because they belong to the protected classification of persons who are married. Miner v. Blunt, Ellis & Loewi (LIRC, 05/29/91), aff'd sub nom. Miner v. LIRC (Rock Co. Cir. Ct., 04/07/92).

DILHR has jurisdiction to hear a complaint alleging that an employer's policy against hiring the spouse of a current employee is discrimination. The Act should be interpreted to prohibit discrimination based on the particular identify of one's spouse. Arrowood v. H.G.C.C. of Wisconsin (Milwaukee Co. Cir. Ct., 01/29/85).

129.3 Insurance coverage

A public employer, as defined by ch. 40, Stats., does not discriminate on the basis of marital status by limiting its married co-employees to one family health insurance policy. Motola v. LIRC, 219 Wis. 2d 589, 580 N.W.2d 297 (1998).

The employer decided that employees with "family coverage/including spouse" insurance coverage would have to contribute toward the cost of their health insurance. This did not constitute unlawful discrimination with respect to compensation based on marital status. For budgetary reasons, the Respondent was only willing to allot a certain sum of money toward health insurance expenses. The Respondent was willing to pay up to a certain amount for all employees, whether single or married. It is a general fact of life that an insurance plan for family coverage will cost more than one for single coverage. The Complainant would be in the same situation if the Respondent provided no health insurance benefits at all and she was required to obtain it on her own. She would have to pay more to obtain family insurance coverage than a non-married person who only needed single coverage. Demet v. Homeward Bound (LIRC, 04/09/98).

It was not unlawful discrimination on the basis of marital status for the Respondent to prohibit employees from electing a health insurance plan which covered their spouse as a dependent if the spouse was also an employee of the Respondent. Employees of the Respondent who were married to one another were each entitled to their own insurance coverage. The limitations on the options allowed to the Respondent's employees who were married to one another are designed to avoid a situation in which the employer actually purchases coverage twice for the same employee. Ohm v. Veltus (LIRC, 01/10/97).

It was not unlawful discrimination on the basis of marital status for the Group Insurance Board to deny a state employee's application for family coverage under the State Group Health Insurance Program on the ground that the employee's wife, also a State employee, already had family coverage under the State's Health Care Insurance Program. Kozich v. Employee Trust Funds Bd., 203 Wis. 2d 363, 553 N.W.2d 830 (Ct. App. 1996).

The Respondent's limitation on the selection criteria for its alternative health care plans to married couples when both spouses were city employees, did not constitute prohibited marital status discrimination. The Respondent, a municipality, prohibited the election of a single and/or family coverage plan by either husband or wife if he or she was covered as a dependent on their spouse's family coverage plan. Genther v. City of Kenosha (LIRC, 07/31/96).

The employer's policy was discrimination on the basis of marital status where married employees whose spouses had other insurance available to them through their employer had to either satisfy the Respondent that the other insurance provided significantly less coverage or that their spouses had dropped their insurance policy in order to be able to continue coverage with the Respondent's health insurance policy. The Respondent's policy discriminates against married employees by treating them differently with respect to health insurance than single employees who are not forced to choose between the district's coverage and other health insurance they may have from another source. Braatz v. LIRC, 174 Wis. 2d 286, 496 N.W.2d 597 (1993).

The Respondent did not discriminate against the Complainant on the basis of marital status when it denied her application for family health insurance coverage for her lesbian companion. Although single and married employees are treated differently under the health insurance benefits scheme in that dependent coverage is available to a married worker's spouse, this kind of differentiation on the basis of marital status does not violate the Wisconsin Fair Employment Act. Despite the fact that the Complainant regards her lesbian companion as her "spouse equivalent" this does not make her similarly situated to a married

employee since the Complainant has no legal relationship to her companion. Phillips v. Wis. Pers. Comm'n, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

The Respondent did not deny health insurance coverage to the Complainant because of her marital status. The Complainant did not receive the insurance coverage because she chose coverage under her spouse's insurance policy instead. Dacquisto v. Fred Knapp Engraving (LIRC, 11/30/90).

The employer did not violate the prohibition on discrimination because of marital status when it paid employees who received family (individual plus dependent) health insurance a higher gross wage rate than employees who received only individual health insurance. The legislature simply did not intend that the prohibition against marital status discrimination would preclude an employer from providing additional or greater health insurance benefits to its employees with spouses and/or dependents than to its employees without dependents. Hartman v. Mueller Food Servs. (LIRC, 09/10/85), aff'd, Washington Co. Cir. Ct., 07/18/86.

The failure of an employer's insurance plan to extend coverage to a divorced employee's children does not constitute marital status discrimination. Bourque v. Wausau Med. Ctr. (LIRC, 02/10/84).

129.4 Cases

The Respondent had a policy which did not proscribe affairs by employees with married co-employees, but which did require that employees be discreet when they carry out an extramarital affair. This policy did not constitute marital status discrimination. Olmanson v. DHFS (Wis. Pers. Comm'n, 01/19/01).

The Complainant established that the Respondent discriminated against her because of her sex and her marital status in regard to compensation through testimony that the Respondent's owner made overtly discriminatory statements when approached about increasing the Complainant's pay to bring it more in line with the pay of male sales representatives. Comments made by the owner included the following: (1) that "between [the Complainant] and her husband, they made enough money"; (2) that "a 'snatch' didn't need to make that much money"; (3) that the Complainant had gotten good results from some accounts because "she was probably screwing the meat manager"; (4) that he was "paying her husband enough and she's a woman and she's compensated properly and she doesn't need any more, any additional compensation;" and (5) that the Complainant "was a good heifer or a good cow and she would produce but we don't have to give her any more." Forster v. Abbyland Processing (LIRC, 03/22/95), aff'd sub nom. Abbyland Processing v. LIRC (Marathon Co. Cir. Ct., 01/25/96); aff'd, 206 Wis. 2d 309, 557 N.W.2d 419 (Ct. App. 1999).

The Complainant was not discriminated against on the basis of marital status where the interviewer made remarks to her about her work and family responsibilities. Such remarks may have been precipitated by the Complainant's résumé, which stated, "available for assignments involving some travel." Further, there was no evidence that the Complainant's response to the interviewer was considered in arriving at her score on the interview. Bell-White v. DHSS (Wis. Pers. Comm'n, 04/30/92).

130 USE OR NON-USE OF LAWFUL PRODUCTS

The Complainant's claim of discrimination because of use or non-use of a lawful product off the employer's premises during non-working hours related to a counseling session which she had with a mental health counselor. The prohibition against discrimination on the basis of use or non-use of a lawful product was intended to provide protections for the use or non-use of products such as tobacco or alcohol. A counseling session with a mental health counselor is not a "product." It is a service. Hoyer v. Calumet Med. Ctr. (LIRC, 05/07/10).

A Complainant and a Respondent would have the following respective burdens of proof in a case of alleged discrimination based on the use of a lawful product off the employer's premises during non-working hours. First, the Complainant would be required to show that: (1) he used a lawful product off the employer's premises during non-working hours; (2) he suffered an adverse employment action; and (3) there was a causal connection between the Complainant's use of the lawful product off the employer's premises during non-working hours and the adverse employment action. Second, if the Complainant met this burden, the burden would then shift to the Respondent to establish that the adverse action taken due to the Complainant's use of a lawful product off the employer's premises during non-working hours was not an act of employment discrimination because the Complainant's use of the lawful product off the employer's premises during non-working hours resulted in any of the conditions listed in sec. 111.35(2)(a)-(e), Stats. Miller v. Menard, Inc. (LIRC, 08/31/06).

Lawfully obtained prescriptions for controlled substances for an individual's existing current medical condition are lawful products under the Wisconsin Fair Employment Act. Miller v. Menard, Inc. (LIRC, 08/31/06).

The Complainant in this case failed to establish that he used a lawful product off the employer's premises. The Complainant, who had back pain, used one pill of Tylenol-3 with codeine, a controlled substance, which had been prescribed for him four years earlier for a different medical condition. Sec. 961.38(1r), Stats., provides that "no controlled substance included in schedule II may be dispensed without the written prescription of a practitioner." Sec. 961.38(3), Stats., provides that "a controlled substance included in schedule III or IV which is a prescription drug, shall not be dispensed without a written, oral or electronic prescription of a practitioner." The Complainant did not show that he was dispensed a controlled substance for his current back condition pursuant to a written, oral or electronic prescription of a practitioner. His use of the medication was, therefore, not the use of a lawful product. Miller v. Menard, Inc. (LIRC, 08/31/06).

There is no basis for interpreting the "use of lawful product" provision in the Wisconsin Fair Employment Act as affording protection against employer action taken against an individual who: (1) is not under the care of a physician, (2) does not possess a current medical prescription authorizing the use of a controlled substance, and (3) who tests positive for use of a controlled substance in violation of the employer's Drug-Free Workplace Policy. Miller v. Menard, Inc. (LIRC, 08/31/06).

A Respondent had reason to believe that an employee was using alcohol to the extent that it was having a negative effect on her ability to perform her job. The employer had a legitimate interest in determining whether or not she was capable of discharging her duties as the administrator of its nursing home. The employee was discharged when she refused to undergo an assessment for alcohol abuse. The Complainant's employment was not terminated because of use or non-use of a lawful product off the employer's premises during non-working hours. Dable v. Petersen Health Care (LIRC, 07/30/97).

The Complainant's claim that the Respondent violated the Wisconsin Fair Employment Act's prohibition against discrimination on the basis of "use or non-use of lawful products off the employer's premises" was properly dismissed where the Complainant was a self-employed person. The Complainant would have had to

have been an employee of an employer who would fire or not hire him based on his use of a lawful product, such as cigarettes. In this case, the Complainant merely alleged that the Respondent would not let him service its fire extinguishing systems because he was not a factory-authorized service representative. Hellerude v. LIRC (La Crosse Co. Cir. Ct., 09/23/96).

131 MILITARY SERVICE

[Ed. note: In 2008, the Wisconsin Fair Employment Act was amended to substitute the term "military service" for the phrase "membership in the national guard, state defense force or any other reserve component of the military forces of the United States, or this state."]

The Complainant did not contend that that the Respondent discriminated again him based upon his status as a member of the National Guard or because of his obligation to perform military service. Rather, the Complainant contended that the Respondent discriminated against him once it learned that he had not been deployed to Iraq and was released from active duty. It is not clear that these contentions, if proven, would state a claim under the Act. However, even if the Act's protections do extend to the status of not being deployed or being removed from active duty, the evidence would not support a finding of discrimination. Besaw v. Winnebago Cnty. Landfill (LIRC, 11/30/12).

The Respondent required certain documentation from the Complainant (his annual schedule of military training dates) in order for the Complainant to take two days of military leave. The Complainant provided that documentation and then took the leave. The action taken by the Respondent did not rise to the level of an adverse personnel action. The complaint, which alleged that the Respondent had discriminated against the Complainant on the basis of membership in the National Guard or military reserve, was appropriately dismissed. Cunningham v. DOC (Wis. Pers. Comm'n, 07/20/99).

Although the Wisconsin Fair Employment Act prohibits an employer from discriminating against an individual based upon his or her status as a member of a reserve component of the military forces of the United States, there is nothing requiring the Respondent to consider the Complainant's military service record in deciding whether to eliminate his job or terminate his employment. Kolberg v. Kearney & Trecker Corp. (LIRC, 06/19/96).

There was no basis for any suspicion that the Respondent had any preconceptions about or bore any animus towards the Complainant because of her service with the Army National Guard. There was nothing wrong in the Respondent's director of nursing making a comment to the effect that most of the Complainant's experience in nursing had been in the Army. Nor was it improper, when the Complainant commented on one occasion to the effect that when she was in the Army they did something a certain way, for the Respondent's director of nursing to respond that that way of doing things did not fit in with the Respondent's way of doing business. Titus v. Oakwood Lutheran Home Ass'n (LIRC, 05/24/94).

The Complainant's allegation that he was displaced from a civil service position by a returnee from military leave and forced to accept a transfer to another institution failed to state a claim for relief under the Wisconsin Fair Employment Act. The intent of including Guard or Reserve membership as a protected status under the Wisconsin Fair Employment Act was to protect individuals from being discriminated against because of their membership in the Guard or Reserve, not to prohibit the State as an employer from complying with a long-standing state law (sec. 230.32, Stats.) requiring the job restoration of employees returning from military leave. Gandt v. DOC (Wis. Pers. Comm'n, 01/08/92).

132 HONESTY TESTING

[NOTE: The provisions of the Wisconsin Fair Employment Act relating to unfair honesty testing were substantially amended in 1991.]

132.1 Required procedures, nature of permitted tests

Written honesty tests were not within the purview of sec. 111.37(1)(a), Stats., as it existed in 1990. Pluskota v. Roadrunner Freight Sys., 188 Wis. 2d 288, 524 N.W.2d 904 (Ct. App. 1994).

The Wisconsin Fair Employment Act is intended to regulate only those types of honesty tests which operate in the same manner as a polygraph, voice stress analysis, or psychological stress evaluator. All of these tests measure the physiological changes in an individual from which deception or veracity may be inferred. The Reid Report, which is a paper and pencil test, purports to measure an individual's attitude towards honesty. It does not attempt to measure physiological changes in an individual. Therefore, it is not covered by the provisions of sec. 111.37, Stats. Hintz v. Fleet Farm (LIRC, 05/22/91).

132.2 Discipline or discharge based on refusal to take test

In connection with an investigation into falsification of refund records at one of its stores, the Respondent asked many of its employees to submit to both a polygraph examination and a security interview with a security firm. Where the Complainant refused to take the polygraph examination, refused to participate in the security interview, and was terminated, the termination was not because of her refusal to take the polygraph examination, but because of her refusal to cooperate in an interview with a security agent attempting to investigate the circumstances of the refund falsifications. Many other employees who refused to take the polygraph examination but who participated in the security interview were retained by the employer. Saler v. Spencer Gifts (LIRC, 09/30/88).

132.3 Definition of "test results"

The fact that an employee was never informed that his answers to pre-test questions could serve as an independent basis for the employer to make an employment decision did not render those pre-test admissions any less voluntary. The Complainant had no legitimate right to expect the employer not to be concerned or to act upon his pre-test admissions of having engaged in unlawful conduct. Sajdowitz v. Cedarburg Police Dep't (LIRC, 10/15/87).

Admissions made by an employee prior to or during a polygraph test do not constitute a "result of a permitted test" within the meaning of the statutory provisions making it illegal to discharge an employee based on the "results of a permitted test." The "results of a polygraph test" are the polygrapher's opinion concerning truth or deception and the recordings of the polygraph machine, and those results exclude statements made to the polygrapher in pre-test or post-test interviews. Thus, it was not illegal to terminate an employee, who, in an interview prior to the administration of a polygraph test, made an admission of petty thefts from the employer. Weston v. Bricker Sys. (LIRC, 12/20/85), aff'd (Milwaukee Co. Cir. Ct., 07/22/87).

When the Complainant, in a pre-test interview, admitted that she had stolen $20 from the Respondent on a previous occasion, and when the Respondent discharged the Complainant because of that admission, it did not violate the Act's prohibition on taking disciplinary action against an employee based on the results of a permitted test. Oral disclosures made in connection with the polygraph test are not "results of a test." Schierl, Inc. v. LIRC (Portage Co. Cir. Ct., 09/17/85).

132.4 Definition of "independently obtained evidence"

When the Complainant, in a pre-test interview, admitted that she had stolen $20 from the Respondent on a previous occasion, and when the Respondent discharged the Complainant because of that admission, it did not violate the Act's prohibition on taking disciplinary action against an employee based on the results of a permitted test. Schierl, Inc. v. LIRC (Portage Co. Cir. Ct., 09/17/85).

Information obtained from a pre-test interview may not be distinguished from that obtained from the polygraph examination itself so as to constitute "independently" obtained information. Weston v. Church's Fried Chicken (LIRC, 08/14/84); Jelenchick v. Howard Johnson's (LIRC, 01/26/84).

133 RETALIATION FOR EXERCISE OF RIGHTS UNDER THE WISCONSIN FAIR EMPLOYMENT ACT

133.1 Coverage

There is no requirement that an employee's protected opposition take the form of a written complaint or that it contain any specific information. All that is necessary is that the employee convey to the employer that he or she believes discrimination has occurred. Castle v. St. Charles Youth & Family Servs. (LIRC, 04/17/15).

In a retaliation case, the employer's motivation is the ultimate issue. To make a *prima facie* case, it is necessary for the Complainant to show that he or she engaged in some statutorily protected act, suffered a subsequent adverse employment action, and that the former was a motivating factor for the latter. Here, the Complainant alleged a discharge in retaliation for his filing of prior discrimination complaints. There was a lack of evidence, however, that the person responsible for deciding to discharge the Complainant knew of the existence of the prior complaints or was unwittingly influenced by someone who harbored animus against the Complainant because of his prior complaints. Lueck v. Cnty. of La Crosse (LIRC, 11/13/14).

The Complainant alleged disability discrimination due to reduction in her pay for home care services she provided for her disabled son. The Complaint failed to state a cause of action under the WFEA because the Complainant is not an individual with a disability, and the WFEA does not cover allegations of discrimination based on a Complainant's association with an individual with a disability. The Complainant's retaliation claim for having filed a federal lawsuit fails to state a claim because the lawsuit did not allege any violation recognized by the WFEA as a basis for a retaliation complaint. Bach v. Easter Seals of Se. Wis. (LIRC, 10/09/14), dismissed on procedural grounds (Milwaukee Co. Cir. Ct. 04/20/15), dismissal aff'd (Ct. App., Dist. IV, summary disposition, 01/28/2016).

A complaint to human resources that the Complainant's supervisor was subjecting him to discriminatory terms and conditions of employment based upon race by not allowing him to bring a black girlfriend to a company party is considered statutorily protected opposition for purposes of a retaliation claim. Much v. Les Stumpf Ford, Inc. (LIRC, 07/31/14).

The mere fact that an employer has taken an adverse action against an employee does not warrant an inference that the employer knows the employee engaged in a protected activity. Rather, the Complainant must affirmatively show that the employer was aware or had reason to be aware of his protected conduct. Sabol v. State of Wis. (LIRC, 04/24/14), aff'd Sabol v. LIRC (Racine County Cir. Ct., 6/12/15).

A different legal standard governs allegations of retaliation because of "opposition" and retaliation because of "participation." In order to be protected, "opposition" must actually be engaged in good faith, while "participation" is always protected, whether done in good faith or not. In addition, it is an essential element of either kind of retaliation case that an employer be shown to have been aware of the protected activity the employee engaged in, and that it understood that the activity was related to alleged discrimination. For this reason, a fair opportunity to defend against a claim of retaliation requires that an employer be put on notice of the specific protected conduct of the employee which is alleged to have been the reason that it retaliated against the employee. Hanson v. DOT (LIRC, 06/14/05).

The Complainant alleged that the Respondent took certain action against him because it believed that he would file a complaint with the Equal Rights Division. Such a complaint clearly fails to state a claim for relief under the Wisconsin Fair Employment Act. Sec. 111.322(3), Stats., provides that it is an act of discrimination "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." The Complainant had not made a

complaint, testified or assisted in any proceeding under the Act prior to the action he believed the Respondent took against him. Therefore, any alleged action could not have been taken because he had made a complaint, testified or assisted in any proceeding under the Act. Thornton v. Omni Glass & Paint (LIRC, 07/16/04).

The Complainant alleged that he was retaliated against by his coworkers after he reported that they had made comments which he considered to be racially hostile towards him. Allegations of coworker retaliation which are not alleged to have been directed by or encouraged by the Respondent cannot support a finding of unlawful retaliation on the part of the Respondent. Bessolo v. Stock Lumber Components (LIRC, 07/30/03).

Retaliation is conduct which the statute condemns solely because of the motivation which underlies it. In order to violate the prohibition against retaliation, an action or decision must have been made because of an actual, subjective belief that the person retaliated against was raising some kind of claim that discrimination was occurring, or was otherwise engaging in protected activity. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

The protections of sec. 111.322(3), Stats., for "oppos[ing] any discriminatory practice under this subchapter" are broad enough to cover a complaint by an employee that she believes that the employer is engaging in discrimination, even if it is not discrimination which adversely affects that particular employee. Osell v. Schedulesoft (LIRC, 10/27/00).

While the Wisconsin Fair Employment Act protects conduct in opposition to what an employee believes to be a discriminatory practice, such conduct is only protected if it is supported by a good faith belief that discrimination in fact occurred. It is not necessary that the employee have been objectively "right" about a belief that an action opposed was prohibited discrimination, but it is necessary that the employee have had a good faith belief that the action they opposed was prohibited discrimination. Where an employee makes allegations of discrimination *without* believing in the truth of those allegations, the "opposition" is not protected under the Act. Osell v. Schedulesoft (LIRC, 10/27/00).

An employee's support of a worker's compensation claim filed by another employee is not one of the protected activities cited in sec. 111.322, Wis. Stats. Lutze v. DOT (Wis. Pers. Comm'n, 07/28/99).

The Complainant's refusal to sign a severance or termination agreement containing a release of any claims against the employer did not constitute "opposition" to a discriminatory practice. Nor did the Complainant's contacting an attorney demonstrate that he opposed a discriminatory practice since the employer had encouraged him to do so before signing the release. Accordingly, the Complainant failed to establish that the employer had retaliated against him by refusing to enter into an independent contractual relationship with him because he had opposed a discriminatory practice under the Act. Weier v. Heiden, Inc. (LIRC, 02/05/98).

To show unlawful retaliation under the Wisconsin Fair Employment Act, the employee must show that he or she engaged in protected activity, was subject to adverse employment decisions, and that there was a causal connection between the two facts. If the employee makes this showing, the employer may rebut the claim of retaliation by articulating a legitimate, non-discriminatory reason for its action. If the employer meets that burden, the employee may prevail by presenting evidence that the proffered reason was a pretext. Kannenberg v. LIRC, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997).

The closeness in time of a complaint and the adverse discipline of the Complainant does not in itself establish retaliation. In this case, the employer had a legitimate, non-discriminatory reason for the written

warning that it gave to the Complainant. Kannenberg v. LIRC, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997).

A claim of retaliation because of the Complainant's relationship to another person who filed a discrimination complaint is not cognizable under the Wisconsin Fair Employment Act. Paul v. Fox Point Sportswear (LIRC, 07/18/95).

The anti-retaliation provision of the Wisconsin Fair Employment Act extends to former employees. In this case, the Respondent filed an unfair labor practice charge before the Wisconsin Employment Relations Commission (WERC) against the Complainant, who at the time was no longer employed by the Respondent but was proceeding to a hearing on a complaint of handicap discrimination against the Respondent. The Complainant alleged that the Respondent's filing of the charge before the WERC constituted unlawful retaliation for protected activity under the Wisconsin Fair Employment Act. However, the Complainant's claim of retaliation was not related to an employment relationship and, thus, fails to come within the scope of the Wisconsin Fair Employment Act. There was not a significant connection between the alleged adverse action by the Respondent and the Complainant's employment opportunity. The gist of the WERC claim was that the Complainant should not be allowed to proceed with his handicap discrimination claim because the issues decided in that claim were already decided by an arbitrator. The WERC complaint did not have negative implications with respect to the Complainant's activity at the workplace or his integrity as a human being. Thus, the Respondent's action could not damage the Complainant's reputation or impair his future employment opportunities. Seeman v. Universal Foods Corp. (LIRC, 09/22/94).

Discrimination because of protected "opposition" does not have to involve a formal complaint to the Equal Rights Divisio, but can take the form of informal opposition expressed directly to the employer. However, the opposition must have been recognized by the employer as involving a claim of employment discrimination. In this case, there was no violation of the Wisconsin Fair Employment Act because what the Complainant was opposing was what he believed to be a violation of a collective bargaining agreement. The Complainant had alleged that his refusal to drop a grievance under the collective bargaining agreement led to his being retaliated against by the Respondent. Yet the grievance involved no assertion that there had been employment discrimination. The Municipal Employment Relations Act, sec. 111.70, et seq., Stats., provides protection from retaliation motivated by the fact that a person has filed a grievance alleging a violation of a collective bargaining agreement. The anti-retaliation provision of the Wisconsin Fair Employment Act, found in sec. 111.322(3m), Stats., is not intended to serve as a catch-all protection for all manner of employee protests. Norton v. City of Kenosha (LIRC, 03/16/94).

Sec. 111.322(3), Stats. prohibits discrimination because a person has opposed a discriminatory practice, or because a person has made a complaint, testified, or assisted in a proceeding under the Wisconsin Fair Employment Act. This section protects both "opposition," which involves that employee's "self-help" actions to oppose what they believe to be a discriminatory practice, and which is only protected if it is supported by a good faith belief that discrimination in fact occurred; and "participation," which involves actual proceedings before the Equal Rights Division (either filing a complaint or assisting in one) and which is absolutely privileged against retaliation. Roncaglione v. Peterson Builders (LIRC, 08/11/93), aff'd sub nom. Roncaglione v. LIRC (Dane Co. Cir. Ct., 05/06/94).

The anti-retaliation provision of the Wisconsin Fair Employment Act has two parts. The "opposition" element covers actions taken by an employee on their own to protest discrimination. The "participation" element relates directly and exclusively to the filing of charges with the agency or to assisting in or participating in the investigation of a filed complaint. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

Retaliation may be found where an individual opposes conduct reasonably believed to be discriminatory, even if he or she is mistaken and there was no discrimination. Roden v. Federal Express (06/30/93).

There is nothing unique about retaliation issues, as opposed to conventional discrimination issues, that suggests that the "in part" test of causation articulated in Muskego-Norway Consol. Joint Sch. Dist. No. 9 v. WERB, 35 Wis. 2d 540, 151 N.W.2d 617 (1967), should not be applied in those types of cases. Horton v. Hopkins Chem. Co. (LIRC, 06/08/92), aff'd (Dane Co. Cir. Ct., 04/28/93).

Sec. 111.322(2m), Stats., prohibits an employer from discharging an employee who files a complaint under the Act. Thus, an employee is entitled to keep a job even if the employee files a complaint which is devoid of merit. In such cases, the employer must resolve the dispute with the employee within the context of the employment relationship even if the bogus claim causes great and irreparable damage to the company's reputation. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

A Complainant need not show that he was harmed by the Respondent's action in order to prevail on a claim of retaliation. Ninabuck v. Consol. Freightways (LIRC, 01/31/92).

The Complainant must be able to prove that the alleged retaliatory act impinged upon the Complainant's work. This is an especially important point of proof where the alleged retaliatory treatment (in this case, the employer's refusal to say "good morning" to the Complainant) is more subtle than, for example, a disciplinary demotion, loss of normal work assignments, extension of the probationary period, or denial of a customary letter of recommendation. Alexander v. Aldridge, Inc. (LIRC, 10/21/91).

An adverse action can, in some circumstances, be subject to the anti-retaliation provisions of the Wisconsin Fair Employment Act even though its relationship to an employment opportunity is only indirect. For example, anti-retaliation provisions cover the giving of bad references to an ex-employee in retaliation for a complaint of discrimination by that employee. Filing a lawsuit in tort against an Equal Rights Complainant seeking damages for defamation or malicious prosecution may also be retaliatory. Similarly, threatening an Equal Rights Complainant with criminal charges for allegedly making threatening phone calls to the employer could also be subject to anti-retaliation provisions. In each of these cases there is some effect upon future employment opportunities of the Complainant. In this case, however, the action which the Respondent is alleged to have engaged in because of a retaliatory motive-contacting the City Recreation Department to report that the Complainant was not a resident of the City in whose softball league she was participating--bears no conceivable relationship whatsoever to any employment opportunity, past, present, or future. While the motivation for the action arose in an employment-related context, the action itself had no relationship to employment and it was, therefore, not prohibited retaliation. Pufahl v. Niebuhr (LIRC, 08/16/91), aff'd sub nom. Pufahl v. LIRC (Dane Co. Cir. Ct., 06/16/92).

Discrimination because of a person's membership in a protected classification, and retaliation because a person has opposed a discriminatory practice, are different things. Either one may exist without the other. An employer may be found to have illegally retaliated where it has taken adverse action against an employee because of that employee's assertion that the employer has discriminated against the person because of some protected characteristic, even if it is later established that the employer is not guilty of the alleged underlying discrimination. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

A Complainant's act of publishing a controversial article on prostitution in a professional journal is not protected by the Act from retaliation. Rubin v. UW (Wis. Pers. Comm'n, 02/18/83).

An employee's opposition to discriminatory treatment of other employees is protected from retaliation. Krejci v. Jonathan Furniture Co. (LIRC, 11/06/81).

An employee's good faith opposition to practices viewed as discriminatory is protected under the Act from retaliation even though the practices may not themselves be discriminatory. Informal opposition is entitled

to the same protection as opposition which is expressed through a formal complaint filed with a federal or state agency. Herslof Optical v. DILHR (Leonard) (Dane Co. Cir. Ct., 03/28/78).

133.2 Standard of proof

Retaliation, like other claims of allegedly discriminatory treatment, is appropriately analyzed utilizing the general framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Initially, the Complainant must establish *prima facie* proof of retaliation by showing that: (1) he engaged in statutorily-protected activity; (2) the Respondent took an adverse employment action; and (3) a causal connection existed between the two. If a *prima facie* case has been established, the Respondent must then articulate a legitimate, non-discriminatory reason for its actions. If the Respondent carries its burden of production, the Complainant then must show that the Respondent's asserted reasons were in fact a pretext for retaliatory conduct. Monroe v. Birdseye Foods (LIRC, 03/31/10).

A claim of retaliation may be proven using either the direct or the indirect method of proof. Under the direct method of proof in a retaliation claim, a Complainant must show that he: (1) engaged in statutorily-protected activity; (2) suffered an adverse action taken by the employer; and (3) a causal connection exists between the two. Under the direct method, there are two types of permissible evidence: (1) direct evidence (i.e., evidence that does not require drawing an inference from evidence to the proposition that it is offered to establish); and (2) circumstantial evidence (i.e., evidence which does require drawing inferences). Circumstantial evidence consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence, none conclusive in itself but together composing a convincing mosaic of discrimination against the Complainant. To prove a claim of retaliation under the indirect method, the Complainant must establish a *prima facie* case of retaliation by showing that he: (1) engaged in statutorily-protected activity; (2) met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly-situated employee who did not engage in statutorily-protected activity. A similarly-situated employee is one who is directly comparable to the Complainant in all material respects. If the Complainant establishes a *prima facie* case, the burden of production shifts to the employer to present evidence of a non-discriminatory reason for its employment action. If the employer meets its burden, the burden shifts back to the Complainant to demonstrate that the employer's reason is pre-textual. If the Complainant has produced evidence that he was fired because of his protected activity, this is actual evidence of unlawful conduct (i.e., evidence that the firing was in fact retaliation for the Complainant's complaining about discrimination). Gunty v. City of Waukesha (LIRC, 03/31/10).

The claim of retaliation, like other discrimination claims, may be proven using either the direct or the indirect method of proof. Under the direct method of proof in a retaliation claim, a Complainant must show that he: (1) engaged in statutorily-protected activities; (2) suffered an adverse action taken by the employer; and (3) a causal connection exists between the two. Under the direct method, there are two types of permissible evidence: (1) direct evidence, i.e., evidence that does not require drawing an inference from evidence to the proposition that it is offered to establish; and (2) circumstantial evidence, i.e., evidence which does require drawing inferences. Under the first type of direct evidence, the evidence essentially requires that the decision-maker admitted that his actions were based upon the prohibited animus. The circumstantial evidence type of case consists of ambiguous statements, suspicious timing, discrimination against other employees, and other types of evidence which may not be conclusive in themselves but which together compose a convincing mosaic of discrimination against the Complainant. Gephart v. DOC (LIRC, 11/18/09).

To prove a claim of retaliation under the indirect method of proof, the Complainant must establish a *prima facie* case of retaliation by showing that he: (1) engaged in statutorily-protected activity; (2) met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less

favorably than a similarly-situated employee who did not engage in statutorily-protected activity. If the Complainant establishes a *prima facie* case, the burden of production shifts to the employer to present evidence of a non-discriminatory reason for its employment action. If the employer meets its burden, the burden shifts back to the Complainant to demonstrate that the employer's reason was pre-textual. Gephart v. DOC (LIRC, 11/18/09).

133.21 *Prima facie* case

A prima facie case of retaliation may be established by showing that: (1) the Complainant engaged in statutorily protected activity; (2) the Complainant suffered an adverse action; and (3) there is a causal link between the protected activity and the adverse action. If the Complainant establishes a prima facie case of retaliation, the Respondent may rebut the prima facie case by articulating a legitimate, non-discriminatory reason for the adverse action. Should the Respondent meet its burden, the Complainant then has the burden of proving that the Respondent's proffered reasons are merely a pretext for discriminatory conduct. Archibald v. All Green Corp. *(LIRC, 06/04/18).*

The Respondent rebutted the Complainant's *prima facie* case of retaliatory discharge by producing evidence that the Complainant's poor attendance was the reason for discharge. The Complainant, who bore the burden of showing that the Respondent's proffered reason was pre-textual, was unable to do so. The reason advanced by the Respondent had a basis in fact, provided a sufficient motivation for discharge, and appeared to be the actual motivation for discharge. The Complainant's tardiness was substantial; on nine occasions in two months she was late by 20 minutes or more, four of which were during her last two weeks of employment. Godfrey v. TK Oshkosh, LLC (LIRC, 01/16/14).

In a claim of retaliation under the Wisconsin Fair Employment Act, a Complainant must show that a reasonable individual would have found the challenged action to be adverse. That is, the action might well have dissuaded a reasonable individual from opposing any discriminatory act under the Act or from making a complaint, testifying or assisting in any proceeding under the Act. There is no bright-line rule. Whether alleged discriminatory conduct is sufficiently adverse can only be determined upon careful examination of the facts and circumstances presented in each case. Krushek v. Trane Co. (LIRC, 12/23/10).

Not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions would form the basis of a discrimination suit. In this case, the Complainant failed to establish that a memo that was sent to the security director by her lieutenant constituted an adverse employment action. The Complainant alleged that the memo falsely accused her of being the subject of a large number of inmate complaints and of being unprofessional and demonstrating a lack of tact when working with inmates. The evidence failed to show that the memo cause the security director to form an unfavorable impression of the Complainant. The memo was an internal memo that was not made a part of the Complainant's personnel file. The memo had absolutely no effect on the Complainant's terms or conditions of employment. Gephart v. DOC (LIRC, 11/18/09).

To establish a *prima facie* case in the retaliation context, a causal connection must be shown between the Complainant's protected activity and an adverse employment action. In the context of a retaliation claim, sec. 111.322(3), Stats., makes it an act of employment discrimination "[to] discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice. . . ." Sec. 111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment. . .or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment." If the subject action is not one of those specified in these statutory sections, the applicable standard is whether the action had any concrete, tangible effect on the Complainant's employment status. A material adverse change in the

terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Warren v. DHFS (Wis. Pers. Comm'n, 02/09/01).

In order to prevail on a claim of retaliation under the Wisconsin Fair Employment Act, a Complainant is required to show that he was subject to a cognizable adverse employment action. A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion, a material loss of benefits, or other indices that might be unique to a particular situation. Vaughan v. UW (Wis. Pers. Comm'n, 09/07/00).

A *prima facie* of retaliation may be established by showing: (1) that the Complainant engaged in statutorily protected expression (i.e., the Complainant opposed a practice made unlawful under the Act, or made a complaint under the Act); (2) that the Complainant suffered an adverse action by the Respondent; and (3) that there is a causal link between the protected expression and the adverse action. If the Complainant establishes a *prima facie* case of retaliation, the Respondent may rebut the *prima facie* case by articulating a legitimate, non-discriminatory reason for the adverse action. Finally, should the Respondent meet its burden, the Complainant then has the burden of proving that the Respondent's proffered reasons are merely a pretext for discriminatory conduct. Sarazin v. W & G Transport (LIRC, 03/09/99).

In a retaliation case the employer's motivation is the ultimate issue. In order to establish a *prima facie* case of retaliation, the Complainant must show (1) that she was engaged in statutorily protected expression; (2) that she suffered an adverse action taken by the employer, and (3) that there was a causal link between the protected expression and the adverse action. The "causal connection" consists of evidence showing that a retaliatory motive played a part in the alleged adverse employment action. Callaway v. Madison Metro. Sch. Dist. (LIRC, 11/27/96).

To establish unlawful retaliation for opposition, an employee must show (1) that he or she engaged in statutorily protected opposition, (2) that the employer took an adverse action against the employee, and (3) that a causal connection exists between these two things. The causal connection can be established by showing that the adverse employment action followed within a fairly short period of time after the protected opposition activity. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

In a retaliation case, the employer's motivation is the ultimate issue. In order to establish a *prima facie* case of retaliation, the employee must show (1) that the employee opposed an unlawful employment practice, (2) that the employee suffered an adverse action by the employer, and (3) that there was a causal link between the opposition and the adverse action. The employer can rebut the *prima facie* case by showing a legitimate non-retaliatory reason for the adverse action, and the employee can prevail by showing that the reason is a pretext. Roden v. Federal Express (LIRC, 06/30/93); Alexander v. Aldridge, Inc. (LIRC, 10/21/91); Frierson v. Ashea Indus. Sys. (LIRC, 04/06/90).

In order to show a *prima facie* case of retaliation, a Complainant must show that: (1) the Complainant engaged in a statutorily protected expression; (2) the Complainant suffered an adverse action by the employer; and (3) a causal link exists between the protected expression and the adverse action. The presumption created then may be rebutted by the Respondent's articulation of a legitimate, non-retaliatory reason for its action. If the Respondent meets that burden of production, the Complainant must present evidence that the proffered reason was pre-textual. Acharya v. Carroll, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989).

The Complainant may establish a *prima facie* case of retaliation by showing that she engaged in protected activity, that she was thereafter subjected to an adverse employment action, and that a causal link exists between the two. Chandler v. UW-La Crosse (Wis. Pers. Comm'n, 08/24/89).

An inference of retaliation may be established by showing that a Complainant engaged in protected activity, was subjected to an adverse employment decision, and that there is a causal connection between these two facts. Jensen v. F.W. Woolworth Co. (LIRC, 05/22/87).

A Complainant who was not rehired established a *prima facie* case by showing that she had filed a discrimination complaint concerning her layoff and that the complaint was pending at the time of her failure to be recalled. Ealey v. Wis. Brick & Block (LIRC, 07/19/83), aff'd sub nom. Ealey v. LIRC (Dane Co. Cir. Ct., 08/09/84).

A *prima facie* case of retaliatory refusal to rehire is established by showing that the employee engaged in a protected activity, that the employer was aware of that activity, and that the employer thereafter refused to rehire the employee. McMillan v. LIRC (Greyhound Lines) (Ct. App., Dist. IV, unpublished opinion, 05/02/80).

It was not necessary for a discharged employee to show that a libelous letter of reference resulted in harm to prevail on her charge that it was sent in retaliation for her discrimination complaint. Pederson v. LIRC (Cepek Constr.) (Dane Co. Cir. Ct., 09/11/78).

133.22 Employer knowledge of oppositional activity

The Complainant was not required to demonstrate exactly when the Respondent became aware of her prior discrimination complaint in order to show that the Respondent had knowledge of her protected activity. Krueger v. Cnty. of Waupaca (LIRC, 08/22/18).

It cannot be found that an employer retaliated against an employee for engaging in protected activities without a showing that the employer was aware of the employee's prior discrimination complaints. Rosneck v. Univ. of Wis. Madison Gen. Library Sys. (LIRC 08/30/17), aff'd sub nom. Rosneck v. LIRC (Dane Co. Cir. Ct. 05/11/18), aff'd (Ct. App., Dist. IV, unpublished opinion, 07/3/2019).

The Complainant's complaint to her supervisors that a co-worker told her she was "bipolar" and "should be checked for ADD" was not regarded by the Respondent as a complaint of sex discrimination, since the remark had nothing to do with her sex and the Complainant never told the Respondent that she believed it was. Holmes v. Manitowoc Cnty. Sheriff's Dep't (LIRC, 9/30/14).

In a retaliation case, the required causal connection between the employee's conduct and the employer's adverse action is not established unless it is proved that the employer was aware of employee's conduct. Here, the only opposition to discrimination was communicated to an individual who was not an employee or agent of the Respondent and who did not relay the opposition to the Respondent. Nielsen v. Sports Clips (LIRC, 03/28/14).

Evidence of the employer's awareness of a Complainant's oppositional activity must be sufficient to support a finding that the individuals who decided to take action against the Complainant were aware of the oppositional activity, or that other employees who were aware of the activity induced the decision-makers to take action against the Complainant. Howard v. Lena's Food Mkt. (LIRC, 01/30/14).

It is an essential element of a retaliation case that an employer be shown to have been aware of the protected activity the employee engaged in and that it understand the activity to be related to alleged

discrimination. The Complainant's statement that she was in contact with an attorney and with the State of Wisconsin and was planning legal action, without mention of an equal rights claim or sexual harassment, was not sufficient to put the Respondent on notice that the Complainant was engaging in protected conduct. Rhinehart v. A & M Plumbing & Pump, Servs., LLC (LIRC, 6/7/13), aff'd, Rhinehart v. LIRC and A & M Plumbing* Pump Servs., LLC (Adams Co. Cir. Ct., 12/12/13).

If an employer does not know that an employee has made a complaint of discrimination, it obviously cannot be motivated by such knowledge in the conduct it undertakes. Crook v. County of Vernon (LIRC, 02/23/04).

The Complainant complained to one of his supervisors that, although he had been required to wear dress shoes rather than tennis shoes, a female employee was allowed to dress inappropriately at work. Evidence in the record established that the Respondent was aware of the Complainant's complaint that he was being treated differently than another employee, but the evidence did not establish that the Respondent was aware that the Complainant believed this different treatment was based on his sex. Therefore, there was no prohibited retaliation. Moller v. Metavante (LIRC, 11/13/03).

If an employer does not know that an employee has made a complaint of discrimination, it obviously cannot be motivated by such knowledge in the conduct it undertakes. Aken v. Blood Ctr. of S.E. Wis. (LIRC, 12/23/98).

To violate the prohibition against retaliation, the Respondent must have a belief that the Complainant is raising some kind of claim that discrimination is occurring. Where the Complainant in this case told management that he was getting tired about being teased about having sex with animals, this was insufficient to prove that he had made known to the Respondent that he was raising a claim of alleged sexual harassment. Matthews v. Bassett Bedding (LIRC, 10/27/93).

In order to violate the prohibition against retaliation, an employer must have a belief that the person retaliated against is raising some kind of claim that discrimination is occurring. If an employer does not have such a belief, it obviously cannot be motivated by such a belief in the conduct it undertakes. Thus, it is an essential element of a claim of retaliation that the Complainant prove that the employer was aware that the Complainant engaged in protected activities. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

Retaliation is conduct which the statute condemns solely because of the motivation which underlies it. The motive is anger or resentment against a person because the person has opposed a practice they believe to be discriminatory. In order to violate the prohibition against retaliation, the employer must have a belief that the person retaliated against is raising some kind of claim that discrimination is occurring. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

Although the Complainants were terminated at least in part for conduct in opposition to practices of their employer, they failed to prove that they had been retaliated against in violation of the Act where they failed to demonstrate that they had ever made it known that their opposition was based on their belief that the practices were discriminatory under the Act, and where the evidence demonstrated that the employer never understood the Complainants to be acting in opposition to perceived discrimination. Keller v. City of Brodhead (LIRC, 04/29/87).

A person alleging retaliation because of a previous complaint he had filed against the employer must show that he employer knew of the complaint. Acharya v. Univ. of Wisconsin (LIRC, 01/19/82).

133.23 Establishing a causal connection between the oppositional activity and the adverse employment action

The Complainant's oppositional activity, the filing and pursuit of previous Equal Rights Division complaints against the employer, took place a few months before the decision was made not to promote her. The Complainant based her retaliation claim primarily on proximity in time, but that argument was weakened by the fact that the timeline for filling the position the Complainant sought was entirely unrelated to the Complainant's oppositional activity. The employer articulated non-retaliatory reasons for choosing another candidate over the Complainant, namely, that the sole decision maker believed that the other candidate's fundraising experience was superior, and that it was reported to the decision-maker that the other candidate had better references. The Complainant was unable to show these reasons to be pretextual. Heart v. Univ. of Wis. - Superior (LIRC, 02/28/20).

Evidence of tardiness and no-shows emerged as a non-discriminatory reason for the Complainant's discipline and discharge during the Complainant's case. The Complainant made a sufficient showing of a causal connection, however, by presenting evidence of close timing between her complaints of sexual harassment and her discipline and subsequent termination for poor attendance, and by plausibly denying that she was absent without notice or late to work immediately prior to her discharge. The employer was not present at hearing to rebut the Complainant's evidence regarding her attendance. Howard v. Lena's Food Mkt. (LIRC, 01/30/14).

Although proximity in time may create an inference of a causal connection, it is not sufficient by itself to establish such a connection. This is true whether the issue is one of probable cause or the merits of a charge. Deal v. D & S Mfg. (LIRC, 06/20/08).

Since intent is a pertinent and necessary inquiry in a discrimination or retaliation case, the question of whether a Respondent's asserted non-retaliatory reason is objectively correct can be considered irrelevant if it appears that the Respondent genuinely believed it to be true. Engen v. Harbor Campus (LIRC, 02/22/08).

A causal connection between oppositional activity and an adverse employment action *may* be inferred from the proximity in time between the protected action and the alleged retaliation. However, a Complainant's establishment of a statutorily protected expression, and adverse action by the Respondent, and the existence of a causal connection between the protected expression and the adverse action only presents a rebuttable presumption that the Act has been violated. A Respondent may rebut this presumption by articulating a legitimate, non-retaliatory reason for its actions. Thus, while closeness in time may indicate the existence of a causal connection between protected expression and an adverse action, this does not establish unlawful discrimination in and of itself. Potts v. Magna Publications (LIRC, 02/27/01).

The timing of a complaint and an adverse employment action against the employee does not in itself establish retaliation. No retaliation was found where there was substantial evidence that the employer had a legitimate, non-discriminatory reason for disciplining the Complainant. Kannenberg v. LIRC, 213 Wis. 2d 373, 571 N.W.2d 165 (Ct. App. 1997).

To establish unlawful retaliation for opposition, an employee must show (1) that he or she engaged in statutorily protected opposition, (2) that the employer took an adverse action against the employee, and (3) that a causal connection exists between these two things. The causal connection can be established by showing that the adverse employment action followed within a fairly short period of time after the protected opposition activity. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

A causal connection between a protected activity and an adverse action can be inferred from a close proximity in time between the protected activity and the adverse action. Horton v. Hopkins Chem. Co. (LIRC, 06/08/92), aff'd, Dane Co. Cir. Ct., 04/28/93.

A causal connection between oppositional activity and an adverse employment action may be inferred from the proximity in time between the protected action and the alleged retaliation. Alternatively, the Complainant can prove causation by providing direct evidence of retaliatory motive. Frierson v. Ashea Indus. Sys. (LIRC, 04/06/90).

Where several months elapsed between the filing of a third party's complaint of discrimination and the issuance of an initial determination which listed the Complainant was a person interviewed, and where more than four weeks had elapsed between that initial determination being issued and the discharge of the Complainant alleging retaliation, all of those facts negated the inference that the Complainant was discharged in retaliation for being a person interviewed for a pending discrimination case, because the events did not follow closely in time. Wausau Hosp. Ctr. v. LIRC (Marathon Co. Cir. Ct., 11/27/85).

The discharge of an employee followed her protests about discrimination within such a short period of time (four to five months) that retaliatory motivation could reasonably be inferred. Weir v. A.E. Moore (LIRC, 02/20/80).

133.3 Retaliation by former employer

The Complainant sought to prove that a former employer retaliated against him by giving bad references to his prospective employers, but his only evidence was a report from a reference-checking service purporting to give the former employer's answers to reference questions. The report was hearsay, and although it might have been a record of regularly conducted activity under the hearsay exception of Wis. Stat. § 908.03(6), the Complainant failed to provide a foundation for the report through the testimony of the custodian of the report or another qualified witness. Although it may be admissible, hearsay evidence cannot be the entire support for a critical finding of fact. Germaine v. Sussek Machine Corp. (LIRC, 02/13/14).

Although anti-retaliation provisions of the WFEA extend to former employees, a nexus with employment is essential to find that retaliatory actions are covered. If the Complainant is alleging that the retaliatory action adversely affects prospects for future employment, the adverse action must have a significant and identifiable employment connection to the former employee's opportunities for future employment. DeMoya v. Dep't of Veterans Affairs (LIRC, 12/12/13).

While the retaliatory use of a negative evaluation to affect a former employee's job opportunities can form the basis of a discrimination complaint, such an allegation cannot be piggy-backed onto a separate complaint merely by characterizing it as evidence going to "damages" following a finding of liability. Swanson v. County of Chippewa (LIRC, 05/11/07).

The Complainant stated a claim for relief under the Wisconsin Fair Employment Act where she alleged that her former employer unlawfully retaliated against her by obtaining a restraining order against her. The restraining order, which prevented the Complainant from coming on the Respondent's campus or having contact with employees of the Respondent, would affect her opportunities not merely to be employed by the University, but also opportunities with respect to other employers which interacted with University employees or who had a presence on the University's campus. Garner v. UW-Milwaukee (LIRC, 02/10/06).

The Complainant stated a claim for relief under the Wisconsin Fair Employment Act where she alleged that her former employer had retaliated against her by filing a criminal complaint against her alleging that she

had made harassing phone calls. However, while the threat to make, or the making of, a criminal complaint alleging that a former employee made harassing phone calls may be unlawful retaliation, it may also be lawful if it was done in good faith, without the intent to retaliate, based on a genuine belief about the matters being alleged. Garner v. UW-Milwaukee (LIRC, 02/10/06).

The Complainant alleged that, following her discharge by the Respondent, the Respondent made comments to one of its employees (who was a friend of the Complainant's) which caused her stress. The complaint did not include any allegation that the alleged post-discharge harassment (which allegedly consisted of asking the Complainant's friend questions about personal topics, such as where the Complainant worked and what her vacation plans were) had an adverse effect upon the Complainant's employment opportunities. Even if the Respondent's actions actually resulted in the type of stress claimed by the Complainant, there was no significant connection between those actions and an employment relationship, nor did the Respondent's actions impair the Complainant's future employment opportunities. Accordingly, the complaint was properly dismissed by the Division. Riley v. Van Galder Bus Co. (LIRC, 05/24/99).

The Complainant's claim that the Respondent released the terms of a confidential settlement agreement does not constitute a valid claim of retaliation under the Wisconsin Fair Employment Act. The Respondent's release of confidential settlement information had no relationship whatsoever to the Complainant's employment. Peck v. Walworth County (LIRC, 09/27/96).

Commencing a legal action against an employee or former employee because they have made a charge of discrimination can be a violation of the anti-retaliation provisions of the Wisconsin Fair Employment Act. However, the Act's anti-retaliation provision does not necessarily make unlawful an employer's attempts to judicially enforce an alleged settlement agreement if the enforcement action had a colorable basis and was brought in good faith and without any punitive motive. Stillwell v. City of Kenosha (LIRC, 09/29/95).

The anti-retaliation provision of the Wisconsin Fair Employment Act extends to former employees. In this case, the Respondent filed an unfair labor practice charge before the Wisconsin Employment Relations Commission (WERC) against the Complainant, who at the time was no longer employed by the Respondent, but was proceeding to a hearing on a complaint of handicap discrimination against the Respondent. The Complainant alleged that the Respondent's filing of the charge before the WERC constituted unlawful retaliation for protected activity under the Wisconsin Fair Employment Act. However, the Complainant's claim of retaliation was not related to an employment relationship and, thus, fails to come within the scope of the Wisconsin Fair Employment Act. There was not a significant connection between the alleged adverse action by the Respondent and the Complainant's employment opportunity. The gist of the WERC claim was that the Complainant should not be allowed to proceed with his handicap discrimination claim because the issues decided in that claim were already decided by an arbitrator. The WERC complaint did not have negative implications with respect to the Complainant's activity at the workplace or his integrity as a human being. Thus, the Respondent's action could not damage the Complainant's reputation or impair his future employment opportunities. Seeman v. Universal Foods Corp. (LIRC, 09/22/94).

The Complainant alleged that the Respondent had retaliated against her in violation of the Wisconsin Fair Employment Act by including a defamation claim against her in a civil lawsuit already pending between the parties. The Respondent has a constitutionally protected first amendment right to bring a defamation claim in state court; however, the suit must be well-founded. There are two elements required to establish unlawful retaliation in such circumstances: (1) the lack of a reasonable basis for the state court lawsuit, and (2) a retaliatory motive. Thus, the Department must make a specific finding as to whether the lawsuit was well-founded before determining whether the lawsuit was filed in retaliation against the Complainant. If the Respondent presents a reasonable basis to the Department which demonstrates that the state court lawsuit raises genuine issues of material fact, then the agency should not proceed any further with a subsequent retaliation complaint because there are legitimate issues joined in the circuit court lawsuit. If,

on the other hand, the Department finds that the defamation action is plainly foreclosed as a matter of law or is frivolous, the Department may proceed on the retaliation complaint. State of Wis. v. DILHR (Dane Co. Cir. Ct., 04/11/94).

An adverse action can, in some circumstances, be subject to the anti- retaliation provisions of the Wisconsin Fair Employment Act even though its relationship to an employment opportunity is only indirect. For example, anti-retaliation provisions cover the giving of bad references to an ex-employee in retaliation for a complaint of discrimination by that employee. Filing a lawsuit in tort against an Equal Rights Complainant seeking damages for defamation or malicious prosecution may also be retaliatory. Similarly, threatening an Equal Rights Complainant with criminal charges for allegedly making threatening phone calls to the employer could also be subject to anti-retaliation provisions. In each of these cases there is some effect upon future employment opportunities of the Complainant. In this case, however, the action which the Respondent is alleged to have engaged in because of a retaliatory motive-contacting the City Recreation Department to report that the Complainant was not a resident of the City in whose softball league she was participating--bears no conceivable relationship whatsoever to any employment opportunity, past, present, or future. While the motivation for the action arose in an employment-related context, the action itself had no relationship to employment and it was, therefore, not prohibited retaliation. Pufahl v. Niebuhr (LIRC, 08/16/91), aff'd sub nom. Pufahl v. LIRC (Dane Co. Cir. Ct., 06/16/92).

133.4 Cases

Not all behavior undertaken in the course of opposition to discriminatory conduct is protected. Where the Complainant was rude to the CEO, demanded that management employees be fired, and walked out of a meeting designed to address her complaints, the Respondent had a legitimate nondiscriminatory reason to discharge her. Hodge v. Brunner Wire Prods., Inc. (LIRC, 10/15/17), aff'd sub nom. Hodge v. LIRC (Juneau Co. Cir. Ct., 04/17/19).

The Respondent did not retaliate against the Complainant by denying him a severance package that was offered to him (and others, who accepted the terms) on the condition he waive his prior discrimination complaints filed against the Respondent, when the Complainant refused to agree to the waiver. The Complainant had no independent entitlement to the severance pay and the Respondent was within its rights to attach such conditions. Davis v. Time Warner Cable of Se. Wis. (LIRC, 08/16/13).

The Complainant need not show that the Respondent's actions resulted in tangible harm in order to establish unlawful retaliation. The Respondent's actions in telling the Complainant his chances for a promotion depended on withdrawal of his pending discrimination complaint amounted to unlawful retaliation. Valyo v. St. Mary's Dean Ventures, Inc. (LIRC, 01/29/13).

The Complainant contended that she had opposed sexual harassment in the workplace when she told one of the Respondent's owners that he needed to "watch it with these girls," and that he was making them "uncomfortable." This statement was too vague to put the Respondent on notice that the Complainant believed that he was engaging in any conduct that violated the law. Freeman v. Animal Motel (LIRC, 07/18/11).

The Complainant alleged that the Respondent retaliated against her after she went over the head of the store manager to complain about her Thanksgiving holiday schedule. This was not an activity which was protected by the Wisconsin Fair Employment Act. Keene v. Menard (LIRC, 05/08/08).

The Complainant failed to establish that the Respondent would reasonably have been aware that she was raising a claim of sexual harassment where she testified that she believed that she told a manager not to

touch her anymore. She did not expressly state that she believed such touching (which consisted of hugging her and rubbing her shoulders and arms) constituted harassment, and it
is not reasonably implicit from the evidence that the manager should have interpreted her statement that way. The Complainant also testified that she told the manager she did not feel comfortable with comments he had made about her body and asked him not to say that type of thing to her. (These comments consisted of his telling the Complainant that she was not fat and looked good when she jokingly referred to herself as "plump," and a similar comment made while she was sharing her emotional distress regarding a personal issue and apparently willingly accepted the manager's expressions of sympathy and empathy.) Given the context, the Complainant's statement could have reasonably been interpreted by the manager as indicating that discussion of her weight made her uncomfortable, that discussion of weight or looks was unprofessional or inappropriate in the workplace, or that she no longer needed reassurances from him because she was no longer feeling distressed and emotional about her personal issues. As a result, the Complainant failed to sustain her burden of proving that she had engaged in a protected opposition activity. Engen v. Harbor Campus (LIRC, 02/22/08).

While the Complainant and her supervisor were on break together and were engaged in general conversation about their personal lives, the supervisor indicated that her children liked "jungle bunny" music. When the Complainant asked what she meant by that term, the supervisor replied, "hip hop and rap." The following day the Complainant told the supervisor that she should find a better way to describe hip hop and rap music because the term "jungle bunny" was derogatory and some people might be offended by it. The supervisor indicated that she understood, and the incident was not mentioned again. The Complainant later filed a complaint alleging that she was discharged in retaliation for her opposition to a discriminatory practice. The Complainant was essentially alleging that the supervisor engaged in racial harassment when she made reference to "jungle bunny" music. Whether or not illegal harassment has occurred is evaluated on both (1) an objective basis (i.e., would a reasonable person find the conduct offensive and unwelcome?) and (2) a subjective basis (did the Complainant actually do so?). In this case, the Complainant conceded that she did not find the "jungle bunny" comment offensive. Although the result could have been different had another individual overheard the conversation between the Complainant and her supervisor and found it objectionable, that is not what occurred here. The Complainant failed to show that, at the time she engaged in the subject opposition activity by telling her supervisor she should find some other term for rap and hip hop music, she believed that discrimination in the form of racial harassment had occurred. As a result, although the supervisor's comment could satisfy the objective reasonable person racial harassment test, it did not satisfy the subjective test. Therefore, the Complainant failed to prove that she engaged in a protected employment activity and, as a result, she failed to prove that she had been retaliated against in violation of the Wisconsin Fair Employment Act when she was discharged. Watson v. Once Upon A Child (LIRC, 06/29/07).

The decision of the Equal Rights Division that a chief of police and a management labor relations consultant acted with a retaliatory motive in discharging the Complainant was reversed. Neither the chief of police nor the management labor relations consultant had the authority to discharge a police officer. The Police and Fire Commission, which is a statutorily-granted body totally independent from the police department, is expressly granted the power to remove officers, according to state law. Since the Equal Rights Division found that the members of the Police and Fire Commission were not motivated by a retaliatory motive, the Complainant's case should have been dismissed. City of River Falls Police Dep't v. LIRC (Pierce Co. Cir. Ct., 01/30/86).

A complaint was properly dismissed for failure to state a claim for relief under the Wisconsin Fair Employment Act where the wrong which the complaint alleged had no significant connection to any employment relationship or employment opportunity for the Complainant. The Complainant, a former employee of a university, alleged that the University's police department did not properly handle or investigate a criminal complaint which she had made. This had nothing to do with

employment, but instead related to a service (police protection) provided by the University to the public at large. There was no reasonable basis to believe that the University's failure to investigate the Complainant's complaint about alleged criminal conduct by someone else would have any significant connection to any employment relationship or that it would impair the Complainant's future employment opportunities. Garner v. UW-Milwaukee (LIRC, 02/10/06).

The retaliation provisions of the Wisconsin Fair Employment Act do not cover the Complainant's claim that her request to have the Respondent accommodate her disability constituted a protected activity. Bjork v. DFI (Wis. Pers. Comm'n, 11/14/01).

Independent contractors are not protected by the Wisconsin Fair Employment Act. In this case, the relationship contemplated by the parties did not involve an employee-employer relationship "employment opportunity." Therefore, the Respondent could not have retaliated against the Complainant for opposition to alleged discrimination in violation of the Act by refusing to enter into an independent contractor relationship unless the Complainant signed a release of his employment claims against the Respondent. Weier v. Heiden, Inc. (LIRC, 02/05/98).

Proof of unlawful retaliation for opposition must include proof that the employer actually has the perception that the conduct engaged in by the employee (which is claimed to have caused the retaliation) was an attempt by the employee to oppose alleged discrimination. It is not necessary for the employee to have been objectively "right" about a belief that an action opposed was prohibited discrimination, as long as some test of reasonableness and good faith is met. Where the Complainant made allegations of discrimination without believing in the truth of those allegations, the "opposition" is not protected under the Act. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

Where the employee actually filed a charge and verbally notified the employer of that action, the employee's actions are covered by the "participation" protection of the Act. It is not necessary that the Complainant prove even a reasonable good faith belief in the validity of the charges in the complaint. The participation protection extends even to those who have filed false and malicious charges. Notaro v. Kotecki & Radtke, S.C. (LIRC, 07/14/93).

The Complainant established a case of retaliation in terms and conditions of employment, where she showed that she rejected unwelcome sexual advances from her supervisor and her supervisor subsequently denied her previously approved job training and shift changes, harassed her about her expense report and disciplined her, all for no apparent good reason. Roden v. Federal Express (LIRC, 06/30/93).

The Complainant stated a claim for relief under the Wisconsin Fair Employment Act when she alleged that she was retaliated against by the Respondent when it filed a civil action in circuit court seeking to enforce a settlement agreement which the Complainant had previously refused to sign. Stillwell v. DILHR (Ct. App, Dist. II, unpublished opinion, 03/17/93).

The Respondent did not unlawfully retaliate against the Complainant because she had filed a complaint of discrimination with the Equal Rights Division. Although the Complainant's hostility toward management was cited by the Respondent as a reason for its discharge decision, the reference was not to her actions in opposing perceived discrimination, but to her day-to-day resistance to directions by her immediate supervisors. This was not protected conduct on the Complainant's part. Delapast v. Northwoods Beach Home Caring Homes (LIRC, 02/17/93).

The Complainant did not state a claim for relief for retaliation under the Wisconsin Fair Employment Act where she alleged that the Respondent retaliated against her for filing a prior charge of discrimination by

asking her a series of personal and allegedly irrelevant questions during a deposition. It would be going beyond a fair liberal construction of the Wisconsin Fair Employment Act to hold that "terms, conditions or privileges of employment," encompasses an employer's line of questioning at a deposition taken in connection with the employee's civil service appeal of a disciplinary action. Larsen v. DOC (Wis. Pers. Comm'n, 07/11/91).

A causal connection was established between the Complainant's filing a complaint of discrimination and the Complainant's discharge four months later because of: (1) the proximity in time of the two actions, (2) a supervisor's comment that the Complainant probably would be discharged for the complaint, and (3) the Respondent's attempt to settle the discrimination case at the time the Complainant was discharged. Frierson v. Ashea Indus. Sys. (LIRC, 04/06/90).

The Respondent discharged the Complainant because he had filed prior complaints of discrimination against the Respondent and because he opposed a practice he believed discriminatory. The Respondent's stated reason for discharging the Complainant was that he knowingly allowed another employee to work while under the influence of alcohol. This asserted reason was found unworthy of credence because the Respondent did not discharge the Complainant until one month after the event in question and during that time the Equal Rights Division began its investigation of one of the Complainant's discrimination complaints. Savage v. Stroh Container (LIRC, 09/20/89).

In a case in which it was concluded that the Complainants' opposition to their employer's practices was never known to the employer as being opposition based on perceived discrimination, even if it was assumed that the Complainants had in fact been retaliated against because of opposition to discriminatory practices, the extremely threatening and disruptive nature which their opposition took deprived it of protected status under the Act and the opposition became an independent and nondiscriminatory reason for their discharge. Keller v. City of Brodhead (LIRC, 04/29/87).

Statements by an employee's supervisor that the employee would have been recalled to work after a job layoff had she not filed a complaint of discrimination against the employer are relevant to the issue of retaliation. Anderson v. Marion Plywood, Inc. (LIRC, 06/18/84).

The employee was discriminated against in retaliation for having assisted another employee with her charge of discrimination when his merit review and salary increase were delayed. Resch v. Stowe Woodward Indus. (LIRC, 04/16/82).

The employer retaliated against an employee by refusing to offer her a position because her sex discrimination complaint was pending before DILHR. Hayward Community Sch. v. DILHR (Hedin) (Sawyer Co. Cir. Ct., 05/04/82).

The employee presented a *prima facie* case of retaliation by showing that the employee's decision not to renew his deputy card was made at the same time his discrimination complaint was pending. The allegations of poor performance advanced by the employer were pretextual since he had served six years without serious incident. Algozino v. Waupaca County (LIRC, 03/24/81).

Where an employee was terminated for opposing her employer's discriminatory policy regarding temporary disability leave for pregnancy and for supporting a fellow employee's challenge of that policy, her discharge was retaliation. Berg v. La Crosse Cooler (LIRC, 03/21/81).

The employee was discriminated against in retaliation for having filed a race discrimination complaint when she was harassed and intimidated by supervisory personnel and was denied a temporary assignment to a better paying position. Royston v. Geuder, Paeschke & Frey (LIRC, 10/09/79).

Where a layoff occurred after DILHR had issued an initial determination of probable cause, an inference was raised that the layoff was retaliatory. However, the employer overcame that inference by showing: 1) a general decline in business, 2) a practice of not replacing employees who quit or retired, and 3) execution of the layoff in accordance with the contract. Allison v. Jensen's Cleaners (DILHR, 06/14/74).

133.9 Miscellaneous

The Complainant established that she was discharged for opposing sexual harassment. However, she was not entitled to compensation in lieu of reinstatement under sec. 111.39(4)(c), Stats., because compensation in lieu of reinstatement may be awarded only on proof of a discharge for opposing a discriminatory practice under sec. 111.322(2m), Stats. Clark v. Golden Basket Rest. (LIRC, 05/28/96).

134 RETALIATION FOR EXERCISE OF RIGHTS UNDER CERTAIN LAWS OTHER THAN THE WFEA [Sec. 111.322(2m), Stats.]

Pursuant to sec. 111.322(2m), Stats., it is unlawful to discharge or otherwise discriminate against an individual because he has filed a complaint under, attempted to enforce any right under, or testified or assisted in any action or proceeding held under a number of statutes other than the Wisconsin Fair Employment Act, or because the individual's employer believes that the individual engaged in or may engage in any such activity. The statutes covered by this provision are:

66.0903 [Municipal Prevailing Wage and Hour]
101.58-101.599 [Employees' Right to Know]
103.02 [Hours of Labor]
103.10 [Family and Medical Leave Act]
103.13 [Records Open to Employees]
103. 28 [Street Trades Regulation]
103.32 [Recovery of Arrears of Wages]
103.455 [Deductions for Faulty Workmanship, Loss, Theft or Damage]
103.49 [Wage Rate on State Work]
103.50 [Highway Contracts (Prevailing Wage)]
103.64-103.82 [Employment of Minors]
104.12 [Minimum Wage]
109.03 [Wage Claims]
109.07 [Plant Closing]
109.075 [Health Care Benefit Plan Cessation]
146.997 [Health Care Worker Protection]
229.8275 [Prevailing Wage – Local Football Stadium Districts]

Note: For cases under sec. 111.322(3), Stats., involving retaliation for exercise of rights under the Wisconsin Fair Employment Act, refer to Section 133.

134.1 Coverage

The Complainant threatened to call DWD about a complaint regarding the payment of overtime and was discharged shortly thereafter. The Respondent claimed that the Complainant was discharged for a "poor attitude that did not fit in with the culture of the business" and elaborated that the Complainant was "threat[ening] to call the State instead of working through the process with administration." The Complainant's discharge under these circumstances was directly related to his protected conduct. White v. Gilman Care Ctr., LLC (LIRC, 07/21/14).

The Complainant's actions fell short of attempting to enforce a right to payment of wages. Although she contacted the ERD and obtained a fact sheet concerning the right to wages, she did not show an interest in enlisting the agency's assistance to enforce the right by asking it to investigate, reporting the name of the employer, or asking for advice in filing a complaint. In the absence of taking any step other than obtaining the fact sheet, the Complainant's presentation of the sheet to the Respondent was an act of self-help opposition to the Respondent's practices, not an attempt to enforce a right by resort to a governmental agency. In addition, the evidence did not show that the Respondent ever formed the belief that the Complainant may file a wage complaint or take some other formal step to enforce her rights. Matuszewski v. Kiddie Kare Akademie (LIRC, 02/13/14).

Section 111.322(2m), Wis. Stats., is referred to as the "omnibus" anti-retaliation provision of the Wisconsin Fair Employment Act because it prohibits retaliation by employers under a number of statutes other than the Wisconsin Fair Employment Act. The statutory term "attempts to enforce any right" in that statute was

intended to refer solely to formal attempts to enforce a right by resort to the governmental agency charged with enforcement of that right. The Complainant's claim that he was "attempting to enforce his rights" to be paid vacation pay owed to him under the wage claim statutes by complaining to management was properly dismissed. Alarcon v. Ave. Bar (LIRC, 12/28/12).

The Complainant's allegation that he was discharged in violation of sec. 111.322(2m)(d), Wis. Stats., because his employer believed that he might file a wage complaint with the Equal Rights Division was dismissed for lack of proof. Evidence that an employer believed that a Complainant planned to file a complaint or testify or assist in a proceeding to enforce a right to payment of wages does not have to include any "magic words" but can consist of other circumstantial evidence of an employee's intent to take formal action. The question is whether the employee has given some indication that he intends to file a wage claim, and whether the record establishes that the employer believed the employee intended to take such an action. Alarcon v. Ave. Bar (LIRC, 12/28/12).

Either an employer's actual knowledge of an employee's filing of a wage claim or the employer's belief that the employee may file such a claim is equally sufficient to satisfy the knowledge prong of the requirements for establishing a *prima facie* case. Gunty v. City of Waukesha (LIRC, 03/29/07).

The Wisconsin Family and Medical Leave Act specifies that an employee who believes his employer has interfered with the exercise of his rights or discriminated against him for opposing a practice prohibited under the Wisconsin Family and Medical Leave Act may file a complaint with the Department. An internal complaint or grievance is not a complaint filed under the FMLA; nor can it be considered an attempt to enforce a right under the FMLA. In this case the Complainant filed an internal complaint and a union grievance alleging that the Respondent had harassed her for invoking her right to take FMLA leave. This was not an attempt to enforce a right under the FMLA which would give rise to a complaint under sec. 111.322(2m), Stats. Swanson v. County of Chippewa (LIRC, 05/11/07).

The Complainant was terminated for informally pursuing with his employer his contention that he had been improperly denied the prevailing wage rate for his work on a project. However, this type of activity is "oppositional" rather than "participatory." Sec. 111.322(2m), Stats., by its terms, applies only to formal participatory activities, not informal oppositional ones. Domini v. Jason Schultz Trucking (LIRC, 02/24/05).

Sec. 111.322(2m)(d), Stats., makes it an act of employment discrimination for an employer to discharge or otherwise discriminate against an individual because the employer believes the individual may file a complaint or attempt to enforce a right under various referenced statutes. This statute is concerned with the motives of the employer. It does not require any "magic words" by the employee. The employee is simply required to present sufficient facts and circumstances that establish that an employer has taken unlawful action because it believes he or she might file a complaint or attempt to enforce a right under the referenced statute. An employee need not make an explicit threat to file a complaint before coming under the protection of the statute. Hephner v. Rohde Bros. (LIRC, 06/30/04).

A complaint that the Complainant was discharged by the Respondent in retaliation for having attached written comments to a personnel record is not cognizable under the Wisconsin Fair Employment Act. Section 103.13, Stats., affords employees the right to inspect and make copies of certain personnel records and to attach corrections and comments to personnel records with which
they disagree. Section 103.13(7m), Stats., provides as follows: "Sec. 111.322(2m) [of the Wisconsin Fair Employment Act] applies to discharge or other discriminatory acts in connection with any proceeding under this section." The Labor and Industry Review Commission has consistently held that sec. 111.322(2m), Stats., recognizes only the "participation" form of protected activity. The Complainant in this case did not contend that she instituted or threatened to institute any type of proceeding aimed at enforcing her rights under the Personnel Record Law. The fact that the Personnel Record Law contains a

civil forfeiture provision (sec. 103.13(8), Stats.) suggests that an employee can seek enforcement for her employer's failure to abide by the law by instituting a proceeding before the district attorney. If the Complainant in this case had attempted to institute a proceeding before the district attorney or any other appropriate forum and believed that she was discharged as a result, she would have been able to state a claim for which relief could be granted under the Wisconsin Fair Employment Act. The Complainant's concerns regarding the lack of protection afforded those employees who exercise the rights conferred by the Personnel Records Law are more appropriately addressed to the legislature, which has the authority to draft corrective legislation, should it deem this necessary. Corry v. Multiple Listing Serv. (LIRC, 07/21/95).

Section 101.055(8)(a), Stats., prohibits retaliation against a public employee who has exercised a right afforded by sec. 101.055, Stats., related to occupational safety and health. The method of analysis applied in Public Employee Health and Safety retaliation cases is similar to that applied in the context of retaliation claims filed under the Wisconsin Fair Employment Act. To establish a prime facie case of Public Employee Health and Safety retaliation, there must be evidence that (1) the Complainant engaged in a protected activity and the alleged retaliator was aware of this activity; (2) the Complainant was "discharged or otherwise discriminated" against (sec. 101.055(8)(b), Stats.); and (3) there is a causal connection between (1) and (2). McKibbins v. UW-Milwaukee (Wis. Pers. Comm'n, 04/04/95).

Unlike sec. 111.322(3), Wis. Stats., which protects both opposition and participation, the more recently enacted sec. 111.322 (2m), Wis. Stats., recognizes only the participation form of protected activity. It makes it unlawful to discharge or otherwise discriminate against an individual because that individual filed a complaint or attempted to enforce any right or testified or assisted in any action or proceeding held under or to enforce any right under the referenced statutes (or is believed by the employer to have engaged in such activity). The language "attempts to enforce a right" under the statute refers solely to formal attempts to enforce a right by resort to the governmental agency charged with enforcement of that right. In this case, there was no "action or proceeding" before the Equal Rights Division at any time prior to the allegedly retaliatory discharge. The Complainant had never filed a complaint with or otherwise attempted to invoke the authority of the Equal Rights Division at any time prior to the allegedly retaliatory discharge. The Complainant's complaint to a municipal building inspector and to OSHA cannot be viewed as attempts to enforce a right under the Employee's Right to Know Law because neither municipal building inspectors nor OSHA have any role in the enforcement of that law. Therefore, the Complainant's conduct was not protected under sec. 111.322(2m), Wis. Stats. Pampuch v. Bally's Vic Tanny Health & Racquetball Club (LIRC, 03/07/94).

Only retaliation because of acts of participation under the listed statutes is made unlawful under the omnibus anti-retaliation provision of the Wisconsin Fair Employment Act, sec. 111.322(2m), Stats. Roncaglione v. Peterson Builders (LIRC, 08/11/93), aff'd sub nom. Roncaglione v. LIRC (Dane Co. Cir. Ct., 05/06/94).

The Wisconsin Family and Medical Leave Act prohibits discharging or discriminating against an individual for opposing a practice prohibited under the Act. Other kinds of retaliation relating to the Family and Medical Act are now defined as discrimination under the omnibus anti-retaliation provision of the Wisconsin Fair Employment Act, sec. 111.322(2m), Stats. These cases are appealable to the Labor and Industry Review Commission, rather than to Circuit Court. Roncaglione v. Peterson Builders (LIRC, 08/11/93), aff'd sub nom. Roncaglione v. LIRC (Dane Co. Cir. Ct., 05/06/94).

The Public Employee Safety and Health Act does not have the same presumption of retaliation or the same definition of discipline found in the Whistleblower Law. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

134.2 Standard of proof

The Wisconsin Fair Employment Act prohibits the discharge of an employee because he has filed a wage claim under sec. 109.03, Stats., or because he has attempted to enforce any right under that statute or because the employer believes that he may do so. In those cases where an employee has not actually filed a wage claim or made a specific threat to do so, the question is whether the employee has given some indication that he intends to file a wage claim and whether the record establishes that the employer believed that the employee intended to take such action. In deciding that question, the decision-maker will consider not only the employee's words, but the entire context of the interactions between the employee and the employer. Brockmann v. Abacus Bertz Ins. (LIRC, 05/31/12).

The Respondent's motivation is the ultimate issue in a retaliation case. In order to establish a *prima facie* case of retaliation, the Complainant must show that: (1) he opposed an unlawful employment practice, (2) he suffered an adverse employment action, and (3) there was a causal connection between the opposition and the adverse action. The Respondent can rebut the *prima facie* case by showing a legitimate non-retaliatory reason for the adverse action. The Complainant can prevail by showing that the proffered reason is merely a pretext for retaliatory conduct. In order to establish a causal connection, it must be shown that the alleged retaliator was aware of, or had reason to be aware of, the Complainant's protected activity. The Complainant in this case failed to show that the Respondent had any reason to be aware of the wage claims the Complainant filed prior to the time that she became employed by the Respondent. Smith v. The Terrace at St. Francis (LIRC, 12/08/06).

A causal connection between a Complainant's contacting the Labor Standards Bureau about her right to overtime pay and her discharge may be inferred from the close proximity in time of those events. Hickman v. Milwaukee Immediate Care Ctr. (LIRC, 02/16/00), aff'd sub nom. Milwaukee Immediate Care Ctr. v. LIRC (Milwaukee Co. Cir. Ct., 11/02/00).

134.3 Cases

The Complainant's statement to her employer that she wanted to be paid for unpaid overtime hours was not an "attempt to enforce a right" to overtime pay under Wis. Stat. § 103.02, nor did the Complainant establish that the employer believe she intended to do so. Radtke v. Vaportek, Inc. (LIRC, 12/30/22). (appealed to court)

In the context of an ongoing dispute about reimbursement for insurance payments the Complainant's statement to the Respondent that "I am on the warpath against you by every legal and lawful means available" was construed as expressing an intent to file a wage claim. However, the Respondent discharged the Complainant based upon insubordinate conduct and not because it believed he engaged in protected conduct. Ball v. A-1 Express Trucking, Inc. (LIRC, 07/30/21).

Shortly after the employee told her supervisor that if the Department of Health Services (DHS) heard what was happening in the facility it would shut them down, DHS conducted an unannounced inspection of the employer's facility. Even though the employee's supervisor stated that DHS did not tell her who filed the complaint, it can be presumed that she guessed it was the employee and understood the employee had engaged in protected conduct. The employer's decision to discharge the employee a week later with no intervening misconduct on the employee's part supported a finding of probable cause to believe that unlawful retaliation occurred. Brunette v. Cardinal Ridge Residential Care, LLC (LIRC, 02/22/19).

The Complainant filed a wage and hour complaint while off work on a seasonal lay-off. The fact that the Complainant was discharged two months later was not shown to be due to discriminatory animus where the Respondent rehired the Complainant after he filed the complaint and increased his salary, and where the Respondent presented evidence to indicate that it was genuinely dissatisfied with the Complainant's work performance. Archibald v. All Green Corp. (LIRC, 06/04/18).

None of the anti-retaliation statutes enforced by the Equal Rights Division apply to the Complainant's allegations of mistreatment by the individual she was caring for. Both Wis. Stat. §§ 55.043 and 46.90(4)(b) are designed to protect individuals who attempt to act in the interest of a certain class of vulnerable adults. Where the Complainant did not report that the Respondent was abused, financially exploited, or neglected, but instead made a series of allegations against the Respondent, such allegations are not covered by the statutes. Banda v. Estate of Barbara J. Fickau (LIRC, 05/31/17).

The employer's decision to discharge the employee after she threatened to contact the DA regarding illegal deductions from her wages amounted to unlawful retaliation. LIRC rejected the employer's argument that it did not know the deductions were illegal. Peterson v. TCAT Corp. (LIRC, 04/30/15), aff'd sub nom. TCAT Corporation v. LIRC and Peterson (Richland Co. Cir. Ct. 04/29/16), aff'd (Ct. App., Dist. IV, per curiam, 08/24/2017).

An employee need not prove that she made an explicit threat to file a wage complaint, but merely needs to show facts and circumstances demonstrating that the employer believed she might. The fact that the employee's husband, who was also her co-worker and subject to the same wage reductions as the employee was, threatened to file a wage claim, was sufficient to give rise to a belief that the employee intended to file a similar claim. White, Janice v. Gilman Care Ctr., LLC (LIRC, 07/21/14).

It is unlawful under the HCWPA to terminate the employment of a doctor because he complained about another doctor's practices. The fact that the doctor being complained of was no longer employed by the Respondent at the time did not put the claim outside of the coverage of the HCWPA. Siegel v. Marshfield Clinic (LIRC, 10/31/13).

The Respondent discharged the Complainant and handed him a paycheck, from which $1,110 had been deducted to offset damages to the truck that the Complainant had driven during his employment. The Complainant immediately informed the Respondent that he would be filing a wage complaint challenging the deduction, but the Respondent had no belief prior to the discharge that the Complainant might file a wage claim. The act of discharging the Complainant was not a retaliatory act, because it occurred before a wage complaint was filed and before the possibility of the filing of a wage complaint was contemplated. When, a few weeks later, the Respondent reversed course by issuing a check to the Complainant in settlement of the wage claim that the Complainant did in fact file, it was not retaliation by the employer to make payroll deductions from that check, even though it was incorrect to do so, because the mistake appeared to result from reliance by the Respondent on the advice of the Labor Standards Investigator. Sowle v. Somniak (LIRC, 10/14/13).

The statute prohibiting retaliation is concerned with the motives of the employer. While the law does not require any "magic words" and an employee need not make an explicit threat to file a wage claim, she must nonetheless present some evidence that would warrant a conclusion that the Respondent formed the belief that she might do so. In this case, during an argument about the Complainant's unemployment insurance and worker's compensation claims, the Respondent told the Complainant that she would not receive "a cent" and that she would "never work again." The Complainant responded that she was going to "take it to Equal Rights" and "take it downtown to [her] lawyer." The Complainant maintained that the Respondent should have known that she was referring to filing a wage claim. However, the facts in this case fell short of warranting a finding that the Complainant had engaged in protected activity. Freeman v. Animal Motel (LIRC, 07/18/11).

The Administrative Law Judge determined that the Complainant had been unlawfully retaliated against because she had filed a complaint under the Wisconsin Family and Medical Leave Act. The Complainant was not entitled to back pay because she had already resigned prior to the retaliatory conduct, and had lost no wages or benefits as a result of the Respondent's conduct. Subsequent to the hearing on the merits, the

Complainant filed a motion for a continued hearing on damages, at which she wanted to present evidence establishing that the Respondent had publicized a poor separation report and that this had cost her other employment opportunities. This request was rejected because it was a separate claim occurring subsequent to the facts at issue in this case, rather than a question of damages. Swanson v. County of Chippewa (LIRC, 05/11/07).

The Complainant in this case established sufficient competent evidence to establish a *prima facie* case that he was discriminated against because he had filed, or the Respondent believed he would file, a wage claim under sec. 109.03, Stats. He presented evidence which included: (1) that an alderman had been overheard saying, "We'll fire that motherfucker if he files that claim," (2) that shortly after he filed his wage claim an alderman announced that he wanted to form a committee for the purpose of reducing the pension fund by eliminating staff, (3) that as a result of this, the Complainant was the only one who lost his position, (4) that, according to the mayor, the city did not save a significant amount of dollars by eliminating the Complainant's position, and (5) that the Complainant was told by the council president that the elimination of his position "was nothing personal to him, although it may have been a factor with other aldermen." This evidence was sufficient to cause the burden to shift to the Respondent to articulate through its witnesses a legitimate, non-discriminatory reason for the Complainant's discharge. Gunty v. City of Waukesha (LIRC, 03/29/07).

The Complainant's daughter filed a claim for unpaid vacation and overtime. The Respondent's owner was visibly upset upon receiving notice of that complaint, and she discharged the Complainant the same day. Given the timing of the events, and considering that the Respondent knew that the Complainant was also banking unpaid overtime, one could reasonably draw the inference that the Respondent believed that the Complainant might file a wage claim and discharged her for that reason. Klatt v. Hallie Chiropractic (LIRC, 08/28/06).

It is true that the law does not require an employee to utter any "magic words," and that an employee need not make an explicit threat to file a wage claim. However, a Complainant must nonetheless present some evidence which would warrant a conclusion that the employer formed the belief that she might do so and, further, that it discharged her for that reason. In this case, the Complainant did not tell the Respondent that she had been in contact with the Equal Rights Division or that she intended to do so. Nor is there any evidence to suggest that the Respondent formed the belief that the Complainant was planning to file a wage claim against it. The Complainant's comment that another worker had gone to the Equal Rights Division with regard to a separate wage dispute, while possibly establishing that the Complainant was aware that she had recourse to the Equal Rights Division and could file a wage claim, does not in and of itself warrant a conclusion that the Complainant was planning to do so. Without more, this was insufficient to have put the Respondent on notice of any such intention. Jancik v. Advantage Learning Sys. (LIRC, 09/16/05)

The owner of the Respondent was unaware that minors were prohibited from operating equipment such as a meat slicer in the deli. He took immediate action to discontinue the practice before the Complainant was discharged. As a result, at the time of the discharge he was in compliance and he would have had no reason to believe that the Complainant (who had not initiated an enforcement action when the Respondent was out of compliance with the requirements of the laws relating to the employment of minors) would initiate or take part in a future enforcement action within the meaning of sec. 111.322(2m)(d), Stats. Therefore, there was no violation of sec. 111.322(2m)(d), Stats. Schulz v. Arms Corp. (LIRC, 06/14/05), aff'd sub nom. Schulz v. LIRC (Waukesha Co. Cir Ct., 12/20/05).

In this case, the Complainant did not claim that she had filed a prevailing wage complaint with the Equal Rights Division or that she had otherwise invoked the authority of the Division, nor did she testify or assist in any prevailing wage action or proceeding. The Respondent's owner believed that the Complainant intended to file a small claims action in regard to concerns she had about increases in group health

insurance costs. The record did not establish that the Respondent's owner believed, or had reason to believe, that the Complainant had filed a prevailing wage claim with the Equal Rights Division or intended to file such a claim, or that he was even aware that such a right or process existed. Smith v. Carpet Warehouse & Design Ctr. (LIRC, 04/13/05).

The Respondent's awareness that the work performed by the Complainant was a prevailing wage job, together with its familiarity of the Department of Transportation's role in the enforcement of the prevailing wage law, and the fact that the Complainant was told he was trying to get the company in trouble with the DOT, all support the conclusion that the Respondent discharged the Complainant because it believed he might attempt to enforce his right to be paid the prevailing wage rate. Travis v. D.C. Nevels Trucking (LIRC, 10/07/02), aff'd sub nom. D.C. Nevels Trucking v. LIRC (Milw. Co. Cir. Ct., 06/12/03).

The employer illegally retaliated against the Complainant when it canceled the Complainant's COBRA health insurance policy soon after it learned that the Complainant had filed a wage claim with the Equal Rights Division. Dreckman v. Henkel Transp. (LIRC, 02/16/01).

The Respondent's practices with respect to calculation of overtime was the source of much confusion amongst employees. The Complainant informed her employer that she had checked with the Labor Standards Bureau to see what the correct procedure was for overtime pay. The employer became upset and told her that what she had done was undermining and underhanded. The Complainant was discharged the following day. The termination violated sec. 111.322(2m), Wis. Stats. which provides that it is an act of employment discrimination to discharge or otherwise discriminate against any individual because, among other things, the individual has filed a complaint or attempted to enforce any right under sec. 103.02, Wis. Stats., which deals with overtime pay. Hickman v. Milwaukee Immediate Care Ctr. (LIRC, 02/16/00), aff'd sub nom. Milwaukee Immediate Care Ctr. v. LIRC (Milwaukee Co. Cir. Ct., 11/02/00).

The Complainants failed to establish that the Respondents violated the Wisconsin Fair Employment Act by discharging them for filing a complaint or attempting to enforce a right under sec. 66.293, Wis. Stats., which is known as the Prevailing Wage Law. The Prevailing Wage Law contains a specific statutory procedure for monitoring and securing compliance with its requirements. Sec. 66.293(10)(c), Wis. Stats., provides that the Department of Workforce Development shall ensure compliance with that section. The statute contains no reference to any entity except the Department of Workforce Development as possessing the authority to monitor and secure compliance with the Prevailing Wage Law. The Complainants' wage complaints filed with the City of Milwaukee did not constitute making a complaint or attempting to enforce a right they may have had under sec. 66.293, Wis. Stats., before the Department. Carter v. Dionne Constr. (LIRC, 05/24/99).

The Complainant failed to prove that she was discharged in retaliation for having filed a wage claim where the evidence failed to establish that the Respondent knew that she had filed a wage claim with the Equal Rights Division before it made the decision to discharge her. Hunt v. Point Publications (LIRC, 09/12/95).

The Complainant established that the Respondent discharged her because one of its agents believed that the Complainant might file a complaint with the State concerning her entitlement to minimum wage. Koll v. Hair Design (LIRC, 04/27/95).

Sec. 111.322(2m), Stats., does not protect informal "opposition" but only the types of protected activities that have generally been referred to in the retaliation area as "participation." In this case, the Complainant alleged that he was discharged because the Respondent had heard that he had contacted the Equal Rights Division concerning his dissatisfaction at not receiving his vacation pay. The Complainant asserted that this contact was an attempt to enforce a right under sec. 109.03, Stats. Such a contact would not have constituted an attempt to enforce a right within the meaning of sec. 111.322(2m), Stats. The Complainant did not identify himself or his employer during this contact, and there would have been no way that the

Equal Rights Division could have exercised its authority in response to such a contact. Werth v. TMS Carriers (LIRC, 02/09/95).

In this case, the chief jailer of the Sheriff's Department communicated a threat to intentionally reduce the amount of work available to female jailers in retaliation for their prosecution of a wage discrimination claim. However, the fact that a threat was made is not determinative on the question of whether it was carried out. In this case, the evidence was inconclusive on the question of whether there was an intentional reduction in female prisoner population which led to a reduction in the hours worked by female jailers. While it is possible to look at the data on hours worked by female jailers and suspect that the reduction which occurred was engineered, more than a suspicion is required. The evidence considered as a whole simply does not establish this fact by a preponderance of the evidence. Blaser v. Oconto County Sheriff's Dep't (LIRC, 09/20/94).

The Complainant did not establish that he was retaliated against for having filed a wage claim. The Complainant did file a wage claim with the Department; however, he did not establish that the Respondent was made aware of the wage claim on or before the date the Complainant was allegedly discharged. Allen v. Robert Peeple Ass'n (LIRC, 09/15/94).

134.9 Miscellaneous

The Labor and Industry Review Commission declined to address the Complainants' argument that the mere making of a threat to retaliate constitutes an independent violation of the Wisconsin Fair Employment Act. This claim was not made in the complaint, nor was it addressed in the Initial Determination or the notice of hearing. Blaser v. Oconto County Sheriff's Dep't (LIRC, 09/20/94.

135 GENETIC TESTING

[No cases]

140 AFFIRMATIVE ACTION

141 Generally

An employer is not required to offer a position to a woman when it is underutilized for females. To impose such a requirement would convert an affirmative action goal into a quota, which is prohibited. Kelley v. DOR (LIRC, 09/23/05)

Although absolute racial preferences may be unlawful, race may be considered as one factor among others in making an employment decision where a bona fide affirmative action plan is involved. Byrne v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 08/15/94).

A public employer must ensure that it has convincing evidence that remedial action is warranted before it embarks on an affirmative action program. It must possess sufficient evidence to justify the conclusion that there has been prior discrimination. Here, there was nothing in the record to indicate that the affirmative action plan of the Respondent met the criteria established in Wygart v. Jackson Bd. of Educ., 476 U.S. 267 (1986) and Johnson v. Transp. Agency, 480 U.S. 616 (1987). Therefore, the Complainant was entitled to a hearing on his claim that he was discriminated against on the basis of his race when he did not receive adjusted seniority as minority employees did by virtue of a consent decree. Samolinski v. DILHR (Milwaukee Co. Cir. Ct., 07/03/91).

It was improper for the Labor and Industry Review Commission to rely upon the factual findings made in a consent decree when that consent decree was not properly admitted in evidence. The Complainant had agreed to the admission of the consent decree for the limited purpose of showing (1) that a consent decree was issued, and (2) that the Respondent was abiding by the consent decree. LIRC inappropriately relied on factual findings in the consent decree to conclude that the consent decree was justified by an underutilization of minorities in the Respondent's workforce. Samolinski v. DILHR (Milwaukee Co. Cir. Ct., 07/03/91).

An employer need not have been found guilty of past discrimination before it can make a sex-conscious hiring decision. It need only point to a conspicuous imbalance in traditionally segregated job categories. For jobs that require no special expertise, the percentage of minorities or women in the employer's work force may be compared with the percentage in the area labor market or general population, and where the job requires special training, the comparison should be with those in the labor force who possess relevant qualifications. Gordon v. City of Milwaukee (LIRC, 10/16/87).

When a Complainant has established a *prima facie* case that race or sex has been taken into account in an employment decision, the employer may meet its burden of articulating a non-discriminatory rationale for its decision by pointing to the existence of an affirmative action plan. That reliance on an affirmative action plan is not to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan; the burden of proving its invalidity remains on the Complainant. Where the Complainant offered no evidence regarding the percentage of women in the labor market, he did not meet his burden of proving the invalidity of an affirmative action plan favoring women used by the Respondent. Gordon v. City of Milwaukee (LIRC, 10/16/87).

142 Affirmative action efforts found permissible

Pursuant to the terms of its affirmative action plan, an interview panel considered an applicant's race in addition to a variety of different and relevant reasons other than race for its hiring decision. The Respondent did not violate the Wisconsin Fair Employment Act when the Complainant would still have been a less qualified candidate based on these other neutral factors. Race can be considered to have been merely "a factor," and not a "determining factor," in the hiring decision. Nelson v. State Historical Soc'y of Wis. (LIRC, 03/31/05).

It was not sex discrimination to use expanded certification to increase the number of women who gained access to interviews where it was used in conjunction with an approved affirmative action plan which complied with the requirements of ch. 230, Stats., and ch. ER 43, Wis. Adm. Code. Gygax v. DOR & DER (Wis. Pers. Comm'n, 12/14/94).

No discrimination was shown with respect to the employing agency's letter directing the interview panelists to contact the affirmative action officer before making a hiring decision where the panelists understood there was no requirement to hire women. There was only a requirement, in the event a male was recommended for hire, to explain why a woman was not recommended. The affirmative action officer had approved the hire of non-targeted groups in other selection decisions when justified (for example, by the interviewer's opinion that another person was the best candidate for the particular vacancy). Gygax v. Wisconsin DOR & DER (Wis. Pers. Comm'n, 12/14/94).

Discrimination does not automatically occur where a member of an under-utilized group identified in an approved affirmative action plan is hired even though the successful candidate has a post-interview rank which is below other candidates who were not members of the under-utilized group. Gygax v. DOR & DER (Wis. Pers. Comm'n, 12/14/94).

Expanded certification is permissible in civil service hiring if it is used in conjunction with an approved affirmative action plan. In this case, the employer did not violate the Wisconsin Fair Employment Act when it considered sex as a factor in the final selections it made from among those on the certification list. The female who was hired was a member of a group identified in an approved affirmative action plan as an underutilized group. The Respondent clearly showed that the individual who was hired was qualified for the job and that the interview process was otherwise free of discrimination. Gygax v. DOR (Wis. Pers. Comm'n, 12/14/94).

In differentiating among well-qualified candidates for a position, it was not evidence of discrimination to consider the goals of a proper affirmative action plan as a selection criterion. Byrne v. DOT & DMRS (Wis. Pers. Comm'n, 09/08/93); aff'd sub nom. Byrne v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 08/15/94).

It was not a violation of the Wisconsin Fair Employment Act for an employer to implement an affirmative action plan that called for departure from strict seniority in layoff to allow black school psychologists and social workers who would otherwise be laid off due to their seniority to be retained while more senior, Caucasian, employees in the classification were laid off. Voluntary affirmative action programs which modify the seniority rights of majority members do not constitute unlawful discrimination when certain conditions are met. Those conditions include: (1) The lay-off plan seeks to prevent the loss of minority hiring gains achieved through affirmative action; (2) the plan is temporary; (3) the plan does not require the retention of unqualified employees; (4) the plan does not require the lay-off of only white employees; (5) the plan does not replace whites with newly hired minorities; and (6) the plan does not bar laid off white employees from re-employment with the employer. Piotrowski v. Milwaukee Bd. of Sch. Dir. (LIRC, 05/02/85).

A male employee had been hired to work as a bobcat operator and all the bobcat work had been completed. It was not unlawful sex discrimination for the Respondent to lay off the male employee and recall a female employee in order to fulfill its affirmative action goals, rather than transfer the male employee to laborer's duties. In Steelworkers v. Weber, 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979), the U.S. Supreme Court recognized that in order to meet the purposes of Title VII, employees must be able to deal with the effects of past discrimination. That case held that an affirmative action plan is permissible if the plan: (1) was voluntary, (2) was designed to break down old patterns of discrimination, (3) did not unnecessarily trammel the interests of male workers, (4) did not require the discharge of males and their replacement by females, and (5) was temporary. The Respondent's plan in this case met these requirements. Ott v. L.S. Lunder Constr. (LIRC, 04/16/81).

An employer created a special position in its Trades Training Program (TTP) for the most qualified female applicant. This position was created solely in an effort to fulfill the Respondent's affirmative action obligations under a federal Executive Order. Male employees continued to be eligible for regular TTP positions as they became available. The male Complainant could not be said to have been unlawfully deprived of any promotional opportunities when he was denied this position because the position in question would not have existed but for the employer's affirmative action obligations. Grenier v. Scott Paper (LIRC, 01/15/81).

An employer did not discriminate against a male in promoting a qualified female with 20 years less experience where affirmative action was required by Title VII, Executive Order 11246 and a consent decree filed in federal court. Maline v. Wis. Tel. (LIRC, 10/22/79).

143 Affirmative action efforts found impermissible

The Complainant, a non-minority, was certified for a position. The person who ultimately was appointed was a minority who became eligible on the basis of an expanded certification that the employer conceded was illegal because a valid workforce analysis had not been conducted in accordance with sec. 230.03(4m), Stats. The illegal use of expanded certification in this manner violated the Complainant's rights under the Wisconsin Fair Employment Act to have been considered for this position without consideration of race except in the context of valid affirmative action considerations which were not present here. The Respondents may have been acting in good faith reliance on existing policies. They may not have had a specific intent to discriminate against the Complainant on the basis of his race. However, this is not a recognized defense in cases involving selection decisions made pursuant to illegal affirmative action plans. Paul v. DHSS & DMRS (Wis. Pers. Comm'n, 03/30/93).

An affirmative action plan which compared utilization to percentages of various minorities in the state population was improper, where the statutory requirements for the affirmative action plan provided that utilization should be measured against various minority groups' representation "in that part of the State labor force qualified and available for employment" in the positions in question. Holmes v. DILHR (Wis. Personnel Comm'n, 04/15/87); Kesterson v. DILHR (Wis. Personnel Comm'n, 12/29/86).

There was probable cause to believe that the Respondent discriminated against the Complainant, who was white, in utilizing expanded certification pursuant to an affirmative action plan which was not legitimate because (1) it was based on state-wide minority population statistics rather than on statistics measuring the percentage of minorities in the qualified labor market for the position in question, (2) it did not meet statistical standards developed for proving disparate impact, and (3) it was inconsistent with applicable statutory requirements. Paul v. DHSS & DMRS (Wis. Pers. Comm'n, 06/19/86).

An affirmative action plan was improper when the plan measured utilization of minority employees by the employer against the general population statistics rather than against statistics measuring the percentage of minorities in the qualified labor market for the position in question. Paul v. DHSS (Wis. Pers. Comm'n, 06/19/86).

An employer did not rebut a *prima facie* case of sex discrimination by showing that it hired a male over a female to balance the male-female teacher ratio in its business education department. Joint Dist. No. 1, City of Menomonie v. DILHR (Ricks) (Dane Co. Cir. Ct., 04/28/77).

The Respondent admitted that it hired a woman for a particular position because of her sex, pursuant to an affirmative action plan. The Respondent did not show that the work of the female employee selected for the job was as good as the work done by a more qualified male employee. While hiring females may have been a desirable goal, the method whereby the Respondent accomplished such an end was discrimination based

upon sex. Absolute preferences, absent a showing of past discrimination, are unlawful. Kostroski v. American Can (DILHR, 04/28/77).

The authority to promulgate sec. PERS 27, Wis. Adm. Code, which provided for an absolute preference in hiring in favor of women and minority group members, was not fairly implied from a statute which authorized "exceptional methods" to employ the "disadvantaged." Other statutes cast doubt on the view that the legislature impliedly authorized absolute preferences. Insofar as the rule authorized the establishment of employment lists that constituted absolute preferences based upon sex or race, it was void *ab initio* as not having been within the authority granted by the legislature. Finding the rule to be void on that basis, the court did not need reach the issues of whether the absolute preferences provided for in the rule violated the Wisconsin Fair Employment Act, Title VII, or the equal protection clause. State v. DILHR, 77 Wis. 2d 126, 252 N.W.2d 353 (1976).

An administrative rule, promulgated pursuant to a governor's executive order which authorized exclusive consideration of minority and female applicants for certain state jobs, violated the state constitution. The statute which authorizes special consideration for handicapped persons was not authority for affirmative action on behalf of minorities and women. State v. DILHR, 77 Wis. 2d 126, 252 N.W.2d 353 (1976).

A Wisconsin Department of Administration rule providing for absolute preferences based on sex and race in certain hiring situations for state employment violated the Wisconsin Fair Employment Act. Absolute preferences do not differ materially from unlawful hiring ratios, particularly where the employee presents no evidence to show that such preferences are the only viable alternative to reach its affirmative action goal. Patzer v. DOA (DILHR, 10/31/74), aff'd sub nom. DOA v. DILHR, 77 Wis. 2d 126, 252 N.W.2d 353 (1977).

149 Miscellaneous

The Complainant's veiled references to an affirmative action plan and to a discrimination lawsuit against the Respondent were not enough to establish that the Respondent's reasons for hiring a female rather than a male were pre-textual. Zurawski v. LIRC (Racine Co. Cir. Ct., 12/22/88).

It is not a defense to an employment discrimination complaint that the DILHR Division of Apprenticeship and Training had advised the employer to test exclusively minority applicants for a two-month period in order to augment certification lists and comply with federal contract requirements. However, the white applicants failed to establish a *prima facie* case where they did not show that the two-month testing of exclusively minority applicants kept them out of the apprenticeship programs. Brown v. AMC (DILHR, 09/10/76).

150 PARTICULAR EMPLOYMENT ACTIONS

151 Constructive Discharge

In order to establish a constructive discharge under the Wisconsin Fair Employment Act, a Complainant must demonstrate not only that his working conditions were intolerable, but that they were intolerable for a reason that violates the Act. Looper v. IHOP Rest. (LIRC, 03/21/12).

The question of whether certain conduct was severe enough to warrant a finding of constructive discharge is reached only when there is a finding that the conduct caused the quitting; persons alleging constructive discharge must show that the action by the employer caused their departure. Gephart v. Wis. Dep't of Corr. (LIRC, 11/18/09).

A finding of constructive discharge contemplates working conditions so difficult or unpleasant that a reasonable person confronted with them would feel compelled to resign. However, the question of whether certain conduct was severe enough to warrant a finding of constructive discharge is reached only when there is a finding that the conduct caused the quitting. In this case, the Complainant's decision to quit was motivated by factors other than sexual harassment. Harper v. Menard, Inc. (LIRC, 09/18/09).

A constructive discharge is not found in every sexual harassment case. A constructive discharge is only found where the conduct made working conditions so intolerable that a reasonable person would feel compelled to resign. A smattering of sexually-tinged comments made over the course of a year and a half, while certainly unpleasant and distasteful, is not sufficient to create a hostile working environment or to render working conditions so intolerable that a reasonable person would feel compelled to resign. Harper v. Menard, Inc. (LIRC, 09/18/09).

The sexual harassment in this case was not severe enough to drive a reasonable person to quit. The Complainant's argument that the "in part" analysis should be applied because the sexual harassment was part of her reason for quitting was rejected. If working conditions were rendered so intolerable due to sexual harassment as to compel the employee to quit, she would not have waited to tender her resignation until other adverse, but non-discriminatory, incidents occurred. Harper v. Menard, Inc. (LIRC, 09/18/09).

To find a constructive discharge it must be established that, due to a discriminatory reason, working conditions are rendered so difficult or unpleasant that a reasonable person would feel compelled to resign. Where the Complainant's "peace of mind" suffered after his supervisor commented to him during his performance evaluation that he was doing "just enough to get by" his loss of satisfaction and contentment in the job were not sufficient to trigger a finding of constructive discharge. Cole v. Northland Coll. (LIRC, 03/19/01).

A constructive discharge occurs when an employer makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. Further, a finding of constructive discharge will not be made based upon the fact of discrimination alone. The individual must also present evidence of "aggravating" factors. In this case, the Complainant introduced medical records which she alleges established the extreme psychological pressure she was under. While the records did show that the Complainant was under psychological stress, there was no persuasive evidence that this was the result of the imposition of discriminatory or retaliatory working conditions attributed to the Respondent. Sarazin v. W & G Transport (LIRC, 03/09/99).

The question of whether certain conduct was severe enough to warrant a finding of constructive discharge is reached only when there is a finding that the conduct caused the quitting. Hager v. Gunderson Lutheran (LIRC, 03/10/98), aff'd (La Crosse Co. Cir. Ct., 08/10/98).

A finding that there has been sexual harassment by the employer does not always establish a basis for finding that the Complainant was constructively discharged. The specific details and circumstances relative to the sexual harassment must always be looked to in deciding whether there was a constructive discharge. A Complainant's failure to quit until some other cause intervened suggests that the discrimination was not so intolerable that the Complainant felt compelled to resign. Tobias v. Jim Walter Color Separations (LIRC, 08/13/97), aff'd on other grounds sub nom. Jim Walter Color Separations v. LIRC, 226 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999).

To find a constructive discharge it must be established that a reasonable person in the employee's position would feel compelled to resign by the difficult or unpleasant working conditions imposed on the employee. The "in the employee's position" element of this test requires consideration of context which goes beyond simply looking at the "difficult or unpleasant working conditions" imposed. In this case, the situation the Complainant was in was a result of his own course of conduct prior to that time. The question, thus, becomes how does a reasonable person respond to the adverse consequences of unreasonable conduct which they themselves engaged in? A reasonable person in the Complainant's position would have appreciated the necessity and the appropriateness of the steps taken by the employer's actions and would have accepted them as the painful consequences of their own actions. Therefore, there was no constructive discharge in this case. Musgrave v. Matthew (LIRC, 04/13/98).

A loss of prestige or supervisory duties does not, standing alone, constitute a basis for constructive discharge, particularly where the employee's duties are changed with no reduction in pay. Dingeldein v. Village of Cecil (LIRC, 05/08/97), aff'd sub nom. Dingeldein v. LIRC (Shawano Co. Cir. Ct., 11/12/97).

When termination is an issue in the complaint, constructive discharge need not be pled as a separate cause of action. Health Enter. of Wis. v. Leconte (Dane Co. Cir. Ct., 05/17/95).

A Complainant was constructively discharged when she quit during an argument with her supervisor. The argument occurred immediately after the supervisor made a crude remark about the Complainant's sexual activities. The Complainant's quitting was, therefore, directly related to the sexual harassment. Given the pervasiveness of the sexual harassment in this case and the Respondent's complete failure to take any remedial action, the Complainant reasonably concluded that she had no alternative but to quit her employment. Miller v. Oak-Dale Hardwood Prod. (LIRC 12/13/94), remanded on other grounds sub nom. Oak-Dale Hardwood Prod. v. LIRC, (Pierce Co. Cir. Ct., 02/16/96).

The Complainant did not establish that she was constructively discharged where there was no evidence showing that her working conditions were intolerable, difficult or unpleasant. The Complainant's exit interview suggested that she may have decided to pursue other alternatives, including part-time work and returning to school full time. Plaski v. Blue Cross/Blue Shield United of Wis. (LIRC, 05/21/93).

The policies underlying the Wisconsin Fair Employment Act will be best served if, wherever possible, unlawful discrimination is attacked within the context of the existing employment relationship. In cases where the employer has not treated the employee in such a manner that it amounts to a constructive discharge, the most efficient way to resolve an employment dispute is through a continuing employment relationship. If the discrimination takes such a form that it amounts to a constructive discharge, the employee is free to resign without forfeiting the right to reinstatement and back pay. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

The Complainant did not establish that her working conditions were so intolerable that she was forced to involuntarily resign where the Complainant, in part, contributed to the working conditions that she complained of and where her failure to complain about the working conditions suggests at least tacit approval on her part. Brettingen v. Dahl Ford Subaru (LIRC, 07/17/92).

Where the treatment of the Complainant consisted of nothing more onerous than that which many employees experience when a change in management brings some degree of change in their jobs, there was no constructive discharge. There having been no unlawful motive and no mistreatment, and the revision of the Complainant's job duties having been a matter of correcting the unwarranted modification which had occurred during the tenure of her previous supervisor, the situation was not an intolerable one that would have made a reasonable person in the Complainant's position feel compelled to resign. Forman v. Cardinal Stritch Coll. (LIRC, 06/08/92).

The question of whether certain conduct was severe enough to warrant a finding of constructive discharge is reached only when there is a finding that the conduct caused the quitting. An employee is constructively discharged when the employer makes the employee's working conditions so intolerable that the employee is forced into an involuntary resignation. Persons alleging constructive discharge must show that action by the employer caused their departure. In this case, much of what the Complainant found intolerable in her workplace was caused not by the conduct of the employer, but by the extremely poor relationship between the Complainant and her co-workers. Riley v. American Family Mutual Ins. (LIRC, 03/30/92).

There are two lines of authority with respect to the facts necessary to establish a constructive discharge. The Department has adopted the line of authority which indicates that a constructive discharge occurs if working conditions are so difficult or unpleasant (for a discriminatory reason) that a reasonable person would feel compelled to resign. Proof of employer intent to cause the termination is not necessary. Jorgenson v. Ferrellgas, Inc. (LIRC, 01/10/92).

Constructive discharge requires that an individual resign involuntarily to escape working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. The Complainant's desire for reinstatement to his former position belies his claim that intolerable conditions underlay his resignation. Here, the Complainant alleged that he was constructively discharged on February 8, 1987. Yet just two working days later, the Respondent asked him to resume his employment with the Respondent, and the Complainant agreed. The fact that the Respondent had actually sought to rehire the Complainant after the Complainant had terminated the employment relationship negated any claim that the Respondent had implemented a plan to get rid of the Complainant because of his sex. James v. Associated Sch., Inc. (LIRC, 11/27/91).

The Complainant's proposed amended complaint alleging that he was constructively discharged was dismissed as untimely because the constructive discharge allegation did not relate back to his original complaint alleging promotion and demotion discrimination. There were absolutely no facts in the original complaint from which it could be implied that such charge included a claim of constructive discharge. The record showed that the Respondent had actually sought to rehire the Complainant after the Complainant had terminated the employment relationship, thereby negating any claim that the Respondent had implemented a "design" or "overall plan" to get rid of the Complainant because of sex. James v. Associated Sch., Inc. (LIRC, 11/27/91).

A constructive discharge occurs when an employer makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. To find a constructive discharge it must be established that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. A finding of constructive discharge will not be made based upon the fact of discrimination alone. An employee must seek legal redress while remaining in his job unless confronted with an aggravated situation beyond "ordinary" discrimination. The policies underlying the civil rights statutes will be best served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships. Waedekin v. Marquette Univ. (LIRC, 03/05/91), aff'd, Milwaukee Co. Cir. Ct., 01/21/92; aff'd (Ct. App., Dist. I, unpublished opinion, 04/26/94).

The burden of proof is on the employee to prove constructive discharge. Waedekin v. Marquette Univ. (LIRC, 03/05/91), aff'd, Milwaukee Co. Cir. Ct., 01/21/92; aff'd (Ct. App., Dist. I, unpublished opinion, 04/26/94).

An employee is constructively discharged when the employer makes the working conditions so intolerable that the employee is forced into involuntary resignation. Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986). The conditions of employment here, while considered intolerable by the Complainant, were not such that a reasonable and objective employee would consider them intolerable. Osteen v. LIRC (Milwaukee Co. Cir. Ct., 09/15/90), aff'd (Ct. App., Dist. I, unpublished opinion, 01/15/91).

The Complainant was not constructively discharged because of race where the racial epithets and racially offensive remarks, combined with the Complainant's supervisor's efforts to dissuade him from taking a voluntary demotion, were not such that a reasonable person in this situation would have felt that he had no other alternative but to quit his employment. Rodgers v. Western Southern Life Ins. (LIRC, 10/12/89). [Ed note: see Rodgers v. Western Southern Life Ins., 12 F.3d 668 (7th Cir. 1993) for a different result.]

The Complainant claimed that he was constructively discharged, arguing that on one occasion about ten days before his last day of work a co-worker called him "boy" and "nigger", and that on another occasion that employee told a derogatory joke about blacks. The evidence showed that the Complainant never complained to management about the joke; he did complain to management about the other incident, and the employee was counseled and cautioned by the employer. Occasional or sporadic instances of the use of racial slurs do not in and of themselves constitute discrimination. The two incidents cited by Complainant would not be sufficient to establish that conditions were so intolerable that a reasonable person would be compelled to resign. Kennedy v. Pick 'n Save (LIRC, 09/22/88).

An employee is constructively discharged when she involuntarily resigns to escape intolerable and illegal employment requirements. Where an employee fails to establish that there was an underlying illegal motivation for an employment action, she fails to establish a constructive discharge. Jensen v. F.W. Woolworth (LIRC, 05/22/87).

In order to establish a constructive discharge, a Complainant must have voluntarily resigned in order to escape working conditions which a reasonable person would consider intolerable. In a case in which the Complainant was found to have welcomed the sexual conduct she complained of, such conduct cannot be considered so intolerable that it forced the Complainant to quit. Winter v. Madison Home Juice Co. (LIRC, 07/19/85).

In order to establish a constructive discharge, an employee's working conditions must have been made so difficult that a reasonable person in that position would have felt compelled to quit. Demro v. Packerland Packing Co. (LIRC, 08/31/84).

Where the owner of the Complainant's place of work continuously sexually harassed her, the Complainant's quitting constituted a constructive discharge. Dumas v. American Companies (LIRC, 07/13/83).

Although a female employee's demand for pay equal to that of male employees was made in good faith, her resignation in the face of the employer's refusal to meet her demand cannot be considered a constructive discharge. Laux v. Dixon (LIRC, 05/07/81), aff'd sub nom. Laux v. LIRC (Winnebago Co. Cir. Ct., 10/15/82).

Where an employee showed that her quitting was partially in opposition to her employer's unequal wage practices, she was entitled to receive the pay difference between her job and the male's salary until she found a better paying job. Ferguson v. Greb Plastics (LIRC, 09/19/77).

152 Harassment, deprecatory employment atmosphere

152.1 Generally

Harassment based on a protected category other than sex is made unlawful through the WFEA's prohibition against discrimination in terms, conditions, and privileges of employment. Here, the owner's age-related comments, while inappropriate, were not shown to be threatening or humiliating, objectively or subjectively, and were not shown to have interfered with the employee's ability to do his job, or to have altered his conditions of employment. Dent v. RJ Wood Indus., Inc. (LIRC, 03/28/14).

The Administrative Law Judge improperly denied the Complainant the right to present testimony regarding acts of alleged harassment which occurred outside of the 300-day period prior to the filing of his complaint. The complaint alleged that the Complainant had been subjected to a hostile working environment. Hostile environment claims by their very nature involve conduct which occurs over a series of days, or perhaps years. Such claims are based on the cumulative effect of individual acts. A Complainant may show a series of related acts, one or more of which are within the limitations period. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. In this case, only one of the alleged incidents which the Complainant alleged created a hostile work environment occurred within the 300 days prior to the filing of his complaint. This did not, however, make his hostile work environment claim untimely. Bowen v. LIRC, 2007 WI App 45, 299 Wis. 2d 800, 730 N.W.2d 164.

The Complainant alleged that her supervisor criticized her in an angry and impatient manner, that the supervisor allegedly invited other co-workers out to lunch more frequently, that the supervisor interrupted the Complainant while she was speaking during a staff retreat; and that the supervisor did not initiate contact with the Complainant at a reception. These perceived slights, even if linked to the Complainant's marital status, did not come close to the level of severity or pervasiveness necessary to establish harassment. Pluskota v. Alverno Coll. (LIRC, 10/21/05).

The Complainant alleged that coworkers had been harassing him by calling him a "queer." In order for a violation with respect to the Complainant's terms and conditions of employment to have occurred, the harassment must have been sufficiently severe or pervasive so as to have altered the conditions of his employment and created an abusive working environment. Whether or not a work environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or whether it is merely an offensive utterance; and whether it unreasonably interfered with the employee's work performance. In this case, the alleged harassment occurred only twice. The harassment was not shown to have been physically threatening to the Complainant. Further, the alleged harassment was not shown to have been directly stated to the Complainant but was instead merely overheard by the Complainant. Accordingly, there was no probable cause to believe that the Respondent discriminated against the Complainant on the basis of sexual orientation in regard to the terms or conditions of his employment. Thompson v. Ashley Furniture Indus. (LIRC, 07/16/03).

Occasional or sporadic instances of the use of racial slurs do not in and of themselves constitute a violation of the law. To prevail on a racially hostile environment claim, the employee must show that his work environment was both subjectively and objectively hostile. Whether a work environment is hostile or abusive can be determined only by looking at all of the circumstances, including the frequency of the conduct; its severity; whether it was physically threatening or humiliating; or whether it was merely an offensive utterance; and whether it unreasonably interfered with the employee's work performance. Clark v. Plastocon (LIRC, 04/11/03), aff'd sub nom. Clark v. LIRC (Milwaukee Co. Cir. Ct., 02/12/04).

As much as it is to be deplored, it is a fact that employers and their supervisors and managers sometimes act in disrespectful, insulting, hostile, or abusive ways towards employees in the workplace. With the exception of conduct which falls within the definition of sexual harassment, such conduct does not

constitute a violation of the Wisconsin Fair Employment Act unless it is established that it occurred **because of** the protected status of the person who is being harassed. Wells v. Roadway Express (LIRC, 05/13/02).

A single incident can be sufficiently severe or pervasive to create a hostile work environment. Conduct constituting a tort claim for assault and battery is not synonymous with an actionable harassment claim, but it is a factor to consider. Further, actionable harassment may be established even though an incident did not have a significant impact on the Complainant's work performance. The Complainant in this case established a hostile environment claim where the Complainant reasonably viewed that his physical safety was threatened by his coworker, and where the employer took no action against the coworker. Al Yasiri v. UW (Wis. Pers. Comm'n, 07/10/01).

Actionable harassment contemplates unwelcome verbal or physical conduct directed at an employee based on his or her protected status. The conduct must be pervasive and severe in order to constitute actionable harassment. Thompson v. DOC (Wis. Pers. Comm'n, 05/09/01).

In determining the pervasiveness of harassment, the trier of fact may aggregate evidence of racial hostility with evidence of sexual hostility. Harsh v. County of Winnebago (LIRC, 11/06/98).

For harassment to be actionable, it must be so severe or pervasive as to alter the conditions of the Complainant's employment and create an abusive working environment. The harassment also must be subjectively offensive; that is, the victim in fact must have perceived the environment to have been hostile and abusive. Where the Complainant did not take advantage of grievance procedures, and did not even indicate to the individuals making the remarks that they were offensive, it cannot be found that the Complainant in fact perceived the environment to be sufficiently hostile or abusive to be actionable. Garner v. Manpower Temp. Serv. (LIRC, 08/11/98).

A comment by the Respondent that the Complainant was a "fucking cripple" was insufficient to establish that the Respondent refused to hire the Complainant because of handicap. The comment is what is known as a "stray remark." Standing alone, and unrelated to the decisional process, such a remark is insufficient to demonstrate that the employer relied on illegitimate criteria, even when the statement was made by the decision-maker in issue. Steffen v. Phil Tolkan Pontiac (LIRC, 06/12/97).

A claim of hostile work environment is actionable when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment. Vegas v. Golden Guernsey Dairy (LIRC, 12/17/93).

The Complainant did not prevail on a claim of harassment where he told his supervisor of one occasion on which a co-worker told him that he did not want to have anything to do with Hispanics. A single instance of a statement of this type would not rise to the level of harassment. A finding of liability on the part of the employer could not be premised on its supposed failure to take adequate action in response to once being told of one such statement. Abaunza v. Neenah Foundry (LIRC, 03/30/93), aff'd (Winnebago Co. Cir. Ct., 10/27/93).

An employer cannot be found responsible for racial or religious discrimination unless it is carried out directly by the employer or, if carried out by co-employees, the employer knows or should reasonably know of it and fails to take reasonable action to prevent it. It is also well established that the occasional and sporadic use of racial slurs, albeit deplorable, may still not rise to a level of violation of the law. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

Slurs about an employee's national origin which continued for a period of years constituted discriminatory working conditions even where the employee did not notify other supervisors of the remarks because the remarks were made by a management official. Polasik v. Astronautics Corp. (LIRC, 04/08/83).

An employer has no legal liability for harassment of an employee by another employee unless the employer, its supervisors or managers knew or should have known of the harassment. Crear v. LIRC, 114 Wis. 2d 537, 339 N.W.2d 350 (Ct. App. 1983).

152.2 Harassment because of creed

[See also sec. 126.5]

An employer cannot be held responsible for racial or religious harassment unless the harassment is carried out directly by the employer or (if carried out by co-employees of the Complainant) the employer knew or should reasonably have known of the harassment and failed to take reasonable action to prevent it. Acevedo v. Oshkosh Corp. (LIRC, 03/29/12).

The Commission does not have to address the issue of whether interpreting the Wisconsin Fair Employment Act as prohibiting harassment of employees because of religion would violate the first amendment free speech rights of the harasser because there was no unlawful harassment in this particular case. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

An employer can violate the Wisconsin Fair Employment Act's prohibition on discrimination because of creed if it either engages directly in religious harassment of an employee (through its management or supervisory personnel) or if it tolerates religious harassment of an employee by co-workers. However, in order to constitute a violation of the Act, harassment must rise above the level of occasional and sporadic use of slurs or epithets. In this case there was some evidence of hostility directed toward the Complainant, whose creed is WICCA, by her co-workers. In some instances, the Complainant's self-identification as a witch was referred to. However, the inconsistencies in the Complainant's evidence as to the extent of this type of conduct and her general lack of credibility left no basis for deciding how extensive that conduct may have been. The Complainant, therefore, failed to meet her burden of proving that she was subject to religious harassment that rose to a level of a violation of the Act. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

152.3 Harassment because of national origin

[See sec. 124.2]

152.4 Harassment because of race

[See sec. 125.3]

152.5 Sexual harassment

[See sec. 127.3]

152.6 Harassment because of gender

[See sec. 127.4]

152.7 Harassment because of sexual orientation

[See sec. 128]

153 Printing or making an inquiry which expresses or implies discrimination.

For purposes of a sec. 111.322(2) "printing or circulating" claim, it is not necessary that the Complainant have been directly affected by the discriminatory conduct. The violation is complete when the policy is in place and then printed or circulated. Jackson v. Ruan Transp. Mgmt. Sys., Inc. (LIRC, 06/21/17).

An allegation that the Respondent violated Wis. Stat. § 111.322(2) by printing a discriminatory advertisement covers a discriminatory policy that is printed on the job application, even though not specified on the complaint. The fact that the Respondent was the party to introduce the application at the hearing and that the Complainant was not directly affected by it does not defeat his claim that the Respondent violated Wis. Stat. § 111.322(2). Jackson v. Ruan Trans. Mgmt. Sys., Inc. (LIRC, 06/21/17).

The Respondent violated sec. 111.322(2), Stats., when it posted a job advertisement that expressed an intention to discriminate against individuals with conviction records. While instatement into the job and back pay are potential remedies for a violation of this statute, these remedies are only granted where the facts warrant a conclusion that, but for the Respondent's act of discrimination, the Complainant would have been hired for the job. In this case, the evidence established that the Respondent never actually filled the job. Therefore, the appropriate remedy was an order requiring the Respondent to cease and desist from printing or circulating such advertisements. No back pay or instatement was ordered. Jackson v. Dedicated Logistics (LIRC, 07/29/11).

By filing an action pursuant to sec. 111.322(1), Stats., a union had the burden of establishing that at least one of its members had been injured. That statute provides a cause of action for acts of discrimination which have already occurred. The union's reliance on cases filed under sec. 111.322(2), Stats. (which creates a cause of action for statements printed or circulated by the employer which proclaim its present or future intent to discriminate) was misplaced. That section applies to prospective harm. It does not require that an individual has actually been harmed. Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/30/10).

The Wisconsin Fair Employment Act permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job. Therefore, it is not a violation of the Act to request conviction record information from a job applicant. A question about an applicant's conviction record on an employer's employment application would not, therefore, constitute prohibited discrimination within the meaning of sec. 111.322(2), Stats., which prohibits printing or circulating any statement, advertisement or publication or using any form of application for employment which implies or expresses any limitation or discrimination with respect to an individual. Lee v. LIRC (Ct. App., Dist. I, unpublished opinion, 05/27/10). Lee v. D.J.'s Pizza (LIRC, 05/20/09); Lee v. Wendy's (LIRC, 05/20/09); Lee v. Speedway Super America (LIRC, 05/20/09).

A question on an employment application asking if an applicant has been convicted of a felony in the preceding five years is not prohibited by the Wisconsin Fair Employment Act. The Act provides that it is not employment discrimination because of conviction record to refuse to employ any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. The Act presupposes that an applicant's criminal record is known to the employer and does not prohibit an employer from asking questions about criminal records. Also, nothing in the Act prohibits an employer from conducting background checks. Jackson v. Klemm Tank Lines (LIRC, 04/29/05).

The types of violations covered by sec. 111.322(2), Stats., are sufficiently distinct from those covered by sec. 111.322(1), Stats., that they need to be specifically alleged and noticed as an issue. Greco v. Snap-On Tools (LIRC, 05/27/04).

The Wisconsin Fair Employment Act provides that it is an act of employment discrimination to print or circulate a statement or publication implying or expressing any limitation, specification or discrimination

based on a protected category. Section 111.322(2), Stats. The Complainant was offended by negative references to gypsies in the Respondent's cashier manual and in a memo. In order to prove a violation of sec. 111.322(2), Stats. in these circumstances, the Complainant would have to prove: (1) that the cashiers' handbook and the memo were statements or publications which had been printed or circulated by the Respondent; (2) that the handbook and memo were actionable statements or publications within the meaning of s. 111.322(2); and (3) that the handbook or the memo implied or expressed any limitation, specification or discrimination based on ancestry. In this case, the hearing record supports the conclusion that the term "gypsy" is used in the handbook section and in the memo to describe a type of criminal activity, not a person of Romany ancestry and, as a result, these writings do not express or imply an intent to target either customers, visitors or employees based on their ethnicity. From the context in which this word appears in the handbook section, which directs employees to take certain actions if customers or visitors engage in certain activities, it has to be concluded that the author's intent was to identify and describe an individual who engages in a certain type of activity, not a person of a certain ethnicity. Therefore, the Complainant failed to prove a violation of sec. 111.322(2), Stats. Schramm v. Farm & Fleet (LIRC, 05/14/03).

An internal memo to the Respondent's legal advisors cannot be considered a "publication" or an "advertisement" within the meaning of sec. 111.322(2), Stats. While it might be considered a "statement" within the broadest sense of that term, for purposes of the statute it was neither printed nor circulated. The "print" provision of the statute has been interpreted to mean "to publish in print," while the term "circulate" contemplates a wide degree of distribution. Valla v. Wal-Mart Distrib. Ctr. (LIRC, 11/30/01).

An employer's letter to an employee containing a last-chance warning is not a publication within the meaning of sec. 111.322(2), Stats. Moreover, a memo and letters regarding the Complainant in this case were copied to nine individuals who all had a "need to know" basis for reviewing the documents. This did not constitute "circulation" within the meaning of the statute. For a thing to be circulated, a relatively wide quantitative degree of distribution is required. Guthrie v. UW (Wis. Pers. Comm'n, 08/28/00).

Offending conduct under sec. 111.322 (2), Wis. Stats., is not the *adoption* of a discriminatory employment policy, but rather the *publication* or *circulation* of such a policy. The dictionary defines "circulate" as "to cause to pass from person to person and. . .to become widely known." Thus, for a thing to be circulated, a certain relatively wide quantitative degree of distribution is required. In this case, the Respondent distributed a letter regarding conditions placed on the Complainant's future employment to nine individuals with a specific "need to know" basis. These individuals were in the supervisory chain over the Complainant, or were involved in personnel administration, which included the processing of disciplinary actions. This limited circulation of a specific warning to the Complainant cannot be considered to constitute circulation of that notice. Williams v. DOC (Wis. Pers. Comm'n, 11/03/99).

The Respondent asked the Complainant during her interview whether she was married and why she had changed her name. He indicated that he had problems in the past in connection with an employee going through a divorce and stated that he could not let that happen again. He informed the Complainant that divorced women were not stable and that the interview was at an end. The Respondent's actions were in violation of sec. 111.322(2), Stats., because he made an inquiry in connection with prospective employment which implied or expressed a limitation, specification or discrimination because of marital status. Behm v. William Haasl, DDS, SC (LIRC, 10/21/91).

If an employer prints or circulates a discriminatory employment policy, this constitutes a violation of the Wisconsin Fair Employment Act and is actionable under sec. 111.322(2) Wis. Stats. This statutory provision requires an affirmative act of volition by the employer in publishing or circulating its discriminatory statements. Such is not demonstrated by media coverage of school board meetings. However, the inclusion of a discriminatory policy in a school board's compilation of official policies does constitute printing and

circulating the policy in violation of the statute. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

A case may be brought under sec. 111.322(2), Wis. Stats., even though no individual has suffered actual injury as a result of a printed statement which implies an intent to discriminate. This statute addresses the evil of employment discrimination on the two fronts where it obviously is practiced -- against existing employees and against prospective employees. The violation is complete when the policy is in place and then printed or circulated. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

Where a union successfully prevented a school district from pursuing a published official policy of unlawful employment discrimination against certain of its members it was acting as a private attorney general to implement a public policy that the legislature considered to be of major importance. Even though the policy was never implemented, this was no mere "moral" or "technical" victory. The union was properly awarded attorney's fees. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

154 Failure to post notices required by law

Where a Complainant argues that the statute of limitations should be equitably tolled because the Respondent did not have informational posters concerning applicable anti-discrimination laws posted at the workplace as required by the Age Discrimination in Employment Act, the Department will analyze the Complainant's arguments by reference to sec. Ind 88.21, Wis. Adm. Code, which is the posting requirement established by the Equal Rights Division. In this case, the Complainant's claim for equitable tolling was rejected, even if the Respondent did not post the required posters. The failure to post notices is only considered legally significant if the employee is genuinely ignorant of the illegality of discrimination which the notice, if it had been posted, could have informed him of. Olson v. Lilly Research Laboratories (LIRC, 06/25/92). [Ed. note: sec. Ind. 88.21, Wis. Adm. Code, has been renumbered sec. DWD 218.23, Wis. Adm. Code.]

155 Use of subjective criteria in hiring

The commission agrees that subjective criteria, such as being a "go getter," being lazy, or appearing unhappy to be at work are valuable tools in assessing the respective qualifications of candidates for promotion. The commission also notes that, when a candidate is in a protected class and is in the minority in the workplace, it is appropriate for the fact finder to more closely scrutinize the use of such subjective criteria. Thobaben v. Cnty. of Waupaca Sheriff's Dept. (LIRC 12/23/11).

The use of subjective criterion in the selection process is not unlawful per se, and in fact the validity of suggestive criteria increases in direct proportion to the level of employment sought. Larson v. Tomah Police Dep't (LIRC, 07/20/94).

The use of subjective criteria is not unlawful per se. The question is whether the selection criteria impermissibly burdens persons in a protected group. The validity of subjective devices increases in direct proportion to the level of employment sought. Gronning v. Sch. Dist. of Viroqua Area (LIRC, 07/28/93).

Nothing in the Wisconsin Fair Employment Act prohibits the use of subjective criteria in the evaluation of an employee's performance. Many jobs involving managerial responsibilities require personal qualities that are not amenable to objective, standardized testing. However, subjective criteria must be closely scrutinized. Kemmerer v. City of Madison Police Dep't (LIRC, 06/30/93).

156 Discrimination by third parties and "Cat's Paw"

The commission has recognized the "cat's paw" analysis adopted by the 7th Circuit in Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990). The "cat's paw" analysis allows a finder of fact to impute a discriminatory motive to an unbiased decision maker who is "decisively influenced" by an employee who is prejudiced against the Complainant based on a discriminatory motive. The Complainant must establish that the decision maker relied "exclusively" or "primarily" on information from the prejudiced employee. Haecker Jr. v. Charter Steel (LIRC 01/28/03).

The Complainant alleged that the Respondent decided not to employ him because of his arrest and/or conviction record. The Respondent's defense was that it was unable to employ the Complainant for the position he sought because the agency that funded the position did not approve his hiring. The evidence presented supported the finding that the Respondent lacked the authority to hire the Complainant without the approval of the funding agency. Documentary evidence appeared to show that the funding agency's refusal to approve the Complainant's application was related to his arrest record. Although an employer cannot avoid liability for its hiring decisions by pointing to the discriminatory animus of some third party, in this case the Respondent ceded control of the hiring process to a third party, independent of its consideration of the Complainant's application for employment. In this unusual set of facts the funding agency's rejection of the Complainant's application is not a discriminatory act of the Respondent. Sloan v. Human Dev. Ctr. (LIRC, 08/29/14).

The Complainant, making a "cat's paw" argument, contended that although the individual making the hiring decision had no perception that the Complainant was disabled, the recruiter who collected his application materials perceived him to be disabled, and withheld certain application materials from the decision-maker because of that perception. The Complainant failed, however, to prove that the recruiter's failure to send the materials to the decision-maker was motivated by discriminatory animus and failed to prove that the missing materials had any effect on the hiring decision. Ray v. Gordon Trucking (LIRC, 06/07/13).

If an employer acted as a conduit of a supervisor's prejudice (i.e., his "cat's paw") the Respondent will be liable. In this case, the Complainant, a female, applied for a promotion within the police department. A detective captain on the selection committee recommended a male for this position, rather than the Complainant. Based upon the evidence at the hearing, it was reasonable to infer that the detective captain, as an agent for the Respondent, lied to cover up his discriminatory purpose. He fabricated deficiencies in the Complainant's performance to justify his choice of another candidate. He did this because he did not want a woman in the position of detective sergeant. The detective captain presented his choice of the male candidate to the selection committee (which was an unbiased decision-maker). The committee rubber-stamped his choice, as was their practice. This choice was then presented to the sheriff, who also accepted the choice of the captain of the division in which the promotion was occurring, as was his practice. In this way, the decision by the biased detective captain decisively influenced the selection committee and the sheriff. His discriminatory motive is attributed to the Respondent. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

The Seventh Circuit Court of Appeals has articulated a "cat's paw" analysis that allows the finder of fact to impute a discriminatory motive to an unbiased decision maker who is decisively influenced by an employee who is prejudiced against the Complainant. In this case, the Complainant contended that the individual who made the decision to discharge him was unaware of his sexual orientation, but that she relied on information and recommendations provided by supervisors who were prejudiced against the Complainant because of his sexual orientation. The Complainant failed to establish that the decision maker relied exclusively or primarily on information she received from the supervisors in reaching the decision to terminate the Complainant. The Complainant also failed to establish that the supervisors were prejudiced against the Complainant because of his sexual orientation. Haecker v. Charter Steel (LIRC, 01/28/03).

Where an employer asserts that it made an employment decision on the basis of adverse media publicity about a particular characteristic of an employee it is clearly relying on a supposition that it could be harmed

by the responses of third parties who would be affected by that publicity (such as customers and clients). However, an employer may not avoid liability for a discriminatory decision by asserting that it was simply responding to the preferences of coworkers, customers, clients, or prospective partners in or purchasers of the business. An employer may not discriminate simply because it is urged or pressured by some third party to do so. That principle also requires the conclusion that an employer may not discriminate simply because adverse media publicity about an employee causes the employer to fear that there will be an adverse response by third parties if it does not do so. Murray v. Waukesha Mem'l Hosp. (LIRC, 05/11/01).

The Complainant failed to establish that the Respondent violated the Act where the Respondent established that it believed in good faith that complaints made about the Complainant by other employees were true and that this is what motivated its decision to terminate the Complainant's employment. Potts v. Magna Publications (LIRC, 02/27/01).

An employer violates the law when it knowingly makes an employment decision because some third party who is in a position to coerce the employer insists on that decision out of a discriminatory motive. The source of the third-party pressure is not relevant. Whether it is the unwillingness of biased customers to patronize a business, or the unwillingness of suppliers to sell to the business, or the unwillingness of biased investors or lenders to provide financial backing for the business, the extent of the pressures brought to bear on the business may be equally serious, but the law remains the same: the employer may not serve as a conduit for the discriminatory intent of the third party. Swanson v. State St. Stylists (LIRC, 11/26/97).

Where an employer acquiesced to pressure from another employee to fire the Complainant, it violated the Act. The motivation of the other employee was improper. In effect, by doing what the third party wanted, the employer itself acted because of an improper motive. Stanton v. Abbyland Processing (LIRC, 05/30/85), aff'd sub nom. Abbyland Processing v. LIRC (Taylor Co. Cir. Ct., 02/14/86).

It was a violation of the Act to transfer a white security guard from a position in Milwaukee's inner city because of a customer request based on the employee's race. Waldo v. Milwaukee Metro Security (DILHR, 04/08/76).

160 DISCRIMINATION FOR DECLINING TO ATTEND A MEETING OR PARTICIPATE IN A COMMUNICATION ABOUT RELIGIOUS OR POLITICAL MATTERS

[No cases]

Section 200:
The Wisconsin Open Housing & Public Accommodations Laws

210 Housing discrimination (Secs. 106.50 and 106.52, Wis Stats.)

[Ed. Note: The Wisconsin Open Housing and Public Accommodations and Amusements Act, sec. 101.22, Stats., was significantly changed by 1991 Wisconsin Act 295, essentially creating two separate laws but keeping the two laws together in one statutory section. ***This change in the Wisconsin Open Housing Law provided for elections to go to circuit court, enhanced remedies and appeals directly to the court, not to the Labor and Industry Review Commission (LIRC).*** *The Public Accommodation Law remained essentially the same after 1991 Wis Act 295 became effective. By 1999 Wis. Act 82, the Open Housing provisions and the Public Accommodations provisions were separated and renumbered again, Open Housing to sec. 106.50, and Public Accommodations to sec. 106.52. Many of the cases that follow were decided based on the statutory language found in the combined housing and public accommodations law when both laws had the same remedies and appeal process before the passage of 1991 Wis Act 295. While these older cases may still be beneficial to interpreting the public accommodation law, the older cases (on or after September 1, 1992) have limited value in interpreting housing law in Wisconsin.]*

211 Coverage, exceptions

There is no express statutory language in the Wisconsin Open Housing Act limiting the right to initiate and prosecute complaints of housing discrimination to persons with any particular threshold level of interest in the violation alleged. The administrative rules promulgated by the Equal Rights Division provide expressly that a complaint may be filed by "any person." Thus, the Equal Rights Division cannot refuse any person the right to file a complaint alleging housing discrimination based on notions of standing. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91).

The Metropolitan Milwaukee Fair Housing Council has standing to challenge unlawfully discriminatory advertisements in newspapers. The Metropolitan Milwaukee Fair Housing Council established that discriminatory advertisements discourage persons seeking housing by leading them to believe that they will face discrimination, and that they lead to misunderstanding among the public at large concerning the permissibility of housing discrimination. These factors would have an impact upon the work of the Metropolitan Milwaukee Fair Housing Council. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91).

The Wisconsin Open Housing Act does not extend to complaints of discriminatory conduct between roommates in the same apartment. Hoffman v. Warner (LIRC, 05/05/88).

An owner of residential property is responsible for the discriminatory actions of the manager, caretaker, or employee where the action is within the subordinate's apparent authority, whether or not the owner has knowledge of the conduct. However, the employee is not responsible for the discriminatory actions of the owner. McWilson v. Rieger (Milwaukee Co. Cir. Ct., 1984).

There is discrimination where race is only a partial motivation for a defendant's actions. Beardon v. Bankier (Milwaukee Co. Cir. Ct., 12/01/83); McWilson v. Rieger (Milwaukee Co. Cir. Ct., 1984).

A white couple who sought to sublet their apartment have standing to sue the apartment owner who they allege was refusing permission to qualified subletters based on their race. Corrao v. James (Milwaukee Co. Cir. Ct., 09/30/82).

212 Cases

212.1 Race discrimination

Discrimination occurs when a prospective black tenant is treated less favorably than a prospective white tenant in connection with an offer to show the apartment, rental negotiation, giving of false or misleading information regarding the availability of an apartment, or refusing or making unavailable an apartment because of the prospective tenant's race. Beardon v. Bankier (Milwaukee Co. Cir. Ct., 12/01/83).

Race was a factor in Respondent's failure to rent to a black couple where the apartment remained vacant after the couple was told that it had already been rented and where no other blacks lived in the building. A $360 forfeiture, payable to the State, was imposed. Williams v. Evers (LIRC, 07/21/83).

A white couple who sought to sublet their apartment have standing to sue the apartment owner who they allege was refusing permission to qualified sub-lessees based on their race. Corrao v. James (Milwaukee Co. Cir. Ct., 09/30/82).

212.2 Sex discrimination; marital status discrimination

A landlord did not violate the Dane County Ordinances which prohibit discrimination based on "marital status," when it refused to rent to groups of unrelated individuals seeking to live together. The landlord's motivation for denying rental to the individuals was triggered by their "conduct," not their "marital status." County of Dane v. Norman, 174 Wis. 2d 683, 497 N.W.2d 714 (1993).

The phrase "ideal for couple" used in an advertisement for rental housing does not state or indicate discrimination against single persons. Metro. Milwaukee Fair Hous. Council v. LIRC (Jacobson), 173 Wis. 2d 199, 496 N.W.2d 159 (Ct. App. 1992).

The phrase "perfect for single person" used in an advertisement for rental housing does not state or indicate discrimination within the meaning of the Wisconsin Open Housing Act. The term "single person" can be understood to mean unmarried person or "one person." In the context in which it appears (i.e., an advertisement which suggests a small house by its use of the word "cottage"), it can be seen as an informational indication that the property is considered to be best suited for not more than one person. Metro. Milwaukee Fair Hous. Council v. Weissgerber (LIRC, 12/06/91).

Where the Complainant was refused the right to rent an available apartment because of her intention to live in that apartment with another single female, this violated the prohibition on discrimination because of the sex or marital status of the person maintaining a household. Bentrup v. Apple Valley Dev. Corp. (Waukesha Co. Cir. Ct., 06/10/85).

A desire to keep a floor in a group residence all one sex (male) because bathrooms are shared is a legitimate, non-discriminatory reason for not allowing a female to rent a room on that floor. McKloskey v. YMCA (LIRC, 10/07/83).

It was not discrimination because of sex or marital status for an agent of a landlord to deny permission to a male renter to add a female friend to his lease. Eisenhauer v. Rinold (Milwaukee Co. Cir. Ct., 06/28/83).

An owner's refusal to rent to an unmarried woman because he did not believe women were capable of the required maintenance work was willful discrimination on the basis of sex and marital status. Stroud v. Evans (LIRC, 06/25/82).

212.3 Disability discrimination

There is no statutory definition of “impairment” in the Wisconsin Open Housing Act. However, the term “impairment” has been defined in the context of the Wisconsin Fair Employment Act to mean a “lessening,

deterioration, or damage to a normal bodily function or bodily condition." This definition is also appropriate for inquiries under the Wisconsin Open Housing Act. To establish a disability within the meaning of the Wisconsin Open Housing Act, the Complainant must show (1) that he or she has an actual impairment, a record of impairment, or is regarded as having an impairment; and (2) the impairment, whether real or perceived, is one that substantially limits one or more major life activities, or is regarded by the Respondent to substantially limit one or more major life activities. Kitten v. DWD, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

A perceived impairment may be sufficient to invoke the Wisconsin Open Housing Act. Kitten v. DWD, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

In this case, although an actual disability was not proven at the hearing, there was evidence that the Respondent was aware that the Complainant had been diagnosed with bulimia. As a result, the Respondent thought that the Complainant suffered from severe depression, that the Complainant was likely suicidal, and that the Complainant was likely to return to the hospital for residential treatment. The next element to be determined is whether the Respondent's perceptions about the Complainant's impairment were true, and if they were, whether one or more of the Complainant's major life activities would be limited. In this case, the Respondent's perceptions did rise to the level where, if taken as true, the Complainant's major life activities would have been limited. Therefore, the Respondent's perceptions of the Complainant show that the Respondent regarded the Complainant as disabled. Kitten v. DWD, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

The Respondent discriminated against the Complainant on the basis of perceived disability where he sought six months' advance rent from the Complainant, as opposed to the normal one month's rent and a security deposit. Thus, the Respondent exacted unequal lease terms from the Complainant because of his disability. Kitten v. DWD, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649.

A county zoning board did not violate the Wisconsin Open Housing Law when it refused to issue a shoreland zoning variance to an applicant who had requested the variance in order to modify a home to accommodate his disability. Provisions in the zoning laws allowing for a variance when "special conditions" result in "unnecessary hardship" did not have to be construed to allow the Board to issue a variance as a reasonable accommodation for an applicant with a disability. Prior Supreme Court interpretations of the zoning laws made it clear that "special conditions" applied to conditions affecting the property in question, not to conditions personal to the landowner. Further, the State has a compelling interest in maintaining its shoreland zoning laws. County of Sawyer v. DWD, 231 Wis. 2d 534, 605 N.W.2d 627 (Ct. App. 1999).

212.4 Other discrimination

Federal Section 8 vouchers do not constitute a "lawful source of income" within the meaning of that phrase as it is used in the Wisconsin Open Housing Act. Knapp v. Eagle Property Mgmt. Corp., 54 F.3d 1272 (7th Cir. 1995).

Sec. IND 89.01(8), Wis. Adm. Code, is not an exclusive listing of what constitutes a "lawful source of income." Section 8 rental assistance payments which are made to the landlord on behalf of a particular tenant are properly considered a source of income to that tenant. Eagle Property Mgmt. v. Wheeler (Dane Co. Cir. Ct., 09/26/94). [Ed. Note: Sec. 89.01(8), Wis. Admin. Code has been renumbered DWD 220.02(8), Wis. Admin. Code.]

A homosexual individual who had been evicted from his apartment failed to establish that the landlords had knowledge of his sexual orientation prior to evicting him or that their articulated reasons for evicting him, relating to repair of his apartment, were pre-textual. Raleigh v. Erickson (LIRC, 12/18/92).

An advertisement indicating, "prefer a Christian" indicates discrimination on the basis of religion in housing. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91).

The Complainant applied for an apartment advertised for rent by the Respondent. The Respondent was aware that the Complainant's income was derived from social security, although he did not know how much that income was. The Respondent declined to rent the apartment to the Complainant, stating that he preferred to rent it to "two working people." The Respondent violated the Wisconsin Open Housing Act by refusing to rent to the Complainant because of the Complainant's source of income. Fernandez-Tome v. Joseph (LIRC, 07/25/90).

213 Testing

The use of testers or investigators is a reasonable means by which compliance with fair housing laws may be ascertained, and evidence of their activities is an appropriate method of demonstrating the presence or absence of discriminatory policies. The fact that a tester is not a bona fide good faith renter or applicant does not impair his or her credibility as a witness. Beardon v. Bankier (Milwaukee Co. Cir. Ct., 12/01/83); Parish v. Sprenger (Milwaukee Co. Cir. Ct., 1984); Brantley v. Rosenblatt (Milwaukee Co. Cir. Ct., 09/06/84).

Testing does not constitute entrapment. Beardon v. Bankier (Milwaukee Co. Cir. Ct., 12/01/83).

A tester may lawfully tape record his or her conversation with another person, even in the course of a fair housing test and in contemplation of a lawsuit, as a legitimate means of preserving evidence. Beardon v. Bankier (Milwaukee Co. Cir. Ct., 12/01/83); Brantley v. Rosenblatt (Milwaukee Co. Cir. Ct., 09/06/84).

214 Advertisements for housing

A newspaper violated the Wisconsin Open Housing Act when it ran an advertisement for housing which read: "Apartment for rent. 1-bedroom, electric included, mature christian handyman . . ." It is immaterial that the word "christian" was not capitalized. The ordinary reader would naturally interpret the ad to state or indicate a discriminatory preference on the basis of religion. The ad also states or indicates sex discrimination. Metro. Milwaukee Fair Hous. Council v. Hartford Times Press (LIRC, 08/31/93).

The test to determine whether an advertisement in connection with housing indicates a preference, limitation or discrimination is whether the advertisement would suggest to an ordinary reader that a particular class is preferred or dispreferred for the housing in question. This test equates the "ordinary reader" with the law's traditional "reasonable person" who is neither the most suspicious nor the most insensitive of our citizenry. Metro. Milwaukee Fair Hous. Council v. LIRC (Jacobson), 173 Wis. 2d 199, 496 N.W.2d 159 (Ct. App. 1992).

The phrase "ideal for couple" used in an advertisement for rental housing does not state or indicate discrimination against single persons. Metro. Milwaukee Fair Hous. Council v. LIRC (Jacobson), 173 Wis. 2d 199, 496 N.W.2d 159 (Ct. App. 1992).

An advertisement for housing violates the law if it would suggest to an ordinary reader that a particular class or category of persons will be preferred or dispreferred for the housing in question. In this case, the use of the phrase "retired or working couple" in an advertisement for rental housing does not indicate discrimination based on marital status. However, the advertisement does state or indicate discrimination

based on lawful source of income. The description "retired or working," is not ameliorated by a qualifying phrase such as "ideal for" or "perfect for," which would have indicated that it was a mere suggestion by the landlord as to who might particularly enjoy the property. Instead, it is bluntly stated and unequivocally suggested that there is at very least a preference for retired or working persons, if not in fact an outright limitation. MMFHC v. South Side Spirit (LIRC, 08/26/92).

The prohibition on the publication of advertisements which express discriminatory distinctions is intended to prevent a harm that such publication can foreseeably cause, and it is not necessary that the harm have actually occurred before there can be a violation of the prohibition. There is no requirement that the person publishing the advertisement be found to have intended to deter persons from seeking housing. The question of liability turns simply on the substance of the advertisement and the effect it could reasonably be expected to have. MMFHC v. South Side Spirit (LIRC, 08/26/92).

The phrase "perfect for single person" used in an advertisement for rental housing does not state or indicate discrimination within the meaning of sec. 101.22(2)(d), Stats. The term "single person" can be understood to mean unmarried person or "one person." In the context in which it appears (i.e., an advertisement which suggests a small house by its use of the word "cottage"), it can be seen as an informational indication that the property is considered to be best suited for not more than one person. Metro. Milwaukee Fair Hous. Council v. Weissgerber (LIRC, 12/06/91), aff'd. sub nom. MMFHC v. LIRC (Weissgerber) (Waukesha Co. Cir. Ct., 08/24/92). [Ed. note: sec. 101.22(2)(d), Stats. has been renumbered sec. 106.50(2)(d), Stats.]

An advertisement indicating "prefer a Christian" indicates discrimination on the basis of religion in housing. Whether the Respondent intended the advertisement to have the effect of discouraging non-Christians from applying to rent the property is immaterial. His actions in choosing the words used and in having the advertisement published were certainly intentional. Sec. 101.22(2)(d), Stats., neither expresses nor implies the necessity for any further intent as a requirement for a finding of illegality. It simply turns on the substance of the advertisement and its effect. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91). (Ed. Note: sec. 101.22(2)(d), Wis. Stats. has been renumbered sec. 106.50(2)(d), Wis. Stats.).

215 Remedies

[Ed. Note: Wis. State 106.50 allows for economic and noneconomic (compensatory) damages, injunctive relief, forfeiture, attorneys fees and costs. *https://docs.legis.wisconsin.gov/document/statutes/106.50(6)(h).]*

It was inappropriate to assess a forfeiture against the Respondents where there was no questioning of them regarding their awareness of the Open Housing Law at the hearing. Imposing a forfeiture is only appropriate where there is proof of a knowing and reckless disregard as to whether an action violates the law. Parkinson v. Obernberger (LIRC, 10/15/93).

The Department's decision finding that a newspaper violated the Wisconsin Open Housing Act by publishing advertisements in connection with the rental of housing did not violate the newspaper's rights to freedom of speech and press as protected by the United States and Wisconsin Constitutions. Metro. Milwaukee Fair Hous. Council v. Hartford Times Press (LIRC, 08/31/93).

The requirement that a newspaper which had published a discriminatory advertisement for housing provide staff with training in the effects of the Open Housing Act on the legality of advertisements for housing is a reasonable exercise of the Department's authority under sec. 101.22(4)(d), Stats., to order such action by the Respondent as will effectuate the purposes of the Act. MMFHC v. South Side Spirit (LIRC, 08/26/92). (Ed. note: sec. 101.22(4)(d), Stats., has been renumbered sec. 106.50(6)(f)5, Stats.).

The requirement of the imposition of a forfeiture contained in the Wisconsin Open Housing Act is indisputably a penal provision. Insofar as the Act is penal in nature (i.e., designed not to provide a remedy to the person wronged but to exact punishment from the person committing the wrong) it must be strictly construed. A violation must also be found to be "willful" for a forfeiture to be imposed. The Respondent must have acted in spite of knowing of the illegality of his conduct under the Wisconsin Open Housing Act, or in "reckless disregard" of the law. Where the Respondent did not know of the existence of the Wisconsin Open Housing Act or of the potential illegality of his conduct under the Act, an assessment of a forfeiture is not appropriate. Metro. Milwaukee Fair Hous. Council v. Goetsch (LIRC, 12/06/91).

The Complainant failed to present adequate proof that he had suffered a monetary loss as a result of the Respondent's discriminatory action of denying him permission to have a roommate where the Complainant: (1) submitted absurdly high estimates of gas and electric costs, (2) failed to prove whether his rent would have stayed the same if he was allowed to have a roommate, and (3) did not have anyone ready to share his apartment and share expenses. Dude v. Thompson (LIRC, 11/16/90), aff'd., sub nom. Dude v. LIRC (Milwaukee Co. Cir. Ct., 08/08/91).

The Respondent's repeated verbal abuse (including his reference to black tenants as "you people" and stating "see how much trouble black people can cause") constituted a willful violation of the Open Housing Act. The Commission, while noting that it did not wish to deprecate the seriousness of the Respondent's conduct, found the conduct less egregious than cases in which racial slurs were used, thus warranting the imposition of a $100.00 forfeiture. Pryor v. Knecht (LIRC, 04/21/89).

The Equal Rights Division has authority to award out-of-pocket expenses, interest, attorney's fees and costs to remedy violations of the Wisconsin Open Housing Act. Davis v. Piechowski (LIRC, 10/24/86); MMFHC v. Hartford Times Press (LIRC, 08/31/93).

As a penalty for the willful violation of the Open Housing Act by refusing to rent to an unmarried woman, the owner must forfeit $100.00 to the State of Wisconsin. Stroud v. Evans (LIRC, 06/25/82).

219 Miscellaneous

Dismissal was appropriate where the Complainant had been provided repeated opportunities to respond to discovery and the ALJ's order to compel discovery but did not do so. Rodriguez v. DWD & La Casa Esperanza (Waukesha Co. Cir. Ct., 12/07/16) (unavailable online).

Sec. 106. 50(f)6., Stats., provides that if there is a finding that a Respondent has not engaged in housing discrimination as alleged in the complaint, costs in an amount not to exceed $100.00 plus actual disbursements for the attendance of witnesses may be assessed against the Department of Workforce Development in the discretion of the Department. While there may be special circumstances which may, in exceptional cases, warrant exercising the discretion to award costs and actual disbursements for attendance of witnesses against the Department of Workforce Development, such an award generally would not be imposed where the administrative agency is carrying out its statutorily-authorized, quasi-judicial duty to fairly and impartially hold hearings on complaints of housing discrimination. Simone v. Lloyd (ALJ decision, 01/07/03).

The prohibition against coercion, intimidation, threatening or interfering with the exercise or enjoyment of rights contained in sec. 101.22(4m), Stats., is in the nature of an anti-retaliation provision. Where there has been a direct violation of the anti-discrimination provision of the Open Housing Act, there is no need to invoke sec. 101.22(4m), Stats., to explain why a violation has been found. Dude v. Thompson (LIRC, 11/16/90), aff'd., sub nom. Dude v. LIRC (Milwaukee Co. Cir. Ct., 08/08/91). [Ed. note: sec. 101.22(4m), Stats., has been renumbered sec. 106.50(2)(j), Stats.]

220 Discrimination in Public Accommodations or Amusements

[Ed. Note: The Wisconsin Open Housing and Public Accommodations and Amusements Act, sec. 101.22, Stats., was renumbered to sec. 106.04, Stats., by 1995 Wis. Act 27. By 1999 Wis. Act 82, the Open Housing provisions and the Public Accommodations provisions were separated and renumbered again. The Open Housing law is now in sec. 106.50, Stats. The Public Accommodations and Amusements law is contained in sec. 106.52, Stats.].

221 Coverage

A library is a place of public accommodation. However, the Complainant's allegation that the Respondent declined to include a book she authored in its collection because of bias against her related to her race and creed was not covered by the WPAAL. Inclusion of a book in the library collection is not a service normally offered to members of the public, but is a discretionary opportunity made available to authors on a selective basis. Lewis v. Wauwatosa Pub. Library (LIRC, 10/31/22).

The commission has generally found that governmental entities are not covered by the WPAAL. The County of Dane is a unit of government and not a "place." While Dane County does operate the Dane County Courthouse, a building that is open to the public, the Courthouse is not a public place of accommodation or amusement within the meaning of the WPAAL; its primary function is not to provide public accommodations or amusements, and it is not comparable to the places of business refenced in the WPAAL. Kreger v. Cnty. of Dane (LIRC, 03/31/22).

Veterinary hospital is a place of business within the meaning of the WPAAL, and pet health care is a service within the meaning of the WPAAL. Nothing in the WPAAL specifies that hospitals or clinics referenced in the statute must be solely for the care of humans. The fact that veterinary services are not specifically referenced in the WPAAL does not compel a conclusion that a veterinary hospital is not covered by the WPAAL as the nature of the business is not dissimilar to those listed in the WPAAL. Shott v. Lake Geneva Animal Hospital (LIRC, 11/11/21).

A radio station was not subject to the WPAAL because it is not a "place," and is not similar to or consistent with the types of businesses enumerated in the statute. The Complainant's allegation that he was denied an opportunity to have his song played on the Respondent's radio station does not set forth a claim that is covered by the WPAAL. McCann v. Midwest Family Broadcasting (LIRC, 11/11/21).

A public defender's office is not a "public place of accommodation or amusement," and a public defender is not providing the type of accommodation or amusement that would be covered under the statute. Hortman v. Maguire Law Office (LIRC, 12/29/20).

The Girl Scouts do not operate a public place of accommodation, notwithstanding the fact that the troop meets at a school. The Girl Scouts also fall within the exception contained in the statute for private non-profit organizations providing services to members or guests. Kreger v. Girl Scouts of Wis. Badgerland Council (LIRC, 09/11/2020).

As a general rule, governmental agencies are not considered public places of accommodation or amusement. Sauers v. Village of Prairie du Sac (LIRC, 09/27/19).

For an employer to be accountable for the acts of its employees under the Public Accommodation Act, the employee must have been acting within the scope of his or her employment when engaging in the allegedly discriminatory conduct. The burden to establish that an employee was acting within the scope of his or her employment is on the Complainant. The Complainant must prove that the individual's conduct was motivated by an interest to serve his or her employer. This interest need not be the employee's primary interest, however, it must be at least one of the purposes motivating the employee's conduct. An employee who called a customer a

racial epithet was acting outside her scope of employment and therefore her discriminatory conduct could not be attributed to the Respondent. Turner v. Kelly's Market (LIRC, 12/11/18).

The Complainant alleged that Outagamie County violated the WPAAL by taking away custody of his children, improperly billing him for the birth of his children, and garnishing his benefits checks to cover child support/childbirth. A county's department of health and social services is not a covered entity under the WPAAL. It is not a public place of accommodation or amusement as defined in the WPAAL. Even if it was considered a business within the meaning of the WPAAL, the injuries alleged by the Complainant are not the type of injuries contemplated by the WPAAL. Young v. Cnty. of Outagamie Dep't of Health & Soc. Servs. (LIRC, 08/30/18).

A gas station and convenience store is a public place of accommodation or amusement within the meaning of the WPAAL. However, the allegation that the Complainant was denied an opportunity to go through the Respondent's trash cans is not covered by the Public Accommodations WFEA. Going through the trash is not an accommodation the Respondent provides to any members of the public. Young v. Kwik Trip, Inc. (LIRC, 09/21/17).

The Public Accommodations Act prohibits any person from denying to another the full and equal enjoyment of a place of public accommodation for a discriminatory reason, and prohibits any person from directly or indirectly publishing, circulating, displaying or mailing any written communication which the communicator knows is to the effect of denying a place of public accommodation to another for a discriminatory reason. Because the Complainant alleged that someone orally notified him that his access would be denied in the future, he has not alleged an injury in violation of the Act. Young v. DWD (LIRC, 01/30/15).

The Complainant's allegation that she was given differential treatment compared to a white male customer in negotiating a transaction at a retail store states a claim under the WFEA's prohibition against preferential treatment. The Complainant's comparison of her experience and the experience of a white male customer did not show preferential treatment because of sex or race. Differences in the treatment of the two customers was satisfactorily explained as being motivated by non-discriminatory economic considerations, reducing the idea of racial or sexual bias to speculation. Khan v. Value Village (LIRC, 12/04/14), (appealed to circuit court then elected a jury trial).

The Wisconsin Public Accommodations & Amusements Law does not prohibit conduct motivated by a desire to retaliate against a person because they have complained of alleged discrimination under the law. (In Schmid v. Step-Up Shop (LIRC, 01/11/93), LIRC held that retaliation was covered by the public accommodations law; however, that holding was the result of different statutory language at the time). Tabatabai v. Wis. Physicians Serv. Health Ins. Co. (LIRC, 02/29/12).

The allegation in the complaint that the Respondent was motivated by race and national origin bias when it paid the Complainant less for a submitted medical expense was properly denied for failure to state a claim under the public accommodations law. The relationship of insurer and insured is fundamentally dissimilar from the types of relationships that the public accommodations law is designed to cover. The nature of the services provided within that relationship is also fundamentally dissimilar from the nature of the types of services to which the law is designed to ensure equal access. The only exception to this principle is sec. 106.52(3)(a)4., Stats., which specifically covers refusal to furnish or charging a higher rate for any "automobile" insurance because of race, color, creed, disability, national origin or ancestry. Tabatabai v. Wis. Physicians Serv. Health Ins. Co. (LIRC, 02/29/12).

A claim that a health insurance company violated the public accommodations law by writing allegedly offensive notes in its internal records because of race and national origin bias was properly dismissed for failure to state a claim under the law because the nature of the relationship and the services involved was fundamentally dissimilar from the types of relationships the law is intended to cover. Further, the offensive

statements in internal documents could not be considered a violation of sec. 106.53(3)(a)3., Stats., because the point of that section is to prevent statements from being publicized so that they have the effect of discouraging or deterring individuals from even attempting to patronize certain establishments. Written notes in a purely internal log would not constitute publishing, circulating, displaying or mailing those documents. Tabatabai v. Wis. Physicians Serv. Health Ins. Co. (LIRC, 02/29/12).

There are a variety of government entities that supply necessities and comforts of the kind offered by the businesses enumerated in the Wisconsin Public Accommodation and Amusements Law. The State itself, through the Department of Natural Resources, provides places for outdoor recreation, including camping, hunting and fishing. County and local governments also provide such places of recreation for the public. Further, various hospitals and nursing homes are government-owned and operated. Such government entities supply necessities or comforts of the kind offered by the businesses listed in the Law's definition of public place of accommodation or amusement and are therefore subject to the Law. Duarte-Vestar v. DOA (LIRC, 10/16/09).

The primary function of the Department of Administration, a State agency, is to provide support services to other State agencies. The DOA is not comparable or consistent with the entities enumerated in the public accommodation or amusement statute. The DOA does not supply necessities or comforts of the kind offered by the listed businesses in the law's definition of public place of accommodation or amusement. Duarte-Vestar v. DOA (LIRC, 10/16/09).

The Complainant alleged that when he attended an event at a stadium, an individual employed by a television station which was providing television coverage of an event at the stadium asked him to leave the building. The Complainant filed a complaint against both the television station and the individual employed by the television station. The complaint was properly dismissed on jurisdictional grounds. Neither the television station nor the individual named in the complaint operated the stadium. Further, with respect to the individual named as a Respondent in the complaint, even assuming that the television station was a place of public accommodation (which it is not) the complaint would have been dismissed because the individual was acting as an agent of an employer. Agents should not be separately named as Respondents. Young v. WEAU-TV (LIRC, 05/18/07).

The Respondent's use of the phrases "women only" and "exclusively for women" did not conform with the advertising provisions of the Wisconsin Public Accommodations and Amusements Law that were in effect at the time of the hearing. Subsequent to the issuance of the Administrative Law Judge's decision, the legislature amended the Wisconsin Public Accommodations and Amusements Law. The newly amended statute, which went into effect on June 3, 2003, provides, "Nothing in this section prohibits a fitness center whose services or facilities are intended for the exclusive use of persons of the same sex from providing the use of those services or facilities exclusively to persons of that sex, from denying the use of those services or facilities to persons of the opposite sex, or from directly or indirectly publishing, circulating, displaying or mailing any written communication to the effect that the use of those services or facilities will be provided exclusively to persons of the same sex and will be denied to persons of the opposite sex." Sec. 106. 52(3)(e), Stats. Because a fitness center is now permitted to discriminate based upon sex, the cease-and-desist order in the Administrative Law Judge's decision was no longer enforceable. Swayne v. Dave Watson, Inc. (LIRC, 09/24/03).

The Wisconsin Public Accommodation and Amusement Law does not prohibit discrimination based upon age, except with respect to lodging. While it would certainly be regrettable if the Complainant were treated unfavorably with regard to his seating on a bus because of his age, such allegations do not constitute a claim for which relief can be granted under the law. Kartin v. Duluth Transit Auth. (LIRC, 08/15/03).

The city clerk's office is not a public place of accommodation or amusement. While it is possible that there are vending machines in the city clerk's office, it is clearly not the function of the city clerk's office to sell sodas or snacks to the public, and the city clerk's office does not operate in order to provide goods or services to individuals. Moore v. City of Madison (LIRC, 09/26/02).

The Respondent, the Wisconsin Youth Soccer Association (WYSA), is a private, non-profit organization. The WYSA requires that players try out and be accepted onto a team and that they adhere to certain rules of conduct adopted by the organization. Thus, membership in the WYSA requires more than the mere payment of a fee. Therefore, the WYSA comes within the exception in sec. 106.52(1)(e), Wis. Stats. It is not a public place of accommodation or amusement within the meaning of the law. Holloway v. Wis. Youth Soccer Ass'n (LIRC, 07/16/02).

A blood plasma center which pays donors for blood plasma donations that are used to produce medical products is not a place of public accommodation within the meaning of the Wisconsin Public Accommodations and Amusements Law. Therefore, its refusal to accept a donation of blood plasma from the Complainant cannot be considered a violation of the statute. Ponick v. Community Bio Resources (LIRC, 08/30/01).

Even an isolated instance of harassing behavior can be sufficient to deprive a restaurant patron of the full enjoyment of a place of public accommodation. Here, the Complainant's contentions that she heard a restaurant manager make an overtly racist remark over a walkie-talkie, and that this made her feel embarrassed and unwelcome, led to a conclusion that the Complainant's experience at this place of public accommodation was less than fully enjoyable. Moreover, it can be inferred that the Complainant's enjoyment was not equal to that of non-black restaurant patrons, who presumably did not have to listen to derogatory about their race. Even presuming that the manager intended the remark to be a harmless joke, the fact remains that he made a remark which was inherently racist and offensive, and which the Complainant found to be embarrassing and unwelcome. LIRC declined to draw any adverse conclusion from the Complainant's failure to register a complaint directly with the Respondent. Moreover, there is no reason to conclude that harassment must be condoned by management before an individual can be found to have been deprived of the full and equal enjoyment of a place of public accommodation. Hampton v. Pizza Hut (LIRC, 07/27/00).

"Economic class" is not a protected category under the public accommodations statute. Green v. PDQ (LIRC, 01/20/99).

Access to the governing bodies and committees of corporations, even those who are alleged to operate public places of accommodation are not protected by Wisconsin's Public Accommodations statute. Therefore, the allegedly discriminatory makeup of the board of directors in this case could not form the basis for a claim under sec. 106.04(9)(a)2, Stats. Barry v. Maple Bluff Country Club, 221 Wis. 2d 707, 586 N.W.2d 182 (Ct. App. 1998). [Ed. Note: sec. 106.04(9)(a)2., Stats. has been renumbered sec. 106.52(3)(a)2., Stats.]

Private nonprofit organizations are outside the scope of the public accommodations statute only when they are providing accommodations, amusements, goods and services to: (a) members of the organization, (b) guests named by members, and (c) guests named by the organization. Whether a private nonprofit organization is outside the scope of the statute is conditioned on the relationship of the club or its members to the persons to whom services or facilities are provided. The obligation to plead and prove this statutory proviso is the club's because it is seeking the benefit of it in this case. Barry v. Maple Bluff Country Club, 221 Wis. 2d 707, 586 N.W.2d 182 (Ct. App. 1998).

A complaint was appropriately dismissed where the Complainant alleged that the Respondent, a grocery store, treated customers differently based upon whether or not they had certain coupons which were attainable only in certain editions of a local newspaper. Even if this was true, it would not be a violation of

the law prohibiting discrimination in public accommodations because of sex, race, color, creed, disability, sexual orientation, national origin or ancestry. Scarvaci v. Kohl's Food Stores (LIRC, 07/20/98).

The Rock County Sheriff's Department is not a "public place of accommodation or amusement" as that term is defined in the Wisconsin Public Accommodations and Amusements Act. The Sheriff's Department is totally dissimilar in nature from the businesses listed in the statute. Therefore, the Complainant's allegations that the Sheriff's Department, among other things, denied him permission to make a phone call, and denied him medical attention were appropriately dismissed. Perry v. Rock County Sheriff's Dep't (LIRC, 06/25/97).

The nature of the businesses listed in the Public Accommodations Act involve businesses that offer health and beauty aids, food, drink, recreation and lodging to patrons. They are accommodations generally offered by businesses classified as service industry businesses. The Respondent's business in this case, which consists of leasing real property to entrepreneurs for the establishment of their own place of business, does not constitute the operation of a public place of accommodation within the meaning of the law. The Respondent does not supply necessities or comforts of a kind enumerated in the statute. Young v. Trimble (LIRC, 07/11/94).

In a case brought under the Wisconsin Public Accommodations and Amusements Act, the Complainant, a lesbian, alleged that she and the members of her baseball team, which played in games sponsored by the Respondent, experienced verbal harassment from both spectators at the game and players on other teams who shouted comments such as "fag," "dike," "queer," "go home," and "she's got AIDS." The heckling that occurred in this case created a hostile environment which had the effect of denying the full and fair enjoyment of a public accommodation to the Complainant. However, the Respondents were not liable in this case because they did not exercise a degree of control over the persons engaging in the harassment. Neldaughter v. Dickeyville Athletic Club (LIRC, 05/24/94).

A health club which provides services to the general public subject to no requirement other than payment of fees for the services does not involve the type of "membership" anticipated by the Legislature in its description of a "bona fide private, nonprofit organization or institution," providing services to "members of the organization or institution," "during an event." Sec. 101.22(1)(bp)2, Stats. The "membership" which the Respondent's health club invokes is no more than a method of accounting for fee payments. Schmid v. Shape Up Shoppe (LIRC, 01/11/93). [Ed. note: sec. 101.22(1)(bp)2, Stats., has been renumbered sec. 106.52(1)(e)2., Stats.]

Sec. 101.22(4)(mn), Stats. is an anti-retaliation provision which applies to the Public Accommodations Law. When a public place of accommodation retaliates against a person who has filed a complaint of discrimination by further limiting or denying access to that person, this tends to coerce, intimate, threaten and interfere with that person's exercise and enjoyment of their statutory right to file a charge of discrimination. Schmid v. Shape Up Shoppe (LIRC, 01/11/93).

The denial of an opportunity to be on an amateur softball team is not a denial or a limitation of a public place of accommodation or amusement. First, the right to be on an amateur softball team is simply not a "place." Second, the right to be on a softball team is dissimilar from the other things mentioned in the statute because it relates to something which is in the normal course not offered to members of the public at large subject only to ability to pay but is rather offered with great selectivity. Third, it is at least arguable that an amateur league team is a "bona fide private, non-profit organization or institution," particularly in the sense of being private. Admittance to the team is entirely dependent upon invitation extended by the group on the basis of private and personal considerations, such as friendship, compatibility and ability. Neldaughter v. Mound View Cheese (LIRC, 07/31/91).

In order to determine whether the Public Accommodations Act is applicable, the nature of the Respondent's business must be considered. Only if the Respondent's business or activity constitutes a "public place of accommodation or amusement" can it be found that the Respondent has violated the law. A company which provides management services for the owners of a shopping center with commercial tenants does not offer "accommodations to the public" as those terms are normally understood. The company serves the property owners that are its clients. The company is totally dissimilar in nature from the businesses listed in the Public Accommodations Law. Wang v. Executive Management, Inc. (LIRC, 12/19/90).

In order to be a place of public accommodation, a business must be of the same type as those identified in the statute. The classified advertising section of the Respondent's newspaper is not subject to the provisions of the Public Accommodations Act because newspapers are totally dissimilar in nature from businesses listed in the Act and since newspapers do not offer public accommodations in the sense that term is normally understood. Hatheway v. Gannett Satellite Network, 157 Wis. 2d 395, 459 N.W.2d 873 (Ct. App. 1990).

222 Cases

The fact that the Respondent presented no witnesses does not require a finding on the Complainant's behalf. The Complainant retains the ultimate burden of proof, and in this case the Respondent's non-discriminatory explanation for barring the Complainant from its facility came in through the Complainant's own evidence. Young v. State of Wis., Dep't of Workforce Devel., Div. of Employment and Training (LIRC, 01/31/22).

The Complainant failed to establish the Respondent violated the Wisconsin Public Accommodations & Amusements Act because of sexual orientation. He alleged that an employee of the Respondent (Walgreens) told him that the Respondent did not serve "his kind of people." That statement, without more, is insufficient to establish that it was related to the Complainant's sexual orientation. Nothing in the record indicates that the employee knew that the Complainant was homosexual. The prescriptions the Complainant sought to have filled were for insulin and blood pressure medication and would have given no reason for the employee to be aware of the Complainant's sexual orientation. James v. Walgreen Co. (LIRC, 05/31/16) (unavailable online, ERD Case # CR201500511).

The Complainant's allegation that she was given differential treatment compared to a white male customer in negotiating a transaction at a retail store states a claim under the WFEA's prohibition against preferential treatment. The Complainant's comparison of her experience and the experience of a white male customer did not show preferential treatment because of sex or race. Differences in the treatment of the two customers was satisfactorily explained as being motivated by non-discriminatory economic considerations, reducing the idea of racial or sexual bias to speculation. Khan v. Value Village (LIRC, 12/04/14), (appealed to circuit court then selected jury trial).

The Complainants may have found it insulting or demeaning to have been denied entry into a club based upon their looks and manner of dress. However, the Respondent is a limited-access club that maintains a dress code designed to ensure that its clientele reflects a fashionable and trendy image. The evidence established that the Respondent turned away people of all races because of their physical appearance and manner of dress. The Complainants' position that they were discriminated against based upon their race was also weakened by the fact that they were admitted to the club on two of the three occasions they attempted to gain entry. Pryor v. Decibel Deep Bar (LIRC, 10/28/11).

There was no probable cause to believe that the Complainant was denied service at a service station because of her race. The Complainant, who is African-American, sent her daughter into the service station with her credit card so that the clerk could authorize her to purchase gasoline. The clerk told the Complainant's daughter that he could not turn on the gas pump because the credit card was not hers. The Complainant entered the service station to speak to the clerk after he cursed at her daughter.

When the Complainant questioned the clerk about using foul language in her daughter's presence, the clerk stated, "I don't have to take this shit from you, nigga." The evidence failed to provide reason to believe that the Complainant was denied gasoline service because of her race. The evidence established that she was actually denied gasoline before the clerk's use of the racial slur, and that other African-American customers did receive gasoline service while the Complainant was at the service station. Bowman v. Citgo Convenience Store (LIRC, 08/25/10).

The Respondent was a van service which was acting as an agent of the county Sheriff's Department. The Sheriff's Department contracted with the Respondent to remove and store the Complainant's personal property after he was evicted and his landlord secured a writ of restitution. The Complainant, as a third party who did not directly attempt to avail himself of the Respondent's services, did not have the type of relationship with the Respondent that is contemplated by the Public Accommodations and Amusements law. Therefore, there was no basis to find that he was denied the full and equal enjoyment of a public place of accommodation or amusement. Wendt v. Bajet Van Lines (LIRC, 10/06/05).

The Complainant failed to establish that the Respondent, a basketball club, violated the Public Accommodations and Amusements law by not selecting her to continue as a volunteer coach for her daughter's fifth grade team because of her sex. Sec. 106.52, Stats., protects access to "places." The right to coach an amateur basketball team is not a "place." Moreover, a "public place of accommodation or amusement" is a place to which members of the public are normally invited under no condition but the payment of a fixed charge (i.e., there was no selectivity on the part of the proprietor in the admission of members of the public, apart from a requirement that they be able to pay). Here, members of the general public are not invited to be coaches of the teams organized by the Club. In addition, the statute protects a person's access to services provided by, not a person's provision of services to, a public place of accommodation or amusement. The intended recipients of the Club's amusements or services are the children who participate in the basketball training and competition opportunities directed by the coach. As a result, it is irrelevant that the Complainant derives amusement from serving as a coach, because her status as a provider of the Club's services is not a protected one. Wolff v. Middleton Basketball Club (LIRC, 03/11/05); aff'd. sub nom. Wolff v. LIRC (Dane Co. Cir. Ct., 01/03/06).

Where the evidence established that the Complainant was barred from the Respondent's premises based upon repeated instances of disorderly conduct, and not because of her race, color, age or gender, there was no probable cause to believe that the Respondent had violated the Wisconsin Public Accommodations and Amusements Act. Rhyne v. Mayflower Motel & Lounge (LIRC, 04/16/01).

The Complainant alleged that she was forbidden from playing golf at certain times and was denied access to certain business and networking opportunities solely because she was a woman member of a country club. Her case was not barred by the one-year statute of limitations because the club's allegedly discriminatory actions constituted continuing violations of the statute resulting from express, openly espoused policies of a continuing nature. Barry v. Maple Bluff Country Club, 221 Wis. 2d 707, 586 N.W.2d 182 (Ct. App. 1998).

The Respondents violated the Wisconsin Public Accommodations and Amusements Act by denying the Complainant the full and equal enjoyment of their bar because of disability. Among other things, the Respondents used demeaning language in telling the Complainant, who has a pronounced limp, that he should leave the bar. For example, one of the co-owners of the bar stated, "Crips don't belong in my bar." The Complainant did not present medical documentation regarding his condition; however, he was still able to prove a violation of the statute by showing that he was regarded as having a disability.

Even if the Respondents had offered accommodations to some disabled individuals, this alone did not defeat the Complainant's claim that he was denied access to the Respondents' business because he was regarded as disabled. Perrigoue v. Oregon Bowl (LIRC, 02/25/98).

The Complainant failed to state a claim upon which relief could be granted where she alleged that the Respondents did not allow her to participate in a basketball game after she had won a contest sponsored by the Respondents. The winner of the contest was to be given an opportunity to play in a basketball game with the Harlem Globe Trotters. When the Complainant reported to the game, the Respondents refused to allow her to play due to her sex. The alleged denial of the opportunity to play in the basketball game did not constitute a violation of the public accommodations law because a basketball game is not a "place" of accommodation or amusement. Graser v. WMIL FM 106 (LIRC, 01/17/95).

The Respondent's "ladies drink free" night violated sec. 101.22(9)(a)2, Stats. The reasonable interpretation of sec. 101.22(9)(a)2, Stats., is that it prohibits price differentials or discounts based on the categories specified in the statute. Certain conduct (such as charging a higher than regular price on drinks to only one gender or to only one race) would violate both subdivisions of this statutory provision. Promotions may not involve price differentials or other differential treatment based on the categories covered by the statute, whatever the intent. It was immaterial in this case that the Respondent also offered a "men's night out" when men received a discount on beer. On the night the Respondent offered free drinks to women it gave preferential treatment to women. Preferential treatment to men on other nights did not correct that violation. Novak v. Madison Motel Ass'n 188 Wis. 2d 407, 525 N.W.2d 123 (Ct. App. 1994). [Ed. note: Sec. 101.22,(9)(a)2, Stats., has been renumbered sec. 106.52(3)(a)2., Stats.]

The Respondent subjected the Complainants to a racially hostile environment, thereby depriving them of the "full and fair enjoyment" of a place of public accommodation when the owner of the restaurant told the Complainants that they could leave after the Complainants had objected to the owner's use of racially offensive language with other restaurant patrons. Although the remarks were not personally directed at the Complainants, they pertained to the Respondent's negative perceptions of black people in general, and were made loudly enough for the Complainants to hear plainly. In essence, although the Complainants were invited by the Respondent to patronize the restaurant, a place of public accommodation, their use of the establishment was made contingent upon their willingness to suffer the offensive comments. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

The Respondent violated the Public Accommodations Law by offering aerobics classes in which only women are allowed to participate. The fact that the legislature has created an express exception with limited applicability to public toilets, showers, saunas and dressing rooms, precludes the Department from recognizing an exception for aerobics classes. It is in the domain of the Legislature to weigh and decide difficult policy questions such as what the scope of the protected right of privacy should be and what weight one person's rights to privacy should be given as against another person's rights to be free of discrimination. Schmid v. Shape Up Shoppe (LIRC, 01/11/93).

A difference in men's and women's showers and dressing rooms is legally significant if it results in either sex not receiving full and equal enjoyment of the public place of accommodation or amusement. A showing that one sex did not receive full and equal enjoyment of a public place of accommodation or amusement may be made by showing that the facilities of one group are unambiguously better than those of the other, or by demonstrating that the differences were either intended to or did have the effect of discouraging one group's use of the public accommodation or amusement in question. Where the Complainant established only that there were partitions between shower heads and separate changing enclosures in the women's shower and locker room that were absent in the men's shower and locker room, the Complainant failed to show that the women's locker room was unambiguously better than the men's locker room or that the difference either was intended to or did discourage men from using the Respondent's facilities. Malecki v. Vic Tanny Int'l of Wis. (LIRC, 08/07/92).

223 Remedies

The assessment of forfeitures within the statutory range set forth in Wis. Stat. §106.52 is within the sound discretion of the Equal Rights Division. The commission found that a $500 forfeiture per violation, for a total of $4,500, was appropriate as it reflected the seriousness of the violations, while taking into account the absence of the type of aggravating factors that might warrant assessing the highest possible penalty per violation. Swayne and Lax Tennis, Ltd. v. Watson, Inc. (LIRC, 09/24/03).

The Public Accommodations and Amusements Act does not authorize the Department to award compensatory damages to a prevailing Complainant. Because the Act does not contain a provision guaranteeing a right to trial by jury (a right which is, by contrast, provided under the recently amended Open Housing Act), allowing the Department to award compensatory damages would raise significant constitutional questions. The constitutional guarantee of the right to a trial by jury in civil matters requires a jury trial in cases in which damages are to be awarded. The Department may, however, award equitable remedies such as "out-of-pocket" expenses. Humphrey v. Comfort Inn (LIRC, 09/06/94).

"Out of pocket expenses" are amounts which are actually spent by the injured party as a necessary consequence of the prohibited discrimination by the Respondent and are in the nature of expenses of mitigation. In this case, the Complainants were not entitled to reimbursement for their meals then they left a restaurant due to the Respondent's use of racially derogatory language. The cost of the meals was not an expense incurred in mitigation of the harm suffered. The Complainants' actions in leaving the restaurant without paying their bill cannot be condoned, regardless of the discriminatory behavior that prompted them to do so. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

A Complainant was not entitled to reimbursement for the cost of counseling sessions where the only evidence in the record regarding the sessions was the Complainant's own testimony that her daughter suffered severe emotional harm as a result of her exposure to racial epithets by the Respondent. The Complainants presented no expert testimony at the hearing establishing the need for the counseling; nor did they present their medical bills for the counseling. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

Although a finding of discrimination generally implies a finding of intent, it is not enough to simply find that every act of discrimination is an inherently "willful" act which would justify the imposition of a forfeiture under the Wisconsin Open Housing Act. In this case, the Respondent intentionally used the word "nigger," knowing that the word was improper and could reasonably be construed by a listener as an offensive racial epithet. However, there was no evidence to suggest that the Respondent was aware of the existence of the Public Accommodations Law or knew that her actions in using the racial epithets were in violation of that statute. Therefore, the Labor and Industry Review Commission cannot conclude that the Respondent knew or should have known that her actions violated the law. Accordingly, the Commission declines to assess a forfeiture penalty. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

229 Miscellaneous

Wis. Stat. §111.39(3) applies to cases filed under the WFEA. It makes dismissal mandatory when a person filing the complaint fails to respond to any correspondence from the Department. The Wisconsin Public Accommodation and Amusement Law ("WPAAL") does not contain any comparable provision. Rather, Wis. Admin. Code DWD § 221.07 which applies to cases under the WPAAL, makes dismissal discretionary when a Complainant fails to respond to correspondence from the Department. Brookens v. Wendy's (LIRC, 08/31/22).

The 300-day filing limit in the Public Accommodations and Amusements Act is not a jurisdictional requirement, but is a statute of limitations that is subject to waiver. Young v. City of Eau Claire (LIRC, 01/04/2018).

Under the Public Accommodations Act, unlike the Fair Employment Act, there is no statutory provision like Wis. Stat. § 111.39(3), mandating dismissal for failure to respond to a letter from the ERD. Instead, there is only an administrative rule, which provides that the ERD "may" dismiss for a non-response. Dismissal of a public accommodation complaint for lack of response to an ERD letter, then, is a matter of discretion. The ALJ did not exercise discretion, but simply dismissed on the assumption that dismissal was mandated. The matter was remanded for consideration under the correct standard. Soto v. Menards, Inc. (LIRC, 06/27/14).

The exceptions that apply to the 300-day statute of limitations in employment discrimination cases under the Wisconsin Fair Employment Act can also be applied by analogy in cases brought under the public accommodations discrimination law. These include what is sometimes referred to as the "discovery rule," as well as the doctrine of equitable tolling. The discovery rule can delay the initial running of the statutory limitations period until a Complainant discovers he has been injured by another. Equitable tolling can suspend the running of the statute of limitations for the time reasonably necessary to conduct the necessary inquiry to determine if an unlawful motive was possibly at work. Tabatabai v. Wis. Physicians Serv. Health Ins. Co. (LIRC, 02/29/12).

The circuit court awarded the Respondent reasonable costs and attorney's fees pursuant to sec. 814.025(1), Stats. for the frivolous claims brought by the Complainant against the Respondent. Both the Equal Rights Division and the Labor and Industry Review Commission had found that there was no probable cause to believe that the Respondent had violated the Wisconsin Public Accommodations Law by giving preferential treatment to others on the basis of race. The Complainant presented no new evidence in his appeal to the circuit court to provide a factual basis for his allegations. The Complainant should have known that without more than conclusory statements his claim would be as unsuccessful in court as it was in the previous administrative hearing. Harris v. Curley (Dane Co. Cir. Ct., 08/11/04).

Standing is not an issue of any significance when commencing complaints of public accommodations discrimination, because there is no statutory provision which imposes a standing limitation on who may bring complaints. Malecki v. Vic Tanny Int'l of Wis. (LIRC, 08/07/92).

A complaint of sex discrimination in the provision of different showering and dressing facilities for men and women at a health club was timely, even though the male Complainant filed the complaint several years after first joining the club, because the maintenance of different facilities for men and women is a continuing act. Malecki v. Vic Tanny Int'l of Wis. (LIRC, 08/07/92).

By 1989 Act 47, effective September 12, 1989, the legislature repealed the Public Accommodations Law, as it then existed in sec. 942.04, Stats. (1987), and recreated it in sec. 101.22, Stats. Prior to this change in the law, the Equal Rights Division did not have authority to conduct hearings on allegations of violations of the Public Accommodations Law. Neldaughter v. Mound View Cheese (LIRC, 07/31/91). [Ed. note: sec. 101.22, Stats., has been renumbered sec. 106.52, Stats.]

Section 300:
The Wisconsin
Family & Medical Leave Act

310 Coverage and application generally

311 Number of employees

The State is to be considered one employer for the purposes of the Wisconsin Family and Medical Act. The Complainant's employment for two state agencies should, therefore, be considered as work for one employer. Butzlaff v. DHFS (Wis. Pers. Comm'n, 09/19/90); rev'd on other grounds sub nom. Butzlaff v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 04/23/91); aff'd, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992).

The Family and Medical Leave Act applies to all employers engaged in business in Wisconsin as long as they employ at least fifty people, regardless of their location. Benefit Trust Life Ins. v. DILHR (Milwaukee Co. Cir. Ct., 12/17/90).

312 Length of employment

The requirement in sec. 103.10(2)(c), Stats., that an employee be employed by the same employer for more than 52 consecutive weeks during the preceding 52-week period must be liberally construed. The 52 consecutive weeks need not be the weeks immediately preceding those in which the employee requests family or medical leave. Butzlaff v. Wis. Pers. Comm'n, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992).

313 Statute of limitations

In a case under the Wisconsin Family and Medical Leave Act, the Respondent should be given an opportunity to show good cause for failing to raise the statute of limitations defense in a timely filed answer before the Department makes a finding that the affirmative defense has been waived. Manor Healthcare Corp. v. DILHR (Dane Co. Cir. Ct., 05/12/94).

Where the Complainant alleged that the Respondent had violated the Wisconsin Family and Medical Leave Act by failing to reinstate him to his former position following his family leave, the complaint was timely even though it was filed more than 30 days after the Complainant's family leave ended. After the Complainant took family leave, he was on administrative leave, and then he used personal holiday or vacation time before returning to work. Sec. 103.13(8), Stats., provides that an employer shall place the employee in his former employment position when the employee returns from family leave. The statute refers to an employee who returns from leave, rather than an employee who has completed their family leave. Boinski v. UW-Milwaukee (Wis. Pers. Comm'n, 04/19/93).

A claim under the Family and Medical Leave Act must be brought within 30 days after a violation accrues or a cause of action has accrued. In this case, sufficient information concerning the medical circumstances surrounding the Complainant's absence from work was given to the Respondent before the date of the Complainant's discharge for a violation of the Act to have accrued. Therefore, the alleged violation occurred on the date when the Respondent discharged the Complainant. Jicha v. DILHR, 169 Wis. 2d 284, 485 N.W.2d 256 (1992).

The Respondent had an open-door policy which provided a post-termination procedure whereby an employee could seek reinstatement. The Respondent's review procedure was a post-termination procedure, rather than part of the termination decision-making process. Therefore, the essential facts
supportive of a claim under the Family and Medical Leave Act reasonably should have been apparent to the Complainant when he received his termination letter. The 30-day statute of limitations began running on that date. Jicha v. DILHR, 169 Wis. 2d 284, 485 N.W.2d 256 (1992).

314 Posting requirement

While the WFMLA requires employers to post notices of the employees' rights under the WFMLA, the WFMLA does not require employers to verbally inform employees of their rights under the WFMLA. An employer does not violate the WFMLA by erroneously requiring an employee to complete a form when the employee is not prejudiced by that requirement. Soulek v. Costco Wholesale (ALJ Decision, 04/15/2020), aff'd sub nom. Soulek v. Dept. of Workforce Dev., Equal Rights Div. (Brown Co. Cir. Ct. 03/03/2021).

The notice-posting provision in the Family and Medical Leave Act requires an employer to post a notice in a conspicuous location where employee notices are customarily posted, but it does not require an employer to ensure that every employee actually reads the notice. Muck v. Humana Employers Health Ins. (ALJ Decision, 07/27/03).

The Respondent's posting of the Family and Medical Leave Act notice met the requirements of the law when it posted the notice in a common break room shared by employees from all areas of the building. The fact that the Complainant may not have chosen to read the notices posted on the bulletin board was not the Respondent's failing, but the Complainant's. Therefore, the statute of limitations was not tolled. Javenkoski v. DOT (Wis. Pers. Comm'n, 08/28/00).

The Wisconsin Family and Medical Leave Act requires employers to post readily visible notices in a place where employees could reasonably expect notices to be placed. In-Sink-Erator v. DILHR, 200 Wis. 2d 770, 547 N.W.2d 792 (Ct. App. 1996).

The Complainant did not have standing to raise the issue of the employer's failure to post notice of the Family and Medical Leave Act because the Complainant knew his rights and was not prejudiced in any way by the employer's failure to post the notice. Zuech v. DILHR (Eau Claire Co. Cir. Ct., 07/02/93).

Where the employer did not post the required notice under sec. 103.10(14)(a), Stats., a general admission by the employees that they gained knowledge of the Act is not an admission that they specifically knew of the 30-day time limit claim provision. Sch. Dist. of River Falls v. DILHR (Pierce Co. Cir. Ct., 10/03/91).

315 Preemption issues

Employers must abide by the Wisconsin FMLA regardless of an employee's immigration status. Once employed, employees have the right to take medical leave for the period during which a serious health condition renders them unable to perform their employment duties. An employer that terminates an employee based on the exercise of his or her right to take medical leave has violated the Wisconsin FMLA and is subject to liability. Nonetheless, the Division may consider an employee's undocumented status in tailoring the remedy in such cases. Burlington Graphic Sys., Inc. v. Dep't Workforce Dev., Equal Rights Div. (Ct. of App., 12/23/14).

The Wisconsin Family and Medical Leave Act is preempted by ERISA when it is applied to (i) mandate employee benefit structures; (ii) interfere with nationally uniform plan administration; and/or (iii) create alternative enforcement mechanisms for the recovery of benefits provided under an ERISA plan. Where the Wisconsin FMLA required the payment of STD benefits contrary to the terms of the employer-Respondent's nationally administered plan, ERISA thus preempted it on all three of the above-listed bases. Nationwide Mutual Ins. Co. v. DWD (6th Cir. Sept. 30, 2014) (unavailable online).

A City's ordinance requiring that its employees be paid sick leave is not preempted by Wisconsin's Family/Medical Leave Act, Wis. Stat. §103.10; Wisconsin's Minimum Wage law, Wis. Stat. ch. 104; or Wisconsin's Workers Compensation Act, ch. 102. The text of Wisconsin's Family/Medical Leave Act does not logically conflict with the

city ordinance, and there is nothing in Wisconsin's Family/Medical Leave Act which prohibits employers from providing medical leave benefits which are more generous than those provided under the statute. Metro Milwaukee Association of Commerce, Inc. v. City of Milwaukee, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287.

The Wisconsin Family and Medical Leave Act is not preempted by ERISA. Aurora Medical Group v. DWD, 2000 WI 70, 236 Wis. 2d 1, 612 N.W.2d 646.

A claim under the Wisconsin Family and Medical Leave Act challenging an employer's refusal to allow an employee to substitute her paid sick leave for the six weeks of unpaid family leave provided for by sec. 103.10(5)(b), Stats., is not preempted by sec. 301 of the federal Labor Management Relations Act. The collective bargaining agreement in this case unambiguously provided for reserve paid sick leave to be accumulated by the employees governed by the agreement. It was not necessary to interpret this unambiguous provision of the collective bargaining agreement. It was clear that the Respondent provided the type of substituted leave that the employee requested under the Family and Medical Leave Act. Nor was it necessary to interpret the agreement in order to determine whether the reserve paid sick leave had accrued to the Complainant. Miller Brewing Co. v. DILHR, 210 Wis. 2d 26, 563 N.W.2d 460 (1997).

Congress intended, through passage of the Federal Family and Medical Leave Act, to restrict ERISA from preempting laws such as the Wisconsin Family and Medical Leave Act. In this case, the Complainant filed a complaint with the Equal Rights Division alleging that the Respondent had violated the Wisconsin Family and Medical Leave Act when it denied her request to substitute paid sick leave for unpaid statutory leave she had taken to care for her sick father. The Respondent sought to have the case removed to federal court. However, since the Complainant's action under the Wisconsin Family and Medical Leave Act was not preempted by ERISA, removal to federal court was not appropriate. Bean v. Aid Ass'n for Lutherans (E.D. Wis., 07/17/95).

The Respondent's self-funded disability plan was not an "employee benefit plan" within the meaning of ERISA and, therefore, the substitution provision of the Wisconsin Family and Medical Leave Act was not preempted by ERISA. The Respondent's plan was a "payroll practice" within the meaning of sec. 29 C.F.R. 2510.3-1(b)(2). Phase I of the Respondent's disability plan addressed short-term disability leave such as the Complainant in this case sought. Further, the leave time the Complainant was entitled to was definite and calculable. The Complainant had accrued enough time for the leave he sought, and he was entitled to substitute that leave for unpaid leave under the Act. Northwestern Mutual Life Ins. Co. v. DILHR (Milwaukee Co. Cir. Ct., 01/16/95), aff'd., Ct. App., Dist. I, 06/12/98.

The Respondent attempted to remove a charge filed under the Family and Medical Leave Act to federal court claiming preemption under § 301 of the Labor Management Relations Act of 1947. The case was remanded to the Department because a claim based on the FMLA is not a claim founded directly on rights created by the collective bargaining agreement and no analysis of the collective bargaining agreement was necessary. Leher v. Consol. Papers Co., 786 F. Supp. 1480 (W.D. Wis., 1992).

316 Miscellaneous

The definition of employee under the Wisconsin Fair Employment Act includes undocumented workers. Burlington Graphic Sys., Inc. v. Dep't Workforce Dev., Equal Rights Div. (Ct. of App., 12/23/14).

Where the Complainant had already been granted and exhausted all his state family medical leave and remained off of work on unpaid leave at the time the Respondent canceled his health care benefits for non-payment, there was no basis in law for his claim that the Respondent interfered with, restrained or denied him the exercise of a right under the Wisconsin Family and Medical Leave Act. Carrington v. Milwaukee County Transit Sys. (ALJ Decision, 07/31/14).

The Complainant had the right to take family leave in relation to the adoption of his stepdaughter under sec. 103.10(3)(b)2., Stats., even though the Complainant's stepdaughter had been living with him for several years at the time of the adoption. Sec. 103.10(b)2., Stats., provides that family leave is allowed for "placement of a child with the employee for adoption." Since "placement of a child for adoption" is distinguished from "placement of a child with the employee… is a precondition to adoption under s. 48.90(2), Stats.," it would appear that a reasonable construction of the statute is that placement "for adoption" is something different than placement "as a precondition to adoption," and that placement "for adoption" relates to the adoption itself. Leavens v. Crown Cork & Seal (ALJ decision, 10/02/08).

Both federal and Wisconsin regulations establish twelve-month periods for when medical leave may be taken, but they differ on what that time period means. The federal law allows employers to choose between four methods of calculating twelve-month periods applicable to FMLA leave. However, these federal FMLA rights are subject to exceptions required by State or local governments regarding their own leave provisions. The Wisconsin Family and Medical Leave Act provides that no employee may take more than two weeks of medical leave during a twelve-month period (sec. 103.10(4), Stats). The administrative rules applying the Wisconsin Family and Medical Leave Act require that twelve-month periods governing leaves under that Act are calendar years. (Sec. DWD 225.01(1)(m), Wis. Adm. Code). Accordingly, employees in Wisconsin are governed by a calendar year method regarding any leave time under the Wisconsin FMLA. Berg v. DWD (Ct. App., Dist. III, unpublished opinion, 01/23/07).

Sec. 103.10(11), Stats., provides that no person may interfere with, restrain or deny the exercise of any right provided under the Wisconsin Family and Medical Leave Act. The statute does not suggest that a violation can exist only if the person interfering with the leave has acted on some improper motive. The employer's motive is irrelevant. To prevail, a Complainant need only establish that he was entitled to a right under the Act, and that the employer interfered with or denied that right. Hull v. PFS Corp. (ALJ decision, 04/07/06).

The Complainant wanted to take leave to care for her mother-in-law, but her mother-in-law died before the leave was taken. The Wisconsin Family and Medical Leave Law does not apply to funeral leave. The Respondent did not violate the law when it charged the Complainant with an absence for taking one more day of funeral leave than the Respondent allowed under its policy. Frank v. US Bank (ALJ Decision, 12/04/03).

An employee's adult son may be a "child" for purposes of the Wisconsin Family and Medical Leave Act. Racine Co. v. DWD (Racine Co. Cir. Ct., 08/15/00).

With respect to allegations of "retaliation" under the Wisconsin Family and Medical Leave Act, sec. 103.10(11)(b), Stats., provides protection for individuals who have opposed a practice prohibited under the Act. The term "opposing" has been used to describe informal self-help activities in opposition to a practice of an employer without actual resort to a government agency. Violations of Sections 103.10(11)(a) or (b) of the Family and Medical Leave Act are expressly made subject to the remedial procedures of the Act itself. The Labor and Industry Review Commission has no jurisdiction in these cases. These cases are subject to review in circuit court. However, sec. 103.10(11)(c) of the Family and Medical Leave Act provides that sec. 111.322(2m) of the Wisconsin Fair Employment Act applies to discharge or other discriminatory acts arising in connection with any proceeding under the Act. A "proceeding" does not exist unless there has been some kind of resort to a governmental agency charged with enforcement of that right. Employer retaliation cases relating to Section 103.10 of the Family and Medical Leave Act of the type listed under sec. 111.322(2m) of the Fair Employment Act are appealable to the Labor and Industry Review Commission rather than to circuit court. Kayler v. Stoughton Trailers (LIRC, 10/27/97).

The Wisconsin Family and Medical Leave Act prohibits discharging or discriminating against an individual for opposing a practice prohibited under the Act. Other kinds of retaliation relating to the Family and Medical

Leave Act are now defined as discrimination under the omnibus anti-retaliation provision of the Wisconsin Fair Employment Act, sec. 111.322(2m), Stats. Roncaglione v. Peterson Builders (LIRC, 08/11/93), aff'd., sub nom. Roncaglione v. LIRC (Dane Co. Cir. Ct., 05/06/94).

A Complainant's claim under the Wisconsin Family and Medical Leave Act was precluded by the compromise of her worker's compensation claim. Because the Complainant settled her worker's compensation claim, she is estopped from asserting in a Family and Medical Leave Act case that her injury (depression) was not work-related. Because the Complainant sustained her injury under the conditions enumerated in sec. 102.03(1), Stats., the compensation provided by the Worker's Compensation Act is her exclusive remedy. Consequently, the Complainant cannot recover on a theory that she was terminated at a time when she should have been permitted to take a medical leave. Finnell v. DILHR, 186 Wis. 2d 187, 519 N.W.2d 731 (Ct. App. 1994). [Ed. note: In Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997), the Supreme Court overruled Finnell to the extent that it stands "for the proposition that '(t)he right of the employee to recover compensation provided for by worker's compensation is exclusive of *all remedies against the employer*'." (emphasis included)]. The same absence for medical reasons can be both a medical leave under the Wisconsin Family and Medical Leave Act and sick leave under a collective bargaining agreement. An employee is not required to choose whether to file a grievance under the applicable collective bargaining agreement or to file a charge under the Family and Medical Leave Act when the employee is denied leave for health reasons. Janssen v. DOC (Wis. Pers. Comm'n, 10/20/93).

The Family and Medical Leave Act should be liberally construed because it is remedial in nature. The legislature intended employee leave rights to be expansive, not limited. Butzlaff v. Wis. Pers. Comm'n, 166 Wis. 2d 1028, 480 N.W.2d 559 (Ct. App. 1992).

317 Appeal rights

LIRC does not have authority to review ERD decisions regarding alleged violations of the Wisconsin Family Medical Leave Act ("WFMLA"), or to give any initial consideration to such allegations. Likewise, LIRC does not have authority (nor does the ERD) to entertain claims under the federal FMLA. Rybak v. Wis. Physicians Serv. (LIRC, 05/31/2013).

Wisconsin's Family Medical Leave Act ("WFMLA") differs from the Fair Employment Law regarding an employer's obligations to an employee returning from WFMLA leave. The WFMLA generally requires that an employee be returned to an "equivalent position" when returning from leave, rather than a "substantially equivalent" position. Ramos v. Stoughton Trailers, Inc. (LIRC, 08/16/01).

320 Definition of "serious health condition"

Where the side effects of a medication prescribed for the treatment of a medical condition render an individual unable to perform his job duties, this is tantamount to the medical condition itself rendering the individual unable to perform his job duties. The fact that the side effects which resulted from taking prescribed medication for a medical condition caused the Complainant to be unavailable for work (rather than the unavailability for work being caused by the medical condition itself) did not deprive the Complainant in this case from coverage under sec. 103.10, Stats. Rothe v. Oshkosh Truck Corp. (ALJ Decision, 01/30/08).

A Respondent's claims manager denied the Complainant's requests for leave. The claims manager had a paramedic license and fifteen years of experience in occupational medicine. However, there was no evidence that the claims manager was qualified to give the type of "second medical opinion" a Respondent is authorized to seek under sec. 103.10(7)(c), Stats. Rothe v. Oshkosh Truck Corp. (ALJ Decision, 01/30/08).

For an employer to ignore the options of obtaining a health care certification or to seek a second opinion and to deny a leave request based on its own doubts about the medical necessity for the leave, puts the employer at risk of being in violation of the Wisconsin Family and Medical Leave Act, if at a later hearing the employee presents sufficient evidence of the medical necessity for the leave. Burton v. UW Hosp. & Clinics (ALJ Decision, 11/30/07).

The Wisconsin Family and Medical Leave Act does not provide detailed guidance on what kind of care qualifies as care for a spouse with a serious health condition entitling an employee to take family leave. However, the Act should be liberally construed because it is remedial in nature. In this case, a physician indicated that the Complainant's husband needed assistance for transportation to receive medical care. Construing the term "care" liberally, transporting someone who cannot transport himself so that that person can get medical treatment is itself a form of care. Therefore, the Complainant was entitled to take family leave. Weekes v. Verizon (ALJ Decision, 05/31/07).

An employer has the right to require medical certification under the Wisconsin Family and Medical Leave Act. When the Complainant provides such certification, the employer has a choice of either: (1) accepting the medical opinion and granting the leave; (2) asking the medical provider or the employee for clarification (if they clearly tell the employee what needs clarification); (3) getting a second opinion at their own expense to challenge the expert medical opinion; or (4) having a lay person review the document to determine if the request for leave substantiates a right to that leave under the Family and Medical Leave Act. A Respondent taking this last option does so at its own peril. A Respondent cannot develop simple rules and apply them to cases irrespective of the medical evidence presented. Each case must be considered on its own merits, with due consideration to the medical opinions expressed in the health care provider certification. In this case, the certification forms from the Complainant's physician clearly showed that the Complainant was entitled to medical leave under the law. The Respondent's lay suspicions and opinions were not credible evidence on the issue of medical necessity or serious health condition. Harvot v. Hoffmaster Solo Cup (ALJ decision, 11/03/06).

The Respondent had the right to request a second medical opinion at its own cost, but it never requested a second opinion in this case. Absent that second opinion, when the medical evidence offered by the Complainant provided sufficient proof of a serious health condition, the Respondent could not simply claim not to believe that medical evidence and deny the Complainant his rights under the Wisconsin Family and Medical Leave Act. Further, while the law requires continuing care for outpatient care, it does not impose a requirement of "recent" care, nor does it place any time limitation on the continuing care as the Respondent in this case did. While most often the continuing care will be recent, there are circumstances where the condition is chronic and is monitored regularly with continuing care that is not closely connected with the employee's absence from work. That absence can still qualify for family leave. Biscontine v. County of Milwaukee (ALJ Decision, 10/07/04).

The Complainant's kidney infection was serious under any commonly understood meaning of the word "serious." If left untreated, the consequences could very well be life-threatening. However, the term "serious health condition" has been defined as meaning a direct, continuous and firsthand contact by a healthcare provider subsequent to the initial outpatient contact. That did not happen here. The Complainant went to the doctor, who prescribed medication. She was not required to return. Accordingly, the Complainant did not suffer from a serious health condition within the meaning of the Family and Medical Leave Act. Fuchs v. Semling-Menke (ALJ Decision, 09/29/03).

Expert medical opinion is not required under the WFMLA for purposes of showing that an employee's serious health condition prevented the employee from being able to perform his or her job. A physical condition, such as the recurrent back pain at issue in this particular case, can have overt manifestations that are easily identifiable by laypersons. The Complainant testified credibly that during her episodes of back pain she experienced severe pain when she engaged in the kind of physical activities that she performed on the job, including standing, walking, bending and lifting. Her testimony in that regard was corroborated by her

physician's medical excuses and certification form. This was sufficient proof of the Complainant's disabling back condition. McKee v. Rock-Tenn (ALJ Decision, 04/04/03).

Sec. 103.10(4)(a), Stats., states that "an employee who has a serious health condition. . .may take medical leave," and sec. 103.10(4)(b), Stats., states that "[n]o employee may take more than 2 weeks of medical leave. . ." (Emphasis added). By contrast, paragraph 103.10(4)(c), Stats., states that "[a]n employee may schedule medical leave as medically necessary." (Emphasis added). The difference in terminology is significant. The use of the word "schedule" suggests that that statutory provision was intended to apply only to situations where an employee is asking to take leave for scheduled or planned medical treatment, not to cases where leave is requested, after the fact, for an absence that arose due to an unplanned medical situation. By contrast, the statutory provisions which refer to the "taking" of leave and make no reference to "scheduled" or "planned" leave, seem to apply more broadly to any type of medical leave, regardless of whether it was planned or unplanned. In this case, the issue of whether the Complainant "scheduled" her leave as "medically necessary" did not arise because this case involved a request for leave made after an unplanned medical situation (i.e., a flare-up of back pain that made the Complainant temporarily unable to perform her job duties). Therefore, the requirement in sec. 103.10(4)(c), Stats., that employees "schedule" leave as "medically necessary" is not applicable to the facts of this case. McKee v. Rock-Tenn (ALJ Decision, 04/04/03).

The Administrative Law Judge concluded that the evidence did not support a finding that the Complainant had a serious health condition where the only evidence regarding her health condition came from the Complainant's testimony. The Complainant is not a medical expert and is not competent to diagnose that she had a urinary tract infection. Her testimony was unreliable hearsay. There was no competent evidence to establish the reasons for the Complainant's doctor's visits, that the two doctor's visits were related, or even that the Complainant's medical condition on the days in question made her unable to work. Reinke v. Oshkosh Coil Spring (ALJ Decision, 03/27/03).

The Complainant established that he had a disabling condition. The Respondent contended that the condition did not constitute a serious health condition because it did not require direct, continuous and firsthand contact by a healthcare provider subsequent to the initial outpatient contact. The Complainant was released to return to work after his initial outpatient care. However, he did need to have his stitches removed as part of the continuing care and treatment of his wounds. The single follow-up care visit required by the stitches was sufficient to qualify this as continuous care. These facts establish that the Complainant had a serious health condition within the meaning of the Wisconsin Family and Medical Leave Law. Hornes v. Great Northern Corp. (ALJ Decision, 02/06/03).

No medical expert testimony was required to establish that the Complainant's serious health condition interfered with her ability to perform her work duties because there existed outward or overt manifestations of that fact that were easily recognizable by lay persons. However, expert medical testimony was necessary to establish that her leave was medically necessary because her serious health condition did not manifest symptoms that lay people would recognize as necessitating a leave. (In this case, the Complainant had requested one week of medical leave on the suggestion of her physician, who was providing her psychiatric care for depression.) Sieger v. Wis. Pers. Comm'n, 181 Wis. 2d 845, 512 N.W.2d 220 (Ct. App. 1994).

Routine preventative visits after a mastectomy are covered as medical leave. Wis. Gas Co. v. DILHR (Milwaukee Co. Cir. Ct., 01/05/94).

Ongoing pregnancy satisfies the definition of "serious health condition" because it is a physical condition requiring outpatient care both before and after birth. Morning sickness, as a symptom of pregnancy, may be considered a "serious health condition" within the meaning of the Family and Medical Leave Act. Haas v. DILHR, 166 Wis. 2d 288, 479 N.W.2d 229 (Ct. App. 1991).

In order for a serious health condition to be "disabling", it should fall within the dictionary definition which includes incapacitation or the inability to pursue an occupation or perform services for wages because of physical or mental impairment. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).

The term "continuing treatment or supervision by a health care provider" contemplates direct, continuous and first-hand contact by a health care provider subsequent to the initial outpatient contact. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).
The Complainant did not have a serious health condition where she: (1) experienced difficulty in breathing, (2) was taken to the hospital emergency room, (3) was treated for bronchitis, (4) was released the same day after an unspecified amount of time, and (5) was not told to return for a follow-up visit. The Complainant's condition did not call for outpatient care that required continuing treatment or supervision by a health care provider and her absence from work on this occasion was not covered by the Act. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).

The Complainant's five-year-old son had a serious health condition where he was kept under observation for six hours in the emergency room after suffering a concussion. This was outpatient care that required continuing treatment or supervision by a health care provider entitling the Complainant to take family leave under the Act. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).

The Complainant's daughter suffered from a serious health condition when she was hospitalized overnight and part of the following day for high fever and dehydration. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).

330 Right to substitute leave

The Respondent interfered with the Complainant's rights under the WFMLA when its staff completed and signed a form purporting to request WFMLA leave, and to authorize the release of information in support of that request, "for" the Complainant without her knowledge or consent, and when the Respondent designated two weeks of involuntary medical leave as WFMLA leave in the absence of any request by the Complainant to take such leave or her agreement to such designation. Barnes v. DOC (ALJ decision, ERD Case #CR201600129, 12/29/16).

The Complainant in this case established that she had “accrued” paid sick leave for which she could substitute leave under the Wisconsin Family and Medical Leave Act. Her sick leave benefits arose from a collective bargaining agreement between her employer and her union. The amount of paid sick leave available to her was “specified and quantifiable.” Under the terms of the collective bargaining agreement, the Complainant was eligible for 12 weeks of sick leave at full pay and 13 weeks of sick leave at half pay. In addition, her sick leave benefits had a “draw-down feature.” (For example, she would have depleted her sick leave benefit entirely if she had been absent for 25 weeks during the fall of 2001 and into the winter of 2002 due to illness. Her sick leave benefits would have renewed only if she had worked a period of 13 consecutive weeks after taking the sick leave). Finally, the Complainant’s sick leave benefits accumulated over time because (1) the amount of leave available to her renewed to the maximum if she worked for 13 consecutive weeks after taking sick leave, and (2) the maximum amount of sick leave available to her increased based on her longevity with the Respondent. Zeigle v. Verizon North (ALJ Decision, 03/14/03).

Once an employee chooses to substitute one type of leave for WFMLA leave under sec. DWD 225.03(1), Wis. Stats., the new leave replaces the WFMLA leave. As a result, only one leave is being used by the employee – the substituted leave. Therefore, only one leave can be reduced. In this case, the Complainant only wanted to take compensatory time off (“CTO”) leave. He never requested WFMLA leave. He never checked the WFMLA leave box on the leave request form, and he never discussed WFMLA leave with his employer. He substituted WFMLA leave with CTO leave. The Respondent’s policy treating the Complainant’s leave as both CTO leave and

WFMLA leave (regardless of whether the Complainant wanted to or not) is contrary to the Wisconsin Administrative Code. "Substitution" means replacement of one thing by another. "Deem," as used in the administrative rules, means to cause one thing to be treated as if it were something else. Therefore, the Respondent cannot deem the Complainant's leave to be WFMLA leave by utilizing sec. DWD 225.03(1), Wis. Adm. Code. Only substitution applies under that section. City of Madison Water Util. v. DWD (Dane Co. Cir. Ct., 10/10/02).

The Complainants had accrued sick leave available to them for substitution under sec. 103.10(5)(b), Stats., where their employer's sick leave benefit met the following criteria: (1) The sick leave benefit arose from the parties' collective bargaining agreement, (2) the amount of paid sick leave available to a given employee is specified and quantifiable (for example, if an employee has worked for the Respondent for six years, he has ten weeks of sick leave available in a twelve-month period.), (3) the benefit has a "draw-down" feature, by which the amount of available leave decreases as the employee uses it, (4) although there is no leave "carryover" feature, the benefit "accumulates" over time because (a) the amount of leave available renews to the maximum every twelve months, and (b) the maximum amount of leave available increases with an employee's longevity. The fact that an employee must be sick for several days before receiving paid sick leave benefits does not render the benefit "indefinite" or "incalculable." Once the waiting period requirement is met, the entitlement is clear and the employer may not, in its discretion, deny a request for payment of the benefit. Further, the employer must allow substitution commencing on the first day of family leave. The employer's sick leave benefit accrues irrespective of the waiting period, and the waiting period requirement is a non-transferring condition when sick leave is substituted for family leave. Kraft Foods v. DWD, 2001 WI App 69, 242 Wis. 2d 378, 625 N.W.2d 658.

The Wisconsin Family and Medical Leave Act gives an employee the unambiguous right to substitute unpaid medical leave under the Act for paid sick leave offered by the employer. Milw. Transport Services v. DWD, 2001 WI App 40, 241 Wis.2d 336, 624 N.W.2d 895.

Under the terms of a collective bargaining agreement, the Complainant was entitled to ten weeks of paid sick leave. The Complainant's sick leave entitlement was calculable, was available for his use, and, therefore, was an accrued benefit. The Respondent contended that the program was a non-accrued, contingent benefit, because it was contingent upon illness or incapacity. However, the term "contingent" means "not certain to occur" or "conditional." It refers to something over which the employer has discretion to grant, which is clearly not the situation in the present case. The sick leave in this case was accrued leave and, therefore, substitutable under the FMLA. Kraft Foods v. State of Wis. (Dane Co. Cir. Ct., 02/04/99).

To prove a violation of sec. 103.10(5)(b), Wis. Stats., the Complainant must establish that (1) at the time the employee requested leave, the employee was covered by the Wisconsin Family and Medical Leave Act; (2) the employee asked to substitute other leave for family leave; (3) the employer provided leave that could be substituted; (4) the employee had accrued the leave to be substituted; and (5) the employer denied the substitution request. Miller Brewing Co. v. DILHR, 210 Wis. 2d 26, 563 N.W.2d 460 (1997).

A claim under the Wisconsin Family and Medical Leave Act challenging an employer's refusal to allow an employee to substitute her paid sick leave for the six weeks of unpaid family leave provided for by sec. 103.10(5)(b), Stats., is not preempted by sec. 301 of the federal Labor Management Relations Act. Miller Brewing Co. v. DILHR, 210 Wis. 2d 26, 563 N.W.2d 460 (1997).

Section 103.10(5)(b), Wis. Stats., permits an employee to pick and choose the dates on which to substitute paid days for unpaid leave days. Barry-Chamberlain v. DILHR (Dane Co. Cir. Ct., 06/30/94).

Extended sick leave which does not accumulate from year to year is still "accumulated leave" for purposes of the substitution of leave provision in the Wisconsin Family and Medical Leave Act. Wis. Gas Co. v. DILHR (Milwaukee Co. Cir. Ct., 01/05/94).

An employer must provide leave that is definite and quantifiable in order for such leave to be available for substitution under the Wisconsin Family and Medical Leave Act. Richland Sch. Dist. v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

The substitution clause, sec. 103.10(5)(b), Stats., permits an employee to substitute paid leave accumulated under a collective bargaining agreement for family and medical leave when the employee does not meet all the conditions for leave eligibility set forth in the collective bargaining agreement. Only those types of leave which an employment contract allows an employee to accumulate over time are available for substitution. Richland Sch. Dist. v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

The plain reading of sec. 103.10(5)(b), Stats., permits an employee to substitute any type of leave provided by the employer for family leave or medical leave. Clintonville v. DILHR (Waupaca Co. Cir. Ct., 01/14/91); City of Milwaukee v. DILHR (Pohlmann) (Milwaukee Co. Cir. Ct., 11/13/91); Waukesha Co. Dep't of Human Resources v. DILHR (Caldwell) (Waukesha Co. Cir. Ct., 06/05/91).

If the leave provided by the employer does not have as liberal a substitution provision as found in sec. 103.10(5), Stats., then the leave is more restrictive than is available under sec. 103.10(3)(b)1, Stats. Lawless v. UW-Madison (Wis. Pers. Comm'n, 06/01/90).

The Personnel Commission granted a rehearing on request from a person aggrieved who was not a party in the original hearing because it concluded that its implicit conclusion that the leave granted by the Respondent was not more restrictive than the leave available under sec. 103.10(3)(b), Stats., constituted a material error of law. Lawless v. UW-Madison (Wis. Pers. Comm'n, 06/01/90).

340 Notice to the employer

The Respondent did not violate the Wisconsin Family and Medical Leave Act in terminating the Complainant's employment for excessive absenteeism where the Complainant did not provide the Respondent with sufficient notice that her November 5, 2010 absence was related to a serious medical condition. The Complainant admittedly understood that she could take medical leave under the Wisconsin Family and Medical Leave Act for a serious medical condition, but did not (i) specifically request family and medical leave for her absence on November 5, 2010 when she called in on that day, (ii) did not provide the Respondent with any information as to why she had missed work on November 5, 2010, beyond a written excuse for her absence from an urgent care physician that noted she was off work due to illness, (iii) did not indicate that she intended to take family and medical leave for her November 5, 2010, absence on an absence form that the Respondent issued to her that specifically asked her whether she was applying for family and medical leave, and (iv) only requested family and medical leave for her November 5, 2010 absence after receiving a final warning for exceeding the 48 hours of sick time in a calendar year allowed by the Respondent – some six weeks later. Schlesner v. US Bank (ALJ decision, ERD Case# CR201104426, 5/30/13) (unavailable online).

An employee's request for leave under the Wisconsin Family and Medical Leave Act need only be reasonably calculated to advise the employer that the employee is requesting medical leave under the Act and the reason for the request. The burden is on the employee to demonstrate that, at the time medical leave was requested, the employee (1) has a serious health condition, (2) that renders the employee unable to perform the employee's duties during a specific time period, and (3) that a leave during that time is medically necessary. If the employer desires more information, it can request certification under sec. 103.10(7), Stats. Essentially, the Act affords employers three choices of action when an employee requests medical leave: (1) approve the leave, (2) disapprove the leave, or (3) request more information through the certification process in sec. 103.10(7), Stats. Sieger v. Wis. Pers. Comm'n, 181 Wis. 2d 845, 512 N.W.2d 220 (Ct. App. 1994).

Several letters to the employer from the Complainant's psychologist were not adequate to satisfy the employer's request that the employee provide certification from a health care provider explaining the extent to which the employee was unable to perform his or her employment duties under the Wisconsin Family and Medical Leave Act. The letters did not address specifically the employee's ability to perform his employment duties and the general finding of a 50 percent disability from the Department of Veteran Affairs failed to specifically address the Complainant's ability to perform his employment duties. Therefore, the letters did not comply with the employer's request for medical certification. Randolph v. DILHR (Ct. App., Dist. II, unpublished opinion, 05/13/92).

The Wisconsin Family and Medical Leave Act does not require that the employee utter magic words or make a formal application in order to invoke the protections of the Act. In this case, a telephone conversation between the Complainant's attorney and the employer gave the employer reasonable notice of a serious health condition. Jicha v. DILHR, 164 Wis. 2d 94, 473 N.W.2d 578 (Ct. App. 1991), aff'd, 169 Wis. 2d 284, 485 N.W.2d 256 (1992).

The Complainant's failure to provide medical excuses for her absences did not render her without protection under the Family and Medical Leave Act where the employer never informed her by personal notice or posting information in the workplace as required by the Act that such certification was necessary for protection under the Act. Haas v. DILHR, 166 Wis. 2d 288, 479 N.W.2d 229 (Ct. App. 1991).

The Complainant was lawfully terminated where she failed to provide medical certification concerning her condition to the Respondent within a reasonable time. Wysocki v. DILHR (Marinette Co. Cir. Ct., 03/11/91).

350 Return to equivalent position after leave

Where the Complainant had already been granted and exhausted all his state family medical leave and remained off of work on unpaid leave at the time the Respondent canceled his health care benefits for non-payment, there was no basis in law for his claim that the Respondent violated his right to return to the same health care benefits upon his return from leave under the Wisconsin Family and Medical Leave Act. Carrington v. Milwaukee Cnty. Transit Sys. (ALJ Decision, ERD Case # CR201303146, 07/31/14) (unavailable online).

The Respondent was within its rights under the WFMLA to require that the Complainant and all other employees continue to pay their portion of their health insurance premiums while out on family medical and other leave, and to cancel their health insurance benefits for their failure to pay these premiums while out on leave, regardless of the reason. See Wis. Stat. § 103.10(09). Such does not constitute interference with, restriction, or denial of an employee's right to return to the same or an equivalent position and benefits under the WFMLA. Carrington v. Milwaukee Cnty. Transit Sys. (ALJ Decision, ERD Case # CR201303146, 07/31/14) (unavailable online).

If an employer can successfully show that, for reasons wholly unrelated to family or medical leave, an employee's position or equivalent position no longer existed when that employee returned from leave, the employer will not be in violation of sec. 101.10(8), Stats., which requires an employer to immediately restore an employee returning from family or medical leave to the position he held before the leave began, or to an equivalent position. Hull v. PFS Corp. (ALJ decision, 04/07/06).

The employer must immediately place the employee in his or her former employment, or an equivalent employment position if the employee's former position is not vacant. An equivalent employment position means a position with equivalent compensation, benefits, working shift, hours of employment, job status, responsibility and authority. An employee who returned from family leave was not placed in an equivalent employment position where: her supervisory duties were reduced from supervising four employees to supervising one employee, her former position required no clerical work while her new position required 23 percent clerical work, and (despite still being designated as a manager) her new job duties were

far less significant than those she performed prior to leave. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992).

While the Complainant was taking family leave under the Family and Medical Leave Act, her employer informed the employees that it was closing its office in Wisconsin. Employees were given the option of relocating to Illinois or being discharged. Complainant was not offered this option. The employer is liable under the Act because it did not give an employee who was taking advantage of her rights under the Act the same privileges as employees who took no qualifying leave of absence. Benefit Trust Life Ins. v. DILHR (Milwaukee Co. Cir. Ct., 12/17/90).

360 Taking partial leave and related issues

The Respondent violated the WFMLA when it denied the Complainant's request to take a partial day of WFMLA leave to care for her son's serious health condition and when it subjected her to adverse employment consequences, including a letter of reprimand and adverse findings in a Performance Improvement Plan, because she left work to take her son to his appointment following the Respondent's unlawful denial of her family and medical leave request. Moran v. Cnty. of Waukesha (ALJ Decision, ERD Case #, CR20180322602/16/2021).

Any non-continuous increment of the six-week family leave allowed for the birth of a child under sec. 103.10(3)(b)1, Stats., must begin within sixteen weeks of the child's birth. Schwedt v. DILHR, 188 Wis. 2d 500, 525 N.W.2d 130 (Ct. App. 1994).

An employee taking non-consecutive family leave may take non-consecutive leave during the first 16-week period before or after the birth or adoption of a child and begin the remaining non-consecutive increment as late as 16 weeks after the birth or adoption date, provided that the remaining non-consecutive increment has been properly commenced within the 16 weeks before or after the birth or adoption of the child. Fuller v. DILHR (Milwaukee Co. Cir. Ct., 04/05/93).

370 Remedies

It was within the Division's discretion to award only attorney's fees and costs, and no back pay, where it found that the Respondent had violated the Wisconsin Family Medical Leave Act by discharging the Complainant, but the Complainant was undocumented. Burlington Graphic Sys., Inc. v. Dep't Workforce Dev., Equal Rights Div. (Ct. of App., 12/23/14).

The Complainant was not entitled to an award of back pay where he misused part of his family leave by markedly increasing the number of hours he worked for a second employer. Rabehl v. DILHR (Dodge Co. Cir. Ct., 03/20/95).

A Respondent's ad hoc rule prohibiting the Complainant from working during the Respondent's normal working hours while he was on family leave was a violation of the Wisconsin Family and Medical Leave Act. The Respondent's termination of the Complainant for violation of this unwritten rule was also a violation of the Act. Rabehl v. DILHR (Dodge Co. Cir. Ct., 03/20/95).

A constructive discharge is not a prerequisite for reinstatement or back pay under the Wisconsin Family and Medical Leave Act. However, the fact that an employee voluntarily quit his or her employment with an employer is an appropriate factor for the Department to consider in determining whether the employee mitigated his or her damages. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

The term "actual attorney's fees" in sec. 103.10(12)(d), Stats., does not preclude an award when a successful Complainant is represented by a nonprofit legal organization. Richland Sch. Dist. v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

A Complainant may recover attorney's fees for successful representation in the Circuit Court and the Court of Appeals on review of the department's order. Richland Sch. Dist. v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

The Department may order an employer who violates the Family and Medical Leave Act to reinstate the employee and pay the employee back pay plus reasonable actual attorney's fees. Although the Act does not expressly provide that back pay awards are to be reduced by interim earnings or amounts earnable with reasonable diligence, the principles of mitigation of lost wages should apply in cases arising under the Act. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992).

The Family and Medical Leave Act does not state that constructive discharge is a requirement for reinstatement or back pay. The fact that an employee voluntarily quit her employment with an employer is an appropriate factor for the Department to consider in determining whether the employee mitigated her damages. Not all voluntary terminations constitute a lack of reasonable diligence. On remand the Department must determine whether the employee acted reasonably in quitting after her return from family leave. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992).

The statutory provision that DILHR is authorized to order the payment of "reasonable actual attorney's fees to the Complainant" is not ambiguous and must be given its ordinary meaning. Therefore, the Administrative Law Judge was not authorized to award attorney's fees to the Complainants and the Complainants' attorneys because the attorneys were employed by WEAC, and no fees were charged to the Complainants. Sch. Dist. of River Falls v. DILHR (Pierce Co. Cir. Ct., 10/03/91).

Only one forfeiture of $100.00 should be assessed against an employer for failing to post notice of the Family and Medical Leave Act, even though two employees brought suit against the employer alleging a violation of the posting requirement. Sch. Dist. of River Falls v. DILHR (Pierce Co. Cir. Ct., 10/03/91).

Sec. 103.10(12)(d), Wis. Stats., does not authorize reimbursement to the Complainant for wages lost during the litigation of her case. Waukesha County Dep't of Human Resources v. DILHR (Caldwell) (Waukesha Co. Cir. Ct., 06/05/91).

380 Cases

The Respondent interfered with, restrained and/or denied the Complainant's exercise of a right protected under the Wisconsin Family and Medical Leave Act when it suspended him without pay for unexcused absences under circumstances that should have reasonably been understood to either (i) be covered by a certification provided for intermittent leave for back pain and headaches, or (ii) have required the Respondent to notify the Complainant that he needed to clarify his intentions regarding his previous certification, or to provide additional certification for his absences. Peetz v. State of Wis. (ALJ Decision, ERD Case # CR201303404 11/4/14) (unavailable online).

The Respondent's request that the Complainant sign an Authorization for Release of medical records so that the Complainant's doctor could respond to questions regarding the Complainant's documented serious medical condition, as documented by her doctor in the Family and Medical Leave Certification of Health Care Provider for an Employee's Serious Health Condition (OCD), and whether said medical condition compromised the Complainant's ability to perform her job duties, did not constitute interference with or denial of her rights under the Wisconsin Family and Medical Leave Act. Although the Respondent referenced the Complainant's FML request in making its request, it was intended to assist the Respondent in determining whether to proceed with disciplinary action against the Complainant. Willis v. DOR (ALJ Decision, 01/25/13) (unavailable online).

The Respondent did not interfere with, restrain or deny the Complainant's right to family medical leave when it denied the Complainant's request to take leave so that he could accompany his wife to her eye doctor appointment where his wife never went back for a follow-up appointment, or received any other continuing care for her eye condition. With no continuing care, the Complainant's wife's health condition did not meet the definition of a serious health condition protected by the Wisconsin Family and Medical Leave Act. Sullivan v. City of Milwaukee (ALJ Decision, 01/25/13) (unavailable online).

The FMLA provides that an employer may require an employee, in advance of taking leave, to have in escrow with the employer an amount equal to health insurance premiums for an eight-week period. If the employee resigns within 30 days of the completion of the leave, the employer may deduct the amount of the premiums for the leave from the escrowed amount and return any remaining escrowed amount to the employee. Section 103.10(9)(c)4., Stats., states that an employer "may" deduct from an escrow account any premium paid by the employer while the employee was on FMLA leave if the employee does not return to work. Nothing in the statute states that an employer waives its right to collect the debt if it fails to escrow the employee's funds. Port Edwards Sch. Dist. v. Reissmann (Ct. App., Dist. IV, unpublished opinion, 03/20/08).

The idea behind the medical certification process is for medical determinations to be made by health care providers, not laypersons. In this case, there was probable cause to believe that the Respondent had rejected two medical certifications provided by the Complainant's physician based, at least in part, on the unsupported lay opinion of the Complainant's supervisor about the nature of her medical condition. Kontny v. Rock County Health Care Ctr. (ALJ Decision, 08/10/07).

In this case, the Respondent granted the Complainant a total of twenty-six consecutive weeks of leave related to her serious health condition (breast cancer and reconstructive surgery due to the cancer) that spanned from August 25, 2004 through February 28, 2005. Thus, the leave included at least two weeks of leave within each calendar year of 2004 and 2005. Under secs. 225. 01(9) and (10), Wis. Adm. Code, it does not appear to make any difference whether this leave granted by the employer for the Complainant's serious health condition was independent of, concurrent with, or consecutive to any other leave that the Complainant may have been entitled to (whether the Respondent's own "Medical Leave" or some other leave offered by the Respondent were leave the Complainant may have been entitled to under another law such as the federal Family and Medical Leave Act). So long as the Complainant was granted a leave relating to the Complainant's own health which was no more restrictive than the leave that the Complainant had available under sec. 103.10(4), Stats., the Complainant's use of the leave granted by the employer constituted the use of her leave available under sec. 103.10, Stats. Since the maximum leave available under the Wisconsin Family and Medical Leave Act is two weeks in each calendar year, the Complainant received both in 2004 and 2005 the maximum amount of Wisconsin Family and Medical Leave Act leave that she was entitled to for her own health condition under sec. 103.10(4), Stats. Therefore, there was no probable cause to believe that the Respondent violated sec. 103.10(11)(a), Stats., when it discharged her when she was unable to return to work at the end of six months, which was the maximum period of time the Respondent allowed for a leave of absence. Berg v. Gold 'n Plump Poultry (ALJ decision, 01/11/06); aff'd sub nom. Berg v. DWD (Ct. App., Dist. III, unpublished opinion, 01/23/07).

The concept of opposing a discriminatory practice involves more than just requesting leave under the Wisconsin Family and Medical Leave Act. There has to be some decision or practice by the employer that is discriminatory, or that the Complainant reasonably believes is discriminatory. There must be evidence that the Complainant took some action to stand in opposition to that allegedly discriminatory practice. Frank v. US Bank (ALJ Decision, 12/04/03).

Where an employee has previously arranged to take vacation on a scheduled work day and, prior to the vacation commencing, a situation subsequently arises that would entitle the employee to take family leave under sec. 103.10, Stats. on the scheduled work day for which the vacation had previously been approved,

the employer must permit the Complainant to take the statutory family leave and then to substitute paid or unpaid leave of any other type provided by the employer. Where the Respondent denied the Complainant family leave because it had a policy of requiring its police officers to schedule their vacation at the beginning of each year, and prohibiting them from rescheduling vacation leave or trading vacation leave during certain specified time periods (including the time period in which the Complainant in this case requested family leave) it violated the FMLA. Felker v. City of Oshkosh (ALJ Decision, 07/18/03).

The employer's requirement that employees respond to a request for certification of a serious health condition within 15 days of the request was a reasonable amount of time under the Wisconsin Family and Medical Leave Act. The Complainant's failure to comply with the policy entitled the employer to refuse to grant his request for family leave, and his request to substitute paid leave for unpaid leave. Eberhardt v. Morningstar Foods (ALJ Decision, 02/07/03).

The Respondent did not unlawfully interfere with or restrain the exercise of the Complainant's rights under the Wisconsin Family and Medical Leave Act by denying her request for a paid day off under the Respondent's Sick Leave Incentive Program (SLIP) provisions of the collective bargaining agreement governing her employment. The SLIP program provides eligible employees with up to one paid day off if the employee (among other things) did not use any paid sick leave during the applicable trimester period for each calendar year. The Complainant took two weeks of medical leave for surgery, exercising her option to substitute paid sick leave (accrued under her union's collective bargaining agreement with the employer) for unpaid medical leave under the WFMLA. Several months later, the Complainant requested a paid day off under SLIP. The employer denied her request because she had used paid sick leave during the preceding trimester, having substituted that leave for unpaid WFMLA leave. Both sec. 103.10(9)(a)(2), Stats. and sec. DWD 225.03(4) Wis. Admin. Code, established that the denial of the Complainant's request for the SLIP paid day off did not interfere with, restrain, or deny her WFMLA rights. The denial of the SLIP day off was a contractual consequence of substituting paid sick leave for unpaid WFMLA leave. Heibler v. DWD, 2002 WI App 21, 250 Wis. 2d 152, 639 N.W.2d 776.

The term "leave to an employee for the birth of the employee's natural child" in sec. DWD 225.01(6), Wis. Adm. Code, applies only to leave specifically designated for the birth of a child. Here, the Complainant requested two weeks of compensatory time off at the time that his child was born. The employer granted him the compensatory time off, but also deducted two weeks from the Complainant's WFMLA leave. The Respondent did this because its policy mandates that the City deduct from an employee's WFMLA leave if the employee "requests paid leave for a reason covered by [WFMLA]," citing sec. 225.01(6), Wis. Adm. Code, as authority. Sec. 225.01(6), Wis. Adm. Code, was created to prevent "stacking" of family and medical leaves. Stacking would occur if an employer granted its employees leave for a specific reason that is also covered under the Act, and the employee then "stacked" those two leaves by using them back to back. Legislative history of the WFMLA shows that the concern over stacking did not include the use of WFMLA leave immediately followed by use of another leave created for a different purpose. In this case, the Complainant was taking compensatory time off, which was leave that had nothing to do with WFMLA leave and was distinct leave that the Complainant himself earned by working overtime. The Respondent violated the Act by also deducting WFMLA leave. City of Madison Water Util. v. DWD (Dane Co. Cir. Ct., 10/10/02).

The Complainant established that he was entitled to take leave under the Wisconsin Family and Medical Leave Act to care for his adult son. The Complainant substituted pay under the Respondent's sick leave policy for seven and one-half days during which he cared for his son while he was hospitalized, and during which he provided direct and necessary assistance and services to his son, in addition to psychological comfort. Racine Co. v. DWD (Racine Co. Cir. Ct., 08/15/00).

Where an employee is found to have used part of his family leave for the purpose of benefiting a secondary employer or business, that action by the employee may be characterized as a misuse of family leave. Rabehl v. DILHR (Dodge Co. Cir. Ct., 03/20/95).

A Respondent's ad hoc rule prohibiting the Complainant from working during the Respondent's normal working hours while he was on family leave was a violation of the Wisconsin Family and Medical Leave Act. The Respondent's termination of the Complainant for violation of this unwritten rule was also a violation of the Act. Rabehl v. DILHR (Dodge Co. Cir. Ct., 03/20/95).

Read together, secs. 103.10(9)(a) and 103.10(9)(b), Stats., provide that an employee returning from family leave is not entitled to a right or employment benefit to which the employee would not have been entitled had he or she not taken family leave, except that, with respect to group health insurance coverage, an employer is required to maintain group health insurance coverage during an employee's family leave and an employee returning from family leave is entitled to group health insurance coverage under the conditions that applied immediately before the family leave or medical leave began. Barry-Chamberlain v. DILHR (Dane Co. Cir. Ct., 06/30/94).

The Complainant was discharged for excessive absenteeism. The Complainant established that he had a serious health condition on four of the days for which he was disciplined. The Family and Medical Leave Act prohibits the Respondent from disciplining the Complainant for these days of statutory leave. The Respondent failed to offer any evidence to support a conclusion that it would have still terminated the Complainant's employment if it had not considered these absences. Therefore, the Respondent violated the Act. Meyer v. DHSS (Wis. Pers. Comm'n, 06/11/92).

The Complainant was given a warning for "excessive absenteeism" when she was absent for two days to care for her son, who had a serious health condition. The warning interfered with the Complainant's rights under the Act because the employer's personnel policies treated the accumulation of such warnings as grounds for dismissal. Haas v. DILHR, 166 Wis. 2d 288, 479 N.W.2d 229 (Ct. App. 1991).

The Respondent's discharge of the Complainant for accumulating twenty-one points in a six-month period under the Respondent's no-fault attendance policy violated the Act when five of those points were assessed for time during which the Complainant took leave protected under the Act. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990).

390 Procedural matters; judicial review

ALJ's may rely upon federal law when interpreting "interference" claims under the WFMLA. To succeed on a federal FMLA claim (and therefore the WFMLA), an employee must prove that the employer interfered with the employee's exercise of FMLA rights and that the interference "prejudiced" the employee. To demonstrate "prejudice," an employee must show that he or she lost compensation or benefits because of a violation, sustained a monetary loss because of the violation, or suffered some loss in employment status. The Complainant failed to establish that he was prejudiced by the Respondent's actions. While the WFMLA requires employers to post notices of the employees' rights under the WFMLA, the WFMLA does not require employers to verbally inform employees of their rights under the WFMLA. An employer does not violate the WFMLA by erroneously requiring an employee to complete a form when the employee is not prejudiced by that requirement. Soulek v. Costco Wholesale (ALJ Decision, 04/15/2020), aff'd sub nom. Soulek v. Dept. of Workforce Development, Equal Rights Div. (Brown Co. Cir. Ct. 03/03/2021).

LIRC has authority to review decisions of the Equal Rights Division ("ERD") alleging violations of the Wisconsin Fair Employment Act. It does not have authority to review ERD decisions regarding alleged violations of the Wisconsin Family Medical Leave Act ("WFMLA"), or to give any initial consideration to such allegations.

Likewise, LIRC does not have authority (nor does the ERD) to entertain claims under the federal FMLA. Rybak v. Wis. Physicians Serv. (LIRC, 05/31/2013).

When no party seeks judicial review of an Administrative Law Judge's decision, an employee has sixty days from the date the thirty-day period for judicial review ends to file an action for damages in circuit court under sec. 103.10(13)(b), Stats. Hoague v. Kraft Foods Global, 2012 WI App 130, 344 Wis. 2d 749, 824 N.W.2d 892.

There is no implied right to a jury trial in a civil action for damages under the Family and Medical Leave Act. Harvot v. Solo Cup, 2009 WI 85, 320 Wis. 2d 211, 768 N.W.2d 176.

Delaying the approval of FMLA leave and the right to substitution may, in some circumstances, result in a denial, restraint, or an interference with an employee's rights under the Wisconsin Family and Medical Leave Act. Therefore, the Respondent's motion to dismiss the complaint in this matter for failure to state a claim upon which relief could be granted under the Act was denied. Burnick v. AT&T Serv. (ALJ Decision, 04/14/06).

In requesting that the record be held open to allow for the filing of a transcript and post-hearing briefs, the parties waived the provision in sec. 103.10(12)(d), Stats., which provides that a decision should be issued within 30 days after the hearing. McKee v. Rock-Tenn (ALJ Decision, 04/04/03).

In sec. 103.10(7)(c), Stats., the scope of a "second opinion" medical examination is expressly limited to the matters enumerated in sec. 103.10(7)(b), Stats., all of which directly relate to the serious health condition at issue in the case, and to what extent it prevented the employee from being able to perform his or her job. Accordingly, the Administrative Law Judge disregarded those portions of a doctor's report that delved into aspects of the Complainant's health history which were not shown to relate to the Complainant's serious health condition at issue in the case. McKee v. Rock-Tenn (ALJ Decision, 04/04/03).

Only employees who are successful in the required administrative proceedings and judicial review may bring an action for damages in court under sec. 103.10(13), Stats. Butzlaff v. DHFS, 223 Wis. 2d 673, 590 N.W.2d 9 (Ct. App. 1998).

Decisions resulting from an administrative proceeding concerning the Family and Medical Leave Act are those of DILHR rather than of a single hearing examiner. Therefore, administrative decisions concerning the Family and Medical Leave Act are governed by the same rules concerning agency discretion as are applied in other cases dealing with the scope of deference which should be given to conclusions of law and statutory interpretation in agency decisions. The Department has developed considerable specialized knowledge in administering similar discrimination laws. Therefore, the Department's decision is entitled to great weight and should be affirmed if reasonable. Jicha v. DILHR, 169 Wis. 2d 284, 485 N.W.2d 256 (1992).

The de novo standard of review is appropriately applied to conclusions of law by a single hearing examiner interpreting sec. 103.10, Stats. MPI Wis. Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W.2d 79 (Ct. App. 1990); Haas v. DILHR, 166 Wis. 2d 288, 479 N.W.2d 229 (Ct. App. 1991).

Section 500:
Other Laws

500 OTHER LAWS

510 PUBLIC EMPLOYEE SAFETY AND HEALTH LAW (Sec. 101.055, Stats.)

[Ed. Note: Pursuant to sec. 101.055(8), Stats., it is unlawful for public employers to discriminate against employees because of their exercise of rights under the Public Employee Health and Safety Law. Enforcement of this law for state employees was previously the responsibility of the Personnel Commission, while enforcement of the law for public employees other than state employees was the responsibility of the Equal Rights Division. Since the elimination of the Personnel Commission in 2003, the Equal Rights Division has been responsible for enforcement of the law for all public employees. Decisions of the Equal Rights Division under this provision are subject to judicial review under ch. 227, Stats.].

The Complainant was not entitled to appeal the initial determination of no probable cause because neither the Public Employee Safety and Health Law, sec. 101.055, Stats., nor the rules of the Equal Rights Division give the Department of Workforce Development jurisdiction to hear an appeal from an initial determination of no probable cause in cases filed under that law. The Complainant's only remedy was to petition for judicial review under ch. 227, Stats. Weiner v. DWD (Milwaukee Co. Cir. Ct., 05/12/06). [Ed. Note: Since this decision was issued, the Equal Rights Division has adopted rules specifically providing for appeals of initial determinations of no probable cause under the Public Employee Safety and Health Law. See, sec. DWD 223.08, Wis. Admin. Code.]

The complaint was properly dismissed for failure to state a claim upon which relief could be granted where the Complainant filed two reports relating to an injury he suffered when he broke up an inmate fight at the correctional institution where he was employed. The Complainant was not complaining of either an unsafe or unhealthy condition, a condition that was correctable, or an injury that was preventable. These reports fall outside of the protections set forth in sec. 101.055(5), Stats. which provides that a public employee "who believes that a safety or health standard or variance is being violated, or that a situation exists which poses a recognized hazard likely to cause death or serious physical harm" may request an inspection. The Complainant, therefore, did not exercise a right related to occupational safety and health under sec. 105.055, Stats. Process v. DOC (Wis. Pers. Comm'n, 03/08/01).

The Public Employee Safety and Health Law protects public employees from retaliation for participation in protected disclosure of health or safety hazards. The method of analysis applied to this law is similar to that employed for retaliation claims under the Wisconsin Fair Employment Act. The Complainant in this case failed to establish a prima facie case of public employee safety and health retaliation where he failed to present any evidence of having participated in a protected disclosure of health or safety hazards. Hawkinson v. DOC (Wis. Pers. Comm'n, 10/09/98).

Workplace violence is regulated under the general duty clause of the Federal Occupational Safety and Health Act. Because the comparable state law (sec. 101.55, Stats.) was intended to give state employees "rights and protections. . . equivalent to those granted to employees in the private sector" under federal law, the Respondent's motion to dismiss the Complainant's Public Employee Safety and Health claim relating to workplace violence was denied. Cygan v. DOC (Wis. Pers. Comm'n, 09/10/97).

The Complainant's occupational safety and health retaliation claim was not defeated by his failure to report unsafe conditions to the Department of Commerce. The Complainant had filed an incident report regarding unsafe working conditions with management and his union. Leinweber v. DOC (Wis. Pers. Comm'n, 08/14/97).

Workplace violence is regulated under the general duty clause of the federal Occupational Safety and Health Act. Wisconsin's public employees' safety and health provisions were intended to give covered state employees the same protections as employees in the private sector. The Complainant's incident report to

management and his union relating to threatening telephone calls in the absence of any staff member other than the Complainant (a social worker) on a floor at a hall in the Drug Abuse Correctional Center, related to dangers protected under state law. Leinweber v. DOC (Wis. Pers. Comm'n, 08/14/97).

Filing Abnormally Hazardous Task Reports and making other disclosures to the Department of Industry, Labor and Human Relations were protected public employee health and safety activities. McKibbins v. UW-Milwaukee (Wis. Pers. Comm'n, 04/04/95).

Comments and ratings on a performance evaluation are reviewable under the public employee health and safety provisions. McKibbins v. UW-Milwaukee (Wis. Pers. Comm'n, 04/04/95).

No retaliation was shown in regard to the Complainant's performance evaluation where the Complainant had reported safety and health problems over a considerable period of years and had not suffered any adverse employment consequences but had been complimented and rewarded for her efforts. The Complainant (a building maintenance helper) had more recently failed to notify her supervisors of health and safety violations in her building, had failed to communicate effectively with her supervisors on various occasions, had failed to carry out a work assignment and had failed to wear proper safety equipment. McKibbins v. UW-Milwaukee (Wis. Pers. Comm'n, 04/04/95).

The Complainant failed to establish a prima facie case of retaliation where the person who decided not to rescind the Complainant's resignation was not aware of the Complainant's protected activity. Radtke v. UW-Madison (Wis. Pers. Comm'n, 11/22/94).

Claims meeting the standard of "discipline" under the Whistleblower Law (secs. 230.80 et seq., Stats.) constitute adverse actions under the Public Employee Safety and Health Law. Sadlier v. Wisconsin DHSS (Wis. Pers. Comm'n, 03/30/89).

Nothing in the statutes suggests that a grievance directed to management and relating to a health or safety concern cannot constitute the exercise of a right under the law entitling the grievant to protection from retaliation. Comments to the media were also protected conduct. However, a grievance referring only to a single instance of prior conduct by management with no indication that the conduct represented a policy did not relate to an ongoing safety concern. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

The Public Employee Safety and Health law, sec. 101.055, Stats., is intended to provide employees rights and protections equivalent to employees in the private sector under OSHA. Strupp v. UW-Whitewater (Wis. Pers. Comm'n, 07/24/86).

The Complainant had a reasonable and good faith belief that the delivery of a drum of sulfuric acid by hand involved a danger of serious injury or death. He presented an expert witness who testified that moving the drum downstairs by hand would not be safe. Although the delivery could have been effected safely with the use of a dolly, this factor alone did not lead to a conclusion that the Complainant's refusal was unreasonable. Strupp v. UW-Whitewater (Wis. Pers. Comm'n, 07/24/86); aff'd sub nom. Strupp v. Wis. Pers. Comm'n (Milwaukee Co. Cir. Ct., 01/28/87).

The Complainant reasonably refused to assist in the delivery of a drum of sulfuric acid because of a reasonable and good faith belief that the task involved a danger of serious injury or death. The Complainant also engaged in protected activity when he sent DILHR a copy of a memo to his supervisor specifically questioning the safety of moving the acid. The Complainant's subsequent termination was based in part on these activities. However, in order to establish a violation of the law, it must be found that the protected activity was a "substantial reason" for the discharge, or that the discharge would not have taken place "but for" the protected activity. In this case, the Respondent had independent reasons for discharging the Complainant. The Complainant's attitude towards management throughout the course of his four months of

employment was contentious and in some respects contumacious (including one statement that a supervisor's memo would "make good toilet paper"). The Complainant's discharge did not violate the Public Employee Safety and Health Law. Strupp v. UW-Whitewater (Wis. Pers. Comm'n, 07/24/86); aff'd sub nom. Strupp v. Wis. Pers. Comm'n (Milwaukee Co. Cir. Ct., 01/28/87).

Under the Public Employee Safety and Health law, sec. 101.055, Stats., the Complainant's reasonable refusal to perform a task which the Complainant has a reasonable and good faith belief may involve danger of serious injury or death is protected, and it is not required that the Complainant prove that the belief was in fact accurate. Strupp v. UW-Whitewater (Wis. Pers. Comm'n, 07/24/86).

A violation of the Public Employee Safety and Health Law was found where the Complainant, a union representative on a joint safety committee, was disciplined for handing out his business card in a work area without authorization. The business card indicated Complainant's title of "Chief Safety Coordinator" for the union. Marchewka v. Milwaukee County (Milwaukee Co. Cir. Ct., 11/25/85).

Under the Public Employee Safety and Health law, sec. 101.055, Stats., the specific language "within 30 days after the employee received a knowledge of the discrimination or discharge" means that, with respect to discharges, it is the date of the discharge, rather than the date on which the employee obtained or should have obtained knowledge that the discharge was discriminatory, that triggers the running of the 30-day statute of limitations. Sprenger v. UW Sys. (Wis. Pers. Comm'n, 09/13/85).

The Labor and Industry Review Commission does not have jurisdiction to review Equal Rights Division decisions issued under sec. 101.055, Stats., regarding public employee occupational safety and health. Marchewka v. Milwaukee County (LIRC, letter ruling, 04/16/85).

The Complainant was found not to have engaged in a protected activity where the only evidence of safety-related activity was that the Complainant discussed health and safety matters with a coworker, and where the Complainant failed to establish that the Respondent believed that he had "filed" an oral safety complaint. Even if the Complainant had shown that he had engaged in a protected activity, he failed to establish a causal connection with his subsequent discharge. Branski v. UW-Milwaukee (Wis. Pers. Comm'n, 02/29/84)

520 EMPLOYEES' RIGHT TO KNOW LAW (Secs. 101.58-101.599, Stats.)

[Pursuant to sec. 101.599, Stats., an employee or employee representative who has not been afforded his rights by an employer in violation of the Employees' Right To Know Law may file a complaint with the department alleging the violation. The department shall investigate the complaint and shall attempt to resolve the complaint by conference, conciliation or persuasion. If the complaint is not resolved and the department finds probable cause to believe a violation has occurred, the department shall proceed with notice and a hearing on the complaint as provided in ch. 227, Stats. If the department finds a violation, it may order such action as will remedy the effects of the violation.]

Pursuant to sec. 111.322(2m), Stats., it is an act of employment discrimination to discharge or otherwise discriminate against any individual because he files a complaint or attempts to enforce any right under the Wisconsin Employees' Right to Know Law (secs. 101.58 to 101.599, Stats.). Presumably, the 300-day filing requirement stated in sec. 111.39(1), Stats., would apply to charges filed pursuant to this provision. Prior to his termination on June 16, 2003, the Complainant in this case filed requests for information pursuant to the Employees' Right to Know Law with his employer. The requests for information related to substances to which he was being exposed in the course of his employment. The employee suspected that these substances were causing or exacerbating certain medical problems he was experiencing at that time. The Complainant asserted that he was unaware until November of 2004 of his right to file a charge of retaliation based upon his exercise of rights under the Employees' Right to Know law. However, ignorance of the law does not toll the statutory filing period. The Complainant also indicated that he did not believe that the Respondent had

acted improperly until he learned from OSHA in December of 2004 that the Respondent "had an overexposure record of a hazardous chemical." However, the belief that the Complainant asserted he first formed in December of 2004 was not the belief that he had been retaliated against when he was disciplined and discharged by the Respondent (which would be the only basis for invoking the jurisdiction of the Equal Rights Division), but instead the belief that the Respondent had violated the Employees' Right to Know law by withholding information from him as to the nature and level of substances to which he had been exposed. The limitations period for filing the complaint began to run on the date that the Complainant received notice of his termination on or before June 16, 2003. No basis was established for tolling the statute of limitations in this case. Van Deraa v. Asten Johnson (LIRC, 06/30/05).

The Employees' Right to Know Law is a broad and comprehensive statutory scheme designed to protect public employees' health, safety, and welfare. This legislation ensures that employees receive adequate information and training necessary to protect them. Thus, the legislation is remedial in nature and must be read broadly to effect its purpose. Door County Highway Dep't v. DILHR, 137 Wis. 2d 280, 404 N.W.2d 548 (Ct. App. 1987).

The Respondent's baling facility was processing hazardous materials including pesticides, herbicides, and infectious materials. The baling facility was also accepting asbestos, a known carcinogen and toxic substance. The compacting of these materials during the baling process released hazardous and toxic substances into the workplace. The Respondent failed to comply with sec. 101.581, Stats., and post a sign advising employees of their right to know of the existence of hazardous materials in the workplace. The Respondent also failed to comply with sec. 101.597, Stats., and provide the Complainant with an education or training program to ensure his safety. The Respondent also failed to notify the Complainant of his rights under sec. 101.055, Stats. Two of the rights granted by that statutory provision are the employee's right to request a Department inspection of a workplace if the employee believes a hazardous situation exists, and the right to reasonably refuse to work in such a situation. Door County Highway Dep't v. DILHR, 137 Wis. 2d 280, 404 N.W.2d 548 (Ct. App. 1987).

The Respondent's failure to educate and train the Complainant in the use of equipment that would ensure his safety was a critical factor in the Complainant's decision not to return to work. Because the Respondent's violation of the Employees' Right to Know Law was directly responsible for the Complainant's ultimate termination, reinstatement with back pay was an appropriate remedy. Door County Highway Dep't v. DILHR, 137 Wis. 2d 280, 404 N.W.2d 548 (Ct. App. 1987).

The Respondent persistently failed to comply with the provisions of the Employees' Right to Know Law, even after complaints had been made and it was made aware of its obligations under those provisions. The Respondent's continued disregard for the Complainant's welfare and his rights afforded under those statutory provisions was willful. Therefore, the Department was empowered under sec. 101.599(3)(b), Stats., to impose a $10,000 forfeiture. The Department's order imposing the forfeiture or, alternatively, requiring the Respondent to install a ventilation booth, was an appropriate incentive for the Respondent to remedy the violation. Door County Highway Dep't v. DILHR, 137 Wis. 2d 280, 404 N.W.2d 548 (Ct. App. 1987).

530 DISCRIMINATION IN ADMISSION TO POSTSECONDARY EDUCATION (Sec. 106.56, Stats.)

[Pursuant to sec. 106.56, Stats., it is unlawful for an institution of postsecondary education to discriminate, in admissions or otherwise, on the basis of disability. Complaints charging discrimination or discriminatory practices in violation of this provision may be filed with the Equal Rights Division, and such complaints are processed by the division in the same manner that employment discrimination complaints are processed under the Wisconsin Fair Employment Act. Decisions of the ERD under this provision may be reviewed by LIRC as provided in sec. 106.52(4)(b), Stats., which is part of the Public Places of Accommodations and Amusements Law.]

The Department of Vocational Rehabilitation ("DVR") was not covered by Wis. Stat. §106.56, Wisconsin's Discrimination in Post-Secondary Education Act. The Act only applies to alleged discrimination by a school, university or other institution offering courses or programs in post-secondary education or vocational training which is supported, wholly or in part, by public funds. DVR is not a school or a university, and it does not itself directly offer courses or programs in postsecondary education or vocational training. DVR cannot be claimed to be an institution that offers courses or programs within the meaning of the statute simply because it offers potential funding for courses or programs. Merely providing funding for courses which are offered and controlled by another institution is distinct from offering the courses themselves. In the context in which it appears in the statute, the word "institution" cannot be stretched far enough to cover DVR and its employees. Daniels v. Div. Vocational Rehab. and Wollensheim, (LIRC, 03/25/11).

The Wisconsin Personnel Commission lacks jurisdiction over complaints filed under sec. 101.223, Wis. Stats., which prohibits post-secondary education institutions from discriminating on the basis of physical condition or development disability. Fischer-Guex v. UW-Madison (Wis. Pers. Comm'n, 12/17/92). [Ed. Note: sec. 101.223 is now sec. 106.56, Stats.]

The Complainant failed to establish probable cause that the Respondent was a school, university or other institution within the meaning of sec. 101.223(1), Stats. Steidl-Cox v. Skilled Trades Improvement Program (LIRC, 11/18/92). [Ed. Note: sec. 101.223(1), Stats., has been re-numbered sec. 106.56(1), Stats.]

540 STATUTES RELATING TO RETALIATION FOR REPORTS OF ABUSE OR NEGLECT

541 RETALIATION FOR REPORTS TO BOARD OF AGING AND LONG-TERM CARE (Sec. 16.009(5), Stats.)

[Ed. note: Pursuant to sec. 16.009(5), Stats., it is unlawful to retaliate against employees for contacting, providing information to or otherwise cooperating with any representative of the Board On Aging And Long-Term Care. An employee who is discharged or otherwise retaliated or discriminated against in violation of this provision may file a complaint with the Equal Rights Division under sec. 106.54(5), Stats. Such complaints are processed in the same manner that employment discrimination complaints are processed under the Wisconsin Fair Employment Act. Decisions of the Equal Rights Division under this law are appealable to LIRC.]

The Respondent, a non-medical home-care business that provides services to those who need assistance with basic tasks such as bathing, bathroom assistance, light housekeeping and food preparation, is not a long-term care facility subject to sec. 16.009(5). In particular, it is not a facility as defined in sec. 647(10), which is one kind of facility made subject to sec. 16.009(5). A facility under sec. 647.10 may include one that provides the kind of personal care services performed by the Respondent, but to be a facility under sec. 647.10, the facility must provide its services under a continuing care contract conditioned on payment of an entrance fee or transfer of at least $10,000 or 50% of a person's estate. The Respondent does not provide its services under a continuing care contract. Kuzmanovic v. Petra Living Assistance, LLC (LIRC, 08/22/2018), aff'd Kuzmanovic v. LIRC (Waukesha Co. Cir. Ct. 03/17/2019).

A complaint was dismissed for failure to state a claim under either sec. 16.009(5), 46.90(4) or 50.07(30), Wis. Stats. Those statute sections are contained within statutory provisions relating to long-term care facilities, to elder abuse and other care and service residential facilities. They afford persons protection against being discharged or otherwise retaliated or discriminated against: 1) for "contacting, providing information to or otherwise cooperating with any representative of the Board (on aging and long-term care)," 2) for "reporting in good faith to the county agency or to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .that he or she believes that abuse, managerial abuse or neglect has occurred. . ." and 3) for "contacting or providing information to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .or for initiating,

participating in, or testifying in an action for any remedy authorized under (subchapter 1 of Ch. 50, Wis. Stats.)." The common thread through all of these statutory provisions is that the protective report must be made before the alleged discriminatory or retaliatory conduct takes place in order for the protections of the statutes to be in effect. In this case, the Complainant did not allege that he contacted, provided information to or cooperated with any representative of the Board on Long-Term Care, that he reported suspected abuse to the county agency or any State official, or that he had initiated, participated in or testified in an action for any remedy under Ch. 50 before the discriminatory or retaliatory conduct complained of had occurred. DeGroot v. Parkview Adult Family Home (LIRC, 07/17/00).

542 RETALIATION FOR REPORTS OF ELDER ABUSE (Sec. 46.90(4)(b), Stats.)

[Ed. note: Pursuant to sec. 46.90(4), Stats., it is unlawful to retaliate against employees for reporting suspected abuse or neglect of an elder person to the designated county official, any state official, or the long-term care ombudsman. Any employee who is discharged or otherwise retaliated against or discriminated against in violation of this provision may file a complaint with the Equal Rights Division under sec. 106.54(5), Stats. Such complaints are processed in the same manner that employment discrimination are processed under the Fair Employment Act. Decisions of the Equal Rights Division under this law are appealable to LIRC.]

The Complainant, a personal caregiver at a non-medical home-care business, was not a person protected from retaliation for reporting elder abuse or adult-at-risk abuse under Wis. Stat. § 46.90(4)(ab) or 55.043(1m). In particular, she was not a health care provider as defined in Wis. Stat. § 155.01(7). Kuzmanovic v. Petra Living Assistance, LLC (LIRC, 08/22/2018), aff'd Kuzmanovic v. LIRC (Waukesha Co. Cir. Ct. 03/17/2019).

The Complainant asserted a complaint under Wisconsin's Elder Abuse Reporting Act and contended that Wis. Stat. §46.197(6)(d) protects employees from retaliation for reporting fraudulent activity. The Chapter cited by the Complainant, Chapter 49, did not apply. Chapter 49 covers public assistance and children and family support services, and the anti-retaliation provisions contained in that section only apply to the Department of Health Services, a county, a tribal governing body, or an employee of one of these entities. Kuzmanovic v. Estate of Fickau (LIRC, 05/31/17)

The Complainant, who was a daycare aide in a community-based residential facility, left a telephone message for the ombudsman stating that she was "calling regarding non-care of resident at group home she worked at." Even if this message constituted a "report" within the meaning of sec. 46.90, Stats., the message does not state that the Complainant believed that "abuse, material abuse or neglect has occurred." Moreover, even if her message was considered to be a report that abuse or neglect has occurred, it fails to satisfy the requirement under sec. 46.90(4)(a)1, Stats., that "[t]he person shall indicate the facts and circumstances of the situation as part of the report." Clearly, the Complainant's message did not indicate any facts or circumstances regarding asserted abuse or neglect of a resident at the Respondent's facility. The Complainant argued that a failure to conclude that her message constitutes a report of a fact-based abuse or neglect sufficient to bring sec. 46.90, Stats. into play would not advance the stated public purpose of the statute. In Hausman v. St. Croix Care Ctr., 214 Wis. 2d 655, 571 N.W.2d 393 (1997), the Supreme Court stated that sec. 46.90(4)(b), Stats., demonstrated a fundamental and well-defined public policy of protecting nursing home residents from abuse and neglect. Nevertheless, the Complainant's message fails to meet all of the requirements of sec. 46.90(4), Stats. Her public policy argument is a matter better addressed by the Legislature. Schultz v. Community Living Arrangements (LIRC, 08/28/03).

A complaint was dismissed for failure to state a claim under either sec. 16.009(5), 46.90(4) or 50.07(30), Wis. Stats. Those statute sections are contained within statutory provisions relating to long-term care facilities, to elder abuse and other care and service residential facilities. They afford persons protection against being discharged or otherwise retaliated or discriminated against: 1) for "contacting, providing information to or otherwise cooperating with any representative of the Board (on aging and long-term

care)," 2) for "reporting in good faith to the county agency or to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .that he or she believes that abuse, managerial abuse or neglect has occurred. . ." and 3) for "contacting or providing information to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .or for initiating, participating in, or testifying in an action for any remedy authorized under (subchapter 1 of ch. 50, Wis. Stats.)." The common thread through all of these statutory provisions is that the protective report must be made before the alleged discriminatory or retaliatory conduct takes place in order for the protections of the statutes to be in effect. In this case, the Complainant did not allege that he contacted, provided information to or cooperated with any representative of the Board on Long-Term Care, that he reported suspected abuse to the county agency or any State official, or that he had initiated, participated in or testified in an action for any remedy under ch. 50 before the discriminatory or retaliatory conduct complained of had occurred. DeGroot v. Parkview Adult Family Home (LIRC, 07/17/00).

The protection outlined under sec. 46.90(4)(b)1, Stats., does not extend to reports of abuse or neglect to governmental agencies other than to the designated county agency as provided under the statute. In this case, the Complainant did not make a complaint to the Pierce County Office on Aging Lead Elder Abuse Agency, the agency designated under sec. 46.90, Stats, for the purpose of receiving reports of abuse or neglect of elderly persons. Therefore, her complaint was properly dismissed for failure to state a claim upon which relief could be granted. Hausman v. St Croix Care Ctr. (LIRC 03/07/96); Wright v. St. Croix Care Ctr. (LIRC, 03/07/96), both cases aff'd sub nom. Hausman v. LIRC (Dane Co. Cir. Ct., 05/08/97).

543 RETALIATION FOR REPORTS RE: RESIDENTIAL CARE FACILITIES (Sec. 50.07(3), Stats)

[Ed. note: Pursuant to sec. 50.07(3), Stats., it is unlawful to retaliate against employees for making a report concerning a residential care facility to any state official or the long-term care ombudsman. Any employee who is discharged or otherwise retaliated or discriminated against in violation of this provision may file a complaint with the Equal Rights Division under sec. 106.54(5), Stats. Such complaints are processed in the same manner that employment discrimination complaints are processed under the Wisconsin Fair Employment Act. Decisions of the Equal Rights Division under this law are appealable to LIRC.]

The Complainant was employed as a day program aide at the Respondent, which is a non-profit organization that operates community-based residential facilities and adult family homes for individuals with severe developmental and physical disabilities. The Complainant established a prima facie case of retaliation under sec. 50.07(1)(e), Stats. She engaged in protected activity by contacting a state ombudsman and leaving a message that she was calling regarding the non-care of a resident at her group home. Four days later, the Respondent terminated the Complainant's employment. A causal connection between the Complainant's protected activity and her discharge can be inferred because of the close proximity in time between her protected activity and her discharge. The reasons given by the Respondent for discharging the Complainant were found to be unworthy of credence. The Respondent contended that it defied logic to suggest that the Respondent would make ombudsman contact information readily available to employees and then fire people who use it. However, the Respondent is required by administrative rule to post ombudsman contact information. (HFS 83.07(15), Wis. Admin. Code). Further, although the ombudsman could not impose a fine or remove the Respondent's license, the Respondent did have reason to fear the ombudsman because the ombudsman had authority to investigate complaints concerning improper conditions or treatment of aged or disabled persons at community-based residential facilities, and because the ombudsman refers suspected abuse or neglect directly to the state licensing specialist who could impose a fine or remove the Respondent's license. The evidence established that the only reason the Respondent discharged the Complainant was because she had contacted an ombudsman. The non-discriminatory reasons proffered by the Respondent for the Complainant's discharge were not the true reasons for the discharge but were a pretext for retaliation. Schultz v. Community Living Arrangements (LIRC, 08/28/03).

A complaint was dismissed for failure to state a claim under either sec. 16.009(5), 46.90(4) or 50.07(30), Wis. Stats. Those statute sections are contained within statutory provisions relating to long-term care facilities, to elder abuse and other care and service residential facilities. They afford persons protection against being discharged or otherwise retaliated or discriminated against: 1) for "contacting, providing information to or otherwise cooperating with any representative of the Board (on aging and long-term care)," 2) for "reporting in good faith to the county agency or to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .that he or she believes that abuse, managerial abuse or neglect has occurred. . ." and 3) for "contacting or providing information to any State official, including any representative of the Office of the Long-Term Care Ombudsman. . .or for initiating, participating in, or testifying in an action for any remedy authorized under (subchapter 1 of ch. 50, Wis. Stats.)." The common thread through all of these statutory provisions is that the protective report must be made before the alleged discriminatory or retaliatory conduct takes place in order for the protections of the statutes to be in effect. In this case, the Complainant did not allege that he contacted, provided information to or cooperated with any representative of the Board on Long-Term Care, that he reported suspected abuse to the county agency or any State official, or that he had initiated, participated in or testified in an action for any remedy under ch. 50 before the discriminatory or retaliatory conduct complained of had occurred. DeGroot v. Parkview Adult Family Home (LIRC, 07/17/00).

Section 50.07(2), Stats., punishes employers for the wrongful termination of reporting employees with up to six months in jail. This provision does not bar an employee from filing an individual civil action for wrongful discharge. Hausmann v. St. Croix Care Ctr., 214 Wis. 2d 655, 571 N.W.2d 393 (1997).

544 HEALTH CARE WORKER PROTECTION (HCWPA) (Sec. 146.997, Stats.)

[Ed. Note: Pursuant to sec. 146.997, Stats., no health care facility or provider may discipline a person for making certain types of reports relating to health care and health care facilities and providers. Any employee of a health care facility or provider who is threatened with or subjected to disciplinary action in violation of this provision may file a complaint with the Equal Rights Division under sec. 106.57(6), Stats. Such complaints are processed in the same manner that employment discrimination complaints are processed under the Wisconsin Fair Employment Act. Decisions of the Equal Rights Division under this law are appealable to LIRC.]

The HCWPA only prohibits discharging an employee because she has filed a complaint or because the employer believes she has done so, not because the employer believes she may do so in the future. In this case, the Complainant did not actually file a complaint and the evidence does not support a conclusion that the Respondent believed she had done so. Uphill v. Sun Valley Homes II, LLC (LIRC, 01/31/22).

The fact that the Milwaukee School of Engineering is a corporation that employs some health care providers does not make the School itself a health care provider under sec. 146.997(1)(d)(16). The statutory term corporation of health care providers refers to a corporation that is either principally composed of individual health care providers under subdivisions 1 through 14 of sec. 146.997(1)(d), or is owned or controlled by such individual health care providers. Suhr v. Milwaukee Sch. of Eng'g (LIRC, 01/30/20).

The Complainant reported a concern to her supervisor that allowing staff to do charting of patients outside the charting room was a violation of the Health Insurance Portability and Accountability WFEA of 1996 (HIPAA). This may have qualified as a report of information under the HCWPA, but there was no violation of the WFEA because there was no evidence that the report motivated the Respondent's decision to discharge the Complainant. Gruss v. County of Dane (LIRC, 08/13/19).

The Respondent, a non-medical home-care business, is not a health care facility under the HCWPA. The Respondent provides services to those who need assistance with basic tasks such as bathing, bathroom

assistance, light housekeeping and food preparation, and its operations are not licensed or approved by the Department of Health Services. It also is not subject to the HCWPA as a home health agency as defined in sec. 50.49(1)(a), Wis. Stats., because its services do not constitute skilled nursing or therapeutic services, it does not have policies established by a professional group including at least one physician and at least one registered nurse, it does not provide for supervision of services by a physician or registered nurse, and it does not maintain clinical records on its clients. Kuzmanovic v. Petra Living Assistance, LLC (LIRC, 08/22/18), aff'd Kuzmanovic v. LIRC (Waukesha Co. Cir. Ct. 03/17/2019).

Between 2006 and 2012, the Complainant reported the occurrence of approximately 15-20 medication errors per year made by nurses using the Med-Dispense machines and requested that a computer interface be purchased for the Med-Dispense machines. Accordingly, the Complainant, in good faith, reported violations of clinical standards which affected the quality of health care services provided and posed a potential risk to the health and safety of its patients and her conduct was protected by the HCWRA. However, there was no retaliation under this Act where the Respondent gave the Complainant good performance evaluations and annual salary increases during the six years that she was making reports about the medication errors and the computer interface. Narut v. Lakeview NeuroRehab Ctr. Midwest, Inc. (LIRC, 08/31/16) (unavailable online), aff'd Narut v. LIRC (Kenosha Co. Cir. Ct, 07/10/2017).

The Respondent did not violate the HCWPA when the Complainant's own testimony indicated that she had not been subject to any adverse employment actions for making alleged complaints. Volkmann v. Colonial Management Group, LP (LIRC, 01/30/15).

The Complainant alleged that two employees of Tellurian, a health care facility, violated HIPPA when, at Tellurian, they disclosed confidential health information about inmates of a DOC facility. The Complainant reported this violation to the DOC and was subsequently discharged by the Respondent for making that report. The commission determined that the Complainant's allegations stated a cause of action under the HCWPA, despite the fact that the report was made to the DOC and the confidential information that the two employees were alleged to have disclosed did not concern patients of the Respondent and, instead, concerned individuals who were inmates at a correctional facility run by the DOC. While the main application of the HCWPA is to protect employees who report problems with their employer's own provision of health care, the law contains open ended language in its description of the potential recipients of reporting which includes any state agency. Ransom v. Tellurian Ucan, Inc. (LIRC, 09/26/14).

It is unlawful under the HCWPA to terminate the employment of a doctor because he complained about another doctor's practices. The fact that the doctor being complained of was no longer employed by the Respondent at the time did not put the claim outside of the coverage of the HCWPA. Siegel v. Marshfield Clinic (LIRC, 10/31/13).

The fact that the Complainant expressed unhappiness with his job and talked about quitting did not provide the Respondent with a nondiscriminatory justification to discharge him. The Respondent had no intention of terminating the employment relationship until after the Complainant engaged in protected conduct. Further, the Complainant's frustrations with his employment were related in part to the Respondent's negative reaction to his protected conduct. Siegel v. Marshfield Clinic (LIRC, 10/31/13).

The Health Services Unit of the Wisconsin Department of Corrections' Columbia Correctional Institution was not a "health care facility" under the Health Care Workers Protection Act (HCWPA), and that the Warden of the Columbia Correctional Institution, who discharged the Complainant, was not a "health care provider" under the HCWPA. Previous LIRC holdings indicate that a literal reading of the relevant definitions is called for. Giving them such a literal reading, it is clear that the DOC is not covered by the HCWPA. For these reasons, the complaint arising from the Complainant's discharge from her position as a nurse was properly dismissed. Hance v. DOC (LIRC, 09/16/13).

The Respondent was not covered by the HCWPA. Although licensed dentists are subject to the HCWPA, the Respondent was a dental laboratory, was not a licensed dentist, and was specifically exempted from being a licensed dentist. The HCWPA unambiguously defines the terms "health care facility" and "health care provider" and it would be improper to attempt to construe the terms to encompass entities that are not specifically mentioned in the HCWPA. Rademacher v. Allesee Orthodontic Appliances, Inc. (LIRC, 06/07/13).

The Health Care Worker Protection Act (HCWPA) protects only "employees," notwithstanding the use of the word "persons" in portions of the statute. An unpaid intern who received no salary or other monetary compensation was not an "employee" for purposes of being protected under HCWPA. Although it may be possible to be considered an employee based upon "tangible benefits," here the Complainant's benefits – an "all access" security badge for the Respondent's facilities, office space, support staff, and parking – were provided to enable the Complainant to perform her assigned duties and did not constitute a form of compensation. Masri v. Med. College of Wis. (LIRC, 08/31/11), aff'd, Masri v. LIRC & Med. College of Wis., 2013 WI App 62, 348 Wis. 2d 1, 832 N.W.2d 139; 2014 WI 81, 356 Wis. 2d 405, 850 N.W.2d 298.

The Complainant did not engage in any conduct that was protected under the Health Care Worker Protection Act. The Complainant worked as a respiratory therapist. He questioned the amount of medication which one of the Respondent's doctors prescribed for a child. The Complainant informed his supervisor about the matter, and he added a note to the child's chart indicating that the prescribed dosage was only recommended for patients six years and under. A notation on a patient's chart does not constitute a report made to an officer, director or supervisor of the medical center as contemplated under the Health Care Worker Protection Act. Moreover, the Complainant did not indicate that he believed that any law or regulation had been violated in prescribing the medication, nor did not he suggest that the quality of health care services provided violated any legal or professional standard or posed a potential threat to public health or safety. At the hearing, the Complainant acknowledged that it was the doctor's prerogative to order a higher dose of medication than recommended. Betts v. Bay Area Med. Ctr. (LIRC, 06/09/11).

The Health Care Worker Protection Act ("HCWPA") applies to reports of any information that would lead a reasonable person to believe: (1) that the health care facility or any of its employees has violated any state law or rule or any federal law or regulation, or (2) that there exists a situation in which the quality of any health care service provided by the health care facility or by any of its employees violates any standard established by any state rule or law or any federal regulation and poses a potential risk to public health or safety. The HCWPA expressly provides that it covers reports made to a supervisor, as well as to reports to some outside agency. Cook v. Delphi Healthcare (LIRC, 02/10/11).

Section 146.997(3)(a), Stats., prohibits retaliation against a person because that person: (1) reported in good faith any information listed under sec. 146.997(2)(a), (2) in good faith initiated, participated in or testified in any action or proceeding under sec. 146.997(2)(c), or (3) in good faith provided information to a legislator under sec. 146.997(2)(d), Stats.; or because the health care facility, health care provider or employee believed that the person did any of those things. The Health Care Worker Protection Act does not protect employees against retaliation because the employer believes that the employee may engage in protected activity in the future. Dieterich v. Lindengrove (LIRC, 09/28/10).

In this case, the Complainant gave a report to a supervisory employee of a health care facility and she was disciplined in part for what she put in the report. Whether this was prohibited retaliatory discipline under the Health Care Worker Protection Act depended on whether the report was about the kinds of things described in secs. 146.997(2)(a)1. and 2, Stats. There was no violation of any state rule or law or federal law or regulation suggested in what the Complainant wrote. Nor did her report provide reason to believe that any health care service violated any applicable standard or posed a potential risk. Two separate reports that the Complainant submitted to a supervisor were both reports the making of which was

protected conduct under the Health Care Worker Protection Act. However, the Complainant did not establish that she was disciplined "because" she made these protected reports. The Complainant was eventually discharged because the Respondent discovered that she had engaged in a serious failure to comply with required procedures concerning the report of an injury to a resident. Dieterich v. Lindengrove (LIRC, 09/28/10).

Unlike the anti-retaliation protection provided by sec. 111.322(2m)(d), Stats., which expressly protects employees from retaliation because the employer believes that they "may engage in," (i.e., in the future) covered protected activity, the anti-retaliation protection provided by sec. 146.997(3), Stats., uses *only* the past tense. That provision expressly refers only to an employer's beliefs that an employee "reported…, participated in or testified in…[or] provided" certain information or proceedings. Dieterich v. Lindengrove (LIRC, 12/29/08).

The Health Care Worker Protection Act prohibits employers from retaliating against an employee because the employer *believes* that the employee made a report of the kind protected under sec. 146.997(3), Stats. It is not necessary that such a report actually has been made if the employer is retaliating because of its belief that the report was made. In this case, there was evidence to suggest that managers of the Respondent believed that the Complainant had made a report to the Bureau of Quality Assurance concerning matters including an injury to a patient. Dieterich v. Lindengrove (LIRC, 12/29/08).

The Complainant was disciplined after she included information in a "quality assurance" report about a nursing assistant being ill and not paying attention, and about a patient sustaining an injury as a result. The Complainant was ultimately discharged. The Complainant's inclusion of this information in the report was information that would lead a reasonable person to believe that there existed a situation in which the quality of the health care service provided by the health care facility violated standards established by state law, rule, or federal law or regulation or clinical or ethical standards established by a professionally recognized accrediting or standard-setting body, and that it posed a potential risk to public health or safety, within the meaning of sec. 146.997(2), Stats. Because this report was given to employees of the Respondent who were in a supervisory capacity, or in a position to take corrective action, its submission was protected conduct. The fact that the Complainant's discharge followed so closely on the heels of her submission of this report, as well as direct evidence that its submission was a factor in her discharge, was sufficient to establish a prima facie case of retaliation under the Health Care Worker Protection Act. Dieterich v. Lindengrove (LIRC, 12/29/08).

Neither the Health Care Worker Protection Act nor the pleading requirements of the Equal Rights Division require that a Complainant specifically identify which state law or rule the Complainant believes has been violated in order to obtain protection under the Health Care Worker Protection Act (sec. 146.997, Stats.). Bruneau v. Olas House (LIRC, 10/19/08).

The Equal Rights Division does not have authority to receive or process complaints under secs. 146.997(5) or (6), Stats. These sections of the Health Care Worker Protection Act relate to penalties and forfeitures for failing to post notices. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

The willingness of the administrator of a health care center to hear and address standard of care issues brought to her attention by staff members strongly suggested that she had no reason to harbor any retaliatory animus against the Complainant for bringing patient care issues to her attention. In this case, the administrator's decision to remove the Complainant as the director of nursing was due to the Complainant's poor interpersonal skills, and not because of her reporting alleged standard of care issues to the administrator. Brown v. Maple Lane Health Care Ctr. (LIRC, 06/20/08).

Neither the Health Care Worker Protection Act nor the pleading requirements of the Equal Rights Division require that a Complainant specifically identify which state or federal law or rule, or ethical or clinical standard, she believes has been violated in order to obtain protection under the Health Care Worker Protection Act. The information reported by the Complainant to her supervisor and to the clinic administrator in this case would lead a reasonable person to believe that a physician had violated a state law or rule and would constitute a protected HCWPA disclosure as a result. It is important to note that the relevant question is not whether the Complainant's allegations were sufficient to establish that a law or rule had been violated but, rather, whether they were sufficient to provide a motive for the Respondent to retaliate. Matson v. Aurora Health Care (LIRC, 03/21/08).

The Complainant failed to establish a causal connection between her protected disclosures and her termination where the record did not establish who made the termination decision. In order to establish a causal connection, it must be shown that the individual who made the termination decision was aware of, or had reason to be aware of, the Complainant's protected activity. Matson v. Aurora Health Care (LIRC, 03/21/08).

The Complainant filed a complaint against his former employer when he was subsequently not re-hired by that employer. His complaint under sec. 146.997, Stats., was dismissed. Sec. 146.997 prohibits taking "disciplinary action" as defined in sec. 230.80(2), Stats. This statute pertains only to employees, in spite of the reference in sec. 146.997(3), Stats., to the prohibition against a healthcare facility or healthcare provider taking "disciplinary action" against "any person," and despite the fact that the forms of "disciplinary action" listed under sec. 230.80(2), Stats., is not an exhaustive list. The reason for this is that sec. 230.80(2), Stats., defines what the term "disciplinary action" means (i.e., any action taken with respect to an employee), and because all of the types of actions listed under that statute are actions that could only be taken against a current employee. It would be inappropriate to find that a failure to hire an individual comes within the meaning of a disciplinary action as defined under sec. 230.80(2), Stats. Ratsch v. Mem'l Med. Ctr. (LIRC, 03/10/06).

The 300-day filing period specified in sec. 111.39(1), Stats., is made applicable to charges filed under the Healthcare Worker Protection Act by operation of sec. 146.997(4)(a), Stats. This 300-day filing limit is not a jurisdictional prerequisite. It is a statute of limitations which is subject to waiver, estoppel, and equitable tolling. Welsh v. DOC (LIRC, 01/13/06).

It was inappropriate to dismiss a case for failure to state a claim for relief because the Complainant failed to identify a "state law or rule or federal law or regulation" within the meaning of sec. 146.997(2)(a)1., Stats., in his charge of retaliation. Neither the Health Care Worker Protection Act nor the pleading requirements of the Equal Rights Division require that a Complainant specifically identify which state law or rule he believes has been violated in order to obtain protection under the Act. In his various communications to management prior to his discharge, the Complainant stated that he believed that an alleged falsification of time cards constituted "fraud." The Complainant's description of the alleged time reporting irregularities, as well as his allusion to fraud (which is an act subject to both civil and criminal penalties), would lead a reasonable person to believe that an employee of the Respondent's health care facility had violated a state rule or law within the meaning of sec. 146.997(2)(a)1., Stats. Lobacz v. DOC (LIRC, 11/03/05).

Sec. 146.997(2)(a)1., Stats., does not limit its application to violations of laws or rules relating to patient care or treatment. Lobacz v. DOC (LIRC, 11/03/05).

The Complainant identified sec. 946.12(4), Stats., as the specific state law he believed was violated when his supervisor and a co-worker falsified their time records. The Respondent argued that this statutory provision could not be relied upon to obtain a criminal conviction of a state employee engaging in falsification of a timecard because its language was not sufficiently definite. However, the question is not

whether the allegations set forth in the employee's report are sufficient to establish a violation of a specific state or federal statute or rule, but rather whether they were sufficient to provide a motive for the Respondent to retaliate. Lobacz v. DOC (LIRC, 11/03/05).

The Health Care Worker Protection Act protects from retaliation only those who are employees of a "health care facility" or of a "health care provider" as defined in secs. 146.997(1)(c) and (d), Stats. The Complainant's employer, the Douglas County Department of Human Services, is not the type of person or entity specified in either of these definitions. Moreover, given the Act's reference to "county home," "county infirmary," "county hospital," and "county mental health complex," it would have to be concluded that the Legislature intended to exclude from the Act's coverage other county entities such as county human services departments. Jasmin v. County of Douglas (LIRC, 03/15/04).

The Health Care Worker Protection Act is limited to protecting employees to the extent that they make reports about things which they believe may result in inadequate care or mistreatment of patients. Here, the complaints which the Complainant made about a physician were in large part complaints about the way he treated staff at the hospital. To the extent that the Complainant's reports were related to allegations having some connection to patient care, they were largely outside the scope of the Act because of who she made them to. The Act is limited to protecting employees who make reports about inadequate care or mismanagement of patients to: (1) a state agency, (2) a professionally recognized accrediting or standard-setting body, (3) an officer or director of the facility, or (4) an employee of the facility in a supervisory capacity, or in a position to take corrective action. (Sec. 146.997(2), Stats.) The Complainant complained to other employees of the Respondent who were not in either a supervisory capacity or in a position to take corrective action, and she made threats to go to the local newspaper with accusations against the physician. Accordingly, there was no probable cause to believe that the Respondent violated the Health Care Worker Protection Act when it discharged the Complainant. Korn v. Divine Savior Healthcare (LIRC, 01/16/04).

The Health Care Worker Protection Act protects employees only to the extent that their reports are made in good faith. Sec. 146.997(3), Stats. Some of the Complainant's complaints about a physician in this case were false and misleading. They were motivated by a desire to see the hospital where the Complainant worked punished regardless of the truth of the allegations, and were not made in good faith. Korn v. Divine Savior Healthcare (LIRC, 01/16/04).

Where the Complainant filed a complaint under the Healthcare Worker Protection Act, sec. 146.997(3), Stats., it was inappropriate for the Equal Rights Division to issue an initial determination making a conclusion as to whether sec. 111.322(2m), Stats., had also been violated. The complaint was drafted and filed on the Complainant's behalf by an attorney. Presumably, if the Complainant had intended to allege not only a violation of the Healthcare Worker Protection Act, but also a violation of sec. 111.322(2m), Stats., she would have done so. Korn v. Divine Savior Healthcare (LIRC, 01/16/04).

550 STATE EMPLOYEE "WHISTLEBLOWER" LAW (Secs. 230.80-.89, Stats.)

[Ed. Note: Enforcement of this law was previously the responsibility of the Personnel Commission. Since 2003, the Equal Rights Division has been responsible for enforcement of this law. Pursuant to secs. 230.80-89, Stats., it is unlawful to retaliate against state employees for making certain disclosures. An employee who believes that a supervisor or appointing authority has retaliated against him or her may file a written complaint with the Equal Rights Division. Decisions of the Equal Rights Division under this provision are subject to judicial review under Ch. 227, Stats.]

551 Coverage

551.1 Generally

A complaint under the Whistleblower Law was dismissed where the Complainant was not a state employee. Kochanowski v. Mid-State Tech. College (Wis. Pers. Comm'n, 03/21/02).

A whistleblower disclosure must relate to circumstances which are not already common knowledge in order for the alleged retaliator to have any reason to retaliate because of it. Lane v. DOC (Wis. Pers. Comm'n, 06/07/01).

The Complainant was not permitted to amend his whistleblower complaint to include the State of Wisconsin as an additional Respondent. There was clear evidence of a legislative intent not to permit the State the Wisconsin to be named as a Respondent in a complaint of whistleblower retaliation. Oriedo v. DPI (Wis. Pers. Comm'n, 08/12/98).

A prima facie case involving alleged assistance "in any action or proceeding relating to the lawful disclosure of information under sec. 230.81 by another employee," sec. 230.80(8)(b), Stats., does not require that the Complainants disclose information as provided in sec. 230.81, Stats. (e.g., in writing to the supervisor or in writing to an agency designated by the Personnel Commission). Pierce v. Wis. Lottery & DER (Wis. Pers. Comm'n, 09/17/93).

To establish a prima facie case in the whistleblower retaliation context, there must be evidence that: (1) the employee participated in a protected activity and the alleged retaliator was aware of that participation, (2) there was a disciplinary action, and (3) there is a causal connection between the first two elements. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

The statutory requirement that the Whistleblower Act be liberally construed has no relation to the burdens of proof of parties to litigation under the law and does not entitle the Complainant to the benefit of the doubt in resolving questions of credibility. Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88; aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir Ct., 09/27/89).

Where the Complainant's immediate supervisor was within an executive salary group, the Complainant was not an employee under the Whistleblower law and was ineligible to file a complaint under that law. Crownhart v. Investment Bd. (Wis. Pers. Comm'n, 01/13/88).

The definition of "employee" in sec. 230.80(3), Stats., should be liberally construed to permit claims arising from an earlier employment relationship, even if the alleged retaliation occurred after the Complainant had stopped working for the employer. Hollinger v. UW-Milwaukee (Wis. Pers. Comm'n, 11/21/85).

551.2 Which entities are covered

[Ed. Note: Some of the cases summarized in this section were decided under the Wisconsin Fair Employment Act. They are included here for guidance they may provide for questions about which entities are subject to suit under the State Employee Whistleblower Law].

The State of Wisconsin is not considered a single employing entity. Wongkit v. UW-Madison (Wis. Pers. Comm'n, 10/21/98).

The Complainant was not permitted to amend his whistleblower complaint to include the State of Wisconsin as an additional Respondent. There was clear evidence of a legislative intent not to permit the State the Wisconsin to be named as a Respondent in a complaint of whistleblower retaliation. Oriedo v. DPI (Wis. Pers. Comm'n, 08/12/98).

Madison Area Technical College, a district technical school authorized under chapter 38, Stats., is not an agency of the state for the purpose of the Wisconsin Fair Employment Act. Thomas v. Madison Area Tech. College (Wis. Pers. Comm'n, 08/04/95).

Private Industry Councils are created by federal, not state law, so they are not state agencies as defined in the Wisconsin Fair Employment Act. Kemp v. DILHR (Wis. Pers. Comm., 03/02/95).

The Wisconsin Housing and Economic Development Authority is not a state agency for purposes of the Wisconsin Fair Employment Act. Connor v. WHEDA (Wis. Pers. Comm'n, 12/14/94).

The Department of Employee Relations was properly a party to a whistleblower claim where it was alleged that it violated the Whistleblower Law with respect to the determination of the Complainant's protective occupation status. Pierce v. Wis. Lottery & DER (Wis. Pers. Comm'n, 09/17/93).

The Medical College of Wisconsin is not a state agency for the purpose of processing complaints of discrimination or retaliation under the Wisconsin Fair Employment Act. Niroomand-Rad v. Med. Coll. of Wis. (Wis. Pers. Comm'n, 05/05/88).

552 Disclosure of information

552.1 Generally

The Complainant Public Integrity Director of the Department of Justice did not "disclose" information, as that term is defined in Wis. Stat. § 230.81(1), when she sent an email to her supervisor stating that she was concerned that the Division of Criminal Investigation's planned provision of security for the Attorney General at the 2008 National Republican Convention in Minneapolis might violate OSER regulations and state law. Wis. Stat. § 230.81(1) does not cover employee statements that merely voice opinions or offer criticism. In this case, the Complainant's supervisor was aware of the proposal to provide the Attorney General with security detail when he attended a political event in Minneapolis. Thus, the Complainant did not disclose unknown "information," but instead, merely gave her opinion that a proposed security detail would possibly violate a law or regulation. DOJ v. DWD, 2015 WI App 22, 861 N.W.2d 789.

The Complainant did not disclose "information" when he asserted to supervisors that two volunteers had been suspended without good reason because his communication merely expressed an opinion that disciplinary action taken against other employees was an "abuse of authority." Kinzel v. UW Bd. of Regents, (No. 2012AP1586, unpublished slip op., Ct. of App., 3/28/13).

The Complainant's note to her supervisor that she would "be seeking further review of the timesheet matter that was discussed at the 12/10/2007 meeting with the proper authorities," did not disclose wrongdoing by the Complainant's supervisor, and thus did not qualify as information for purposes of protection under the relevant statues. Hewko v. DWD, Equal Rights Division, 2012 WI App 1264.

The policy behind Wisconsin's Whistleblower Law is to protect employees from retaliation and to encourage disclosure of certain information. However, the statutes provide specific parameters for protection. Although these protective statutes are to be liberally construed, only certain disclosures made a particular way and regarding a subject matter covered in the statute will qualify for protection. In order to gain protection under the Whistleblower Law, an employee must meet the requirements laid out in the relevant statutory provisions. "Retaliatory action" is defined in sec. 230.80(8), Stats., and includes disciplinary action taken because "[t]he employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1)." Before an employee is entitled to protection, the employee must make a disclosure of information in writing. "Information" is defined in the statute. Under sec. 230.80(5)(a), Stats., an employee is protected for disclosures of information that relate to one of four issues: mismanagement, abuse of authority in state or local government, substantial waste of public funds, or danger to public health and safety. The only claim made in this case is mismanagement. The Complainant wrote a memo which raised several topics, including a "supervisory style that is arbitrary and capricious," and a lack of guidelines. These actions lack any specific description of mismanagement. They do not even provide enough information to determine if they might reflect a simple disagreement over management techniques. The other topic in the Complainant's memo was an allegation of an excessive workload. Sec. 230.85(5), Stats., defines "information" to include information gained by the employee which the employee reasonably believes demonstrates mismanagement. Mismanagement is more precisely defined in sec. 230.80(7), Stats. as "a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function." A "pattern of incompetent management actions" under sec. 230.80(7), Stats., requires more than a claim of a single act of incompetent management. Because the Complainant's memo in this case claimed only a single act of alleged mismanagement, the memo is not a disclosure of information protected under the Whistleblower Law. Hutson v. Wis. Pers. Comm'n, 2003 WI 97, 263 Wis. 2d 616, 665 N.W.2d 212.

The Complainant verbally made safety concerns known to his supervisor. None of the disclosures listed in his complaint were in writing. The safety concerns that the Complainant raised orally do not satisfy the requirements of sec. 230.81(1)(a), Stats., and they do not satisfy any of the alternative categories of protected activities described in secs. 230.81(1), (2), or (3), Stats. The Complainant also had a claim of retaliation for occupational safety and health reporting activities under sec. 101.055, Stats. He argued that disclosures under that law are not required to be made in writing. However, in order to state a claim under the Whistleblower Law, the Complainant must have engaged in a protected activity under the Whistleblower Law. Because the Complainant did not make a lawful disclosure, his whistleblower claim was dismissed. Young v. DOT (Wis. Pers. Comm'n, 05/17/01).

The Whistleblower Law is designed to protect an employee who discloses information that the public has an interest in having disclosed. The statute protects disclosures of "information," as defined in sec. 230.80(5), Stats. Some of the terms within that definition are defined elsewhere in sec. 230.80, Stats. (e.g., "abuse of authority," "mismanagement," and "substantial waste of public funds."). The Complainant's e-mail message in this case did not describe "information" as required by the statute, and the e-mail did not qualify as a disclosure because it was not directed to the Complainant's supervisor. The Complainant's position was in the Division of Management Services. The individual to whom he sent the e-mail was a supervisor in the Division of Law Enforcement Services. That individual provided the funding for the Complainant's project, but he was not the Complainant's supervisor. Jenkins v. DOJ (Wis. Pers. Comm'n, 10/04/00).

The Complainant worked in the Division of Management Services in the Department of Justice. The Complainant sent an e-mail message to the administrator of another division within the Department of Justice. This e-mail did not qualify as a disclosure because it was not directed to the Complainant's supervisor. The Complainant contended that the individual to whom he sent the e-mail was an agent of the Attorney General, so that a disclosure to him was a disclosure to the Attorney General, who heads the

Department of Justice. The Complainant contended that since the Attorney General is in the supervisory chain above the Complainant, his disclosure to the administrator in another division constituted a disclosure to the Attorney General's agent, and thus falls within sec. 230.80(1)(a), Stats. If the Complainant's theory were adopted, the result would be contrary to the clear intent of the Whistleblower Law, which specifies certain routes for obtaining protection under the law. Jenkins v. DOJ (Wis. Pers. Comm'n, 10/04/00).

The Whistleblower Law requires that an employee disclose the subject information to his or her supervisor. The Personnel Commission has interpreted this to include any supervisor in the employee's chain of command. This must be done prior to disclosing that information to any other person in order to obtain protection as a whistleblower. Several of the claimed disclosures in this case did not entitle the Complainant to protection as a whistleblower. Those included disclosures which were not authored by the Complainant; disclosures which were not made to supervisors in the Complainant's chain of command; and disclosures which (although copied to supervisors in Complainant's chain of command) were not provided to them prior to their disclosure to other persons and, as a result, do not satisfy the requirements of sec. 230.81, Stats. Ochrymowycz v. UW-Eau Claire (Wis. Pers. Comm'n, 06/07/00).

The Respondent's motion to dismiss the complaint for failure to state a claim was granted where the only protected activity identified by the Complainant was a conversation with a representative of the Respondent's human resources department. That activity did not fall within the scope of any portion of sec. 230.81, Stats. Kowing v. UW Hosp. & Clinics Bd. (Wis. Pers. Comm'n, 11/05/99).

The filing of a whistleblower complaint with the Personnel Commission is a protected disclosure pursuant to sec. 230.80(8)(a), Stats. Stanley v. DOC (Wis. Pers. Comm'n, 08/25/99).

Some of the Complainant's union grievances did not constitute protected disclosures where the grievances indicated that another staff worker was harassing the Complainant but did not allege that the Respondent failed to correct the situation. Nor did the grievances request management to remedy the perceived harassment. However, the Complainant filed another grievance which specifically raised the perceived harassment by another staff person and which contained a request for management to remedy the situation. Another grievance concerned the lack of union representation at certain meetings. These grievances have the potential of being considered as disclosures of information under sec. 230.80(5), Stats. Therefore, the Respondent's motion to dismiss the complaint for failure to state a claim upon which relief could be granted was denied. Stanley v. DOC (Wis. Pers. Comm'n, 08/25/99).

The Complainant's memo reciting discrepancies of "almost 1%" and "almost 2%" between certain affirmative action report figures and certain veteran report figures were not major differences, and his memo did not satisfy the requirements of a disclosure of "information." Sheskey v. DER (Wis. Pers. Comm'n, 08/26/98).

Even though the Complainant did not submit copies of the written disclosures that served as the basis for his complaints of retaliation, he described the disclosures in a manner that was sufficiently specific to withstand the Respondent's motion to dismiss for failure to specify the "information" he had disclosed. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Qualifying disclosures under the Whistleblower Law need not be made to a first-line supervisor in order to qualify as a disclosure to a supervisor within the meaning of sec. 230.81(1)(a), Stats. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

When a faculty member is the "employee" making a whistleblower disclosure, it is reasonable to interpret "supervisor" to include the campus chancellor, the college dean and the department chair of the

department containing the employee's position. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The filing of a complaint under the Wisconsin Fair Employment Act is not a protected activity under the Whistleblower Law that entitles a Complainant to protection under sec. 230.80(8)(a), Stats. Oriedo v. DPI (Wis. Pers. Comm'n, 08/12/98).

A written disclosure that faulted the conduct of an inmate rather than an employee was insufficient to meet the definition of "information." Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

A written report made at the request of the employer and made to individuals designated by the employer to handle the matter met the whistleblower disclosure requirements, even though it was not made to the Complainant's immediate supervisor. Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

A union grievance filed by the Complainant qualified as a protected whistleblower disclosure to her collective bargaining representative within the meaning of sec. 230.81(3), Stats. Williams v. UW-Madison (Wis. Pers. Comm'n, 09/17/96); aff'd sub nom. Williams v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 11/19/97).

A disclosure need not be made to a first-line supervisor, but may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employee's supervisory chain of command in order to qualify as a disclosure to a supervisor within the meaning of sec. 230.81(1)(a), Stats. However, merely because an individual processed grievances originating in the UW-Hospital did not qualify him as a supervisor of the Complainant (who worked for the hospital), and as a result, the Complainant did not make a protected disclosure. Williams v. UW-Madison (Wis. Pers. Comm'n, 09/17/96); aff'd sub nom. Williams v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 11/19/97).

Under sec. 230.80(5), Stats., the "information" disclosed must have a specific, substantive content in order to be eligible for protection. A note scheduling a meeting cannot somehow utilize its connection with the meeting to become a protected disclosure under the law. Elmer v. DATCP (Wis. Pers. Comm'n, 11/14/96).

Where the Complainant filed a written disclosure with an employee of the Respondent's affirmative action office and contended that it was with the Complainant's understanding that the employee would provide a copy of the writing to someone in Complainant's supervisory chain of command, the Respondent's motion to dismiss was denied. Kortman v. UW-Madison (Wis. Pers. Comm'n, 11/17/95).

In ruling on a motion for failure to state a claim, the Complainant's memo, which referred to the absence of a maintenance agreement for the equipment in two offices, could be said to satisfy the requirements for a written disclosure of "mismanagement." Duran v. DOC (Wis. Pers. Comm'n, 10/04/94).

The Complainant's testimony in federal court was not a disclosure protected by the Whistleblower Law because it did not fit within any of the communications enumerated in sec. 230.81, Stats. Rentmeester v. Wis. Lottery (Wis. Pers. Comm'n, 05/27/94).

The Complainant made a protected disclosure to her legislator when she sent him a copy of a letter she sent to her employer concerning her request for reassignment to her previous route as an accommodation for her handicap. While the letter did not explicitly allege a violation of state laws, considered in the context of other communications with the Legislature and using a liberal construction of the statute, the communication met the requirement of "information gained by the employee which the employee reasonably believes demonstrates a violation of any state. . . law." Rentmeester v. Wis. Lottery (Wis. Pers. Comm'n, 05/27/94).

The Complainant's consultations with her attorney concerning her request for accommodation constituted a covered disclosure pursuant to secs. 230.80(5)(a) and 230.81(1)(3), Stats. Rentmeester v. Wis. Lottery (Wis. Pers. Comm'n, 05/27/94).

A filing of a WFEA complaint is not a protected activity under the Whistleblower Law that entitles a Complainant to protection under sec. 230.80(8)(a), Stats. The court system and, by necessary implication, the system of administrative law, are excluded from the category of "law enforcement agency" in sec. 230.81(2), Stats. Butzlaff v. DHSS (Wis. Pers. Comm'n, 11/19/92).

The Whistleblower Law covers disclosures to legislators and the Legislature, and thus includes a disclosure to a private sector auditor providing services for the Legislature. Pierce and Sheldon v. Wis. Lottery & DER (Wis. Pers. Comm'n, 10/16/92).

A newspaper advertisement seeking information from other persons regarding the actions of the Complainant's employer is not a protected disclosure. Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88); aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 09/27/89).

A disclosure made to three individuals, all of whom were in the supervisory chain above the Complainant, constituted a protected disclosure even though it was not made to the Complainant's first-line supervisor. Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88); aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 09/27/89).

It would be contrary to the policy behind the protections of the Whistleblower Law for information exchanged in informal discussions to render subsequent formal written disclosures unprotected. Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88); aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 09/27/89).

The Complainant's whistleblower claim was dismissed where her attorney made no allegation that she made any disclosure other than a verbal disclosure. However, the Complainant was still entitled to protection from retaliation for having filed her complaint. Iwanski v. DHSS (Wis. Pers. Comm'n, 06/21/89).

The statute does not require that a disclosure made under the Whistleblower Law and made in the form of a grievance, indicate on its face that it is a whistleblower disclosure. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

A grievance did not constitute a disclosure of alleged "mismanagement" where the grievance related only to one action by the superintendent of the correctional institution, rather than to a "pattern" of conduct. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

A letter written by the Complainant's attorney and serving to inform the Respondent that the Complainant contended that she had engaged in a protected activity under the Whistleblower Law by making a disclosure to the attorney need not itself meet the requirements of a lawful disclosure. Canter-Kihlstrom v. UW-Madison (Wis. Pers. Comm'n, 06/08/88).

552.2 Exception for disclosure likely to result in anything of value for the employee

The Complainants' disclosure was not protected under the Whistleblower Law because it fell within the exception set forth in sec. 230.83(2), Stats., for disclosures for personal benefit. The Complainants' disclosure was that their positions lacked the appropriate arrest authority not withstanding that their position descriptions called for law enforcement certification, and the lack of such authority jeopardized their continued law enforcement certification and protective occupation status. The provision in sec. 230.83(2), Stats., that the law does not apply to an employee whose disclosure is made to receive

something of value, clearly applies to an employee who makes a disclosure in order to perpetuate the receipt of benefits to which the employee is not entitled. Here, the Complainants appear to contend that once the disclosure was made their employer should have proceeded to assign them the enforcement authority that was described on their inaccurate position descriptions. This would result in the receipt of something of value – i.e., their retirement benefits would be greater in protective occupation status. Pierce & Sheldon v. Wis. Lottery & DER (Wis. Pers. Comm'n, 10/16/92).

553 Processing of information by governmental unit

Where the Complainant's disclosure was investigated and the Respondent ultimately disciplined an employee because of it, the employer determined that the protected disclosure merited further investigation. Therefore, the Complainant was entitled to the presumption of retaliation with respect to the Respondent's decision to discharge her, where the discharge was within two years of when she made her protected disclosure. Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

Where the protected disclosure consisted of a union grievance relating to the presence of cockroaches in campus buildings, and where the Respondent processed the grievance as it was required to do under the applicable collective bargaining agreement, there was no showing that the Respondent concluded that investigation of the health and safety issue presented in the grievance was merited, or that such an investigation occurred. Therefore, the Complainant failed to establish the prerequisite for presuming, under sec. 230.85(6), Stats., that a subsequent suspension constituted whistleblower retaliation. Williams v. UW-Madison (Wis. Pers. Comm'n, 09/17/96); aff'd sub nom. Williams v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 11/19/97).

The statutory presumption of retaliation established in sec. 230.85(6), Stats., was inapplicable to that component of a written disclosure by the Complainant to the Department Secretary relating to an allegation that a coworker of the Complainant's was violating the Respondent's fraternization policy where: (1) the Complainant had raised the fraternization issue once before, (2) it had been investigated and resolved by a previous secretary and (3) as a result, the Respondent did not feel that this part of the Complainant's more recent disclosure merited further investigation. However, where the second component of the Complainant's written disclosure (that an employee used work phones for personal calls) was the subject of individual meetings with employees in the Complainant's work unit after the date of the disclosure, it appeared as though the Respondent felt that this part of the disclosure merited further investigation and, as a result, the statutory presumption of retaliation would apply. King v. DOC (Wis. Pers. Comm'n, 03/22/96).

Where the Respondent (the Department of Employee Relations) received a letter from the Complainant (who was not a DER employee) regarding the reclassification of his position and protection under the Whistleblower Law, and, in response, referred the complaint to the Personnel Commission as the agency specified in the Whistleblower Law as having responsibility for receiving and deciding complaints of whistleblower retaliation, the Respondent met its obligation under the Whistleblower Law and was not liable for retaliation if the Complainant was the victim of retaliation by his employing agency. Seay v. DER & UW-Madison (Wis. Pers. Comm'n, 03/31/94); aff'd sub nom. Seay v. Wis. Pers. Comm'n, (Dane Co. Cir. Ct., 03/03/95).

The Complainant was entitled to the presumption of retaliation even though the Respondent did not investigate the disclosure before issuing the Complainant a letter stating that the information "merits further investigation." The Personnel Commission is only to look at whether the agency found the information merited further investigation rather than to carry out a substantive review of the adequacy of that finding. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

554 Retaliatory action prohibited

554.1 Generally

Filing a complaint of whistleblower retaliation is itself a protected activity under the Whistleblower Law. Therefore, a disciplinary action threatened or imposed after the Respondent learned of the Complainant's charge of whistleblower retaliation could constitute illegal retaliation under the Whistleblower Law. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Whistleblower Law does not include protection against retaliation by coworkers. In this case, a correctional officer's attempt to persuade an inmate to submit a concocted report about the Complainant (a food service worker) and other actions by correctional officers were not carried out by the appointing authority or an agent of the appointing authority as required in sec. 230.83(1), Stats. There was no persuasive evidence from which it would be reasonable to conclude that the Respondent fostered or condoned the officers' actions to such a degree that the officers should be considered as agents of the Respondent. Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

In determining whether a series of incidents constituted "verbal or physical harassment" within the definition of disciplinary action, the possible cumulative impact of the incidents on the employee may be considered. Seay v. DER & UW-Madison (Wis. Pers. Comm'n, 03/31/94); aff'd sub nom. Seay v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 03/03/95).

The Complainant failed to establish a prima facie case of whistleblower retaliation as to events occurring before his alleged retaliators were aware of his protected disclosures. Seay v. DER & UW-Madison, (Wis. Pers. Comm'n, 03/31/94); aff'd sub nom. Seay v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 03/03/95).

An employer will not be held accountable for acts of alleged retaliation when the Complainant was given the opportunity to provide information relating to the allegations to representatives of the employer but generally declined to do so. Seay v. DER & UW-Madison (Wis. Pers. Comm'n, 03/31/94); aff'd sub nom. Seay v. Wis. Pers. Comm'n, (Dane Co. Cir. Ct., 03/03/95).

The Complainant failed to establish a prima facie case of retaliation where the person who decided not to rescind the Complainant's resignation was not aware of the Complainant's protected activity. Radtke v. UW-Madison (Wis. Pers. Comm'n, 11/22/94).

The Complainants alleged that the Respondents' settlement offer constituted a threat to terminate their protective occupation status and constituted a threat of retaliation under the Whistleblower Law. The Respondents contended in support of their motion to dismiss for failure to state a claim that its action was not prohibited by the Whistleblower Law. Since the offer presented two options (depending on whether or not the offer was accepted), both of which were penalties, the offer can be seen as a vehicle for retaliation, and covered by the Whistleblower Law. Pierce & Sheldon v. Wis. Lottery & DER (Wis. Pers. Comm'n, 10/16/92).

The Personnel Commission's authority under the Whistleblower Law does not extend to an individual outside the employing agency who may have played some precipitating role in a disciplinary action, but who has no legally recognized role as an appointing authority or employer. The Complainant (a Correctional Officer 3 employed by the Department of Corrections and assigned to the security ward at the UW Hospital and Clinic) alleged that he had been reassigned to another facility and harassed as a result of complaints of sexual harassment made by UW Hospital and Clinic employees. UW-Madison was dismissed as a party. Martin v. DOC & UW-Madison (Wis. Pers. Comm'n, 01/11/91).

While the issue of just cause can be an appropriate consideration at the analytical stage of determining pretext in a claim arising from the imposition of discipline, the ultimate issue in whistleblower cases is

whether retaliation occurred, not whether there was just cause for the imposition of discipline. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

A settlement offer made in the context of an ongoing administrative review of an employment decision did not fall within the scope of the prohibition against retaliation because the conditions of settlement required acceptance by the Complainant before they could go into effect. Hollinger v. UW-Milwaukee (Wis. Pers. Comm'n, 11/21/85).

554.2 Disciplinary action

At some point, maintaining an employee on a leave of absence, even a leave with pay, may reach the level of a disciplinary action, i.e., it may result in a loss of position or other consequences commonly associated with job discipline. Rykal v. DATCP (Wis. Pers. Comm'n, 12/20/01).

The complaint was dismissed for failure to state a claim upon which relief could be granted where the only disciplinary actions alleged in the complaint were that the Respondent established a policy requiring that personal guests of employees were required to remain in the reception area until they were escorted into the office by the employee, and where program assistants in the office presented flowers to certain probation and parole agents in celebration of "agent week," but did not present any flowers to the Complainant. These actions do not constitute disciplinary actions within the meaning of the whistleblower retaliation statute. Reed v. DOC (Wis. Pers. Comm'n, 11/15/00).

The introductory clause to sec. 230.80(2), Stats., states that "'disciplinary action' means any action taken with respect to an employee which has the effect, in whole or in part, of a penalty...." The introductory clause clearly states that the action complained of must have the effect, at least in part, of a penalty. The examples of actions having the effect of a penalty are contained in subparagraphs (a) through (d) of the statute but are not intended to be an all-inclusive list. The Personnel Commission has held that the common understanding of a penalty in connection with a job-related disciplinary action does not cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Stanley v. DOC (Wis. Pers. Comm'n, 08/25/99).

The Respondent's alleged conduct of removing the Complainant from his role as a faculty advisor to a student organization related to the "removal of any duty" under sec. 230.80(2), Stats., and fell within the scope of a disciplinary action. The Respondent's motion to dismiss was denied as to that allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant, a faculty member, alleged that the Respondent refused to pay him for working with a visiting professor, it was comparable to an allegation that the Complainant's pay had been reduced, thus having the effect of a penalty within the scope of a disciplinary action. The Respondent's motion to dismiss was denied as to that allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant was a faculty member, his whistleblower allegation that the Respondent had threatened to remove his endowed chair fit within the scope of a disciplinary action. The Respondent's motion to dismiss was denied as to that allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant, a faculty member, alleged that the Respondent did not promptly respond to his proposal that an artist serve as "artist in residence for a few days," the allegation did not rise to the level of a disciplinary action because it resulted in no loss of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant, a faculty member, alleged that the Respondent did not adequately respond to efforts to have several students from a foreign university attend UW-Whitewater, the alleged conduct did not rise to the level of a disciplinary action because it resulted in no loss of pay, position, upgrade or transfer or in any other consequences commonly associated with job discipline. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Complainant's whistleblower allegation that campus administrators tried to convince a third party to commence a civil action against the Complainant was not a consequence commonly associated with job discipline, so it did not satisfy the requirement of disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged action of reminding the Complainant that all guest editorials had to be coordinated through the administration did not rise to the level of a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Alleged actions taken by the Complainant's superiors (or at their direction) to steal a fax sent to Complainant, to flatten the tires on Complainant's car, to steal his cell phone from his office, to leave anonymous and derogatory notes in the Complainant's office, to vandalize his car, to prevent the Complainant from retrieving his personal belongings, and to take a bottle of copy machine toner that the Complainant had purchased, all allegedly in response to his protected activities, constituted "physical harassment" under sec. 230.80(2)(a), Stats. The Respondent's motion to dismiss was denied as to those allegations. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged action of responding inadequately to the Complainant's request relating to a public expenditure was not a disciplinary action where the Complainant's request was made "as a taxpayer." The allegation did not involve the employment relationship. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged statement that personnel files and records of individual faculty members were public documents and were available for inspection upon demand was not a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged action of making a notation on a document did not rise to the level of a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged action of completely barring the Complainant from using the university's mail system rose to the level of a disciplinary action, assuming the Complainant alleged it had a drastic effect on his ability to perform his responsibilities as a member of the faculty and that it was taken in response to the Complainant's protected activities. The Respondent's motion to dismiss was denied as to that allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged action of asking the Complainant to clarify whether the Complainant's activities in Cuba were taken as a private citizen or as a representative of the Respondent was not a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's alleged activity in the nature of a public criticism by an employer of an employee's or a group of employees' approach to a controversial issue is outside the scope of verbal or physical harassment. Administration officials were quoted in two newspaper articles relating to the Complainant, a faculty member. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant was a member of the faculty, the Respondent's alleged action of temporarily suspending the Complainant's photocopying privileges at the campus library until the Respondent

reviewed the Complainant's justification for his copying requests was not a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant was a faculty member, the Respondent's alleged action of failing to support or approve the Complainant's request for a one-year sabbatical rose to the level of a disciplinary action. The Respondent's motion to dismiss was denied as to this allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant was a faculty member, the Respondent's alleged action of removing the Complainant's printing and labeling privileges rose to the level of a disciplinary action, assuming the Complainant alleged it had a drastic effect on his ability to perform his responsibilities and assuming it was taken in response to the Complainant's protected activities. The Respondent's motion to dismiss was denied as to this allegation. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

A memo informing the Complainant that he was required to obtain approval from the administration for any expenditure request was not a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The Respondent's action of merely preventing the Complainant from using the employer's mail service for two specific memos did not rise to the level of a penalty or disciplinary action as listed in sec. 230.80(2), Stats. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The action of the dean of the college not to include the Complainant in a list of eight individuals who were congratulated in a memo for receiving grants or donations was not a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

The possibility that the Respondent might forward the name of a candidate for the Complainant, a faculty member, to consider for hire as an LTE was neither a disciplinary action nor a threat thereof. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Filing a complaint with an agency's EEO office and initiating an investigation of that complaint are not disciplinary actions. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the Complainant, a faculty member, alleged that the Respondent had removed his secretary, thereby denying him secretarial services, the Respondent's alleged conduct qualified as a disciplinary action. The Respondent's motion to dismiss was denied as to this allegation. However, the Complainant's allegation that the Respondent removed a particular photocopy machine, but continued to provide him with photocopying options, was not considered a disciplinary action. Benson v. UW-Whitewater (Wis. Pers. Comm'n, 08/26/98).

Where the only actual change in duties or responsibilities that could reasonably be implied related to the Complainant having less independence in setting the schedule for his audits of fire departments, it was not a sufficiently significant change to qualify as a "removal of duties" or a "reassignment" within the meaning of sec. 230.80(2), Stats. Bruflat v. Dep't of Commerce (Wis. Pers. Comm'n, 07/07/98).

The Complainant stated that all employees in his work unit had been granted home stations in 1994, but that he did not make the move to his home area of Hayward at that time for personal reasons. Approximately two years later, the Complainant requested relocation to Hayward. The Complainant's allegation that the Respondent denied his request was sufficiently akin to a transfer or a reassignment (or to their denial) to qualify as a disciplinary action within the meaning of sec. 230.80(2), Wis. Stats. Bruflat v. Dep't of Commerce (Wis. Pers. Comm'n, 07/07/98).

A delay in processing a travel voucher does not have the permanence or the long-term impact of penalties cited in sec. 230.80(2), Stats. as disciplinary actions. Bruflat v. Dep't of Commerce (Wis. Pers. Comm'n, 07/07/98).

Where it was undisputed that a decision had been made to change the duties and responsibilities of the Complainant's position, such an action could be equivalent to removing a duty from a position or reassignment so as to constitute a disciplinary action within the meaning of sec. 230.80(2), Stats. Bruflat v. Dep't of Commerce (Wis. Pers. Comm'n, 07/07/98).

Two alleged statements, standing alone, were not sufficiently severe or pervasive to support a conclusion that the conditions of the Complainant's employment were affected to the extent required for a finding of verbal harassment within the meaning of sec. 230.80(2)(a), Stats. The Complainant alleged that his manager asked, "How long are we going to keep choking this chicken, Dave?" and then repeated the question, using hand gestures to mimic masturbation. Even when considered with the Complainant's remaining allegations of verbal harassment, the cumulative effect of the allegations was insufficient to support a finding that the requirements of sec. 230.80(2)(a), Stats. had been met. Bruflat v. Dep't of Commerce (Wis. Pers. Comm'n, 07/07/98).

A statement to the Complainant (a food service worker) by a supervisor of officers in a correctional institution that it was not a good idea to "tick off" correctional officers, did not have a substantial or potentially substantial negative effect on the Complainant. Therefore, it was not a "disciplinary action" within the meaning of the Whistleblower Law. Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

An increased workload due to a vacancy in a subordinate position does not rise to the level of a "penalty" under the Whistleblower Law. Perrien v. DOC (Wis. Pers. Comm'n, 07/02/97).

Moving the Complainant to a different work station constituted a penalty within the meaning of the whistleblower statute where the Complainant had communicated to the Respondent that the association of the new work station with a fellow employee to whom she had developed an aversion could significantly affect her health and her mental and physical ability to function in her job. King v. DOC (Wis. Pers. Comm'n, 03/22/96).

To be a "disciplinary action," the employer's act must, at the very least, be related to the Complainant's employment. Allegedly retaliatory actions taken against the Complainant's attorney, in public statements made by a supervisor which were not related specifically to the Complainant or to his employment, did not constitute "disciplinary action." However, an alleged failure by the Respondent to promptly investigate allegations of sexual harassment, alleged reductions in the Complainant's responsibilities and alleged negative aspects of a performance evaluation do constitute "disciplinary action." Getsinger v. UW-Stevens Point (Wis. Pers. Comm'n, 04/30/93).

Actions which occurred after the termination of the Complainant's employment relationship with the Respondent could not, as a matter of law, constitute "disciplinary action" pursuant to sec. 230.80(2)(a), Stats., which refers to "action taken with respect to an employee." Kuri v. UW-Stevens Point (Wis. Pers. Comm'n, 04/30/93).

To meet the definition of "disciplinary action," the employer's act must be related to the Complainant's employment status. The law does not cover harassment of an employee's attorney. Kuri v. UW-Stevens Point (Wis. Pers. Comm'n, 04/30/93).

The methods used by the Respondent in carrying out an investigation of the Complainant's work performance and the decision to permit a union official to carry out an investigation of the Complainant's

conduct were not "disciplinary actions" as that term is used in the Whistleblower Law. However, an oral reprimand, the denial of a wage increase, and the denial of a promotion fall within the definition. Flannery v. DOC (Wis. Pers. Comm'n, 07/25/91).

The common understanding of a penalty in connection with a job-related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. The Complainant was not retaliated against where his disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline. Vander Zanden v. DILHR (Outagamie Co. Cir. Ct., 05/25/89).

The following actions did not constitute "disciplinary actions" within the meaning of sec. 230.80(2), Stats.: (1) The denial of a request to publish a thank you note in a correctional institution's daily bulletin; (2) the denial of pay status for one-fourth of an hour during an investigative meeting where the denial was subsequently reversed; and (3) a decision to investigate an incident which could have led to the imposition of discipline against the Complainant. (Seven other actions were found to fall within the definition of "disciplinary actions.") Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

A requirement that the Complainant undergo a psychiatric evaluation was not a disciplinary action within the meaning of sec. 230.80(2), Stats., where the evaluation could have been completed within the period of a ten-day suspension imposed against the Complainant, and the requirement did not create a stigma for the Complainant because it was a matter of record that the Complainant had previously been given a leave of absence to enable him to undergo psychiatric treatment. The ten-day suspension and the involuntary leave without pay (which resulted from the Respondent's failure to return the Complainant to work status after the expiration of the suspension) were found to be disciplinary actions. Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88); aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 09/27/89).

Only those personnel actions which have a substantial or potentially substantial negative impact on an employee fall within the definition of "disciplinary action" found in sec. 230.80(2), Stats. Limitations placed on the Complainant's contacts with a certain office did not constitute a disciplinary action where the duties and responsibilities of the Complainant's position did not necessitate frequent contacts with that office and the limitations re-routed, but did not prevent, those contacts. Vander Zanden v. DILHR (Wis. Pers. Comm'n, 08/24/88); aff'd by Outagamie Co. Cir. Ct., 05/25/89.

554.3 Presumption of retaliation

Where the Complainant's disclosure was investigated and the Respondent ultimately disciplined an employee because of it, the employer determined that the protected disclosure merited further investigation. Therefore, the Complainant was entitled to the presumption of retaliation with respect to the Respondent's decision to discharge her, where the discharge was within two years of when she made her protected disclosure. Bentz v. DOC (Wis. Pers. Comm'n, 03/11/98).

Where the protected disclosure consisted of a union grievance relating to the presence of cockroaches in campus buildings, and where the Respondent processed the grievance as it was required to do under the applicable collective bargaining agreement, there was no showing that the Respondent concluded that investigation of the health and safety issue presented in the grievance was merited, or that such an investigation occurred. Therefore, the Complainant failed to establish the prerequisite for presuming, under sec. 230.85(6), Stats., that a subsequent suspension constituted whistleblower retaliation. Williams v. UW-Madison (Wis. Pers. Comm'n, 09/17/96); aff'd sub nom. Williams v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 11/19/97).

The statutory presumption of retaliation established in sec. 230.85(6), Stats., was inapplicable to that component of a written disclosure by the Complainant to the Department Secretary relating to an

allegation that a coworker of the Complainant's was violating the Respondent's fraternization policy where: (1) the Complainant had raised the fraternization issue once before, (2) it had been investigated and resolved by a previous secretary and (3) as a result, the Respondent did not feel that this part of the Complainant's more recent disclosure merited further investigation. However, where the second component of the Complainant's written disclosure (that an employee used work phones for personal calls) was the subject of individual meetings with employees in the Complainant's work unit after the date of the disclosure, it appeared as though the Respondent felt that this part of the disclosure merited further investigation and, as a result, the statutory presumption of retaliation would apply. King v. DOC (Wis. Pers. Comm'n, 03/22/96).

The presumption of retaliation does not apply to all discipline occurring within certain time periods. It only applies to that discipline specifically listed in secs. 230.80(2)(a), (b), (c) and (d), Stats., rather than disciplinary actions falling within sec. 230.80(2)(intro), Stats. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

The Complainant was entitled to the presumption of retaliation even though the Respondent did not investigate the disclosure before issuing the Complainant a letter stating that the information "merits further investigation." The Personnel Commission is only to look at whether the agency found the information merited further investigation rather than to carry out a substantive review of the adequacy of that finding. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

554.4 Cases

The Respondent's action temporarily placing the Complainant on leave with pay while it sought clarification of her medical restrictions was not an adverse employment action, where she was not required to use any leave time and there was no demonstrable negative impact on her employment. Rentmeester v. Wis. Lottery (Wis. Pers. Comm'n, 05/27/94).

The Respondent's decision not to allow inclusion of the union steward or attorney requested by the Complainant to represent the Complainant at an investigative meeting was not retaliatory where there was nothing in the department-wide policy which indicated that the represented employee had the choice to select either a personal attorney or a local union grievance representative who was unavailable at the time of the hearing, and there was no evidence that on other occasions delays in the hearings had been permitted to allow for representation by either a personal attorney or by a union representative who was unavailable at that time. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

The Respondent's decision to suspend the Complainant for ten days for unauthorized distribution of literature on the grounds of a correctional institution was upheld where (1) management had previously indicated a strong opposition to the practice of distributing union newsletters in the institution, (2) antagonism between the Complainant and management preceded the Complainant's protected activities, (3) those protected activities were not significant departures from the Complainant's previous conduct, (4) the person who made the final decision to suspend the Complainant was unaware that the Complainant had engaged in any of the specific protected activities and (5) within the previous ten months, the Complainant had received a written reprimand and two three-day suspensions. The Respondent's decision not to modify the suspension after another employee admitted to distributing some of the literature was upheld where the policy violated by the Complainant did not differentiate the degree of malfeasance based on the amount of information found to have been distributed. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

The following actions by the Respondent were found not to be retaliatory: (1) The refusal to provide assistance when the Complainant called for help where testimony indicated assistance was not required, (2) the decision to investigate a report which raised serious questions about the Complainant's conduct, (3) the decision to substitute a day of suspension for a previously scheduled day of vacation where the person

who made the change was unaware that the change was not desired by the Complainant, and (4) the decision to deny the Complainant admittance to the correctional institution grounds during the period of his suspension where the Respondent's action was consistent with existing policy. Sadlier v. DHSS (Wis. Pers. Comm'n, 03/30/89).

No retaliation was found with respect to the Respondent's decision to suspend the Complainant for ten days where (1) the Complainant had disrupted the work and morale at the work site, (2) coworkers made unsolicited complaints about the Complainant to management, and (3) the Complainant had been disciplined several times before (most recently for violent and threatening behavior towards two superiors). Morkin v. UW-Madison (Wis. Pers. Comm'n, 11/23/88); aff'd sub nom. Morkin v. Wis. Pers. Comm'n (Dane Co. Cir. Ct., 09/27/89).

555 Procedures for enforcement

555.1 Jurisdictional issues; timeliness of complaint

Sec. 230.88(2), Stats., provided that upon an employee's commencement of an action in a court of record alleging matters prohibited under sec. 230.83(1), Stats., the Personnel Commission had no jurisdiction to process a complaint filed under sec. 230.85, Stats., except to dismiss the complaint. The Personnel Commission lost subject matter jurisdiction over the Complainant's whistleblower complaint once he filed an action in federal district court that included allegations of state whistleblower violations. The Personnel Commission had no authority to place the case in abeyance. Albrechtsen v. DWD, 2005 WI App 241, 288 Wis. 2d 144, 708 N.W.2d 1.

Allegations of the complaint which related to decisions made prior to the 60-day actionable period were dismissed as untimely. Ochrymowycz v. UW-Eau Claire (Wis. Pers. Comm'n, 06/07/00).

The filing of a sec. 1983 action in a court of record deprives the Personnel Commission of jurisdiction over a complaint of whistleblower retaliation based on the same allegedly retaliatory conduct, by operation of sec. 230.88(2)(c), Stats. Dahm v. Wis. Lottery (Wis. Pers. Comm'n, 08/26/92).

555.2 Remedies

The Personnel Commission has the authority to assess fees and costs for frivolous claims under the Whistleblower Law only if the case is resolved by a decision issued after a formal hearing, and not where the case is resolved by a summary motion. If the Legislature had intended the Personnel Commission to have the power to assess fees and costs for a frivolous action at any time during the proceeding, then the Legislature would have included in sec. 230.85(3)(b), Stats., a reference to that broad range of authority in sec. 814.025, Stats. Stanley v. DOC (Wis. Pers. Comm'n, 08/25/99). [Ed. Note: Sec. 230.85(3)(b), Stats., now provides that in order to find that a complaint is frivolous under the Whistleblower Law, the Equal Rights Division must find that sec. 802.05(2), Stats., has been violated.]

555.3 Judicial review [No cases]

556 Cases

No probable cause was found as to the Complainant's WFEA retaliation, occupational and safety whistleblower claims arising from the decision not to reclassify his position where the Respondent contended that the request was denied because the Complainant's position did not meet the requirements of the higher classification and the Complainant did not show that the Respondent's decision was unreasonable, or that the Respondent applied the specification requirements more stringently for him than for employees who had not engaged in protected activities. Holubowicz v. DOC (Wis. Pers. Comm'n, 04/24/97).

No probable cause was found as to the Complainant's occupational and safety whistleblower claims arising from the decision to require him to undergo an interview for a vacant position along with the other names on the certification list, rather than to transfer into the position without an interview, where (1) the record did not indicate that the alleged retaliator knew the position's classification had been lowered prior to the date the certification list was generated, (2) the Respondent had posted the position for transfer prior to accepting applications for competition, and the record did not indicate that the Respondent would have had an obligation to post the position for transfer a second time, and (3) the Complainant waited until minutes before his interview started before requesting an opportunity to transfer without an interview. Holubowicz v. DOC (Wis. Pers. Comm'n, 04/24/97).

The following allegedly retaliatory acts did not rise to the level of "verbal or physical harassment" within the meaning of sec. 230.80(2), Stats.: (1) The Complainant was forced off the road when a coworker with whom he had a personality conflict cut him off sharply in traffic and (2) this same coworker would not allow the Complainant to park in the garage with other trucks. Seay v. DER & UW-Madison (Wis. Pers. Comm'n, 03/31/94); aff'd sub nom. Seay v. Wis. Pers. Comm'n, (Dane Co. Cir. Ct., 03/03/95).

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, it was not possible to determine on the limited record before the Personnel Commission whether a conversation with a co-employee concerning a statement made by the agency head would be considered a verbal disclosure to "any other person" that was not preceded by a disclosure under either sec. 230.81(1)(a), Stats. (in writing to the supervisor) or sec. 230.81(1)(b), Stats. (in writing to a governmental unit designated by the Personnel Commission), and hence not a disclosure covered by the Whistleblower Law, or whether the conversation with the co-employee was part of assisting "in any action or proceeding relating to the lawful disclosure of information under sec. 230.81 by another employee" within the meaning of sec. 230.80(8)(b), Stats. Pierce v. Wis. Lottery & DER (Wis. Pers. Comm'n, 09/17/93).

No probable cause was found with respect to a decision to reorganize the Complainant's work unit where the reorganization did not result in any change in the Complainant's classification or his position description and there was no evidence that the reorganization plan was promulgated so as to retaliate against the Complainant. Holubowicz v. DHSS (Wis. Pers. Comm'n, 09/05/91).

No probable cause was found with respect to the Respondent's decision to bar entry of the Complainant into a correctional institution where such action was standard procedure when there was an investigation pending which directly affected institution security. In addition, the Respondent's action was taken by persons who were unaware that the Complainant had engaged in a protected activity. Holubowicz v. DHSS (Wis. Pers. Comm'n, 09/05/91).

No probable cause was found with respect to the Respondent's scheduling the Complainant for a pre-disciplinary hearing where the Respondent's practice was to schedule such hearings whenever an investigation had identified a work rule violation and the person who had conducted the investigation was unaware that the Complainant had engaged in a protected activity. Holubowicz v. DHSS (Wis. Pers. Comm'n, 09/05/91).

560 STATUTES RELATING TO CERTAIN MILITARY SERVICE AND EMERGENCY WORKER RIGHTS

561 Re-employment rights after National Guard, state defense force, or public health emergency service (Sec. 321.65, Stats.)

562 Discrimination based on civil air patrol membership (Sec. 321.66, Stats.)

563 Absence from work of volunteer firefighter, emergency medical technician, first aid responder or ambulance driver (Sec. 103.88, Stats.)

[No Cases]

Section 600:
Proof -
Standards & Burdens

600 PROOF – STANDARDS AND BURDENS

610 General Considerations

611 Complainant's ultimate burden of proof

The Complainant's prima facie case of discrimination because of conviction record went unrebutted where the employer's only witness could offer no details about the hiring decision and provided no explanation for it. In addition, the Respondent's concession that it would not have considered the Complainant for certain jobs because of conviction record was direct evidence of discrimination. Zunker v. RTS Distributors (LIRC, 06/16/14).

A *prima facie* case will trigger a burden of production for the employer, but, unless the employer remains silent in the face of that *prima facie* case, the Complainant continues to bear the burden of proof on the ultimate issue of discrimination. Currie v. LIRC, 210 Wis. 2d 381, 565 N.W.2d 253 (Ct. App. 1997).

In a discrimination case, the Complainant bears the ultimate burden of persuading the trier of fact that a factor such as pregnancy was a motivating factor in the employment decision. There must be enough evidence to supply the necessary inference of discriminatory intent. Hoell v. Narada Productions (LIRC, 12/18/92), aff'd sub nom. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

The Complainant bears the ultimate burden of proving that her protected status was a motivating factor in the Respondent's decision. The question of an employer's motivation presents a question of a fact. Kemmerer v. City of Madison Police Dep't (LIRC, 06/30/93).

The ultimate burden of persuading the trier of fact that age was a determining factor in a hiring decision remains at all times with the Complainant. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

612 Burden of proof in mixed motive cases

The Respondent refused to hire the Complainant because of both his conviction record and his arrest record. To the extent the Respondent was motivated by arrest record it was discriminatory; the arrest record did not contain any pending criminal charges. To the extent it was motivated by conviction record, it was not discriminatory because the Respondent proved a substantial relationship between the conviction record and the circumstances of the job. The remedy was limited to a cease and desist order and attorney's fees because the Complainant's conviction record had the most influence on the Respondent's decision not to hire. Kelly v. Multi-Serve, Inc. (LIRC, 08/13/19).

The Respondent did not meet its burden of proving that, even if it did discriminate against the Complainant because of arrest and conviction record, it would not have hired her in any event because of schedule availability issues. This is particularly so where there was no proof at all that the schedule availability issues were an actual reason for the challenged action. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

The mixed motive test applies where the record contains evidence showing that an employer was motivated by both prohibited and non-prohibited factors in taking an adverse employment action against an employee. Discriminatory intent is not part of the analytical paradigm of the mixed motive

test. Stoughton Trailers v. LIRC, 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102, aff'd sub nom. Stoughton Trailers v. Geen, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

In order to prove discrimination, a Complainant must prove that a protected characteristic was a "determining factor" in the decision. A "determining factor" is more than "a factor." Nelson v. State Historical Soc'y of Wis. (LIRC, 03/31/05).

The mixed motive test is applied in cases where an employer has made an employment decision in part due to a prohibited discriminatory reason and in part due to a legitimate business reason. An employer who has made such an employment decision is liable under the Wisconsin Fair Employment Act, but the remedy may be modified depending upon whether the termination would have taken place in the absence of the impermissible motivating factor. If the employer would have made the same employment decision in the absence of the impermissible discriminatory reason, the Complainant should be awarded only a cease and desist order and attorney's fees. If, however, the employment decision would not have been made in the absence of the prohibited discriminatory reason, the Complainant can be awarded all of the remedies ordinarily allowed, such as back pay, reinstatement and attorney's fees. Holman v. Empire Bucket & Mfg. (LIRC, 08/15/03).

The mixed motive test is applied in cases where an employer has made an employment decision in part due to a prohibited discriminatory reason and in part due to a legitimate business reason. If the employer would have made the same employment decision in the absence of the impermissible discriminatory reason, then the Complainant should be awarded only a cease and desist order and attorney's fees. If, however, the employment decision would not have been made in the absence of the prohibited discriminatory reason, the Complainant can be awarded all of the remedies ordinarily allowed. Miles v. Regency Janitorial Serv. (LIRC, 09/26/02).

Although an employer cannot escape liability if a Complainant has been discriminated against "in part" on a prohibited basis, evidence that legitimate reasons also contributed to the employer's decision can be considered in fashioning an appropriate remedy. In this case, although the Complainant's marital status was a factor in the Respondent's decision not to hire him, the Respondent would not have hired the Complainant for the position even if his marital status had not been a factor considered in its selection. Accordingly, the Complainant's remedy is limited to a finding of discrimination, an order that the Respondent cease and desist from unlawfully discriminating against the Complainant because of his marital status, and an award of attorney's fees. Larson v. Tomah Police Dep't (LIRC, 07/20/94).

The "in part" test applied by the Supreme Court to mixed motive discharges under municipal and government employment laws also applies in private sector discrimination cases arising out of the Wisconsin Fair Employment Act. This test is also known as the "mixed motive" test. A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and a prohibited discriminatory motive. If an employee is terminated in part because of an impermissible motivating factor and in part because of other motivating factors, but the termination would not have occurred in the absence of the impermissible motivating factor, the Department has the discretion to award some or all of the remedies ordinarily awarded. However, if an employee is terminated in part because of an impermissible factor and in part because of other motivating factors, and the termination would have taken place in the absence of the impermissible motivating factor, the employee should be awarded only a cease and desist order and attorney's fees. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

In a case where an impermissible motive, if present at all, was a minor factor in the employer's motivations, the appropriateness of finding liability on the Muskego-Norway "mixed motive"/"in part"

analysis is questionable. In this case, if there was an impermissible motive, it was not significant. The distinction is between a motivation which is "a factor" in a decision, and one which is a "determining factor." Paxton v. Aurora Health Care (LIRC, 10/21/93).

In dual motive cases in which the "in part" test is applied, evidence that legitimate reasons contributed to the employer's decision can be considered by the Department in fashioning an appropriate remedy. Baumgartner v. Tolibia Holdings (LIRC, 03/30/93), aff'd, (Fond du Lac Co. Cir. Ct., 10/11/93).

The Labor and Industry Review Commission has recently questioned the application of the "in part" test in mixed motive situations. Since the Wisconsin Supreme Court has specifically declined to rule on the question of whether that test should be applied in cases under the Wisconsin Fair Employment Act, the question is at best an open one. Notaro v. Kotecki & Radtke, SC (LIRC, 07/14/93).

In Wisconsin, the courts have adopted the "determining factor" standard under which, to prove discrimination in the first place, a Complainant must prove that a protected characteristic was a "determining factor" in the decision. A "determining factor" is more than "a factor." Notaro v. Kotecki & Radtke, SC (LIRC, 07/14/93).

In a dual motive case in which the "in part" test is applied, evidence that legitimate reasons contributed to the employer's decision can be considered by the Department in fashioning an appropriate remedy. Gee v. ASAA Technology (LIRC, 01/15/93).

The Labor and Industry Review Commission has consistently held that the "in part" test is the appropriate one under the Wisconsin Fair Employment Act. Horton v. Hopkins Chem. Co. (LIRC, 06/08/92).

In mixed motive cases the employer's actions are motivated by a mixture of discriminatory and legitimate reasons. The reference to case law involving mixed motive discharges under the Municipal Employment Relations Act (MERA) is questionable in a case brought under the Wisconsin Fair Employment Act, since MERA does not apply. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

In order to prove discrimination, a Complainant must prove that a protected characteristic was a "determining factor in the decision. A "determining factor" is more than a "factor." Kovalic v. DEC Int'l, 161 Wis. 2d 863, 874, 469 N.W.2d 224 (Ct. App. 1991).

LIRC declines to follow the test set forth in Price Waterhouse v. Hopkins in mixed motive cases. The applicable causation standard in mixed motive cases in Wisconsin is the "in part" test, which requires the employee to demonstrate that the employer's action was based at least in part upon an impermissible consideration. The discriminatory reason must be a determining factor in the employer's decision, but it need not be the only determining factor. Maline v. Wis. Bell (LIRC, 10/30/89).

The Personnel Commission adopts the test set forth in Price Waterhouse v. Hopkins in mixed motive cases. Under this test, a Respondent who has considered an improper motive in an employment action can still avoid liability if it can establish that it would have reached the same result even in the absence of the improper motive. Jenkins v. DHSS (Wis. Pers. Comm'n, 06/14/89); see also, Kohl v. DOT (Wis. Pers. Comm'n, 05/01/91).

The "in part" causation standard is the appropriate standard to employ in mixed motive cases arising under the Wisconsin Fair Employment Act due to the weaknesses inherent in applying the "but for" standard. The "but for" standard appears to be based on two highly dubious assumptions: (1) that Title VII's only goal is compensating "victims" and (2) that the only concerned parties are the plaintiff and defendant at bar. On the contrary, the purpose of Title VII is to eliminate discrimination in employment opportunities. Title VII cases involve the vindication of a major public interest. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

It does not matter if a decision to terminate an employee is based, in part, on economic or business reasons if it is also based in part on a protected characteristic such as sex. An employee may not be fired when one of the motivating factors is a protected activity or class, no matter how many other valid reasons exist for the discharge. The "in part" standard enunciated in Muskego-Norway Consol. Joint Sch. Dist. No. 9 v. WERB, 35 Wis. 2d 540, 556-57, 151 N.W.2d 617, 625 (1967) applies under the Wisconsin Fair Employment Act. Abbeyland Processing, Inc. v. LIRC (Ct. App., District III, unpublished opinion, 02/03/87).

An employee may not be lawfully terminated if the termination was motivated in part by prohibited bias, even though valid reasons might exist for the discharge. Thus, after showing that a termination was caused at least in part by prohibited bias, the employer is not entitled to attempt to show that the Complainant would have been terminated in any event. Collins v. Madison Area Tech. College (LIRC, 12/19/86).

The "but for" test for causation articulated in the Mount Healthy case is not applicable under the Wisconsin Fair Employment Act. The appropriate causation standard is the "in part" test, requiring the employee to demonstrate that the employer's action was based at least in part upon an impermissible basis. The discriminatory reason must be a determining factor in the employer's decision, but the Complainant need not prove that it was the sole determining factor or that the employer's articulated legitimate reason is false. Lohse v. Western Express (LIRC, 02/04/86).

The Complainant need not prove that the employer's articulated reason was false. Instead, the Complainant must prove that a protected characteristic was a determining factor in the employer's decision. The employer's articulated reason may in fact have been true, but if a protected characteristic was also a determining factor in the employer's decision, discrimination has been demonstrated. Conduct complained of may not be upheld when one of the motivating factors is a discriminatory reason, no matter how many other valid reasons exist for such conduct. Lyckberg v. First Realty Group (LIRC, 09/25/85).

Where the employer discharged a female employee because she declined to "get more serious" in her relationship with her boyfriend, also an employee of the employer, the discharge was based at least in part on the Complainant's gender, and was thus unlawful. The fact that the dispute between the two employees made the employer feel it had to terminate one of them, and that the male employee was a more valued employee because of his experience, skill and longevity, did not make the determination legal, since sex was at least one factor. Stanton v. Abbeyland Meat Processing, Inc. (LIRC, 05/30/85), aff'd sub nom. Abbeyland Processing v. LIRC (Taylor Co. Cir. Ct., 02/14/86).

A termination is unlawful if age is a determining factor in the termination decision. Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

Retaliatory motives need be shown to play only a part in an adverse employment action to support a finding of discrimination. Smith v. Univ. of Wis. (Wis. Pers. Comm'n, 06/21/82).

The holding of Muskego-Norway CSJSD No. 9 v. WERB, 35 Wis. 2d 540 (1967), that an employee may not be fired when any one of the motivating factors is a statutorily protected one, is applicable to issues arising under the WFEA. Pokrass v. LIRC (Applied Power) (Waukesha Co. Cir. Ct., 08/20/81).

The Complainant is entitled to a finding of discrimination where he can show that his handicap was one of the reasons for his non-hire, regardless of how legitimate the other reasons are. Dep't of Agric. v. LIRC (Anderson) (Dane Co. Cir. Ct., 05/25/78).

An employee need only show that sex was a factor in the employment decision to prove that the decision was discriminatory. Appleton Elec. v. DILHR (Kreider) (Dane Co. Cir. Ct., 11/07/77).

619 Miscellaneous

Under a "cat's paw" argument, the fact finder may impute a discriminatory motive to an unbiased decision-maker who is decisively influenced by an employee who is prejudiced against the Complainant. The Complainant failed to prove discrimination by this argument, by failing to prove discriminatory animus on the part of supervisors who gave the decision-maker negative impressions of the Complainant during a selection process, and by failing to prove that the decision-maker was decisively influenced by those impressions, as opposed to coming to her independent judgment about the Complainant's qualifications. Delgadillo v. Kenosha Unified Sch. Dist. (LIRC, 11/30/2018), aff'd sub nom. Delgadillo v. LIRC (Milwaukee Co. Cir. Ct., 10/28/2019).

The Complainant, making a "cat's paw" argument, contended that although the individual making the hiring decision had no perception that the Complainant was disabled, the recruiter who collected his application materials perceived him to be disabled, and withheld certain application materials from the decision-maker because of that perception. The Complainant failed, however, to prove that the recruiter's failure to send the materials to the decision-maker was motivated by discriminatory animus and failed to prove that the missing materials had any effect on the hiring decision. Ray v. Gordon Trucking (LIRC, 06/07/13).

An employer who has a past record of not discriminating against individuals in a protected class is not immune as a matter of law from a discrimination complaint. Evidence of an employer's favorable treatment of employees in a protected class may be relevant to rebut a claim of discrimination by showing a lack of discriminatory intent but would not operate as a bar to the claim. Monpas v. MRS Machining Co., Inc. (LIRC, 04/08/13).

The Complainant need not show that the Respondent's actions resulted in tangible harm in order to establish unlawful retaliation. The Respondent's actions in telling the Complainant his chances for a promotion depended on withdrawal of his pending discrimination complaint amounted to unlawful retaliation. Valyo v. St. Mary's Dean Ventures, Inc. (LIRC, 01/29/13).

If an employer acted as a conduit of a supervisor's prejudice (i.e., his "cat's paw") the Respondent will be liable. In this case, the Complainant, a female, applied for a promotion within the police department. A detective captain on the selection committee recommended a male for this position, rather than the Complainant. Based upon the evidence at the hearing, it was reasonable to infer that the detective captain, as an agent for the Respondent, lied to cover up his discriminatory purpose. He fabricated deficiencies in the Complainant's performance to justify his choice of another candidate. He did this because he did not want a woman in the position of detective sergeant. The detective captain presented his choice of the male candidate to the selection committee (which was an unbiased

decision-maker). The committee rubber-stamped his choice, as was their practice. This choice was then presented to the sheriff, who also accepted the choice of the captain of the division in which the promotion was occurring, as was his practice. In this way, the decision by the biased detective captain decisively influenced the selection committee and the sheriff. His discriminatory motive is attributed to the Respondent. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

The Labor and Industry Review Commission has not adopted the view that a complainant is required to prove that an employment action is "material" in order to be actionable under the Wisconsin Fair Employment Act. The statutory language of neither the WFEA nor Title VII imposes this requirement. The imposition of a requirement that alleged discriminatory employment conduct be "material" is a judicially-created requirement in cases brought under Title VII. While federal law may be looked to for guidance in considering discrimination claims under the WFEA, federal law is not binding. Wisconsin courts must construe Wisconsin statutes as it is believed the Wisconsin Legislature intended, regardless of how the U.S. Congress may have intended that comparable statutes be construed. By its terms, the Wisconsin Fair Employment Act is to be liberally construed for the purpose of deterring and remedying discriminatory conduct of employers which infringes employees' civil rights. It would be inconsistent to impose a requirement that discriminatory conduct be "material" simply in an effort to separate what some might consider to be "significant" claims from "trivial" claims. Krushek v. Trane Co. (LIRC, 12/23/10).

What is "material" in an employment relationship may be quite subtle. In a close case, the imposition of a requirement that the alleged adverse employment action be "material" would likely cause the trier of fact to apply his or her own subjective belief as to what is or is not a material adverse action. Krushek v. Trane Co. (LIRC, 12/23/10).

In a claim of retaliation under the Wisconsin Fair Employment Act, a complainant must show that a reasonable individual would have found the challenged action to be adverse. That is, the action might well have dissuaded a reasonable individual from opposing any discriminatory act under the Act or from making a complaint, testifying or assisting in any proceeding under the Act. There is no bright-line rule. Whether alleged discriminatory conduct is sufficiently adverse can only be determined upon careful examination of the facts and circumstances presented in each case. Krushek v. Trane Co. (LIRC, 12/23/10).

Not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions would form the basis of a discrimination suit. In this case, the Complainant failed to establish that a memo that was sent to the security director by her lieutenant constituted an adverse employment action. The Complainant alleged that the memo falsely accused her of being the subject of a large number of inmate complaints and of being unprofessional and demonstrating a lack of tact when working with inmates. The evidence failed to show that the memo cause the security director to form an unfavorable impression of the Complainant. The memo was an internal memo that was not made a part of the Complainant's personnel file. The memo had absolutely no effect on the Complainant's terms or conditions of employment. Gephart v. DOC (LIRC, 11/18/09).

The Complainant failed to show that she suffered an adverse employment action when the Respondent reorganized part of its workforce and did not place her in an internal sales position as part of this reorganization. The Complainant failed to show that she requested placement in a particular position or classification, or that the consultant position in which she was placed was less desirable than others for which she was qualified, including the new internal sales positions. The Complainant's new consultant position was at the same level and pay as her previous position and as the internal sales

positions created as part of the reorganization, and actually involved higher level responsibilities than the internal sales positions. Vick v. Marshfield Door Sys. (LIRC, 01/31/07).

The Labor and Industry Review Commission has not specified a minimum level of significance that an action is required to meet in order to be cognizable under the Wisconsin Fair Employment Act (other than an implicit de minimis level). Pluskota v. Alverno College (LIRC, 10/21/05).

The Labor and Industry Review Commission has not adopted the approach of the Seventh Circuit Court of Appeals that in order to satisfy the second element of a prima facie case (i.e., that the Complainant suffered an adverse employment action), an action must have a materially adverse impact on a Complainant's employment status (such as that effected, for example, by a termination, demotion, a decrease in wages, a material loss of benefits, or significantly diminished responsibilities). Post v. Mauston School Dist. (LIRC, 08/28/02); Froh v. Briggs & Stratton (LIRC, 09/29/04).

The Seventh Circuit Court of Appeals has articulated a "cat's paw" analysis that allows the finder of fact to impute a discriminatory motive to an unbiased decision maker who is decisively influenced by an employee who is prejudiced against the Complainant. In this case, the Complainant contended that the individual who made the decision to discharge him was unaware of his sexual orientation, but that she relied on information and recommendations provided by supervisors who were prejudiced against the Complainant because of his sexual orientation. The Complainant failed to establish that the decision maker relied exclusively or primarily on information she received from the supervisors in reaching the decision to terminate the Complainant. The Complainant also failed to establish that the supervisors were prejudiced against the Complainant because of his sexual orientation. Haecker v. Charter Steel (LIRC, 01/28/03).

The Complainant failed to establish that the Respondent violated the Act where the Respondent established that it believed in good faith that complaints made about the Complainant by other employees were true and that this is what motivated its decision to terminate the Complainant's employment. Potts v. Magna Publications (LIRC, 02/27/01).

A negative performance evaluation is not considered an adverse employment action unless it has a tangible adverse effect on an employee's employment status with regard to such things as salary or promotion. Cunningham v. DOC (Wis. Pers. Comm'n, 01/19/01).

The applicable standard in determining whether an adverse employment action has been taken against the Complainant if the subject action is not one of those specified in sec. 111.322(1), Stats., is whether the action had any concrete, tangible effect on the Complainant's employment status. Examples of situations that have been held to not constitute "adverse actions" include: (1) lower performance rating and work restrictions; (2) lateral transfer resulting in title change and employee reporting to former subordinate; (3) transfer to another school; (4) comment made to the Complainant by one of her supervisors during a meeting asking whether she had anything to add; (5) negative performance evaluation; (6) solicitation or acceptance of negative comments from an employee's coworkers; (7) physical move to an equivalent nearby office, and (8) interference with the Complainant's receipt of some work-related information through informal discussions. Olmanson v. DHFS (Wis. Pers. Comm'n, 01/19/01).

Not everything that makes an employee unhappy is a cognizable adverse action. The Wisconsin Fair Employment Act was not intended to create a cause of action for minor or trivial employment actions. Lincoln v. DHFS (Wis. Pers. Comm'n, 08/28/00).

In order to prevail on a claim of discrimination or retaliation under the Wisconsin Fair Employment Act, a Complainant is required to show that he or she was subject to a cognizable adverse employment action. Sec. 111.322(1), Wis. Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment. . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment." The applicable standard, if the subject action is not one of those specified in this statutory section, is whether the action had any concrete, tangible effect on the Complainant's employment status. Dewane v. UW-Madison (Wis. Pers. Comm'n, 12/03/99).

In analyzing whether other candidates had qualifications equal or superior to those of the Complainant, the focus is not on how the Complainant or the Department views the candidate's qualifications in comparison to the other candidates, but on how the Respondent perceived them. By the same token, courts generally decline to dictate what factors an employer may use to judge between employees or job applicants, so long as the factors are considered in good faith and are not discriminatory. Naill v. W. Wis. Tech. College (LIRC, 02/12/99).

A negative performance evaluation may constitute an adverse employment action and may form the basis for a discrimination complaint. The harm to the Complainant was not limited to having received a poor evaluation. She also suffered the loss of a tangible job benefit in that she was denied a salary increase as a direct result of the evaluation. Munzenberger v. County of Monroe (LIRC, 08/13/98).

Informal discipline, such as negative entries in a supervisor's log, can constitute an actionable adverse employment action. Foust v. City of Oshkosh Police Dep't (LIRC, 04/09/98).

Stray remarks, when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision-maker in issue. In this case, the comment by a regional vice president of the Respondent that he couldn't "get rid of [the Complainant] because [he was] too damn old" was not persuasive evidence that the Complainant's age was a factor in his failure to be hired. The remark was made at some unspecified time five years earlier, and the Complainant himself conceded that no other comments were made which implicated his age. Jacobs v. Glenmore Distilleries (LIRC, 07/27/95).

Discriminatory attitudes are not unlawful unless they actually result in discriminatory treatment. In this case, there was evidence that the Respondent's operation's manager stated that he thought that men made better managers. However, no unlawful discrimination was established where the record indicated that the operation manager's selection of store managers was in fact not limited to males and that he retained a number of female store managers. Currie v. Garrow Oil (LIRC, 06/16/95), aff'd, Adams Co. Cir. Ct., 05/06/96; aff'd sub nom. Currie v. LIRC, 210 Wis. 2d 380, 565 N.W.2d 253 (Ct. App. 1997).

Discriminatory attitudes are not unlawful unless they actually result in treatment. In this case, the fact that an agent of the Respondent had certain biased views concerning women was irrelevant where the non-promotion of the Complainant resulted from non-discriminatory factors. Schiller v. City of Menasha Police Dep't (LIRC, 01/14/93).

The Respondent did not violate the Wisconsin Fair Employment Act, even though the owner of the Respondent said, with regard to hiring two Cuban job applicants, "If they are Cuban, no way." There were no job openings for which the Complainants could apply at the time that the Respondent's owner made this statement. As repugnant as the discriminatory attitude that was expressed by the

Respondent may be, such discriminatory attitude must result in discriminatory treatment in order to constitute a violation of the Act. Dominguez v. Lawrence (LIRC, 01/30/91).

While it is possible (given statements by the Respondent's owner that the Complainant didn't need more pay because she had a husband who was working) that the Respondent would have denied the Complainant health insurance benefits because of her sex had it been confronted with the necessity of making a decision on that point, no decision was ever made, and thus no discrimination ever occurred. Discriminatory attitudes are not unlawful unless they result in discriminatory treatment. Sahr v. Tastee Bakery (LIRC, 01/22/91).

It is not a function of the Wisconsin Fair Employment Act to dictate to employers, as a general matter, that hiring and other employment decisions must be made on the basis of particular, job-related, considerations. Legro v. County of Langlade (LIRC, 03/20/90).

Criteria of a subjective nature are sometimes necessary in hiring, especially in hiring supervisory personnel, and there is nothing discriminatory per se about the use of such criteria. However, the use of such criteria will be closely scrutinized where applied by a non-minority decision-maker to a minority candidate. Howard v. City of Madison (LIRC, 02/24/87).

620 Proof of intentional discrimination

621 Direct evidence of discrimination

A prima facie case analysis under McDonnell-Douglas is inapplicable where the complainant presents credible direct evidence of a discriminatory animus underlying the challenged decision. Hill v. Stanton Optical (LIRC, 09/26/14), citing Willard v. Piggly-Wiggly (LIRC, 07/31/90).

A statement by the decision maker that he was not in the habit of hiring somebody out of jail and had given the Complainant one chance (referring to the Complainant's conviction for DUI earlier in his employment), made at a time nearly contemporaneous with terminating the Complainant, was direct evidence of a discriminatory motivation. Monpas v. M R S Machining Co. Inc. (LIRC, 04/08/13).

Direct evidence is evidence which, if believed by the trier of fact, would prove the particular fact in question without reliance on inference or presumption. Direct evidence must not only speak directly to the issue of intent; it must also relate to the specific employment decision in question. Wallis v. St. Paul's Evangelical Lutheran Church & School (LIRC, 08/25/10).

The EEOC has issued guidelines on the analysis of direct evidence. Direct evidence of discriminatory motive may be any written or verbal policy or statement made by a Respondent or Respondent official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action. Direct evidence of bias, standing alone, does not necessarily prove that a discriminatory motive was responsible for a particular employment action. A link must be shown between the employer's proven bias and its adverse action. For example, evidence that the biased remarks were made by the individual responsible for the adverse employment decision, or by one who was involved in the decision, along with evidence that the remarks were related to the decision-making process, would be sufficient to establish this link. Balele v. DNR (Wis. Pers. Comm'n, 01/25/00).

The reliance on stereotypes about the characteristics of people in protected categories (such as, for example, the stereotype that old people are slow) is one of the evils which equal rights laws are intended to prevent. However, to carelessly accept the proposition that an otherwise category-neutral

description of a person (for example, "slow") is automatically to be understood as a surrogate for a reference to their membership in the protected category for which that description is a stereotype (i.e., "old") would turn the principles of equal rights laws on their head, by acknowledging and relying on the very stereotypes which the law is intended to do away with. The Department does not accept the stereotype that old people are slow, and it will therefore not presume that a comment about someone being slow is a disguised reference to their being old. Connor v. Heckel's, Inc. (LIRC, 09/27/99).

A gas station attendant proved she was discharged because of her back problems where the decision maker's written notes indicated that her back problems were a motivating factor for her discharge. Macara v. Consumer Coop. of Walworth County (LIRC, 02/14/92).

While a Complainant is not required to introduce direct evidence of the presence of discriminatory bias in order to prove a claim of discrimination, when a Complainant does introduce direct evidence of the presence of discriminatory bias on the part of a management-level employee of the Respondent, and the trier of fact concludes that the evidence is irrelevant because the management employee played no part in the challenged action, it is incumbent on the decision-maker to explain why it disregarded the evidence. Gentilli v. Badger Coaches (LIRC, 07/12/90), aff'd sub. nom. Gentilli v. LIRC, Dane Co. Cir. Ct., 01/15/91.

The direct evidence that the persons involved in making the challenged decision were motivated by the Complainant's handicap was unpersuasive because the witnesses were not credible. The first witness had been fired by the Respondent and had tried to blackmail the Respondent. The second witness had left the Respondent's employ to start a competing business and she testified much differently at the hearing than she had at a prior deposition. The third witness had been fired after he had an extreme personality conflict with a co-worker. Albright v. Steenberg Homes (LIRC, 09/20/90).

The McDonnell-Douglas formula for establishing a prima facie case is inapplicable where the Complainant presents credible direct evidence of discriminatory animus. Willard v. Piggly-Wiggly (LIRC, 07/31/90).

Direct evidence is defined as "proof which speaks directly to the issue, requiring no support by other evidence." Racially repugnant remarks by an employer are circumstantial evidence. The Complainant must still show that the employer's racially offensive attitudes led him to discriminate against the Complainant. Mouncil v. Pepsi Cola (LIRC, 02/16/89).

Where there was direct evidence of a retaliatory motive, the finding of discrimination was affirmed notwithstanding the evidence which showed that the Complainant had not applied for the position in question because it had not been posted before the successful candidate was hired, and the evidence which also failed to demonstrate the Complainant's qualifications for the position. Milwaukee County v. LIRC (Milwaukee Co. Cir. Ct., 12/16/87).

Proof of a general atmosphere of discrimination is not direct proof of discrimination against an individual but will be considered with other evidence to determine whether race discrimination occurred. Stonewall v. DILHR (Wis. Pers. Comm'n, 05/30/80).

622 Proof of intent utilizing the McDonnell Douglas v. Green framework

622.1 General considerations

The McDonnell-Douglas method of proving discrimination was not meant to be inflexible. Sometimes a Complainant cannot identify similarly-situated employees. However, the Complainant may show that the circumstances surrounding the adverse action indicate that it is more likely than not that his protected status was the reason for it (rather than establishing that the Complainant was treated less favorably than a similarly-situated person not in the protected class). Williams v. All Saints Healthcare Sys. (LIRC, 08/14/09).

The Complainant alleged that his discharge was based upon race and that, had he been a white employee, he would not have been discharged for engaging in the same conduct. In support of this assertion, the Complainant attempted to present comparative evidence showing that white employees had engaged in serious misconduct with lesser disciplinary consequences. Comparative evidence is relevant in a disparate treatment case, and the appropriate question is not whether such evidence is admissible, but how much weight it should be given. The Respondent's belief that the workers to whom the Complainant compared himself were distinguishable from the Complainant went to the strength of the Complainant's pretext argument. It was not, however, a proper basis for excluding the evidence from the record. Arvin v. C & D Technologies (LIRC, 10/31/08).

In reviewing disparate treatment claims it is appropriate to utilize the burden-shifting method of analysis originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under that analysis, first the Complainant has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the Complainant succeeds in proving the prima facie case, the burden shifts to the Respondent to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the Respondent carry this burden, the Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Respondent were not its true reasons, but were a pretext for discrimination. (Citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). Josellis v. Pace Indus. (LIRC, 08/31/04).

It is not adequate for a Complainant to present evidence which simply raises the suggestion or the possibility that a prohibited motivation was at work. A Complainant bears the burden of demonstrating by a preponderance of the evidence that the Respondent's actions were based upon prohibited factors. Connor v. Heckel's, Inc. (LIRC, 09/27/99).

Discriminatory intent is an element of a disparate treatment case under the Wisconsin Fair Employment Act. Discriminatory intent can be inferred using the McDonnell-Douglas standard. Eleby v. Meriter Retirement Services (LIRC, 08/28/97).

Discrimination cases are frequently based upon circumstantial evidence. Circumstantial evidence is often stronger and more satisfactory than direct evidence. Novick v. ABQC Corp. (LIRC, 02/26/97).

While comparative evidence can be material in a discrimination case, the fact that a Respondent did not discharge everybody in the protected class does not mean it did not discriminate against a particular Complainant. Schneider v. Stoughton Trailers (LIRC, 02/24/95).

Irrespective of sec. 903.01, Stats., relating to presumptions, the Respondent's burden in a case arising under the Wisconsin Fair Employment Act is one of production, rather than persuasion. It is for the Complainant to establish by a preponderance of the evidence that the Respondent's actions were based upon prohibited factors. Lowe v. City of Appleton (LIRC, 01/11/95).

Where the employer has articulated a legitimate nondiscriminatory reason for failing to hire a Complainant, whether the Complainant made out a prima facie case is no longer relevant; the only

issue that remains is the ultimate factual dispute of whether the employer intentionally discriminated against the Complainant. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

The prima facie case method established in McDonnell-Douglas was never intended to be rigid, mechanized or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience. Gentilli v. Badger Coaches (LIRC, 07/12/90), aff'd sub nom. Gentilli v. LIRC, (Dane Co. Cir. Ct., 01/15/91).

Where the Respondent's asserted non-discriminatory reasons for its action are put into the record during the Complainant's case, the question of whether a prima facie case has been proven falls away and the inquiry proceeds to the ultimate issue of whether the Respondent has violated the Act. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

The prima facie case method established in McDonnell-Douglas v. Green was not intended to be rigid, mechanized or ritualistic. The parties may develop their record without adhering to the prima facie case method. A Complainant can prove discrimination by direct or circumstantial evidence or by making the required showing under McDonnell-Douglas. Kumph v. LIRC (Ct. App., Dist. IV, unpublished opinion, 02/23/89).

When the ultimate issue of whether the Act was violated is reached, the question of whether a prima facie case of discrimination has been established is no longer important. Mouncil v. Pepsi Cola (LIRC, 02/16/89).

Where the Respondent has done everything that would be required of it if the Complainant had properly made out a prima facie case, whether the Complainant really did so is no longer relevant. The question in such cases is whether or not the Complainant proved that the Respondent's proffered reasons were merely a pretext. Schenck v. Northwest Fabrics (LIRC, 02/20/87).

The Wisconsin Fair Employment Act does not provide a specific procedure by which a Complainant must prove a charge of discrimination. Accordingly, state courts have looked to federal court decisions involving Title VII for guidance in interpreting the Fair Employment Act; citing Puetz Motor Sales, Inc. v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (1985). Wilbert v. City of Sheboygan (LIRC, 04/15/86).

Where the Respondent fails to persuade the examiner to dismiss the complaint for lack of a prima facie case at the close of the Complainant's case in chief, and then responds to the Complainant's proof by offering evidence of the reason for the Complainant's rejection, the prima facie case analysis is no longer relevant. The question then becomes whether the Complainant has proved by a preponderance of the evidence that the legitimate reasons offered by the Respondent were not its true reasons, but were a pretext for discrimination. Lyckberg v. First Realty Group (LIRC, 09/25/85).

The ultimate burden of persuading the trier of fact of sex discrimination remains at all times with the Complainant. The employer's burden is satisfied if it simply explains what has been done or produces evidence of legitimate, nondiscriminatory reasons. The employee must then show directly that a discriminatory reason is the more likely explanation, or show indirectly that the employer's explanation is unworthy of credence and therefore a pretext for discrimination. Warnke v. DHSS (Dane Co. Cir. Ct., 09/22/81); Miller v. Sch. Dist. of Manawa (LIRC, 02/24/82).

The U.S. Supreme Court has clarified the burden and order of proof in discriminatory treatment cases in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). First, the employee has the

burden of proving a prima facie case. Second, if the employee succeeds, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employee's rejection. Third, the employee must then prove that those reasons were either not true or a pretext for discrimination. Henry v. Andrews Roofing & Siding (LIRC, 11/20/81), aff'd sub nom. Henry v. LIRC (Fond du Lac Co. Cir. Ct., 11/11/82); Anderson v. UW-Whitewater (LIRC, 12/03/80), aff'd sub nom. UW-Whitewater v. LIRC (Dane Co. Cir. Ct., 07/03/81).

Because the question of the order and nature of proof in sex discrimination cases has not been addressed by the Wisconsin Supreme Court, the Wisconsin courts generally, and DILHR consistently, have applied the standards developed by the federal courts in Title VII actions as set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Waukesha Pub. Sch. v. DILHR (Coulson) (Dane Co. Cir. Ct., 07/06/78).

622.2 Complainant's prima facie case

The Complainant made out a prima facie case by evidence that he was qualified for a promotion and was told he would be promoted, but the position was given to an employee not in the protected class and the Complainant never got a chance to apply. The Respondent failed to articulate a non-discriminatory reason for its actions. Because the Complainant's evidence raised a suspicion that discrimination occurred, the Complainant was entitled to a hearing on the merits. Alexander v. Hous. Auth. of the City of Milwaukee (LIRC, 01/30/20).

There are two ways a complainant can prove discrimination under the Wisconsin Fair Employment Act. A complainant can prove discrimination under the indirect evidence method, as originally set forth in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) or by introducing direct evidence of discrimination. In the context of a hiring decision, the elements of a prima facie case using the McDonnell Douglas method of proof are that the complainant: (1) is a member of a protected class, (2) applied for and is qualified for the position, and (3) was rejected under circumstances which gave rise to an inference of unlawful discrimination. Zunker v. RTS Distributors (LIRC, 06/16/14).

A "similarly-situated" analysis calls for a flexible, common-sense examination of all relevant factors. A similarly-situated employee need not be identical to the employee in every conceivable way. Binversie v. Manitowoc Tool & Mfg., Inc. (LIRC, 03/28/13).

The Complainant contended that he was treated differently than another employee who was not in the protected class of individuals aged forty and over. The Complainant failed to establish that he and the other employee were similarly situated such that they would be expected to receive the same level of discipline for similar conduct. A similarly-situated employee is one who is "directly comparable to [the Complainant] in all material respects." (Citing Grayson v. Oneill, 308 F.3d 808, 819 (7th Cir. 2002)). The Complainant and the other employee were not similarly situated where the Complainant was a manager and the other employee was not a manager, but was a technician and a member of the union. These factors alone warranted different treatment for reasons having nothing to do with age. Gruebling v. Wis. Bell (LIRC, 08/26/11).

The question of whether two employees are "similarly situated" must take into account all relevant factors in the context of the case. In order to be similarly situated, employees must normally have dealt with the same supervisor, have been subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. An identical supervisor is not an essential requirement for employees to be similarly situated. However, the existence of different supervisors can present a

major obstacle to proving discrimination based on disparate treatment. Stern v. LIRC (Dane Co. Cir. Ct., 06/05/09).

The Complainant in this case did not establish disparate treatment because there was nothing in the evidence to suggest that the different treatment was not the result of different supervisors exercising their separate decision-making discretion. James v. Dane County Parent Council (LIRC, 02/02/09).

The Labor and Industry Review Commission has not adopted the approach of the Seventh Circuit Court of Appeals that in order to satisfy the second element of a prima facie case (i.e., that the Complainant suffered an adverse employment action), an action must have a materially adverse impact on a Complainant's employment status (such as that effected, for example, by a termination, demotion, a decrease in wages, a material loss of benefits, or significantly diminished responsibilities). Post v. Mauston Sch. Dist. (LIRC, 08/28/02); Froh v. Briggs & Stratton (LIRC, 09/29/04).

The burden of establishing a prima facie case of disparate treatment is not intended to be onerous. The policies served by the prima facie case are to eliminate the most common non-discriminatory reasons for the adverse employment action, and to provide an opportunity for the Complainant to prove discriminatory intent directly. In addition, the question of whether the Complainant has made out a prima facie case is no longer relevant once the Respondent responds to the Complainant's proof by offering evidence of the reasons for the action taken. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). The Respondent's reasons for its actions, and defense to the claim, may be established through evidence presented as part of the Complainant's case in chief. Josellis v. Pace Indus. (LIRC, 08/31/04).

In disciplinary cases in which a Complainant claims to have been disciplined more harshly, determining whether employees are similarly situated normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. When different decision-makers are involved, the situations are rarely similarly situated in all respects. Different decision-makers may exercise their discretion differently. Castro v. Micro-Precision (LIRC, 06/25/04).

A Complainant is not required to show, as a part of the prima facie case, that she was more qualified than the successful candidates. An inference of discrimination can be drawn not only from circumstances in which the Complainant's qualifications are greater than those of the successful candidate, but also from circumstances in which the Complainant's qualifications are similar to those of the successful candidate. Martin v. Milwaukee Bd. of Sch. Dir. (LIRC, 02/26/03).

One element of a prima facie case is that the Complainant applied for and was qualified for a job for which the employer was seeking applicants. The Complainant in this case could not establish a prima facie case when he did not assert (nor could it reasonably be implied from the information that he provided) that the Respondent was seeking applicants for customer service positions in general, or for the customer service representative position from which the Complainant had been terminated specifically, at the time he applied. Ficken v. Harmon Solutions Group (LIRC, 02/07/03).

An employee alleging age discrimination in the context of a hiring decision makes a prima facie case by showing: (a) he is forty or older, (b) he was not hired, (c) he was qualified for the job, and (d) he was rejected under circumstances which give rise to an inference of unlawful discrimination. Kalsto v. Village of Somerset (LIRC, 10/03/00).

The burden of establishing a prima facie case of disparate treatment is not intended to be onerous. The policies served by the prima facie case are to eliminate the most common non-discriminatory reasons for the adverse employment decision and to provide an opportunity for the Complainant to prove discriminatory intent indirectly. Requiring proof of subjective qualifications at the prima facie phase of the analysis does not serve either of these policies. Rather, forcing the Complainant at the outset to prove subjective qualifications subverts the indirect method of proof by requiring proof of the subjective standards and motives of the employer, and has the effect of collapsing the three-step McDonnell Douglas analysis into a single step at which all issues would be resolved. Foust v. City of Oshkosh Police Dep't (LIRC, 04/09/98).

When a Complainant in a race discrimination case did not introduce specific evidence that she was replaced, this did not prevent a conclusion that she established a prima facie case of discrimination in discharge. The elements of a prima facie case are not fixed in stone, but can vary with the circumstances of the case. Proof of replacement can be substituted for by proof that others not in the protected class were treated more favorably. Ray v. Ramada Inn-Sands West (LIRC, 03/05/91).

In the context of a hiring decision, the elements of a prima facie case are that the Complainant: (1) is a member of a protected class, (2) applied for and is qualified for the position, and (3) was rejected under circumstances which gave rise to an inference of unlawful discrimination. Larson v. DILHR (Wis. Pers. Comm'n, 01/22/89).

The elements of a prima facie case vary with the circumstances of each case, but generally a prima facie case refers to evidence which is sufficient to support a finding in the Complainant's favor unless rebutted. Goldberg v. St. Joseph's Hosp. (LIRC, 08/09/85).

In a claim of discriminatory discharge on the bases of age, the Complainant must show that he was 40 or older, that he was discharged, that he was qualified for the job, and either that he was replaced by someone not within the class or that others not in the protected class were treated more favorably. Here, however, the fact that the Complainant was not replaced by a younger employer is not dispositive, as the necessary elements of a prima facie case are not fixed in stone but vary with the facts of each case. It is enough that the Complainant established facts which raise an inference of age discrimination. The Complainant did so in this case by establishing that he was laid off while a much younger and less experienced employee was retained in a position for which the Complainant was fully qualified and which was in fact essentially a sub-set of the position the Complainant had held. Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

To support a prima facie case of discriminatory discharge, the discharged employee need not establish that his performance was excellent or even average, but only that it was of sufficient quality to merit continued employment. That the employee's work was inferior to that of other employees, making him a candidate for discharge when there was a reduction in available work, is instead properly raised by the employer as a nondiscriminatory reason for discharge. Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

Minority Complainants may make out a prima facie case of discrimination, even if they were replaced by another minority, if they can demonstrate that the hiring of a minority replacement was a pretext to mask an actual discriminatory discharge. Davis v. Univ. of Wis. Sys. (Wis. Pers. Comm'n, 01/07/85).

A Complainant's failure to enter his age and the age of his replacement into the hearing record prevented any finding that his layoff was age discrimination. Nelson v. Massey Ferguson (LIRC, 10/20/83).

A Complainant establishes the element of satisfactory performance necessary to a prima facie case by proving that she was not criticized by her employer. Lenich v. Dana's Deli (LIRC, 03/29/83).

In failure to promote cases, the employee's initial burden is to show that: (1) he belongs to a protected group, (2) he was qualified and applied for a promotion, (3) he was considered for and denied a promotion, and (4) other employees of similar qualifications who were not in the protected group were promoted at the same time. He need not prove at the initial stage that he was the most qualified person for the promotion in order to make out a prima facie case, nor must he show that he applied where the promotion was not announced. Bolden v. Wis. Tel. Co. (LIRC, 08/04/81).

Under McDonnell-Douglas, an employee claiming individual discrimination must establish that: 1) she is a member of a protected class, 2) she applied and was qualified for a job for which the employee was seeking applicants, 3) she was rejected, and 4) after such rejection, the position remained open and the employer continued to seek applications from persons of the Complainant's qualifications. Rubenstein v. LIRC (UW Bd. of Regents) (Dane Co. Cir. Ct., 02/06/81).

Even where it was not clear that an employee made out a prima facie case of sex discrimination, a minimal showing of analogous McDonnell-Douglas factors should justify some explanation on the part of the employer. Waukesha Pub. Sch. v. DILHR (Coulson) (Dane Co. Cir. Ct., 07/06/78).

622.3 Respondent's burden to articulate a legitimate, non-discriminatory reason

A finding in the Complainant's favor will result when the Complainant's prima facie case of discrimination is not rebutted by the Respondent's articulation of a non-discriminatory reason. In promotion cases, a Complainant need not provide evidence that he applied to be promoted where there is evidence that the Complainant was told that he would not be promoted and denied the opportunity to apply. Alexander v. Hous. Auth. of the City of Milwaukee (LIRC 01/30/20).

Once the Respondent has articulated a legitimate, nondiscriminatory reason for its actions the question of whether the Complainant has established a prima face case becomes moot. The burden of proof then reverts to the Complainant to show that the reason articulated by the Respondent is a pretext for discrimination. Wilks v. St. Joseph's Rehab. (LIRC, 02/28/13).

The Complainant argued that the Respondent did not provide a legitimate, non-discriminatory reason for her discharge since the Respondent's explanation that it discharged her for stealing from the Respondent was not credible. The evidence at hearing established that the Respondent's son saw the Complainant taking dog treats when he watched the security video at the Respondent's place of business. The Complainant contended that she had intended to purchase the dog treats and that she had asked another employee to write up a slip so that the cost could be deducted from her paycheck. However, the Respondent had reason to believe that the Complainant was stealing from it. That belief, even if mistaken, was a legitimate, non-discriminatory reason for terminating the Complainant's employment. Freeman v. Animal Motel (LIRC, 07/18/11).

The testimony given by a Complainant may establish the legitimate, non-discriminatory reason for the employer's actions and, thus, rebut a prima facie case of discrimination. The testimony and evidence presented by the Complainant in this case established the Respondent's legitimate, non-

discriminatory reasons for the action it took against her. Traska v. Mid-States Express (LIRC, 01/22/09).

A Respondent's burden to articulate a non-discriminatory explanation for a challenged adverse action cannot be satisfied by assertions of its counsel in argument. It must be made by the introduction of admissible evidence. That evidence may be met by evidence which comes into the record as part of the Complainant's case in chief. Dieterich v. Lindengrove (LIRC, 12/29/08).

The question of whether an employer's asserted non-discriminatory reason is objectively correct can be considered irrelevant if it appears that the employer genuinely believed it to be true. The finder of fact need only determine that the employer in good faith believed in those reasons, and that the asserted reasons for the action were not a mere pretext for discrimination. Deal v. D & S Mfg. (LIRC, 06/20/08).

A Complainant cannot prevail if the Respondent honestly believed in the non-discriminatory reason it offered for the employment action, even if this reason was foolish, trivial, or even baseless. Fink v. Sears Roebuck & Co. (LIRC, 03/01/07).

The question of whether an employer's asserted non-discriminatory reason is objectively correct is irrelevant if it appears that the employer genuinely believed it to be true. The trier of fact need only determine that the employer in good faith believed in that reason and that the asserted reason for the action was not a mere pretext for discrimination. Grell v. Bachmann Constr. (LIRC, 07/15/05).

The question of whether an employer's asserted non-discriminatory reason is objectively correct may be considered irrelevant if it appears that the employer genuinely believed the reason to be true. The trier of fact need only determine that the employer in good faith believed in those reasons and that the asserted reasons for the action were not a mere pretext for discrimination. Ford v. Lynn's Hallmark (LIRC, 06/27/05); Stichmann v. Valley Health Care Ctr. (LIRC, 06/14/05).

"[T]he employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate non-discriminatory reasons.'" Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). A requirement that the Respondent introduce evidence which would persuade the trier of fact that the employment action was lawful exceeds what can be demanded to satisfy the Respondent's burden of production. The ultimate burden of persuading the trier of fact that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant. Booker v. NMT Corp. (LIRC, 08/27/04).

The Respondent's burden of producing a legitimate, nondiscriminatory reason for its actions can be met by facts presented as part of the Complainant's case-in-chief. Cortez v. City of Milwaukee (LIRC, 01/31/01).

The requirement that the employer articulate a non-discriminatory reason is rather minimal. The employer need not initially prove that the articulated reason was the actual reason for the discharge. Rather, the employer need only raise a genuine issue of fact as to whether it discriminated against the employee. To do this, the employer must at least "clearly set forth, through the introduction of admissible evidence, the reasons for the employee's rejection." Kalsto v. Village of Somerset (LIRC, 10/03/00).

A finding in the Complainant's favor will result when the prima facie case of discrimination is not rebutted by the articulation of a non-discriminatory reason. Foust v. City of Oshkosh Police Dep't (LIRC, 04/09/98).

Where no question of fact exists as to whether a Complainant has stated a *prima facie* case, a Respondent's failure to present any legitimate non-discriminatory reason for its actions warrants a decision in favor of the Complainant as a matter of law. While there are cases where it has been found that there was no unlawful discrimination without the Respondent having offered any legitimate non-discriminatory reason for its actions, these are cases in which the evidence presented by the Complainant himself placed those reasons into the record. Rutherford v. J & L Oil (LIRC, 06/06/97).

Where a Respondent's articulated reason is disbelieved, the trier of fact should not ignore other evidence which shows that the Respondent's real reason was, nonetheless, one that did not violate the Act. Campbell v. Barch Communications (LIRC, 01/17/97).

The Labor and Industry Review Commission rejected the Complainant's argument that once he established a prima facie case the burden of persuasion shifted to the Respondent to rebut that presumption. The word "presumption," properly used, refers only to a device for allocating the production burden. The ultimate burden of proving discrimination remains at all times with the Complainant. Franklin v. Foxboro Co. (LIRC, 11/16/94).

The employer does not have the burden of proving or substantiating the reasons for its actions. The burden that shifts to the employer upon the establishment of a prima facie case is only that of producing evidence that its actions taken were for a legitimate, non-discriminatory reason. The employer need not persuade the court that it was actually motivated by the proffered reason. It is sufficient that the employer's evidence raises a genuine issue of fact as to whether it discriminated against the Complainant. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the Complainant remains at all times with the Complainant. Nordin v. Goodwill Indus. (LIRC, 09/28/94).

In some cases, the question of whether an employer's asserted nondiscriminatory reason is true can be considered irrelevant if it appears that the employer genuinely believed it to be true. Moncrief v. Gardner Baking (LIRC, 07/01/92).

An employer's reason for its actions may be a good reason, a bad reason, a mistaken reason or no reason at all so long as the decision was not based on race or other unlawful discriminatory criteria. The illegality of the Respondent's actions in not putting the Complainant on its payroll, standing alone, would not be enough to establish that unlawful discrimination had occurred. Salinas v. Crivello Properties (LIRC, 06/05/92).

An employer is not required to prove that its decision was correct. The trier of fact need only determine that the employer in good faith believed the Complainant's performance to be unsatisfactory and that the asserted reason for the action was not a mere pretext for discrimination. Salinas v. Crivello Properties (LIRC, 06/05/92).

Even where a Respondent's articulated reason is disbelieved, the trier of fact cannot ignore the fact that the evidence shows that the Respondent's real reason was nevertheless one that did not violate anti-discrimination laws. It is not true that if the articulated reason is disproved, there must be a finding of discrimination. Von Neumann v. West Bend Co. (LIRC, 03/30/92).

If a prima facie case is established, an employer must articulate a legitimate business reason for the discharge or the employee will prevail on the basis of the prima facie case. Where an employer takes the position that an employee has resigned and was not discharged, and therefore articulates no reason (even in the alternative) for a discharge, the employer runs the risk that the fact finder will decide that the employee really was discharged (or constructively discharged) and that the employee would then prevail on the basis of the prima facie case alone. Jorgenson v. Ferrellgas, Inc. (LIRC, 01/10/92).

In most cases, the question of whether the ultimate burden of proving discrimination has been carried is resolved by looking to the question of whether the articulated reason has been proven pre-textual. However, a finding in the Complainant's favor will also be made when the prima facie case of discrimination, which raises the presumption that discrimination occurred, is not rebutted by the articulation of a non-discriminatory reason. Where the Respondent alleged that the Complainant had quit and had not been discharged, as the Complainant alleged, the Respondent failed to meet its minimal burden to articulate a non-discriminatory reason for its actions. The evidence established that the Complainant had been discharged, but the Respondent did not offer any explanation as to why it discharged her. The presumption that it did so because of the Complainant's race, which was created by the prima facie case established by the Complainant, stood unrebutted and called for a finding of discrimination in the Complainant's favor. Ray v. Ramada Inn-Sands West (LIRC, 03/05/91).

When the Respondent's decision to eliminate a position because of a decline in the amount of work was arrived at in good faith, the decision is not discriminatory even if the decision seems erroneous when viewed in hindsight. Gentilli v. Badger Coaches (LIRC, 07/12/90), aff'd sub nom. Gentilli v. LIRC, Dane Co. Cir., Ct. 01/15/91.

Whether the Complainant has made out a prima facie case is no longer relevant once the Respondent responds to the Complainant's proof by offering evidence of the reason for the action taken. Under U.S. Postal Serv. Bd. of Governors v. Aikens, the factual inquiry becomes whether the Respondent's action was discriminatory under the law. Gentilli v. Badger Coaches (LIRC, 07/12/90), aff'd sub nom. Gentilli v. LIRC, Dane Co. Cir. Ct., 01/15/91.

A decision in the Complainant's favor need not be made where the Respondent presents no evidence at hearing. A Respondent is not obliged to prove that it did not discriminate; a Complainant bears the burden of proving that discrimination did occur. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

The examiner erred in dismissing at the close of the Complainant's case his claim that he was discriminated against because of his race when the employer discharged him, supposedly for abetting a fraud in connection with his employment. The evidence offered at the hearing did not establish the Respondent's nondiscriminatory reason. The matter was remanded for further proceedings, to allow the Respondent to present its case in chief. Browder v. Best Food (LIRC, 01/09/87).

The employer must rebut the inference with a "clear and reasonably specific" explanation. Smith v. Bruckner Excavating Co. (LIRC, 06/29/84), aff'd sub nom. Bruckner Excavating Co. v. LIRC (Milwaukee Co. Cir. Ct., 09/20/85).

An employer met its burden without introducing any witnesses of its own, where an applicant's own testimony on cross examination revealed her lack of experience in the position applied for. Evidence that an employer had marked an application with a "B" does not show that its stated reason for failing

to hire a black applicant was a pretext for discrimination. Ewing v. James River-Dixie Northern (LIRC, 10/19/84).

Though a Respondent's reason may seem poor or erroneous to an outsider, the only relevant question is whether it is a pretext for discrimination. Henry v. Andrews Roofing & Siding (LIRC, 11/20/81), aff'd sub nom. Henry v. LIRC (Fond du Lac Co. Cir. Ct., 11/11/82).

An employer's non-discriminatory reasons for its actions may be presented through the testimony of the Complainant's own witnesses. Davis v. Jos. Schlitz Brewing (LIRC, 09/14/82).

The employer's burden is to produce evidence that the employee was rejected, or someone else preferred, for a non-discriminatory reason. The employer need not prove that it was actually motivated by the preferred reasons. Bolden v. Wis. Tel. (LIRC, 08/04/81).

While it was credible that the selecting official could no longer remember the basis of his selection decision, such explanation does not meet the employer's burden to articulate a legitimate nondiscriminatory reason for its actions. Anderson v. UW-Whitewater (LIRC, 12/03/80), aff'd sub nom. UW-Whitewater v. LIRC (Dane Co. Cir. Ct., 07/03/81).

Once a Complainant established a prima facie case, the employer's burden is to show a legitimate, nondiscriminatory reason for an applicant's rejection, not to prove that the individuals who were hired in place of the applicant were clearly more qualified. Zimmerman v. Milwaukee County Civil Serv. Comm'n (LIRC, 04/12/79).

Subjectivity in the employer's decision making process is not, by itself, evidence of discrimination. Subjective reasons may be adequate to rebut a prima facie case where they are not discriminatory in application or pre-textual. Waukesha Pub. Sch. v. LIRC (Coulson) (Dane Co. Cir. Ct., 07/06/78).

Once a prima facie case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the rejection. This burden may be met even where the reason articulated is based on a mistaken, but honestly held belief. Herslof Optical v. DILHR (Leonard) (Dane Co. Cir. Ct., 03/28/78).

Where the employee showed that he was handicapped and was discharged, and his employer did not prove another reason for the discharge, it can be assumed that the employee was discharged because of his handicap. Buyatt v. C.W. Transp. (LIRC, 07/25/77).

After an employee makes an initial showing of discrimination, the test under the McDonnell-Douglas analysis is whether the employer can articulate a "legitimate, nondiscriminatory reason" for its actions, not a "rational and neutral business justification." Mt. Sinai Med. Ctr. v. DILHR (Preddy) (Dane Co. Cir. Ct., 06/17/77).

622.4 Complainant's proof of pretext

A Complainant must not only establish that a Respondent's asserted reasons for terminating a Complainant's employment were false, but also that discrimination was the real reason. Neal v. Independence First, (LIRC, 07/29/2022).

Where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicant's competing qualifications does not constitute

evidence of pretext unless those qualifications are so favorable to the Complainant that there can be no dispute among reasonable persons of impartial judgment that the Complainant was clearly better qualified for the position at issue. Delgadillo v. Kenosha Unified Sch. Dist. (LIRC, 11/30/2018), aff'd sub nom. Delgadillo v. LIRC (Milwaukee Co. Cir. Ct., 10/28/2019).

Where the Complainant was the only individual whose conduct was investigated, even though a member of the public complained about impolite treatment from several employees, the employer's claim that the Complainant was disciplined because of genuine concerns about impolite conduct towards the public was rejected. Krueger v. County of Waupaca (LIRC, 08/22/18).

Proof that other individuals in the protected class were paid less than the Complainant is not evidence that the Complainant was discriminated against in pay. Instead, the Complainant must show that an employee or employees outside of the protected class earned more than he did for similar work. Lofton v. The Jor-Mac Company, Inc. (LIRC, 04/19/2018).

Once the Respondent has articulated a legitimate, nondiscriminatory reason for its actions the question of whether the Complainant has established a prima face case becomes moot. The burden of proof then reverts to the Complainant to show that the reason articulated by the Respondent is a pretext for discrimination. Wilks v. St. Joseph's Rehab. (LIRC, 02/28/13).

Pretext means a dishonest explanation, a lie rather than an oddity or an error. The focus of a pretext inquiry is whether the Respondent's stated reason for an action is honest, not whether it is accurate, wise, or well-considered. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

A Complainant must show not only that the Respondent's asserted reasons were false, but that discrimination was the real reason for its action. The Complainant may be able to prove pretext even in the absence of any direct evidence of discriminatory intent by showing that the Respondent's explanation is unworthy of credence. If the Complainant offers specific evidence from which the finder of fact may reasonably infer that the Respondent's proffered reasons do not represent the truth, the case then turns on the credibility of the witnesses. On the other hand, if the Respondent genuinely believed its asserted, non-discriminatory reason to be true, even if it was mistaken, the Respondent cannot be found to have had discriminatory intent. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

The fact that a particular characteristic is not mentioned in a job announcement as being desirable does not necessarily mean that the employer's subsequent reliance on that characteristic as being important was pre-textual. Wallis v. St. Paul's Evangelical Lutheran Church & Sch. (LIRC, 08/25/10).

Pretext means a dishonest explanation, i.e., a lie rather than an oddity or an error. In this case, the Respondent mistakenly gave another employee a higher salary based upon experience which he did not have. This was done in error. This did not, however, constitute proof of pretext. Bialk v. Aurora Health Care (LIRC, 04/23/10).

The decision-maker in a discrimination case may not substitute its business judgment for that of the employer. The mere fact that the Respondent made a decision that may have been ill-advised is not evidence of pretext on its part. The focus of a pretext inquiry is whether the Respondent's stated reason was honest, not whether it was accurate, wise or well-considered. The issue is whether the legitimate reason provided by the employer is in fact the true one. Ebner v. Dura Tech (LIRC, 04/23/09).

Since intent is a pertinent and necessary inquiry in a discrimination or retaliation case, the question of whether a Respondent's asserted non-retaliatory reason is objectively correct can be considered irrelevant if it appears that the Respondent genuinely believed it to be true. Engen v. Harbor Campus (LIRC, 02/22/08).

A Complainant may demonstrate that the employer's asserted reason for an adverse action is pre-textual by showing that the reason: (1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action. In this case, the Administrative Law Judge properly determined that the Respondent's asserted reason for discharging the Complainant was insufficient to have motivated the decision, and that the actual motivation for the Respondent's decision was the Complainant's disability. Sult v. Jerry's Enter. (LIRC, 02/08/08).

The demonstrated falsity of an employer's asserted reason for an employment action may, in itself, be viewed as some evidence that an improper motivation was behind the decision. Cole v. Greyhound Bus Lines (LIRC, 09/16/05).

Where the Complainant established that the entries in the Respondent's logs (which were offered by the Respondent as evidence of its complaints about the Complainant's performance) were probably not prepared contemporaneously with the dates associated with them, called into question the veracity of the complaints about the Complainant's performance. "The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. . . ." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Kurtzweil v. GPI Corp. (LIRC, 08/27/04).

If an employer articulates a legitimate non-discriminatory reason for a discharge or other employment action, the issue of whether the Complainant has established a prima facie case becomes moot. Once an employer has articulated such a reason, the burden of proof reverts to the Complainant to show that this reason is a pretext for discrimination. Stern v. RF Technologies (LIRC, 02/06/04).

Proof that the Respondent's explanation for the employment action taken against the Complainant is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. Rodriguez v. Flash, Inc. (LIRC, 01/28/03).

The Respondent's argument that it honestly believed its reason for discharging the Complainant was rejected. In Gordon v. United Airlines, 246 F.3d 878 (7th Cir. 2002), the court indicated that when determining whether an employer's belief is honest, "we need not abandon good reason and common sense in assessing an employer's actions." The court further found that if an employee offers specific evidence from which the trier of fact may reasonably infer that the Respondent's asserted non-discriminatory reasons do not represent the truth, the case then turns on the credibility of the witnesses. The court stated, "[w]hen the sincerity of an employer's asserted reasons for discharging an employee is cast into doubt, a fact finder may reasonably infer that unlawful discrimination was the true motivation." In this case, the Complainant offered specific evidence regarding the Respondent's failure to discharge white employees who engaged in the same type of conduct that led to the Complainant's discharge. Furthermore, the Administrative Law Judge determined that the Respondent's witnesses were not credible. These facts allowed the ALJ to reasonably infer that

unlawful race discrimination was the true motivation for the Respondent's termination of the Complainant's employment. Rodriguez v. Flash, Inc. (LIRC, 01/28/03).

Where the Respondent's explanation for its actions in treating the Complainant differently from a similarly situated employee was not credible, the question to decide was whether the Respondent's explanation was a pretext for discrimination. The Complainant has the ultimate burden of persuasion on this point. Showing that an employer's reason is a pretext permits, but does not compel, a finding of discrimination. While disbelief of an employer's proffered non-discriminatory reason for an employment decision does not compel a conclusion of discrimination, it does permit the trier-of-fact to infer the ultimate fact of intentional discrimination without additional proof. Where there was nothing to set the Complainant and the similarly situated employee apart other than race, and where there was no evidence to suggest that the Respondent was motivated by a consideration of the sort that would be unfair but not discriminatory, the Department properly concluded that the Respondent's explanation for its actions was a pretext for discrimination. Thompson v. Century Cable (LIRC, 06/07/99).

If an employer articulates a legitimate non-discriminatory reason for a discharge, the issue of whether the employee has established a *prima facie* case becomes moot. Once such a reason is articulated, the burden of proof reverts to the Complainant to show that this reason is a pretext for discrimination. If the articulated, non-discriminatory reason is not credible or is unworthy of belief, this may simply prove a pretext (which by itself would not satisfy the Complainant's burden), or it may serve double duty and prove a pretext for discrimination. In other words, a fact finder's disbelief of an employer's proffered non-discriminatory reason for an employment action permits the trier-of-fact to infer the ultimate fact of intentional discrimination without additional proof. Naill v. Western Wis. Tech. College (LIRC, 02/12/99).

For purposes of the Wisconsin Fair Employment Act, a "pretext" refers to a neutral sounding reason offered for a discharge or other adverse employment decision in order to conceal discrimination of a type specifically prohibited by the Act. Newton v. St. Gregory Educ. & Christian Formation Comm. (LIRC, 12/10/97).

In some cases, the question of whether an employer's asserted non-discriminatory reason is objectively correct can be considered irrelevant, if it appears that the employer genuinely believed it to be true. The trier of fact need only determine that the employer in good faith believed in that reason and that the asserted reason was not a mere pretext for discrimination. The reasonableness of an employer's reasons for its decisions may be probative of whether they are pre-textual. Atkins v. Pepsi Cola Gen. Bottlers (LIRC, 12/18/96).

There are three factors which bear on the question of pretext: (1) the employer's treatment of the employee during employment, (2) the employer's treatment of the protected class of which the employee is a member, and (3) the absence of minorities on the employment decision-making body. Bates v. Thomson Newspapers (LIRC, 12/04/96).

A pretext determination is concerned with whether the employer honestly believes in the reasons it offers, not whether it made a bad decision, a mistake or a bad business judgment. In this case, the Respondent's manager reasonably believed that the Complainant was fabricating an illness in order to get off work. Even assuming that the Complainant had in fact been sick, the fact that the manager mistakenly believed that she was lying about being sick and recommended her discharge for that reason, does not constitute unlawful discrimination. Murphy v. Roundy's (LIRC, 04/25/96).

When the Respondent has produced evidence which would allow the trier of fact to rationally conclude that its employment decision had not been motivated by discriminatory animus, the presumption raised by the Complainant's prima facie case falls away and the Complainant must then proceed to establish that the reasons offered by the employer were not its true reasons, but merely a pretext for discrimination. Essentially, the burden is on the Complainant to establish a causal link between the employer's pretext and a discriminatory motive. The Complainant's burden at the pretext stage is to prove that the Respondent's reasons are false and that the Respondent intentionally discriminated against the Complainant. The ultimate burden of persuading the trier of fact that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant. The Complainant may be well advised to present additional evidence of discrimination because the fact finder is not required to find in the Complainant's favor simply because she establishes a prima facie case and shows that the employer's proffered reasons are false. Spearman v. Beloit Convalescent Ctr. (LIRC, 09/19/95).

While a Respondent's failure to rebut a prima facie case of discrimination will permit the trier of fact to infer that prohibited discrimination occurred, the Complainant is not entitled to a judgment as a matter of law simply because she proves a prima facie and shows that the Respondent's proffered reasons for its actions are false. Where this is evidence that the Respondent's actions were taken for a non-discriminatory reason, and where it was not demonstrated that it is more likely that a discriminatory reason motivated the Respondent, the Complainant has failed to prove discrimination. Even where a Respondent's articulated reason is disbelieved, the trier of fact cannot ignore other evidence which shows that the Respondent's real reason was nonetheless one that did not violate the Act. Currie v. Garrow Oil Corp. (LIRC, 06/16/95).

The Complainant failed to show that an employer's reasons for failing to hire him were a pretext for age discrimination where (1) the employer notified the job applicant that the position available was for both a custodial and a maintenance person, and (2) the employer allowed all of the candidates an unrestricted opportunity to discuss their qualifications during the interview. An employer is not required to list all of its hiring criteria in a one-paragraph job announcement. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

To prevail on a claim of discrimination, a Complainant must prove not only that an asserted reason for an employment action was a pretext, but that the asserted reason was a pretext for discrimination. Rangel v. City of Elkhorn (LIRC, 09/30/92).

Where the employer had previously warned the Complainant about taking finished product home and had told the Complainant previously to return finished product, the Respondent's subsequent failure to follow progressive disciplinary methods when the Complainant was discharged for taking product was not sufficient to show that its articulated reason was pre-textual. Molinar v. Larsen Co. (LIRC, 02/04/92).

The Complainant must show that the Respondent's articulated reason is a pretext for discrimination, not merely that it is a pretext for some other reason which the employer wishes to hide or will not acknowledge. Kovalic v. DEC Int'l, 161 Wis. 2d 863, 469 N.W.2d 224 (Ct. App. 1991), motion for relief from final judgment denied, 186 Wis. 2d 162, 519 N.W.2d 351 (Ct. App. 1994).

The Complainant failed to establish that he stopped making derogatory remarks about the Respondent and its president after being warned that continuing to make such comments would result in his discharge, or that his subsequent discharge for continuing to make such comments was pretext for age discrimination. Binder v. Nercon Eng'g & Mfg. (LIRC, 12/18/90).

The fact that the Respondent did not indicate in its announcement for the position that an educational background in agronomy was desired does not establish that the Respondent subsequently altered its specifications for the position. Nothing requires an employer to list all of its hiring criteria in a one-paragraph job announcement. Walstrom v. Wisconsin Dairy Herd Improvement Coop. (LIRC, 11/29/90).

The Respondent's giving the Complainant untrue reasons for discharging the Complainant can constitute evidence that the reasons subsequently given by the Respondent as the true reason for the discharge were pre-textual. However, in this case it was not conclusive evidence of pretext because it appeared that the long relationship between the parties made it difficult for the Respondent to honestly confront the Complainant about his performance. Hanson v. Culver Elec. Supply Co. (LIRC, 11/19/90).

The Respondent's stated reason for discharging the Complainant, excessive absences, was not pretext despite the fact that the Complainant's absences did not exceed the ten days a year extended to her under her short-term disability allowance. Multiple absences are disruptive. The sick leave allowance was intended as a "bank" to prevent employees from loss of income in the event of serious illness or injury. Gehr v. Wausau Ins. (LIRC, 10/19/90).

An employer's assertion of several alternative, independent, non- discriminatory reasons for an employee's discharge does not necessarily justify a finding of pretext if one reason is shown to be untrue, but that does not mean that the false justification cannot constitute evidence of the presence of an illegal motivation. Donovan v. Graebel Van Lines (LIRC, 05/23/90, amended 06/08/90).

The Respondent's proffered non-discriminatory explanation for discharging the Complainant was pretext because there was direct evidence that a discriminatory reason more likely motivated the Respondent, including evidence that there were other ways to accomplish the desired results without discharging the Complainant. La Crosse v. LIRC, (La Crosse Co. Cir. Ct., 05/04/90).

Where the Respondent did not call any witnesses with firsthand knowledge of the Complainant's job performance, the statements of the reasons for the Complainant's discharge in the letter of termination were not strong enough, standing alone, to avoid a finding of pretext. Davis v. Braun-Hobar Corp. (LIRC, 04/18/90).

The reasonableness of the employer's reasons for its decisions may be probative of whether they are pretext. The more idiosyncratic or questionable the employer's reason, the easier it would be to expose it as a pretext, if indeed it is one. Leick v. Menasha Corp. (LIRC, 08/17/89).

The Complainant's veiled references to an affirmative action plan and to a discrimination lawsuit against the Respondent were not enough to establish that the Respondent's reasons for hiring a female rather than a male were pre-textual. Zurawski v. LIRC (Racine Co. Cir. Ct., 12/22/88).

A Complainant who made out a prima facie case of race discrimination in hire failed to prove that the Respondent's reason, that the hired candidate was most qualified, was pre-textual where the Complainant argued that the selection process utilized subjective criteria. Criteria of a subjective nature are sometimes necessary in hiring, especially in hiring supervisory personnel, and there is nothing discriminatory per se about the use of such criteria. However, the use of such criteria will be closely scrutinized where applied by a non-minority decision maker to a minority candidate. Howard v. City of Madison (LIRC, 02/24/87).

The fact that a particular characteristic was not mentioned in a job announcement as being desirable did not mean that the employer's subsequent reliance on that characteristic as being important was pre-textual. Nothing requires an employer to list all its hiring criteria in a one paragraph job announcement. Phillips v. Green County Sheriff's Dep't (LIRC, 01/16/87).

A Complainant may establish pretext either directly by showing that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. That a reason is pre-textual does not mean it is false, as the facts asserted may in fact be true but not be the actual reason for the action. Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

A female state trooper established sex discrimination by showing that she had been fired for conduct for which male troopers were only suspended, and this comparison was especially probative because at least some of the male troopers had the same district and local supervisors as the female and had been disciplined at approximately the same time. The employer's explanation was suspect because it was conceived long after the female was discharged. Krueger v. DOT (LIRC, 10/04/82).

Though the record raised a considerable question as to whether there was just cause for the Complainant's discharge, pretext was not established. Whether there is just cause is a different inquiry from whether the employer's asserted reasons are pre-textual. Miller v. Manawa Sch. Dist. (LIRC, 02/24/82).

Those reasons which are considered at the time an irrevocable decision is made to terminate an employee are the ones by which that decision will be judged. Pokrass v. LIRC (Applied Power) (Waukesha Co. Cir. Ct., 08/20/81).

Several factors may bear on a showing of pre-textuality: the treatment of the employee by the employer during the course of employment; the employer's treatment of the protected class of which the employee is a member; and the absence of minorities on the decision-making body. Rubenstein v. LIRC (UW Bd. of Regents) (Dane Co. Cir. Ct., 02/06/81).

630 Proof of Disparate Impact

631 General considerations

The Complainant's disparate impact claim fails where she did not identify any employment practice or selection device utilized by the Respondent that is claimed to have a disparate impact on females or individuals in the protected age group, and where she also failed to present any competent statistical analysis showing a disproportionality of a distribution of a group of employees or any reason to believe that such disproportionality, if it existed, would be the result of a neutral selection device or procedure. Kelly v. Couleecap, Inc. (LIRC, 01/15/14).

A single employment decision, involving only one employee, does not constitute the type of facially neutral policy or practice that can be the subject of disparate impact analysis. Rather, for the purposes of disparate impact analysis, an employment practice consists of something in which an employer regularly or repeatedly engages. The employment practice challenged must also be something specific enough to allow the kind of statistical evaluation of effect that is necessary in a disparate impact case. Bartel v. Greater Madison Convention & Visitors Bureau (LIRC, 12/19/13).

A single employment decision, involving only one employee, does not constitute the type of facially-neutral policy or practice that can be the subject of disparate impact analysis. There is no such thing as an individual disparate impact case. Rather, for the purposes of disparate impact analysis, an employment practice consists of something in which an employer regularly or repeatedly engages. Thoma v. LJ's Bad Penny Bar & Café (LIRC, 08/27/09).

Disparate impact must be proved by statistical evidence, significant (in the statistical sense) to the confidence level required by law, comparing the effect of an employer's selection device or standard on employees in the different groups being compared. The Complainant's assertion that a female had never been appointed to the position for which she applied, and that males outnumber females in professional positions in the city government were not supported by necessary statistical evidence to establish a disparate impact. Kaczmarek v. City of Stevens Point (LIRC, 08/12/03).

Hiring statistics without corresponding information about the applicant pool are insufficient to establish a disparate impact. Workforce composition statistics without information regarding selection rates are insufficient to establish a disparate impact. Balele v. DOR (Wis. Pers. Comm'n, 01/25/02).

Statistical disparities must be sufficiently substantial and not of limited magnitude to give rise to a claim of disparate impact. The surrounding facts and circumstances are considered along with the statistics. Balele v. DOR (Wis. Pers. Comm'n, 01/25/02).

A disparate impact claim cannot be established without statistical proof. It is not enough to show that the Complainant was the sole adversely-affected individual. Balele v. DOC (Wis. Pers. Comm'n, 06/13/01).

There is no such thing as an individual disparate impact case. Abaunza v. Neenah Foundry (LIRC, 03/30/93), aff'd (Winnebago Co. Cir. Ct., 10/27/93).

Where an employer's use of a non-discriminatory, neutral factor has a statistically significant disparate impact on members of a protected group, the employer must prove a business necessity for its practice. A complainant cannot prove disparate impact by anecdotal evidence or by supposition based on expert testimony about the behavioral characteristics of members of a certain group. Disparate impact must be proved by statistical evidence which is significant "in the statistical sense" to the confidence level required by law, comparing the effect of an employer's selection device or standard on employees in the different groups being compared. Abaunza v. Neenah Foundry (LIRC, 03/30/93), aff'd (Winnebago Co. Cir. Ct., 10/27/93).

The disparate impact theory of discrimination set forth by the U.S. Supreme Court in Griggs v. Duke Power is applicable to the Wisconsin Fair Employment Act. Under the disparate impact theory, an employment practice which is neutral on its face can be found to be discriminatory if in practice it has an adverse impact on a protected group which is disproportionate to that group's level of involvement in the practice. Moncrief v. Gardner Baking (LIRC, 07/01/92).

The disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group. Under the disparate impact theory, a Complainant need not offer proof of discriminatory intent. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

Consideration of an applicant's recent gaps in teaching experience is not evidence of age or sex discrimination, unless it is shown that such a consideration actually has a disparate impact on women or people over the age of 40. Chandler v. UW-La Crosse (Wis. Pers. Comm'n, 08/24/89).

The disparate impact theory of discrimination is used to attack employment practices which are neutral on their face but which fall harshly on a protected class of employees. To establish such a claim, it must be shown that a facially neutral employment practice has had a significant discriminatory impact on a protected class. If this is demonstrated, the employer is given an opportunity to defend the practice by showing that it is "job related" or is justified by "business necessity," and if the employer fails in that burden the practice is illegal. Turman v. W.H. Brady Co. (LIRC, 10/17/85).

An isolated decision not reflective of a regular employment practice or policy is not appropriately challenged under the disparate impact theory. Turman v. W.H. Brady Co. (LIRC, 10/17/85).

632 Complainant's burden to show adverse impact

632.1 Complainant's prima facie case

The Complainant contended that a requirement that candidates for the job of school principal have five years of experience in the public schools had a disparate impact against Catholics and others with "religious school experience," since most private schools are religious. This contention was rejected. The sole evidence of disparate impact was a list of private schools in Wisconsin in 2012, with a designation as to which of them was religious. The record contained no statistical evidence to suggest that the requirement of five years of public school experience had the effect of eliminating applicants of any particular creed, including Catholicism, from being selected by the Respondent. Stanke v. Holmen Sch. Dist. (LIRC, 02/13/14), aff'd (St. Croix Co. Cir. Ct., 09/24/14).

The Complainant's disparate impact claim fails where she did not identify any employment practice or selection device utilized by the Respondent that is claimed to have a disparate impact on females or individuals in the protected age group, and where she also failed to present any competent statistical analysis showing a disproportionality of a distribution of a group of employees or any reason to believe that such disproportionality, if it existed, would be the result of a neutral selection device or procedure. Kelly v. Couleecap, Inc. (LIRC, 01/15/14).

The employer's reliance on the Complainant's lack of recent supervisory experience as a reason for a challenged decision, will not support a "disparate impact" claim. Disparate impact must be proved by actual statistical evidence, significant (in the statistical sense) to the confidence level required by law, comparing the effect of an employer's selection device or standard on employees in the different groups being compared. This is an evidentiary requirement. However, the Complainant presented no statistical evidence, but relied only on a sort of "thought experiment," in his brief, positing a hypothetical population of individuals who all acquired two years of supervisory experience between the ages of 18 and 20, and then describing what the effects would be of applying to them a number of specific cut-off tests. This is insufficient to establish a prima facie case of disparate impact. Bartel v. Greater Madison Convention & Visitors Bureau (LIRC, 12/19/13).

To make out a prima facie case of disparate impact, a Complainant must show that an employment practice or selection device (for example, a passing score on a certain test, or a high school diploma requirement) selects employees or applicants in a pattern which is significantly different from the pattern of a particular minority in the applicant pool. Moncrief v. Gardner Baking (LIRC, 07/01/92).

In order to prove disparate impact, the Complainant must identify the specific employment practice that is challenged, especially where the employer has combined subjective criteria with more rigid rules or standardized rules or tests. Watson v. WPS (LIRC, 09/06/89).

Where the complaints alleged a disparate impact upon blacks, information on the effect of the challenged practice on Hispanic and American Indian persons should not have been considered in determining whether a disparate impact was demonstrated. Davis v. City of Milwaukee (LIRC, 09/05/86).

A female teacher with over two years experience failed to prove that combining an academic teaching position with coaching duties had a disparate impact on female teachers, or that the employer's interviewing for budgetary reasons of only persons with no more than two years experience was sex discrimination. Marcoux v. Mayville Pub. Sch. (DILHR, 10/29/76); Emling v. DILHR (Mt. Horeb High) (Dane Co. Cir. Ct., 03/27/78).

632.2 Extent of disparity

A disparate impact analysis must include a conclusion as to whether the degree of disparity between the protected class and the non-protected class is of sufficient magnitude to establish a prima facie case for disparate impact, and a Complainant must prove that its disparity figures are statistically accurate to the degree (called a "confidence level") required by law. Where demonstration of statistically significant disparate impact is concerned, the Department is unwilling to intuit what ought to be demonstrated by expert opinion. Popp v. Rhinelander Paper Co. (LIRC, 07/28/95).

Disproportionality of a distribution of minorities in a particular employment setting is proven in disparate impact cases almost exclusively by some kind of expert statistical analysis. A Complainant's intuitive sense that a minority's distribution in a seniority system must have a negative impact on their opportunity for advancement cannot substitute for the kind of rigorous statistical analysis that is necessary to establish a claim of disparate impact in promotion. Moncrief v. Gardner Baking (LIRC, 07/01/92).

The 4/5ths Rule is not a sophisticated enough statistical test that it should be relied on to establish that there has been discrimination, but it is useful in identifying cases where the evidence is so weak that discrimination can be ruled out. Under the 4/5ths Rule, a disparate impact will ordinarily not be inferred unless the rate at which a protected group is successful in a given situation is less than 4/5ths of the rate at which others are successful. Helton v. Wesbar Corp. (LIRC, 03/19/92).

A disparate impact analysis must include a conclusion as to whether the degree of disparity between the protected class and the non-protected class is of sufficient magnitude to establish a prima facie case for disparate impact. In addition, the Complainant must prove its disparity figures are statistically accurate to the degree, called a "confidence level," required by law. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The "4/5ths rule" in EEOC guidelines (i.e., that adverse impact will not be inferred unless the members of a protected class are selected at a rate less than 4/5ths of the rate at which the group with the highest rate is selected) is not a rule that presumes that discrimination has occurred where its conditions have been met. There are more reliable statistical tests than the 4/5ths rule. Watson v. WPS (LIRC, 09/06/89).

The fact that the percentage of a protected group in a particular job category is relatively small is not significant unless there is relevant statistical evidence concerning the qualified, available labor pool for that job and the percentage of employees in the protected group is less than the percentage of that group in the available labor pool. Chandler v. UW-La Crosse (Wis. Pers. Comm'n, 08/24/89).

A company's hiring policies did not disproportionately impact on black applicants where statistics presented could not lead to a reasonable inference that they were not excluded at a rate substantially higher than white applicants and where the company hires blacks at a rate double their representation in the relevant labor market. Nickols v. LIRC (Milwaukee Co. Cir. Ct., 12/03/82).

A Complainant failed to establish disparate impact where, using a binomial model, the standard deviation arrived at did not show that women as a class were being hired or promoted at a significantly lower rate than men. Niles v. Delco Electronics (LIRC, 10/22/82).

To prove that a test or procedure has a disparate impact, a job applicant must show that it selects persons of a particular national origin in a pattern significantly different from the pool of applicants in general. A Hispanic applicant for a summer job program failed to meet this burden where she was the only Hispanic to apply and was one of 27 other applicants who were rejected in the initial screening process. Sanchez v. LIRC (Dane County) (Dane Co. Cir. Ct., 11/20/80).

A female applicant failed to establish a prima facie case that the employer's recruiting practice of advertising a math position combined with a wrestling coach position had a statistically significant adverse impact on women. Marcoux v. DeForest Joint Sch. Dist. No. 10 (LIRC, 09/25/80).

632.3 Adequacy of sample size and statistical evidence

The Complainant's use of the employer's data regarding the ages of people who had been hired for a custodial maintenance position during a seven-year period was insufficient to establish age discrimination since the statistical sample was too small to be of any significance and the Complainant failed to provide evidence of the number and distribution of older persons in the applicant pool. Kurtz v. Sch. Dist. of St. Croix Falls (LIRC, 06/10/93).

A Complainant's attempt to establish disparate impact based upon two promotional postings failed because the numbers involved were simply too small to allow a conclusion to be drawn with any degree of confidence in its statistical significance. Moncrief v. Gardner Baking (LIRC, 07/01/92).

Where the effect of a challenged practice on two blacks, or at most seven minorities, was compared to its effect on 82 whites, it was concluded that the sample size was too small to allow a meaningful conclusion that there was a disparate impact. Davis v. City of Milwaukee (LIRC, 09/05/86).

Although an employee presented evidence that, in one year, 9% of the workforce was black (23 out of 253 hourly employees) and 57% of those discharged were black (eight out of 14), the actual number of black workers discharged is too small to draw any statistically significant conclusions. Story v. Massey-Ferguson (LIRC, 11/06/81).

To establish a prima facie case of disparate impact, a female job applicant must show that the hiring procedure has a substantial adverse impact on women, i.e., that the hiring process selects significantly more males than females when compared to the number that apply. However, the employer's lack of female police officers does not establish a prima facie case under a disparate

impact theory where the size of the police force is small, the frequency of vacant positions is minimal and the number of female applicants is low. Tall v. City Council of Shullsburg (LIRC, 05/13/80).

633 Respondent's burden to show job-relatedness

Once the Complainant has established a prima facie case, the employer may attempt to rebut the prima facie case by way of evidence that the employment practice or selection device has a manifest relationship to the employment in question. Moncrief v. Gardner Baking (LIRC, 07/01/92).

Unlike Title VII, which protects bona fide seniority systems, the Wisconsin Fair Employment Act has no specific protection for such systems, and if it is demonstrated that the application of such systems has a disparate impact on minorities, the employer must demonstrate the requisite business necessity or job-related defense for the practice or be found to have engaged in illegal discrimination. Lopez v. Milwaukee County (LIRC, 11/04/86).

Once a Complainant establishes that an employer's policies have a disparate impact on blacks or other protected groups, the employer's burden is to prove that the policy is based on a legitimate business necessity. That burden is not one merely of articulation, but of proof. Nickols v. LIRC (A.O. Smith) (Milwaukee Co. Cir. Ct., 12/03/82).

If the Complainant can demonstrate that a practice has a disparate impact, the employer has the burden of showing that its selection process bears a demonstrable relationship to successful job performance. Tall v. City Council of Shullsburg (LIRC, 05/13/80).

634 Complainant's burden to demonstrate availability of alternatives with lesser adverse impact

If an employer has attempted to rebut the Complainant's prima facie case by presenting evidence that the employment practice or selection device in question has a manifest relationship to the employment in question, the Complainant may still prevail by showing that there are alternative methods available which will meet the employer's goals but with less of an adverse impact. Moncrief v. Gardner Baking (LIRC, 07/01/92).

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The Complainant alleged that she had been discriminated against by the Respondent on the basis of sex and age when it did not hire her for a position as a librarian. The Complainant appeared to offer a disparate impact theory of sex discrimination by offering data regarding the sex and age of certain people who were hired within the Respondent's library system. However, disparate impact must be proved by statistical evidence, significant (in the statistical sense) to the competence level required by law, comparing the effect of an employer's selection device or standard on employees in the different groups being compared. The Complainant failed to offer this type of statistical evidence, and any claim of disparate impact discrimination failed as a result. Rosneck v. UW-Madison (LIRC, 08/10/06). aff'd sub nom. Rosneck v. LIRC and UW-Madison (Dane Co. Cir. Ct., 01/22/07); aff'd (Ct. App., Dist. IV, unpublished opinion, 01/10/08).

The Complainant claimed that the Department of Corrections' use of career executive reassignment had a significantly disproportionate effect on the opportunities of minorities to compete for open positions because the percentage of minorities in the DOC career executive program is less than the percentage of minorities available in the relevant labor pool. The Complainant's claim rested upon his assertion

that only 5.7% of the DOC career executives were minorities, as compared to 7.5% of qualified administrators in the general labor pool. The Complainant argued that the difference between 5.7% and 7.5% represents a significantly disparate impact because the federal government uses an "80% rule" in evaluating adverse impact for the purposes of affirmative action. The Wisconsin Personnel Commission was not required to adopt such a rule. Its conclusion that even the difference between 5.7% and 7.5% was not significant enough to establish a disparate impact in this case was a reasonable one. Oriedo v. Wis. Pers. Comm'n (Ct. App., Dist. IV, unpublished opinion, 04/25/02).

Where the selection device at issue was not pass/fail but involved the ranking of candidates, a balanced bottom line could be considered as a defense and a disproportionate distribution of blacks in the seniority rankings was not found to have a per se disparate impact. The Complainant did not establish unlawfully discriminatory disparate impact where he failed to present expert statistical evidence to demonstrate that the distribution of blacks (in terms of relative seniority) was different to a statistically significant degree from what might be expected to arise by chance. Moncrief v. Gardner Baking (LIRC, 07/01/92).

In seniority-based layoffs, 14 of the employer's 26 white fire fighters were laid off while all 7 of the Respondent's non-white fire fighters were laid off. This established that the use of seniority of a selection method in layoff had a disparate impact on minority fire fighters. Where the Respondent offered no evidence that its reliance on seniority was related to successful employment as a fire fighter, it was concluded that an illegal discriminatory impact had been shown. Lopez v. Milwaukee County (LIRC, 11/04/86).

A written exam had a discriminatory impact where none of the 10 blacks but 38 of 55 white applicants passed, and the test was not a valid predictor of job performance and had not been validated. Turner & Poindexter v. Racine Co. (LIRC, 05/25/83).

Rejection of a job applicant because she failed to meet minimum height (5 feet, 8 inches) and weight (148 lbs.) requirements had a disparate impact on females and could not be justified where the employer did not consider each applicant's ability to pass the physical agility tests. Ruffin v. Village of West Milwaukee (DILHR, 02/02/77).

Non-validated tests and subjective promotion procedures are not per se discrimination and the employee failed to demonstrate that they had a statistically valid adverse impact on blacks. Greene v. DOA (DILHR, 09/21/76).

Where an employer had hired predominantly females into the custodial department, a requirement that only employees in that department forfeit seniority upon transferring perpetuated the effects of past discrimination by discouraging transfers and locking the females into lower paying, less desirable jobs; and the employer could not prove business necessity by reference to reduced training requirements or turnover. Haug v. Ohio Med. Prod. (DILHR, 08/05/75).

The prohibition in a union contract against the transfer out of janitress jobs had a disparate impact on females and constituted sex discrimination where the female employees showed that: no males have ever been employed in those jobs; although the employer could assign any employee to the jobs, it only assigned females; only females on layoff were informed of such job openings; and the title "janitress" has a female connotation and would foreseeably discourage more male than female applicants. Bruce v. Parker Pen (DILHR, 11/14/72).

640 Probable Cause

641 Definition of probable cause

The critical question for the commission when reviewing a probable cause decision is whether there is more than a suspicion that discrimination occurred. Tohl v. CUSA ES, LLC (LIRC, 11/21/13).

The concept of probable cause focuses on probability and not on possibilities. In contrast, the concept of the prima facie case focuses on inference and presumption, which are closer to possibility and suspicion than to probability. Therefore, a Complainant is required to establish more than a prima facie case in order to sustain the burden of showing probable cause to believe that discrimination has occurred as alleged. Barnes v. Miller Brewing Co. (LIRC, 05/14/12)

A Complainant is required to establish more than a prima facie case in order to sustain his burden to show probable cause to believe that discrimination has occurred. The conclusion of the circuit court in the case of Gentilli v. LIRC (Dane Co. Cir. Ct., 03/30/90) that at the probable cause stage the most a Complainant should be required to do is set forth that which would be required to make a prima facie case, does not establish binding precedent or authority. Braunschweig v. SSG Corp. (LIRC, 08/31/06).

The concept of probable cause focuses on probabilities rather than possibilities, and it lies somewhere between preponderance of the evidence and suspicion. The concept of the prima facie case, however, focuses on inference and presumption, which are more closely akin to possibility and suspicion than to probability. As a result, the Complainant is required to establish more than a prima facie case in order to sustain his burden to show probable cause to believe that discrimination has occurred as alleged. In this case, although the Complainant established a prima facie case of discrimination, he did not show that the legitimate, non-discriminatory reason offered by the Respondent for his discharge was probably a pretext for age discrimination. Stichmann v. Valley Health Care Ctr. (LIRC, 06/14/05).

It was appropriate to assess the credibility of the Respondent's director of human resources at a probable cause hearing where the issue was whether his awareness of the Complainant's medical condition was a determining factor in his decision to terminate the Complainant. Roncaglione v. Peterson Builders (LIRC, 08/11/93).

In Boldt v. LIRC, 173 Wis. 2d 469, 469 N.W.2d 676 (Ct. App. 1992), the Court of Appeals explained that establishing probable cause is not a preponderance of the evidence test; however, the Court suggested that the Complainant's burden was to prove that discrimination "probably" occurred. Roncaglione v. Peterson Builders (LIRC, 08/11/93).

The concept set out in sec. Ind 88.01(8), Wis. Adm. Code, focuses on probabilities, not possibilities. The rule adopts the viewpoint of a prudent, not a speculative, imaginative or partisan person. As such, it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is LIRC's duty to consider the facts of each case and determine whether they meet this fluid concept. Boldt v. LIRC, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992).

Probable cause cases are to be analyzed under the McDonnell-Douglas framework, but require a quantum of proof that is less than that of a case on the merits. Frierson v. Ashea Indus. Sys. (LIRC, 04/06/90).

The probable cause standard is primarily a screening mechanism. Gentilli v. LIRC (Badger Coaches) (Dane Co. Cir. Ct., 03/30/90).

Probable cause is somewhere between preponderance and suspicion. Hintz v. Flambeau Med. Ctr. (LIRC, 08/09/89).

At a probable cause hearing, Complainants are permitted to present their case before a quasi-judicial officer and receive a more exacting scrutiny of the evidence than would otherwise be available in the normal investigative process. Lienhardt v. Pacon (DILHR, 01/21/76).

Concepts such as "burden of proof" and "probable cause" are often elusive and incapable of being precisely defined. Street v. DeLaval Separator Co. (DILHR, 06/27/75).

The purpose of a no probable cause hearing is to afford the complaining party an opportunity to present evidence sufficient to demonstrate probable cause to believe that discrimination has occurred, and it is not an opportunity to review the initial determination or the investigative technique of the field representative. Street v. DeLaval Separator Co. (DILHR, 06/27/75).

Probable cause does not mean proof of discrimination to a reasonable certainty, but proof within a reasonable probability that a full hearing will establish discrimination to a reasonable certainty. Marshall v. Indus. Comm'n (Dane Co. Cir. Ct., 02/23/67).

642 Complainant's burden of proof

Generally a Complainant must prove more than a *prima facie* case in order to establish probable cause. However, if the Respondent chooses not to present any evidence of a legitimate, nondiscriminatory reason for its actions to rebut the Complainant's *prima facie* case, a finding of probable cause will result. Vaserman v. Lakeshore Med. Clinic Ltd. (LIRC, 02/28/14).

The Complainant wondered why one decision in her case found probable cause, while a second decision found no discrimination on the merits. The burden of proof at the probable cause hearing was lower than at the hearing on the merits, the evidence introduced at the two hearings was not identical, and two different administrative law judges were involved in making the decisions. Robbins v. Extendicare Health Serv., Inc. (LIRC, 02/13/14) (unavailable online).

A Complainant is required to establish more than a *prima facie* case in order to sustain the burden of showing probable cause to believe that discrimination has occurred. Sec. 218.02(8), Wis. Admin. Code, provides that probable cause means that there is "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." The Complainant has the burden to show this reasonable ground for belief that discrimination occurred. Even if some evidence of discrimination exists in a case, it might still be concluded that (based upon all of the evidence produced at the hearing) it was not probable that discrimination occurred. Barnes v. Miller Brewing Co. (LIRC, 05/14/12).

Although the standard of proof at a probable cause hearing is low, the burden of showing probable cause rests on the Complainant. Even if some evidence of discrimination exists in a case, the trier of fact might still conclude that, based upon all the evidence produced at the hearing, it was not *probable* that discrimination occurred. The probable cause concept focuses on "probabilities" and not "possibilities." Oler v. TTM Technologies (LIRC, 06/23/11).

A Complainant is generally required to do more than establish a prima facie case in order to sustain his or her burden of establishing probable cause to believe that unlawful discrimination has occurred. However, absent the Respondent's presentation of evidence of a legitimate, non-discriminatory reason

for the Complainant's discharge, or the presentation of any evidence to rebut the Complainant's testimony, this is not the case. A finding of probable cause results where the Respondent has offered no evidence at the hearing to rebut the Complainant's prima facie case. Nevels-Ealy v. County of Milwaukee (LIRC, 03/14/08).

The Complainant is required to establish more than a prima facie case in order to sustain his burden to show probable cause to believe that discrimination has occurred as alleged. It is incorrect that in a probable cause proceeding disputes as to facts should be resolved in favor of the Complainant. On the contrary, factual disputes are to be resolved by assessing and weighing the evidence offered by the parties at hearing. Ford v. Lynn's Hallmark (LIRC, 06/27/05).

The Complainant's burden is to prove that probable cause exists to believe that discrimination occurred as alleged in the complaint. The Complainant's argument that he should prevail if any credible evidence exists to support his claim is rejected. Josellis v. Pace Indus. (LIRC, 08/31/04).

Though the standard of proof at a probable cause hearing is low, the burden of showing probable cause rests with the Complainant. Boldt v. LIRC, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992).

The probable cause standard should be less stringent than, or, at the very most equivalent to, that required to set forth a prima facie case of employment discrimination. At the probable cause stage, the very most that a Complainant should be required to do is to set forth that which would be required to make out a prima facie case. Gentilli v. LIRC (Dane Co. Cir. Ct. 03/30/90).

Although the Complainant claimed she was replaced by a younger employee, there was no basis for her testimony. Complainant showed no foundation to establish that she was in a position to know who replaced her. Therefore, a finding of no probable cause was appropriate. Hintz v. Flambeau Med. Ctr. (LIRC, 08/09/89).

The mere articulation of a bare prima facie case is generally not adequate to establish probable cause except in cases in which the employer has offered no evidence to rebut that prima facie case. Saltarikos v. Charter Wire Corp. (LIRC, 07/31/89).

In determining whether there is probable cause, a less rigorous standard of proof is involved. However, the McDonnell-Douglas framework is still a useful analytical tool. Larson v. DILHR (Wis. Pers. Comm'n, 01/22/89).

Sec. 227.08, Stats., implies that the Commission may consider only evidence having reasonable probative value when determining whether there is probable cause to believe a violation of the Fair Employment Act has occurred. In this case, the Complainant could not remember whether she had complained about the alleged sexual harassment. Complainant submitted her notes at the hearing, but the notes did not support a finding that she had informed the Respondent about the alleged sexual harassment. Accordingly, the Commission concluded that a reasonable person could not believe that Complainant had informed the Respondent about the alleged sexual harassment. Schoenhofen v. Alcoholism & Drug Council of Waupaca County (LIRC, 09/21/87).

The Complainant has the burden to show probable cause to believe discrimination occurred as alleged. This is a lesser burden of proof than the burden applicable to Complainants in a hearing on the merits. Under the Wisconsin Fair Employment Act, the initial burden of proof is on the Complainant to show a prima facie case of discrimination. If Complainant meets this burden, the Respondent then has the burden of articulating a non-discriminatory reason for the actions taken which the Complainant may, in

turn, attempt to show was a pretext for discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). A similar analysis is appropriate at a probable cause hearing; however, the standard by which the evidence is measured is not as demanding as that used at a hearing on the merits. Fluekiger v. Mathy Constr. Co. (LIRC, 05/14/87).

The Complainant's burden of proof is less in a probable cause proceeding than it would be at a hearing on the merits. In a probable cause proceeding the Complainant's burden is to show a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief, that discrimination occurred. Herling v. Dealers Office Equip. (LIRC, 02/18/87).

The Personnel Commission rejects Complainant's argument that the evidentiary threshold necessary to establish probable cause is quite minimal, and that any and all facts giving rise to competing inferences should be resolved in the Complainant's favor. The Commission notes that this is similar to the "substantial evidence" standard used by courts in judicial review, and if applied as the standard for determining probable cause would not meet the clear purpose of the legislature in establishing a probable cause standard, which was to provide a screening device to sort out cases lacking a certain threshold degree of substance. However, the Commission also rejects the Respondent's approach that a preponderance of the evidence standard should be applied. The Commission concludes that probable cause requires a degree of proof that is less demanding than the preponderance standard applicable on the merits, but more demanding than the standard urged by the Complainant. The Commission agrees with the characterization of probable cause "as being somewhere between preponderance and suspicion." Winters v. DOT (Wis. Pers. Comm'n, 09/04/86).

In a probable cause proceeding the evidentiary standard applied is not as rigorous as that which is required at a hearing on the merits. Nevertheless, it is useful to use the McDonnell-Douglas format in analyzing the record. Mitchell v. UW-Milwaukee (Wis. Pers. Comm'n, 04/04/86).

The Commission is not limited at the probable cause hearing to merely examining whether the petitioner has presented evidence, which, if believed, would be sufficient to support his claim. Rather, the test is whether the Commission believes, upon its examination of the evidence and its review of the credibility of the witnesses, that discrimination has probably occurred. McLester v. Wis. Pers. Comm'n, (Ct. App., Dist. III, unpublished opinion, 03/12/85).

The question in a probable cause proceeding is whether there is any credible evidence in the record sufficient to support a claim that the Complainant was discriminated against. If there is such evidence, even if it is disputed or outweighed by contrary evidence, a finding of probable cause would have to be made. Christner v. LIRC (Dane Co. Cir. Ct. 06/30/78).

At a hearing on the issue of probable cause, a Complainant is not held to the same standard which applies to a full hearing on the merits. Lienhardt v. Pacon Corp. (LIRC, 01/21/76).

A hearsay statement alone is insufficient competent evidence to support a probable cause finding that discrimination has been committed. Hunt v. City of Madison (DILHR, 02/11/75).

643 Credibility considerations

It is appropriate for an Administrative Law Judge to make credibility assessments at a hearing on the issue of probable cause. Oler v. TTM Technologies (LIRC, 06/23/11).

The Labor and Industry Review Commission believes that it is required to make credibility determinations at probable cause hearings when issues of credibility exist. Sommerfeldt v. AT&T (LIRC, 10/27/93).

The Department is entitled to make credibility determinations at probable cause hearings. In this case, LIRC found the Complainant's testimony about seeking psychiatric help not to be credible and concluded that there was no probable cause to believe that he suffered from a handicapping mental illness. Boldt v. LIRC, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992).

The Personnel Commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause. The Personnel Commission is not limited to merely examining whether the Complainant has presented evidence which, if believed, would be sufficient to support his claim. Cozzens-Ellis v. UW-Madison (Wis. Pers. Comm'n, 02/26/91).

The Complainant's testimony was contradicted by one of her own exhibits. Further, her testimony was not supported by one of her own witnesses. Complainant's testimony was also inconsistent on some points. Considering all of the evidence, the Commission concluded that there was no probable cause to believe the Complainant had been discriminated against. Albertson v. Methodist-Meriter Hosp. (LIRC, 09/20/90).

In proceedings limited to the issue of probable cause, the decision-maker is not to weigh the testimony by balancing the credibility of witnesses, but rather merely determine whether Complainant's evidence is believable. (Marshall v. Indus. Comm'n, Dane Co. Cir. Ct., 1 EPD par. 9772 p. 709). The fact that the Administrative Law Judge appears to have engaged in weighing the testimony by balancing the credibility of witnesses leads the Commission to conclude that the Administrative Law Judge decided this case on the merits by application of the "preponderance of the evidence" standard rather than deciding it by application of the lesser "probable cause" standard. Joseph v. Central Parking (LIRC, 08/20/90).

The Complainant was not a credible witness because he testified dishonestly with respect to a document which was received into the record. The document was a collection of daily production sheets on which the employee required data concerning the jobs he had run. The Complainant offered this packet of production sheets as evidence supporting his claim of harassment because of national origin, testifying repeatedly that notations he made on those sheets were contemporaneously made on the same day or at most within a few days of the incident. This testimony was rendered unbelievable by the substance of the notation on the production sheet for December 20, 1985, which concerned a meeting which indisputably took place in March of 1986. This established that the notations were clearly made long after the fact in order to bolster the Complainant's case. The Complainant's insistence that this notation was contemporaneously made, even in the face of this impossibility, left the Commission disinclined to credit him as a believable witness. Since his testimony, even standing by itself, could not be believed, it failed to establish to the burden required in a probable cause hearing, that the facts concerning his discharge were as alleged. Saltarikos v. Charter Wire Corp. (LIRC, 07/31/89).

The Commission found it unnecessary to address the question of how credibility issues should be resolved in hearings restricted to the issue of probable cause. Whether the Commission were to follow the test of Marshall v. Indus. Comm'n (Dane Co. Cir. Ct., 02/23/67), followed in Lienhardt v. Pacon (DILHR, 01/21/76), that the decision-maker is not to weigh the testimony by balancing the credibility of witnesses but rather is to merely determine whether the Complainant's evidence is believable, or the

view expressed in McLester v. Wis. Pers. Comm'n (Ct. App., Dist III, unpublished opinion, 03/12/85) that it is appropriate to weigh the credibility of competing witnesses in a probable cause hearing, it would arrive at the same result in this case. Ward v. Programmed Cleaning, Inc. (LIRC, 07/26/89).

The Commission did not have to disregard the testimony of the Complainant's witness because the witness lives with the Complainant. In this case, any incentive which the witness might have to misrepresent her testimony in favor of the Complainant based upon their living arrangement was offset by her incentive not to misrepresent the facts based upon her continued employment with the Respondent and her resulting dependence on the Respondent for her livelihood. Herling v. Dealer's Office Equip. (LIRC, 02/18/87).

The Personnel Commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause. The Commission is not limited at the probable cause hearing to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim. Rather, the test is whether the Commission believes, upon its examination of the evidence and its view of the credibility of the witnesses, that discrimination has probably occurred. McLester v. Wis. Pers. Comm'n (Ct. App., District III, unpublished opinion, 03/12/85).

In determining whether there is probable cause, DILHR is not to weigh the credibility of the complaining party, but to determine if the complaining party's evidence is believable. Lienhardt v. Pacon (DILHR, 01/21/76).

The Commission is not to weigh the testimony by balancing the credibility of the witnesses, but rather merely determine whether the Complainant's evidence is believable. Marshall v. Indus. Comm'n of Wis. (Dane Co. Cir. Ct., 02/23/67).

644 Cases

The Complainant made out a prima facie case by evidence that he was qualified for a promotion and was told he would be promoted, but the position was given to an employee not in the protected class while the Complainant never got a chance to apply. The Respondent failed to articulate a non-discriminatory reason for its actions. Because the Complainant's evidence raised a suspicion that discrimination occurred, the Complainant was entitled to a hearing on the merits. Alexander v. Hous. Auth. of the City of Milwaukee (LIRC, 01/30/2020).

Proof that other individuals in the protected class were paid less than the complainant is not evidence that the Complainant was discriminated against in pay. Instead, the Complainant must show that an employee or employees outside of the protected class earned more than he did for similar work. Lofton v. The Jor-Mac Company, Inc. (LIRC, 04/19/18).

Considering the totality of the evidence presented, the Complainant did not show probable cause to believe that sex or race was a motivating factor in assignment of work. The Complainant failed to show that employees who were given the assignment that she wanted were similarly situated to her. Evidence also showed that someone within the Complainant's protected category was treated favorably with respect to her assignment. While not conclusive, an employer's favorable treatment of other members of a protected class can show lack of discriminatory intent on the part of the employer. Liddell v. Kleen Test Products, Inc. (LIRC, 04/11/14).

The standard of proof at a probable cause hearing has been described as "low." Where an employer has become aware that the Complainant's deafness is causing problems, and subsequently terminates the Complainant based on a claim that there is not enough work, while seeking other employees, there is reasonable ground for belief that discrimination has occurred. Buska v. Central Bldg. Maint. (LIRC, 09/28/95).

The Complainant's failure to provide medical certification from a health care provider explaining the extent to which he was unable to perform his employment duties, when requested by the employer, establishes that there is no probable cause to believe that the employer violated the Wisconsin Family and Medical Leave Act by terminating the employee following his absence from work without medical documentation that he was unable to perform his duties. Randolph v. DILHR (Ct. App., Dist. II, unpublished opinion, 05/13/92).

Probable cause exists to believe discrimination occurred where an employer failed to establish that the requested accommodation for a physical handicap was unreasonable or posed a hardship when the employer's testimony was based on mere speculation that creating a part-time job for a former full-time employee would increase payroll costs and would cause inefficiencies as the result of job sharing. Gartner v. Hilldale, Inc. (LIRC, 05/12/92).

The mere fact that the duties that the Complainant performed remained after his discharge and that the remaining employees were younger than the Complainant does not suffice to establish probable cause to believe that the Respondent discharged the Complainant because of age. Gentilli v. Badger Coaches (LIRC, 03/21/89), aff'd (Dane Co. Cir. Ct., 03/30/90).

There was no probable cause to believe that the Respondent discriminated against the Complainant by terminating his employment because of sex where the Complainant had acted in a fashion that led female employees to believe that he was exposing himself to them and where female employees had reported that he made obscene phone calls to them. Hammer v. G.E. Medical Sys. (LIRC, 08/29/89).

There was probable cause to believe that the Respondent violated the Wisconsin Fair Employment Act by terminating the employment of the Complainant because of handicap where the Complainant established that she was handicapped, the Complainant was not inherently incredible when she testified, and where it could be inferred that the Respondent's claim was pre-textual. Johnson v. Simpson Elec. (LIRC, 04/12/89).

There was no probable cause to believe that the termination of the Complainant's employment was because of age where the Respondent, due to poor financial conditions, laid off several employees based on seniority and employment status. Schneider v. Northwestern Mutual Ins. of Milwaukee (LIRC, 01/26/89).

In a hearing on the issue of probable cause, Respondent failed to establish that Complainant's handicap was reasonably related to the Complainant's ability to undertake the duties of a new position where there was little evidence supporting a doctor's establishment of lifting, bending, stooping and twisting restrictions; where the doctor's conclusion was based on Complainant's notations of his medical history and an examination limited to five minutes which did not include questions regarding the meaning of those notations; and where the doctor was not shown to be aware of how the duties of the Complainant's current position compared to the duties of the position the Complainant desires. Lauri v. DHSS (Wis. Pers. Comm'n, 11/03/88).

Where the Respondent was informed by a physician's assistant that the Complainant was suffering from an inflammatory arthritic condition, and the Respondent thus was aware of the Complainant's handicap, and where the Respondent thereafter terminated the Complainant for failing to comply with a call in requirement without first providing him a written warning, as it was its practice to do, the evidence was adequate to raise an inference of discrimination sufficient to justify a finding of probable cause. Herling v. Dealers Office Equip. (LIRC, 02/18/87).

The facts that a terminated Complainant was in the protected age group and that her replacement was not are not sufficient, standing alone, to support a finding of probable cause that age discrimination occurred. Sanrope v. Hillsboro Pub. Sch. (LIRC, 08/22/86).

Complainant's testimony in an age discrimination case that her immediate supervisor told her that she should take early retirement was incredible because the Complainant had failed to make this allegation any time prior to the probable cause hearing. Further, even if the remark was made, Complainant's own testimony indicates that the context in which the remark was allegedly made indicated that the remark was not an indication of discrimination. Thus, Complainant presented no credible evidence sufficient to support a finding of probable cause to believe that her age was a determining factor in Respondent's decision to discharge her. Sanrope v. Hillsboro Pub. Sch. (LIRC, 08/22/86).

Where the Complainant offered testimony sufficient to establish a prima facie case of age discrimination, and the Respondent offered no evidence at the hearing to rebut the prima facie case, a finding of probable cause resulted. Gunderson v. Bonded Spirits Corp. (LIRC, 07/17/86).

649 Miscellaneous

Generally a Complainant must prove more than a *prima facie* case in order to establish probable cause. However, if the Respondent chooses not to present any evidence of a legitimate, nondiscriminatory reason for its actions to rebut the Complainant's *prima facie* case, a finding of probable cause will result. Vaserman v. Lakeshore Med. Clinic Ltd. (LIRC, 2/28/14).

650 Specific Issues

651 Proof of medical facts [see sec. 123.6 also]

If an employee is discharged because of bad behavior which was caused by a disability, the discharge is, in legal effect, because of that disability. Whether an individual's bad behavior is caused by a mental disorder from which the individual suffers, though, is a question of medical/scientific fact on which expert testimony is required. It cannot simply be presumed that every act of bad behavior engaged in by a person who has a mental disorder, is caused by that mental disorder; it may or may not have been. The question is to be resolved by weighing the expert evidence in the record on that question. Maeder v. UW-Madison, UW Police (LIRC, 06/28/13).

It was error for an Administrative Law Judge to exclude medical records solely on the basis that they lacked certification. However, in this case, even if the Administrative Law Judge had not excluded medical records because they lacked certification, the disputed records would not have been sufficient to warrant a conclusion that the Complainant had a disability within the meaning of the Wisconsin Fair Employment Act. The medical documents consisted of an X-ray report, a memo from the Complainant's family practice doctor, an unsigned and difficult-to-read medical report, and general instructions about post-surgical care. These documents suggested that the Complainant was suffering from neck, shoulder

and back pain. However, they did not indicate that the Complainant had been diagnosed with any permanent medical condition that would constitute a disability. Thoreen v. Fabco Equip. (LIRC, 11/25/09).

Although the Court of Appeals in Rutherford v. LIRC, 2008 WI App 66, 309 Wis. 2d 498, 752 N.W.2d 897, held that medical records could not be excluded from Chapter 227 administrative hearings simply because they were not certified, the Court did not deal directly with the issue of the probative value of documents created by a medical provider and received into the hearing record if they were not authenticated either through certification or through the testimony of the provider. Any medical opinion stated in such a document would constitute hearsay evidence. Savaglio v. LeBlanc, Inc. (LIRC, 01/30/09).

Where the existence of a disability is in dispute, the Complainant must present competent medical evidence establishing the nature, extent, and permanency of an impairment. The only medical evidence the Complainant presented in this case was uncertified memos and reports prepared with respect to his worker's compensation injuries. He provided no non-hearsay medical evidence showing what tests were performed and what diagnosis was reached. The Complainant contended that the expense of bringing a doctor to a discrimination hearing is burdensome to Complainants, who are often with limited means. The Complainant suggested that there should be a standard medical form which could be used for discrimination hearings. However, a Complainant can meet his burden of establishing a disability through presentation of certified medical documents or documents with "other circumstantial guarantees of trustworthiness." Tschida v. UW-River Falls (LIRC, 12/30/08).

An Administrative Law Judge improperly refused to admit or consider uncertified copies of medical records which the Complainant wished to introduce at hearing. Chapter 227, Stats., requires very relaxed rules of evidence in administrative proceedings. Further, there is no administrative rule which requires the submission of certified copies of medical records. In excluding the uncertified copies, the Administrative Law Judge made no analysis of the factors governing admissibility of evidence in these hearings, which are provided by statute. The Complainant should have been permitted to introduce her treating doctor's opinion that she had a permanent disability, where that opinion was stated in his treatment records, even though the Complainant had not been able to get certified copies of the records. Rutherford v. LIRC, 2008 WI App 336, 309 Wis. 2d 498, 792 N.W.2d 897.

In order to establish that she is an individual with a disability within the meaning of the Wisconsin Fair Employment Act, the Complainant must present competent medical evidence to establish the existence, nature, extent, and permanence of an impairment, if disputed as a matter of fact. It is not enough to state a diagnosis or to list symptoms. The Complainant must establish through credible and competent evidence how or to what degree these symptoms made achievement unusually difficult for her or limited her capacity to work. As a result, the fact that the Complainant's treating physician rendered a diagnosis that she suffered from migraine headaches, or suffered the symptoms of tendonitis, would be insufficient alone to establish the existence of a disability. There was no competent medical evidence in the record to establish that the Complainant's tendonitis was permanent. The medical evidence with respect to migraine headaches indicated that the condition was permanent, but that it did not create any restrictions which would impede the Complainant's ability to perform her assigned duties. Thus, the Complainant failed to sustain her burden to prove that she qualified as an individual with a disability. Fields v. UW Hosp. & Clinics Auth. (LIRC, 02/12/07).

The medical evidence of record generally consisted of return-to-work slips, FMLA forms completed by the Complainant's treating physicians, and a letter summarizing the results of an independent medical examination. The physicians who ostensibly authored these documents did not testify at hearing and,

as a result, these documents were uncorroborated hearsay evidence. The documents were not certified, and had no other circumstantial guarantees of trustworthiness sufficient to qualify for application of the hearsay exception set forth in sec. 908.03(24), Stats. As a result, the Complainant failed to show by competent medical evidence the existence, nature, extent, or permanence of any impairment. The Complainant's testimony that she suffered a heart attack from which she had not fully recovered and that she was diagnosed with diabetes was not sufficient, without more, to satisfy this burden. Moreover, even if competent medical evidence establishing the existence of a cognizable impairment were a part of the record, the evidence did not show that the Complainant's diabetes or heart condition placed a substantial limitation on a major life activity or on her capacity to work. Seil v. Dairy Farmers of Am. (LIRC, 08/26/05).

The Complainant failed to show by competent medical evidence that she suffered from an actual impairment within the meaning of the Wisconsin Fair Employment Act. The records that the Complainant submitted at hearing were ostensibly prepared by physicians who did not testify at hearing. As a result, these documents were uncorroborated hearsay evidence. The documents were not certified, and they had no other circumstantial guarantees of trustworthiness sufficient to qualify for application of the hearsay exception set forth in sec. 908.03(24), Stats. There was, however, evidence that the Respondent perceived the Complainant as an individual with a disability. Wodack v. Evangelical Lutheran Good Samaritan Soc'y (LIRC, 08/05/05).

To demonstrate that a disability exists under the Wisconsin Fair Employment Act, the Complainant must present competent evidence of a medical diagnosis regarding the alleged impairment. Erickson v. LIRC (Ct. App., Dist. II, unpublished opinion, 08/03/05).

Although the Respondent did not dispute that the Complainant had been treated for a neck and back injury and for carpal tunnel syndrome, the Complainant was required to offer competent medical evidence as to the nature, extent, and permanence of these conditions in order to sustain his burden to prove that these conditions constituted impairments within the meaning of the Wisconsin Fair Employment Act. Cramer v. Woodman's Food Mkt. (LIRC, 01/14/05).

The Complainant submitted sufficient competent evidence to warrant a conclusion that she suffers from carpal tunnel syndrome. She submitted a signed "Physician's Statement of Disability," in which her attending physician certified that she was hospitalized with bilateral carpal tunnel syndrome. In addition, she submitted two different independent medical evaluations, both showing a diagnosis of carpal tunnel syndrome. These reports, while not certified, had sufficient circumstantial guarantees of trustworthiness so as to fall under the hearsay exception contained in Sec. 908.03(24), Wis. Stats. Jones v. United Stationers (LIRC, 01/25/01).

Expert testimony should be adduced concerning matters involving special knowledge, skill or experience on subjects which are not within the realm of the ordinary experience of mankind. Expert medical testimony was required to establish that the Complainant's vociferous reaction to the announcement that another employee was being promoted to a position for which he had sought promotion was caused by his obsessive compulsive disorder (OCD). Without expert medical testimony, the Department would be speculating as to whether a causal link existed between the Complainant's disability and the conduct which triggered his ultimate discharge. Wal-mart Stores v. LIRC, 2000 WI App 272, 240 Wis.2d 209, 621 N.W.2d 633.

Even though the Complainant suffered from the disease of obsessive compulsive disorder (OCD), he was not an "expert" on OCD, since there is no indication in the record that he possessed scientific, technical or other specialized knowledge that would qualify him to give an expert opinion on whether

certain behavior was caused by his OCD. Wal-mart Stores v. LIRC, 2000 WI App 272, 240 Wis.2d 209, 621 N.W.2d 633.

No expert medical testimony was required to establish that the Complainant had a serious health condition within the meaning of the Wisconsin Family and Medical Leave Act where there were outward or overt manifestations of the fact that her condition interfered with her ability to perform her work duties. However, expert medical testimony was necessary to establish that her leave was medically necessary where her serious health condition did not manifest symptoms that lay people would recognize as necessitating a leave. Sieger v. Wis. Pers. Comm'n, 181 Wis. 2d 845, 512 N.W.2d 220 (Ct. App. 1994).

The Complainant failed to establish that she had a handicap where she never produced any expert medical evidence to establish that she had such a condition, or that the condition would satisfy the standard for an actual impairment. Two medical excuses were insufficient to establish an actual impairment since they merely referred to the Complainant's condition as an illness. The record was devoid of sufficient evidence to establish what condition the Complainant had, the nature of the condition, or the extent of the condition (i.e., whether it was temporary or permanent in nature). Plaski v. Blue Cross/Blue Shield United of Wis. (LIRC, 05/21/93).

Several letters to the employer from the Complainant's psychologist were not adequate to satisfy the employer's request that the employee provide certification from a health care provider explaining the extent to which the employee was unable to perform his or her employment duties under the Wisconsin Family and Medical Leave Act. The letters did not address specifically the employee's ability to perform employment duties and the general finding of a 50 percent disability from the Department of Veteran Affairs failed to specifically address the Complainant's ability to perform his employment duties. Therefore, the letters did not comply with the employer's request for medical certification. Randolph v. DILHR (Ct. App., Dist. II, unpublished opinion, 05/13/92).

The mere fact that the employer has made its employment decision in reliance upon the opinion of a doctor does not protect the employer from a finding of discrimination. Where there is conflicting medical evidence, the trier of fact conclusively determines which view of the evidence it will accept. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

Although the Complainant testified that he had gone to a rehabilitation hospital for treatment and had been diagnosed as an alcoholic, the hearing examiner was entitled to give no weight to this testimony, since no expert testimony was received on the subject. Alcoholism is a disease, the diagnosis of which is matter of expert medical opinion proved by a physician and not a layman. Schaafs v. Schultz Sav O Stores (LIRC, 11/06/86).

Since alcoholism is a disease, its diagnosis is a matter of expert medical opinion by a physician and not by a layperson. Connecticut Gen. Life v. DILHR, 86 Wis. 2d 393, 273 N.W.2d 206 (1979).

DILHR (LIRC) commissioners become virtual medical experts as a result of the volume of testimony that they hear and evaluate and they may use this expertise to accept or reject any or all such testimony. Bucyrus-Erie v. DILHR (Parks) (Dane Co. Cir. Ct., 05/14/77), aff'd, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

Merely because a physician states an opinion to a reasonable degree of probability or certainty does not require an administrative agency to accept such an opinion. DILHR may reject such statements made by two doctors testifying for an employer where five doctors thought it would be safe for an epileptic

employee to return to work and where the employee possessed an unrestricted driver's license. Chicago & N.W. R.R. v. DILHR (Pritzl) (Dane Co. Cir. Ct., 06/15/78).

It is a long-standing rule in Wisconsin that it is for DILHR, and not the courts, to evaluate conflicting medical testimony and assess its weight and credibility. Soo Line R.R. v. DILHR (Hintz) (Dane Co. Cir. Ct., 02/25/77).

659 Miscellaneous

The Complainant need not show that the Respondent's actions resulted in tangible harm in order to establish unlawful retaliation. The Respondent's actions in telling the Complainant his chances for a promotion depended on withdrawal of his pending discrimination complaint amounted to unlawful retaliation. Valyo v. St. Mary's Dean Ventures, Inc. (LIRC, 01/29/13).

The Labor and Industry Review Commission has not adopted the view that a complainant is required to prove that an employment action is "material" in order to be actionable under the Wisconsin Fair Employment Act. The statutory language of neither the WFEA nor Title VII imposes this requirement. The imposition of a requirement that alleged discriminatory employment conduct be "material" is a judicially-created requirement in cases brought under Title VII. While federal law may be looked to for guidance in considering discrimination claims under the WFEA, federal law is not binding. Wisconsin courts must construe Wisconsin statutes as it is believed the Wisconsin Legislature intended, regardless of how the U.S. Congress may have intended that comparable statutes be construed. By its terms, the Wisconsin Fair Employment Act is to be liberally construed for the purpose of deterring and remedying discriminatory conduct of employers which infringes employees' civil rights. It would be inconsistent to impose a requirement that discriminatory conduct be "material" simply in an effort to separate what some might consider to be "significant" claims from "trivial" claims. Krushek v. Trane Co. (LIRC, 12/23/10).

What is "material" in an employment relationship may be quite subtle. In a close case, the imposition of a requirement that the alleged adverse employment action be "material" would likely cause the trier of fact to apply his or her own subjective belief as to what is or is not a material adverse action. Krushek v. Trane Co. (LIRC, 12/23/10).

In a claim of retaliation under the Wisconsin Fair Employment Act, a complainant must show that a reasonable individual would have found the challenged action to be adverse. That is, the action might well have dissuaded a reasonable individual from opposing any discriminatory act under the Act or from making a complaint, testifying or assisting in any proceeding under the Act. There is no bright-line rule. Whether alleged discriminatory conduct is sufficiently adverse can only be determined upon careful examination of the facts and circumstances presented in each case. Krushek v. Trane Co. (LIRC, 12/23/10).

The fact that the Complainant was hired by the same individual who fired the Complainant only a short time later creates an inference that there was no improper discrimination. Anderson v. AWC Group (LIRC, 07/21/10).

Not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions would form the basis of a discrimination suit. In this case, the Complainant failed to establish that a memo that was sent to the security director by her lieutenant constituted an adverse employment action. The Complainant alleged that the memo falsely accused her of being the subject of a large number of inmate complaints and of being unprofessional and

demonstrating a lack of tact when working with inmates. The evidence failed to show that the memo cause the security director to form an unfavorable impression of the Complainant. The memo was an internal memo that was not made a part of the Complainant's personnel file. The memo had absolutely no effect on the Complainant's terms or conditions of employment. Gephart v. DOC (LIRC, 11/18/09).

In disciplinary cases in which a Complainant claims to have been disciplined more harshly, determining whether employees are similarly situated normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. When different decision-makers are involved, the situations are rarely similarly situated in all respects. Different decision-makers may exercise their discretion differently. Castro v. Micro-Precision (LIRC, 06/25/04).

While the fact that two of the decision-makers in this case were similar in age to the Complainant might suggest that they would not prejudge his capabilities based upon his age, it is certainly not a truism that employers do not discriminate against individuals who are in the same protected class. Stern v. RF Technologies (LIRC, 02/06/04).

A business owner who discharges an employee because of that person's protected status violates the law. It does not matter if it was done in an attempt to make the business more attractive to an outside party who was interested in investing in it. Trainor v. Hanson (LIRC, 04/28/00).

Generally, the failure to promote an employee will not be construed as a failure to hire, except in rare cases where the position sought by an employee and the position offered by the employer are so different that the employer's action can be considered a failure to hire rather than to promote. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

Where allegations of discriminatory conduct are resolved by a settlement agreement, those allegations will not thereafter be considered if offered as evidence in a proceeding between the parties on a subsequent claim of discrimination. Where an individual claimed that the employer offered him money to give up his employment in an effort to settle an earlier discrimination claim, and such offer had been made prior to the parties having signed a settlement agreement releasing the employer from any and all claims arising out of conduct by the employer prior to the date the agreement was signed, the settlement agreement precluded the Complainant from using the offer as evidence of discriminatory motive in a subsequent discrimination claim alleging, among other things, retaliation in regard to discharge. Moncrief v. Gardner Baking (LIRC, 07/01/92).

Section 700: Procedure

700 PROCEDURE

710 Complaint

711 Timeliness

The Equal Rights Division does not lose competency to proceed on an untimely complaint but will dismiss the complaint when the Respondent successfully raises the affirmative defense that the complaint was untimely filed. Pospychala v. Pine Crest Nursing Home (LIRC, 09/17/21).

In order to toll the statute of limitations when failure to comply with the statute of limitations is due to a medical condition, a Respondent must establish, through competent medical evidence that, because of the medical condition, the Complainant was "entirely incapable of bringing a legal action" during the entire filing time period. Ostopowicz v. United Health Care (LIRC, 03/30/20).

The Complainant's employment was terminated after she had been out on disability leave for years. The employer never informed the Complainant of the termination, as required by her union contract. The Complainant only found out she was terminated when she contacted the employer over a year later about returning to work. She then filed her complaint within 300 days of learning that she no longer had a job. While under some circumstances an employee might have a responsibility to remain apprised of her employment status during the course of a lengthy leave of absence, given the Respondent's failure to adhere to its contractual obligation to send the Complainant written notice of the termination the complaint in this case was not time-barred under a "should have known" theory. Ronette v. Gen. Motors, LLC (LIRC, 01/15/15).

A Complainant's letter to the Equal Rights Division satisfied the requirements for a cognizable complaint. It was signed by the Complainant. It included his name and address. It provided sufficient information from which the Equal Rights Division could identify and contact the Respondent, and it included a statement of the underlying allegations. The Complainant later submitted a formal complaint form, which was received more than 300 days after the alleged violation. Because the initial letter was filed within 300 days, the complaint was timely. Lobacz v. DOC (LIRC, 11/03/05).

An affirmative defense that a complaint was not filed within the statute of limitations period must be raised in a pleading or by a motion, or it is deemed waived. It was error for an Administrative Law Judge to dismiss a portion of a complaint on the basis of untimeliness where the Respondent had not raised the statute of limitations issue in a timely-filed answer and had not make any argument about the statute of limitations until after the hearing. Reddin v. Neenah Joint Sch. Dist. (LIRC, 08/24/04).

Even if the Complainant had been unsure for several months where to file his complaint, this would not be a viable reason for late filing. Ignorance of one's rights does not suspend the operation of the statute of limitations. Adam v. DNR (Wis. Pers. Comm'n, 12/20/02).

The Wisconsin Fair Employment Act contains no exception to the running of the statute of limitations where the Complainant is a minor. Mittelsteadt v. A.J. Air Express (LIRC, 01/16/98).

Ignorance of one's rights does not suspend the operation of the statute of limitations. Burt v. Wis. Lottery (Wis. Pers. Comm'n, 04/05/91).

The Administrative Law Judge erred by dismissing one of the Complainant's claims on the basis of untimeliness where the Respondent had not raised the statute of limitations issue in a timely filed answer. Blohm v. Holiday Inn (LIRC, 01/31/90).

A showing of actual prejudice to the Respondent is not necessary for the enforcement of a statute of limitations against the Complainant. Kaufman v. UW-Eau Claire (Wis. Pers. Comm'n, 01/09/86).

The Act's requirement that a complaint be filed within 300 days of the alleged act of discrimination is not jurisdictional; rather, it is a statute of limitations. An employer's stipulation prior to hearing that a complaint was timely filed constitutes a waiver of the affirmative defense that the complaint was not timely filed. County of Milwaukee v. LIRC, 113 Wis. 2d 199, 335 N.W.2d 412 (Ct. App. 1983).

Because the 300 day requirement for filing a charge of discrimination can be waived, a Complainant who fileslate is entitled to present facts to the Equal Rights Division which would justify a waiver. The burden of establishing the justification rests with the Complainant. The Equal Rights Division has no duty to investigate on its own to determine whether a waiver should be granted. Wadsworth v. DILHR (Milwaukee Co. Cir. Ct., 1983).

The date of the Equal Rights Division's receipt of the Complainant's letter complaining of discrimination is the date to be used for measuring timeliness, even where the letter was unsworn and otherwise did not meet the technical requirements for a complaint. These technical defects could be cured later by an amended complaint, which could be filed even after the statute of limitations period had run. Lasiewicz v. Watertown Metal (LIRC, 08/31/83); Goodhue v. Univ. of Wis. (Wis. Pers. Comm., 11/09/83).

711.1 Measurement of timeliness

The Complainant's contention that he did not learn he had not been selected for a job until years after the fact was rejected. A reasonable person would conclude that he had not been hired for a position within months of submitting an application and receiving no response. Further, the Complainant failed to explain what new information he received years later that put him on notice that discrimination might have occurred. Marty v. S.C. Johnson & Son, Inc. (LIRC, 03/31/21).

The term "days" in Wis. Stat. § 111.39(1) refers to calendar days, not business days. Byrne v. Aurora Health Care (LIRC, 01/31/19).

No statute, expressly or by implication, has conferred on the ERD or the ALJ the power to apply the equitable doctrine of laches to dismiss a complaint. Complaint was timely filed with EEOC, and cross-filed with the ERD; EEOC completed its investigation and dismissed the complaint, but did not follow its usual practice of notifying ERD, so that the ERD could ask the Complainant if he wanted the ERD to investigate the state complaint. Ten years elapsed before the ERD discovered the dismissal and asked the Complainant if he wanted to pursue the complaint in the ERD. The delay in the case was not due to an untimely filing by the Complainant. Owens v. SBC Commc'ns (LIRC, 03/28/14).

The Complainant's writing, filed with the ERD on October 15, 2012, was missing some information, which prevented it from being an accepted complaint, but it identified the parties, was signed by the Complainant or an authorized representative, provided the Complainant's name and address and sufficient information to identify and contact the Respondent, and included a statement of allegations. This was sufficient to secure October 15, 2012 as the filing date of a complaint for purposes of meeting the statute of limitations, when an acceptable version of the complaint was filed on April 23, 2013. Germaine, Xianhong Zhang v. Sussek Machine Corp. (LIRC, 02/13/14).

Section DWD 218.03(5), Wis. Admin. Code, deems a complaint filed with the ERD when it is received by the EEOC. This is true even though the general rule is that a complaint is only deemed filed when it is physically

received by the Equal Rights Division. This case was remanded for further proceedings to determine whether an Intake Questionnaire the Complainant filed with the EEOC qualified as a "charge" under federal law. If it did, the "charge" was timely filed for federal and state purposes and the Complainant would be deemed to have filed a timely complaint with the Equal Rights Division. Aldrich v. LIRC, 2012 WI 53, 341 Wis. 2d 361, 814 N.W.2d 433. ("Aldrich II")

The statute of limitations does not begin to run until the facts which would support a charge of discrimination were apparent (should have been apparent) to a person with a reasonably prudent regard for his rights. In this case, the Complainant was notified on January 22, 2004 that his job was being eliminated. However, it was not until September of 2004 or thereafter that he first learned that younger employees were going to be performing his job duties. The Complainant's complaint was timely because it was filed within 300 days of the date he had an inkling that someone else might be performing his duties. Anchor v. DWD (LIRC, 01/04/12).

There is no legal requirement that an employer provide a job applicant with written notice as to whether the applicant will be hired. The Respondent credibly testified that it was not its practice to do so. For purposes of calculating when the statute of limitations begins to run, the question is not whether the Complainant received written notice that he was not selected for the job, but when the Complainant knew or reasonably should have known of the wrong that was allegedly committed against him. Begolli v. Home Depot (LIRC, 08/11/11).

In some situations, the commencement of the statute of limitations period can be considered to be postponed until the date on which the employee discovers sufficient information to support a claim of discrimination. The limitations period does not begin to run until the facts that would support a charge were apparent or should have been apparent to a person with a reasonably prudent regard for his or her rights. Drabek v. Major Indus. (LIRC, 06/09/11).

Section DWD 218.03(5), Wis. Admin. Code, provides that a complaint filed with another agency and deferred to the Equal Rights Division will be deemed to have been filed when it was received by the other agency. The date of filing of an EEOC "Intake Questionnaire" can be used as the date of filing for statute of limitations purposes if the EEOC accepts that as the date of filing. The Intake Questionnaire is a form which the EEOC has Complainants fill out prior to the drafting of the official complaint form. Lee v. Bed Bath & Beyond (LIRC, 03/25/11).

Equitable estoppel comes into play if the Respondent took active steps to prevent the Complainant from filing a complaint in time, such as by hiding evidence or promising not to plead the statute of limitations. Among other things, the granting of equitable estoppel should be premised upon: (1) a showing of the Complainant's actual and reasonable reliance on the Respondent's conduct or representations, and (2) evidence of improper purpose on the part of the Respondent, or of the Respondent's actual or constructive knowledge of the deceptive nature of its conduct. Equitable tolling comes into play where a Complainant is unable to obtain vital information bearing on the existence of his claim due to wrongdoing by the Respondent. The Complainant in this case did not establish any wrongdoing by the Respondent. Schulke v. Mills Fleet Farm (LIRC, 06/04/10).

Discrimination occurs when the employer acts and the employee knows about it, not when the effects of the action are most painfully felt. In this case, the Complainant suggested that the adverse effects of his earlier license suspension were not experienced until more than 300 days later, when his license was reinstated with restrictions, and he attempted unsuccessfully to find work. The Complainant's complaint was not timely filed. Holmen v. Dep't of Regulation & Licensing (LIRC, 05/27/10).

The operable date from which the statute of limitations period runs in a failure-to-hire case is not dependent on the Respondent's completion of the entire application or selection process. Nor is it dependent on when the Complainant realized the effects of this process. Rather, it is dependent on the date that the Complainant was made aware that the Respondent did not intend to hire him. Jackson v. Aurora Health Care (LIRC, 08/24/04).

The statute of limitations period begins to run when the Complainant knew or reasonably should have known of the wrong that was committed against him. Stated somewhat differently, a statute of limitations begins to run when the facts that would support a charge of discrimination are apparent or would be apparent to a person with a reasonably prudent regard for his or her rights. Washington v. United Water Serv. (LIRC, 08/15/03), aff'd sub nom. Washington v. LIRC (Ct. App., Dist. I, summary disposition, 02/07/05).

It is the Complainant's burden to establish that he complied with the statutory 300-day filing requirement. It is not the Respondent's burden to establish that the Complainant failed to do so. Wanta v. Tower Automotive (LIRC, 10/17/03).

Since the Complainant (despite being represented by counsel) failed to specify in his complaint when he became aware of his termination, it was appropriate to consider collateral sources for that information. In this case, information derived from these collateral sources, including the substance of communications from and through the Complainant's union representatives and attorneys, established that the Complainant was aware of the subject termination more than 300 days before he filed his complaint. The complaint was, therefore, untimely. Wanta v. Tower Automotive (LIRC, 10/17/03).

The Complainant may not use a post-termination event as a basis to file a claim regarding his employment that is otherwise untimely. Hopkins v. City of Kenosha (LIRC, 08/22/03).

The Respondent's personnel manager informed the Complainant (a state employee) in writing that his employment had been terminated following a meeting during which the Complainant's impending discharge had been discussed. However, this letter was ineffective as a matter of law to have effectuated the Complainant's discharge effective the date of the letter, as it purports to do, because sec. 230.34(1)(b), Stats., requires an appointing authority to furnish a state employee with notice in writing of the reasons for any disciplinary action *prior to* taking the disciplinary action. As a result, the meeting at which the Complainant's impending discharge was discussed could not have provided effective notice of the Respondent's decision to terminate the Complainant's employment, regardless of what management said. All that management could have done at that point would have been to have provided the Complainant with verbal notice of its *intent* to discharge the Complainant, which intent could only be carried out by written notice in accordance with sec. 230.34(1)(b), Stats. Since the statutes require that notice of discipline be given in writing to a state employee prior to the effectuation of the disciplinary action, verbal notice of an impending disciplinary action should not be considered effective notice for purposes of triggering the statute of limitations in sec. 111.39(1), Stats. Patera v. UW Sys. (Wis. Pers. Comm'n, 05/16/03).

The Division's rules specifically provide that a discrimination complaint is considered to be "filed" only upon the physical receipt of the document by the Division. The rules contain no exception for complaints which are mailed in a timely fashion, but which are not received by the Division. Riley v. Van Galder Bus Co. (LIRC, 05/24/99).

The Equal Rights Division returned a complaint which had been filed by a Complainant requesting that the Complainant supply additional information. The Complainant filed another complaint form including the additional information; however, the second complaint was received more than 300 days after the last act of alleged discrimination. The first complaint which was filed was adequate, at least to establish the

commencement of a proceeding, even if certain elements of the complaint required correction or expansion. Essentially, this situation involved an original complaint and an amended complaint. Tobias v. Jim Walter Color Separations (LIRC, 08/13/97), aff'd on other grounds sub nom. Jim Walter Color Separations v. LIRC, 266 Wis. 2d 334, 595 N.W.2d 68 (Ct. App. 1999).

Where the Complainant filed an Intake Questionnaire regarding an age discrimination complaint with the EEOC within the 300 day statute of limitations, his complaint was timely filed even though he did not submit a completed charge form until 304 days after the last alleged act of discrimination. Because the complaint was considered timely by the EEOC, it was also timely under the Wisconsin Fair Employment Act. (The complaint was referred to the Equal Rights Division for processing under the terms of a work-sharing agreement between the Equal Rights Division and EEOC.) Keup v. Mayville Metal Prod. (LIRC, 06/22/95).

The statute of limitations period does not begin to run until the Complainant knew or reasonably could have known of the wrong that had been committed against her. This discovery rule postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when she discovers she has been injured. In this case, it was only when a similarly situated male was returned to the position of courier following a medical leave of absence that facts that would support a charge of sexual discrimination would have become apparent to the Complainant, who was not allowed to return to work following a long-term disability leave. Lange v. Federal Express (LIRC, 02/22/93).

The statute of limitations did not begin to run on the Complainant's last day of work, at which time she was verbally informed that her termination would be recommended to the board; nor did it begin to run when the Complainant received a letter confirming that her termination would be recommended to the board. The Complainant became aware of the adverse action against her when she attended the meeting during which the school board voted to terminate her employment. The complaint was timely filed where it was filed 296 days after that date. Veneman v. Sch. Dist. of Beloit (LIRC, 10/21/92).

An employee who was informed of the termination of his employment on March 19, 1990 was required to file his claim alleging discriminatory discharge within 300 days of the March 19, 1990 date. The employee's attempts, through the employer's post-termination procedures, to regain his position did not toll the statute of limitations period. Hoefs v. Perlman-Rocque, Whitewater (LIRC, 09/16/92).

The 300-day statute of limitations in the Wisconsin Fair Employment Act begins to run when the employer makes the discriminatory decision and communicates it to the employee, not when the decision becomes effective. Olson v Lilly Research Lab. (LIRC, 06/25/92).

After a hearing on the merits, a complaint was dismissed on the ground that it was filed more than 300 days after March 1, 1988, when the Complainant was told that he was medically disqualified from the position of lubricator. The complaint had also mentioned that the Complainant alleged that he was rejected for another lubricator opening in July of 1989, only days before the complaint was filed. At hearing, there was not a shred of evidence in the record which supported this claim of a July 1989 refusal. However, in the Respondent's formal answer to the complaint, it specifically and expressly admitted the allegations of the complaint. Therefore, LIRC found it appropriate to make findings of fact based on those admitted allegations and, based on those findings of fact, it concluded that the complaint was timely. Reich v. Ladish Co. (LIRC, 03/30/92).

Where the Complainant alleged that she was discriminated against because she was not reclassified until she had been employed for one year while non-white employees were reclassified before they had been employed for one year, her complaint was timely because the time period for filing the charge of discrimination did not begin to run until the other employees were reclassified. Piotrowski v. DILHR (Wis. Pers. Comm'n, 05/01/91).

A complaint of age discrimination was timely where the Complainant filed her complaint within weeks of becoming aware that younger and less senior employees had received equity awards over 300 days earlier. A person with a reasonably prudent regard for her rights in the Complainant's position would not have made an inquiry about the salaries of younger co-workers. Rudie v. DHSS (Wis. Pers. Comm'n, 09/19/90).

The 300-day period for filing a complaint under sec. 111.39(1), Stats., commenced when the Complainant became aware of a certain conversation regarding his employment, not when the Complainant formed a belief that that conversation had resulted in the withdrawal of the Respondent's offer of employment. Bruns v. DOT (Wis. Pers. Comm'n, 02/07/90).

The time for filing a complaint runs from the date the Complainant should have been aware of the facts giving rise to the discrimination claim, rather than when the Complainant became aware of a relevant document. Welter v. DHSS (Wis. Pers. Comm'n, 02/22/89).

Discrimination occurs when the employer acts and the employee knows about it, not when the effects of the action are most painfully felt. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App. 1988).

The statute of limitations begins to run when the adverse decision is made and communicated to the employee, not when the effects of the employer's action are most painfully felt. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App. 1988).

For purposes of the 300 day statute of limitations contained in sec. 111.39, Stats., a complaint is not "filed" when it is mailed, but only when it is actually received by the Equal Rights Division. Hilmes v. DILHR, 147 Wis. 2d 48, 433 N.W.2d 251 (Ct. App. 1988).

The statute of limitations begins to run on the date that the employee becomes aware that he is going to be laid off. The statute of limitations on a claim of discriminatory refusal to recall from layoff begins to run at the point at which the employee becomes aware, or should reasonably have been aware, that he had not been recalled while others had and that he would not likely be recalled. Where an employee was told she would be recalled when things picked up, knew that the employer's business had picked up, knew that others had been recalled, and saw an advertisement in the newspaper soliciting new employees to do work which she had previously done, the statute of limitations on her refusal to recall claim began to run at that point, which was the point at which a reasonable person would have understood that they were not going to be recalled. Oehlke v. Moore-O-Matic (LIRC, 07/26/88).

The Complainant credibly alleged that at the time of his layoff he was told that his position had been eliminated, and that he only later found out that the position had been "reinstated" and that he had not been recalled to it. At the time of his layoff the facts that would support a charge of discrimination would not have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the Complainant. Thus, the complaint was not untimely. Sprenger v. Univ. of Wis. Sys. (Wis. Pers. Comm'n, 01/24/86).

Although the 300-day time limit begins to run only when facts that would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the Complainant, it does not delay the commencement of the statute of limitations that the Complainant does not until some later time come to the conclusion based on those facts that discrimination may have occurred. Gozinske v. DHSS (Wis. Pers. Comm'n, 06/25/86).

The statute of limitations with respect to a claim of discrimination and hire begins to run on the date on which the Complainant is advised of the hiring decision, not on the date on which the hiring decision itself is made. Ames v. UW-Milwaukee (Wis. Pers. Comm'n, 11/07/85).

Discrimination occurs when the adverse decision is made and the Complainant is so notified. Goodhue v. Univ. of Wis. (Wis. Pers. Comm'n, 11/09/83).

The 300 day statute of limitations began to run on the date of the employee's suspension and not when he later received a letter in which he was referred to as a "former employee." Van Pay v. Stange Wis. Corp. (LIRC, 06/28/83).

711.2 Continuing violations

The method of determining the timeliness of a claim of discrimination in compensation approved in Abbyland Processing v. LIRC, 206 Wis. 2d 309 (Ct. App. 1996), and Rice Lake Harley Division v. LIRC, 2014 WI App 104, 357 Wis. 2d 621, applies to a compensation claim based on protected categories other than sex -- here, race, color, national origin and ancestry. A compensation claim is timely if it alleges a discriminatory payment of compensation occurring within 300 days of the filing of the complaint, even if the employer's alleged decision to discriminate in pay arose prior to the statutory filing period. Gallardo v. Accurate Specialties, Inc. (LIRC, 09/06/19).

The Complainant's allegation that her transfer to a different job, which occurred more than 300 days before the complaint was filed, was part of an ongoing pattern of harassment, was rejected because continuing violation theory does not apply to discrete personnel actions. Lamont v. Nelson Global Prods. (LIRC, 06/10/19).

The Commission believes that its reliance on AMTRAK v. Morgan and other federal court decisions on the application of the statute of limitations to compensation discrimination, was misplaced. The Commission will return to the interpretation reflected in the Wisconsin Court of Appeals' 1996 Abbyland decision, that "[s]alary discrimination is an ongoing matter and can be challenged if the result of the discrimination occurs both within and outside the statute of limitations." Mack v. Rice Lake Harley Davidson (LIRC, 02/07/13), aff'd, Rice Lake Harley Davidson v. LIRC (Barron Co. Cir. Ct., 11/12/13); 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882, rev. denied, 01/13/15.

When the Complainant opened a box of doughnuts, another worker stated something to the effect of, "The pink one's for you, buddy." The individual who made the remark had previously told other workers that he disliked the Complainant because of his homosexuality, which he regarded as being against his religious beliefs. The Complainant had been subjected to other harassing remarks regarding his sexual orientation. Given this, the "pink doughnut incident" did have a sexual connotation, and it was part of a pattern of harassment based upon the Complainant's sexual orientation. This incident occurred within the 300-day statute of limitations period. Based upon this, the Respondent's argument that the complaint was time barred and that no earlier acts of harassment could be considered, was rejected. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

Hostile environment claims are based upon the cumulative effect of individual acts. The entire time period of the hostile environment may be considered for the purposes of determining liability if at least one act contributing to the claim occurred within the 300-day filing period. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

The general rule announced in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) reaffirmed the principle that discrete acts are generally not subject to application of the continuing violation doctrine, but

that harassing acts generally are. The Lilly Ledbetter Fair Pay Act of 2009 clarified that a discriminatory compensation decision occurs each time compensation is paid pursuant to the discriminatory compensation practice. The rule set out in *Ledbetter* and prior cases – that current effects alone cannot breathe new life into prior uncharged discrimination – is still binding for disparate treatment cases involving discrete acts other than pay. Bethke v. Virchow Krause (LIRC, 01/29/10).
A "failure to promote" discrimination claim is a discrete employment action, and discrete employment actions are not actionable if they are filed more than 300 days after the discrete discriminatory act occurred. Anderson v. Baldwin Area Med. Ctr. (LIRC, 05/08/08).

The Administrative Law Judge improperly denied the Complainant the right to present testimony regarding acts of alleged harassment which occurred outside of the 300-day period prior to the filing of his complaint. The complaint alleged that the Complainant had been subjected to a hostile working environment. Hostile environment claims by their very nature involve conduct which occurs over a series of days, or perhaps years. Such claims are based on the cumulative effect of individual acts. A Complainant may show a series of related acts, one or more of which are within the limitations period. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. In this case, only one of the alleged incidents which the Complainant alleged created a hostile work environment occurred within the 300 days prior to the filing of his complaint. This did not, however, make his hostile work environment claim untimely. Bowen v. LIRC, 2007 WI App 45, 299 Wis. 2d 800, 730 N.W.2d 164.

The basic holding of National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002), is that discrete acts are generally not subject to application of the continuing violation doctrine, but that harassing acts generally are. In this case, the acts of alleged harassment, one of which fell within the actionable 300-day period, were determined to be a part of a continuing violation. These allegations were, therefore, timely. Kanter v. Ariens Co. (LIRC, 09/23/05).

A disciplinary warning and a denial of the Complainant's request for a permanent assignment were discrete personnel actions which were not susceptible to application of the continuing violation doctrine. Wodack v. Evangelical Lutheran Good Samaritan Soc'y (LIRC, 08/05/05).

The modification of the Complainant's lunch schedule, the imposition of discipline and other acts of alleged discrimination were discrete personnel actions not susceptible to application of the continuing violation doctrine. Koenigsaecker v. City of Madison (LIRC, 03/11/05).

In its decision in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the Supreme Court identified two classes of employment actions (i.e., discrete acts and harassing acts underlying hostile environment claims). Its basic holding was that discrete acts are generally not subject to application of the continuing violation doctrine, but that harassing acts are. The Court identified the following as examples of discrete acts: termination, failure to promote, denial of transfer, refusal to hire, denial of training, written counseling, and award of compensation. They concluded that discrete employment actions are not susceptible to application of the continuing violation doctrine regardless of whether they are related in some way to employment actions which took place during the actionable period. Josellis v. Pace Indus. (LIRC, 08/31/04).

The Labor and Industry Review Commission has looked to federal court decisions in Title VII cases for guidance on continuing violation and other timeliness issues. In this case it relied upon the decision of the Supreme Court of the United States in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), to support its conclusion that discrete employment actions such as a refusal to hire are not susceptible to application of the continuing violation doctrine regardless of whether they are related in

some way to employment actions which took place during the actionable period. Jackson v. Aurora Health Care (LIRC, 08/24/04).

Discrete employment actions are not susceptible to application of the continuing violation doctrine even if they are related in some way to employment actions which took place during the actionable period. The U.S. Supreme Court clarified the continuing violation doctrine in AMTRAK v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). In that decision, the Court held that discrete acts are generally not subject to application of the continuing violation doctrine, but harassing acts generally are. The Court identified the following as examples of discrete acts: termination, failure to promote, denial of transfer, refusal to hire, denial of training, written counselings, and awards of compensation. It held that related discrete acts do not constitute a single unlawful practice for the purpose of timely filing. Lau v. Latec Credit Union (LIRC, 02/07/03).

The Complainant was required to perform back-up teller duties (which were generally regarded as less desirable duties) more frequently than a younger coworker. Each time the Complainant was directed to perform back-up teller duties would be considered a discrete act. As a result, the complaint was untimely filed as it related to those back-up teller assignments which predated the actionable statute of limitations period. Lau v. Latec Credit Union (LIRC, 02/07/03).

A termination is a discrete and completed personnel action which may not be rendered timely through its possible connection to other personnel actions. The continuing violation doctrine is inapplicable in such a situation. Moeller v. County of Jackson (LIRC, 01/27/03).

The Complainant alleged that in 2002, when she was about to retire, she learned that she had lost six months of retirement benefit service as a result of a short period of time when she was off work after having been terminated in 1969 due to a pregnancy (she had subsequently been re-hired). The Complainant filed a complaint alleging sex discrimination in June of 2002. Throughout the Complainant's tenure at the Respondent, the Respondent had maintained a retirement plan for its employees. The plan provided for benefits for every year worked, with a reduction for time not worked. As a consequence of the time the Complainant was not employed during 1969, she received only five-twelfths of a year credit towards her benefit service. The Complainant knew or should have known back in 1969, when her employment was terminated in January and she was later rehired in July, what effect her loss of hours of work would have on her benefit service for the year 1969. Her complaint amounts to a claim about the present effects of a past act of discrimination. However, discrimination occurs when the employer acts and the employee knows about it, not when the effects of the action are most painfully felt. Accordingly, the complaint was untimely. Webster v. Appleton Papers (LIRC, 12/23/02).

The Complainant did not establish a continuing violation where he was informed of his demotion and accompanying reduction in pay more than 300 days prior to the date that he filed his complaint. The Complainant's continued employment did not make the action taken by the Respondent ongoing and continuing discriminatory conduct. His argument that his continued employment caused the alleged discrimination to be ongoing and continuing discriminatory conduct amounts to a claim about the present effects of alleged past discriminatory conduct. The present effects of past discrimination theory involves a situation in which the adverse effects of a past discriminatory act continue into the limitations period. This theory was rejected by the United States Supreme Court in United Airlines v. Evans, 431 U.S. 553, 558 (1977). Eller v. CHR Hansen, Inc. (LIRC, 01/31/02).

There are three viable continuing violation theories. The first theory stems from cases (usually involving hiring or promotion practices) where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred. The second theory stems from cases

in which the employer has an express, openly espoused policy that is alleged to be discriminatory. The third continuing violation theory stems from cases in which the Complainant alleges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open policy. In such cases the challenged practice is evidenced only by a series of discreet, allegedly discriminatory acts. (These criteria were set forth in Selan v. Kiley, 969 F.2d 560 (7th Cir. 1992)). Under the third theory, the question is whether the Respondent's acts were related closely enough to constitute a continuing violation or were merely discreet, isolated and completed acts which must be regarded as individual violations. There are three factors to be used to make this determination. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuous violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is the degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? (These factors were originally enumerated in Berry v. Bd. of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983)). Talley-Ronsholdt v. Marquette Univ. (LIRC, 02/13/01).

A Complainant may not base her suit on conduct that occurred outside the statute of limitations period unless it would have been unreasonable to expect the Complainant to file a complaint before the statute ran on that conduct. (This is the standard set forth in Galloway v. General Motors, 78 F.3d 1164, 1167 (7th Cir., 1996)). In this case, the Complainant claimed in December of 1998 that the continuous running of a window air conditioner (which continued into the 300-day filing period) was a discriminatory action which could serve as an anchor for earlier alleged discriminatory conduct by the Respondent. The alleged continuous running of the window air conditioner began in the early 1990's. By no later than the Complainant's claimed near death in 1993, this should have triggered the Complainant's awareness of and duty to assert her rights clearly. By then, this should have indicated to her that the continued existence of the consequences of this act was to be expected without being dependent upon a continuing intent to discriminate. Therefore, her complaint relating to terms and conditions of employment was untimely. Talley-Ronsholt v. Marquette Univ. (LIRC, 02/13/01).

The Complainant alleged that her complaint should be considered timely filed as it related to other alleged incidents of sexual harassment through application of a continuing violation theory. One purpose of applying a continuing violation theory in a context such as this is to protect the employee who would have had no reason to believe that she was being harassed until a series of adverse actions established a visible pattern of discriminatory treatment. Here, the Complainant acknowledged that the alleged harassment began more than one year before she filed her complaint. Obviously, she had formed a belief prior to the actionable period that she was being harassed. This belief triggered the Complainant's duty to file a complaint, which she failed to do until more than 300 days later. Therefore, the allegations of sexual harassment were properly dismissed as untimely. Massart v. Univ. of Wis. (Wis. Pers. Comm'n, 10/18/00).

The continuing violation doctrine allows a Complainant to get relief for a time-barred act by linking it with an act that is within the time limitations period. Courts treat such a combination as one continuous act that ends within the limitation period. In this case, the question is whether alleged acts of sexual harassment were related closely enough to constitute a continuing violation or whether they were merely discrete, isolated, and complete acts which must be regarded as individual violations. Javenkoski v. DOT (Wis. Pers. Comm'n, 09/11/00).

A continuing violation can be shown under one of two theories: (1) a continuing course of conduct, or (2) a continuing pattern or practice of discrimination. A continuing pattern or practice of discrimination refers to an openly espoused discriminatory policy that affects an entire class of individuals, such as, for example, a

continuing requirement that employees perform Sunday work, or the continued maintenance of different facilities for men and women. The continuing course of conduct theory applies when an individual Complainant has been subjected to a series of separate, but related discriminatory acts, at least one of which takes place within 300 days of the filing of the complaint. For example, where an employee has been the victim of unlawful sexual harassment within the 300 day period before the complaint was filed, she may bring suit challenging all related sexually harassing conduct, including that occurring outside the limitations. Belli v. Village of Greendale (LIRC, 12/15/98).

The Complainant did not establish a continuing violation where he contended that the Respondent's denial of a promotion (which occurred more than 300 days prior to the filing of the complaint) resulted in his being discriminated against in pay within the 300 day limitations period. The denial of a pay increase is a predictable consequence of the denial of a promotion, and it cannot be considered a separate act of discrimination. In considering whether a continuing course of discriminatory conduct exists, the emphasis is not upon the effects of earlier employment decisions, but upon whether any present violation exists. Thus, while the Complainant is now earning less than he might had different employment decisions been made prior to the running of the statute of limitations, this fact cannot be used to revive an otherwise stale discrimination complaint. Belli v. Village of Greendale (LIRC, 12/15/98).

When a Complainant experiences a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it. Where a continuing violation can be shown, a Complainant is entitled to bring suit challenging all conduct that was a part of that violation, even conduct that occurred outside the limitations period. In this case, the complaint was timely because it alleged that there was an on-going policy or practice by the Respondent of engaging in or permitting sexual harassment to create a hostile work environment that continued through the Complainant's last day of work. Eckstein v. City of Neenah (LIRC, 08/31/95).

There are two basic continuing violation theories: (1) the continuing course of conduct theory, and (2) the continuing pattern or practice of discrimination theory. The continuing course of conduct theory applies when an individual Complainant had been subjected to a series of separate, but related, discriminatory acts, at least one of which takes place within 300 days of the filing of a complaint. The continuing pattern or practice of discrimination theory requires the presence of a continuing discriminatory practice against a class of individuals and a continuing employment relationship. Jeanpierre v. City of Milwaukee (LIRC, 09/01/93).

The Complainant did not establish a continuing violation where she alleged discrimination in benefits provided to her for doing the same work as males, where she was only subject to this allegedly discriminatory practice as long as she actually received compensation for work. Although the Complainant retired within 300 days prior to the filing of the complaint, she was not actually receiving compensation for work during this period. Thus, she was no longer subject to the policy of receiving unequal benefits during the 300-day statute of limitations. She may have continued to suffer from the effects of past discrimination, but there was no present violation which had continued into the limitations period. Jeanpierre v. City of Milwaukee (LIRC, 09/01/93).

To successfully plead a continuing violation, the Complainant must show that some illegal act, part of a continuing pattern of violations, took place during the 300 days prior to the filing of the complaint. Where more than 300 days passed between the incidents, the alleged discriminatory actions were too sporadic to be found to be a continuing practice. Brye v. Brakebush Bros. (LIRC, 01/11/93).

To establish a continuing violation, a Complainant must demonstrate a substantial relationship or nexus between the timely and untimely claims. In making this determination, a relevant factor is whether the

timely and untimely acts involved the same type of discrimination and, thus, tend to connect them in a continuing violation. The Complainant in this case failed to establish a continuing violation where the evidence established that the Complainant's untimely claims of discrimination with respect to privileges and conditions of employment last occurred almost six months prior to her timely claim of discrimination with respect to termination. This decision was bolstered by the fact that the timely claim of discriminatory discharge was significantly different from the untimely claim of discrimination with respect to privileges and conditions of employment. Rangel v. City of Elkhorn (LIRC, 09/30/92).

A complaint of public accommodations discrimination was timely where the complaint alleged that different shower and dressing facilities were provided for men and women at a health club. The Complainant, a male, had first joined the health club several years prior to the filing of his complaint. His complaint was timely because the maintenance of different facilities is a continuing act. Malecki v. Vic Tanny Int'l of Wis. (LIRC, 08/07/92).

The Complainant alleged that she had been discriminated against on the basis of her creed because the Respondent denied group health insurance coverage for Christian Science practitioner expenses. The complaint was filed more than 300 days after the Complainant terminated her group health insurance coverage. However, the Respondent's policy prohibiting reimbursement of Christian Science practitioner expenses was a continuing violation. Therefore, the complaint was timely. Lazarus v. Dep't of ETF (Wis. Pers. Comm'n, 02/15/91).

A Complainant may successfully claim a continuing violation by showing that an employer maintained an openly espoused discriminatory policy alleged to be discriminatory; that the violation continued into the relevant time period; and that the Complainant remained employed and subject to the policy during the limitation period. In this case, the Respondent instituted a policy of mandatory work on Sunday. The Complainant filed a religious discrimination claim nearly four years after the Respondent instituted its policy. The complaint was timely under the continuing violation theory. Hyler v. Nekoosa Papers (LIRC, 01/28/91).

The Complainant indicated on the complaint form that the most recent date that the Respondent had discriminated against him was "daily." However, the allegation in the handicap discrimination portion of the complaint clearly arose out of events which occurred more than 300 days prior to the filing of the complaint. The continuing violation theory is inapplicable to a single, completed act of alleged discrimination. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. Hyler v. Nekoosa Papers (LIRC, 01/28/91).

A layoff is not a continuing violation. Oehlke v. Moore-O-Matic (LIRC, 07/26/88).

The monthly retirement annuity of protective occupation employees is, under statute, reduced by a certain amount for each quarter year that elapses after a calendar year in which the participant obtains age 55. Complainant retired at age 55 in order to not have his benefits thus reduced. More than 300 days after his retirement, he filed a complaint of discrimination alleging that he was forced to retire because of that provision. This was not a continuing violation. A true continuing violation involves an employer's ongoing policy that affects the employee continually. Here, the employee is not complaining about how the provision affected his retirement benefit, since - because he retired at 55 - it is not affecting his benefits; he complains only that he was forced to retire at age 55. Pelikin v. DNR (Wis. Pers. Comm'n, 06/24/87).

The continuing violation theory may be seen as consisting of three sub-theories: (1) a continuing course of conduct or a series of acts with one independent discriminatory act occurring within the charge filing period; (2) the maintenance of a system or policy which discriminates; or (3) the present effects of past

discrimination. The third sub-theory is no longer viable under United Air Lines Inc. v. Evans. Proof of the applicability of the first sub-theory requires demonstration of a series of acts that are sufficiently related in nature so as to transcend the time limitations. Discrete employment actions of a different nature occurring at different times may not be so related as to support a continuing violation theory. Poole v. DILHR (Wis. Pers. Comm'n, 12/06/85).

An employer's repeated refusals to rehire an employee do not constitute a continuing violation for the purpose of measuring timeliness. Peronto v. Leicht Transfer & Storage (LIRC, 03/02/84).

A complaint which challenges a job classification constitutes an allegation of continuing discrimination for purposes of measuring timeliness. Wis. Fed'n of Teachers v. Wis. Dep't of Pers. (Wis. Pers. Comm'n, 04/02/82).
A complaint by a woman that she was paid less than a similarly situated male employee states a claim of continuing discrimination. This is distinguishable from a discrete personnel transaction which, over the years, has a cumulative effect on an employee's salary. Hoepner v. DHSS (Wis. Pers. Comm'n, 06/30/81).

A complaint against one agency for discriminatory wages was not timely when it was filed more than 300 days after the employee transferred to another agency; and the employee's allegation that the lower wage paid by the first agency resulted in a lower entry wage paid to her by the second agency did not constitute continuing discrimination. Jacobson v. DILHR (Wis. Pers. Comm'n, 04/23/81).

711.3 Tolling of time to file complaint; equitable estoppel and discovery rule

Fear of retaliation is not a basis for tolling the statute of limitations. The WFEA specifically prohibits retaliation and provides a cause of action if retaliation occurs. Further, in this case the Complainant had already lost her job and would have no reason to fear retaliation. Ohren v. Ascension Health Alliance (LIRC, 12/29/21).

Equitable tolling based on a claim of depression was not justified where the Complainant submitted no medical evidence indicating that her condition was disabling and where she was able to perform other tasks including starting a new job and pursuing an internal grievance related to her discharge during the limitations period. Pospychala v. Pine Crest Nursing Home (LIRC, 09/17/21).

The statute of limitations began to run when the Complainant learned he was denied a job, even though he was not specifically informed of the age, sex or race of the individual hired instead. Only a month earlier, the Complainant had filed a separate complaint against the same employer alleging an ongoing and systematic failure to hire him for multiple jobs due to discriminatory reasons. Consequently, the Complainant had reason to suspect that discrimination occurred even before he received specific details about the successful candidate and should have acted to preserve his rights. Shore v. Univ. of Wis. Madison (LIRC, 02/12/21).

The Complainant's argument for equitable tolling based upon her disability fails where she was able to contact the Equal Rights Division during the limitations period, was represented by counsel during at least some of that time, and filed a timely appeal of a determination in another matter. Ostopowicz v. United Healthcare (LIRC, 03/30/20).

The Complainant filed a timely charge with the Milwaukee office of the EEOC regarding alleged discrimination in November 2014. The EEOC designated "St. Louis Civil Rights Enforcement" as the local fair employment agency and transferred the case to the St. Louis District Office of the EEOC. Two and one-half years later the Complainant filed a complaint with the Wisconsin Equal Rights Division making the same allegations as in the EEOC charge filed in 2014. The Equal Rights Division complaint was untimely. Equitable tolling does not apply to allow the filing date of the EEOC charge to serve as the filing date of the Wisconsin Equal Rights Division

complaint. Since the Equal Rights Division was not the designated local fair employment practice agency on the EEOC charge, and it had no knowledge of the charge at the time it was filed, there is no basis for finding error on the part of the Equal Rights Division as a cause for the late filing. Broughton v. Express Scripts Inc. (LIRC, 05/30/18).

Equitable tolling may be appropriate when a Complainant's failure to comply with the statute of limitations is attributable to his or her medical condition, but only if it is established through medical evidence that because of the condition the Complainant was entirely incapable of bringing a legal action, and it must be shown that the incapacity lasted essentially throughout the filing period, leaving the Complainant unable, during any periods of capacity, to file a timely complaint. Here, the Complainant's vague and conclusory statements, without description of how a medical condition adversely affected his capacity to function, are not sufficient to support equitable tolling. Equitable tolling may also be appropriate when the untimeliness of a complaint was due to agency error, but here the Complainant's reference to making contact with someone at the Equal Rights Division and to his thought that the employee told him he had a year to file a complaint is too vague to support equitable tolling. Van Derel v. Kettle Moraine Hardwoods (LIRC, 04/30/15).

A claim of mental disability may be sufficient to toll the running of the statute of limitations, but only if it is established by medical evidence that the individual was entirely incapable of bringing legal action or discovering vital information in support of his claim, because of the disability. Here, evidence of the eligibility for Social Security disability, along with the Complainant's own statement that a mental condition was the basis for eligibility, is not enough to allow tolling. Material in the case file shows the Complainant was aware of his rights, maintained an ability to respond to requests for information, and meet other deadlines for pursuing this matter. Johnson v. BRP US, Inc. (LIRC, 04/11/14).

Application of equitable estoppel should be premised on a showing of the Complainant's actual and reasonable reliance on the Respondent's conduct or representations, and evidence of improper purpose on the part of the Respondent, or of the Respondent's actual or constructive knowledge of the deceptive nature of its conduct. In this case, it was unreasonable for the Complainant to rely on comments by the Respondent, which were not deceptive in nature. Therefore, there was no basis for tolling the statute of limitations. Dieter v. Richland Ctr. Foundry (LIRC, 07/24/12).

The complaint in this matter was filed 323 days after the Complainant was discharged by the Respondent. The Equal Rights Division dismissed the complaint on statute of limitations grounds. On appeal, the Labor and Industry Review Commission determined that due process required that the Complainant be provided an opportunity for a hearing at which she could attempt to prove that it was only after some time had passed without her being rehired (while others were rehired) that the Complainant began to realize that the Respondent did not have any intention of reinstating her employment. Dykstra v. Rhodes Int'l (LIRC, 03/29/12).

The complaint in this case was not timely filed and there was no basis for tolling the statute of limitations. The Complainant submitted statements that she has been diagnosed with attention deficit disorder; however, the documentation she provided did not establish that she was entirely incapable of bringing a legal action or discovering the information needed for her claim. The fact that the Complainant did ultimately get her complaint filed, and that she understood the effect of the statute of limitations when she found out about it, show that her condition was not something that made her entirely incapable of acting on her rights within the statute of limitations period. Kiefer v. Caring Alternatives (LIRC, 04/29/11).

The Wisconsin Fair Employment Act does not recognize ignorance of one's rights as a basis for overlooking the statute of limitations. The law expects that individuals will show a reasonably prudent regard for their rights. Kiefer v. Caring Alternatives (LIRC, 04/29/11).

In order for a Complainant to invoke equitable estoppel there must be evidence that the Respondent took active steps to prevent the timely filing of a complaint, such as hiding evidence or promising not to plead the statute of limitations. In this case, the Respondent's alleged promise to look into the Complainant's disagreement with the reasons for his termination did not include any requests that he not file a complaint. Nor did the Respondent give the Complainant any indication that any investigation it did could result in the reversal of its decision to terminate his employment. The Respondent did not do anything that would warrant the tolling of the statute of limitations in this case. Parker v. Tri-County Mem'l Hosp. (LIRC, 03/25/11).

Equitable estoppel comes into play if the Respondent took active steps to prevent the Complainant from filing a complaint in time, such as by hiding evidence or promising not to plead the statute of limitations. Among other things, the granting of equitable estoppel should be premised upon: (1) a showing of the Complainant's actual and reasonable reliance on the Respondent's conduct or representations, and (2) evidence of improper purpose on the part of the Respondent, or of the Respondent's actual or constructive knowledge of the deceptive nature of its conduct. Equitable tolling comes into play where a Complainant is unable to obtain vital information bearing on the existence of his claim due to wrongdoing by the Respondent. The Complainant in this case did not establish any wrongdoing by the Respondent. Schulke v. Mills Fleet Farm (LIRC, 06/04/10).

Equitable tolling may apply when the untimeliness of the complaint was due to errors by the Equal Rights Division. The Complainant in this case did not establish that the Equal Rights Division had misled the Complainant in any way. Schulke v. Mills Fleet Farm (LIRC, 06/04/10).

Equitable tolling may be appropriate where the Complainant's failure to comply with the statute of limitations is attributable to the Complainant's medical condition. However, equitable tolling is not appropriate where the Complainant has made only a vague claim, without a particularized description of how his condition adversely affected his capacity to function generally or in relationship to the pursuit of his rights. In this case, the Complainant did not state when he was diagnosed with cancer; nor did he submit any medical information regarding his diagnosis of cancer and how it might have affected his capacity to function generally or in relationship to the pursuit of his rights. Schulke v. Mills Fleet Farm (LIRC, 06/04/10).

The Complainant asserted that he has a disability of "mental retardation." Mental incapacity might be sufficient to toll the filing period, but only if the individual was entirely incapable of filing the legal action or discovering the vital information for the claim. The Complainant did not affirmatively assert that his mental condition prevented him from timely filing a complaint against his employer. Nor did he submit any medical evidence which would support a showing that his mental condition was so disabling that it rendered him incapable of filing a timely complaint. Brantner v. Goodwill Indus. (LIRC, 02/19/10).

A limited period of incapacity does not toll the running of the statute of limitations indefinitely. In this case, even if the statute of limitations were to be tolled for the 51 days during which the Complainant's psychiatrist contended he was incapacitated during the limitations period, there was nothing to indicate that the Complainant had been too impaired to understand or act on his legal rights during the first 249 days of the 300-day filing period. Albino v. Iglesia Metodista Unida Cristo En Tu Ayuda (LIRC, 07/25/08).

The "discovery rule" is read into the statute of limitations and postpones the beginning of the limitations period from the date the Complainant was wronged to the date when the Complainant discovered that he or

she has been injured. The limitations period does not begin to run until the facts that would support a charge of discrimination were apparent, or should have been apparent, to a person with a reasonably prudent regard for his or her rights. Williams v. Four Points Sheraton Hotel (LIRC, 03/21/08).

While mental incompetence has sometimes been found to be a justifiable basis for tolling the statute of limitations, there was nothing in this case which supported tolling the statute of limitations on that basis. The Complainant failed to affirmatively assert that her depression did, in fact, cause her to miscalculate the filing deadline. Further, the Complainant did not submit any medical evidence which would support a showing that her condition was so disabling that it rendered her incapable of filing a complaint of discrimination throughout the 300-day charge-filing period. Berg v. Agape of Appleton (LIRC, 09/22/06).

During the 300-day filing period, the Complainant sent a letter to the Respondent in an attempt to avoid termination. The Complainant did not send his letter to the Equal Rights Division or to any other authorized agency. The Complainant later argued that the Respondent's failure to forward his letter to the Equal Rights Division constituted fraud and that the Respondent should be estopped from raising the statute of limitations as a defense to the complaint he filed after the 300-day filing period. The Respondent had no duty to serve as the Complainant's advocate or agent. Moreover, the Complainant did not assert that the Respondent misinformed him about the complaint-filing process or otherwise misled him in regard to this matter. The complaint was appropriately dismissed because it was not timely filed with the Equal Rights Division. Rowry v. Schneider Training Acad. (LIRC, 01/13/06).

The Complainant sent correspondence relating to a consumer complaint filed against the Respondent to the Attorney General of Illinois within the 300-day filing period; however, this did not toll the statute of limitations under the Wisconsin Fair Employment Act. Illinois does not have a work-sharing agreement with the Equal Rights Division, or any other authority for accepting filings under the Wisconsin Fair Employment Act, and filing a complaint with a consumer protection agency in another state does not otherwise satisfy the requirements for filing a WFEA complaint with the Equal Rights Division of the State of Wisconsin. Rowry v. Schneider Training Acad. (LIRC, 01/13/06).

The Complainant argued that the filing deadline should be extended because the Respondent denied him access to certain records during the actionable 300-day filing period. This argument was rejected because despite the Respondent's alleged denial of access to certain records, the Complainant had reason to suspect during the filing period that retaliation may have been a motive for his termination. Welsh v. DOC (LIRC, 01/13/06).

The Complainant unsuccessfully argued that his failure to timely file a complaint should be excused because he was relying upon advice from his union representative in prosecuting his claim. Cramer v. Woodman's Food Mkt. (LIRC, 01/14/05).

The statute of limitations begins to run when the Complainant receives actual or constructive notice of the allegedly discriminatory adverse employment action, not when the Complainant forms a belief that he was discriminated against when this action was taken. Although a Respondent's subsequent treatment of similarly situated employees could be relevant to the issue of discrimination, it does not serve to toll the limitations period. The Complainant in this case was aware in December of 2001 that a successor corporation would not be employing him in any capacity. The Complainant's termination was effective in March of 2002. At that time the Complainant learned that the new corporate entity had selected a younger person for the regional leader position for which he believed he was qualified. Neither the fact that the Complainant may not have formed a belief that he had been discriminated against in regard to his involuntary separation until he learned that a younger person had been selected for the regional leader position, nor the fact that his termination was not effected until March of 2002 would operate to toll the statute of limitations.

The operative date for computing the Complainant's 300-day filing period was the date in December of 2001 when he learned that the new corporate entity would not be employing him. Maynard v. Cummins Npower (LIRC, 01/28/04).

The doctrine of equitable estoppel, also known as "fraudulent concealment," applies to situations in which the Respondent takes active steps to prevent the Complainant from filing a complaint in time, such as by hiding evidence or promising not to raise the statute of limitations defense. Equitable estoppel is available only if the employee's untimely filing was the result of a deliberate design by the employer, or actions that the employer should have understood would cause the employee to delay filing his charge. Among other factors, the granting of equitable estoppel should be premised upon the showing of the employee's actual and reasonable reliance on the employer's conduct or representations, and evidence of improper purpose on the part of the employer, or of the employer's actual or constructive knowledge of the deceptive nature of its conduct. Washington v. United Water Serv. (LIRC, 08/15/03).

Even if it can be found that the Respondent attempted to mislead or misrepresent the facts to a Complainant in order to prevent him from filing a timely complaint, the doctrine of equitable estoppel cannot be applied where the Complainant's failure to file a timely complaint was not shown to be in reliance on such misrepresentations. Washington v. United Water Serv. (LIRC, 08/15/03).

Although the Complainant's stroke may have had some adverse effects on her physical and mental capabilities, a Complainant is only entitled to a tolling of the statute of limitations when her incapacity reaches such a level that she was incapable of filing a complaint within the requisite time period. The Complainant did not meet this burden. She did not submit any medical evidence, or a statement from her physician, which would support a showing that her condition was so disabling that it rendered her incapable of filing a complaint of discrimination with the Equal Rights Division throughout the 300 day charge-filing period. Wilson v. Doskocil Foods (LIRC, 07/30/03).

The Complainant contended that the filing deadline should be equitably tolled since the Respondent failed to properly respond to open records requests filed by the Complainant after his termination. However, the Complainant had formed the belief that he had been retaliated against by the date of his termination. Since a Complainant need only provide a general statement describing the alleged retaliatory action in the complaint, the Respondent's failure to provide the requested information did not prevent the Complainant from having adequate information upon which to make his complaint. The Complainant's dispute with the Respondent relating to his post-termination open records requests did not justify the Complainant's untimely filing of the complaint. Moeller v. County of Jackson (LIRC, 01/27/03).

A complaint must be filed within 300 days of the date of the alleged discrimination unless a reason exists for the filing deadline to be equitably tolled. A Respondent's awareness that the Complainant believed that he had been discriminated against, or that the Complainant intended to file a complaint, does not satisfy the test for equitable tolling. The Complainant's argument that the Respondent in this case could not claim surprise that the Complainant filed a discrimination complaint because the Complainant had previously filed a complaint with the U.S. Department of Labor was rejected. Moeller v. County of Jackson (LIRC, 01/27/03).

The Complainant contended that the Respondent should not be allowed to raise the affirmative defense that the complaint was not timely filed because the Respondent had informed him that it was willing to waive the time limitations. However, the record supports a finding that the Complainant's supervisor had a good faith belief that she only was waiving the time limits for filing a non-contractual grievance. Further, the Complainant failed to establish that he was justified in relying on his supervisor's comment as a waiver of the statutory time limit for filing a complaint under the Wisconsin Fair Employment Act, as opposed to waiver merely of the time limit for filing a non-contractual grievance. Therefore, it was not inequitable to

allow the Respondent to invoke the 300-day statute of limitations under the Act. Adam v. DNR (Wis. Pers. Comm'n, 12/20/02).

An allegation of negligence on the part of an attorney does not warrant tolling the statute of limitations. Johnsrud v. Prairie du Chien Mem'l Hosp. (LIRC, 06/21/02).

Equitable estoppel is available only if the employee's otherwise untimely filing was the result of either a deliberate design by the employer, or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge. Josellis v. Pace Indus. (LIRC, 06/21/02).

Individuals claiming equitable estoppel against a state agency must show the following elements: (1) That the claiming individual relied, (2) to his detriment, (3) upon an action or inaction by a state agency, (4) that resulted in a serious injury, and (5) the public's interest would not be unduly harmed by application of estoppel. In this case, a motion to dismiss the complaint on timeliness grounds was dismissed where, accepting what the Complainant said as being true, he established a claim of equitable estoppel where his supervisor stated that she would waive time limits on formal actions and the Complainant relied on this to his detriment because he did not file his complaint within the 300-day time limit. Adam v. DNR (Wis. Pers. Comm'n, 02/11/02).

Lack of familiarity with the law does not toll a statutory filing period. Javenkoski v. DOT (Wis. Pers. Comm'n, 08/28/00).

Many Complainants are laypersons. Layperson status does not justify extending the statute of limitations. Fester v. Kurt G. Joa, Inc. (LIRC, 08/25/00).

Even if the Complainant could demonstrate that his complaint was late due to negligence on the part of his attorney, this would not justify tolling the statute of limitations. Belli v. Village of Greendale (LIRC, 12/15/98).

The Complainant's mental illness tolls the statute of limitations only if the illness in fact prevents the sufferer from managing his affairs and, thus, from understanding his legal rights and acting upon them. Osegard v. Wis. Physicians Serv. (LIRC, 08/13/98).

While "excusable ignorance" may toll a statute of limitations, excusable ignorance does not mean ignorance of all the filing periods and technicalities contained in the law, nor does it mean ignorance of specific guidelines such as those issued by the EEOC. Rather, the question to consider is whether the Complainant was generally aware that she had a legal right to be free from discrimination. Gruhle v. Random Lake Sch. Dist. (LIRC, 06/19/98).

The Complainant did not establish a sufficient basis for tolling the statute of limitations where she asserted that she filed the complaint late due to "medical/physical problems." The Complainant presented no competent medical evidence to show that she was incapable of handling her affairs or comprehending her legal rights during the entire 300 day period following her discharge. Durham v. Emjay Corp. (LIRC, 03/26/97).

The application of the doctrine of equitable tolling was not warranted where the Complainant alleged that he was misled by his attorney into believing that he had waived his right to file a fair employment claim by collecting unemployment compensation benefits. Gartmann v. Ideal Door Co. (LIRC, 07/03/96).

Employees are required to exercise reasonable diligence by requesting an explanation for unfavorable employment actions when there is sufficient information available to them that should have, in their minds, raised a suspicion of discrimination. In this case, the Complainant did not inquire into the Respondent's reasons for not hiring him. After the 300- day statutory limit for filing a complaint had expired, he was informed that the job he had applied for had been "targeted for a woman." The Complainant did not establish a sufficient basis for tolling the 300-day statute of limitations. Young v. Madison Water Util. (LIRC, 01/18/96).

The application of equitable estoppel against the employer is justifiable only where the employer has knowingly been untruthful. When the employer offers a specific, objective factual statement which an unsuccessful job applicant might reasonably rely on to allay their concerns about whether their rejection was for a non-discriminatory reason, it could be considered to equitably estop the employer from reliance on the statute of limitations if it is later proven to be untrue. Sunn v. School Dist. of Poynette (LIRC, 07/24/95), aff'd sub nom. Sunn v. LIRC (Dane Co. Cir. Ct., 02/19/96).

Employees have an obligation to exercise reasonable diligence to discover essential information bearing on their claim. If they fail to exercise such reasonable diligence, any ignorance they suffer from is not "excusable" and equitable tolling may not be invoked. However, when an employer volunteers or otherwise provides a reason for the discharge, the situation is different. If a person is already in possession of information which casts doubt on the reason they received from the employer, it may not be reasonable for them to simply sit on their rights in the face of this knowledge. In this case, the Respondent told the Complainant that he was chosen for layoff because he made the most money and because his work performance was not up to par. The Complainant consistently argued that the allegations regarding his work were untrue. Additionally, the fact that a younger man remained employed in the Complainant's department, coupled with the Respondent's comments about his salary, would have or should have caused a reasonably prudent person to surmise that the discharge may have been based on the Complainant's age. Therefore, there was no basis in this case for tolling the statute of limitations. Kniess v. EGA Prod., Inc. (LIRC, 06/23/94).

The Respondent was not equitably estopped from asserting the statute of limitations as a defense because its attorney incorrectly represented to the Complainant's attorney that the Complainant was required to exhaust internal remedies prior to filing a complaint. The Complainant's attorney's reliance on the representation made by the Respondent's attorney were not reasonable. Case law establishes that participating in a grievance procedure does not toll the running of the statute of limitations for commencing an action under the Wisconsin Fair Employment Act. The Complainant's attorney had an obligation to look up the statute of limitations and determine through independent research whether he was required to follow the Respondent's internal procedures prior to filing a complaint with the Department. Perri v. DILHR (La Crosse Co. Cir. Ct., 04/25/94).

The two equitable doctrines relevant to the statute of limitations are equitable tolling and equitable estoppel. Equitable tolling is a doctrine that treats the running of the statute of limitations as being suspended for the duration of any period in which the Complainant is excusably ignorant of the employer's discriminatory act. Equitable estoppel, by contrast, is a doctrine that treats the employer as being estopped from raising the statute of limitations as a defense if the employer has misrepresented or concealed facts necessary to support a discrimination charge. The concepts of equitable estoppel and equitable tolling "intertwine" where the Complainant is excusably ignorant of the employer's discrimination because the employer has misrepresented or concealed facts. When an employer gives no reason for an employment action and no reason is apparent from facts already known by the person affected, or when the employer gives a reason which is inconsistent with facts already known by the person affected, the person affected may not later claim some equitable basis for relief from the statute of limitations if they take no steps to learn what the reason for the action was. However, if the employer does give a reason, and if it is not inconsistent with or

rendered doubtful by facts already known to the person affected, then the person affected will reasonably rely on this reason given. Their ignorance of an alleged real reason which they subsequently learn of is, in these circumstances, reasonable; it is also inequitable in such circumstances for the employer to raise the statute of limitations as a defense. Sunn v. Sch. Dist. of Poynette (LIRC, 08/17/93).

The statute of limitation will be tolled if the employer makes a misrepresentation of its intent to remedy an unlawful practice. The burden of establishing facts sufficient to justify tolling of the filing period is on the Complainant. Wright v. DOT (Wis. Pers. Comm'n, 02/25/93).

An employee who was informed of the termination of his employment on March 19, 1990 was required to file his claim alleging discriminatory discharge within 300 days of the March 19, 1990 date. The employee's attempts, through the employer's post-termination procedures, to regain his position did not toll the statute of limitations period. Hoefs v. Perlman-Rocque, Whitewater (LIRC, 09/16/92).

Where a Complainant argues that the statute of limitations should be equitably tolled because the Respondent did not have informational posters concerning applicable anti-discrimination laws posted at the workplace as required by the Age Discrimination in Employment Act, the Department will analyze the Complainant's arguments by reference to sec. Ind 88.21, Wis. Adm. Code, which is the posting requirement established by the Equal Rights Division. In this case, the Complainant's claim for equitable tolling was rejected, even if the Respondent did not post the required posters. The failure to post notices is only considered legally significant if the employee is genuinely ignorant of the illegality of discrimination which the notice, if it had been posted, could have informed him of. Olson v. Lilly Research Lab. (LIRC, 06/25/92). [Ed. note: sec. Ind 88.21, Wis. Adm. Code, has been renumbered sec. DWD 218.23, Wis. Adm. Code.]

There are two related doctrines whereby a Complainant may modify the length of a filing period: equitable estoppel and equitable tolling. Equitable estoppel occurs where an employee is aware of his rights but does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct. The employer must be shown to have either an improper purpose or constructive knowledge of the deceptive nature of his conduct. Equitable tolling is premised on a party's excusable ignorance of their statutory rights. It can be found to toll the statute of limitations if the excusable ignorance is caused by the failure of the employer to conspicuously post informational notices required by law. Even where an employer has failed to post, the appropriateness of equitable tolling continues only until the employee receives actual notice or contacts an attorney. The required knowledge of the law is not the details of the statute of limitations or other procedural niceties of the anti-discrimination statutes, but merely of the general fact that discrimination is unlawful. Olson v. Lilly Research Lab. (LIRC, 06/25/92).
A person's hope that an employer will reverse an adverse decision, when that hope has not been induced by statements or actions of the employer, is an inadequate basis on which to find equitable estoppel which would modify the length of the filing period. Olson v. Lilly Research Lab. (LIRC, 06/25/92).

There are circumstance where a Complainant may be allowed to file a complaint of discrimination even though the filing of the complaint occurs beyond the 300-day limitations period. The doctrine of equitable estoppel comes into play if a Respondent takes active steps to prevent the Complainant from suing in time. The doctrine of equitable tolling comes into play where a Complainant, despite due diligence, is unable to obtain vital information bearing on the existence of his claim (i.e., information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the Respondent). Similarly, equitable tolling may apply when the untimeliness of the complaint was due to errors by the fair employment practice agency. There were no such errors here. The Equal Rights Division investigator issued an Initial Determination making a finding on a constructive discharge claim when that issue had not been raised by the complaint. However, the Complainant was represented by legal counsel within only a few days of the issuance of the Initial Determination. The Complainant's counsel should have noted that, although there was a finding of

constructive discharge in the Initial Determination, there was no claim of constructive discharge in the complaint. At the time that the Complainant retained legal counsel, several months still remained before the expiration of the 300-day statutory filing period. Equitable tolling is inappropriate when the Complainant has consulted an attorney during the statutory limitation period. James v. Associated Schools, Inc. (LIRC, 11/27/91).

The Complainant was denied leave to amend the complaint because the amendment was untimely. There was no merit to the Complainant's claim that the statute of limitations should have been tolled because of his alleged disability where the Complainant: (1) was represented by legal counsel and told his counsel of the factual basis for his amendment months before the statute of limitations expired, and (2) filed an unemployment compensation claim and testified at a hearing on that claim well before the statute of limitations on his equal rights claim expired. Wilson v. Coplan's Appliance (LIRC, 10/10/89).

The Complainant's lack of knowledge of the law does not toll the running of the statute of limitations. Gillett v. DHSS (Wis. Pers. Comm'n, 08/24/89).

Where the Complainant received notice of his termination and the complaint was filed 417 days later, the complaint was untimely despite the Complainant's filing of a grievance with the union within the 300-day period. Landrum v. DILHR (Yellow Freight) (Milwaukee Co. Cir. Ct., 03/06/89).

The filing of a contractual grievance concerning an employment action does not toll the running of the statute of limitations. King v. DHSS (Wis. Pers. Comm'n, 08/06/86).

The 300-day filing limit is not a jurisdictional prerequisite to suit. It is a statute of limitations which is subject to waiver, estoppel, and equitable tolling. County of Milwaukee v. LIRC, 113 Wis. 2d 199, 335 N.W.2d 412 (Ct. App. 1983).

The 300-day limitation period does not stop running even though a contractual grievance is filed. Hoepner v. DHSS (Wis. Pers. Comm'n, 06/30/81).

711.4 Determinations of timeliness, appealability

The commission's authority under the WFEA is limited, pursuant to Wis. Stat. §111.39(5), to reviewing the findings and orders of ERD's administrative judges, and not the decisions of ERD investigators or other employees. A petition for commission review is not a substitute for departmental review of the decisions of ERD's investigation bureau. Balele v. State of Wis. Dep't of Corrections (LIRC, 06/13/18).

The question of whether a layoff is permanent and terminates the employment relationship is a fact-specific one. It is inappropriate to resolve a factual dispute regarding the timeliness of a complaint without an evidentiary hearing. Krentz v. Carew Trucking, Inc. (LIRC, 2/7/13).

It is not necessary to hold an evidentiary hearing in a statute of limitations case when the Complainant's contentions are inherently incredible. In this case, the Complainant's assertion that she did not have adequate notice of her discharge was not reasonable or credible and could not be the basis of a genuine issue of material fact just because she asserted that it was. Stanitsa v. Med. College of Wis. (LIRC, 09/21/12).

It is inappropriate to resolve a factual dispute regarding the timeliness of a complaint without an evidentiary hearing, unless the Complainant's contentions are inherently incredible. In this case, the Complainant's

assertions were inherently incredible. They did not warrant further hearing. The dismissal of the complaint as untimely was affirmed. Hootsell v. Waukesha County (LIRC, 06/09/11).

The fact that certain allegations in the complaint were untimely, and thus could not in themselves be found to constitute discreet violations of the Wisconsin Fair Employment Act, does not mean that the events cannot be considered as evidence bearing on the question of whether acts which occurred within the 300-day period were discriminatory. The statute of limitations is not a rule of evidence. Clark v. Friskies Petcare (LIRC, 08/16/01).

An order by the Administrative Law Judge which remanded a case to investigation and which also denied the Complainant's motion for leave to amend his complaint because the proposed amended complaint was time-barred is a final order with respect to the denial of permission to amend the complaint. It does not matter that the Equal Rights Division treats the order as being interlocutory. LIRC has authority to act on the Complainant's petition for review. James v. Associated Schools, Inc. (decision on petition for rehearing) (LIRC, 03/24/89).

A hearing examiner's conclusion that a complaint is timely filed is not subject to appeal until the case has been decided on the merits. Fox v. Massey-Ferguson (LIRC, 02/28/83).

Where the Equal Rights Division dismissed a complaint as untimely prior to investigating the complaint, the proper appeal was by writ of mandamus to circuit court rather than to LIRC, since LIRC's jurisdiction is limited by sec. 111.36(3m), Stats. Chester v. Int'l Harvester (LIRC, 06/05/80). [Ed. note: Sec. 111.36(3m), Stats., has been replaced by sec. 111.39(5)(a), Stats.]

712 Parties, naming in complaint

An individual supervisor should not be named separately as a Respondent where the alleged violation of the law arose out of actions taken as an agent of the employer. Powell v. Salter (LIRC, 07/11/97).

Where there was no evidence that a named individual acted outside of his authority as an agent of the Respondent, that individual should not be named as a Respondent. Hoey v. County of Fond du Lac (LIRC, 07/09/97).

While secs. 111.321 and 111.325 of the Wisconsin Fair Employment Act provide that no "person" may engage in an act of employment discrimination, the Act also expressly provides for employer liability for any financial remedies ordered as a result of a violation of the law "by an individual employed by the employer." Sec. 111.39(4)(c), Stats. Thus, individual supervisors acting as agents of the employer should not be named as separate Respondents in discrimination complaints. Yaekel v. DRS, Ltd. (LIRC, 11/22/96).

Even if the Complainant misnamed one of the parties in the complaint, the Equal Rights Division should not have dismissed the complaint on that basis because the Division caused the problem itself by initially "rejecting" the complaint and returning it to the Complainant with instructions to name a different entity as the Respondent. The Complainant followed the instructions given to her by the Equal Rights Division. For the Division to subsequently dismiss the complaint because it found fault with that description is contrary to notions of fundamental fairness. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

Given the close statutory relationship between the Department of Regulation and Licensing and the Dentistry Examining Board, it would be highly artificial to insist that the Board had such a separate identity from the Department that an administrative complaint was defective in naming the Department rather than the Board, particularly when the allegations of the complaint identified the role of the Board in the alleged discrimination.

Dismissal of the complaint for some perceived failure to correctly name parties would represent a hyper-technical approach to pleading that has no place in administrative litigation. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96).

Failure to name a city as a party in a discrimination complaint did not deprive the Equal Rights Division of jurisdiction to investigate where the Complainant was unrepresented at the time of filing, the drafting of the complaint was done by the Equal Rights Division, the city had timely notice of the allegations and the city was named in an amended complaint. Jones v. Racine County (LIRC, 07/08/83).

713 Identification of issues, notice

A Complainant who was unrepresented when filling out her complaint form should not have that complaint read narrowly. The Complainant filed her complaint without assistance from legal counsel. Although she only checked the box on the complaint form for retaliation, in her "Statement of Discrimination" she included a set of factual assertions that clearly encompassed an allegation of disability discrimination. Having concluded that the issue of disability discrimination was raised but never investigated, the commission remanded for a new investigation. Zahorik v. Karl Schmidt Unisia, Inc. (LIRC, 06/18/15).

Where an issue is not raised by a complaint, the Equal Rights Division's investigation bureau is without authority to issue an initial determination making a conclusion on that issue, and the Equal Rights Division is without authority to conduct a hearing on that issue. Findings and orders under the Wisconsin Fair Employment Act may not be broader than that specified in the complaint and notice of hearing. Greco v. Snap-On Tools (LIRC, 05/27/04).

Where the Complainant filed a complaint under the Healthcare Worker Protection Act, sec. 146.997(3), Stats., it was inappropriate for the Equal Rights Division to issue an initial determination making a conclusion as to whether sec. 111.322(2m), Stats., had also been violated. The complaint was drafted and filed on the Complainant's behalf by an attorney. Presumably, if the Complainant had intended to allege not only a violation of the Healthcare Worker Protection Act, but also a violation of sec. 111.322(2m), Stats., she would have done so. Korn v. Divine Savior Healthcare (LIRC, 01/16/04).

A Complainant need provide only a general statement describing the allegedly discriminatory action in order to satisfy the very liberal pleading requirements of the Wisconsin Fair Employment Act. Moeller v. County of Jackson (LIRC, 01/27/03).

When termination is an issue in the complaint, constructive discharge need not be pled as a separate cause of action. Health Enterp. of Wis. v. Leconte (Dane Co. Cir. Ct., 05/17/95).

Where an issue is not raised by a complaint, the Equal Rights Division's Investigation Bureau is without authority to issue an Initial Determination making a conclusion on that issue, and the Equal Rights Division is without authority to conduct a hearing on that issue. In this case, the investigator made a finding of probable cause on the issue of constructive discharge, which was not an issue raised by the complaint (which only contained allegations of discrimination with respect to promotion and demotion). The notice of hearing also indicated that constructive discharge was an issue in the case. On motion of the Respondent, the Administrative Law Judge correctly amended the notice of hearing to delete constructive discharge as an issue for hearing. James v. Associated Schools, Inc. (LIRC, 11/27/91).

Where, in a case concerning an alleged discriminatory discharge, there was no reference to wage discrimination in the complaint and no investigation or initial determination of any wage discrimination claim,

the Administrative Law Judge properly barred the Complainant from litigating a discriminatory wage claim at the probable cause hearing. Marchant v. Breakthru Marketing Serv. (LIRC, 02/05/88).

A Complainant who was unrepresented when filling out her complaint should not have that complaint read narrowly so as to prevent her from introducing evidence on issues which are closely related to those raised in the complaint. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

A complaint (and notice of hearing) that alleges retaliatory discharge does not constitute sufficient notice that the Complainant is also alleging that her discharge was sex discrimination. Hoyer v. LIRC (Milwaukee Pub. Library) (Dane Co. Cir. Ct., 11/10/83).

Where a complaint (and notice of hearing) alleges that a Complainant had not been reinstated because she refused a lie detector test, the issue of whether her initial suspension was for the same reason was not properly raised. Rudd v. The Rising Sun (LIRC, 11/04/82).

A complaining party's failure to allege anything related to her termination in the complaint precluded DILHR from deciding whether she was constructively discharged. Rau v. Mercury Marine (LIRC, 05/19/77), aff'd sub nom. Rau v. DILHR (Dane Co. Cir. Ct., 02/21/79).

It was proper for DILHR to consider the legality of an employee's demotion and its relationship to the ultimate discharge even though his complaint challenged only the discharge. Michels v. Giddings & Lewis Machine Tool (DILHR, 12/06/77).

An employer's failure to make a reasonable accommodation can be considered raised by a complaint which charges the employer with handicap discrimination even where the complaint did not specifically allege such a failure. In addition, the investigation of a handicap discrimination complaint by DILHR must include a determination of whether a prudent person might believe that there has been a failure to reasonably accommodate a handicapped individual. Teggatz v. LIRC (DHSS) (Dane Co. Cir. Ct., 10/03/77).

Where handicap discrimination did not form the basis for the filing of the original complaint and was not raised in the notice of hearing, the hearing examiner's findings on that issue cannot be affirmed by DILHR. Hanson v. Waukesha Bearings (DILHR, 11/18/76).

714 Amendment of complaint, relation back to original complaint

The Complainant failed to establish good cause for waiting until the day of hearing to attempt to amend his complaint to include a constructive discharge claim where the Complainant argued that: (1) his constructive discharge claim was implicit, (2) he made the investigator aware that he had retired earlier than planned, and (3) the Respondent had adequate notice that he intended to pursue this claim. The Complainant failed to make any mention of constructive discharge in his complaint. Moreover, the initial determination only addressed the issue of reasonable accommodation and should have made the Complainant well aware that the Department did not construe his complaint as encompassing a constructive discharge claim. Nevertheless, the Complainant did not attempt to amend his complaint, even after the hearing notice was issued indicating that the only issue for hearing was whether the Respondent violated the law by refusing to accommodate a disability. Satorius v. DOC (LIRC, 01/31/17).

Under the circumstances, the Complainant had ample opportunity prior to the conclusion of the evidentiary hearing to amend his complaint to include a claim of retaliation; failure to move to amend prior to the close of the evidentiary record amounted to a waiver of the right to assert a retaliatory discharge claim. Dent v. RJ Wood Indus., Inc. (LIRC, 03/28/14).

The Complainant's proposed amended complaint contained allegations of discrimination in compensation. These allegations did not rise out of the same facts and circumstances in her original complaint, which alleged discrimination in discipline, suspension and discharge. Therefore, the amended complaint did not relate back to the original complaint for statute of limitations purposes. The amended complaint was filed more than 300 days after the alleged discrimination, and it was appropriately dismissed. Sallis v. Aurora Health Care (LIRC, 12/03/10).

The provisions of sec. 802.09(2), Stats., relating to "Amendments to Conform to the Evidence" do not apply to hearings on complaints under the Wisconsin Fair Employment Act. Hanson v. DOT (LIRC, 06/14/05).

It is too late to amend a complaint once the evidence has been presented at hearing and the decision issued. Hosey v. West Allis Mem'l Hosp. (LIRC, 07/08/98).

The amended complaint, which named an additional Respondent, was filed well beyond the 300-day statute of limitations. The amended complaint could not relate back to any earlier, timely complaint because no such complaint had ever been filed against that particular Respondent. Pulvermacher v. Regency Partners (LIRC, 04/28/93).

When, during the course of investigation, it becomes apparent that a Complainant is alleging a second basis of discrimination which is not clearly identified by the complaint, the proper procedure is that the Complainant should be advised to file an amended complaint pursuant to sec. 88.06(2), Wis. Admin. Code. Gartner v. Hilldale, Inc. (LIRC, 05/12/92). [Ed. note: sec. 88.06(2), Wis. Admin. Code, has been replaced by sec. DWD 218.06(2), Wis. Admin. Code.]

The Complainant's proposed amended complaint alleging that he was constructively discharged subsequent to the date he filed his original complaint was untimely because it did not relate back to the original complaint, which contained allegations of promotion and demotion discrimination. The constructive discharge claim was comprised of an entirely different set of facts and circumstances than those set forth in the original complaint. James v. Associated Schools, Inc. (LIRC, 11/27/91).

The Complainant failed to establish good cause for failing to amend his complaint at least ten days prior to the hearing where the Complainant argued that the Respondent had adequate notice that he intended to pursue a claim of constructive discharge, even though that claim was not included in the original complaint, which alleged discrimination with respect to promotion and demotion. There was nothing in the Respondent's conduct which can be said to have caused it to have acquiesced in the prosecution against it of the claim of constructive discharge. In any event, it is difficult to see how a waiver theory could justify the Equal Rights Division in conducting a hearing on an issue as to which no complaint had ever been filed. James v. Associated Schools, Inc. (LIRC, 11/27/91).

Where the record at hearing discloses a possible violation of the Wisconsin Fair Employment Act which was not included in the complaint, the Department may wish to consider the significance of sec. Ind 88.06(2), Wis. Admin. Code, which provides that the Department may advise a Complainant to amend the complaint if it appears that the Respondent may have engaged in discrimination other than that alleged in the complaint. Joseph v. Cent. Parking (LIRC, 08/20/90). [Ed. note: sec. Ind. 88.06(2), Wis. Admin. Code, has been replaced by sec. DWD 218.06(2), Wis. Admin. Code.]

Where the allegations of a proposed amended complaint arise out of the same facts and circumstances alleged in an earlier, timely filed, complaint the proposed amended complaint will be deemed to relate back to the earlier complaint for statute of limitations purposes. Wilson v. Coplan's Appliance (LIRC, 10/10/89).

An amended complaint of handicap discrimination concerning events occurring "during the course of the Complainant's employment" and "on or about June 1986" did not relate back to the original complaint where the original complaint concerned a claim of race discrimination based on Complainant's discharge in December 1986. Wilson v. Coplan's Appliance (LIRC, 10/10/89).

The Complainant was given leave to amend his complaint because the amendment, which was an allegation that his discharge was based on his handicap, arose from the same facts and circumstances as the original complaint, which alleged that the Complainant's discharge was based on his race. Wilson v. Coplan's Appliance (LIRC, 10/10/89).

The Complainant was not allowed to amend the complaint to include additional allegations after the Initial Determination had been issued where the Complainant had already amended his complaint once and gave no good reason why he had not made his amendment earlier. Ferrill v. DHSS (Wis. Pers. Comm'n, 08/24/89)

Where it is unclear from the complaint and the amended complaint whether the allegation involved is a continuing violation, it would be inappropriate to deny the request to amend the complaint. Vander Zanden v. DILHR (Wis. Pers. Comm'n, 02/28/89).

The Administrative Law Judge appropriately informed the Complainant he could file an amended complaint to add an allegation of sex discrimination when, during the course of the hearing on a claim of retaliatory failure to hire, one of the Respondent's witnesses indicated that sex was a factor in the hiring decision. Rodgers v. Milwaukee County (LIRC, 09/19/88).

The Complainant in a race and handicap discrimination matter moved to include a charge of sex discrimination two days before the hearing. The Personnel Commission refused to allow the Complainant to amend his complaint in view of the untimeliness of this request, the fact that the Complainant was represented by counsel, the fact that there was no indication that the issue of sex discrimination was not known at the time the complaint was filed, and the fact that well prior to the hearing date, counsel for the Complainant entered into a formal stipulation as to issues for hearing which did not involve sex discrimination. Johnson v. DHSS (Wis. Pers. Comm'n, 01/30/85).

It would be fundamentally unfair not to allow a party to amend her complaint to include a new charge where she had been without counsel and relied on the assistance of the Department in preparing the original complaint. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

Where an allegation of age discrimination in a proposed amended complaint arose out of the same events as set forth in the original charge, it would relate back to the date of filing of the original charge. Szymczak v. S.C. Johnson & Son (LIRC, 08/27/82).

It was error to deny the Complainant's request to amend his race discrimination complaint to include a charge that the same conduct was also national origin discrimination, because no new factual allegations were involved and such an amendment relates back to the original date the complaint was filed. Parker v. Thiem (LIRC, 05/14/82, amended 06/10/82).

An amendment to allege retaliation was permitted because it related back to the date of the original complaint, but the amendment should be referred for investigation and an initial determination before proceeding to hearing. Adams v. DNR (Wis. Pers. Comm'n, 01/08/82).

The employer properly objected to a hearing on a new discrimination issue which had been added by amendment to the original charge, but which the Equal Rights Division had not investigated or found probable cause on. AMC v. DILHR (Basile) (Dane Co. Cir. Ct., 10/03/77).

715 Adequacy of complaint

The narrative portion of the Complainant's complaint did not "clearly encompass" a retaliation claim that had not been specifically identified by the Complainant due to Complainant's failure to check the box on the complaint form indicating a cause of action for retaliation. Bates v. Care Partners Assisted Living, LLC (LIRC, 09/27/19).

An unrepresented Complainant checked the box indicating that the reason for discrimination was her filing of a previous complaint with the ERD but did not check the box indicating that her disability was also a reason she experienced discrimination. In the narrative portion of the complaint, the Complainant asserted facts that encompassed a claim of disability discrimination. The commission found that the set of factual assertions in the narrative portion of the complaint "clearly encompassed" an allegation of disability discrimination. The fact that the Complainant did not check the proper box on the front of the form, which is not a statutory requirement for the filing of a complaint, is not a circumstance that should have prevented all of the allegations in her complaint from being investigated and resolved. Zahorik v. Karl Schmidt Unisia (LIRC, 06/18/05).

A complaint which contains an extremely long and rambling statement of allegations may effectively frustrate any attempt an employer might make to respond to it or an investigator might make to analyze and evaluate it. In this case, the complaint failed to state any clear allegations which, if true, would constitute a violation of the Wisconsin Fair Employment Act. The complaint's references to "creed" do not refer to a creed or religion as covered by the Act. The few statements in the complaint touching upon the matter of age are ambiguous. None of the situations mentioned in the complaint narrative clearly alleged discrimination because of age as contemplated by the Act. The complaint makes references to the Complainant's medical condition, however there is no clear allegation that the employer allegedly discriminated against the Complainant because of this condition. Accordingly, the complaint was properly dismissed for failure to state a claim for relief under the Wisconsin Fair Employment Act. Beimborn v. Mark Kuether Constr. (LIRC, 04/19/00).

The rules of the Personnel Commission indicate that a complaint shall be written, signed, verified and notarized and should identify the Complainant, the Respondent and the facts which constitute the alleged unlawful discrimination. The rules specify that technical defects or omissions may be cured by amendment. In this case, the Complainant's letter to an EEOC investigator identified the Complainant, the Respondent and the alleged discriminatory conduct. Technical omissions could be cured through the submission of a completed complaint form. Dawsey v. DHSS (Wis. Pers. Comm'n, 10/29/92).

The Wisconsin Fair Employment Act does not require that a complaint be on a particular form. Sec. Ind 88.02(2), Wis. Adm. Code, indicates that a complaint shall be written on a form which is available at any Division office, however, it also indicates that it may be filed on "any other form acceptable to the Department." A letter alone may serve to satisfy the requirements of timely filing of a complaint. Therefore, a letter filed as an attachment to and expanding upon the allegations set forth on an official division complaint form should be viewed as part of the complaint. Helton v. Wesbar Corp. (LIRC, 03/19/92). [Ed. note: sec. 88.02(2), Wis. Admin. Code, has been replaced by sec. DWD 218.03(3), Wis. Admin. Code.]

Where the gist of the complaint was that the Respondent discharged the Complainant on the basis of false reports made to the Respondent by others, and where the complaint failed to allege that the false reports concerned or were motivated by the Complainant's religious beliefs, that the Respondent knew or believed that the complaining individuals disliked the Complainant's religious beliefs, or that the employer itself shared any dislike others may have held for his religious beliefs, the complaint failed to state a claim upon which relief

could be granted on a theory of religious or creed discrimination. Hallingstad v. A.B. Dick Prod. (LIRC, 11/05/87).

Where the Complainant was denied employment as a truck driver because he was too large to be accommodated in the cab of the truck, the hearing examiner properly dismissed the complaint without conducting a hearing on the grounds that the Complainant was not handicapped within the meaning of the Act. Because the complaint failed to state a claim upon which relief could be granted under the Wisconsin Fair Employment Act, the examiner was within his authority to dismiss the complaint prior to the hearing. Rick v. Fore Way Express (LIRC, 07/25/85).

DILHR has the authority to dismiss a complaint at any stage of the proceedings before it, whether at the request of a party or upon its own motion, for failure to state a claim upon which relief may be granted. Lambert v. DILHR (AMC) (Dane Co. Cir. Ct., 07/25/77).

716 Preliminary Determinations

It was unnecessary to determine whether the Complainant was in good enough health to file an appeal or whether she was justified in assuming that her attorney had filed an appeal on her behalf because the statute contains no exception for appeals that are late for good cause. Glass v. FF Mark of Wisconsin (LIRC, 12/11/18).

Where the Complainant asserted that he did not receive the preliminary determination until after the deadline for appealing had expired, and those assertions were not inherently implausible, the Complainant must be given an opportunity for a hearing to establish late receipt. Pendleton v. Madison Kipp Corporation (LIRC, 08/22/18).

Wisconsin Admin. Code § DWD 218.05(3) provides that a preliminary determination may be appealed within 20 days of the date of the determination. The rule provides no exception allowing late appeals of preliminary determinations to be considered, even where the appeal is late for good cause. Anderson v. Labor Ready Midwest (LIRC, 12/14/17).

The Complainant filed untimely appeals of an initial determination of no probable cause and a preliminary determination partially dismissing her complaint. There are circumstances in which a late appeal does not foreclose the possibility that the appeal could be addressed and ruled upon, such as in Carlson v. SPF North America (LIRC, 04/27/07), where a party did not have a reasonable opportunity to receive or become aware of the determination within the appeal period. That exception does not apply here, where the Complainant left town without making arrangements to have her mail attended to. Sipprell v. Kenosha Unified Sch. Dist. (LIRC, 01/15/15).

In this case, the written appeal of a preliminary determination dismissing the complaint was not received until 24 days after the preliminary determination was issued, and it was, thus, late. The rule governing appeals of preliminary determinations provides no exceptions for late appeals. The Complainant had vision problems, but prior to the issuance of the preliminary determination he had not requested documents to be sent to him in large print. The investigator's mailing of a large print version of the preliminary determination to the Complainant at his request did not constitute issuance of a new determination so as to set a new appeal period. Nemec v. Sch. Dist. of Washburn (LIRC, 01/30/14).

A hearing should be held in the case of an appeal of a Preliminary Determination which turns on disputed factual issues. Bedynek-Stumm v. City of Madison (LIRC, 11/30/01).

The "preliminary review of complaints" rule found in sec. ILHR 218.05, Wis. Admin. Code, applies to every complaint filed. A complaint is filed when it is received by the Equal Rights Division. If the Division concluded

that a complaint failed to identify a Respondent that was subject to the Act, then it was incumbent on it to follow the procedures of the "preliminary review of complaints" rule, rather than to "reject" the complaint and return it to the Complainant with instructions to provide different information in the complaint. Johnson v. Cent. Reg'l Dental Testing Serv. (LIRC, 02/29/96). [Ed. note: Sec. ILHR 218.05, Wis. Admin. Code, has been re-named sec. DWD 218.05, Wis. Admin. Code].

An investigator for the Equal Rights Division concluded that some of the allegations of race discrimination in a complaint were barred by the statute of limitations. The investigator issued a Preliminary Determination and Order dismissing those untimely allegations. The investigator also issued an Initial Determination finding that there was no probable cause to believe that other portions of the complaint (which were timely) established reason to believe that the Respondent had discriminated against the Complainant on the basis of race. The Complainant filed a letter stating that he wished to appeal the finding made in his case. The Division certified the case to hearing on the appeal of the no probable cause portion of the case. The appeal of the Preliminary Determination was referred to the Administrator of the Equal Rights Division for a decision regarding the statute of limitations issue with respect to the remaining portions of the complaint. The Administrator of the Equal Rights Division issued a decision indicating, inter alia, that the Initial Determination in this matter should have been labeled a Preliminary Determination, and that the complaint was dismissed because it was untimely. Subsequently, a notice of hearing was issued on the no probable appeal portion of the case. The Administrative Law Judge assigned to the case dismissed the complaint on the ground that the decision of the Administrator had dismissed the entire complaint. The Labor and Industry Review Commission reversed this decision, believing that the Administrator of the Equal Rights Division had made an essentially ministerial error of failing to observe that there had been not one but two decisions issued by the investigator. The Commission therefore concluded that the Administrator had not intended to dismiss the entire complaint, but only the portions of it as to which the investigator had made a finding of untimeliness. Jones v. Milwaukee County (LIRC, 10/13/94).

717 Effect of pre-filing waiver and release of claims

While tendering back the consideration a Complainant received for signing the waiver and release is a prerequisite for challenging the validity of the waiver and release, dismissal of the Complainant's case on the basis of his check being returned for insufficient funds was inappropriate where the Respondent's attorney had waited an unreasonable amount of time (more than a month) to deposit the check into the Respondent's account. The Complainant was willing to return the severance pay when asked and did so. The Respondent's attorney received the check from the Complainant but did not act expeditiously to deposit the check into its trust account. The Respondent then acted immediately to move for a dismissal of the complaint which the Administrative Law Judge promptly granted without giving the Complainant any opportunity to remedy the situation. Xu v. Epic Systems Corp. (LIRC, 01/31/17).

Undisputed facts persuade LIRC that the Complainant knowingly and willingly waived his rights to bring a complaint of employment discrimination against his employer. The Complainant's lack of knowledge that his employer had made certain changes in his personnel record did not make the waiver not "knowing." Alternatively, dismissal was also required here because the Complainant did not tender back the payment he received in exchange for his waiver. Musial v. AECOM Gov't Serv., Inc. (LIRC, 07/21/14).

Although Complainants are generally required to tender back any consideration received in exchange for the waiver of their rights to pursue discrimination claims, as a condition precedent to challenging the validity of such waiver, there was a special circumstance in this case: the settlement agreement contained a provision stating that "reimbursement shall occur if, *and only if*, employee receives a judgment against the [employer]." The provision anticipates that any return of the consideration will come out of a recovery on the underlying discrimination claim. The tender-back requirement, therefore, does not apply. Carson v. Columbia St. Mary's (LIRC, 03/12/13).

The severance agreement in this case, which waived the employee's claims against the employer, does not have an "integration" clause indicating that it is the final, full and complete expression of the parties' agreement. Therefore, the parol evidence rule does not preclude the employee from relying on a claim that oral statements by an agent of the employer altered the terms of the written settlement agreement subsequently entered into. Carson v. Columbia St. Mary's (LIRC, 03/12/13).

In this case in which the employee is challenging the validity of a severance agreement waiving her claims against the employer on the grounds that she did not knowingly and voluntarily waive her rights when she signed it, there were material disputes of fact as to what was said, including whether the Complainant was told particular things about the effect of the agreement. The Commission concludes that determination of whether the employee knowingly and voluntarily waived her rights when she signed the severance agreement should be made based on assessment of credibility of testimony given at a hearing. Carson v. Columbia St. Mary's (LIRC, 03/12/13).

The Complainant voluntarily entered into a severance agreement waiving the right to file any claims against the Respondent under the Wisconsin Fair Employment Act. The Complainant's argument that the agreement was nullified by the Respondent's alleged breach of the agreement was rejected. The Equal Rights Division does not have jurisdiction to decide whether a severance agreement has been breached. It is for a court to determine whether such an agreement has been breached and, if so, what remedy is available to the Complainant. Duquaine v. Wis. Evangelical Lutheran Synod (LIRC, 03/31/06).

The Complainant made a voluntary and knowing waiver of her right to bring an employment discrimination complaint against the Respondent under the Wisconsin Fair Employment Act. There was no showing that she was induced to sign the agreement through any fraud. The Complainant was aware of facts sufficient to lead her to suspect age discrimination at the time of her termination, and the release did not hide the fact that the Respondent was seeking to protect itself from any possible age discrimination claims. Moreover, the Respondent did not obtain the Complainant's termination in exchange for the benefits it was giving her under the agreement; the termination was something the employer (in the absence of any contractual right to a term of employment) had the power to carry out regardless of the agreement. What the Respondent obtained was the release of claims in exchange for the benefits it gave the Complainant, and there was no fraud in connection with that exchange. The Complainant had the opportunity to consult with an attorney of her own choosing. She was given forty-five days to consider the release agreement. Following execution of the agreement, she was given seven days to revoke her acceptance of the agreement. Semandel v. Briggs & Stratton (LIRC, 02/24/05).

A Complainant cannot challenge the validity of a separation agreement and, at the same time, keep the proceeds of that agreement. However, it is sufficient if the Complainant offers to return the severance payment, even if payment has not yet been made. In this case, the Complainant indicated that she did not intend to return the payment. The Administrative Law Judge dismissed her complaint. The Complainant's offer to return the severance payment at the time that she filed her petition for review of the dismissal of her complaint was self-serving; however, it might be sufficient to enable the Complainant to challenge the validity of the underlying agreement on appeal. Wesley v. TMP Worldwide (LIRC, 02/07/03).

The following factors should be applied as part of a "totality of circumstances" test to determine whether a Complainant made a knowing and voluntary waiver of her right to pursue an employment discrimination claim against a Respondent under the Wisconsin Fair Employment Act: (1) the Complainant's education and business experience, (2) the amount of time the Complainant had to examine the agreement before signing it, (3) the Complainant's role in determining the terms of the agreement, (4) the clarity of the agreement, (5) whether the Complainant was represented by counsel or consulted with an attorney, (6) whether the consideration

given in exchange for the waiver exceeded employee benefits to which the Complainant was already entitled by contract or law, and (7) whether the Complainant was encouraged to consult an attorney and whether the Complainant knew or should have known her rights upon execution of the release. That a Complainant chooses not to consult an attorney does not undermine a finding that a release was signed knowingly and voluntarily. It should normally suffice for the employer to suggest that the employee may want to consult an attorney. Further, the fact that a Complainant did not play a role in deciding the terms of the agreement is not a sufficient basis, in and of itself, upon which to conclude that the waiver was not knowing and voluntary. Further, while a Complainant's particular financial circumstances may have made it difficult for her to reject the agreement, a release of claims will nevertheless be upheld if she had a meaningful choice, in that she could have consulted an attorney and elected to pursue her legal rights rather than execute the release agreement. Wesley v. TMP Worldwide (LIRC, 02/07/03).

The Complainant's allegations of fraud were insufficient to void a severance agreement where the offer of a severance package was a separate issue from the termination itself. The Complainant alleged that, at the time she signed her severance agreement, which released all known and unknown claims against Respondent, she had been told by Respondent that her position was being eliminated due to a restructuring of the company. She later learned (after the expiration of the agreement's revocation period) that her former position had actually been assumed by a male employee. The Complainant stated that she suspected at the time of separation that she had been the victim of discrimination, and yet she entered into the severance agreement despite this suspicion. Wesley v. TMP Worldwide (LIRC, 02/07/03).

An agreement into which a Complainant has knowingly and voluntarily entered will not be disturbed simply because the Complainant has had second thoughts about the wisdom of entering into such an agreement. The fact that a Complainant has changed his or her mind about the wisdom of what they have done does not change the binding nature of the agreement. Wesley v. TMP Worldwide (LIRC, 02/07/03).

The Complainant's complaint of discrimination was foreclosed based upon the Agreement of Resignation and Release he entered into with the Respondent. Under the agreement, the Complainant irrevocably and unconditionally released the Respondent from any and all claims arising prior to the signing of the agreement. The Complainant objected to the validity of the release. However, the totality of the circumstances demonstrated that the agreement was valid. Under the agreement the Respondent agreed to provide the Complainant with group health insurance benefits for three months as consideration for signing the agreement. The Complainant was given three weeks to examine the agreement before signing it, and after signing it, another week to change his mind and rescind it. He was encouraged to review the agreement with a representative of his choice prior to signing it, and he in fact did consult an attorney prior to signing it. The mere fact that the Complainant found himself in financial difficulties and that he had to care for his family and pay his bills did not constitute duress. The record shows that there was a knowing and voluntary waiver of rights under the Wisconsin Fair Employment Act. Meltz v. City of Appleton (LIRC, 12/27/01).

Following her discharge, the Complainant signed a waiver and release which specifically waived claims the Complainant may have had under the Wisconsin Fair Employment Act. The Complainant subsequently filed a complaint of discrimination with the Equal Rights Division. She alleged that the contract containing the waiver and release was null and void because it had been breached by the Respondent. However, an alleged breach of a contract does not make the contract null and void. The Complainant had the right to go to court to enforce the contract and to seek a court order that the Respondent comply with the terms of the contract. The Equal Rights Division does not have jurisdiction to decide breach of contract questions regarding private agreements. The Complainant willingly and voluntarily signed the agreement, with the advice of legal counsel and with adequate time to consider the agreement. Therefore, the Equal Rights Division properly dismissed her complaint. On appeal to LIRC, the Complainant asserted for the first time that there was duress in the signing of the agreement. However, an assertion that a settlement agreement was entered into based on poor advice

from an attorney does not provide a basis for the Equal Rights Division to overlook the existence of a waiver and release directed expressly to claims under the Wisconsin Fair Employment Act. Welles v. Einhorn Assoc. (LIRC, 04/19/00).

A Complainant is required to tender back the consideration received in exchange for a waiver of her rights as a condition precedent to challenging the validity of the waiver. Lynch v. Zalk Joseph's Fabricators (LIRC, 07/17/96).

The Complainant's claim that she did not know "the real reason" for her discharge at the time she signed a release agreement was immaterial since the agreement clearly noted that it was a release of all "known and unknown" claims against the employer. Release agreements containing this language constitute a valid and binding waiver of the right to bring a subsequent claim of alleged discrimination. Further, the fact that the agreement expressly advised the Complainant to consult with an attorney prior to executing the agreement, and gave her several weeks to consider whether or not to execute the release, established that she had a meaningful choice when presented with the release agreement. The fact that the Complainant chose not to consult an attorney did not undermine a finding that the release was signed knowingly and voluntarily. Lynch v. Zalk Joseph's Fabricators (LIRC, 07/17/96).

A Complainant's offer to return previously received pension benefits to the employer, even where the monies had not yet actually been returned, was sufficient to allow him to challenge the validity of a release of claims arising out of his employment including, but not limited to, any alleged violation of state or federal measures which prohibit employment discrimination. Grahl v. Mercury Marine (LIRC, 12/04/92).

The totality of the circumstances should be used in determining whether there has been a knowing and voluntary waiver of rights under the WFEA. Although giving an employee an opportunity to negotiate the terms of a release and encouraging the employee to consult with an attorney are factors to consider in determining whether a release was knowing or voluntary, such factors are not mandatory requirements and a release could be found valid even in their absence. In this case, a release was determined to have been knowing and voluntary where the release was clear in its language, where a reasonable amount of time was allowed to consider whether or not to sign it, where the consideration given exceeded the amount of pension benefits the employee was otherwise entitled to receive, and where the employee had a high school education and had been a management employee who had many years of business experience and who had signed or had been a party to numerous contracts. Grahl v. Mercury Marine (LIRC, 12/04/92).

Where the Respondent gave the Complainants special benefits in consideration for the Complainants' promises not to sue the employer for any employment-related claim, the Complainants could not retain the consideration they received pursuant to those agreements while maintaining age discrimination claims against the Respondent, absent fraud on the part of the Respondent. Giese & Field v. Wausau Ins. (LIRC, 10/25/88).

The Complainant was terminated abruptly and offered severance pay on the condition that he execute a release waiving his rights to pursue a claim of discrimination against the employer. The court, characterizing the situation as one of "hurry up, get out of here, just the sign the papers if you want severance pay or leave," concluded that the release was signed under duress and is void as against public policy and is not enforceable. Thurmond v. Webster Elec. Co. (Racine Co. Cir. Ct., 07/30/85).

The Complainant's statement that she would forego all rights relating to her alleged discriminatory termination does not constitute a waiver because her right to be free from sex discrimination serves an important public policy. Hoyer v. LIRC (Milwaukee Pub. Library), (Dane Co. Cir. Ct., 11/10/83).

719 Miscellaneous

Specific arguments in the Complainant's petition for review are considered abandoned when the Complainant fails to mention them in its brief, the Respondent argues in reply that the Complainant has abandoned them, and the Complainant does not challenge that argument in its reply brief. Liddell v. Kleen Test Prod., Inc. (LIRC, 04/11/14).

For the Equal Rights Division to give preclusive effect to an EEOC investigation result and to dismiss a complaint on that basis without providing an opportunity for hearing would be improper as a matter of law. This is because EEOC investigations are ex parte. They do not allow for any form of confrontation or examination of adverse witnesses and they are not, standing alone, sufficient to satisfy the requirements of due process. Banty v. Dings Co. Magnetic Group (LIRC, 07/31/12).

The Equal Rights Division and the EEOC have a work-sharing agreement which provides for the cross-filing of complaints. Section DWD 218.03(5), Wis. Admin. Code, provides that when a complaint is deferred to the ERD by the EEOC, it is considered "filed" with the ERD when it is received by the deferring agency. Aldrich v. LIRC, 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433.

The administrative rules of the Equal Rights Division provide that a complaint may be filed in person at any Division office, or that it may be mailed to one of two specified Division offices. Other possible methods of filing a complaint are not permitted. A complaint may not be filed by fax, absent an administrative rule expressly allowing such filings. Hinsa v. Ponsse USA (LIRC, 08/05/05).

The Personnel Commission has the discretion to reject a complaint under certain circumstances. Sec. 111.39(1), Wis. Stats., provides that a complaint of discrimination "may" be received and investigated if it is filed no more than 300 days after the alleged discrimination occurred. A quasi-judicial administrative agency must be viewed as having some ability to limit access by individuals who have abused the legal process in the past. To conclude otherwise would allow one individual to paralyze the operation of the Commission, in light of its finite resources. Balele v. DOA, et al. (Wis. Pers. Comm'n, 07/31/02).

The Personnel Commission limited the Complainant's filing of new cases based on the following circumstances: (1) The Complainant had filed 56 complaints with the Personnel Commission between 1987 and 2002 (The Complainant's filings represented 3.5% of all the complaints received by the Commission during a six year period), (2) the Complainant had not prevailed in any of his cases before the Personnel Commission, or on appeal, (3) the Complainant had acted improperly during the course of a number of proceedings arising from his complaints before the Commission, (4) the Complainant had failed to pay a $398.11 discovery sanction imposed by the Commission in one of his cases, (5) the Complainant has directed *ad hominem* attacks against counsel for a Respondent, (6) the Complainant had made extensive use of the discovery process, and the discovery requests were burdensome. All of these circumstances supported the imposition of sanctions against the Complainant. Therefore, all of the cases the Complainant had pending against the named Respondents were stayed and the Complainant was barred from filing any new complaints against any of those Respondents until the Complainant paid all the monies due the State of Wisconsin arising from three circuit court proceedings that arose out of cases originally filed with the Personnel Commission. Balele v. DOA, et al. (Wis. Pers. Comm'n, 07/31/02).

The Equal Rights Division has adopted very specific administrative rules which provide the process by which a complaint may be disposed of before it is certified to hearing. If a complaint which meets the standards set forth in the rules is filed, it may thereafter only be disposed of in one of the ways specifically set forth in the rules: (1) It may be dismissed as part of a preliminary review process, (2) it may be investigated, or (3) it may be dismissed based upon the Complainant's request for withdrawal. (A dismissal based on a Complainant's representation that he is no longer interested in pursuing the complaint must be made based only on a written

withdrawal signed by the Complainant or the Complainant's authorized representative). The complaints in this matter were never made the subject of a written request for withdrawal. They were never dismissed. They are, therefore, still pending until they are disposed of on one of the bases provided for in the ERD's rules. Pasternak v. Goodman Forest Indus. (LIRC, 04/15/87).

Where an employee filed a motion to intervene in a proceeding brought by another employee, in which it had been found that there was probable cause to believe that discrimination occurred in the establishment of an employment register, the Commission denied the request for leave to intervene on the grounds that the intervenor did not file his motion to intervene within 300 days of the date of the establishment of the register, which was the subject of his complaint. Schroeder v. DHSS (Wis. Pers. Comm'n, 11/12/86).

720 Investigation

721 Generally

On appeal to the Labor and Industry Review Commission, the Complainant referenced certain information which she alleged was improperly presented to, and was improperly relied upon by, the Equal Rights Division investigator. However, upon appeal from an investigator's initial determination of no probable cause, a de novo proceeding is conducted by an Administrative Law Judge. As a result, the type of defect in the investigative process alleged would not affect either the Equal Rights Division's or the Labor and Industry Review Commission's disposition of the charge. Bock v. Shopko Stores (LIRC, 08/16/06).

The Equal Rights Division is not authorized to dismiss a complaint based upon a final action by the U.S. Equal Employment Opportunity Commission (EEOC). The Division is required to investigate all complaints of discrimination unless the complaint fails to meet one or more of the four criteria specifically enumerated in the Division's rules (Sec. DWD 218.05 & 218.06, Wis. Adm. Code). A dismissal by the EEOC is not among those criteria and is not a circumstance that warrants dismissal of a complaint before an investigation has been conducted. Catlin v. Crystal Lake Cheese Factory (LIRC, 07/20/01), aff'd sub nom. Crystal Lake Cheese Factory v. LIRC (Barron Co. Cir. Ct., 02/07/02).

If a complaint contains some allegations that satisfy the requirements described in sec. DWD 218.05, Wis. Admin. Code, it would be improper to dismiss the entire complaint just because it contains some allegations that do not satisfy those requirements. However, the administrative rule authorizes only the dismissal of the entire complaint. Therefore, a suggested better procedure for handling complaints that contain both legally viable allegations and legally inadequate ones would be to submit them to the normal probable cause/no probable cause investigation process and to issue an Initial Determination finding "no probable cause" as to the legally inadequate allegations. Woodford v. Norwood Health Ctr. (LIRC, 05/11/01); Stone v. Milwaukee Bd. of Sch. Dir. (LIRC, 08/17/01). [Ed. note: Sec. DWD 218.05, Wis. Admin. Code, has since been amended to provide that a preliminary determination shall dismiss a complaint, or a portion of a complaint, that fails to meet the requirements of sec. DWD 218.05(1), Wis. Admin. Code].

The Complainant maintains that the investigation of his complaint was mishandled by the Equal Rights Division. However, the Division's investigation of the complaint had no bearing on the manner in which the hearing was conducted, nor did it limit the Complainant's ability to present relevant evidence at the hearing. The Initial Determination was not submitted into evidence at the hearing and did not influence the findings of fact and conclusions of law made by the Administrative Law Judge. Ollenburg v. Milwaukee County Sheriff's Dep't (LIRC, 09/28/94).

The Equal Rights Division issued an Initial Determination of probable cause, indicating that jurisdictional issues raised by the Respondent would have to be resolved at the hearing stage. An alternative writ of

prohibition was quashed by the Circuit Court where there was no clear statutory provision or case law which deprived the Equal Rights Division of jurisdiction and where the jurisdictional issue was not a pure question of law presented in the context of undisputed facts, since the Respondent denied the allegations in the complaint. State of Wis. v. DILHR (Dane Co. Cir. Ct., 04/11/94).

Nothing in the administrative rules or the statute indicates that affirmative defenses must be asserted during an investigation or be waived. Olson v. Lilly Research Lab. (LIRC, 06/25/92).

When, during the course of investigation, it becomes apparent that a Complainant is alleging a second basis of discrimination which is not clearly identified by the complaint, the proper procedure is that the Complainant should be advised to file an amended complaint. Gartner v. Hilldale, Inc. (LIRC, 05/12/92).

When an allegation of discrimination has not been made the subject of a properly filed complaint, there should not be a hearing until the Division has conducted an investigation and issued an Initial Determination on the matter of probable cause. Yarie (Schroeder) v. The Pumphouse (LIRC, 09/14/90).

Where a complaint of discrimination based on ancestry and age, which was followed by a second complaint mentioning merely age, was never formally withdrawn or dismissed, it was still pending before the Division. Pasternak v. Goodman Forest Indus. (LIRC, 04/15/87).

Where the investigator refused to disclose the name of an informant with whom she had spoken in the course of her investigation to the Complainant's attorney, the Personnel Commission ruled that the name of the witness would have to be disclosed to the Complainant's attorney, with the provision that the Complainant's attorney was directed not to disclose the identity of the witness unless he decided to call the witness at hearing. Stroud v. DOR (Wis. Pers. Comm'n, 03/27/85).

At the investigative (and hearing) stage, the Equal Rights Division must make findings of fact, conclusions of law and orders on each specific allegation of discrimination raised by a Complainant. Fleschar v. Rainfair (LIRC, 07/02/82).

The Equal Rights Division is without authority to change its initial determination once the period for appealing that decision has run. Anthony v. Lakeside Bridge & Steel (LIRC, 09/12/80).

A hearing on a complaint of discrimination should not be held until the Equal Rights Division has conducted an investigation and issued an initial determination on the matter of probable cause. Schumacher v. Metal Indus. (DILHR, 11/17/76).

722 Appeals of no probable cause determinations

722.1 Filing of appeal

Wisconsin Stat. § 801.15, which provides that if a notice is served by mail 3 days shall be added to the prescribed appeal period, applies to proceedings in court and not to matters before the Equal Rights Division. Marigny v. Sunrise Care Ctr. (LIRC, 12/10/21), aff'd. sub nom. Marigny v. LIRC, DWD, and Sunrise Care Ctr. (Milwaukee Co. Cir. Ct. 01/20/23). (appealed to court of appeals)

An appeal of initial determination by email is not permitted under the Division's rules. Documents may be filed by email only if expressly authorized by the equal rights officer or administrative law judge. Stone v. Andis Co. (LIRC, 10/15/21).

Although a plausible assertion of non-receipt of a decision should not be rejected without an opportunity for hearing, no hearing is required where the Complainant's explanations are not plausible. Phelan v. Alter Trading Corp. (LIRC, 11/30/18).

A representative from the Equal Rights Division erroneously informed the Complainant that it was okay to file his appeal "a little late." Misinformation supplied by a department representative with respect to appeal deadlines is a circumstance that warrants accepting a late appeal. Nickel v. City of Milwaukee (LIRC, 08/30/17).

Dismissal of an appeal on timeliness grounds where a Complainant has mailed an appeal through the United States Postal Service with ample time to ensure its timely receipt, but due to an error or other unusual circumstances beyond the control of the Complainant the letter was not received, would be an absurd result not contemplated by Sec. DWD 218.08, Wis. Admin. Code. Shorey v. Dillon Bindery, Inc. (LIRC, 10/31/16).

The Complainant can rebut the presumption of receipt of the initial determination by offering credible testimony of non-receipt. The fact that the Complainant received other mail from the Department does not call into question her testimony that she did not receive the initial determination, nor does the fact that when the Complainant spoke with a Department representative and learned about the adverse decision she did not request a copy of the initial determination. Brunette v. Cardinal Ridge Residential Care, LLC (LIRC, 09/30/16).

The Complainant faxed an appeal of an initial determination to the Equal Rights Division's Milwaukee office after the close of business on the 30th day after the issuance of the initial determination. Department rule on the filing of documents by facsimile (Sec. DWD 218.25, Wis. Admin. Code) moved the date of receipt of the appeal back to the next business day, making the appeal untimely. DWD 218.08, Wis. Admin. Code. Jackson v. Wal-Mart Stores, Inc. (LIRC, 06/29/16).

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The Complainant's excuse for a late appeal of an Initial Determination was that he did not receive his copy of the determination and did not become aware of it until after the appeal period had expired. A rebuttable presumption of receipt arises, but the Complainant's assertion of non-receipt cannot be disregarded. If receipt of a mailed item is plausibly denied, the presumption of receipt is spent, and a question of fact is raised. Due process requires that a plausible assertion of non-receipt should not be rejected without an opportunity for hearing to prove non-receipt. Marrero v. Bullseye, Inc. (LIRC, 08/31/15).

After two separate no probable cause determinations were issued (one addressing disability discrimination and one addressing retaliation), the Complainant's attorney filed an appeal which mentioned only one hearing number (that corresponding to the disability discrimination claim), but which was clearly meant to encompass both cases. It was error to dismiss the retaliation case where it was clear that the Complainant

intended to appeal both cases, and the Complainant was entitled to a hearing on the retaliation issue. Hazard v. PJ Milwaukee, LLC (LIRC, 02/27/15).

The Complainant filed untimely appeals of an initial determination of no probable cause and a preliminary determination partially dismissing her complaint. There are circumstances in which a late appeal does not foreclose the possibility that the appeal could be addressed and ruled upon, such as in Carlson v. SPF North America (LIRC, 04/27/07), where a party did not have a reasonable opportunity to receive or become aware of the determination within the appeal period. That exception does not apply here, where the Complainant left town without making arrangements to have her mail attended to. Sipprell v. Kenosha Unified Sch. Dist. (LIRC, 01/15/15).

Sec. DWD 218.08, Wis. Admin. Code, provides that an appeal of an initial determination of no probable cause must be filed within 30 days after the date of the initial determination. This administrative rule contemplates that a Complainant should have a reasonable opportunity during the appeal period to receive a no probable cause initial determination, or to otherwise become aware of its existence, in order for the 30-day filing period to run. In this case, the Complainant should have been given the opportunity to prove that, without fault on his part, he did not have this opportunity. It appears that the Complainant made reasonable efforts to arrange for the proper delivery of his mail after he moved from one city to another, and that he had no reason to become aware of the existence of the initial determination during the appeal period. The case was remanded to the Equal Rights Division to allow the Complainant to prove that he did not have the opportunity to file a timely appeal. Carlson v. SPF North America (LIRC, 04/27/07).

The Complainant's appeal letter was delivered to another unit of the Department of Workforce Development on the appeal deadline. That unit of the Department sent the letter to the Equal Rights Division through inter-departmental mail. The Equal Rights Division received the Complainant's appeal of the initial determination one day after the thirty-day appeal period expired. The receipt of the Complainant's appeal by a unit of the Department of Workforce Development on or before the final day of the appeal period satisfied the timely filing requirement of sec. 218.08, Wis. Admin. Code. Steffen v. MB Co. (LIRC, 10/13/06).

Where the Complainant failed to file a timely appeal of an initial determination, that initial determination must be considered the final determination of the Department. The administrative rules contain no exception for appeals that are filed only a few days late, nor is there is an exception for appeals that are late due to compelling personal circumstances, even extremely tragic ones. Rivas v. City of Milwaukee (LIRC, 05/24/99).

The Complainant's expectation that the postal service would provide next-day delivery of the written request for hearing on the issue of probable cause did not excuse the late filing of the request. Rogers v. DOA (Wis. Pers. Comm'n, 12/22/89).

A Complainant's untimely appeal from an initial determination of no probable cause is not made timely by the fact that the cover letter he received from the Equal Rights Division with the Initial Determination gave an older address for the Division, where the facts show that the appeal would not have been timely received by the Division whichever address had been used, given the date it was mailed. Adams v. Consol. Paper Co. (LIRC, 03/28/84).

LIRC will not accept an appeal from a dismissal of a complaint by the Equal Rights Division's Investigation Bureau. Its appellate jurisdiction is restricted to review of examiners' findings and orders. Mathews v. Marc Plaza Hotel (LIRC, 03/31/83).

Where the Equal Rights Division incorrectly advised a Complainant that she had 20 days, instead of the then-mandated 15 days, in which to file an appeal of a no probable cause determination, the Division was obliged to treat her appeal, filed within 20 days, as timely. Magnarini v. Jos. Reilly (LIRC, 06/17/81).

An unrepresented Complainant is not held to strict compliance with the procedural requirements in appealing an initial determination of no probable cause. William v. Vulcan Basement Water Proofing (DILHR, 03/01/75).

722.2 Probable cause hearing

When an investigation results in a determination of no probable cause and that is appealed to a hearing on the issue of probable cause, and when that hearing results in an ALJ's decision that there is probable cause and that the matter should proceed to a hearing on the merits, the proceedings on the merits which follow are entirely de novo. The record of the probable cause hearing is not part of the record on which the merits are to be decided, and the decision of the ALJ who presided at the probable cause hearing is of no relevance and of no weight in the merits proceedings. Neither the probable cause hearing record nor the decision resulting from it should be cited as having any significance, or accorded any significance, in the process of trying and deciding the merits of the case. Walker v. City of Eau Claire (LIRC, 03/28/13).

An Administrative Law Judge does not "reverse" decisions of the Equal Rights Officer. A probable cause determination by the Equal Rights Officer simply means that there was reason to believe that there was sufficient information to warrant a hearing on the complaint of alleged discrimination. Whether in fact discrimination has occurred must be established on the basis of the evidence presented at a hearing before an Administrative Law Judge. At such a hearing, the Complainant must prove, by a preponderance of the evidence, that a violation of the Act has occurred. Piggee v. Crothall Health Care (LIRC, 04/21/03).

It has long been recognized that an administrative appeals procedure under the Wisconsin Fair Employment Act which provided for only an oral argument and a record review of an Initial Determination of no probable cause would constitute a denial of due process. Bedynek-Stumm v. City of Madison (LIRC, 11/30/01).

An Administrative Law Judge may make credibility determinations at a probable cause hearing. Jones v. Gen. Motors Corp. (LIRC, 07/28/99).

Credibility determinations may be made at a probable cause hearing. Boldt v. LIRC, 173 Wis. 2d 469, 496 N.W.2d 676 (Ct. App. 1992).

Section Ind 88.08, Wis. Admin. Code, providing for hearings on the issue of probable cause upon appeal of initial determinations of no probable cause, was validly promulgated and is constitutional. Sections 111.375(1) and 111.39(2), Stats. both empower the Division to hold hearings necessary to perform its functions, and the no probable cause hearing is thus a proper exercise of the Division's authority to investigate complaints to determine if probable cause exists. Black & Decker v. DILHR (Gwendolyne Smith) (Ct. App., District IV, unpublished opinion, 09/15/88). [Ed. note: sec Ind. 88.08, Wis. Admin. Code, has been replaced by sec. DWD 218.08, Wis. Admin. Code.]

The Labor and Industry Review Commission is without authority to act on a petition for review of an Administrative Law Judge's decision finding, after hearing, that there is probable cause to believe allegations of a complaint and ordering the matter remanded to conciliation. Binder v. Nercon Eng'g & Mfg. Co. (LIRC, 07/23/87).

In seeking a review of an initial determination of no probable cause, complaining parties are entitled to present their case before a quasi-judicial officer and receive a more exacting scrutiny of the evidence than would otherwise be available in the normal investigative process. Lienhardt v. Pacon (DILHR, 01/21/76).

A probable cause finding made by a hearing examiner at a no probable cause hearing is not reviewable. Basile v. AMC (DILHR, 01/30/75).

An administrative appeals procedure which provided only an oral argument and a record review of the initial determination of no probable cause would constitute a denial of due process. Warren v. DILHR (Mt. Sinai Hospital) (Dane Co. Cir. Ct., 12/21/70).

730 Conciliation

Conciliation requires the assent of all parties that the dispute has ended. Conciliation does not occur merely because the complaining party has accepted the position she was denied. The Complainant is still entitled to seek a finding whether discrimination had occurred. Watkins v. DILHR, 69 Wis. 2d 782, 223 N.W.2d 360 (1975).

740 Procedures prior to hearing

741 Notice of hearing

741.1 Generally

The Respondent contended that it had not been properly notified of the hearing because notice of the hearing had been sent to its local office and not its corporate office, which was located in another state. The Respondent did not meet its burden of showing that it had good cause for failing to attend the hearing. The Respondent was not denied due process because the Equal Rights Division mailed notice of the hearing by first class mail to its local office in Wisconsin. There is no requirement that process on a corporation be served only at its headquarters, or only on its president or chief executive officer. The Administrative Law Judge determined that the mail that the Equal Rights Division sent to the Respondent was received by the Respondent at its local Wisconsin address, and that it was either lost or destroyed by a manager at that address. Therefore, the Respondent failed to establish good cause for failing to appear at the hearing. Salley v. Nationwide Mortgage & Realty Corp. (LIRC, 12/13/07).

The Complainant claimed that she did not receive a Notice of Hearing. However, even assuming that the Complainant did not get actual notice, she did receive copies of the Respondent's answer and its witness and exhibit list, which put her on notice that her hearing was scheduled to take place very soon. Feaster v. Dillingham, N.A., Inc. (LIRC, 06/29/90).

It was error for the examiner to dismiss a complaint at hearing based on the Complainant's failure to file the complaint within the applicable statute of limitations period, when no notice was given to the Complainant or his counsel prior to hearing that there was a statute of limitations issue in the case that was going to be addressed. Peronto v. LIRC (Brown Co. Cir. Ct., 06/30/86).

The Respondent's fundamental right to due process requires that it be apprised of the issues to be raised at the hearing. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

There is no requirement that DILHR notify the parties who the hearing examiner will be prior to the hearing. Carignan v. Schlitz Container (LIRC, 06/22/79).

A degree of specificity in the notice of hearing is required to conform with the fundamentals of due process. Wis. Tel. Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975).

The scope of DILHR findings, conclusions and orders is not limited by the initial determination, but by the notice of hearing. Chicago, Milwaukee, St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

741.2 Identification of issues

The Administrative Law Judge improperly ruled that sexual harassment was not an issue in a case where the Complainant had alleged that she had been harassed because she was a female. The notice of hearing had improperly omitted this issue. The notice of hearing was, in turn, based upon the Initial Determination, which had specified that the issues were sex discrimination as to terms and conditions of employment and termination, and fair employment retaliation. Although sexual harassment is a type of sex discrimination, it is distinct from sex discrimination as to terms and conditions of employment. Therefore, the case was remanded to the Equal Rights Division to allow the Complainant to present her evidence relating to her allegation of sexual harassment. Matson v. Aurora Health Care (LIRC, 03/21/08).

The Complainant's claim that the Respondent retaliated against her because of a statement she made to her supervisor was significantly different from the claim in her complaint that the Respondent retaliated against her because she filed a complaint with the Personnel Commission. These two allegations were not only factually distinct claims about different motives, but also allegations which presented distinct legal issues. The issue of whether the Respondent took adverse employment actions against the Complainant because she made certain statements to her supervisor at a meeting was not alleged in the complaint. Neither was it investigated or identified in the notice of hearing. Therefore, the Administrative Law Judge properly declined to address this issue at hearing. Hanson v. DOT (LIRC, 06/14/05).

Where an issue is not raised by a complaint, the Equal Rights Division's investigation bureau is without authority to issue an initial determination making a conclusion on that issue, and the Equal Rights Division is without authority to conduct a hearing on that issue. Findings and orders under the Wisconsin Fair Employment Act may not be broader than that specified in the complaint and notice of hearing. Greco v. Snap-On Tools (LIRC, 05/27/04).

The complaint alleged that the Respondent had violated sec. 146.997, Stats., the Health Care Worker Protection Act. A conclusion of law in the decision issued after the hearing which referred to sec. 111.322(2m), Stats., was deleted where there was no allegation in the complaint that the Respondent had violated that statutory provision. The complaint was drafted and filed on the Complainant's behalf by an attorney. Presumably, if the Complainant had intended to allege not only a violation of the Health Care Worker Protection Act, but also a violation of sec. 111.322(2m), Stats., she would have done so. Where an issue is not raised by a complaint, the Equal Rights Division is without authority to conduct a hearing on that issue. Korn v. Divine Savior Healthcare (LIRC, 01/16/04).

Where the Department affirmatively limited the hearing to the issue of whether discrimination had occurred, it was patently unfair to punish the Respondent for failing to produce evidence on the issue of remedy. Milwaukee Bd. of Sch. Dir. v. LIRC (Milwaukee Co. Cir. Ct., 06/14/00).

Where a notice of hearing indicated that a hearing would be held to determine whether the Respondents had violated the Wisconsin Fair Employment Act by refusing to license the Complainant because of "handicap," the Respondent had adequate notice that the Complainant was proceeding on the basis that she had a "perceived handicap." The statute clearly provides that the definition of a handicapped individual includes

not only a person who has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work, but also one who has a record of having such an impairment, or who is perceived as having such an impairment. Hentges v. Dep't of Regulation & Licensing (LIRC, 01/12/96).

An Administrative Law Judge improperly found that a particular individual discriminated against the Complainant in conditions of employment, where the Complainant had not so alleged in her complaint. In the complaint, the only allegations of discrimination in conditions of employment were expressly related to alleged mistreatment by another individual. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

It was improper to add the issue of liability of a Respondent who was named in an amended complaint to the issues for hearing where there had never been a formal investigation and Initial Determination of whether there was probable cause to believe that that individual, as a party Respondent in his own right, had violated the Wisconsin Fair Employment Act. Pulvermacher v. Regency Partners (LIRC, 04/28/93).

It was not proper to add to the notice of hearing an issue of whether the Respondent had retaliated against the Complainant for her filing of an earlier discrimination complaint. Even a liberal reading of the complaint would not disclose an allegation of retaliation. Further, such an allegation was not referred to during the course of the investigation, and no issue of retaliation was addressed in the Initial Determination or made the subject of a finding as to probable cause. Schiller v. City of Menasha Police Dep't (LIRC, 01/14/93).

Findings and orders under the Wisconsin Fair Employment Act may not be broader than that specified in the complaint and notice of hearing. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

Where an issue is not raised by a complaint, not raised in any writing filed by the Complainant during the course of the investigation, and never disclosed by the investigator to the Respondent as an issue for investigation, and where the investigator does not allow the Respondent to be heard on this issue, the Equal Rights Division's Investigation Bureau is without authority to issue an Initial Determination making a conclusion on that issue, and the Equal Rights Division is without authority to conduct a hearing on that issue. In this case, the investigator made a finding of probable cause on the issue of constructive discharge, which was not an issue raised by the complaint (which only contained allegations of discrimination with respect to promotion and demotion). The notice of hearing also indicated that constructive discharge was an issue in the case. On motion of the Respondent, the Administrative Law Judge correctly amended the notice of hearing to delete that issue as an issue for hearing. The Equal Rights Division cannot conduct a hearing on an issue as to which no complaint had ever been filed. James v. Associated Schools, Inc. (LIRC, 11/27/91).

The Administrative Law Judge erred in concluding that a discharge was in retaliation for opposition to a discriminatory practice where the complaint alleged only that the Complainant was discharged because of marital status and where that was the only issue investigated by the Department and the only issue set forth in the notice of hearing. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

Where: (1) the complaint alleged only that the Complainant was pregnant, that she took a leave of absence and that when she tried to return to work while still pregnant she was not allowed to return, and (2) the notice of hearing indicated that the hearing was to determine whether the Respondents violated the Wisconsin Fair Employment Act "by discriminating against the Complainant in terms of employment because of pregnancy as alleged in the attached complaint," the Administrative Law Judge was without authority to make findings and conclusions of law and issue an order concerning the circumstances of the Complainant's actual return to work following the birth of her child. Neither findings nor an order should be made on allegations of discrimination not identified as issues for hearing in the notice of hearing. Yarie (Schroeder) v. The Pumphouse (LIRC, 09/14/90).

Although the complaint and notice of hearing related only to race discrimination, the Initial Determination was attached to the notice of hearing and materials referred to in the Initial Determination provided notice of a claim of sex discrimination. Both the race discrimination and sex discrimination claims involved the same factual occurrences. Consequently, LIRC had jurisdiction to consider the sex discrimination claim. Rucker v. LIRC (Ct. App., Dist. I, unpublished opinion, 05/15/90).

Where, in a case concerning an alleged discriminatory discharge, there was no reference to wage discrimination in the complaint and no investigation or initial determination of any wage discrimination claim, the Administrative Law Judge properly barred the Complainant from litigating a discriminatory wage claim at the probable cause hearing. Marchant v. Breakthru Mktg. Serv. (LIRC, 02/05/88).

A Complainant who was unrepresented when filling out her complaint should not have that complaint read narrowly so as to prevent her from introducing evidence on issues which are closely related to those raised in the complaint. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

A complaint (and notice of hearing) that alleges retaliatory discharge does not constitute sufficient notice that the Complainant is also alleging that her discharge was sex discrimination. Hoyer v. LIRC (Milwaukee Pub. Library) (Dane Co. Cir. Ct., 11/10/83).

Where a complaint (and notice of hearing) alleges that a Complainant had not been reinstated because she refused a lie detector test, the issue of whether her initial suspension was for the same reason was not properly raised. Rudd v. The Rising Sun (LIRC, 11/04/82).

A complaining party's failure to allege anything related to her termination in the complaint precluded DILHR from deciding whether she was constructively discharged. Rau v. Mercury Marine (LIRC, 05/19/77), aff'd sub nom. Rau v. DILHR (Dane Co. Cir. Ct., 02/21/79).

It was proper for DILHR to consider the legality of an employee's demotion and its relationship to the ultimate discharge even though his complaint challenged only the discharge. Michels v. Giddings & Lewis Machine Tool (DILHR, 12/06/77).

An employer's failure to make a reasonable accommodation can be considered raised by a complaint which charges the employer with handicap discrimination even where the complaint did not specifically allege such a failure. In addition, the investigation of a handicap discrimination complaint by DILHR must include a determination of whether a prudent person might believe that there has been a failure to reasonably accommodate a handicapped individual. Teggatz v. LIRC (DHSS) (Dane Co. Cir. Ct., 10/03/77).

The employer properly objected to a hearing on a new discrimination issue which had been added by amendment to the original charge, but which the Equal Rights Division had not investigated or found probable cause on. AMC v. DILHR (Basile) (Dane Co. Cir. Ct., 10/03/77).

Where sexual harassment was found but not alleged in the notice of hearing, DILHR still must order such action as will effectuate its elimination. Hamilton v. DILHR (Appleton Elec.) (Dane Co. Cir. Ct., 09/12/77).

Where handicap discrimination did not form the basis for the filing of the original complaint and was not raised in the notice of hearing, the hearing examiner's findings on that issue cannot be affirmed by DILHR. Hanson v. Waukesha Bearings (DILHR, 11/18/76).

A hearing on a complaint of discrimination should not be held until the Equal Rights Division has conducted an investigation and issued an initial determination on the matter of probable cause. Schumacher v. Metal Indus. (DILHR, 11/17/76).

DILHR cannot make findings or issue an order on allegations not contained in the notice of hearing. Price v. Lakeside Sch. Bd. (DILHR, 11/17/76).

Where the probable cause decision found that the complaining party had been discriminatorily denied employment on the basis of a medical guideline that was relied upon by the employer as a defense, there was ample notice that the guideline was at issue and the employer could be ordered to change it. Esch v. Milwaukee County (DILHR, 09/06/74).

The scope of DILHR findings, conclusions and orders is not limited by the initial determination, but by the notice of hearing. Where the notice of hearing pertained to issues affecting only a single employee and a single act of discrimination, DILHR's application of its order to "like situated employees or applicants for employment" and "ongoing acts of discrimination" was overly broad. Chicago, Milw., St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

742 Answer

The purpose of pleading an affirmative defense is to provide notice of that defense and to prevent surprise or other injustice to the other party. In this case, the Respondent raised the affirmative defense that the Complainant's conviction was substantially related to the job in question in its response to the investigator and the Complainant was aware prior to the hearing that the Respondent intended to argue that his convictions were substantially related to the job. Given the Complainant's extensive experience litigating essentially the same issue before the Equal Rights Division, there was no risk that he would be blindsided by a substantial relationship defense, whether or not the Respondent raised it prior to the hearing. Jackson v. Millis Transfer (LIRC, 09/28/12).

The failure to raise an affirmative defense in an answer does not constitute a waiver if this failure was not unfair or prejudicial to the Complainant. The purpose of pleading an affirmative defense is to provide notice of that defense and to prevent surprise or other injustice to the other party. In this case, the Complainant anticipated that the Respondent would raise the defense that his conviction was substantially related to the circumstances of the job. The Complainant was not prejudiced by the Respondent's failure to raise that defense in an answer. The Respondent's failure to raise the substantial relationship affirmative defense in an answer did not constitute a waiver of the defense. Ward v. Home Depot (LIRC, 10/21/05).

An affirmative defense that a complaint was not filed within the statute of limitations period must be raised in a pleading or by a motion, or it is deemed waived. It was error for an Administrative Law Judge to dismiss a portion of a complaint on the basis of untimeliness where the Respondent had not raised the statute of limitations issue in a timely-filed answer and had not make any argument about the statute of limitations until after the hearing. Reddin v. Neenah Joint Sch. Dist. (LIRC, 08/24/04).

The substantially related defense to a claim of conviction record discrimination constitutes an affirmative defense. The substantially related defense does not depend on a denial of the claim of discrimination, but instead argues that new matter constitutes a defense even assuming the allegations of the complaint to be true. However, prior case law has established that the failure to raise the statute of limitations defense in a timely manner does not constitute a waiver of that defense if the failure to raise it was not unfair or prejudicial to the Complainant. The principal purpose of the rule concerning timely assertion of the defense is to assure that the Complainant against whom it is raised will have enough advance notice of the assertion of the defense to

prepare to meet it at the hearing. The substantial relationship defense in this case, similarly, would not be waived because the Complainant was well aware of the defense and he was not prejudiced by the Respondent's failure to raise the defense in the answer. Jackson v. Summit Logistic Serv. (LIRC, 10/30/03).

Failure to mitigate damages is an affirmative defense which must be pled in the Respondent's answer. Radlinger v. Kentucky Fried Chicken (LIRC, 06/20/03).

After the hearing, and after the Administrative Law Judge issued a preliminary decision finding that the Respondent had unlawfully discriminated against the Complainant, the Respondent moved to amend its answer to raise a question of failure to mitigate damages. The administrative rules relating to hearings before the Equal Rights Division provide that a complaint may not be amended less than 20 days before hearing unless good cause is shown. Although the rule dealing with answers is silent on when amendment is permitted, one may infer a 20-day rule applies to amendments offered to raise affirmative defenses in answers as well. Further, even if sec. 802.09(2), Wis. Stats., applied to cases before the Equal Rights Division, the statute does not authorize raising entirely new, unlitigated causes of action or affirmative defenses after the conclusion of the hearing. Kalsto v. Village of Somerset (LIRC, 10/03/00).

While the Respondent was asked to raise the statute of limitations issue in its initial response to the complaint, its failure to do so at that time did not constitute a waiver of the issue. The Respondent raised the issue in a timely filed answer after the notice of hearing was issued. Ault v. Allen Bradley Co. (LIRC, 02/05/98).

The Respondent was not foreclosed from raising a statute of limitations defense shortly before the hearing, even though it failed to establish good cause for not raising the defense in a timely filed answer. In this case, there was no prejudice to the Complainant. Mittelsteadt v. A.J. Air Express (LIRC, 01/16/98).

There is no right to a "default" decision even if a Respondent fails to file an answer. Polesky v. United Brake Parts (LIRC, 08/30/96).

The Respondent need only raise the statute of limitations defense in its answer in order to preserve that defense. In this case, the Respondent filed its answer three days late and apparently said nothing about its statute of limitations defense at the hearing. The Labor and Industry Review Commission nevertheless determined that the untimeliness of the Complainant's claim of discrimination was evident from a simple reading of the charge of discrimination, and it, therefore, dismissed the complaint as untimely. Wilson v. Burnett County Sheriff's Dep't (LIRC, 09/29/95), aff'd sub nom. Wilson v. LIRC (Burnett Co. Cir. Ct., 02/22/96).

The fact that the Respondents were not represented by legal counsel at the time the answer was filed does not constitute good cause for the Respondents' failure to timely raise the statute of limitations defense. Olson v. Servpro of Beloit (LIRC, 08/04/95).

In a case under the Wisconsin Family and Medical Leave Act, the Respondent should be given an opportunity to show good cause for failing to raise the statute of limitations defense in a timely filed answer before the Department makes a finding that the affirmative defense has been waived. Manor Healthcare Corp. v. DILHR (Dane Co. Cir. Ct., 05/12/94).

The Respondent's failure to raise the issue of the statute of limitations until two weeks before the hearing did not bar the Respondent from raising the issue where the Complainant did not object to the Respondent raising the issue either at the time the defense was raised or at the hearing, and where the Complainant had a sufficient amount of time and opportunity to prepare and present evidence on the issue of timeliness because of the protracted hearing schedule. Rangel v. City of Elkhorn (LIRC, 09/30/92).

Not raising an affirmative defense, including the statute of limitations defense, in a timely filed answer may, in the absence of good cause, be held to constitute a waiver of such affirmative defense. Blohm v. Holiday Inn (LIRC, 01/31/90).

Where the Division's rules did not provide any penalty for a Respondent's failure to file its answer on a timely basis, the Commission would not hold that the Respondent waived the statute of limitations defense by failing to raise it in a timely filed answer where there was no prejudice to the Complainant. Oehlke v. Moore-O-Matic (LIRC, 07/26/88). [Ed. note: The Division's rules now provide that the failure to raise the defense of the statute of limitations in an answer may, in the absence of good cause, be held to constitute a waiver of the defense.]

The statute of limitations defense is waived if not raised in the answer to the complaint. Tamsett v. City of Milwaukee (LIRC, 01/25/88).

The Respondent's failure to timely file an answer to the complaint did not justify reversing the Administrative Law Judge's decision dismissing the complaint, where there was no claim of prejudice because of the failure of the Respondent to file an answer or of any other unfairness in connection therewith alleged to have been committed by the Respondent. Sawi v. Embassy Restaurant & Lounge (LIRC, 03/11/87).

Failure to submit a timely answer does not justify summary judgment for Complainant where the employer had stated its position at previous stages in the complaint process. Bullock v. Milwaukee County (LIRC, 10/15/82).

An employer is required to file an answer giving the Complainant notice of the issues and defenses and, where the employer fails to do so, a timely raised objection, together with evidence supporting a showing of prejudice to the Complainant, would warrant a new hearing after receipt of an answer. However, where the Complainant specifically responded to the issues presented by the employer at the hearing, a new hearing was not required. Smith v. Prairie Homes (LIRC, 08/12/81).

743 Postponements

Three weeks before hearing, the lawyer that the Complainant hoped to retain told him he was not going to help him. The ALJ did not abuse discretion by denying the Complainant's request to postpone the hearing, given that the Complainant had never retained the lawyer, and did not use the three weeks before hearing diligently to prepare for hearing. The ALJ also did not err in denying a postponement for the Complainant's doctor's appointment on the day of the hearing. A party requesting a postponement for a medical reason must show to a reasonable degree of medical certainty that he or she is unable to attend because of the medical condition. The Complainant characterized his appointment as a pre-op meeting, and did not provide a medical opinion that he was unable to attend the hearing. Wood v. R & M Freight, Inc. (LIRC, 09/11/15).

The fact that the Complainant requested a postponement of the hearing did not give her good cause for failing to appear at the hearing. The Complainant's postponement request was unclear. The ALJ made repeated attempts to contact the Complainant before hearing to get more information about the circumstances behind the request but did not hear back from her. The Complainant was notified, by a telephone message from the ALJ, that the request for the postponement was not granted. The fact that the Administrative Law Judge had granted the Respondent's earlier postponement request did not require that the Complainant's request be granted. Wennesheimer v. AON Risk Serv. (LIRC, 08/14/12).

An Administrative Law Judge's failure to respond to a request for postponement of the hearing is tantamount to a denial of the request. Although the best practice would be for the Administrative Law Judge to issue a formal ruling which sets forth his rationale for granting or denying the request, a party who has been given no

reason to believe that such a request was granted is expected to appear for the hearing or show good cause for his failure to appear. Cottingham v. McDonald's (LIRC, 08/25/10).

Where a complaint is dismissed for the Complainant's failure to appear at hearing, the Administrative Law Judge should discuss his reasons for denying any last-minute request for a postponement that preceded the hearing. In this case, the Complainant alleged a conflict between a scheduled court appearance and the hearing before the Administrative Law Judge. The case was remanded to the Equal Rights Division to determine if the Complainant could establish that he in fact had a court date that conflicted with the Equal Rights proceeding, and if he could demonstrate that he only learned of that conflict shortly before filing the postponement request. Under these circumstances, the Complainant would establish the type of unforeseeable emergency circumstance that would warrant granting a postponement after the ten-day period for requesting postponements set forth in the Department's administrative rules. Brewer v. Laidlaw Transit Serv. (LIRC, 09/18/07).

The Administrative Law Judge should have postponed the hearing where the Complainant presented a note from his physician which implied that the Complainant's medical condition would compromise his ability to fully attend, and to participate in, the hearing process. The Administrative Law Judge could have preserved the integrity of the proceedings and recognized the Complainant's lack of diligence in filing a witness and exhibit list by ruling that the parties would not be permitted to file any additional lists of witnesses or copies of exhibits prior to the rescheduled hearing date. Salinas v. Russ Darrow Group (LIRC, 08/31/07).

When a party has had a sufficient amount of time to make arrangements for legal representation, any failure to obtain such representation will not be grounds for a postponement. Selimi v. Wellpoint (LIRC, 11/29/05).

The Administrative Law Judge did not rule on the Complainant's request for a postponement, which was made five days prior to the hearing. The failure to rule on the motion prior to the hearing was tantamount to a denial of the motion. However, it would have been better practice for the Administrative Law Judge to issue a formal ruling on the motion, setting forth his rationale for granting or denying it. Beasley v. OIC-GM (LIRC, 10/13/04), aff'd sub nom. Beasley v. LIRC (Dane Co. Cir. Ct., 03/10/05).

Even if the party had presented a postponement request to the Department which it failed to address, this circumstance would not provide good cause for failing to appear at the scheduled hearing. Wallace v. Laidlaw Transit (LIRC, 02/24/05).

The Complainant argued that he did not appear at the hearing because he no longer had an attorney. However, there was no indication that the Complainant ever notified the Equal Rights Division of his situation or made a request for a postponement or a continuance of the hearing. His complaint was properly dismissed. Alexander v. Unified Solutions, Inc. (LIRC, 01/31/03).

An Administrative Law Judge improperly denied the Complainant's request to have the hearing postponed where the Complainant specifically advised the Administrative Law Judge that he was unable to attend the hearing because he would be undergoing chemotherapy that week. Mottl v. The Sales Force Companies (LIRC, 06/26/96).

By failing to timely apprise the Department that she was having difficulty in locating her witnesses, and by not appearing at the scheduled hearing, a Complainant essentially waived any right of postponement she might have had based upon the unavailability of witnesses. Gill v. Ryder Bus Co. (LIRC, 01/31/94).

When a Complainant has a sufficient amount of time to make arrangements for legal representation, any failure to obtain such representation will not be grounds for a postponement. The administrative rules do not provide

postponements for poor working relationships between parties and their counsel. Moreover, the hearing notice clearly states that the Equal Rights Division normally does not grant postponements because a party wishes to keep looking for an attorney or because their attorney needs more time. Surin v. Toney (LIRC, 06/25/92).

A medical condition, to justify good cause for postponement of the hearing, must be proven by competent evidence and to a reasonable degree of medical certainty. The Complainant in this case failed to produce any competent medical evidence to show that she was unable to continue with the hearing because of her daughter's medical condition. Surin v. Toney (LIRC, 06/25/92).

The Equal Rights Division's administrative rules provide that requests for postponements shall be filed with the Administrative Law Judge. The rules define "filing" as "the physical receipt of a document at any Division office." This strongly suggests that requests for postponements must be made in writing. It was not reasonable for an attorney to rely upon an oral representation over the telephone by an unidentified person at the Equal Rights Division that a hearing had been postponed. Phillips v. J.L. Marcus Dept. Stores (LIRC, 02/12/91).

The Complainant, who lived in California, had good cause for his failure to appear at the hearing where he had notified the Administrative Law Judge prior to the hearing that he was required to meet with his probation officer on the date the hearing was scheduled and that he could not leave California without permission to do so by his probation officer. Jones-Browning v. Woodman's (LIRC, 09/27/90).

Where the complaint is dismissed for failure of the Complainant to appear at the hearing, the Administrative Law Judge must discuss the reasons for denying any last-minute request for postponement. The absence of explanation may, in some cases, require a remand for further proceedings. Jaskolski v. M & I Data Serv. (LIRC, 05/23/90).

The fact that a party filed a request for a postponement and had not received any response to the request from the Equal Rights Division did not justify the party's failing to appear at the hearing. Jaskolski v. M & I Data Serv. (LIRC, 05/23/90).

The Complainant is entitled to a hearing on whether he had good cause for failing to appear at the hearing after his request for a postponement on the ground that he was unable to attend because of medical conditions was denied. The Complainant must prove by competent evidence, and to a reasonable degree of medical certainty, that he was unable to attend because of a medical condition. Jones-Browning v. Assoc. Leasing (LIRC, 03/16/90).

The Complainant asserted that his personal financial situation prevented him from having sufficient funds to obtain legal representation and failed to proceed with his case when the Administrative Law Judge denied his request for a postponement. LIRC upheld the dismissal of the case because the Complainant had sufficient time to make arrangements for representation. Webinger v. P.V. Farmer, Inc. (LIRC, 11/29/88).

Where the Complainant was incarcerated at the time he filed his complaint and continued to be incarcerated since that time, and was still incarcerated when the matter was scheduled for hearing and did not anticipate being released until approximately nine months after the scheduled hearing date, his request for a postponement of the hearing was found to be for good cause. Smith v. Park East Hotel (LIRC, 02/20/87).

Where a notice was issued on August 25 for a hearing on December 14, and advised that the parties should immediately notify the department of any problems with that date, and where on December 12 the employer's attorney orally requested a continuance, which request was denied, there was no abuse of discretion in the examiner's decision to proceed with the hearing in the absence of the employer or its counsel, who failed to

appear at the hearing after the request for a continuance was denied. The denial of the request for the continuance, which was made based on a claimed conflict with another trial, was not inappropriate, and due process does not require providing a further hearing to one who, without justifiable excuse, does not proceed according to the rules. Tomah-Mauston Broad. Co. v. Eklund (Ct. App., Dist. IV, unpublished opinion, 03/25/86).

Where the Complainant was given three months notice of the hearing date, and two months before the hearing her attorney withdrew, it was not error to deny a request for a postponement of the hearing made only two days prior to the scheduled hearing date by the Complainant's newly retained attorney, given the Complainant's unexplained neglect for two months prior to the hearing to seek new counsel or to advise the Division of the need for a postponement. Timeliness of a request for a postponement is judged not by the date on which the Complainant retains counsel, but by the date on which the Complainant is given notice of the date of hearing. Vicente v. Med. College of Wis. (LIRC, 04/19/85).

In dismissing a complaint for failure of the Complainant to appear at hearing, the examiner must discuss the reason for denying a last minute request for postponement. Schilling v. Walworth County (LIRC, 03/09/83).

It was proper to dismiss a case which had previously been continued at the Complainant's request where the Complainant's attorney had been denied another postponement sought one week before the rescheduled date and subsequently failed to proceed at the hearing. Patrick v. Sch. Dist. of Spooner (LIRC, 03/10/83).

It was not an abuse of discretion to refuse a postponement at the Complainant's request and dismiss her complaint where she refused to proceed without her chosen attorney and there had already been two postponements at her request. Kluss v. LIRC (Wisconsin Higher Ed. Aids Bd.) (Milwaukee Co. Cir. Ct., 07/16/81).

Where the president of an employer was denied a rescheduling of the hearing because he was going to be out of town, it was appropriate to proceed with the hearing in his absence. Guralski v. Standard Container (DILHR, 08/04/76).

744 Pre-hearing conferences and orders

The complaint was properly dismissed where the Complainant failed to appear at a scheduled pre-hearing conference (1) where she provided no plausible reason for her failure to appear, (2) where she did not timely respond to the Personnel Commission's directive to explain her failure to appear, and (3) where her previous conduct had precipitated other delays in proceeding with this case. McMillan v. DOC (Wis. Pers. Comm'n, 09/21/01).

A complaint was properly dismissed where the Complainant failed to appear at a pre-hearing conference. Peterson v. Harvest Life Ins. Co. (LIRC, 04/19/96).

Where a complaining party did not comply with a pre-hearing order to clarify the pleadings, the complaint was properly dismissed. Ramos v. Aunt Nellie's Foods (DILHR, 04/28/76).

745 Discovery

Dismissal as a sanction for failure to comply with discovery is not appropriate where the Complainant was unrepresented and received limited direction from the administrative law judge, but nonetheless made a good faith effort to comply with voluminous and complex discovery requests. Hamilton v. Froedtert Med. Coll. - Mem'l Hosp. (LIRC, 04/29/20).

The administrative law judge made adequate efforts to assist an unrepresented Complainant to understand and comply with discovery. After the Complainant provided incomplete responses to written discovery, the administrative law judge appropriately granted a motion to compel. The administrative law judge then appropriately dismissed the complaint on a motion to dismiss that alleged that the Complainant had failed to comply with the order to compel, which the Complainant did not contest. The commission did not address the Complainant's assertion in his petition for review that he did comply with the order to compel, since he did not make that assertion to the administrative law judge although the administrative law judge gave him ample opportunity to make that argument prior to dismissing the complaint. Ellenbecker v. Infinity Food Group (LIRC, 06/10/19).

It was not an appropriate exercise of discretion for the administrative law judge to dismiss a complaint as a sanction for failing to cooperate with discovery where the Complainant was unrepresented, had a learning disability, and had received limited direction from the administrative law judge regarding how to respond to the Respondent's discovery requests, but nonetheless made an effort to comply. Moore v. Dairy Queen (LIRC, 03/11/19).

Dismissal of the complaint was appropriate where the Complainant did not attend his deposition or notify the Respondent that he would be unable to attend and did not provide responsive materials to written discovery requests, even after being ordered to do so by the administrative law judge. The Complainant's actions evinced an intent not to cooperate with the discovery process. Under these circumstances, the ALJ's dismissal of a complaint was not an abuse of discretion. Ogbujiagba v. REM Wisconsin, Inc. (LIRC, 02/22/19).

An administrative law judge only has jurisdiction over those portions of a complaint that are before the administrative law judge. When a Complainant failed to appear at a hearing on probable cause, an administrative law judge could only dismiss the claims that were the subject of that hearing, and not other claims that still remained to be decided at a merits hearing before another administrative law judge. Birmingham v. Capital Finishing, LLC (LIRC, 07/31/18)

Dismissal of the complaint was an appropriate sanction when the pro se Complainant made no effort to arrange transportation to his deposition, even though he was aware that failure to appear could result in the dismissal of his complaint, and where it was determined that the administrative law judge had made adequate efforts to assist him in understanding and complying with the discovery process. Belizaire v. Sweet Additions, LLC (LIRC 05/30/18).

Dismissal of an action or proceeding, while permitted by statute, is a harsh sanction for a discovery failure. Dismissal is appropriate only if the non-complying party's conduct is egregious and indicates an intent not to cooperate with the discovery process. Xiong v. Logistics Health, Inc., (LIRC, 10/24/17), citing Kutschenreuter et. ano. v. Roberts Trucking, (LIRC, 04/21/11).

Dismissal of the complaint as a sanction for failure to comply with discovery is appropriate against an unrepresented party where the administrative law judge made efforts to assist the Complainant in understanding and complying with the discovery process and the Complainant was aware of the consequences of failing to do so, but made no effort to respond to the Respondent's discovery requests. Xiong v. ABR Employment Servs. (LIRC 10/24/17).

The ALJ's pre-hearing order which, without warning, terminated discovery months before the hearing, was an abuse of discretion. Although the Complainant was serving confusing and burdensome discovery on the Respondent, and a protective order may have been justified, there was no justification to put a stop to all further discovery months before the expected hearing date, especially considering that the parties were about

one month into a four-month period of discovery which had previously been granted by another ALJ. Absent a showing of prejudice to the Complainant as a result of the termination of discovery, however, the outcome of the case is affirmed. Shi v. UW Sys. Bd. of Regents (LIRC, 09/11/15).

The Complainant had months to start discovery but waited to do so until so close to the hearing date that it virtually ensured there would be no time to resolve any discovery disputes prior to the hearing. Given the circumstances, the Administrative Law Judge's denial of the Complainant's discovery motion, filed less than ten days before the hearing, was a proper exercise of her discretion. Ionetz v. Carmax Waukesha (LIRC, 10/16/14), aff'd Ionetz v. LIRC (Jefferson County Cir. Ct., 05/21/15).

The Complainant had approximately 17 months prior to hearing during which she was permitted to use all the tools of discovery under Wis. Stat. ch. 804, but she failed to conduct any discovery until making an eleventh-hour subpoena request. Allowance of the subpoena request would have caused a delay in the hearing, giving an undeserved benefit to the Complainant for being dilatory. It was not an abuse of discretion for the ALJ to turn down the request. Paskiewicz v. Marshfield Clinic (LIRC, 06/27/14).

Dismissal of a complaint as a sanction for discovery noncompliance was error in this case where the non-compliance was the fault of Complainant's counsel, and not of the Complainant. An alternative rationale resting dismissal on matters "deemed" admitted because discovery requests for admission were not responded to, is also rejected, because the Complainant's opposition to dismissal is effectively a request for withdrawal of those "deemed" admissions, which is granted on the grounds that it will subserve the presentation of the merits. Romero v. Boumatic, LLC (LIRC, 06/27/14).

The question of whether to sanction a party for destruction, or spoliation, of evidence, is a matter within the discretion of the trier of fact. The ALJ did not abuse his discretion in failing to impose a sanction where it was not shown that the party responsible for the destruction knew or should have known at the time of destruction that litigation was a distinct possibility, and that the documents would constitute evidence relevant to the pending or potential litigation. Kelly v. Sears Roebuck & Co. (LIRC, 05/30/14).

An ALJ's authority to impose discovery sanctions under ch. 804, Stats., is limited to situations involving either non-compliance with an order compelling discovery under sec. 804.12(2), Stats., or a discovery failure listed in sec. 804.12(4). An ALJ does not have authority under ch. 804 to sanction a Complainant based on a finding that the Complainant lied at her discovery deposition. Stephens v. Renaissance Place (LIRC, 12/12/13).

The Respondent failed to provide the Complainant with copies of evaluations of potentially similarly-situated employees in response to a request for production of documents, based on the explanation that the documents were not in the Respondent's possession. The burden is on the party resisting production to prove that compliance is not possible because of non-possession of documents. The ALJ misallocated the burden of proof by requiring the Complainant to prove that the Respondent had possession of the documents. Reversal or remand is not required, however, because the ALJ's error did not prejudice the Complainant. In weighing the prejudicial effect of a mistaken procedural ruling, the error must be placed in the context of the evidence actually presented in the case. The Complainant failed to show that his situation was similarly situated to that of the employees who were the subjects of the evaluations sought by the Complainant in discovery, and failed to present other evidence raising an inference of discriminatory motive. Obasi v. Milwaukee Sch. of Eng'g (LIRC, 10/14/13).

By failing to renew his request for employer records after the employer objected to the request, either before the hearing or at the hearing, the Complainant must be considered to have withdrawn his request for the records. Hungerford v. The Boldt Co. (LIRC, 05/17/13).

LIRC reviews ALJ orders imposing sanctions for non-compliance with discovery orders, under an abuse of discretion standard: the question is whether the ALJ reasonably exercised discretion, by examining the relevant facts, applying a proper standard of law using a rational process, and reaching a reasonable conclusion. Anderson v. Columbia-St. Mary's Hosp. (LIRC, 04/16/13).

Dismissal of a complaint may be an appropriate sanction for a Complainant's failure to comply with a Respondent's discovery requests. The relevant inquiry is whether the non-complying party intentionally or deliberately delayed, obstructed, or refused the requesting party's discovery demand, or whether the non-complying party's conduct, even though unintentional, is so extreme, substantial, and persistent that it can properly be characterized as egregious. Anderson v. Columbia-St. Mary's Hosp. (LIRC, 04/16/13).

Even taking into account that the dismissal of a complaint is the most serious step that can be taken as a sanction, the ALJ's exercise of discretion here was reasonable, where the ALJ considered the whole history of the discovery process, described what occurred accurately, and applied a standard which focused on whether the Complainant intended to comply with the order he had issued. It was reasonable to find that Complainant's non-compliance with her discovery obligations and with the ALJ's order to compel, was intentional, because of its persistence in the face of the clear and repeated warnings to the Complainant by both the Respondent's counsel and the ALJ. These circumstances made it a reasonable inference, if not a compelling one, that the Complainant did not actually intend to comply with the obligations imposed on her by the discovery requests and the ALJ's order. Dismissal of the complaint was therefore affirmed. Anderson v. Columbia-St. Mary's Hosp. (LIRC, 04/16/13).

In deciding whether the dismissal of a complaint is an appropriate sanction to impose on an unrepresented party for failing to respond to discovery requests, there must be a determination whether the Administrative Law Judge made adequate efforts to assist the party in understanding and complying with the discovery process prior to dismissing the complaint. This case was remanded to the Equal Rights Division because the Complainant, who was unrepresented by legal counsel, had not received any assistance or guidance in complying with the Respondent's discovery requests. The Administrative Law Judge granted the Respondent's motion to compel discovery without providing the Complainant any opportunity to respond. Moreover, the Administrative Law Judge failed to notify the Complainant about the consequences of failing to comply with his order compelling discovery. Duncan v. Int'l Union of Operating Eng'rs, Local 139 (LIRC, 09/11/12).

In deciding if dismissal of a complaint is an appropriate sanction to impose on an unrepresented party, the commission will take into account whether the administrative law judge made adequate efforts to assist the party in understanding and complying with the discovery process prior to dismissing. Duncan v. International Union of Operating Engineers Local 139, (LIRC 09/11/12).

An Administrative Law Judge improperly dismissed a complaint based upon the Complainant's responses to several Requests for Admission filed by the Respondent. Under sec. 804.11(2), Stats., withdrawal of admissions may be permitted when the presentation of the merits would be subserved thereby and the party who obtained the admission fails to show that withdrawal or amendment will prejudice the party maintaining the action or defense on the merits. It is clear that the Complainant opposed the dismissal of his complaint based on his responses to the admissions. Such opposition was effectively a request for withdrawal of those admissions. The inquiry into whether the presentation of the merits would be subserved by allowing withdrawal of the admissions involved consideration of whether the admissions were contrary to the record in the case. It is clear that the significant issues in the case were, in fact, in dispute. In his complaint, in his submissions to the investigator, and in his responses to the Respondent's interrogatories, the Complainant had made it clear that he believed that the Respondent had unlawfully discriminated against him. The admissions requested were plainly contrary to the record of the positions the Complainant had taken in this case. Further, the Respondent would not be prejudiced by the withdrawal of the admissions. The Respondent would simply

be in the position that it had been before the admissions. Rationalizing dismissal without a chance for hearing on the theory that the Complainant actually admitted that he was not discriminated against, when he clearly believed and contended that he was discriminated against, would involve relying on a willful fiction. The dismissal of the case was set aside and the matter was remanded to the Equal Rights Division for hearing. Ford v. Briggs & Stratton Corp. (LIRC, 07/24/12).

As a general matter LIRC conducts a de novo review and acts as an original fact-finder and reviewer of an ALJ's decision. However, where LIRC is asked to review an ALJ's exercise of discretion in ruling on discovery matters the standard is not whether LIRC believes that a particular position has been substantially justified and whether attorneys' fees and costs should have been awarded, but whether it finds the ALJ's decision on the issue to have been an abuse of discretion. A discretionary decision will be sustained if the ALJ has examined the relevant facts, applied the proper standard of law using a rational process, and reached a reasonable conclusion. Kutschenreuter v. Roberts Trucking (LIRC, 04/21/11).

The complaint was appropriately dismissed where the Complainant failed to appear at a deposition and failed to comply with an ALJ's order that he explain his failure to comply with discovery. On appeal to LIRC, the Complainant indicated that he was incarcerated and that was the reason he had not appeared for his deposition. The Complainant had never notified the Equal Rights Division that he was incarcerated. Further, it appeared that the mail which was sent to the Complainant at a post office box number was being forwarded to him. Therefore, the Complainant's failure to provide any response to counsel's discovery request or to the Administrative Law Judge's order to respond to the Respondent's motion to compel discovery was intentional and his complaint was appropriately dismissed. Perez v. SYNICO Staffing (LIRC, 12/09/10).

Dismissal of a complaint for failure to comply with a discovery order is appropriate only in cases of bad faith or egregious conduct on the part of the Complainant. Bad faith, by its nature, cannot be unintentional. There must be a finding that the non-complying party intentionally or deliberately delayed, obstructed or refused the requesting party's discovery demand. The non-complying party's conduct may be characterized as egregious if it was extreme, substantial and persistent, (even though unintentional). Further, the decision to impose sanctions is not dependent upon a showing that the opposing party was actually prejudiced by the delay or failure to respond to discovery. Perez v. SYNICO Staffing (LIRC, 12/09/10).

Dismissal of a complaint as a sanction for refusal to cooperate with discovery is a drastic step; however, it is one which is warranted in certain cases. The failure of a party to attend his own deposition is considered a very serious default, as evidenced by the fact that it is singled out in the statutes as being a potential grounds for sanction up to and including the dismissal of a complaint the first time it happens, even absent a warning such as an order to compel. The sanction of dismissal of an action will be sustained if there is a reasonable basis for the determination that the non-complying party's conduct was egregious and without clear and justifiable excuse. In this case, the notice of deposition was sent to the Complainant at his most recent address of record, followed by a reminder notice. The Complainant never informed the Respondent that he would be unable to appear at the scheduled deposition. He provided no excuse for his failure to appear, although he was given a specific opportunity to do so by the Administrative Law Judge. This leads to the inference that there was, in fact, no valid excuse for the failure to appear. Griffin v. Manor Care Health Serv. (LIRC, 03/23/10).

An Administrative Law Judge may render a judgment by default against a party who fails to comply with a discovery order. The Administrative Law Judge had notified the Respondent that failure to comply with a discovery order granting the Complainant's motion to compel discovery would result in a finding of discrimination without hearing. Notwithstanding this clear warning about the consequences of failing to comply with the discovery order, the Respondent took absolutely no steps to do so. Smith v. RWS Trucking (LIRC, 11/18/09).

The statute permitting a party to withdraw deemed admissions does not require the party seeking withdrawal to demonstrate that the failure to respond to the admissions in a timely manner was with good cause. Rather, the party moving for withdrawal or amendment of the admissions must show that the presentation of the merits will be served, and the party who obtained the admission must fail to demonstrate that withdrawal or amendment would prejudice the party in maintaining the action on the merits. Johnson v. Roma Pizza II (LIRC, 02/25/09).

The Complainant's argument that the Respondent's notice of deposition was served without proper notice was without merit. A subpoena is not necessary to compel a party's attendance for a deposition. The Respondent had mailed notice of its discovery requests to the Complainant at his last-known address, in accordance with sec. 801.14(2), Stats. Perkins v. BOS MRS Enter. (LIRC, 11/26/08).

The dismissal of the Complainant's complaints was warranted because his conduct in failing to respond to the Respondent's discovery requests was intentional, it evinced bad faith, and it was without justifiable excuse. The Complainant did not appear for his rescheduled deposition, he did not provide documents requested by the Respondent, and he did not return phone messages the Respondent's attorney left him regarding his failure to appear at the deposition and to provide the requested documents. Perkins v. BOS MRS Enter. (LIRC, 11/26/08).

The Complainant's numerous and repeated failures to comply with the Administrative Law Judge's explicit discovery orders in this case were deliberate and sufficiently egregious to justify dismissal of her charge. The Administrative Law Judge had attempted to carefully guide the Complainant through the discovery process, specifying in detail what she was required to provide and giving her numerous opportunities to provide it, explaining in explicit terms what the consequence would be for her failure to do so. Roen v. Allen Bradley Rockwell Automation (LIRC, 08/19/08).

The dismissal of a complaint as a sanction will be sustained if there is a reasonable basis for the ALJ's determination that the non-complying party's conduct was egregious and without clear and justifiable excuse. In this case, the Complainant's failure to respond to the Respondent's discovery requests was egregious. He did not comply with the Respondent's requests for production of documents. He did not respond to the Respondent's written interrogatories. Nor did he appear for his scheduled deposition. The Complainant's assertion that he had "no time" to respond to the discovery requests was not believable. As a party who brought an action against another party, the Complainant had responsibilities and obligations that he had to attend to in pursuit of that action. His complaint was properly dismissed for failure to respond to the Respondent's discovery requests. Moya v. Clarity Care (LIRC, 07/25/08).

It was too late for a Complainant to raise an issue relating to discovery for the first time at hearing where she had failed to file a motion to compel discovery or to otherwise bring this discovery matter to the attention of the Equal Rights Division prior to the hearing. Matson v. Aurora Health Care (LIRC, 03/21/08).

Under sec. 804.11(2), Wis. Stats., a court "may permit withdrawal or amendment [of the admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment would prejudice the party in maintaining the action or defense on the merits." The party moving for withdrawal or amendment of the admissions must show that the presentation of the merits would be served, and the party who obtained the admission must fail to demonstrate that withdrawal or amendment of the admissions would prejudice the party in maintaining the action on the merits. It is not necessary for a party seeking to amend or withdraw an admission to bring a formal motion in every case. Federal courts have held that the party making the admission must show that presentation of the merits will be subserved by withdrawal, and that this inquiry involves consideration of whether the admission is contrary to the record in the case. In this case, presentation of the merits of the action would be subserved

by permitting withdrawal of the admissions. There is no indication that the Complainant did not dispute liability in this case. The admissions were contrary to the record as shown by the Complainant's responses to the Respondent's other discovery requests. Further, the Respondent could not fairly argue that withdrawal of the admissions would prejudice it in maintaining its defense against the action. The prejudice contemplated by the rule is not simply that a party would be worse off without the admission. Rather, a party benefiting from the admission must show prejudice in addition to the inherent consequence that the party will now have to prove something that would have been deemed conclusively established if the opposing party was held to its admissions. Nabors v. Kelly IT Resources (LIRC, 10/06/06).

A court may permit withdrawal or amendment of admissions in a Request to Admit when the presentation of the merits of the action would be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment would prejudice the party maintaining the action on the merits. Whether the presentation of the merits will be subserved by withdrawal involves consideration of whether the admission is contrary to the record in the case. In this case, the Respondent's admissions were contrary to the record. Further, there was no showing that the withdrawal of the admissions in any way prejudiced the Complainant's claim against the Respondent. Jackson v. Quality Carriers (LIRC, 03/17/06).

A dismissal of a complaint for failure to answer an interrogatory or to permit inspection does not need to be preceded by a motion for an order compelling an answer or inspection, the granting of said motion and then the party's failure to obey the order before a judge may order dismissal of the action (i.e., the procedure described in secs. 804.12(1)(a), (b) and 804.12(2)(a)3, Stats). A party may also obtain dismissal of a complaint as a sanction under sec. 804.12(4), Stats. That statute does not require a violation of a discovery order to justify sanctions; failure to comply with the statutory directive is sufficient. The imposition of sanctions is discretionary with the judge. However, dismissal is a drastic penalty that is appropriate only where the non-complying party's conduct is egregious or in bad faith and without clear and justifiable excuse. In this case, the day after his discovery responses were due, the Complainant asked for an extension of time to submit a response. The Complainant was not represented by legal counsel at the time. The Complainant indicated that he did not respond to the discovery requests because he "didn't have the foggiest idea what they were talking about." The record does not indicate that the Complainant's conduct was so extreme, substantial and persistent that it could be characterized as egregious. Therefore, the dismissal of the complaint was not warranted on this basis. Swanson v. Kelly Serv. (LIRC, 10/13/04).

It is not necessary for a party seeking to amend or withdraw an admission to bring a formal motion in every case. A party seeking to withdraw an admission must show that the presentation of the merits will be served, and the party that obtained the admission must fail to demonstrate that allowing withdrawal or amendment of the admission would prejudice the party in maintaining the action on the merits. Swanson v. Kelly Serv. (LIRC, 10/13/04).

Sanctions may be imposed for failing to comply with discovery requests where the non-complying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. In order to dismiss a complaint on the basis of bad faith, there must be a finding that the non-complying party intentionally or deliberately delayed, obstructed, or refused the requesting party's discovery demand. In this case, the Administrative Law Judge had a rational basis for dismissing the complaint where the Complainant refused to respond to a question asked of him at a deposition, even after the Administrative Law Judge directed him to answer the question (which was related to where he was currently employed). However, a discovery sanction is limited to the case before the Administrative Law Judge. Here, the Administrative Law Judge had only part of the case before him. The remaining portion of the case had previously been dismissed in a Preliminary Determination on lack of timeliness grounds. The Complainant had appealed the Preliminary Determination dismissing that portion of his complaint, and that appeal had not yet been resolved. Because that appeal was not before the

Administrative Law Judge who resolved the discovery issue, that portion of the complaint was not properly dismissed. Josellis v. Pace Indus. (LIRC, 06/21/02).

Where the Complainant failed to respond to the Respondent's Requests For Admissions, those matters were conclusively established by operation of law. The Respondent then sought to dismiss the complaint based upon the admissions, which included admissions that the Complainant was accommodated when he presented limited duty slips, that the Complainant engaged in conduct that warranted discipline and was given discipline because of his conduct, and that the Complainant was terminated from his employment because of his violation of a directive regarding the use of safety equipment. Based upon these admissions, and upon the Complainant's statement indicating that he had no admissible evidence upon which he could establish his claim that he had a disability, the Administrative Law Judge properly concluded that the complaint should be dismissed. Gross v. Sodexho Marriott Mgmt. (LIRC, 06/21/02).

Sec. 804.12(1)(c), Wis. Stats., contemplates that a separate hearing will be held on the issue of whether fees and costs should be awarded in connection with a discovery motion. However, a separate hearing was not required where the Complainant waived the right to such a separate hearing by his long delay in submitting a statement of the fees and costs being sought. Wells v. Roadway Express (LIRC, 05/13/02).

Dismissal of a complaint as a sanction for refusal to cooperate with discovery is a drastic step, but it is warranted in certain cases. In this case, dismissal was warranted where the Complainant engaged in a course of conduct evidencing a lack of any serious intention to cooperate in the discovery process. Even after the Administrative Law Judge ordered him to comply, the Complainant continued to refuse to cooperate. Reed v. Wurth USA (LIRC, 09/25/01).

The Administrative Law Judge improperly required the Complainant to pay costs, including attorneys fees, in connection with her Request for Production of Documents. The provisions of sec. 804.12(1)(c), Stats., "*Award of Expenses of Motion,*" do not by their terms apply to motions to shorten or lengthen time to respond to discovery requests. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

The failure of a party to attend at their own deposition is considered a very serious default, as evidenced by the fact that it is singled out in the statutes as being a potential grounds for sanctions up to and including the dismissal of a complaint the first time it happens, even absent a "warning." Here, the complaint was properly dismissed where the Complainant failed twice to attend at his own deposition, the second time after such a warning had been issued. The imposition of an order for payment of fees and costs incurred was also authorized and reasonable. The assessment of such an order against a Complainant and his counsel was appropriate in view of the fact that the attorney also failed to appear at the deposition. McAdoo v. Wm. Beaudoin & Sons (LIRC, 04/19/00).

The disclosure of some documents in the context of discovery may be subject to a protective order to prohibit dissemination of the documents beyond the confines of the litigation. In this case, the protective order issued by the Personnel Commission stated: "The following materials filed by Respondent and provided to Complainant or his representative may be used by Complainant or Complainant's representative only for the purpose of litigating this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by Complainant or Complainant's representative for any other purpose. The Complainant is directed to inform the Department of the name and address of any expert or other witness Complainant intends to consult prior to divulging any of this material to any such person, so that the Department may serve copies of this order on such person prior to disclosure of the material, and any such person is directed not to disclose the materials to the public or outside the confines of this proceeding." Fondow v. DOR (Wis. Pers. Comm'n, 01/19/00).

An Administrative Law Judge has the authority to order the execution of a medical records release as an adjunct to a medical examination ordered under sec. 804.10 (1), Stats. Dismissal of the complaint was an appropriate sanction for the Complainant's refusal to comply with an order that he execute a medical records release. Michalzik v. Time Ins. Co. (LIRC, 01/16/98).

A complaint was appropriately dismissed as a sanction for the Complainant's failure to comply with discovery where the evidence established that the Complainant sought every opportunity she could to frustrate the Respondent's attempts to depose her, and that she did so, not based on a good faith belief about what she was or was not entitled to do, but rather on the basis of her assessment of what she could get away with without having her case dismissed. Castiglione v. Giesen & Berman (LIRC, 06/25/97).

A party's motion for sanctions in a discovery matter was appropriately denied where that party failed to make a motion for a protective order under sec. 804.01(3), Stats. Priegel v. Garden Way (LIRC, 04/24/97).

The complaint was appropriately dismissed where the Complainant failed to appear at a scheduled deposition on two separate occasions. The Complainant's failure to appear at the second deposition was either intentional or in bad faith, or reflected a callous disregard for his obligation to submit to discovery. Dobbs v. Super 8 Motel (LIRC, 10/15/96).

A complaint was properly dismissed where the Complainant failed to appear at a pre-hearing conference. Peterson v. Harvest Life Ins. Co. (LIRC, 04/19/96).

The complaint was appropriately dismissed as a sanction for the Complainant's failure to comply with discovery requests and orders. The Complainant's failure to comply with the Administrative Law Judge's discovery order was egregious and without any clear or justifiable excuse. Burgess v. Milwaukee Forge (LIRC, 06/13/95).

It was not error for the Administrative Law Judge to preclude the Complainant from conducting further discovery between the first day of hearing and the date of the continued hearing, which was several months later. The Administrative Law Judge did allow the Complainant to subpoena materials for production at the continued hearing. Nenning v. Milwaukee County Med. Complex (LIRC, 02/09/95).

The Complainant's unwillingness to take time off from work does not constitute a valid objection to the taking of her deposition. Woods v. Medalcraft Mint, Inc. (LIRC, 06/10/94).

Dismissal of a claim is a permissible sanction for a Complainant's refusal to comply with discovery. The complaint in this case was appropriately dismissed where the Complainant clearly failed to comply with the Administrative Law Judge's order to provide certain medical authorization and documents. Gemmell v. ABFM (LIRC, 02/24/94).

It was appropriate for an Administrative Law Judge to issue an order compelling discovery where the Respondent argued that the internal complaint procedures which it followed in resolving discrimination complaints (which was written pursuant to the employer's voluntary affirmative plan) was protected as work-product. The report was not prepared in anticipation of litigation, and so may not be considered protected work-product. State ex. rel. Madison Metro. Sch. Dist. v. LIRC, (Dane Co. Cir. Ct., 10/01/93).

Given that discovery is meant to be broad and far-reaching in order to focus the issues for hearing, it would be unfair to allow the Respondent to allege failures in the Complainant's work performance as an employee of the Respondent's law firm while simultaneously attempting to shield itself from responding to the Complainant's discovery requests on the grounds of attorney-client privilege. Bahr v. Levine & Epstein (LIRC, 06/05/92).

The Administrative Law Judge properly quashed a subpoena for the production of documents which was issued two days before the beginning of the second day of the hearing. The party seeking the subpoena could not have introduced the documents into the record even if the documents had been produced according to the subpoena since the Department's administrative rules require that all exhibits must be submitted no later than the tenth day prior to the day of the hearing. Vaisman v. Aldridge, Inc. (LIRC, 10/21/91).

The Administrative Law Judge appropriately quashed a subpoena duces tecum which the Complainant served upon the Respondent shortly before the hearing. The subpoena requested significant volumes of documents. If these documents were produced at hearing and the Complainant was given the opportunity to review them in order to determine which were relevant to her case and which were not, the review process would be extremely time consuming and would inordinately delay the hearing. The Complainant had the opportunity to conduct this kind of search for relevant evidence by way of pre-hearing discovery. Because none of the documents had been identified by the Complainant prior to the hearing as potential exhibits, they would have been subject to exclusion in any event. Chacon v. Dairy Equipment Co. (LIRC, 02/15/91).

A Complainant can be required to appear for a deposition, even if that means missing work and not being paid for the time involved. Holubowicz v. DOC (Wis. Pers. Comm'n, 08/22/90).

The Administrative Law Judge abused his discretion and denied the Respondent due process of law when he prohibited the Respondent from further deposing the Complainant after she abruptly walked out of her deposition. The questions posed by the Respondent's attorney were either relevant or reasonably calculated to lead to admissible evidence. Face-to-face discovery was essential to the Respondent's preparation of its defense to the charges of discrimination raised by the complaint. Therefore, an Absolute Writ of Prohibition was issued restraining the Equal Rights Division from any further proceedings until the Complainant's deposition was taken and the Respondent had completed its discovery. State of Wis. ex rel. Assoc. Schools, Inc. v. DILHR, Moriarty & Schacht (Milwaukee Co. Cir. Ct., 09/19/89).

A complaint was properly dismissed as a sanction for the Complainant's failure to comply with the Respondent's discovery requests. Complainant's attorney was further ordered to pay the Respondent's actual costs and attorney's fees incurred because of the Complainant's refusal to comply with discovery requests. If the attorney was to blame for the dismissal, the Complainant's remedy was a suit for malpractice. Smith v. Norris Adolescent Ctr. (LIRC, 04/21/89).

Dismissal of the complaint was too severe a sanction for the Complainant's failure to answer interrogatories. The Complainant did answer the interrogatories, albeit late. The Respondent never brought a motion to compel, nor did it show prejudice. Bie v. WLUK-TV (LIRC, 02/29/88).

The proper remedy for incomplete responses to discovery requests is a motion to compel, not a motion for sanctions. The party requesting the information must establish its relevancy to the complaint but need not show that it would be admissible at the hearing. Paul v. DHSS (Wis. Pers. Comm'n, 10/14/83).

746 Dismissals for failure to respond to correspondence from the department

Dismissing a complaint for failure to respond to a certified letter that the Complainant never received and had no reason to expect he would be receiving based upon the length of time since his last communication with the ERD would frustrate the purpose of the statute. Pimentel v. Cnty. of Waukesha (LIRC, 09/17/21).

The department shall dismiss a complaint if the Complainant fails to respond within 20 days to correspondence from the department which poses some question for the Complainant to answer and which has the purpose of obtaining information the Equal Rights Division needs to carry out its case management goals, so long as the correspondence was sent by certified mail to the Complainant's last-known address. The department's correspondence met these requirements. Dismissal was warranted where the Complainant moved from her daughter's address and failed to either inform the department of her new address or arrange to be notified in the event of her daughter's receipt of mail from the department. Davidson v. State Collection Serv., Inc. (LIRC, 08/13/19).

Wisconsin Stat. § 111.39(3) statute, which provides for dismissal of the complaint where a party has failed to respond to correspondence from the department, requires that the department's correspondence be sent by certified mail. Dismissal of the complaint is not permissible where the letter was sent by regular mail. Carter v. Community Action, Inc. (LIRC, 05/17/19).

Where the requirements of sec. 111.39(3), Wis. Stats., were satisfied, dismissal of the matter was required by law. There is no exception where a party can show that the failure to respond in a timely manner was for a reason beyond its control. Vandehey v. Batzner Pest Mgmt. (LIRC, 09/16/16).

The complaint was dismissed after the Complainant failed to respond to a certified letter from the Equal Rights Division within 20 days. Subsequently, the Complainant's attorney asked the Division to place this matter in abeyance pending resolution of the complaint filed in federal court, and the Division placed the matter in abeyance. However, because the requirements of sec. 111.39(3), Wis. Stats., were met, dismissal of the matter was required by law, and the fact that the Division placed the matter into abeyance after issuing its order of dismissal did not serve to resuscitate the case. Murphy v. UW-Madison Bd. of Regents. (LIRC, 04/11/16), aff'd sub nom. Murphy v. LIRC (Dane Co. Cir. Ct., 04/15/17).

Although the statute provides for dismissal of cases where the Complainant fails to respond within 20 days to a certified letter from the Department mailed to his last known address, the intent of the statute is frustrated when the Complainant does not actually receive the letter. In this case, the Complainant did not receive the Department's certified letter because it was sent to an address where he no longer resided and he had not kept the Department apprised of his new mailing address. Considering the length of time that had elapsed since the Department's last communication with the Complainant (more than a year), and the fact that the Department had provided him with inaccurate information regarding the processing of his case, the Commission concluded that it would be inappropriate to dismiss his case on the basis of his failure to respond to the certified letter. Xu v. Epic Sys. Corp. (LIRC, 03/26/15).

For purposes of the statute, the certified 20-day letter is required to be sent to the Complainant himself, and not just to the Complainant's attorney. Lancerio v. Genesis Group (LIRC, 09/26/14).

The Department is encouraged to rely on options less drastic than a 20-day letter, with the accompanying sanction of dismissal of the complaint, when attempting to elicit information from parties. Lancerio v. Genesis Group (LIRC, 09/26/14).

The Division properly mailed a 20-day letter to the Complainant concerning her complaint, and she did not make a timely response. The Complainant acknowledged in her petition for review that she received the letter a week before the deadline for responding to the Division, which was enough time to make a timely response. She attempted to do so, but failed to put postage on her response, and the post office returned the response to her instead of delivering it to the Division. The allegations of the petition do not state a plausible case that the untimeliness of the Complainant's response was not her fault. It is not necessary, therefore, to remand for a

hearing on whether the Complainant's complaint was properly dismissed. Conard v. A.L. Schutzman Co. (LIRC, 01/15/14).

In certain circumstances, considerations of due process require that a Complainant receive a hearing on his assertion that he never received notice of the Department's certified letter. Laboy v. Mantissa Corp. (LIRC, 03/21/12).

The complaint was dismissed after the Complainant failed to respond to a certified letter from the Equal Rights Division within 20 days. The certified letter informed the Complainant that a response was required and that the information was needed by the Equal Rights Division in order to process and make a decision regarding her complaint. This was purposeful correspondence. The Complainant was not entitled to a hearing on her assertion that she never received the Department's certified letter because she conceded that she was no longer residing at the address to which the certified letter was mailed, even though this was her address of record with the Equal Rights Division at the time. Maxwell v. Aramark Educ. Serv. (LIRC, 11/30/10).

A complaint was properly dismissed for failure to respond to correspondence from the Department where the Complainant admitted that the reason he did not go to the post office to claim the certified letter from the Equal Rights Division was that he thought it was mail from a bill collector. Had he gone to the post office to ascertain who the mail was from, he would have learned that it was correspondence from the Department regarding his discrimination complaint. Hobson v. USA Sec. (LIRC, 01/31/08).

The Equal Rights Division dismissed a complaint based upon the Complainant's failure to respond to correspondence sent by certified mail to her last known address. The Complainant appealed the dismissal to the Labor and Industry Review Commission indicating that she had never received the Department's certified mail. Due process considerations require that the Complainant receive a hearing on her assertion that she never received notice of the Department's certified mail. McGee v. County of Milwaukee (LIRC, 08/18/06).

The Administrative Law Judge inappropriately dismissed a complaint based upon the Complainant's failure to respond to a certified letter. The certified letter sent by the Administrative Law Judge was confusing. The letter stated, "If you wish to pursue your complaint, you have twenty days to respond to [the Respondent's] motion to dismiss." The ALJ enclosed a "Request to Withdraw Complaint" form with the certified letter. It may not have been clear to the Complainant whether she needed to file her brief on the motion to dismiss within the twenty-day period in order to keep her charge alive, or whether she simply needed to indicate her intent to proceed in order to do so. Furthermore, the correspondence from the Administrative Law Judge was not purposeful. It appears that the only factor triggering the letter was the withdrawal of the Complainant's counsel. There was nothing in the file to indicate that the Complainant was considering abandoning her case. All parties, whether or not represented by counsel, should be afforded a full and fair opportunity to participate in the hearing process. Starks v. SBC Ameritech (LIRC, 02/09/06).

The Equal Rights Division had reason to question the Complainant's intent to proceed when she failed to respond to the Respondent's discovery request. As a result, the Department's correspondence advising the Complainant that a response was required within twenty days was "purposeful." The Complainant's failure to respond to this letter justified the dismissal of her complaint. Rodgers v. Lutheran Home (LIRC, 12/30/05).

The Equal Rights Division sent the Complainant a letter concerning his charge of discrimination by certified mail. The letter noted that his case had been in abeyance status for an extended period of time while he pursued the matter in another forum. The letter indicated that if this matter had been resolved the Complainant should indicate that the case should be closed, or, if he wanted the matter to remain open, to send a letter explaining his reasons for requesting that it remain open. The letter advised the Complainant that if a response was not received within twenty days his case would be dismissed pursuant to sec. 111.39(3), Stats.

The correspondence from the Department concerning the Complainant's complaint was purposeful correspondence. The Department did not know the status of the Complainant's federal claim. It could not be expected to defer action on the Complainant's court case indefinitely. The Department's subsequent dismissal of the complaint for the Complainant's failure to respond to the letter within the specified time was appropriate. Rogers v. Wis. Knife Works (LIRC, 12/22/05).

A certified letter from the Department was correctly addressed to the Complainant. It was returned to the Equal Rights Division from the post office with the handwritten words "she doesn't live there" and "unknown" on the envelope. The envelope also contained a "return to sender" stamp from the post office and a typewritten, affixed, post office notice which reads, "Return to Sender, Attempted – Not Known, Unable to Forward." The complaint should not have been dismissed for failure to respond to correspondence from the Department where the Complainant denied receiving any certified mail. The words "she doesn't live there" written on the envelope provide no indication that this was information provided by someone from the Complainant's household. A Complainant cannot be penalized by having her complaint dismissed for refusal to timely respond to correspondence from the Department sent by certified mail when some unknown person not of the Complainant's household, for whatever reason, has misinformed the postal carrier about the Complainant's place of residence. Nzeaka v. South Point Healthcare (LIRC, 08/26/05).

The legislative purpose underlying sec. 111.39(3), Stats., is frustrated by the failure of the postal service to follow its typical practice of leaving notice for the intended recipient that delivery of a certified letter has been attempted. Johnson v. Badger Meter (LIRC, 07/29/05)

When a Complainant's failure to respond to a twenty-day letter resulted from actions within his control, sec. 111.39(3), Stats., does not permit an exception. The underlying case must be dismissed. In this case, the Complainant asserted that he did not receive the certified letter because he was out of town. Apparently, the Complainant did not make arrangements for the monitoring or forwarding of his mail during his absence. The dismissal of his complaint for failure to respond to correspondence from the Department is affirmed. Johnson v. Badger Meter (LIRC, 07/29/05)

Sec. 111.39(3), Stats., requires the use of certified mail for the Department correspondence. However, because of the peculiarities associated with such mailing service, certified mail is not always the best means of assuring that the intended recipient will receive notice of the Department's correspondence. In the instant case, the failure of the post office to leave the Complainant notice of its attempted certified mail delivery frustrated the purposes of the statute. Accordingly, the decision dismissing the complaint was set aside and the case was remanded for further proceedings. Unseth v. County of Vernon (LIRC, 06/30/05).

The Complainant's complaint was properly dismissed because she failed to respond within 20 days to correspondence concerning her complaint. The Department sent the correspondence by certified mail to the Complainant's last known address. The correspondence from the Department was purposeful in that it inquired if the Complainant wanted the Equal Rights Division to conduct a second independent investigation of her complaint, which had been dismissed by the EEOC. The correspondence from the Department advised the Complainant that a written response was required within 20 days. The Complainant failed to respond within that time period. Wren v. Columbia St. Mary's Hosp. (LIRC, 11/26/04).

The use of "twenty-day letters" should be restricted to cases where there is a particular reason to ask the Complainant if he is still planning to appear and proceed with his case. Where there is a particular reason for the inquiry, the practice of "twenty-day letters" does not have the effect of being merely a de facto procedural requirement imposed on unrepresented Complainants. Furthermore, where there is a particular reason to ask a Complainant if he is still planning to appear and proceed with his case, the fact that an Administrative Law Judge asks that question is understandable and is less likely to create the impression that the Administrative

Law Judge is implicitly suggesting (rather than merely inquiring about) that outcome. Frederick v. Initial Security (LIRC, 08/28/03); Martinez v. Water Street Brewery (LIRC, 08/28/03); Perez v. Aurora Sinai Samaritan (LIRC, 08/28/03).

There are two significant elements which are required in order for a letter to constitute "correspondence from the department concerning the complaint" within the meaning of sec. 111.39(3), Stats. First of all, the correspondence must require a response. The correspondence must pose some sort of question and inform the Complainant that a response is required. Secondly, the correspondence from the department concerning the complaint must be purposeful. The response sought from the Complainant must assist the department in obtaining information which it actually needs to process and decide cases, and it must advance the department's legitimate goal of efficiently managing its caseload, as well as the interests of administrative justice. Correspondence from the department which does not meet these requirements does not justify the dismissal of the complaint. Palmer v. Wis. Pub. Serv. Corp. (LIRC, 07/30/03).

The Complainant included the cost of expedited mail delivery, delay in regular mail service and lack of a telephone as reasons for his failure to timely respond to a letter from the Department. It is difficult to believe that the Complainant could not have obtained assistance from a friend or neighbor so that a timely response could have been made. In any event, the statute does not allow for any exceptions. The statute requires that a complaint be dismissed where correspondence from the Department concerning the person's complaint is sent by certified mail to the person's last-known address and the person fails to respond to that correspondence within twenty days. Hernandez v. Spanish Ctrs. of Racine, Kenosha & Walworth (LIRC, 01/23/02).

The Complainant stated that he did not receive correspondence from the Division because he was incarcerated. There was nothing in the case file to indicate that the Complainant had ever notified the Division that he was incarcerated and had a new address. Therefore, his failure to respond to correspondence from the Department within twenty days required dismissal of his complaint under sec. 111.39(3), Wis. Stats. Wingo v. Pepsi-Cola Gen. Bottlers (LIRC, 01/23/02).

The Complainant submitted evidence that clearly established that there was a problem with his mail delivery. Sec. 111.39(3), Stats., does not seem to contemplate whether reasons for not responding to a certified letter from the Department are reasonable. However, the purpose of the statute was frustrated when a certified letter with the correct address was not delivered to that address. Accordingly, the Department's dismissal of the complaint was reversed. Wilson v. LIRC (Milwaukee Co. Cir. Ct., 01/11/02).

The Complainant contended that he did not receive a letter from the Equal Rights Division because he was incarcerated. The correspondence from the Department was sent to the Complainant's home address. The Complainant could have received mail from the Department at the correctional institution had he provided the Department with that address. Manning v. INX Int'l Ink (LIRC, 03/17/00).

The law requires dismissal of the case if the Complainant fails to respond within twenty (20) days to correspondence with the Department concerning the complaint, which is sent by certified mail to his last known address. This provision applies even when compelling personal circumstances exist. Manning v. INX Int'l Ink (LIRC, 03/17/00).

The Complainant contended that an inexperienced postal carrier who did not have knowledge of his apartment number caused the delay in his receipt of a 20 day letter. However, substitute postal carriers are a predictable occurrence. It was incumbent upon the Complainant to have provided the department with his full address. His failure to have done so means that he cannot be heard when his subsequent non-receipt of correspondence from the department is due to that failure. Brown v. Miller Brewing Co. (LIRC, 04/27/95).

On review, the Complainant argued that she had mailed her response to the Equal Rights Division on time, but subsequently learned that her letter remained in the mailbox for three days before it was picked up by the postal service. Even if this explanation were accepted, it would not constitute a basis for overturning the dismissal of the complaint. Sec. 111.39(3), Stats., does not provide for any exception to the requirement that a complaint be dismissed when the Department does not receive a response to its correspondence within twenty days. Prill v. Country Kitchen of Oshkosh (LIRC, 11/16/94).

The Complainant argued that since her response letter (which was received by the Equal Rights Division approximately ten days after the response period ended) was received by the Equal Rights Division prior to the ALJ's dismissal order, the dismissal of her case was too harsh a remedy. However, sec. 111.39(3), Stats., provides for no exception for "substantial compliance" with the statute. Behlen v. Hartford Automotive Parts Co. (LIRC, 04/26/94).

The Department improperly dismissed a complaint of failure to respond to correspondence from the Department within 20 days where the Department misaddressed the Complainant's certified letter. Cera v. Cooper Power Sys. (LIRC, 01/14/94).

Although sec. 111.39(3), Stats., requires only a response from the Complainant within 20 days, the Administrative Law Judge's request for a written response does not preclude an order of dismissal since the Complainant failed to timely respond in any fashion. Roth v. Cornell Sch. Dist. (LIRC, 11/04/93).

If the Complainant's response to certified correspondence from the Department requiring response within 20 days is late, dismissal of the complaint is absolutely required. Daniels v. Marcus Corp. (LIRC, 07/14/93).

Where the Complainant failed to notify the Department of his last known address, the failure of the post office to forward his mail after he moved did not excuse his failure to timely respond to correspondence from the Department, and his complaint was properly dismissed under sec. 111.39(3), Stats. Pohl v. Thong (LIRC, 05/12/93).

The dismissal of a case for failure to timely respond to correspondence from the Department was set aside where the certified letter to the Complainant was misaddressed. Evidence that some earlier correspondence had been similarly misaddressed but had been delivered to the Complainant did not warrant a different conclusion. Powell v. Kohl's (LIRC, 04/30/92).

The Complainant may have been confused as to when he had to respond to the certified letter from the Administrative Law Judge, since the letter, which required a response within 20 days, was accompanied by a letter from the Equal Employment Opportunity Commission which required a response within 30 days. Nevertheless, sec. 111.39(3), Stats., provides for no exceptions. It makes dismissal of a complaint mandatory when there is a failure to respond within 20 days to any correspondence from the Department. If the Complainant was confused about when the response to the Equal Rights Division was due, he should have contacted the Administrative Law Judge for clarification. Dixon v. Genesis Program (LIRC, 07/22/91).

If sec. 111.39(3), Stats., was interpreted as requiring actual receipt by the Complainant before the 20-day period began to run, this would negate the whole purpose of the law as it would prevent the Personnel Commission from dismissing a complaint filed by a person who had moved without providing a forwarding address, since such a person would never receive the correspondence. In addition, the response to the 20-day letter must actually be received by the Personnel Commission within the 20-day period. It is not enough that the response was mailed to the Commission within the 20-day period. King v. DHSS (Wis. Pers. Comm'n, 05/29/91); rehearing denied, 06/27/91.

The complaint was properly dismissed when the Complainant failed to file a timely response to a 20-day letter, even though the Complainant argued that his response to the letter was affected by problems with the mail service and by intervening holiday times. If the legislature had intended that the 20-day time period should be tolled because of the vagaries of the U.S. postal system or by intervening holidays, it would have given some indication of this in the language of the statute. Jones v. DOT (Wis. Pers. Comm'n, 06/17/91).
The Commission remanded the case to the Equal Rights Division for a hearing on the issue of the Complainant's failure to respond to a certified 20-day letter where (1) the Complainant denied receiving the certified letter, (2) the Complainant submitted a letter purportedly signed by the postmaster indicating that the post office had not received a certified letter for the Complainant, and (3) the Complainant submitted an affidavit stating that no one by the name of the person who allegedly signed the receipt for certified mail had ever been present at his address. Peterson v. K-Mart (LIRC, 05/24/91).

A complaint was dismissed when a response to a 20-day letter was received from the Complainant on the 21st day after the letter was sent. The 20-day period referred to in sec. 111.39(3), Stats., commences on the date the letter is mailed. Block v. UW-Madison Extension (Wis. Pers. Comm'n, 07/27/89).

The 20-day period provided by sec. 111.39(3), Stats., within which a Complainant must answer an inquiry concerning their case or be subject to dismissal of the complaint, runs from the date on which the correspondence is mailed to the Complainant, not from the date on which the Complainant receives it. Jackson v. DHSS (Wis. Pers. Comm'n, 03/10/88).

The language of sec. 111.39(3), Stats. that "the Department shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence concerning the complaint," is mandatory, and the 20-day response period is measured from the date of the mailing of the correspondence to the date on which the party's response is received. Schilling v. Walworth County (LIRC, 05/10/84).

Where the Equal Rights Division failed to send correspondence to the Complainant's last known address as required by statute, its dismissal of the complaint is reversed. Marcoux v. Ashwaubenon Pub. Sch. (LIRC, 01/23/80).

747 Pre-hearing disclosure of witnesses and exhibits

The Complainant failed to send a copy of his list of proposed witnesses to the Respondent or the Respondent's attorney. When the Respondent objected to issuance of a hearing subpoena for one of the witnesses on the Complainant's witness list, the administrative law judge sustained the objection and did not issue the subpoena. The Complainant failed to rebut the Respondent's assertion that the notice of proposed witnesses had not been properly served, and that the short notice of the subpoena request was an impediment to the witness' availability, as the proposed witness was the Respondent's CEO who had a busy schedule. The administrative law judge's decision to not grant the Complainant's request for a subpoena was not an abuse of discretion. Stilwell v. Spooner Health System (LIRC, 03/31/17).

Medical records offered in evidence were properly excluded by the ALJ. The Complainant had failed to timely disclose them to the opposing party prior to hearing, and the ALJ properly considered the factors of surprise and prejudice to the opposing party, and balanced the equities between the parties, before ruling that the records would be excluded. Perkins v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/22/15).

The ALJ improperly exercised discretion by refusing to admit a proposed exhibit that had not been disclosed to the opposing party in compliance with sec. DWD 218.17, Wis. Admin. Code, without first balancing the equities between the parties, and without considering whether the party opposing admission of the exhibit would be prejudiced by its admission. The rejection of the exhibit may have affected substantial rights of the

party offering it, making it necessary to remand for a new hearing and decision. Korth v. CHI Towing, Inc. (LIRC, 11/29/13).

In his application of the "ten-day rule," Wis. Admin. Code § 218.17, the ALJ properly exercised discretion by excluding witnesses from the hearing. The witnesses had not been mentioned in the complaint or the Department's initial determination, the employer had no reason to know they might be called, and the lack of notice left the employer without adequate time to prepare for their testimony. The primary consideration in applying this administrative rule is to protect parties from surprise and to protect the fairness and due process of the proceedings. In addition, the hearing notice sent to the Complainant clearly set forth the ten-day notice requirement for names of witnesses and copies of documents to be used at the hearing. Coleman v. Levy Restaurants, LLC (LIRC, 3/28/13).

The Administrative Law Judge did not exercise discretion in applying sec. DWD 218.17, Wis. Admin. Code, when the ALJ did not balance the equities as between the parties before refusing to admit copies of medical records (which had been previously produced by the Complainant to the Respondent, but which were not produced a second time in connection with the administrative hearing). The excluded evidence was both relevant and material to the Complainant's claim. Such evidence, had it been considered, might have resulted in a different conclusion by the ALJ. Consequently, the case was remanded for a new hearing. Rutherford v. LIRC, 2008 WI App 66, 309 Wis. 2d 498, 792 N.W.2d 897.

The Administrative Law Judge properly excluded the Complainant from calling witnesses (other than herself) and from offering any exhibits other than those which duplicated exhibits noticed by the Respondent because the Complainant did not file a witness list or copies of her hearing exhibits prior to hearing. Even though the Respondent's counsel may have viewed certain of these documents during the investigative process, the Respondent was prejudiced when it had no reason to know which of the numerous documents (which were part of the investigative file) the Complainant intended to rely upon at hearing. Rutherford v. Wackenhut Corp. (LIRC, 01/31/06).

The Administrative Law Judge properly precluded the Complainant from introducing documents which had not been timely identified ten days prior to the day of hearing. While the Respondent may have furnished these documents to the Complainant during discovery, the record indicated that the Respondent had supplied the Complainant with approximately 9,000 documents in response to his discovery requests. By failing to specifically identify which of these documents he intended to use at hearing, the Complainant effectively hid those documents. The Respondent could not guess what information the Complainant would consider relevant and wish to offer at hearing. By identifying documents he intended to use for the first time at hearing, the Complainant frustrated the purposes of sec. DWD 218.17, Wis. Adm. Code. Blunt v. DOC (LIRC, 02/04/05).

Compliance with the requirement of disclosure of witness and exhibit information to the opposing party can be achieved by, and will be complete upon, mailing to the opposing party. Borum v. Allstate Ins. Co. (LIRC, 10/19/01).

The fact that a party's disclosure of documents was effected by CD-ROM justified the Administrative Law Judge's decision to exclude the documents. Clark v. Friskies Petcare (LIRC, 08/16/01).

The purpose of the rule requiring pre-hearing exchange of exhibits is frustrated where a party simply serves a huge number of documents (In this case, thousands of documents were served not as copies of documents, but as digital versions of documents on a CD-ROM). By serving thousands of documents, the Complainant effectively hid anything which was potentially relevant and which might be used at hearing in a flood of other papers. The effect is the same as if nothing at all had been served. Clark v. Friskies Petcare (LIRC, 08/16/01).

The rule concerning pre-hearing disclosure of witnesses and exhibits provides that the failure to make the necessary exchange "may" result in the exclusion of the witnesses or the exhibits. The paramount consideration in applying the rule must be its purpose to protect parties from surprise and to protect the fairness and the due process of the proceedings. In a case in which a party would not have been surprised or prejudiced by allowing testimony, it should be allowed. Berglund v. Post Crescent (LIRC, 01/31/01).

Where the Complainant failed to identify the Respondent's representative as a witness prior to the hearing and the Respondent's representative was not on notice that he would be called upon to testify, the Administrative Law Judge's ruling that the employer's representative was not required to testify was appropriate. Kilgore v. Wisconsin Indianhead Tech. College (LIRC, 04/30/98).

An Administrative Law Judge properly prohibited the Complainant's witnesses from testifying at the hearing where the Complainant had not complied with the requirement to disclose his list of witnesses ten days prior to the hearing. The purpose of the notice requirement for witnesses and exhibits is to give the opposing party proper opportunity to prepare its case against such witnesses and exhibits. A lack of notice prejudices the party that did not receive it. Walker v. Masterson Co. (LIRC, 10/4/95).

The Administrative Law Judge properly excluded both the Initial Determination and a letter sent by the Respondent to the ERD investigator because they had not been disclosed as potential exhibits prior to the hearing. The Complainant had offered the Initial Determination in an effort to rely upon a statement therein to the effect that it was not disputed that her handicap was a factor in her termination. Since the purpose in offering the statement was to prove that the Complainant was handicapped, and since this proof was required to be part of her case in chief, the Complainant could not assert that it was legitimate rebuttal evidence, i.e., something the need for which could not reasonably be anticipated prior to hearing. Geske v. H.C. Prange Co. (LIRC, 12/09/93).

The Department's administrative rules permit, but do not mandate, that exhibits be excluded if they are not timely served upon the opposing party. The party requesting exclusion must show that he was prejudiced by the late disclosure of the information on the list. Peace v. Milwaukee Plating Co. (LIRC, 08/21/92).

The Administrative Law Judge properly quashed a subpoena for the production of documents which was issued two days before the beginning of the second day of the hearing. The party seeking the subpoena could not have introduced the documents into the record even if the documents had been produced according to the subpoena since the Department's administrative rules require that all exhibits must be submitted no later than the tenth day prior to the day of the hearing. Vaisman v. Aldridge, Inc. (LIRC, 10/21/91).

Service of the witness and exhibit disclosure list by mail is complete upon mailing. Pohlen v. Gen. Elec. Co. (LIRC, 04/18/91).

The requirement of filing the witness and exhibit disclosure list with the Department serves mainly to keep the Division informed as to whether the parties are complying with the exchange requirement. The exclusion of relevant evidence simply because it had not been filed with the Division ten days prior to the hearing, without any finding that the opposing party was prejudiced thereby, would be unjustified. Pohlen v. Gen. Elec. Co. (LIRC, 04/18/91).

The Administrative Law Judge has discretion to allow evidence notwithstanding non-compliance with the witness and exhibit disclosure rule. The Administrative Law Judge should consider the question of whether any prejudice would result to the other parties, rather than concluding that there is prejudice per se when service and filing of the witness and exhibit list was untimely. Pohlen v. Gen. Elec. Co. (LIRC, 04/18/91).

Where a party has clearly identified on the record at hearing its desire to call a particular person as a witness, all parties reasonably anticipate that the hearing will continue on a subsequent day before the party proposing a witness rests its case, and the hearing is in fact continued on a subsequent day more than ten days later and the party proposing the witness has not rested its case, sec. Ind. 88.14(1), Wis. Admin. Code, should not be invoked to preclude presentation of that evidence. The opposing party will have had ten days' opportunity to prepare to rebut the disclosed evidence, just as in the case of initial disclosure. Pohlen v. Gen. Elec. Co. (LIRC, 04/18/91). [Ed. note: sec. Ind. 88.14(1), Wis. Admin. Code, has been renumbered DWD 218.17(1), Wis. Admin. Code.]

The Administrative Law Judge appropriately quashed a subpoena *duces tecum* served on the Respondent shortly before the hearing. Because none of the documents requested in the subpoena *duces tecum* had been identified by the Complainant ten days prior to the hearing as potential exhibits, they would have been subject to exclusion in any event. Chacon v. Dairy Equip. Co. (LIRC, 02/15/91).

The Administrative Law Judge's exclusion of witnesses and exhibits identified in a witness list filed with the Department on the day before the hearing was upheld. Osteen v. Aldridge, Inc. (LIRC, 11/21/89), aff'd sub nom. Osteen v. LIRC (Milwaukee Co. Cir. Ct., 06/15/90), aff'd, (Ct. App. Dist. I, unpublished opinion, 01/15/91).

The purpose of the Department's rule requiring the exchange of witness and exhibit lists is to avoid undue surprise at hearing. The most important requirement of this rule is the notice provided to the other party. The requirement of service on the Division serves mainly to keep the Division informed as to whether the parties are complying with the exchange requirement. Scott v. Sno Bird Trailer Co. (LIRC, 12/19/90).

Where the Respondent submitted a witness and exhibit list to the Department but failed to serve it on the Complainant, the Administrative Law Judge properly exercised her discretion when she precluded all but one of the Respondent's witnesses and precluded the introduction of any exhibits by the Respondent. Scott v. Sno Bird Trailer Co. (LIRC, 12/19/90).

A finding of no probable cause which was based on testimony of a witness for the Respondent who had not been properly identified as a witness prior to the hearing was reversed where the Complainant was clearly prejudiced by the witness' testimony because he did not even know who the witness was. Smith v. Menard Lumber Store (LIRC, 05/05/88).

The rule concerning pre-hearing disclosure of witnesses and exhibits provides that the failure to make the necessary exchange "may" result in exclusion. The paramount consideration in applying the rule must be its purpose to protect parties from surprise and to protect the fairness and the due process of the proceedings, so that in a case in which a party would not have been surprised or prejudiced by allowing testimony, it should be allowed. Hansen v. Airborne Freight Corp. (LIRC, 05/21/87).
Where the Complainant had prior knowledge of the requirement for pre-hearing disclosure of witnesses, and failed to make that disclosure, and was unable to show that good cause existed for her failure, and where a substantial potential existed for prejudice to the Respondent if witnesses the Complainant sought to have testify were allowed to testify, it was proper to preclude them from testifying. Brunson v. Columbia Hosp. (LIRC, 05/14/87).

The purpose of the rule regarding pre-hearing disclosure of witnesses and exhibits is to protect the parties from surprise and to ensure the fairness of the proceedings. A Respondent should have been allowed to call a witness who had been identified as a potential witness of the Complainants, since the Complainants could not assert surprise in such a case. Also, where the Complainants' witness list was filed only nine days before the hearing, this should not result in a dismissal of the case where the filing of the list one day late did not result in any prejudice (i.e., surprise) to the Respondent. Dominquez v. Sawdust Factory (LIRC, 04/16/87).

A Respondent's failure to provide the Complainant with a list of witnesses prior to a no probable cause hearing is not grounds for excluding their testimony where it is offered solely to rebut the testimony of the Complainant's own witnesses. Hammes v. Rain Fair, Inc. (LIRC, 09/28/84).

Evidence offered by the Complainant was properly excluded where the Complainant had failed to exchange a list of exhibits and witnesses with the Respondent beforehand, where the prejudicial effect to the Respondent outweighed the Complainant's assertion that he did not know of the requirements, and where the Complainant had failed to pay the required witness fees. Clarke v. Milwaukee County Med. Ctr. (LIRC, 09/20/84).

748 Withdrawals and settlements

Undisputed facts persuade LIRC that the Complainant knowingly and willingly waived his rights to bring a complaint of employment discrimination against his employer. The Complainant's lack of knowledge that his employer had made certain changes in his personnel record did not make the waiver not "knowing." Alternatively, dismissal was also required here because the Complainant did not tender back the payment he received in exchange for his waiver. Musial v. AECOM Gov't. Servs., Inc. (LIRC, 07/21/14).

748.1 Withdrawal of complaint; dismissal

The Complainant gave the Administrative Law Judge a written, dated and signed document stating that a settlement agreement had been reached and that he would like to close his case. The Complainant's filing of the request for withdrawal of his complaint was unconditional, voluntary, and intentional, and it was done with the knowledge that it would result in the issuance of an order dismissing his complaint. The Complainant's complaint was appropriately dismissed and his subsequent attempt to revoke the settlement was rejected. This is not a case where there was never any intention of withdrawing the complaint or where the withdrawal of the complaint was "inadvertent." It was the Complainant's choice not to wait to file his request to withdraw his complaint until the settlement agreement's revocation period had expired. The Complainant made the decision to go ahead and resign from his job, withdraw his complaint and get his complaint dismissed because he wanted to speed up his receipt of the settlement proceeds. The Department does not have authority to entertain actions for reformation, enforcement or breach of contract regarding a settlement agreement which has been signed by the parties. Burton v. United Gov't Serv. (LIRC, 11/21/11).

Based on information he apparently received from a union representative, the Complainant believed that the Respondent would ultimately agree to grant him reinstatement and back pay. He requested withdrawal of his complaint as a result, and his complaint was dismissed. However, no such agreement was reached and, as a result, the Complainant sought to have the order dismissing his case set aside. Although it is unfortunate that the Complainant acted before he knew what type of settlement would ultimately be achieved, he apparently did so knowingly and voluntarily and with benefit of counsel. This is not the type of circumstance which would warrant setting aside the order of dismissal. Luckett v. City of Milwaukee (LIRC, 08/30/05).

While a dismissal with prejudice precludes a party from re-filing the same claim with the Equal Rights Division, the effect of such a dismissal on the Complainant's rights to go forward in any other forum is a matter for the other forum to decide. The Department does not have the authority to either grant or deny jurisdiction to any other forum. Kemp v. Ramada Hotel (LIRC, 02/06/04).

The Equal Rights Division dismissed a case based upon the Complainant's written request to withdraw his complaint before the Equal Rights Division and to proceed before the federal Equal Employment Opportunity Commission (EEOC). The Complainant subsequently sought to have the order of dismissal set aside stating that he did not understand that the EEOC would apply a different definition for determining whether he was

disabled and that he would not have withdrawn his ERD complaint had he known this. While it is unfortunate that the Complainant made incorrect assumptions about federal law when choosing the proper forum for his complaint, this is not a situation which would warrant setting aside the order of dismissal of the ERD complaint. Crawford v. Kraft Foods (LIRC, 01/16/04).

Where a settlement agreement was signed by the Complainant, and where the agreement clearly provides that the Complainant agrees to the dismissal of her complaint, it was not necessary for the Administrative Law Judge to also obtain a separate withdrawal form from the Complainant. King v. Kmart (LIRC, 08/28/03).

The Division's administrative rules provide that the complaint shall be dismissed upon the filing of a request for a withdrawal. While the rule does not provide any exception to the requirement that the complaint be dismissed once a withdrawal is tendered, there are circumstances in which it can be concluded that no withdrawal was intended. In this case, there is evidence that the Complainant did not intend to file the request to withdraw his complaint at the time he did. He filed the withdrawal request prior to the time that a negotiated confidential settlement had been finalized. Comments made by the Administrative Law Judge led the Complainant to believe that, although he had submitted a withdrawal form, the form would not be filed and the matter would not be dismissed until the settlement was reduced to writing. The settlement was not reduced to writing and, ultimately, the parties were not able to agree on certain terms. Dismissing the complaint based upon the signed withdrawal form would clearly be contrary to the will of the parties in this case. Accordingly, the Administrative Law Judge's order dismissing the complaint was set aside. Walsh v. Tom A. Roth, S.C. (LIRC, 11/29/02).

The Complainant requested that her case be dismissed without prejudice because she desired to litigate the subject matter of the complaint in federal court. Unreviewed administrative decisions do not have preclusive effect with regard to a federal court Title VII proceeding, although administrative factual findings are entitled to preclusive effect with respect to actions under 42 U.S.C. § 1983 in federal court. Whether the Personnel Commission's decision would have any preclusive effect on a proceeding in another forum involving the same subject matter would be a question to be resolved by that other forum. Sleik v. Dep't of Commerce (Wis. Pers. Comm'n, 12/03/99).

It was error for an Administrative Law Judge to grant a Complainant's request for a withdrawal of her complaint without prejudice where: (1) the Complainant's complaint before the Equal Rights Division had proceeded to a hearing on the merits, with the Complainant examining several witnesses, (2) the Respondent had incurred substantial expenses to prepare for the hearing, and (3) counsel for the Complainant stated that he had never intended to complete the ERD hearing, but had used the hearing process for discovery purposes related to the Complainant's potential federal claims. Smith v. Racine Unified Sch. Dist. (LIRC, 09/30/99).

The Administrative Law Judge's order dismissing a complaint was set aside where the Complainant's request for withdrawal of the complaint (which was the basis for the Administrative Law Judge's dismissal order) was filed inadvertently and the Labor and Industry Review Commission concluded that the Complainant did not actually wish to withdraw his complaint. Hatcher v. Larson (LIRC, 08/26/94).

Any discretion to dismiss a complaint without prejudice is that of the Department, and not that of the withdrawing Complainant. The Administrative Law Judge did not abuse his discretion in denying the Complainant's motion for withdrawal without prejudice in this case. Silva v. City of Madison (LIRC, 11/12/93).

The Complainant stated that he wished to withdraw his complaint, and the Personnel Commission dismissed the charge. Several months later, the Complainant requested that his original charge of discrimination be

reinstated, on the grounds that he had withdrawn the charge as part of a settlement agreement but that the settlement agreement had been breached. The Commission lacked authority to reopen the matter. Haule v. UW-Milwaukee (Wis. Pers. Comm'n, 8/26/87).

An examiner correctly dismissed a complaint without prejudice as requested by a Complainant who wished to pursue the matter in federal court, notwithstanding the employer's objections before the hearing, which the Complainant failed to attend and at which no ruling on the request was made. Weiss v. Nicolet Instrument (LIRC, 06/18/84).

Under certain circumstances it is not an abuse of discretion for an Administrative Law Judge to dismiss a complaint without prejudice. Weiss v. Nicolet Instrument (LIRC, 06/18/84).

A voluntary withdrawal by a Complainant of her discrimination charge in exchange for an offer of hire does not constitute a settlement or waiver of her charge unless she fully understood that such would be the result. Krawczyk v. Greenfield Sch. Dist. No. 6 (LIRC, 04/15/82); Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

748.2 Settlement agreements; enforcement

In WPAAL cases, LIRC's jurisdiction extends only to reviewing whether the WPAAL was violated. LIRC is not authorized to decide breach of contract questions or entertain actions for enforcement of a settlement agreement. Bellocchio v. Best Western Inn & Suites, New Richmond (LIRC, 02/18/21).

The Complainant contended that she entered into a settlement agreement under duress because the administrative law judge would not grant a continuance to allow her to subpoena her witnesses. However, a finding of duress contemplates threats or wrongful acts. The failure to grant a continuance did not force the Complainant into accepting a settlement. Coenen v. Plexus Corp. (LIRC, 01/08/21).

The Respondent's failure to comply with the OWBPA might affect the Complainant's rights under the ADEA but has no bearing on her claims under the WFEA. Coenen v. Plexus Corp. (LIRC, 01/08/21).

LIRC treats settlement agreements as final absent an allegation of misrepresentation or intimidation by a representative of the Division or an allegation that the settlement contains something that renders it invalid on its face. Allegations by the Complainant that he was "not treated fairly" and that he is "not happy with the outcome in court" are not sufficient to set aside a voluntary settlement agreement. Osman v. JBS Green Bay, Inc (LIRC, 03/30/20).

Where the Complainant returned the consideration he received for signing an agreement releasing the Respondent from certain claims pending a determination by the Equal Rights Division regarding the validity of the agreement, such consideration must be returned to the Complainant upon a conclusion that the Complainant did in fact sign a knowing and voluntary waiver of his right to sue. The Respondent's refusal to return the consideration to the Complainant would have the effect of rendering the agreement unenforceable. Xu v. Epic System Corporation (LIRC, 06/04/18).

The Equal Rights Division and LIRC have no authority to adjudicate a contract dispute. However, they may decide whether the Respondent's interpretation of the agreement was a reasonable one for purposes of determining whether the Respondent presented a legitimate, nondiscriminatory reason for its actions. Weber v. State of Wisconsin DWD (LIRC, 01/04/18).

Language in a settlement agreement indicating that the Complainant has not waived his right to file a complaint with agencies such as the EEOC that he "cannot be prohibited from or punished for filing as a matter of law" evinced an intent to preserve the Complainant's right to file a complaint with the Equal Rights Division. Therefore, dismissal of the complaint based upon the settlement agreement was in error. Xu v. Epic Systems, Inc. (LIRC, 10/24/2017). [Ed. note: In Ionetz v. Menard, Inc. (LIRC, 03/13/18), LIRC stated that it would no longer follow this decision].

The Complainant gave the Administrative Law Judge a written, dated and signed document stating that a settlement agreement had been reached and that he would like to close his case. The Complainant's filing of the request for withdrawal of his complaint was unconditional, voluntary, and intentional, and it was done with the knowledge that it would result in the issuance of an order dismissing his complaint. The Complainant's complaint was appropriately dismissed and his subsequent attempt to revoke the settlement was rejected. This is not a case where there was never any intention of withdrawing the complaint or where the withdrawal of the complaint was "inadvertent." It was the Complainant's choice not to wait to file his request to withdraw his complaint until the settlement agreement's revocation period had expired. The Complainant made the decision to go ahead and resign from his job, withdraw his complaint and get his complaint dismissed because he wanted to speed up his receipt of the settlement proceeds. The Department does not have authority to entertain actions for reformation, enforcement or breach of contract regarding a settlement agreement which has been signed by the parties. Burton v. United Gov't Serv. (LIRC, 11/21/11).

The Complainant signed a paper in which she agreed to arbitration of this matter. The settlement agreement that was reached as a result of arbitration was valid and binding. The Complainant was represented by counsel throughout the settlement negotiations. Although it is unfortunate that the Complainant is dissatisfied with her attorney's representation of her, that does not render the settlement invalid. Wennesheimer v. American Express (LIRC, 11/25/09).

Settlements will be treated as final even in cases where a party is unrepresented, provided that the party entered into the settlement agreement knowingly and voluntarily. In this case, the Complainant was a college student. He had several days to review the Agreement and Release before signing it. In seeking to re-open his case, the Complainant did not allege that the document he signed contained something that made it invalid on its face. Nor did he allege that there was any misrepresentation or intimidation by a representative of the Department. The Complainant was dissatisfied with the settlement and resulting dismissal of his complaint because he either expected to receive, or wanted to receive, more money under the settlement. However, settlements are final absent an allegation of misrepresentation or intimidation by a representative of the Department or an allegation that the settlement agreement contained something to render it invalid on its face. Ocholi v. Sodexho, Inc. (LIRC, 09/04/09).

Once a settlement agreement is entered into knowingly and voluntarily, a dispute about whether its terms have been complied with does not affect the validity and finality of the agreement. Neither the Equal Rights Division nor the Labor and Industry Review Commission has the authority to decide what are in effect breach of contract questions regarding whether settlement agreements have been breached. Sullivan v. UW-Marathon County (LIRC, 09/27/07).

The Complainant failed to provide a basis for voiding the settlement agreement in his case where he argued that the Respondent had made misrepresentations regarding the tax consequences of the settlement. The Respondent correctly informed the Complainant that the settlement amount was taxable as income. Sec. 104(a)(2), of the Internal Revenue Code, provides a statutory exception for taxation of gross income for the amount of any damages (other than punitive damages) which are received (whether by suit or agreement, and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. The Complainant in this case did not receive income from the settlement on account of personal

physical injuries or physical sickness. The amount which he received as the settlement amount represented a cash payment in lieu of paid leave following his resignation, a cash payment for his overtime hours and accrued vacation and personal holiday accounts, and severance pay equal to one and one-quarter times his annual salary. For this, and other reasons, the Administrative Law Judge appropriately dismissed the Complainant's claims that the settlement agreement should be voided. Sullivan v. UW-Marathon County (LIRC, 09/27/07).

Where a settlement has been entered into knowingly and voluntarily, the settlement is final. The "totality of the circumstances" test should be used to determine whether there has been a knowing and voluntary waiver of rights under the Wisconsin Fair Employment Act. There was such a knowing and voluntary waiver of rights in this case. The Complainant had a Bachelor of Business Administration degree and he had been employed at a college as an activities coordinator. The Respondent had not imposed any time limit on the Complainant's review and consideration of the settlement agreement. The Complainant had an active role in deciding the terms of the agreement. The agreement was written in clear and unambiguous language. The Complainant did not consult an attorney during the settlement negotiations; however, the settlement agreement expressly advised the Complainant to consult legal counsel. The Complainant was given consideration in exchange for his waiver of rights against the Respondent that exceeded employee benefits to which he was already entitled by contract or law. Moreover, the Complainant failed to establish that he agreed to the settlement under intimidation or threat of termination. The Complainant suggested that a valid settlement did not exist because he was "under psychiatric care for mental health concerns." However, there was no medical documentation to substantiate this medical condition. The Complainant's own correspondence to the Respondent indicated that his alleged condition had no adverse impact on his ability to willingly, knowingly, and freely negotiate a settlement agreement with the Respondent. Sullivan v. UW-Marathon County (LIRC, 09/27/07).

Sec. 227.48, Stats., provides that every decision shall include notice of any right of the parties to petition for administrative review of adverse decisions. Settlement agreements may be adverse decisions. Therefore, the Equal Rights Division should attach a notice of appeal rights to all orders in which a complaint is dismissed as a result of a settlement agreement. Fettig v. County of Fond du Lac (LIRC, 07/14/06).

A party may not laterally attack the finality of a settlement agreement by claiming misrepresentation on the part of their attorney, or by claiming that their attorney exceeded the scope of his authority in agreeing to it. Fettig v. County of Fond du Lac (LIRC, 07/14/06).

Once a Complainant, personally or through counsel, makes an unconditional request for the withdrawal of a complaint, dismissal of the complaint is required and collateral attacks on the finality of a settlement will not be entertained in the absence of an allegation of misrepresentation or intimidation by a representative of the Department, or an allegation that a provision of the underlying settlement agreement is per se invalid. Oehldrich v. Wausaukee Rescue Squad (LIRC, 10/29/04).

Neither the Equal Rights Division nor the Labor and Industry Review Commission has the authority to decide whether settlement agreements have been breached. Oehldrich v. Wausaukee Rescue Squad (LIRC, 10/29/04).

An Administrative Law Judge issued an order dismissing the complaint based upon a settlement agreement entered into by the parties. The order of dismissal listed the EEOC case number as well as the ERD case number, and the order of dismissal described its effect by using such general terms as "this case" and "this matter." Thus, the Administrative Law Judge's order could be understood as purporting to dispose not only of the Complainant's claim under the Wisconsin Fair Employment Act, but also of any claims that could have been brought under the federal Age Discrimination in Employment Act (ADEA). However, the settlement

agreement was inconsistent with the provisions of the federal Older Workers Benefits Protection Act which requires that settlements of age discrimination claims under the ADEA must give claimants seven days after executing an agreement waiving such claims to revoke such agreements. The Complainant in this case indicated that he had "decided not to proceed with the settlement." It appears that the lack of certain provisions in the settlement agreement would make it invalid as a waiver of rights under the ADEA. However, this would not make the settlement agreement invalid with respect to foreclosing the Complainant's claim under the Wisconsin Fair Employment Act. The order of dismissal was amended to make it clear that it applied only to the Complainant's claim under the WFEA and that it was not intended to have any effect on any claims the Complainant might have under the ADEA or any other federal law. Crymes v. County of Milwaukee (LIRC, 02/24/04).

A Complainant's claims of misrepresentation on the part of his attorney in the entering into of a settlement agreement will not be entertained in the absence of: (1) an allegation of misrepresentation or intimidation by a representative of the Department, or (2) a settlement agreement that contains something that makes it invalid on its face. This rule reflects the important policy of making parties accountable for actions of their attorneys, as well as the equally important policy that settlement should be encouraged. There would be no incentive to enter into a settlement if, once entered into, it could be repudiated by the other party simply because they thought better of it later. If settlement is to be encouraged, settlements must be treated as final when made. Scott v. Oconomowoc Area Sch. Dist. (LIRC, 01/30/04).

The Complainant sought to repudiate a settlement agreement based upon alleged shortcomings and improprieties by his union representative. The Complainant should not be any less accountable for the actions of his union representative than if an attorney had represented him. To permit the Complainant to get out of his settlement agreement under the circumstances in this case would only serve to discourage settlements where union representation was involved. Scott v. Oconomowoc Area Sch. Dist. (LIRC, 01/30/04).

Parties who have entered into settlement agreements providing for the dismissal of their complaints, or who have executed and filed requests to withdraw their complaints based on settlements, cannot have their cases reopened by alleging that they were poorly represented, misled by, or otherwise ill-served by their attorneys. In the absence of an allegation of misrepresentation or intimidation by a representative of the Department, and where there is nothing in the terms of the settlement agreement itself which renders it invalid on its face, the Department will not entertain collateral attacks on the finality of a settlement based on a party's claim that his attorney misrepresented the agreement to him or exceeded the scope of his authority in agreeing to it. Kellar v. Copps Gas Station (LIRC, 01/28/04).

Where a settlement agreement was signed by the Complainant, and where the agreement clearly provides that the Complainant agrees to the dismissal of her complaint, it was not necessary for the Administrative Law Judge to also obtain a separate withdrawal form from the Complainant. King v. Kmart (LIRC, 08/28/03).

Once a settlement agreement is entered into, a dispute about whether its terms have been complied with does not affect the validity and finality of an agreement made as part of that settlement that proceedings before the Equal Rights Division will be dismissed. King v. Kmart (LIRC, 08/28/03).

There are two ways in which a settlement can result in the dismissal of a complaint. The first method is for the parties to put the terms of the settlement (one of which will presumably be the withdrawal of the complaint) into the record. The Administrative Law Judge can then dismiss the complaint based upon the settlement agreement. The second method is for the parties to arrive at a confidential settlement that they do not want embodied in an order, after which the Complainant submits a request to withdraw the complaint based upon having arrived at a confidential settlement. Where the parties seek dismissal of a complaint

based upon a confidential settlement, the signed withdrawal obviates the need for any discussion on the record of the terms of the settlement. Walsh v. Tom A. Rothe, S.C. (LIRC, 11/29/02).

Settlements will be treated as final, absent an allegation of misrepresentation or intimidation by a representative of the Department, or an allegation that the settlement agreement contains something to render it invalid on its face. A party alleging that he has entered into a settlement agreement under duress is required to specifically allege conduct constituting duress which would, if true, justify voiding the agreement. Gribbons v. Chart Indus. (LIRC, 03/26/02).

The Complainant's claim that a settlement agreement was void and unenforceable because his attorney engaged in unethical conduct during settlement negotiations lacked merit. In the absence of an allegation of misrepresentation or intimidation by a representative of the Department, and where there is nothing in the terms of the settlement agreement itself which renders it invalid on its face, LIRC will not entertain collateral attacks on the finality of a settlement based on a party's claim that his attorney misrepresented the agreement to him or exceeded the scope of his authority in agreeing to it. Summers v. Northwest Airlines (LIRC, 05/26/00).

Settlements will be treated as final even in cases where a party is unrepresented, provided that the party entered into the agreement knowingly and voluntarily. Summers v. Northwest Airlines (LIRC, 05/26/00).

Although the parties had agreed "in principle" to settle a case, no signed settlement agreement was ever effectuated and no cash payment was ever tendered to the Complainant. The Respondent failed to notify the Division that a settlement had been reached, and a hearing was conducted. It was only after the hearing, and after a preliminary decision had been issued by the Administrative Law Judge, that the Respondent contended that the Complainant had agreed to a settlement and that her damages should be limited to the amount agreed upon at that time, rather than those ordered by the Administrative Law Judge. The Commission determined that, because no final settlement was ever reached, the Respondent was bound by the order issued by the Administrative Law Judge. Roach-Davis v. Rave (LIRC, 03/26/99).

A settlement agreement is a contract which, among other things, requires a definitive offer and acceptance by the parties. Once the parties settle a disputed claim, neither party will be permitted to repudiate it in the absence of any element of fraud or bad faith. Geen v. DHFS (Wis. Pers. Comm'n, 01/13/99).

The Complainant contended that her complaint should not have been dismissed on the grounds that the parties had settled. However, there was no evidence in the record to support her contention that the settlement document she signed was merely a "draft" agreement. Furthermore, there was no basis for the Complainant's contention that the Respondent's attorney did not have authority to agree to non-monetary terms of settlement. An express authorization of the delegation of authority to settle is necessary in financial matters involving the county because the county board is ultimately the sole source of the power to spend the county's money. However, agents of the county are not limited in making decisions that do not commit unbudgeted county funds. Gronowski v. Milwaukee County (LIRC, 04/13/98).

A settlement agreement in an employment discrimination case is in essence a contract. The Equal Rights Division may ask to have a written withdrawal form filed, or to have a copy of the final settlement agreement filed, but these are not legal requirements which affect the validity of the settlement. Rather, they are simply ways in which the Division may assure itself that an agreement has, as a matter of fact, been reached. Gronowski v. Milwaukee County (LIRC, 04/13/98).

The Equal Rights Division does not have authority to decide what are in effect breach of contract questions regarding whether settlement agreements have been breached. Gronowski v. Milwaukee County (LIRC, 04/13/98).

The Complainant's claim that the Respondent released the terms of a confidential settlement agreement does not constitute a valid claim of retaliation under the Wisconsin Fair Employment Act. The Respondent's release of confidential settlement information had no relationship whatsoever to the Complainant's employment. Peck v. Walworth County (LIRC, 09/27/96).

Once entered into by all parties, either in writing or verbally on the record, a settlement is final. The Labor and Industry Review Commission is disinclined to entertain collateral attacks on the finality of a settlement based on a party's claim that their attorney misrepresented the agreement to them, exceeded the scope of their authority in agreeing to it, or otherwise engaged in some sort of improper conduct. Such issues relating to attorneys' professional responsibility should be addressed to other tribunals with the specific duty of addressing such issues. Gahan v. The Milwaukee & S.E. Wis. Dist. Council of Carpenters (LIRC, 03/29/96).

The Labor and Industry Review Commission will not entertain collateral attacks on settlement agreements resolving discrimination complaints even where allegations are made that the attorney who represented the Complainant acted improperly in some respect, including entering into settlement terms not authorized by the client. Where the attorney acted within their authority in agreeing to certain terms of settlement, the Commission has held that an oral settlement agreement entered into on a party's behalf by their attorney will be upheld against subsequent collateral attack. Stillwell v. City of Kenosha (LIRC, 09/29/95).

While the Respondent may have subjectively believed in good faith that a settlement agreement arrived at between itself and counsel for the Complainant precluded the Complainant from bringing claims against the Respondent in connection with its commencement of a civil action against her, this belief was not reasonable because the terms of that settlement had been expressly limited to three specific undertakings and could not be construed to extend to the question of whether the Respondent's commencement of a civil action against the Complainant had violated the Wisconsin Fair Employment Act. Therefore, the Complainant's subsequent fair employment complaint was not barred by the doctrine of equitable estoppel. Stillwell v. City of Kenosha (LIRC, 09/29/95).

In the absence of an allegation of misrepresentation or intimidation by a representative of the Department, and where there is no issue presented about whether a settlement agreement contains something which makes it invalid on its face, but only a question of whether it was in fact agreed to, the Labor and Industry Review Commission will not entertain collateral attacks on the finality of a settlement based on a party's claim that their attorney misrepresented the agreement to them or exceeded the scope of their authority in agreeing to it. If a Complainant did not authorize his attorney to enter into a settlement on his behalf, the Complainant's remedy for such action by the attorney is to attempt to prove malpractice by that attorney or to go to the Attorneys' Board of Professional Responsibility. Nealy v. Miller Compressing Co. (LIRC, 09/19/95).

It is not within the authority of the Labor and Industry Review Commission to set aside a settlement agreement where the Complainant seeks to be relieved of the agreement on the ground that his attorney had a conflict of interest. The Commission would have to address issues concerning attorney's professional responsibility and the effects of unethical conduct on contractual obligations, which are issues that are not within its statutory authority. Brunswick v. Emergency Serv. of Door County (LIRC, 12/08/94), aff'd on other grounds, Door Co. Cir. Ct., 06/14/95.

When parties enter into settlements, they are free to structure them as they wish, and if they choose to structure them in a way which waives some claim arising out of a transaction while preserving others, that is their right. In this case, the Complainant did not waive her right to complain of sex discrimination when she settled an OSHA complaint relating to her discharge. The settlement agreement did not provide that it settled all claims arising out of the discharge. The terms of the agreement provided that the Complainant "agrees to accept this agreement in full and complete settlement of any and all claims arising out of filing of this complaint against Respondent." The claims settled were only the claims of a violation of OSHA, not the claims of a violation of any other law. The complaint with OSHA could not encompass a claim under the Wisconsin Fair Employment Act because OSHA has no authority to act on such a claim. Pampuch v. Bally's Vic Tanny Health & Racquetball Club (LIRC, 03/07/94).

Parties should be discouraged from drafting private settlement agreements which purport to have a binding effect upon the manner in which the Department conducts its business. In this case the parties had reached a settlement agreement that was contingent upon the actions of a third party. Due to the nature of the agreement, the parties were unable to proceed to a hearing until the third party had acted. The Administrative Law Judge determined that the Equal Rights Division should not be bound by the terms of the settlement agreement and denied the Complainant's request to hold the hearing in abeyance or to postpone the hearing for a six month period. LIRC reversed the order of dismissal because in this case the settlement agreement was drafted with the assistance of one of the Department's Administrative Law Judges and the parties could, therefore, reasonably assume that the terms of the agreement would be acceptable to the Department. Biernacki v. Vrakas (LIRC, 02/24/94).

Without specific allegations of conduct constituting alleged duress which would (if the allegations were true) justify voiding a settlement agreement, the Department will not consider requests to be relieved of the effect of settlement agreements. Kaufer v. Miller Brewing Co. (LIRC, 11/19/93).

In the absence of an allegation of misrepresentation or intimidation by a representative of the Department, and where there is no issue presented about whether a settlement agreement contains something which makes it invalid on its face, but only a question of whether it was in fact agreed to, the Department will not entertain collateral attacks on the finality of a settlement based on a party's claim that their attorney misrepresented the agreement to them or exceeded the scope of their authority in agreeing to it. This rule reflects not only the important policy of making parties accountable for actions of their attorneys, but also the equally important policy that settlement should be encouraged. If settlement is to be encouraged, settlements must be treated as final when made. Johannes v. County of Waushara Exec. Comm. (LIRC, 11/01/93).

If a Complainant had not authorized his attorney to enter into a settlement on his behalf, or to dismiss his complaint with prejudice on his behalf, then the Complainant's remedy was to attempt to prove malpractice by that attorney. The Labor and Review Commission is not the appropriate tribunal to determine whether the obligations of attorney to client were properly complied with. Johannes v. County of Waushara Exec. Comm. (LIRC, 11/01/93).

Prior to the commencement of the hearing, the parties entered into a verbal settlement agreement on the record. The Complainant subsequently indicated that she felt she had not exercised good judgment in agreeing to the settlement without legal counsel and that she could not agree to the settlement. However, the transcript of the hearing indicated that the parties had entered into a full and final settlement on the record. A settlement thus memorialized is as conclusive as one which is reduced to writing and is signed by the parties. Once entered into by all parties, either in writing or on the record, such a settlement is final. In the absence of an allegation of misrepresentation or intimidation by a representative of the Department, and

where there is nothing in the terms of the settlement agreement itself which makes it invalid, the Department will not entertain collateral attacks on the finality of a settlement. Pustina v. Fox & Fox, SC (LIRC, 04/27/93).

The Complainant stated a claim for relief under the Wisconsin Fair Employment Act when she alleged that she was retaliated against by the Respondent when it filed a civil action in circuit court seeking to enforce a settlement agreement which the Complainant had previously refused to sign. Stillwell v. DILHR (Ct. App, Dist. II, unpublished opinion, 03/17/93).

Where allegations of discriminatory conduct are resolved by a settlement agreement, those allegations will not thereafter be considered if offered as evidence in a proceeding between the parties on a subsequent claim of discrimination. Where an individual claimed that the employer offered him money to give up his employment in an effort to settle an earlier discrimination claim, and such offer had been made prior to the parties having signed a settlement agreement releasing the employer from any and all claims arising out of conduct by the employer prior to the date the agreement was signed, the settlement agreement precluded the Complainant from using the offer as evidence of discriminatory motive in a subsequent discrimination claim alleging, among other things, retaliation in regard to discharge. Moncrief v. Gardner Baking (LIRC, 07/01/92).

LIRC may take jurisdiction of a case for the limited purpose of dismissing the complaint based upon the parties' settlement. In this case, it was clearly the parties' intent that their obligations should be defined not by the Administrative Law Judge's order but by their settlement agreement. Carey v. DeBoer, Inc. (LIRC, 06/11/92).

Where allegations of discriminatory conduct were made the subject of a charge of discrimination which were then settled, the same allegations could not thereafter be considered relevant in a subsequent proceeding to prove that subsequent acts by the employer were also motivated by bias. Helton v. Wesbar Corp. (LIRC, 03/19/92).

The Equal Rights Division does not have the authority to enforce the terms of an agreement between the parties which they entered into in order to resolve a claim of housing discrimination short of a finding of discrimination. Winfrey v. Paramount Concepts, Inc. (LIRC, 07/24/91); rev'd in part and remanded (Dane Co. Cir. Ct., 01/06/92).

The Complainant stated that he wished to withdraw his complaint, and the Personnel Commission dismissed the charge. Several months later, the Complainant requested that his original charge of discrimination be reinstated, on the grounds that he had withdrawn the charge as part of a settlement agreement but that the settlement agreement had been breached. The Commission lacked authority to reopen the matter. It only has jurisdiction to re-open a case if the request is filed within 20 days of the date of the order. The Commission does not have express or implied authority to enforce settlement agreements. Haule v. UW-Milwaukee (Wis. Pers. Comm'n, 8/26/87).

Complaints by an employee against her employer were settled, and the Commission issued orders of dismissal with prejudice, stating that it retained jurisdiction for the limited purpose of dealing with any allegations of failure to comply with the provisions of the settlement agreement. Some years later, the Complainant filed a motion to reopen those earlier matters on the grounds that the settlement agreement had not been complied with, and she also filed a new complaint alleging that the employer had violated the settlement agreement by providing her with negative job references. The Commission had no jurisdiction to reopen the previously dismissed cases. However, the Complainant's new complaint could be entertained as a complaint of discriminatory provision of negative job references. Rogers v. DOA (Wis. Pers. Comm'n, 06/11/87).

Where an earlier incident which resulted in the filing of a complaint of retaliation was thereafter resolved by a settlement agreement which provided that the Respondent did not admit any violation, that the Complainant would not sue the Respondent on the matters raised in the complaint, and that the agreement was to operate as the complete and final disposition of the complaint, the Commission would not consider evidence of the incident in a subsequent proceeding on another retaliation claim. McKiernan v. Madison Metro Bus Co. (LIRC, 02/12/87).

In a case involving a complaint by individual fire fighters against a city fire department, alleging race discrimination in promotion, the examiner initially allowed the fire fighters union to intervene in the case for the limited purpose of participating in the litigation in the event liability was determined and a remedy had to be determined. Thereafter, the fire fighters and the city entered into a settlement agreement resolving the dispute between them, calling upon the city to take certain actions, and this settlement agreement was approved by the examiner and entered as a stipulated order of dismissal. The acceptance of the settlement agreement was not improper where the union had the opportunity to state its objections to certain portions of it, and where those objections were discounted by the examiner. El-Amin v. City of Beloit (LIRC, 04/16/86).

Where there is no allegation of misrepresentation or intimidation by the examiner or any other representative of the department and nothing in the provisions of a settlement agreement itself which makes it invalid, a Complainant's claims of misrepresentation on the part of his attorney in the entering into the settlement agreement are beyond the scope of the Commission's review authority. In such a case, the Complainant has clearly waived his right to continue with his action under the Act by entering into the settlement agreement, and the Commission will not set the settlement agreement aside. Clussman v. Ellis Stone Constr. (LIRC, 03/25/86).

A voluntary withdrawal by a Complainant of her discrimination charge in exchange for an offer of hire does not constitute a settlement or waiver of her charge unless she fully understood that such would be the result. Krawczyk v. Greenfield Sch. Dist. No. 6 (LIRC, 04/15/82); Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

749 Motions for failure to state a claim upon which relief may be granted.

While the failure to state a claim for which relief can granted is an appropriate basis on which to dismiss a complaint, it was not permissible for the administrative law judge to dismiss a complaint prior to hearing on the ground that the Complainant lacked evidence to support his claim. Due process requires that the Complainant be given an opportunity to present what evidence he has at a hearing. Ford v. Briggs & Stratton Corp. (LIRC, 04/11/19).

It is not appropriate to dismiss a complaint based upon findings that are contrary to the version of facts offered by the Complainant without first holding a hearing. Williams v. State of Wis. – Dep't of Vocational Rehab. (LIRC, 06/08/17).

There is no summary judgment procedure under the Wisconsin Fair Employment Act. However, in appropriate circumstances, an Administrative Law Judge may dismiss a complaint prior to hearing where, even if what is claimed by the Complainant is true, there would be no violation of the Act as a matter of law. The authority to dismiss a complaint without hearing only extends to circumstances where it appears that, based upon the assertions in the complaint, there is simply no way the Complainant could prevail. Orders of dismissal may be granted, for example, in cases where the conduct alleged to be discriminatory was not covered under the Act.

However, where a complaint contains allegations which, if proven, would be covered under the Act, a dismissal prior to hearing is inappropriate. McCullum v. Lutheran Home (LIRC, 05/23/08).

The Administrative Law Judge improperly determined prior to hearing that the Complainant had no competent medical evidence to offer and would be unable to prove the theory of his case without such evidence. The Administrative Law Judge granted the Respondent's motion to dismiss the complaint prior to hearing. Dismissal of a complaint prior to hearing is appropriate only in cases where, based upon the assertions in the complaint, there is simply no way that the Complainant could prevail. To require the Complainant to not only state a cognizable claim, but also to disclose prior to hearing what proof he intends to offer, and to have the Administrative Law Judge assess whether this proof will be sufficient to sustain his burden, goes beyond the authority of an Administrative Law Judge to dismiss a charge for failure to state a claim. Such an approach would permit an Administrative Law Judge to avoid the due process safeguards inherent in the administrative hearing process by deciding the merits of a contested case without an evidentiary record. Salinas v. Russ Darrow Group (LIRC, 8/31/07).

In deciding whether a complaint states a claim under the Wisconsin Fair Employment Act, the complaint is the starting point. Additional assertions made by the Complainant may then be looked at to the extent necessary to provide details concerning claims already alleged in the complaint. In this case, the complaint was somewhat indefinite as to when certain acts allegedly occurred, and as to who was involved in those acts. However, the nature of the claim could be clarified by looking at position statements and materials which the Complainant submitted to the Equal Rights Division during the course of the investigation. A review of these materials indicated that the complaint did state a claim for relief under the Wisconsin Fair Employment Act. Therefore, it was inappropriate for the complaint to be dismissed for failure to state a claim. Garner v. UW-Milwaukee (LIRC, 02/10/06).

Dismissal of a complaint prior to hearing is appropriate where, even if the facts alleged by the Complainant were proven, they would not amount to a violation of the law. However, a motion to dismiss for failure to state a claim should not be granted unless there are no circumstances under which relief could be granted. Cases in which it has been found that there were no circumstances in which the Complainant could prevail based upon the allegations in the complaint have generally involved situations in which the conduct alleged to be discriminatory was not covered under the Wisconsin Fair Employment Act. Sabol v. UW-Eau Claire (LIRC, 01/31/06).

The complaint was properly dismissed for failure to state a claim for relief under the Wisconsin Fair Employment Act even when the Complainant's complaint and his assertions that he was sexually harassed were construed in the light most favorable to him. The Complainant conceded that the incidents complained of were not of a sexual nature. Instead, he indicated that the incidents complained of were nothing more than horseplay. Mroczkowski v. Belmark, Inc. (LIRC, 04/28/05).

There is no mandatory requirement under sec. DWD 218.05, Wis. Adm. Code, that an Administrative Law Judge hold a hearing. Watt v. FedEx Ground Package Sys. (LIRC, 08/31/04).

An Administrative Law Judge has the authority to dismiss a complaint *sua sponte*. However, this authority only extends to instances where it appears that, even if what the Complainant claims is true, a decision in favor of the Respondent would be required by law. A motion to dismiss for failure to state a claim should not be granted unless there are no circumstances under which relief could be granted. Reddin v. Neenah Joint Sch. Dist. (LIRC, 08/24/04).

A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless there are no circumstances under which relief could be granted. Jackson v. Milwaukee Area Tech. College (LIRC, 07/16/03).

A complaint is subject to dismissal if it fails to satisfy a subject matter jurisdiction requirement; if it fails to satisfy the statute of limitations; or if it fails to state a claim upon which relief may be granted, regardless of the outcome of the investigation. The fact that the investigator found probable cause does not entitle the Complainant to a hearing if the complaint is subject to dismissal for one of the foregoing reasons. Lau v. Latec Credit Union (LIRC, 02/07/03).

A complaint may be dismissed prior to hearing on a motion to dismiss for failure to state a claim upon which relief may be granted if it appears that, even if what is claimed by the Complainant is true, a decision in favor of the Respondent is nevertheless required as a matter of law. Ficken v. Harmon Solutions Group (LIRC, 02/07/03).

An administrative agency has only those powers expressly conferred or reasonably implied from its statutory grant of authority. The administrative agency is not a court of equity and may not grant relief on that basis, no matter how compelling. Accordingly, the Labor and Industry Review Commission rejected the Complainant's contention that it should deny a motion to dismiss based upon the equities present in the case, in particular the financial hardship the Complainant's unemployment caused for his family. Ficken v. Harmon Solutions Group (LIRC, 02/07/03).

While an administrative law judge may hold a hearing to allow the parties to establish facts which may have a bearing on whether the complaint should be dismissed, this determination may also be made based upon the documents and affidavits presented by the parties, pursuant to sec. ILHR 218.10, Wis. Admin. Code. Newton v. St. Gregory Educ. & Christian Formation Comm. (LIRC, 12/10/97). [Ed. note: sec. ILHR 218.10, Wis. Admin. Code is now sec. DWD 218.10, Wis. Admin. Code].

Administrative Law Judges have the authority to dismiss complaints without hearing where that action would be legally justified even if the facts were as asserted by the Complainant. Castiglione v. Giesen & Berman (LIRC, 06/25/97).

There is no sense in conducting a hearing on a complaint where, even if the facts alleged are proven, they do not amount to a violation of law upon which relief can be predicated. Dunn v. City of Burlington Eng'g Dept. (LIRC, 07/28/95).

An Administrative Law Judge may dismiss a complaint prior to hearing if it appears that, even if what the Complainant claims is true, a decision in favor of the Respondent is required by law. In making this decision, the Administrative Law Judge should look only at what the Complainant alleges and any other assertions of the Complainant which provide an indication of the nature of the claim. Schaefer v. New Berlin Realty (LIRC, 06/10/93).

No authority exists under the Administrative Procedure Act, the WFEA or the Division's rules to entertain motions for summary judgment of the kind authorized in actions or proceedings in court by sec. 802.02(2), Stats. There is no procedure whereby a Respondent, merely by filing a motion and supporting affidavit which disputes material facts alleged by a Complainant, can somehow force the Complainant to file responsive affidavits or risk having the case dismissed on the version of the facts advanced by the Respondent. However, in appropriate circumstances, an ALJ may dismiss a complaint prior to hearing where it appears that even if what is claimed by the Complainant is true, there would be no violation of the Act as a matter of law. Making such a determination involves simply looking at what the Complainant asserts he will prove. This can be

accomplished by looking at what the Complainant alleges and to any other assertions by the Complainant which provide an indication of the nature of the claim. Jacobs v. Glenmore Distilleries Co. (LIRC, 11/25/92).

In response to the Respondent's claim that the work relationship between the Complainant and the Respondent is shielded by the Federal and State Constitutions from Division intrusion, the Division held an evidentiary jurisdictional hearing. Jocz v. Sacred Heart School of Theology (LIRC, 08/17/92).

In determining whether it was appropriate to dismiss a complaint prior to hearing on the basis that it was untimely, an Administrative Law Judge could only review the Complainant's assertions. It was improper to consider a Respondent's affidavit as to when the communication of the employee's seniority date occurred. Because the documents which could be considered (i.e., those containing the Complainant's assertions) were inconclusive, the timeliness issue could not be resolved without a hearing. Valeri v. Delco Electronics (LIRC, 07/17/92).

The Department may, in appropriate circumstances, dismiss a complaint prior to a hearing when it appears that even if what is claimed by the Complainant is true, a decision in favor of the Respondent is required as a matter of law. Generally in such cases the decision will be made by looking to the allegations of the complaint, but other allegations made by the Complainant may be taken as indications of the Complainant's assertions as to the facts. In this case, assertions made by the Complainant to the Equal Rights investigator, sworn testimony of the Complainant given in a discovery deposition, assertions made by or on behalf of the Complainant by way of affidavit submitted in response to a motion to dismiss, and assertions made by counsel for the Complainant in written argument submitted in response to a motion to dismiss were all considered. Tucker v. Rock County (LIRC, 07/02/92).

A Respondent may move to dismiss a complaint prior to hearing if it believes that even the facts asserted by the Complainant require as a matter of law that the complaint be dismissed. Olson v. Lilly Research Lab. (LIRC, 06/25/92).

As a general matter, any pre-hearing determination as to the legal adequacy of a charge of discrimination should be made by reference to the complaint, and not by reference to assertions made in subsequent affidavits or other collateral sources submitted by the party seeking dismissal. However, the particular circumstances of a case may justify looking beyond the narrow confines of the complaint. Where the Complainant has intentionally omitted information from the complaint which is necessary to determine whether the complaint meets the requirements of a preliminary review under sec. Ind 88.03, Wis. Admin. Code, it is appropriate to look to any reliable collateral sources for that information. In this case, it was appropriate to rely upon a discovery deposition of the Complainant and factual assertions in the Complainant's brief. Olson v. Lilly Research Laboratories (LIRC, 06/25/92).

The Wisconsin Administrative Procedure Act does not provide explicitly for a summary judgment procedure. However, since sec. 227.42(1)(d), Stats., provides that an evidentiary hearing in a contested case is only required when "[t]here is a dispute of material fact," if it can be determined that there are no disputed issues of material fact, the Personnel Commission can issue a decision without an evidentiary hearing in what amounts functionally to a summary judgment proceeding. Balele v. UW-Madison (Wis. Personnel Comm'n, 06/11/92).

Where a co-employee had a sexual relationship with the Complainant's spouse, and the Complainant alleged essentially that the relationship adversely affected his employment and led to his termination, the dismissal of the complaint was upheld on the grounds that even if the facts alleged were deemed true this would not constitute marital status discrimination as a matter of law. Miner v. LIRC (Rock County Cir. Ct., 04/07/92).

The Equal Rights Division does not have authority to entertain motions for summary judgment of the kind that are authorized by sec. 802.08, Stats. An Administrative Law Judge may, in appropriate circumstances, dismiss a complaint prior to hearing when it appears that even if what is claimed by the Complainant is true, there would be no violation of the Wisconsin Fair Employment Act. However, making such an analysis involves simply looking at what the Complainant asserts he will prove. There is no procedure whereby a Respondent, merely by filing an affidavit which disputes material facts alleged by the Complainant, can force the Complainant to file responsive affidavits or risk having the case decided on the version of the facts advanced by the Respondent. Alvey v. Briggs & Stratton (LIRC, 11/27/91).

The Complainant did not state a claim for relief for retaliation under the Wisconsin Fair Employment Act where she alleged that the Respondent retaliated against her for filing a prior charge of discrimination by asking her a series of personal and allegedly irrelevant questions during a deposition. It would be going beyond a fair liberal construction of the Wisconsin Fair Employment Act to hold that "terms, conditions or privileges of employment," encompasses an employer's line of questioning at a deposition taken in connection with the employee's civil service appeal of a disciplinary action. Larsen v. DOC (Wis. Pers. Comm'n, 07/11/91).

The Complainant filed a complaint of handicap discrimination based upon the Respondent's removal of its uncorrected vision standard, under which the Complainant had qualified for certification to the list of people to be considered for a conservation warden position. The complaint did not constitute a claim under the Wisconsin Fair Employment Act, but the Complainant was given thirty days to amend the complaint to allege that the Respondent's deletion of the uncorrected vision standard was motivated by an intent to discriminate. Wood v. DNR (Wis. Pers. Comm'n, 05/18/89).

Where the gist of the complaint was that the Respondent discharged the Complainant on the basis of false reports made to the Respondent by others, and where the complaint failed to allege that the false reports concerned or were motivated by the Complainant's religious beliefs, that the Respondent knew or believed that the complaining individuals disliked the Complainant's religious beliefs, or that the employer itself shared any dislike others may have held for his religious beliefs, the complaint failed to state a claim upon which relief could be granted on a theory of religious or creed discrimination. Hallingstad v. A.B. Dick Prod. (LIRC, 11/05/87).

Where the Complainant was denied employment as a truck driver because he was too large to be accommodated in the cab of the truck, the hearing examiner properly dismissed the complaint without conducting a hearing on the grounds that the Complainant was not handicapped within the meaning of the Act. Because the complaint failed to state a claim upon which relief could be granted under the Fair Employment Act, the examiner was within his authority to dismiss the complaint prior to the hearing. Rick v. Fore Way Express (LIRC, 07/25/85).

Failure to submit a timely answer does not justify summary judgment for Complainant where the employer had stated its position at previous stages in the complaint process. Bullock v. Milwaukee County (LIRC, 10/15/82).

DILHR has the authority to dismiss a complaint at any stage of the proceedings before it, whether at the request of a party or upon its own motion, for failure to state a claim upon which relief may be granted. Lambert v. DILHR (AMC) (Dane Co. Cir. Ct., 07/25/77).

750 Role of Administrative Law Judge

751 Generally

The Complainant failed to establish that the ALJ in a hearing on the merits ruled against him in retaliation for his having appealed a previous no-probable-cause decision by a different ALJ. The Complainant also failed to establish bias or abuse of discretion by the ALJ in his ruling changing the hearing date, his declining to sanction the Respondent for not filing a timely answer, and his terminating the Complainant's cross-examination of a witness because of the Complainant's breach of civility toward the witness. But even if the last ruling exceeded the ALJ's authority, it did not deprive the Complainant of a fair opportunity to present his case, and therefore would not be grounds for reversal. Vaserman v. Lakeshore Med. Clinic, Ltd. (LIRC, 10/30/15), aff'd. sub nom Vaserman v. LIRC, (Milwaukee Co. Cir. Ct., 6/3/16)

The mere fact that the administrative law judge may have engaged in a conversation with some of the Respondent's witnesses prior to the hearing is not evidence of improper *ex parte* communications. Young v. County of Milwaukee (LIRC, 03/19/15).

The Complainant's assertion that the Administrative Law Judge was supposed to provide the information in the case file at the hearing was rejected. The ALJ will only consider evidence presented at the hearing. Robinson v. Pfister, LLC (LIRC, 04/09/10).

The fact that the Administrative Law Judge started the hearing by making sweeping rulings about what evidence was "relevant" to the case made it clear that as far as he was concerned the slate was not blank and that, instead, he had brought to the hearing a well-formed and predetermined idea about what the facts of the case were. This created a significant appearance of unfairness. It is not possible for a judge to make informed and non-arbitrary rulings about what evidence may or may not be relevant in a case unless and until the judge has some idea about what the facts of the case are, or what they are claimed to be. Burton v. United Gov't Serv. (LIRC, 03/02/10).

It is not the Administrative Law Judge's responsibility to conduct an investigation into the facts of the case. The Administrative Law Judge's job is to consider the evidence presented by the parties at the hearing and, based upon that evidence, to decide whether the Complainant has met his or her burden of establishing a violation of the Wisconsin Fair Employment Act. Stumpf v. Goeden Transport (LIRC, 12/23/09).

It is the role of the Administrative Law Judge to assess whether a Respondent honestly believes the reasons that it has advanced for a disciplinary action or whether those reasons are a pretext for discrimination. It is not the role of the Administrative Law Judge to supply *post hoc* a reason the Respondent never thought to advance. To the extent that the ALJ decided the Complainant's retaliation claim in this case on a basis never previously disclosed to her nor litigated by the parties at the hearing, this was improper. Gephart v. DOC (LIRC, 11/18/09).

The Equal Rights Division routinely provides the parties with a copy of its rules prior to hearing, along with information on how to access a copy of the Equal Rights Division Decision Digest. Further exposition by the Administrative Law Judge with respect to hearing procedures and legal standards prior to the hearing is neither necessary nor appropriate. Cappelletti v. OceanSpray Cranberries (LIRC, 02/15/08).

Factors to be considered in determining whether an Administrative Law Judge adequately protected the rights of a party not represented by counsel include: (1) whether there was a full opportunity for the unrepresented party to develop his case on direct and cross examination; (2) whether a full and fair hearing was provided; (3) whether it was clear that the party had notice of the issues to be considered at the hearing and an opportunity to present evidence on those issues; (4) whether the unrepresented party understood and was able to hear and participate in the hearing and understand the evidence offered; and (5) whether the Administrative Law Judge was impartial. Ramada Inn v. LIRC (Eau Claire Co. Cir. Ct., 06/03/03).

Chapter 227.46(1)(e), Stats., provides that hearing examiners may regulate the course of the hearing. Clark v. Plastocon (LIRC, 04/11/03).

The hearing examiner was not obligated to elicit testimony from a Respondent where the Complainant was given ample opportunity to do so at the hearing, and appeared to understand that no further testimony could be presented after the hearing was closed. Heinz v. JoJo's Rest. (LIRC, 04/18/84).

An unrepresented Complainant is not entitled to have the hearing examiner act as her attorney, but only to assist her by explaining matters of evidence and procedure. Cole v. Univ. of Wis. (Wis. Pers. Comm'n, 01/13/81).

An examiner should be commended rather than criticized for adducing necessary jurisdictional evidence for the record even after the employer had moved to dismiss upon completion of the Complainant's case. State ex rel. Badger Produce v. MEOC (Dane Co. Cir. Ct., 09/02/80).

There is no requirement that DILHR notify the parties who the hearing examiner will be prior to the hearing. Carignan v. Schlitz Container (LIRC, 06/22/79).

An employee's contentions that the hearing examiner failed to assist him and that he was denied due process because of his lack of fluency in English were not supported by the record. It was discretionary with the hearing examiner whether or not to appoint an interpreter for a Complainant. Kropiwka v. DILHR, 87 Wis. 2d 709, 275 N.W.2d 881 (1979).

DILHR may delegate its authority to administer the Act without the need for official action, and the departmental hearing notice was sufficient to apprise an employer that a hearing examiner had been delegated authority to hear the evidence and judge the merits of a discrimination complaint. State ex rel. G. E. v. DILHR, 68 Wis. 2d 688, 229 N.W.2d 597 (1975).

752 Disqualification of Administrative Law Judge

Decision makers in state administrative hearings enjoy a presumption of honesty and integrity. A party seeking to prove bias or an impermissibly high risk of bias bears a heavy burden to overcome that presumption. In order to disqualify an administrative law judge in an ERD proceeding for bias, a party must provide and establish an actual reason, documented in a supporting affidavit, for the judge's disqualification. The Complainant in this case never filed a timely and sufficient affidavit asserting personal bias on the part of the administrative law judge or any other reason for disqualification. The Complainant simply based her accusation of bias on the fact that she did not get the result she wanted in the hearing, despite presenting, in her opinion, plenty of evidence for her case. That is not a sufficient basis for a finding of bias. Bates v. Care Partners Assisted Living, LLC (LIRC, 09/27/19).

The Complainant believed the administrative law judge was biased against him and asked her to recuse herself from his case, but the administrative law judge declined to do so. The Complainant's remedy under the circumstances was to appear at the hearing and preserve his objections on appeal. By failing to appear at the hearing the Complainant waived his opportunity to present his case. Ghanem v. Univ. of Wisconsin-Madison Office of Admin. Legal Servs. (LIRC, 01/30/18).

The Commission continues to take the view that a Complainant who disagrees with rulings of an ALJ is required to proceed with the hearing in order to preserve his right to review of those rulings on appeal, and that if the Complainant instead refuses to proceed with the hearing due to his objections to the rulings, and his complaint is dismissed as a result, he is deemed to have waived his objections to those rulings. This rule is important to

the integrity of the system in place for litigation, appeal and review of Equal Rights cases, because it secures the non-appealability of interlocutory decisions of ALJs. Mullins v. Wauwatosa Sch. Dist. (LIRC, 05/17/13).

An ALJ's procedure of insisting that offers of proof be made by submission in writing after the hearing created an unfortunate appearance of arbitrariness. A judge should actually have a basis for concluding that evidence should not be allowed. If the ALJ does not know what the evidence is, it can appear that he does not have such a basis. Burton v. United Gov't Serv. (LIRC, 03/02/10).

Due process is violated if a decision-maker is not fair or impartial. There does not need to be a showing of actual bias by a decision-maker in order to show a violation of due process. Circumstances which lead to a high probability of bias may be sufficient to establish a violation of due process, even though no actual bias is revealed in the record. Burton v. United Gov't Serv. (LIRC, 03/02/10).

There is a presumption of honesty and integrity on the part of Administrative Law Judges. However, this presumption is not conclusive. A showing of special facts and circumstances may demonstrate that the risk of unfairness in a particular case is intolerably high. This may involve showing that the adjudicator had become psychologically wedded to a pre-determined disposition of the case. Determining whether an administrative law judge has prejudged a matter requires an examination of the facts of the individual case. There was an appearance of lack of impartiality by the Administrative Law Judge in this case. The Administrative Law Judge had a personal connection with counsel for the Complainant. The Administrative Law Judge also improperly received into evidence the decision of another Administrative Law Judge which had been previously set aside by the Labor and Industry Review Commission. The Administrative Law Judge's comment that he was deferring to the first ALJ's decision "out of fairness to a colleague" made it appear that the appellate process had been ignored. This created an intolerably high risk of unfairness in this particular case. The ALJ's rulings excluding evidence also created a significant appearance of unfairness. Burton v. United Gov't Serv. (LIRC, 03/02/10).

Persons who serve as decision-makers in state administrative proceedings enjoy a presumption of honesty and integrity. A party seeking to prove either actual bias or an impermissibly high risk of bias bears a heavy burden to overcome this presumption. In this case, the Administrative Law Judge may have erred in excluding a document that the Complainant wished to enter into evidence. However, there was no reason to believe that the Administrative Law Judge held any bias against the Complainant. The Administrative Law Judge attempted to assist the Complainant at the hearing by asking him questions in an effort to help him to present his case. Williams v. Salvation Army (LIRC, 10/19/07).

There is a presumption of honesty and integrity on the part of those persons performing administrative adjudicatory functions. Anyone alleging bias by an Administrative Law Judge bears a heavy burden of overcoming this presumption. Jackson v. USF Holland (LIRC, 11/17/06).

Decision-makers in state administrative proceedings enjoy a high presumption of honesty and integrity. A party seeking to prove either actual bias or an impermissibly high risk of bias bears a heavy burden to overcome this presumption. In this case, the Complainant asserted, among other things, that the Administrative Law Judge's knowledge that the Complainant had filed a grievance against her with the Office of Lawyer Regulation (OLR) relating to her handling of this matter would necessarily cause her to be biased against the Complainant. However, permitting a litigant to effect the disqualification of an Administrative Law Judge who has ruled against her by simply filing a grievance against the ALJ with the OLR would violate the integrity of the administrative process. In the absence of other indicia of a cognizable personal or financial interest, or of conduct evidencing a lack of objectivity (which was not present here) the existence of an OLR grievance would not justify recusal of an Administrative Law Judge under the circumstances presented in this case. Casetta v. Zales Jewelers (LIRC, 06/14/05).

In order to disqualify an Administrative Law Judge in a proceeding before the Equal Rights Division, a party must provide and establish an actual reason for the judge's disqualification. Both sec. DWD 218.16, Wis. Adm. Code, and sec. 227.46(6), Stats., provide that the party seeking the disqualification must file a timely and sufficient affidavit asserting personal bias or other reason for disqualification of the ALJ. The Complainant in this case failed to file such an affidavit. She simply made a written request for the substitution of the Administrative Law Judge without stating any reason for such a request. The Complainant did argue to the Administrative Law Judge that sec. 801.58, Stats., which allows a party a one-time ability to substitute a presiding Circuit Court judge without demonstrating a reason for such a request, was applicable to the hearing process in the Equal Rights Division. However, that statute cannot be applicable because the procedure is in direct conflict with the Division's administrative rules and Ch. 227, Stats., which govern hearing procedures before the Division. Lenz v. Humana Ins. (LIRC, 04/28/05).

The Complainant contended that, because the Respondent was under contract with the Wisconsin Department of Corrections, a state agency, the Administrative Law Judge, as a state employee, had a conflict of interest. However, the Administrative Law Judge was not shown to have any personal stake in the outcome of this litigation, and his status as a state employee was insufficient alone to support a conclusion of bias or an appearance of bias. The potential pecuniary impact of the outcome of litigation such as this on any individual state employee would be too speculative and *de minimis* to constitute either a cognizable conflict or an appearance of a conflict of interest. Carbage v. Genesis Behavior Serv. (LIRC, 04/15/05).

The Labor and Industry Review Commission conducts a de novo review, acting as an original fact-finder and reviewer of the Administrative Law Judge's decision. As a result, in the absence of some indication that an Administrative Law Judge's conduct of the hearing improperly influenced the creation of the record in some way, remand for hearing before a different Administrative Law Judge would not be necessary or appropriate, even if some bias or appearance of bias was present in the case below. Carbage v. Genesis Behavior Serv. (LIRC, 04/15/05).

An Administrative Law Judge should attempt to avoid creating the appearance that he has prejudged the matter before him. Lee & Stark v. Fitzpatrick Law Office (LIRC, 08/12/03).

A party's disagreement with the Administrative Law Judge's rulings and decision is not a sufficient basis upon which to disqualify an Administrative Law Judge. Bedynek-Stumm v. City of Madison (LIRC, 06/27/03).

A party who fails to persuade an Administrative Law Judge to remove himself must proceed to hearing with that Administrative Law Judge, and then raise the Administrative Law Judge's failure to remove himself as grounds for appeal in the event of an unfavorable decision. If a party refuses to proceed with the hearing and the complaint is dismissed for that reason, the claim that the denial of the substitution request was made in error must be considered to have been abandoned. Clemons v. Opportunities Industrialization Ctr. of Greater Milwaukee (LIRC, 02/14/03).

A party who believes it is not getting a fair hearing should nonetheless attempt to put in its best case while preserving its objections on the record should it become necessary to file an appeal. Where the Complainant abandoned the hearing without putting in his entire case, his procedural objections were waived. Clemons v. Opportunities Industrialization Ctr. of Greater Milwaukee (LIRC, 02/14/03).

A minimal rudiment of due process is a fair and impartial decision-maker. There is, however, a presumption of honesty and integrity on the part of those persons performing administrative adjudicatory functions, and any challenger bears a heavy burden of overcoming this presumption. The challenger must show "special facts

and circumstances to demonstrate that the risk of unfairness is intolerably high." Odya v. Captain Install, Inc. (LIRC, 05/19/00).

The Labor and Industry Review Commission is generally unpersuaded by allegations of bias on the part of the ALJ which are raised by a party only after the hearing has resulted in a decision adverse to that party. Eliason v. County Mkt. (LIRC, 11/30/93).

A party who fails to persuade an Administrative Law Judge to remove himself must proceed to hearing and may later raise the ALJ's failure to remove himself as grounds for appeal in the event of an unfavorable decision. If the party refuses to proceed with the hearing and the complaint is for that reason dismissed, the claim that the denial of the substitution request was error is abandoned. Young v. Valley Pkg. Indus. (LIRC, 04/27/92).

Due process requires that a hearing examiner be fair and impartial. Actual bias or unfairness need not be shown. The test to be applied is whether the circumstances are such that the risk of partiality or unfairness on the part of the examiner is too high to be constitutionally tolerable. Local 322, Allied Indus. Workers of Am. v. Johnson Controls, Inc. (LIRC, 03/30/92).

The timing of the Complainant's affidavit for disqualification of the examiner suggested that the Complainant's motion was motivated by disagreement with the examiner's ruling rather than by some bias on the part of the examiner. Generally, a litigant should not be able to accept a judge initially as satisfactory and then subsequently, during the course of the litigation, seek to disqualify him because the litigant has gained an impression from the rulings of the court that the court's attitude towards his position is unfavorable. Asadi v. UW-Platteville (Wis. Pers. Comm'n, 01/24/92).

A litigant is entitled to a fair and impartial judge, but is not entitled to pick his judge. Asadi v. UW-Platteville (Wis. Pers. Comm'n, 01/24/92).

Persons who serve as decision-makers in state administrative proceedings enjoy a presumption of honesty and integrity. A party seeking to prove either actual bias or an impermissibly high risk of bias bears a heavy burden to overcome this presumption. Vaisman v. Aldridge, Inc. (LIRC, 10/21/91).

The Complainant waived her right to contend that the Administrative Law Judge was biased where she did not raise that issue by filing an affidavit of personal bias or disqualification with the Administrative Law Judge prior to the decision being issued. Alexander v. Aldridge, Inc. (LIRC, 10/21/91), aff'd, Milwaukee Co. Cir. Ct., 01/27/93.

In determining whether the chairperson of the Personnel Commission should be disqualified from hearing a case, the Personnel Commission looked to the general rule governing disqualification of a quasi-judicial administrative official as set forth in Am Jur 2d Administrative Law 64. The test is whether the administrative officer has a personal or pecuniary interest, or whether he is related to an interested person. Cozzens-Ellis v. UW-Madison (Wis. Pers. Comm'n, 02/26/91).

An Administrative Law Judge should recuse himself if he determines that he cannot be impartial in a matter or if his impartiality could reasonably be questioned by others because of an appearance of bias on his part. Phillips v. Milwaukee County Med. Complex (LIRC, 09/27/89).

Where the Administrative Law Judge: (1) asked the Complainant at the commencement of the hearing whether she carried a gun; and (2) made negative comments about the quality of the Complainant's representation, there was an appearance of bias serious enough to warrant disqualification. Phillips v. Milwaukee County Med. Complex (LIRC, 09/27/89).

Where an Administrative Law Judge has been found to have engaged in bias, LIRC will engage in a completely independent reevaluation of all of the evidence and made a de novo determination of all the issues in the case. Phillips v. Milwaukee County Med. Complex (LIRC, 09/27/89).

A mere showing of antagonism or a strained relationship between counsel and the Administrative Law Judge is not a sufficient basis to require the disqualification of the Administrative Law Judge. Phillips v. Milwaukee County Med. Complex (LIRC, 09/27/89).

The administrative rule concerning disqualification of Administrative Law Judges requires the filing of a written affidavit setting forth the basis for requesting disqualification. Even if an unsworn oral request is treated as adequate, it must still be made in a timely fashion. Young v. Pic 'n Save Warehouse Foods (LIRC, 06/12/86).

The fact of an examiner's marriage to the investigator who issued the initial determination of no probable cause is not grounds for reversal where there is no evidence or allegation of impartiality, or any reason to believe that another examiner would have decided the case differently. However, the Commission noted that the examiner should have disqualified himself. Hammes v. Rainfair, Inc. (LIRC, 09/28/84).

The test of an examiner's impartiality is whether the particular circumstances of a given case are such that the risk of partiality or unfairness by the examiner is too high to be constitutionally tolerable. The standard applicable to an examiner presiding at an administrative hearing is the same as that which applies to a Circuit Court Judge. The existence of a strained relationship between the examiner and a party's attorney was not sufficient to require the examiner's disqualification, although she had exhibited a great deal of hostility toward counsel in the presence of his client. Kane v. LIRC (Bellin Mem'l Hosp.) (Brown Co. Cir. Ct., 02/18/83).

760 Procedures at Hearing

761 Parties' right to representation; questions relating to conduct of attorneys

Consistent with Industrial Roofing Serv., Inc. v. Marquardt, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898, when a party failing to respond to discovery requests in an ERD case is represented by legal counsel, the ALJ must determine whether the party is blameless in the discovery failure when considering an appropriate sanction under Wis. Stat. ch. 804, and it is an abuse of discretion for the ALJ to order dismissal of a complaint without having made a determination that the party, as opposed to the attorney, was at least partly to blame. Welke v. Luther Hosp., Mayo Health Sys. (LIRC, 05/30/14).

The actions or inactions of a Complainant's attorney, even if erroneous, are imputed to the Complainant. Where the actions of an attorney adversely impact a Complainant who retains that attorney, the actions by the attorney do not provide a basis for granting further hearing. Amos v. McDonald's (LIRC, 05/25/07).

Steps should be taken to ensure that unrepresented litigants understand the rules relating to proceedings before the Equal Rights Division. Nevertheless, they will be held to those rules, which are the same rules that apply to attorneys. Rutherford v. LIRC (Milwaukee Co. Cir. Ct., 11/03/06).

It is appropriate to impute the procedural errors of a party's representative to the party. In this case, the failure of a party's attorney to file an initial brief for almost five months after the due date, with no valid excuse, and where there would be prejudice to the other party, warranted disregarding the brief. Nickell v. County of Washburn (LIRC, 07/29/05).

The Complainant asserted on appeal that she did not appear for her hearing because she could not find a lawyer who would take her case. While the Complainant may have preferred to have an attorney represent her at the hearing, representation by an attorney is not a matter of right under the Equal Rights Division's rules. In instances where a party does not appear by counsel or other representative, it is the role of the Administrative Law Judge to see that the party's case is properly developed. Therefore, the Complainant did not show good cause for her failure to appear at the hearing. Whitt v. Alterra Wynwood of Madison West (LIRC, 07/15/05).

Clients are responsible for the actions of their legal counsel. Cleary v. Federal Express (LIRC, 07/30/03).

If a party chooses to proceed without legal counsel, it is held to the same standards of proof as if they were represented. The law is no different for those who appear *pro se* than for those who appear with representation. Ramada Inn v. LIRC (Eau Claire Co. Cir. Ct., 3/12/03).

Factors to be considered in determining whether an Administrative Law Judge adequately protected the rights of a party not represented by counsel include: (1) whether there was a full opportunity for the unrepresented party to develop his case on direct and cross examination; (2) whether a full and fair hearing was provided; (3) whether it was clear that the party had notice of the issues to be considered at the hearing and an opportunity to present evidence on those issues; (4) whether the unrepresented party understood and was able to hear and participate in the hearing and understand the evidence offered; and (5) whether the Administrative Law Judge was impartial. Ramada Inn v. LIRC (Eau Claire Co. Cir. Ct., 06/03/03).

The Complainant stated that he was misinformed about the hearing date by his attorney. Any misinformation that the Complainant received regarding the date of his hearing originated with the Complainant's attorney, and was not due to any fault on the part of the Respondent or the Administrative Law Judge. The actions by the attorney do not provide a basis for setting aside the dismissal of the case. The Complainant has a possible remedy in a malpractice action, particularly when the dismissal of the complaint is entirely attributable to the attorney's conduct. Hamilton v. Northwestern Elevator Co. (LIRC, 12/10/02).

It is necessarily implied from the Personnel Commission's general authority to regulate the conduct of hearings that the Commission can prohibit a representative from practice when his conduct interferes substantially with the conduct of the hearing. Sathasivam v. DOC (Wis. Personnel Comm'n, 07/31/02).

An allegation of negligence on the part of an attorney does not warrant tolling the statute of limitations. Johnsrud v. Prairie du Chien Mem'l Hosp. (LIRC, 06/21/02).

While it is unfortunate if the Complainant received inadequate legal representation, that is not a basis for setting aside the Administrative Law Judge's decision. It is more equitable to allow the adverse consequences of poor legal representation to fall upon the shoulders of the party who has chosen the attorney, rather than on the opposing party. The Complainant has the possible remedy of a malpractice action against the attorney. Squires v. Montex, Inc. (LIRC, 03/15/02).

The Respondent's decision to appear *pro se* is a matter for which he must bear the consequences. The Equal Rights Division issued a hearing notice two months prior to the hearing, along with an information sheet advising the parties that if they planned on having legal representation they should obtain an attorney immediately, since attorneys need time to prepare a case for hearing. Mackey v. ICR, Ltd. (LIRC, 01/31/02).

The Complainant's failure to properly serve subpoenas did not establish good cause for a postponement of the hearing. The error may have been attributable to the fact that the Complainant was not an attorney and did not understand the applicable procedural requirements as readily as an attorney might. However, parties who

choose to represent themselves accept certain risks attendant with their decision to proceed without assistance of counsel. Oriedo v. Madison Area Tech. College (LIRC, 07/24/98).

The Labor and Industry Review Commission will not address issues concerning an attorney's professional competence and responsibility or the effects of unethical conduct on contractual obligations, since these issues are not within its statutory authority. Nealy v. Miller Compressing Co. (LIRC, 09/19/95); Summers v. Northwest Airlines (LIRC, 05/26/00).

Inadequate legal representation is not an adequate basis for setting aside an Administrative Law Judge's decision or for a granting re-hearing. Patek v. Waukesha Engine Div., Dresser Indus. (LIRC, 08/31/95).

The Labor and Industry Review Commission is not in a position to determine whether an alleged conflict of interest may have required the withdrawal of the Complainant's counsel. Such questions would be more appropriately addressed to the Board of Attorneys' Professional Responsibility. Brunswick v. Emergency Serv. of Door County (LIRC, 12/08/94).

The Complainant objected to the Respondent being represented by out-of-state counsel. The Administrative Law Judge determined that the Division's rules allow an out-of-state attorney to practice before the Division. Even if the attorney's appearance at the hearing was in violation of the provisions of sec. 757.30, Stats., which governs the practice of law in Wisconsin, this would not constitute grounds for a reversal of the Administrative Law Judge's decision because the Complainant did not establish probable cause to believe that he was discriminated against. Dolk v. Marquette Electronics (LIRC, 07/11/94).

The Complainant's attorney could not reasonably rely on representations regarding the applicable statute of limitations made by the Respondent's attorney. The Complainant's attorney had an obligation to look up the statute of limitations and determine through independent research whether he was required to exhaust internal grievance procedures before filing a complaint under the Wisconsin Fair Employment Act. Perri v. DILHR (La Crosse Co. Cir. Ct., 04/25/94).

The Complainant had ample opportunity to retain legal counsel and his failure to do so was not grounds for a postponement of the hearing. The Complainant contended that he learned the night before the hearing that the individual who was assisting him with his case did not have a license to practice law. However, the Department's administrative rules provide that a party may appear at the hearing in person and "by counsel or other representative." Thus, even if the Complainant did have a representative without a license to practice law, this individual was not prevented from appearing on the Complainant's behalf. Jenkins v. Pfister & Vogel Tanning Co. (LIRC, 03/22/94).

On appeal, the Complainant asserted that he failed to prevail on his complaint of discrimination because his attorney was incompetent. Even if the Complainant's assertion was true, it would not provide a basis for reversing the Administrative Law Judge's decision. This is a matter between the Complainant and his attorney. Barnes v. A.C. Rochester (LIRC, 03/24/94).

Where counsel for the Complainant made an argument which assumed that the Department had authority to control withdrawal of counsel from representation, Complainant's counsel could not later argue that such authority did not exist. Complainant's counsel was, therefore, admonished to abide by an order that she not withdraw from representation of the Complainant without express approval of the tribunal before which the Complainant's claim was pending. Saccomandi v. E. Pocus & Co. (LIRC, 09/09/93).

An Administrative Law Judge can only limit a party's choice of representative for a compelling reason. The right to appear by a representative under Ind 88.16(2), Wis. Admin. Code, is unqualified. Jackson v. City of Milwaukee Pub. Library (LIRC 12/14/90).

No party has the right to advance notice whether the opposing party will be represented by an attorney at hearing. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

At the commencement of the hearing, the Complainant informed the Administrative Law Judge that his attorney was unavoidably delayed in returning to Wisconsin from out of state. The Complainant advised the Administrative Law Judge that they could either await the attorney's arrival or proceed without him. The hearing proceeded and the Complainant presented his own testimony. The Administrative Law Judge then granted the Respondent's motion to dismiss. The subsequent motion to vacate the proceedings filed by counsel for Complainant was without merit. Stoffel v. Briggs & Stratton (LIRC, 09/20/89).

Parties who choose to represent themselves accept certain risks attendant with their decision to proceed without assistance of counsel. Hammer v. G.E. Med. Sys. (LIRC, 08/29/89).

The Complainant's claim that his attorney provided inadequate representation at the hearing is not a basis for reversing the Administrative Law Judge's decision or for ordering further hearing on appeal. McCabe v. All-Car Automotive (LIRC, 07/31/89).

The complaint was dismissed and the Complainant's attorney was ordered to pay the Respondent's attorney's actual costs and attorney's fees incurred due to the Complainant's failure to comply with discovery requests. If the Complainant's attorney was to blame for the failure to respond to the discovery requests, as the Complainant argued on appeal, the Complainant's remedy would be a suit for malpractice against the attorney, not a reversal of the dismissal of his complaint. Smith v. Norris Adolescent Ctr. (LIRC, 04/21/89).

Parties who chose to represent themselves in an Equal Rights administrative proceeding accept certain risks attendant with their decision which do not rise to the level of a due process concern. Thus, Complainant here had no due process right to have additional evidence considered in her appeal before the Commission, which she had not submitted at hearing, simply on the grounds that she was not represented by an attorney at hearing. Johnson v. Wis. Lutheran Child & Family Serv. (LIRC, 09/09/86).

Although representation by legal counsel would have been helpful to the Complainant, the hearing examiner did give him a full opportunity to develop his case. When the Complainant decided to relieve his attorney prior to the hearing and proceed without counsel, he did so at his own risk. Kropiwka v. DILHR, 87 Wis. 2d 709, 275 N.W.2d 881 (1979).

762 Evidence

The primary problem with a hearsay report is not its admissibility; it is the fact that it is uncorroborated by any non-hearsay evidence. Hearsay cannot be the entire support for a crucial finding of fact. Germaine v. Sussek Machine Corp., (LIRC. 02/13/14).

Comparative evidence is relevant in a disparate treatment case. The appropriate question is not whether such evidence is admissible, but how much weight it should be given. Arvin v. C&D Technologies (LIRC, 10/31/08).

Wis. Stat. Section 227.45(1) establishes that an ALJ is not bound by common law or statutory rules of evidence, and is directed to admit evidence of reasonable probative value. Rutherford v. LIRC 2008 WI App 66, 309 Wis. 2d 498, 792 N.W. 2d 897

The Rules of Evidence are not applicable in hearings before the Equal Rights Division. The "Best Evidence Rule," being a statutory rule of evidence, is thus not binding. Borum v. Allstate Insurance Company (LIRC, 10/19/01).

Admissibility of evidence under the WFEA depends on statutory and code provisions. Wis. Admin. Code Ch. DWD 218.18(1) provides that "[hearings shall be conducted in conformity with the act and the provisions of ch. 227, Stats." The WFEA is silent on the issue of what evidence is admissible, but Wis. Stat. 227.45(1) provides that: "An agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony . . . " The risk that irrelevant evidence will have an improper effect on the decision maker is not particularly significant in an administrative hearing held under the WFEA. The only really significant reason for excluding evidence on relevancy grounds in administrative hearings is to avoid unnecessary lengthening of the hearing. Fautek v. Sinai Samaritan Medical Center and Allen (LIRC, 11/09/00).

762.1 Generally

A written statement cannot substitute for the sworn testimony of a witness. Arrangements to have a witness appear by telephone must be made in advance. Boyd v. Goodwill Indus. of S.E. Wis., Inc. (LIRC, 09/27/19).

The Respondent's position statement contained an admission that the Complainant's history of arrests was a partial motivation for its decision not to hire him. The position statement was an admission of a party opponent. It was a statement of assertion of fact offered against a party, qualifying as an admission in two ways: as a "statement by a person authorized by the party to make a statement concerning the subject" (§ 908.01(4)(b)3); and as a "statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship" (§ 908.01(4)(b)4). Kelly v. Multi-Serve, Inc. (LIRC, 08/13/19).

The Complainant was not required to bring an expert to the hearing in order to present data showing the ages and salaries of various employees. Gabrielson v. Wauwatosa Sch. Dist. (LIRC, 04/05/19).

An Administrative Law Judge's reliance on an unemployment decision to decide if the Complainant quit or was discharged was misplaced. The issue of whether the separation is characterized as a discharge or a quit has no bearing on the ultimate question of whether there has been a violation of the WFEA. Patton v. Summit Packaging (LIRC, 06/16/14) (unavailable online).

After resting her case at the end of the first day of hearing, the Complainant asked to supplement her case on the second day with additional exhibits and testimony of two additional witnesses. The ALJ properly ruled that the Complainant had missed her opportunity to present this evidence and testimony in any way other than by rebuttal to the Respondent's case. The ALJ properly indicated that she would decide at the conclusion of the Respondent's case whether the proposed testimony and documentary evidence would be allowable as rebuttal. Delgado v. Saint Gobain Performance Plastics Corp. (LIRC, 11/29/13).

Expert testimony is mandatory only where the matter at issue is not within the realm of ordinary experience and lay comprehension. In this case, the question of whether earrings for males is a commonly accepted social norm is the type of question which is within the realm of ordinary experience. A decision-maker is not required to ignore his or her personal observations in issuing decisions. Vernon v. Wackenhut Corp. (LIRC, 10/18/11).

One risk of an overly stringent approach to questions of relevance is that, in the event of an appeal of the Administrative Law Judge's decision, evidence which the Labor and Industry Review Commission might find

relevant and might wish to consider will have been excluded from the record, thereby impairing the Commission's ability to carry out its role as a de novo decision-maker. The procedure followed by an Administrative Law Judge of insisting that offers of proof be made by submission in writing after the hearing was not proper. The generally-accepted practice for making offers of proof is that counsel should be allowed to either make them in question-and-answer form (by asking the witness the questions and getting the answers) or by describing in summary form (also on the record) what the testimony would be. Burton v. United Gov't Serv. (LIRC, 03/02/10).

Chapter 227, Stats., requires very relaxed rules of evidence for administrative hearings. An Administrative Law Judge is directed to admit evidence of reasonable probative value, and should exclude only evidence that is "immaterial, irrelevant or unduly repetitious," or evidence that is inadmissible under a statute relating to HIV testing. Neither Ch. 227, Stats., nor the Department's administrative rules relating to hearings require certified copies of medical records. Rutherford v. LIRC, 2008 WI App 66, 309 Wis. 2d 498, 792 N.W.2d 897.

The Complainant alleged that his discharge was based upon race and that, had he been a white employee, he would not have been discharged for engaging in the same conduct. In support of this assertion, the Complainant attempted to present comparative evidence showing that white employees had engaged in serious misconduct with lesser disciplinary consequences. Comparative evidence is relevant in a disparate treatment case, and the appropriate question is not whether such evidence is admissible, but how much weight it should be given. The Respondent's belief that the workers to whom the Complainant compared himself were distinguishable from the Complainant went to the strength of the Complainant's pretext argument. It was not, however, a proper basis for excluding the evidence from the record. Arvin v. C & D Technologies (LIRC, 10/31/08).

The Equal Rights Division is not bound by common law or statutory rules of evidence, including the hearsay rule. However, in this particular case, the medical records which were introduced into the record over the Complainant's objection were not hearsay because they were not offered to prove the validity of the physician's medical opinion, but were instead offered to prove that this was information which the physician had provided to the Respondent. Smith v. Mail Contractors of Am. (LIRC, 02/15/08).

In the proper circumstances, the failure of a party to present a material witness for evidence within their control permits an inference against that party. In this case, it was inferred that the Respondent chose not to present the testimony of the individual who decided to discharge the Complainant because it would have tended to show that the reason he had given for discharging the Complainant was not accurate. Cole v. Greyhound Bus Lines (LIRC, 09/16/05).

Pursuant to sec. 227.45, Stats., the Equal Rights Division is not bound by common law or statutory rules of evidence, including the hearsay rule. Stichmann v. Valley Health Care Ctr. (LIRC, 06/14/05).

For there to be a conclusion that an Administrative Law Judge erred by excluding evidence, there needs to be some indication as to what evidence it is claimed could have been presented but for that ruling. An offer of proof is the preferred method of providing that indication. Sasich v. City of Milwaukee (LIRC, 06/18/04).

Failure to object to the receipt of evidence in a timely fashion constitutes waiver. Merta v. Johnson Controls (LIRC, 10/30/03).

Although hearsay evidence is admissible at hearing, an ultimate or crucial finding of fact may not be based solely on uncorroborated hearsay evidence. Merta v. Johnson Controls (LIRC, 10/30/03).

An offer of proof should be placed on the record at the time the ruling excluding the evidence is made and there is a request to make an offer of proof. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

The Complainant kept a log in which she made contemporaneous notes about many events which occurred at work. The fact that written notations about alleged discriminatory events occurring at work are made contemporaneously with the events can be something that gives the notations great weight as proof. However, the Complainant in this case chose not to offer the log as evidence supporting her version of the disputed events. The failure of a party to present material evidence within their control permits an inference against such party. In this case, the circumstances justified an inference that the Complainant elected not to offer her log because it would have undercut her testimonial version of a number of material important events. Connor v. Heckel's, Inc. (LIRC, 09/27/99).

If the Initial Determination is not received into the hearing record, it should not be considered in making factual findings. In any event, the hearsay indication of an investigator that a co-employee of the Complainant told her something would have no greater reliability than any other hearsay testimony. Schanandore v. Roddiscraft, Inc. (LIRC, 06/19/92).

The Administrative Law Judge properly refused to receive the Initial Determination in evidence as an exhibit. The Initial Determination is merely a hearsay document reflecting the conclusions of an investigator made after an ex parte investigation. Henchen v. County of Vernon (LIRC, 09/05/91).

It was improper for LIRC to rely upon the factual findings made in a consent decree when that consent decree was not properly admitted in evidence. The Complainant had agreed to the admission of the consent decree for the limited purpose of (a) showing that a consent decree was issued, and (b) that the Respondent was abiding by the consent decree. LIRC inappropriately relied on factual findings in the consent decree to conclude that the consent decree was justified by an under-utilization of minorities in the Respondent's workforce. Samolinski v. DILHR (Milwaukee Co. Cir. Ct., 07/03/91).

There is no reported authority in Wisconsin recognizing the appropriateness of calling an attorney as an expert witness on an issue of law which is an issue for the judge in the case. Opinions on a question of law are actually no more than arguments. Arguments should be presented as such, not in the guise of "expert testimony" from attorneys sworn as witnesses. Therefore, the Commission will not consider the testimony of an assistant attorney general who was called as an expert witness on the question of whether the Complainant's conviction for armed robbery was substantially related to his job as a juvenile correctional worker. Collins v. Milwaukee County Civil Serv. Comm'n (LIRC, 03/08/91).

It is improper for an Administrative Law Judge to rely on matters outside of the hearing record as a basis for a finding of fact. Joseph v. Central Parking (LIRC, 08/20/90).

If the Initial Determination is not received into the hearing record, it should not be considered by the Administrative Law Judge in making factual findings. Joseph v. Central Parking (LIRC, 08/20/90).

Where documents which were given to the investigator are not presented and received into the record, the Administrative Law Judge has no authority to reach into the file to consider those matters. Beach v. Best Buy (LIRC, 10/26/89).

Directly relevant evidence received in another case was properly disregarded by the Administrative Law Judge in reaching a conclusion that the Complainant had failed to prove discrimination, even though the same Administrative Law Judge had found the Respondent to have discriminated against the Complainant in a companion case. Rodgers v. Milwaukee County (LIRC, 09/19/88).

The Division cannot base crucial or essential findings upon hearsay testimony alone. Hunt v. City of Madison (DILHR, 02/11/75).

762.2 Admissibility

Pre-hearing deposition of a Respondent-manager taken by the Complainant's attorney, and offered into evidence at hearing by Respondent, was admitted over the Complainant's objection. The deponent had died prior to hearing and was therefore unavailable under Wis. Stat. sec. 908.04. Gruss v. County of Dane (LIRC, 08/13/2019).

Complainant sought to prove that a former employer retaliated against him by giving bad references to his prospective employers, but his only evidence was a report from a reference-checking service purporting to give the former employer's answers to reference questions. The report was hearsay, and although it might have been a record of regularly conducted activity under the hearsay exception of Wis. Stat. § 908.03(6), the Complainant failed to provide a foundation for the report through the testimony of the custodian of the report or another qualified witness. Although it may be admissible, hearsay evidence cannot be the entire support for a critical finding of fact. Germaine, John v. Sussek Machine Corp. (LIRC, 02/13/14).

Testimony offered not for the truth of the matter asserted but instead for the purpose of showing what the employer believed, and thus what motivated the employer in making an employment decision, is not hearsay. In this case, the ALJ properly allowed testimony from the Respondent's witnesses when such testimony was not offered for the truth of the matter, but was offered as an explanation of what the Respondent's witnesses had been told or what they understood had occurred and, thus, what motivated their actions in the employment decisions they made relating to the Complainant. Barnes v. Miller Brewing Co. (LIRC, 05/14/12).

It was not error for the Administrative Law Judge to refuse the admission of the Respondent's counsel's response to the investigator into the record. The attorney's statement about why the Complainant was not considered for employment was hearsay. Further, the attorney may have misunderstood the facts, or simply have not been in possession of all the facts at that point in his involvement in the case. The attorney's response did not identify any specific personnel of the Respondent as the source of the statement he provided. Nor did the attorney's response provide any reason to conclude that a manager's later testimony about the reason the Complainant was not considered for employment was false. Jackson v. USF Holland (LIRC, 02/25/09).

An Administrative Law Judge improperly refused to allow the Respondent to offer and move the Complainant's discovery deposition into evidence. Sec. 804.07(1)(b), Stats., states that "the deposition of a party. . . may be used by an adverse party for any purpose." Engen v. Harbor Campus (LIRC, 02/22/08).

In order for the attorney-client privilege to apply, a party has to satisfy the following three-part test: (1) The communication must be between a client and his attorney, (2) the communication must be confidential in nature, and (3) the communication must be made for the purpose of facilitating legal services. Absent any of the three criteria, there is no privilege. In this case, the Administrative Law Judge improperly sustained the Respondent's objections to testimony between the Respondent's attorney and an alderman on the grounds of attorney-client privilege. The alderman was overheard telling the Respondent's attorney that, "We'll fire that motherfucker if he files that claim," referring to the Complainant's filing a complaint under Ch. 109 of the Wisconsin Wage Payment Act. The Respondent did not establish that this statement was made for the purpose of facilitating legal services. Gunty v. City of Waukesha (LIRC, 03/29/07).

An Administrative Law Judge may consider evidence consisting of an employer's testimony about statements made to them by a third-party declarant if they are offered not to prove the truth of the matter asserted by the declarant, but as evidence of what the employer believed and, thus, what motivated the employer in making a challenged decision. Stichmann v. Valley Health Care Ctr. (LIRC, 06/14/05).

Sec. 804.07, Stats., does not allow the Complainant to use his own discovery deposition to support factual assertions in his brief. It is only the adverse party (in this case, the Respondent), that is free to use the opposing party's deposition for any purpose. Greco v. Snap-On Tools (LIRC, 05/27/04).

"Hearsay" is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. In employment discrimination cases, the important question is the motivation of the person making the challenged decision (specifically, whether they were motivated by an impermissible factor such as race, sex or age). Evidence about something a decision-maker was told by another person can be important in understanding what the decision-maker's motive was, and it is appropriate for it to be considered for that purpose. Therefore, it is acceptable to consider evidence consisting of an employer's testimony about statements made to them by a third-party declarant, not to prove the truth of the matter asserted by the declarant, but as evidence of what the employer believed and, thus, what motivated them in making a challenged decision. Kleinsteiber v. Eaton Corp. (LIRC, 03/15/04).

The Administrative Law Judge properly admitted statements made by third parties which were offered in evidence not to prove the truth of their contents, but to prove that the person who heard them believed and relied upon them in making a subsequent, challenged employment decision. Cook v. Community Care Resources (LIRC, 01/13/03).

Where a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay. Potts v. Magna Publications (LIRC, 02/27/01).

The Administrative Law Judge properly admitted written "feedback forms" regarding the Complainant into the record. These forms were prepared by a number of mentors and trainers who had been working with the Complainant prior to her termination. The forms were admissible as records of regularly conducted activity under sec. 908.03(6), Stats. An adequate foundation for the receipt of these documents was provided by the evidence that it was a regular business practice of the Respondent to have such feedback forms prepared, and that they are used in the regular course of Respondent's business as a training tool. McGee v. Society's Assets (LIRC, 02/13/01).

In a sexual harassment case, testimony by the Complainant's coworkers that their supervisor, who was accused of sexual harassment, had acted inappropriately towards them could not be used to show the supervisor's proclivity for bad conduct or bad character. However, this testimony was relevant and admissible for purposes of establishing a generally hostile work environment. Harsh v. County of Winnebago (LIRC, 11/09/98).

Testimony regarding statements by a third-party declarant to the employer were not hearsay when offered only to show how the statements influenced the employer's beliefs as to what had happened, and not to prove the truth of the matter asserted. Voelz v. Kimberly-Clark (LIRC, 06/06/97).

While an administrative law judge may consider hearsay to which no objection has been made at hearing to the extent it has probative value, crucial or critical findings of fact should not be based on uncorroborated hearsay. Rutherford v. J & L Oil (LIRC, 06/06/97).

Evidence of events occurring outside of the statute of limitations may be admitted as proof of a state of mind for acts occurring during a relevant time; i.e., one within the statute of limitations. Abbyland Processing v. LIRC, 206 Wis. 2d 309, 557 N.W.2d 419 (Ct. App. 1996).

A Complainant who has been harassed on only a few occasions may be allowed to offer evidence of harassment suffered by other employees in order to show that harassment was pervasive. An employee can be intimidated or oppressed by witnessing an employer harass her co-workers, or by hearing about such behavior. Olson v. Servpro of Beloit (LIRC, 08/4/95).

Where statements made by third parties are offered in evidence not to prove the truth of their contents, but to prove what the person who heard them believed and relied upon them in making an employment decision, they are not inadmissible hearsay. Jones v. Milwaukee County (LIRC, 04/06/95).
Generally, where no objection is made to hearsay it is admitted as evidence and may be used as proof to whatever extent it may have rational persuasive power. Although an Administrative Law Judge may not base a finding solely on hearsay, the ALJ has the discretion to allow hearsay testimony at a hearing. Higgins v. Total Petroleum, Inc. (LIRC, 07/25/94).

A letter sent by an agent for the Respondent to the ERD investigator stating that the Complainant was not rehired when she applied for her old job back because it was discovered that she had falsified information on her employment application was not a binding admission, since it was not made in a formal discovery process. It was merely some evidence as to the reason for the challenged action. It is not necessarily error for an Administrative Law Judge to refuse to receive into evidence a letter from a representative of the Respondent to the investigator explaining why some challenged action was taken where that representative does not testify at the hearing. Geske v. H.C. Prange Co. (LIRC, 12/09/93).

The Initial Determination should not be received as evidence at hearing because it is a hearsay document reflecting the conclusions of the investigator following an ex parte investigation. Geske v. H.C. Prange Co. (LIRC, 12/09/93).

Where third party statements, whether or not the statements are true, are offered to demonstrate that the Respondent relied upon the statements to make a hiring decision, the third-party statements are not inadmissible hearsay. Vandeveer v. Brown County (LIRC, 06/28/93).

The Administrative Law Judge properly admitted medical evidence obtained by the Respondent after the Complainant's termination. Meacham v. Sunburst Youth Homes (LIRC, 02/04/93).

Hearsay testimony received into the record without objection can be considered by the trier of fact to whatever extent it is found to have probative value. Campbell v. A.J. Sweet of Madison, Inc. (LIRC, 08/29/92).

Where hearsay evidence is not objected to at hearing, it may be used by the trier of fact as a basis for findings to whatever extent it is viewed as having probative value. Schanandore v. Roddiscraft, Inc. (LIRC, 06/19/92).

The Administrative Law Judge erred in rejecting an exhibit which both parties wished to have received into evidence. The Administrative Law Judge also erred in not receiving the deposition of the Complainant. Sec. 804.07(1)(b), Stats., provides that the deposition of a party may be used at trial by an adverse party for any purpose. Catley v. Benjamin Air Rifle Co. (LIRC, 06/21/91).

Even though administrative proceedings are not bound by the same rules of evidence that govern trials, some evidentiary restrictions may apply, including those concerning hearsay not subject to a recognized exception. A document entitled “Entry Level Vision Requirements Validation Study” was properly excluded as hearsay.

The document did not qualify as a scientific treatise under sec. 908.03(18), Stats., nor did it qualify as a public record or report under sec. 908.03(8), Stats. Brown County v. LIRC (Phillips & Grinkey) (Ct. App., Dist. III, unpublished opinion, 02/27/90).

Hearsay testimony which is received into the record without objection can be considered by the trier of fact to whatever extent it is found to have probative value. Maline v. Wis. Bell (LIRC, 10/30/89).

The Commission reversed the Administrative Law Judge's ruling that testimony regarding events which occurred after the date the complaint was filed were inadmissible, where such evidence was relevant to the issue of whether the employer failed to take appropriate action within a reasonable time. Vervoort v. Central Paper (LIRC, 01/25/89).

Exclusion of testimony under sec. 804.12(2)(a)2, Stats. is proper where the Respondent failed to answer the Complainant's interrogatories regarding that testimony. Golden v. Heinen & Vernoski (LIRC, 12/29/88).

It was not error for the Administrative Law Judge to refuse to receive into evidence a letter written by counsel for the Respondent to the Equal Rights Division's investigator during the course of the investigation which outlined the position of the Respondent on why the Complainant was terminated. Tassotti v. LIRC (Kenosha Co. Cir. Ct., 02/23/88).

The Administrative Law Judge has discretion to allow hearsay testimony at a hearing, but no findings may be based on such testimony. Levanduski v. Visiting Nurse Ass'n of Sheboygan (LIRC, 02/10/88).

Although a finding of retaliation was based on a hearsay statement to the effect that "the county does not hire people who are suing the county," the hearsay statement was within the exception provided in sec. 908.01(4), Stats. for statements of a party. The hearsay statement was made by an assistant to the County Executive, and the statement was made while he was so employed. Milwaukee County v. LIRC (Milwaukee Co. Cir. Ct., 12/16/87).

Where an earlier incident which resulted in the filing of a complaint of retaliation was thereafter resolved by a settlement agreement which provided that the Respondent did not admit any violation, that the Complainant would not sue the Respondent on the matters raised in the complaint, and that the agreement was to operate as the complete and final disposition of the complaint, the Commission would not consider evidence of the incident in a subsequent proceeding on another retaliation claim when the earlier incident was argued to be relevant. McKiernan v. Madison Metro Bus Co. (LIRC, 02/12/87).

Sec. 904.04, Stats., does not preclude the admission, in a proceeding concerning allegations of sexual harassment, of evidence that the accused harasser engaged in sexual harassment towards others on other occasions. Schwantes v. Orbit Resort (LIRC, 05/22/86).

A hearing examiner has broad discretion as to what evidence to admit at hearing, and the scope of review is limited to abuse of discretion. Kasun v. LIRC (Kearney & Trecker) (Milwaukee Co. Cir. Ct., 11/05/83).

Where the employer introduced a doctor's letter as part of its exhibits, it waived whatever valid hearsay objection it may have had to the exhibit. Janz v. Jos. Schlitz Brewing (LIRC, 09/10/81).

A letter was rejected as evidence where it was written by a person who was available but who did not appear at the hearing. Baker v. Northern Sash (LIRC, 08/09/78).

Although the Equal Rights Division is not bound by the statutory rules of evidence, it may voluntarily apply such rules and accept an employee's admissions made within the scope of his employment. Appleton Elec. v. DILHR (Kreider) (Dane Co. Cir. Ct., 11/07/77).

Although hearsay documents should not be received at an administrative hearing where direct testimony is available, they may be used as proof to whatever extent they have rational persuasive power where an employer fails to object; and such failure prevents raising the objection on appeal to the circuit court. Olin v. DILHR (Hoadley) (Dane Co. Cir. Ct., 07/11/77).

Although hearsay is admissible at a hearing and the Wisconsin Supreme Court has not ruled on the extent to which administrative agencies may ground decisions on hearsay evidence, the Department cannot base "crucial" or "essential" finding upon hearsay alone. Hunt v. City of Madison (DILHR, 02/11/75).

762.3 Matters found probative or relevant

Where at the hearing the Complainant was not asked to explain any discrepancies between his testimony and what he wrote on his complaint form, and was not given an opportunity to provide an explanation for any apparent inconsistencies between the two, the Commission would not rely on the complaint form to impeach the Complainant's credibility. Hopson v. Actuant Corp. (LIRC, 05/8/14).

When an investigation results in a determination of no probable cause and that is appealed to a hearing on the issue of probable cause, and when that hearing results in an ALJ's decision that there is probable cause and that the matter should proceed to a hearing on the merits, the proceedings on the merits which follow are entirely de novo. The record of the probable cause hearing is not part of the record on which the merits are to be decided, and the decision of the ALJ who presided at the probable cause hearing is of no relevance and of no weight in the merits proceedings. Neither the probable cause hearing record nor the decision resulting from it should be cited as having any significance, or accorded any significance, in the process of trying and deciding the merits of the case. Walker v. City of Eau Claire (LIRC, 03/28/13).

In discrimination cases the important question is the motivation of the person making the challenged decision – specifically, whether that person was motivated by an impermissible factor such as race, sex or age. Evidence about something a decision-maker was told by another person can be important in understanding what the decision-marker's motive was and it is appropriate for that evidence to be considered for that purpose. Luckett v. Regis Corp. (LIRC, 12/28/12).

Events which occurred outside of the statute of limitations period may be considered at hearing, although the remoteness in time of the events may limit their usefulness. Thobaben v. Waupaca County Sheriff's Dep't (LIRC, 12/23/11).

It was within an Administrative Law Judge's discretion to foreclose the Complainant from further attempts to impeach a witness's hearing testimony after the ALJ concluded that the Complainant's prior attempts to impeach the witness's testimony did not in fact constitute impeachment. Whether what a witness says on the stand is inconsistent with a prior statement lies within the discretion of the trier of fact. Clark v. Plastocon (LIRC, 04/11/03).

The fact that certain allegations in the complaint were untimely, and thus could not in themselves be found to constitute discreet violations of the Wisconsin Fair Employment Act, does not mean that the events cannot be considered as evidence bearing on the question of whether acts which occurred within the 300-day period were discriminatory. The statute of limitations is not a rule of evidence. Clark v. Friskies Petcare (LIRC, 08/16/01).

The risk that irrelevant evidence will have an improper effect on the decision-maker is not particularly significant in an administrative hearing such as those held on complaints under the Wisconsin Fair Employment Act. Administrative Law Judges, who are attorneys experienced in resolution of the evidentiary and other legal issues presented in cases of this nature, are presumably able to disregard evidence which is irrelevant or otherwise improper when the time comes for them to make decisions on the merits of the case. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

The only significant reason for excluding evidence on relevancy grounds in administrative hearings is to avoid unnecessary lengthening of the hearing. An overly stringent approach to questions of relevance can be directly counter-productive to the goal of expediting the hearing. Further, LIRC or a court on review may find certain evidence relevant even though the ALJ may not. For this reason, the proper procedure is to allow parties to submit offers of proof as to evidence which the ALJ concludes is inadmissible. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

Details of a prior conviction may be considered as evidence impeaching credibility where the probative value of the evidence is not outweighed by its danger of unfair prejudice. Sec. 906.09, Stats. In this case, the probative value of the evidence that the Complainant had been convicted of a criminal offense involving dishonesty was highly relevant to the issue of the Complainant's truthfulness. Urbanek v. Arrowhead Reg'l Distrib. (LIRC, 09/19/97).

Anecdotal evidence provided by former employees as to their own situations and their allegations that they were discharged because of their age, offered to prove a pattern of age discrimination, is generally not helpful. Evidence of such a pattern can more convincingly be shown by statistics that show unexplained disparities in treatment of classes of employees apparently distinguished by age. Erickson v. DEC Int'l (LIRC, 01/18/90).

Consideration of an applicant's recent gaps in teaching experience is not evidence of age or sex discrimination, unless it is shown that such a consideration actually has a disparate impact on women or people over the age of 40. Chandler v. UW-La Crosse (Wis. Pers. Comm'n, 08/24/89).

The reasonableness of the employer's reasons for its decisions may be probative of whether they are pretext. The more idiosyncratic or questionable the employer's reason, the easier it would be to expose it as a pretext, if indeed it is one. Leick v. Menasha Corp. (LIRC, 08/17/89).

Evidence of other cases in which insubordinate behavior similar to the Complainant's was tolerated was found unpersuasive, where the other incidents occurred before the tenure of the general manager who discharged the Complainant, and were unknown to him. McKiernan v. Madison Metro Bus Co. (LIRC, 02/12/87).

Sec. 904.04, Stats., does not preclude the admission, in a proceeding concerning allegations of sexual harassment, of evidence that the accused harasser engaged in sexual harassment towards others on other occasions. Schwantes v. Orbit Resort (LIRC, 05/22/86).

Evidence of how a Complainant's replacement performed after he replaced the Complainant was not relevant. In determining whether there was a prohibited motivation in removing the Complainant from the position, the Commission looks only to the motivations leading up to that decision, not to what happened afterwards, since what happened after has no bearing on whether the decision was based on a discriminatory intent. Lyckberg v. LIRC (Dane Co. Cir. Ct., 03/25/86).

Because promotion decisions were made at the divisional level, it was not error for LIRC to consider the pattern of supervisor promotions outside the plant where the employee worked. If there were varying "local factors" that led to covert discrimination, these factors should have been established. Bidlack v. LIRC (Sola-Basis Indus.) (Walworth Co. Cir. Ct., 03/25/81).

Proof of a general atmosphere of discrimination is not direct proof of discrimination against an individual, but will be considered with other evidence to determine whether race discrimination occurred. Stonewall v. DILHR (Wis. Pers. Comm'n, 05/30/80).

Adverse employment recommendations, while admissible into evidence and probative of the employer's state of mind in making its hiring decisions, are hearsay with respect to the applicant's work performance and do not of themselves constitute a legitimate, nondiscriminatory reason for refusing to hire a black applicant. Jackson v. Wingra Redi-Mix (LIRC, 06/07/78).

A denial by DILHR of the unemployment compensation claim of an employee with rheumatoid arthritis because she was unavailable for work was not probative of her inability to perform her job duties at the time of her discharge. J.C. Penny v. DILHR (Mitchell) (Dane Co. Cir. Ct., 03/22/76).

762.4 Official Notice

Although the record in the hearing was devoid of any evidence as to the definition of the crime of burglary, the Administrative Law Judge may take official notice of the state statute which defines the crime of burglary when determining if the crime of burglary is substantially related to a particular job. Santos v. Whitehead Specialties, Inc. (LIRC, 02/26/92).

LIRC took administrative notice that a Complainant was aware of the significance of a witness and exhibit list where the Complainant had filed many complaints with the Equal Rights Division in the past. Young v. Leach (LIRC, 12/18/90).

There was no testimony as to how large a menu would have to be in order for a person with 20/200 vision to read the menu. The Personnel Commission could not take judicial notice of such a fact because such a determination was outside the realm of generally recognized fact, and there was no foundation in the record as to the established technical or scientific facts upon which such a determination would be based. Betlach-Odegaard v. UW-Madison (Wis. Pers. Comm'n, 12/07/90).

Where the Administrative Law Judge concluded that the Respondent did not know of the Complainant's race at the time he failed to consider his application for employment, she also appropriately rejected the argument of the Complainant that official notice could be taken of the fact that the Complainant spoke with a recognizable "black dialect" and that therefore it could be inferred, based on his telephone conversation with the person who made the hiring decision, that the person must have known he was black. This was not a proper subject for official notice under sec. 227.45(3), Stats. Ealy v. Roundy's (LIRC, 03/12/87).

The circuit court may take judicial notice of the generally known procedure in which a Complainant goes to the Equal Rights Division, tells her story to an investigator, and then signs a complaint prepared by the investigator. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

762.5 Judicial Admissions

For a statement to be a judicial admission, it must be clear, deliberate and unequivocal, and it must be a statement of fact rather than opinion. Two letters written by representatives of the Respondent to the Equal

Rights Division in this case were appropriately treated as judicial admissions. The letters stated, among other things, that the Complainant (who alleged in his complaint that the Respondent failed to accommodate his religious practices) was selected for layoff in part because of his inability or unwillingness to work on Sunday. Although the Respondent subsequently claimed that the letters did not accurately reflect the Respondent's reason for discharging the Complainant, this testimony did not preclude the determination that the letters were judicial admissions. Tolibia Holdings, Inc. v. DILHR (Ct. App., Dist. II, unpublished opinion, 02/15/95).

In order for a statement to constitute a judicial admission, it must be clear, deliberate and unequivocal, and it must be a statement of fact rather than opinion. Whether a statement or purported concession is to be treated as a judicial admission rests in the sound discretion of the court. James v. Associated Schools, Inc. (LIRC, 11/27/91).

762.6 Rebuttal Evidence

Generally, evidence offered in a Complainant's rebuttal case is permitted only if it is responsive to new facts put in evidence by the Respondent in its case, but this rule is flexible, and an exception is made when admission of the proposed evidence is necessary to achieve justice. The Commission examines an ALJ's ruling excluding proposed rebuttal evidence on the basis of whether it was a reasonable exercise of discretion, but an erroneous exclusion of evidence would only require reversal if there was a reasonable probability that it contributed to the outcome of the proceeding. Here, the exclusion of two rebuttal witnesses was not an abuse of discretion. The witnesses should have been presented in the Complainant's case-in-chief because the Respondent's articulated non-discriminatory reason, which the evidence was intended to rebut, was put in evidence prior to the conclusion of the Complainant's case-in-chief. In addition, the proposed evidence was integral to the Complainant's proof of causation, an element of his claim under the direct method of proof. Also, the Complainant did not show that the proposed evidence would have been crucial to the outcome of the case if it had been admitted. Oertel v. K & A Mfg. Co. (LIRC, 06/16/14).

In the strictest sense, rebuttal evidence is that evidence offered by the Complainant after the Respondent has rested its case to contradict specific evidence unexpectedly presented by the Respondent. But in a broad sense, rebuttal evidence is any evidence offered by either side in order to rebut evidence which could not reasonably be anticipated and which surprised the party offering the rebuttal evidence. The surprise claimed should be considered to be tempered by the extent to which a party knew or should have known what testimony would be offered. Schwantes v. Orbit Resort (LIRC, 05/22/86).

763 Other procedures at hearing

The administrative law judge's refusal to allow a witness to testify by telephone falls into the category of rulings concerning the conduct of hearings that are within the administrative law judge's discretion to make. The administrative law judge did not abuse her discretion in deciding not to allow telephone testimony. The administrative law judge properly considered the fact that the party wanting to call the witness had reason to know in advance of the hearing that she would like to have the witness testify, and that there were ways to attempt to obtain his live attendance prior to hearing, which the party's attorney did not try, most importantly the process of subpoenaing him. The administrative law judge also properly considered the fact that the witness's credibility would need to be closely examined, given that he was expected to directly contradict the testimony of another witness concerning a conversation in which they both participated. The administrative law judge reached a reasonable conclusion that a fair comparison of the credibility of the witnesses would best be obtained by observing the demeanor of both of them while testifying. Billings v. Right Step, Inc. (LIRC, 06/10/20).

The Administrative Law Judge did not err in deciding to hold a hearing on the question of whether the Complainant required an interpreter at the same time as the substantive hearing. McCarthy v. Dunargin Wis., LLC (LIRC, 02/28/14).

After resting her case at the end of the first day of hearing, the Complainant asked to supplement her case on the second day with additional exhibits and testimony of two additional witnesses. The ALJ properly ruled that the Complainant had missed her opportunity to present this evidence and testimony in any way other than by rebuttal to the Respondent's case. The ALJ properly indicated that she would decide at the conclusion of the Respondent's case whether the proposed testimony and documentary evidence would be allowable as rebuttal. Delgado v. Saint Gobain Performance Plastics Corp. (LIRC, 11/29/13).

It was not error for an Administrative Law Judge to require the Complainant to provide a synopsis of the expected testimony of each witness he intended to subpoena in order to assist the Administrative Law Judge in determining whether the proposed witnesses' testimony would be relevant, and whether subpoenas should be provided to the Complainant. The Complainant's original request was for 35 subpoenas. The information provided by the Complainant consisted of a two or three-word description of what each witness would testify to and was inadequate to assist the Administrative Law Judge in determining whether to issue the requested subpoenas. The Administrative Law Judge therefore reasonably declined to issue the subpoenas. (At the hearing, the Administrative Law Judge advised the Complainant that he could request a continuance if there was a witness whose testimony was crucial to the presentation of his case, but the Complainant did not do so). Denis v. Wal-Mart Stores (LIRC, 05/31/11).

It was not an abuse of discretion for the Administrative Law Judge to allow a witness to testify by telephone. Counsel for the Respondent had apprised the Administrative Law Judge that the witness had not worked for the Respondent for more than a year, and that she lived in another state and was beyond the subpoena power of the state of Wisconsin. Johnson v. Kelly Services (LIRC, 04/21/09), aff'd sub nom Johnson v. LIRC (Milwaukee Co. Cir. Ct., 04/06/10).

An Administrative Law Judge properly denied the Complainant's request that various individuals be subpoenaed to testify at the hearing. The Complainant did not dispute the Respondent's assertion that the individuals did not have personal knowledge regarding the actions underlying the complaints, nor were they directly involved in investigating complaints that had been made against the Complainant, or imposing the reprimands that resulted from those complaints. Kaye v. City of Milwaukee (LIRC, 09/30/08).

A subpoena issued by a party who is not an attorney is invalid. Sec. 227.45(6m), Stats., provides that a party's attorney of record may issue a subpoena to compel the attendance of a witness. The Equal Rights Division's administrative rules provide that either the Department or a party's attorney of record may issue a subpoena to compel the attendance of a witness. The Complainant in this case argued that he was acting as his own attorney. However, this argument was unpersuasive. The Complainant was acting as his own representative, but that did not make him a member of the bar and, thus, an "attorney" within the meaning of the statute or the administrative rules. Betters v. Kimberly Area Sch. (LIRC, 11/28/07).

Neither an Administrative Law Judge nor the Labor and Industry Review Commission have the authority to enforce a subpoena. Sec. 885.11, Stats.; Sec. 218.15, Wis. Adm. Code. The Complainant could have initiated a judicial action to enforce a subpoena where the potential witness failed to appear at the hearing. In order to justify conducting a continued hearing for the purpose of taking the witness's testimony, the Complainant would have had to demonstrate that the content of the witness's testimony would be sufficiently strong to reverse or modify the decision of the Administrative Law Judge. Josellis v. Pace Indus. (LIRC, 08/31/04).

Administrative Law Judges have the authority to decline to enforce a subpoena if there is a reasonable excuse or reasonable cause for non-compliance with the subpoena. A witness must be considered to have a reasonable excuse and reasonable cause for not complying with a subpoena which is unreasonable and oppressive. When a subpoena is served on the evening before the hearing and only actually received the morning of the hearing, it is reasonable to consider it to have been unreasonable and oppressive and to consider the late service to be a reasonable excuse and reasonable cause for non-compliance with the subpoena. Greco v. Snap-On Tools (LIRC, 05/27/04).

While witnesses may be excluded from the hearing room so that they cannot hear the testimony of other witnesses, this does not extend to a party who is a natural person, or to an officer or employee of a party which is not a natural person who has been designated as its representative. Harris v. M & I Bank (LIRC, 09/11/03).

Sec. ILHR 218.15(1), Wis. Adm. Code, restricts the power for issuing subpoenas to the Department or to a party's attorney of record. A *pro se* litigant is not an attorney of record. Individual litigants appearing *pro se* desiring to compel the attendance of witnesses must avail themselves of the assistance of the Department. Oriedo v. LIRC (Dane Co. Cir. Ct., 05/20/99).

It is questionable whether pre-payment of witness fees and travel expenses is required when subpoenas for attendance at Equal Rights Division hearings are served. Oriedo v. Madison Area Tech. College (LIRC, 07/24/98).

Only a member of the Bar, or the Department itself, may issue a subpoena requiring attendance at a hearing before the Equal Rights Division. Subpoenas issued by a non-attorney were properly quashed. Oriedo v. Madison Area Tech. College (LIRC, 07/24/98).

The purpose of a sequestration order is to assure a fair trial and, more specifically, to prevent the shaping of testimony by one witness to match that given by other witnesses. While the Administrative Law Judge could have disqualified all of the sequestered witnesses that the Respondent called, based upon its violation of the sequestration order, it was not error to deny the Complainant's request to disqualify the witnesses if no prejudice resulted from the violation. Sobkowiak v. Trane Corp. (LIRC, 09/06/91).

There is no absolute right to a sequestration order. Jackson v. City of Milwaukee Pub. Library (LIRC, 12/14/90).

A court reporter was adequately appointed by the Department as required by sec. 111.39(4)(b), Stats., where: (1) the Division sent the parties a notice indicating that any party wishing to engage a court reporter at the hearing would be allowed to do so, (2) the Administrative Law Judge stated on the record that a court reporter was recording the proceedings, and (3) the court reporter did in fact take down the entire proceedings. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

764 Dismissal of a complaint at close of Complainant's case

The commission has frequently advised administrative law judges against dismissing a complaint without hearing the entire case. It was error to dismiss the complaint at the close of the Complainant's case where the Complainant made out a prima facie case of age discrimination and the Respondent presented no evidence in rebuttal. Gabrielson v. Wauwatosa Sch. Dist. (LIRC, 04/05/19).

The Complainant's evidence of favorable treatment of similarly-situated employees not in the Complainant's protected age class, in a hearing on probable cause, was storing enough to withstand the Respondent's motion to dismiss, when considered in light of the Commission's consistent advice that mid-hearing motions to dismiss should be granted only in the clearest and most unambiguous circumstances, when there is no reasonable way

the Complainant can prevail. The comparators were sufficiently comparable to make it plausible that they received more favorable treatment for similar conduct, at least without further explanation from the employer. Binversie v. Manitowoc Tool & Mfg., Inc. (LIRC, 03/28/13).

It is an error to grant a motion to dismiss in the middle of a hearing where the Complainant has made out a prima facie case of discrimination that has not been rebutted by any evidence from the Respondent. Gilmore v. Beverly Living Ctr. (LIRC, 01/29/13).

There is no statute, rule, or other authority which requires that when a Respondent moves to dismiss a complaint at the close of the Complainant's case, the Administrative Law Judge must issue a decision on the sufficiency of the Complainant's case before the hearing can continue. An Administrative Law Judge may simply decline to rule on such a motion, leaving it to the Respondent to decide whether it wishes to either rest without offering any evidence, or to put on its case. Dieterich v. Lindengrove (LIRC, 12/29/08).

A dismissal at the close of the Complainant's case in chief should only be issued where it is clear that, whether or not the Respondent introduces any evidence on its behalf, there is simply no way in which the Complainant can reasonably prevail. In all but the clearest and most unambiguous of circumstances, the best practice is to require the Respondent to go forward with its case so that the fact-finder may consider all of the relevant evidence. Arvin v. C & D Technologies (LIRC, 10/31/08).

Dismissals at the end of the Complainant's case should be granted only after careful consideration and in the most narrow of circumstances. Often a Respondent has a strong defense which could be presented expeditiously and without unduly prolonging the hearing, yet it opts to request a dismissal on the mistaken belief that such a resolution best serves its interests. The Respondent may be better off taking the time to put on its evidence and run the risk that a higher level decision-maker will disagree with the Administrative Law Judge's conclusion that the Complainant failed to meet his evidentiary burden and remand the case for further hearing. Cappelletti v. OceanSpray Cranberries (LIRC, 02/15/08).

A dismissal at the close of the Complainant's case-in-chief contemplates a circumstance in which it is clear that, whether or not the Respondent introduces any evidence on its behalf, there is simply no way in which the Complainant can reasonably prevail. Roberge v. DATCP (LIRC, 05/31/05).

The proper standard to be applied in deciding a motion to dismiss at the close of a Complainant's case in chief in a probable cause proceeding is whether, based on the evidence of record, the Complainant has sustained his burden of proving that probable cause exists to believe that discrimination occurred as alleged in the complaint. The facts to be relied upon in deciding such a motion are not those viewed as most favorable to the Complainant, but instead those established by the credible evidence of record. Josellis v. Pace Indus. (LIRC, 08/31/04).

Where a Complainant appears at a hearing but does not put in any evidence, a summary order of dismissal is appropriate because the failure to present any evidence establishes as a matter of law that there has been a failure of proof. Oriedo v. Madison Area Tech. College (LIRC, 07/24/98).

An employer's true motivation is an elusive factual question, the determination of which is difficult to ascertain and generally unsuitable for summary disposition of an employee's claim of retaliatory discharge. Frierson v. Ashea Indus. Sys. (LIRC, 04/06/90).

Caution must be exercised in granting a request to dismiss a complaint at the close of a Complainant's case. Before granting such a request, the Administrative Law Judge must be fully knowledgeable of what facts a Complainant needs to present to establish his or her case and exactly what evidence has been presented at the

hearing. In this case, the Administrative Law Judge erred in dismissing the complaint at the close of the Complainant's case where the Complainant's evidence demonstrated that she made it known to the Respondent that she was seeking another position, that she was qualified to perform the administrative assistant job, and where she was never considered for the job and a person of another race was hired. Holcomb v. Am. Convenience Prod. (LIRC, 03/25/88).

The Administrative Law Judge erred in dismissing the complaint at the close of the Complainant's case where the Complainant had made out a prima facie case by proving that she had been pregnant, that she had been capable of performing her job as evidenced by having passed her probationary period less than two weeks before she was fired, that she had only been criticized for her performance by her foreman on one occasion and that after that occasion she performed her job as required, and that she was discharged about two weeks after she first informed the employer she was pregnant. Although evidence concerning the Respondent's asserted reasons for terminating the Complainant - that she was slow and bossy - apparently was received into the record during the Complainant's case in chief, the Complainant offered evidence to show that those reasons were pre-textual. Matthes v. Schoeneck Containers (LIRC, 03/11/88).

The examiner erred in dismissing at the close of the Complainant's case his claim that he was discriminated against because of his race when the employer discharged him, supposedly for abetting a fraud in connection with his employment. The evidence offered at the hearing did not establish the Respondent's nondiscriminatory reason. The matter was remanded for further proceedings, to allow the Respondent to present its case in chief. Browder v. Best Food (LIRC, 01/09/87).

If testimony from a Respondent's witness or witnesses comprises an integral part of a Complainant's case, then it is the Complainant's responsibility to call those witnesses adversely to ensure that the testimony will be a part of the record. If the Complainant rests his or her case in chief without presenting such testimony, and if the Complainant's case in chief has not presented sufficient evidence to satisfy the required burden of proof, the complaint is appropriately dismissed. Mazzara v. Endata, Inc. (LIRC, 01/09/87).

Where a complaining party had established a prima facie case, the hearing examiner could not dismiss the case and the employer is obliged to present rebuttal evidence. Jenkins v. Allis Chalmers (LIRC, 10/11/77).

765 Failure to appear at hearing

The Complainant's complaint was dismissed after he failed to appear at a virtual no probable cause hearing using the WebEx platform. The Complainant asserted that he was unable to attend the hearing because the Division failed to have a reasonable working system. The commission rejected the Complainant's arguments, noting that the Complainant was able to appear at an earlier pre-hearing conference using the same technology that he contends did not work for the hearing. The commission noted that the hearing administrative law judge took numerous precautions to ensure that the Complainant would be able to appear at the virtual hearing and questioned the credibility of the Complainant's assertion that he was unable to appear at the hearing. Furthermore, the commission emphasized that the Complainant had many options to notify the administrative law judge that he was unable to connect to the hearing and failed to do so in a timely manner. Tadisch v. PMI Ent. Group d/b/a Brown County Memorial Complex (LIRC, 11/11/21).

The Complainant's assertion that the presence of security guards in the hearing room made him feel unsafe based upon his race, a matter which he did not mention to the administrative law judge when requesting to appear by telephone, did not provide the Complainant with good cause for failing to appear at the hearing. Young v. Goodwill Indus. of S.E. Wisconsin (LIRC, 07/09/20).

A party who requests unsuccessfully that an administrative law judge recuse himself from the case must nonetheless proceed with the hearing, then raise the failure to recuse as grounds for appeal in the event of an unfavorable decision. The administrative law judge's denial of a request to recuse does not constitute good cause for failing to appear. Young v. Accurate Full Service Vehicle Ctr. (LIRC, 05/30/19).

The Complainant contended she had good cause for missing the hearing because she never received the hearing notice. However, even if the Complainant did not receive the hearing notice, she received actual notice of the hearing in the form of a scheduling order which specified the hearing date and location, and should have made some effort prior to the hearing to confirm the particulars of where and when the hearing would be held. Dillard v. Charter Commc'ns, LLC (LIRC, 05/18/18).

The Complainant believed the administrative law judge was biased against him and asked her to recuse herself from his case, but the administrative law judge declined to do so. The Complainant's remedy under the circumstances was to appear at the hearing and preserve his objections on appeal. By failing to appear at the hearing the Complainant waived his opportunity to present his case. Ghanem v. Univ. of Wis.-Madison Off. of Admin. Legal Servs. (LIRC, 01/30/18).

There is a rebuttable presumption that properly mailed notices are received. Where there was proper mailing of a notice of hearing and the item was not returned by the post office, the Complainant failed to rebut the presumption because her assertion of non-receipt was not plausible. The attorney who made the assertion on her behalf did not have first-hand knowledge of whether his client received the notice. Burright v. Ashley Furniture Indus., Inc. (LIRC, 07/22/15).

A party's failure to notify the ERD of a new mailing address is not fatal to a claim that he had good cause for missing the hearing because he did not receive the notice, provided the party can show that he took reasonable steps to update his address with the United States Postal Service and there is no other reason to believe that he was aware of or should have been aware of the hearing date. Ford v. Chicago Grill (LIRC, 02/27/15).

The Complainant missed the hearing because she recorded the incorrect hearing time on her calendar. The Commission rejected her claim that the error was the Respondent's fault because of the distress its alleged discrimination had caused her. Failure to pay sufficient attention to notices from the ERD is not "excusable neglect," but the result of carelessness or inattentiveness. Murphy v. Wal-Mart Stores, Inc. (LIRC, 08/12/14).

The Commission continues to take the view that a Complainant who disagrees with rulings of an ALJ is required to proceed with the hearing in order to preserve his right to review of those rulings on appeal, and that if the Complainant instead refuses to proceed with the hearing due to his objections to the rulings, and his complaint is dismissed as a result, he is deemed to have waived his objections to those rulings. This rule is important to the integrity of the system in place for litigation, appeal and review of Equal Rights cases, because it secures the non-appealability of interlocutory decisions of ALJs. Mullins v. Wauwatosa Sch. Dist. (LIRC, 05/17/13).

A party's lack of a car cannot, standing alone, always be considered good cause for failure to appear at a hearing. It must be determined whether the party who did not have a car had time to make alternative transportation arrangements. Also, the party must make efforts to contact the Equal Rights Division to advise it of problems that might create the need for a postponement of the hearing. In this case, the Complainant had almost three months to look into making arrangements to get to the hearing. She never said anything to the Equal Rights Division about needing a postponement or a change in the hearing location. The Complainant failed to establish good cause for failing to appear at the hearing and her case was appropriately dismissed. Clemons v. Senior Helpers (LIRC, 11/20/12).

The Complainant's failure to pay sufficient attention to the hearing notice from the Equal Rights Division, which changed the hearing date from one date to another date, is a clear example of carelessness or inattentiveness of the kind that may not be considered "excusable neglect." The Complainant did not show good cause for his failure to appear at the hearing. Allen v. Miles Kimball Co. (LIRC, 12/28/12).

The Respondent's motion to dismiss was properly granted where the Complainant abruptly left the hearing without presenting any evidence. A Complainant bears the burden of proof. The Complainant's failure to present any evidence establishes as a matter of law that there has been a failure of proof. Robinson v. Schlossmann's Imports (LIRC, 05/31/12).

A party's plausible assertion that it did not receive a notice of hearing, and that this was the reason for failing to appear at the hearing, cannot be rejected or resolved without providing an opportunity for hearing. While the circumstances in this case suggest that the Complainant should have received the notices of hearing, his contention that he did not receive any notice of hearing cannot be rejected without allowing an opportunity for hearing on that question. The case was remanded to the Equal Rights Division for a hearing to address whether the Complainant had received notice of the first hearing held in this matter. Hernandez v. Starline Trucking Corp. (LIRC, 02/29/12).

The failure of parties to appear at scheduled hearings before the Equal Rights Division is a significant challenge to calendaring the many cases which the Division is called upon to hear. It is appropriate that ALJs with crowded hearing calendars may seek to clarify the parties' intentions prior to the day of hearing. It was understandable for the ALJ in this case to seek to clarify whether the Complainant, whose mailing address was in California, intended to appear at the hearing. The ALJ did not demonstrate bias by contacting the Complainant's daughter, who had been listed as the contact person for the Complainant on the complaint form. The Complainant's argument that she did not appear at the hearing because the ALJ was not impartial or that the ALJ had predetermined the outcome of the case was rejected. Elizalde v. Teamsters Gen. Local #200 (LIRC, 02/21/12).

A party who requests a new hearing based upon a failure to appear at the original hearing must demonstrate good cause for the failure to appear. Good cause has been defined to mean excusable neglect (i.e., the degree of neglect a reasonably prudent person might be expected to commit in similar circumstances). Alvey v. First Student, Inc. (LIRC, 08/22/11).

The fact that the Respondent also failed to appear at the hearing did not provide a basis for overlooking the Complainant's failure to appear. The consequences are different when a Respondent fails to appear at a hearing. Section DWD 218.18, Wis. Admin. Code, provides that if the Complainant fails to appear and to proceed the Administrative Law Judge *shall* dismiss the complaint. The rule further provides that if the Respondent fails to appear at the hearing the hearing shall proceed as scheduled. A Complainant must always show up and put in a case even if a Respondent has not appeared because the Complainant bears the burden of proving that he or she was discriminated against. Parks v. Walnut Grove (LIRC, 03/31/11).

In order to establish good cause for failing to appear at a hearing, a party must show that the failure to appear was either the result of excusable neglect or a reason which, if established by competent evidence, would amount to circumstances beyond the individual's control or which would otherwise have prevented or made it unreasonable for the party to appear. The failure to appear for the hearing must be explained with a degree of specificity adequate to allow a reasoned assessment by the decision-maker of whether it is probable that good cause for the failure to appear could be established. Ellingsworth v. Humana Ins. (LIRC, 12/30/10).

Section DWD 218.18(4), Wis. Admin. Code, provides that an Administrative Law Judge may reopen a hearing if, within ten days after the date of hearing, any party who failed to appear shows good cause in writing for the

failure to appear. This rule does not mean that a party's assertions that are submitted more than ten days following the hearing may not be considered. However, once an Administrative Law Judge's decision has been issued, a party's written objection to that decision should generally be treated as a petition for LIRC review. Ellingsworth v. Humana Ins. (LIRC, 12/30/10).

The Complainant in this case established good cause for her failure to appear at the hearing. She submitted a discharge summary from a hospital indicating her diagnosis and treatment for a head injury two days prior to the hearing. The Respondent's argument that this document was hearsay was rejected. Since sec. DWD 218.18(4), Wis. Admin. Code, requires that a party failing to appear at a hearing show good cause "in writing" for the failure to appear, this "writing" will undoubtedly be hearsay. Ellingsworth v. Humana Ins. (LIRC, 12/30/10).

As a general rule, factual assertions as to a person's reasons for failure to appear at a hearing will not be rejected without an opportunity for hearing where the non-appearing party suggests that he or she may be able to demonstrate good cause for failing to appear. Cottingham v. McDonald's (LIRC, 08/25/10).

A Complainant whose case has been dismissed for failure to appear at a hearing must demonstrate, on appeal, that there was good cause for the failure to appear. Good cause has been defined to mean either that the failure to appear was the result of excusable neglect (i.e., the degree of neglect a reasonable, prudent person might be expected to commit in similar circumstances), or a reason which, if established by competent evidence, would amount to circumstances beyond the individual's control or which would otherwise have prevented or made it unreasonable for the Complainant to appear. The failure to appear for the hearing must be explained with a degree of specificity adequate to allow a reasoned assessment by the decision-maker of whether it is probable that good cause could be established. Schwarz v. Gateway Tech. College (LIRC, 04/23/10), aff'd sub nom. Schwarz v. LIRC (Racine Co. Cir. Ct., 08/16/10).

A Complainant who did not appear at the hearing must, in appealing the dismissal of his case, offer an explanation which, if proved, would demonstrate that he had good cause for his failure to appear. Even if the Complainant had presented a postponement request to the Equal Rights Division which the Division failed to address, this circumstance would not establish good cause for his failure to appear at the scheduled hearing. The Complainant had reason to be aware that a postponement request had not been granted in his case and that the Division had not granted his request to appear by telephone rather than in person, yet he failed to appear at the noticed hearing. These were not the actions of a reasonably prudent person. Amos v. McDonald's (LIRC, 05/25/07).

The Complainant refused to proceed at the hearing because he objected to the Administrative Law Judge's decision not to postpone the hearing. The complaint was properly dismissed as a result of the Complainant's failure to proceed and present evidence in support of the complaint. Jackson v. Transwood, Inc. (LIRC, 04/27/07).

A Complainant whose complaint has been dismissed for failure to appear at the hearing may have the hearing re-opened, provided the Complainant can show good cause in writing for the failure to appear. Good cause is a reason which, if established by competent evidence, would amount to circumstances beyond the individual's control, or which would otherwise have prevented or made it unreasonable for the Complainant to appear. Kieck v. Mas Graphics (LIRC, 08/28/06).

As a general rule, factual assertions as to grounds for failure to appear at a hearing will not be rejected without an opportunity for hearing where the non-appearing party suggests that he may be able to demonstrate good cause for failing to appear. Kieck v. Mas Graphics (LIRC, 08/28/06).

The Complainant asserted on appeal that she did not appear for her hearing because she could not find a lawyer who would take her case. While the Complainant may have preferred to have an attorney represent her at the hearing, representation by an attorney is not a matter of right under the Equal Rights Division's rules. In instances where a party does not appear by counsel or other representative, it is the role of the Administrative Law Judge to see that the party's case is properly developed. Therefore, the Complainant did not show good cause for her failure to appear at the hearing. Whitt v. Alterra Wynwood of Madison West (LIRC, 07/15/05).

A party who disagrees with rulings rendered by an Administrative Law Judge prior to hearing is required to proceed to hearing, preserving her objections to such rulings on the record for review on appeal. If the Complainant instead refuses to proceed with the hearing due to her objections to the Administrative Law Judge's rulings, and her complaint is dismissed as a result, the Complainant is deemed to have waived her objections to these rulings. Casetta v. Zales Jewelers (LIRC, 06/14/05).

It interferes with the process established by sec. DWD 218.18(4), Wis. Adm. Code, for an Administrative Law Judge to issue an order of dismissal based upon a Complainant's failure to appear at a hearing before the ten-day review process referenced in that provision has expired. Wallace v. Laidlaw Transit (LIRC, 02/24/05).

In order to establish good cause for failing to appear at a hearing, the non-appearing party must offer an explanation which, if proved, would demonstrate that the failure resulted from excusable neglect, which is the degree of neglect a reasonably prudent person might be expected to commit in similar circumstances. Even if the party had presented a postponement request to the Department which it failed to address, this circumstance would not provide good cause for failing to appear at the scheduled hearing. Wallace v. Laidlaw Transit (LIRC, 02/24/05).

A Complainant is expected to manage his personal and work life in a manner which will enable him to prepare for, and to attend, a scheduled ERD hearing. Parties are expected to take time off from work to attend scheduled hearings. Wallace v. Laidlaw Transit (LIRC, 02/24/05).

A Complainant whose case was dismissed for failure to appear at a hearing must demonstrate, on appeal, that there was good cause for the failure to appear at the hearing (i.e., that the failure resulted from excusable neglect). This failure to appear must be explained with a degree of specificity adequate to allow a reasoned assessment by the decision-maker of whether it is probable that good cause could be established. The Complainant's failure to appear because she looked at the wrong document for the date of hearing did not amount to excusable neglect in this case. Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances. The circumstances presented here indicate that the Complainant's failure to appear for her scheduled hearing was not the act of a reasonably prudent person, but was the result of carelessness or inattentiveness. Martin v. County of Milwaukee (LIRC, 12/17/04).

As a general rule, factual assertions as to grounds for failure to appear at a hearing will not be rejected without an opportunity for hearing where the non-appearing party suggests that they may be able to demonstrate good cause for failing to appear. Whitlow v. Air Trans Airways (LIRC, 12/13/04).

It interferes with the process established by sec. DWD 218.18(4), Wis. Adm. Code, for an Administrative Law Judge to issue an order of dismissal based upon a Complainant's failure to appear at a hearing before the ten-day review process referenced in that provision has expired. Casetta v. Zales Jewelers (LIRC, 06/25/04).

A party who cannot read English, or who does not read English well, has an obligation to have documents translated. In this case, the Complainant was able to file a complaint, to read or have translated the initial determination, and to take appropriate action to file a timely appeal. She was also able to read or have

translated the Administrative Law Judge's dismissal order, and she filed a timely petition for review. There was no reason to believe that the Complainant was not capable of understanding, or gaining understanding of, the hearing notice, not withstanding her lack of facility with English. Her failure to do so did not provide her with good cause for missing the hearing. Accordingly, the dismissal of her complaint was affirmed. Further, the Labor and Industry Review Commission denied the Complainant's request that it issue its decision in this matter in Spanish. If the Complainant had difficulty reading the decision of the Commission, it was her obligation to have it translated. Hernandez v. Sara Lee Corp. (LIRC, 05/21/04).

Where a Complainant does not have good cause for failing to appear at the hearing, the dismissal of the complaint is required. This applies equally to those parties who are represented by counsel, and those who choose to proceed pro se. Hinkforth v. Bricklayers & Allied Craftsmen Dist. Council (LIRC, 02/23/04).

The Department's administrative rules permit an Administrative Law Judge to reopen a hearing upon the request of a party who failed to appear at the initial hearing if the party establishes good cause for failing to appear within 10 days after the date of hearing. Upon concluding that the Respondent had demonstrated good cause for its failure to appear at the first hearing in this matter, the Administrative Law Judge granted its request to reopen, although the ALJ limited the Respondent's presentation of evidence to that which could have been presented at the initial hearing. This was an appropriate exercise of discretion. Jackson v. Mansur Trucking (Ct. App., Dist. IV, summary affirmance, 12/18/03).

As a general rule, factual assertions as to the grounds for failure to appear at a hearing will not be rejected without an opportunity for hearing where the Complainant suggests that she may be able to demonstrate good cause for failing to appear. Hopson v. Family Dollar Stores (LIRC, 10/30/03).

In order to establish good cause for failure to appear at the hearing, a party must demonstrate that the failure to appear resulted from excusable neglect, and must explain this failure to appear with a degree of specificity adequate to allow a reasoned assessment by the decision maker of whether it is probable that "good cause" could be established. The Complainant here did not establish a single explanation why she failed to appear until one hour after the notice of hearing indicated the hearing was scheduled to commence. The most reasonable inference is that the Complainant failed to carefully read the notice of hearing. This is not sufficient to show good cause. Malone v. Froedtert Mem'l Lutheran Hosp. (LIRC, 07/30/03).

An Administrative Law Judge may not dismiss a complaint as a sanction for a Complainant's abandonment of a hearing when the record contains some evidence upon which factual findings could be made. Rather than dismissing the complaint, the appropriate course under these circumstances would be to treat the Complainant as having rested at the point at which he walks out or otherwise abandons the hearing, to afford the Respondent an opportunity to present its case if it chooses to do so, and to issue a decision based on the adequacy of the evidence presented. Clemons v. Opportunities Industrialization Ctr. of Greater Milwaukee (LIRC, 02/14/03).

The Complainant asserted that he failed to appear at the hearing because he no longer had an attorney. However, there was no indication as to what efforts, if any, he had made to secure another attorney. Furthermore, there was no indication that the Complainant ever notified the Equal Rights Division of his situation and made a request for a postponement or a continuance of the hearing. Therefore, it was appropriate to dismiss the Complainant's complaint when he failed to appear at the hearing. Alexander v. Unified Solutions, Inc. (LIRC, 01/31/03).

The Department's rules require dismissal of the case if a Complainant fails to appear at a hearing in person or by a representative. In this case, the Complainant did not appear at the hearing, but her attorney did. While the Complainant's failure to come to the hearing did not require dismissal of her complaint, her failure to put

in any evidence in support of her case was a situation warranting dismissal. Sweet v. M & H Restaurants (LIRC, 11/29/02).

Where the Complainant's attorney appeared at the hearing, but the Complainant did not because her daughter was ill, the Complainant's attorney should have requested a continuance. Further, the Administrative Law Judge should have ascertained whether the attorney intended to proceed on the Complainant's behalf without the Complainant's presence before dismissing the case. The Complainant was not legally obligated to be present at the hearing, and her attorney could have attempted to make the case based on other evidence available to her. Sweet v. M & H Rest. (LIRC, 11/29/02).

The Complainant alleged that he had not appeared at the hearing because he had not received the notice of hearing. There is a rebuttable presumption that mail which is properly addressed is delivered and received. The notice of hearing in the Division's case file showed that the Division had the correct address for the Complainant, and that the Division mailed a notice of the hearing to him. No notice of hearing was returned to the Division as undeliverable by the post office. Therefore, the Complainant did not rebut the presumption that he received notice of the hearing, and the dismissal of his case was affirmed. Vang v. Donaldson Co. (LIRC, 08/29/02).

The Respondent's failure to appear at the hearing constituted excusable neglect where the Respondent had been sold to a new entity approximately five weeks before the hearing and where the company that had been monitoring the outstanding claims against the Respondent failed to provide the new entity with adequate information regarding the status of outstanding claims against the Respondent. Zollicoffer v. Ryder Student Transp. Serv. (LIRC, 08/25/00).

The Department's rule regarding failure to appear at hearing requires more than a mere assertion of good cause; the non-appearing party must explain his failure to appear with a degree of specificity adequate to allow a reasoned assessment by the decision maker of whether it is probable that "good cause" could be established. In this case, the Complainant simply said that he had been "ill and unable to attend." This was insufficient to show good cause for his failure to attend the hearing. Mason v. ASI Technologies (LIRC, 04/17/98).

Where the Complainant merely stated that she had an extreme personal emergency which necessitated her being out of the area during the time of the scheduled hearing, she failed to establish good cause for her failure to appear at the hearing. The Complainant objected to revealing the nature of her emergency; however, the Administrative Law Judge was justified in requiring the Complainant to provide satisfactory evidence which established that she was faced with an unavoidable emergency. Kikkert v. Trinity Evangelical Lutheran Church (LIRC, 09/27/96).

It was not a violation of due process for the Administrative Law Judge to proceed with a hearing and to make a decision based solely on the Complainant's testimony, where the Respondent failed to appear at the hearing. Kaczynski v. Whitlock Auto Supply (LIRC, 07/17/96), aff'd sub nom. WRS Corp. v. LIRC (Dane Co Cir. Ct., 04/08/97).

Parties are expected to take time off from work in order to attend scheduled hearings. Further, financial constraints do not constitute good cause for a failure to appear at hearing. Accordingly, an Administrative Law Judge appropriately dismissed a case where the Complainant failed to appear at the hearing after requesting, and being denied, a postponement on the ground that she was hospitalized as part of a medical study. Kupferschmidt v. Milwaukee Bd. of Sch. Dir. (LIRC, 05/30/96).

A complaint was properly dismissed where the Complainant failed to appear at a pre-hearing conference. Peterson v. Harvest Life Ins. Co. (LIRC, 04/19/96).

Where a complaint is dismissed for failure of the Complainant to appear at the hearing, the Administrative Law Judge should discuss his or her reasons for denying any last-minute request for a postponement that preceded the hearing. Peterson v. Marquette Univ. (LIRC, 07/11/94).

The Complainant established good cause for failing to appear at the hearing where she and her attorney arrived at the hearing one hour late because the attorney had inadvertently recorded the incorrect time for the hearing on her calendar. This was a simple and unintentional mistake made on the part of the Complainant's attorney. Gibbs v. LIRC (Waukesha Co. Cir. Ct., 04/07/94).

A Complainant failed to establish that her failure to appear at the hearing was for good cause. The Complainant asserted that she could not travel 500 miles to attend the hearing and that she could not leave her mother and her four children home alone; however, the Complainant failed to provide requested medical certification or an affidavit establishing that she could not leave her mother's care. Fullilove v. First Choice Fitness Ctr. (LIRC, 02/18/94).

A new hearing may be ordered if the party who fails to appear shows good cause for that failure. Good cause is a reason which, if established by competent evidence, would amount to circumstances beyond the individual's control or which otherwise prevented or made it unreasonable for him to appear. Being scheduled for work does not demonstrate such good cause. Parties are expected to take time off from work to attend scheduled hearings. Talaska v. C.A.T.S. Nationwide (LIRC, 02/08/94).

There is no per se requirement that a Complainant actually be present at a hearing, only a requirement that evidence be presented on the Complainant's behalf. The administrative rule providing for dismissal of complaints based on "failure to appear" cannot be relied upon where the Complainant appears at a hearing but leaves without putting in any evidence. Nevertheless, a summary dismissal order is appropriate because the failure to present any evidence establishes as a matter of law that there has been a failure of proof. Jackson v. City of Milwaukee (LIRC, 10/28/93).

Financial constraints do not provide the Complainant with good cause for failing to appear at the hearing. Russ v. Milwaukee Area Tech. College (LIRC, 08/06/93).

It was not reasonable for the Complainant to have concluded that the hearing date had been changed based upon a conversation with the clerk of courts in the county where the hearing was scheduled to be held. The Complainant had a duty to contact the Equal Rights Division about his scheduled hearing. Backey v. John Deere Horicon Works (LIRC 04/08/93).

The Complainant did not establish good cause for failing to appear at the hearing where he speculated that the notice of hearing may have been lost in the mail. Vogel v. Milwaukee Bd. of Sch. Dir. (LIRC, 02/25/93).

There is no requirement that a Complainant appear in person at a hearing. Ind 88.16(5), Wis. Admin. Code, only requires dismissal if the Complainant fails to appear either in person or by a representative. However, a case was properly dismissed, even though the Complainant's attorney appeared at the hearing, where the Complainant failed to put in evidence in support of her case. Cooper v. Janlin Plastics (LIRC, 06/05/92).

The Complainant established good cause for failing to appear at the hearing where he presented evidence to the Labor and Industry Review Commission that he had been incarcerated on the day of the hearing from early morning until the middle of the afternoon. The Complainant's hearing had been scheduled to begin at 9:00 a.m. Young v. Pinkerton Sec. Serv. (LIRC, 10/15/91).

The Complainant did not establish good cause for failing to appear at his hearing when he indicated that he did not receive the notice of hearing because he had been arrested and was confined at a federal prison in Pennsylvania. This case is no different from one in which a party moved without notifying the Equal Rights Division of the party's new address and then failed to appear at the hearing (or to notify the Equal Rights Division of inability to attend) because of failure to receive the notice of hearing. A party has an obligation to keep the Equal Rights Division informed of his address. A party cannot be allowed to create "good cause" for failure to appear at a hearing by moving without notifying the Equal Rights Division of his new address and thus avoiding the notice of hearing. Moses v. Northshore Healthcare Ctr. (LIRC, 06/06/91).

Where the complaint identified the Respondent's Wisconsin address, and where the Respondent did not directly request the Equal Rights Division to serve notices on its corporate offices in Dallas, Texas, the Respondent could not justify failing to appear at the hearing on the ground that it did not receive the notice of hearing at its corporate office in Texas. The Respondent conceded that the notice of hearing had been received at its Wisconsin location. Orwen-Richter v. Royal Int'l Optical (LIRC, 05/03/91).

The Complainant had good cause for failing to appear at the hearing where he was summoned for jury duty on the day of the hearing and where he mailed a copy of the jury summons to the Administrative Law Judge and to an Equal Rights Division Bureau Director prior to the date of the hearing. Hahn v. Waupaca County Dep't of Human Resources (LIRC, 02/14/91).

LIRC will remand a case to the Administrative Law Judge to take testimony on the Respondent's reasons for failing to appear at the hearing, rather than making that determination itself on the basis of an affidavit from the Respondent. Moore v. Holst Excavating, Inc. (LIRC, 02/12/91).

The Commission was not persuaded that the Complainant failed to receive notice of the hearing because: (1) the Department's file indicated that the Complainant was mailed a notice of hearing which was not returned as undeliverable, (2) the Respondent mailed a copy of its list of witnesses and exhibits to the Complainant, and (3) based on its having previously reviewed several of the Complainant's discrimination cases, LIRC took administrative notice of the fact that the Complainant was aware of the significance of the Respondent's witness and exhibit list. Young v. Leach (LIRC, 12/18/90).

Where a complaint is dismissed for failure to appear at the hearing, the Administrative Law Judge must discuss in his order of dismissal his reasons for denying any last-minute request for postponement. A functionally equivalent situation is presented when a last-minute request for postponement is made and denied and the Complainant, while initially present at the hearing, refuses to present any evidence and leaves. Jackson v. City of Milwaukee Pub. Library (LIRC, 12/14/90).

The complaint was dismissed where the Complainant failed to appear at the hearing. The Complainant had three months' notice that the law firm which had been representing him would no longer do so and there was no indication that he did anything to obtain other counsel during that period. Kranz v. Marc's Big Boy (LIRC, 08/08/90).

The Complainant did not have good cause for failing to appear at the hearing. The Complainant claimed that she did not receive a Notice of Hearing. However, even assuming that the Complainant did not get actual notice, she did receive copies of the Respondent's answer and its witness and exhibit list, which put her on notice that her hearing was scheduled to take place very soon. The Complainant's failure to contact the Department to find out the date of the hearing or to request a postponement was unreasonable. Feaster v. Dillingham, N.A., Inc. (LIRC, 06/29/90).

Where the complaint is dismissed for failure of the Complainant to appear at the hearing, the Administrative Law Judge must discuss the reasons for denying any last-minute request for postponement. The absence of explanation may, in some cases, require a remand for further proceedings. Jaskolski v. M & I Data Serv. (LIRC, 05/23/90).

The fact that a party filed a request for a postponement and had not received any response to the response from the Division did not justify the party's failing to appear at the hearing. Jaskolski v. M & I Data Serv. (LIRC, 05/23/90).

The Complainant is entitled to a hearing on whether he had good cause for failing to appear at the hearing after his request for a postponement on the ground that he was unable to attend because of medical conditions was denied. The Complainant must prove by competent evidence, and to a reasonable degree of medical certainty, that he was unable to attend because of a medical condition. Jones-Browning v. Associates Leasing (LIRC, 03/16/90).

After a hearing was continued based on representations by the Complainant's attorney that the Complainant was suffering from a back injury and was physically incapable of participating in the hearing, the Administrative Law Judge learned that the Complainant's representation that her doctor had advised her not to attend the hearing was untrue. Further, the Complainant failed to provide medical documentation that she had been physically unable to attend the hearing. The Complainant's complaint was, accordingly, dismissed. Ludwig v. Eau Claire County Sheriff's Dep't (LIRC, 01/31/90).

LIRC ordered the matter remanded for a hearing as to whether the Complainant had good cause for failure to appear at the hearing, where the Complainant asserted in a timely petition for review that her sister's foster child took a call from a woman who stated that the time for the hearing had been changed. Lonetree v. Ho-Chunk Bingo (LIRC, 12/08/89).

The Complainant did not show good cause for failure to appear at the hearing where he contended that he never received notice of the hearing because he had moved to a new address. It was the Complainant's responsibility to keep the Department informed of his current address. Pechacek v. J. C. Penney (LIRC, 11/10/89).

Neither the Complainant's belief that he was going to get a "conciliation hearing," his having to work on the day of the hearing, nor his inability to find a potential witness's address justified his failure to appear at the hearing. Smith v. Menard (LIRC, 02/24/89).

The Complainant's petition to have his case reopened after it was dismissed for his failure to appear at hearing was denied where 39 days had elapsed after the hearing before the Complainant attempted to contact the Department regarding his non-appearance, and no documentation of the Complainant's injury or his attorney's illness was received by the Commission. Holt v. Lee (LIRC, 02/24/89).

The Complainant, who claimed in his petition for review that he had been physically unable to be present at the hearing, had telephoned the Equal Rights Division at 8:30 on the morning of the hearing, and did not call back when the call was disconnected before it could be switched to the Legal Bureau Director. Noting that the Complainant lived in Camp Douglas, Wisconsin, and that his claim that he was "physically unable to be present" could just as easily be interpreted as indicating that he had overslept as indicating that there was an emergency, LIRC affirmed the order of the Administrative Law Judge dismissing the complaint based on the failure of the Complainant to appear. Frohmader v. Milwaukee County Dep't of Social Serv. (LIRC, 09/30/88).

The Complainant did not have good cause for failing to appear at the hearing merely because he thought an "offer of settlement" had settled the matter, where he failed to offer any evidence that he had agreed to accept the settlement offer made by the Respondent or that the Respondent had agreed to accept the settlement offer made by him. Absent an agreement by the parties to settle the matter, the Complainant could not reasonably have concluded that there was no reason to attend the scheduled hearing. Love v. Dr. Su Ryong Her (LIRC, 08/31/88).

The Administrative Law Judge's dismissal of the complaint based on Complainant's failure to appear at the hearing was affirmed, despite the Complainant's assertion that he failed to appear because he had not received the notice of hearing. The Complainant's assertions were inconsistent: he claimed that he had moved to a new address and informed the Department of his new address, and put in a change of address card at the Post Office, but he also asserted that the current tenant of his former address had held his mail containing the notice of hearing until after the hearing date. Other correspondence from the Equal Rights Division was mailed to the former address, and the Complainant did not assert that he failed to receive that. Phillips v. Nat'l Transit Leasing (LIRC, 06/03/88).

A Complainant's failure to appear at hearing was justified where he faced unforeseen difficulties in getting to the hearing from out of state and where he had made every effort to overcome them. Amaya v. Newcap (LIRC, 07/20/83).

In dismissing a complaint for failure of the Complainant to appear at hearing, the examiner must discuss the reason for denying a last minute request for postponement. Schilling v. Walworth County (LIRC, 03/09/83).

766 Interpreters; translations; inability to speak or read English

The Administrative Law Judge did not err in deciding to hold a hearing on the question of whether the Complainant required an interpreter at the same time as the substantive hearing. McCarthy v. Dunargin Wis., LLC (LIRC, 02/28/14).

A party who cannot read English, or who does not read English well, has an obligation to have documents translated. In this case, the Complainant was able to file a complaint, to read or have translated the initial determination, and to take appropriate action to file a timely appeal. She was also able to read or have translated the Administrative Law Judge's dismissal order, and she filed a timely petition for review. There was no reason to believe that the Complainant was not capable of understanding, or gaining understanding of, the hearing notice, not withstanding her lack of facility with English. Her failure to do so did not provide her with good cause for missing the hearing. Accordingly, the dismissal of her complaint was affirmed. Further, the Labor and Industry Review Commission denied the Complainant's request that it issue its decision in this matter in Spanish. If the Complainant had difficulty reading the decision of the Commission, it was her obligation to have it translated. Hernandez v. Sara Lee Corp. (LIRC, 05/21/04).

The Complainant failed to establish that he was deprived of an opportunity for a full and fair hearing because the individual who served as an interpreter for the hearing was not able to communicate effectively in American Sign Language ("ASL"). The record of the hearing established that the interpreter had trained at the National Technical Institute for the Deaf, that she was certified by the National Registry of Interpreters for the Deaf, and that she had many years of experience interpreting for the deaf. Further, the Complainant failed to cite even a single specific example of any point on which something said by the interpreter supposedly varied from what he told her. Buska v. Central Bldg. Maint. (LIRC, 09/28/95).

The identity of an interpreter should be noted on the record at the time that he or she is sworn in. The party requesting the interpreter should satisfy himself as to the qualifications of the interpreter by examining the

interpreter as to those qualifications prior to the commencement of his testimony. Buska v. Central Bldg. Maint. (LIRC, 09/28/95).

Where an interpreter is present at a hearing, the Administrative Law Judge should note the following for the record: (1) the name of the interpreter, (2) what training, experience and other qualifications the interpreter has, and (3) who requested or arranged for the presence of the interpreter at the hearing. Buska v. Central Bldg. Maint. (LIRC, 04/14/95).

767 Presentation of evidence regarding remedy

A Complainant who disagrees with the Administrative Law Judge's rulings should proceed with the hearing to preserve her objections to such rulings. If the Complainant refuses to proceed with the hearing due to her objections to the rulings and her complaint is dismissed as a result, she will be deemed to have waived her objections to those rulings. McCarthy v. Dunargin Wis., LLC (LIRC, 2/28/14).

The usual practice in discrimination cases is to issue a generally-worded back pay order if a statutory violation is proved, and then to hold a hearing to determine the specific amount of back pay owed if the parties cannot agree. Achilli v. Sienna Crest Assisted Living (LIRC, 01/28/09).

The Respondent contended that, because the practice in proceedings before the Equal Rights Division is to bifurcate the hearing process (i.e., to hear the case on the merits and, if the Complainant prevails, to remand the case for a remedy hearing), the case should be remanded for a remedy hearing where the Respondent should be allowed to argue that the Complainant failed to mitigate her damages. However, the asserted usual practice of bifurcated hearings does not justify the Respondent's failing to plead the affirmative defense of failure to mitigate damages in its answer; nor does it support the contention that the affirmative defense could first be pleaded after the hearing on liability. Therefore, the Respondent is not entitled to raise the issue of mitigation of damages as a part of a hearing on remedy in this case. Radlinger v. Kentucky Fried Chicken (LIRC, 06/20/03).

Where the Department affirmatively limited the hearing to the issue of whether discrimination had occurred, it was patently unfair to punish the Respondent for failing to produce evidence on the issue of remedy. Milwaukee Bd. of Sch. Dir. v. LIRC (Milw. Co. Cir. Ct., 06/14/00).

The usual practice in discrimination cases is to conduct a hearing on the question of whether a statutory violation occurred and to issue a generally worded back pay order if a violation is proven, and then to hold a second hearing if the parties cannot agree on the amount of back pay owed. Kaczynski v. WSR Corp. (LIRC, 10/29/97).

In discrimination cases arising under the Act, the usual practice is to conduct hearings on the question of a statutory violation but not to take evidence on the specific amount of monetary damages. If a statutory violation is proven, generally-worded back pay orders direct the violator to pay that back pay which the victim would have received but for the violation, less the statutory set-offs. If the parties cannot agree on the exact amount of back pay owing, a subsequent hearing is held to make that determination. Toonen v. Brown Co. (LIRC, 10/15/82).

A DILHR hearing under the Wisconsin Fair Employment Act is not a "class two" proceeding since back pay is not a sanction or penalty, and a DILHR examiner may therefore preside at a supplemental hearing to determine a remedy. Appleton Elec. v. LIRC (Kreider) (Dane Co. Cir. Ct., 05/12/81).

769 Miscellaneous

Dismissal of the complaint as a sanction for disruptive conduct at the hearing is not permissible. The administrative law judge may regulate the hearing, but due process requires that the Complainant be given an opportunity to complete the hearing and that he receive a decision on the merits of the case. However, an administrative law judge may reasonably infer that a party engaging in disruptive or harassing conduct has completed his testimony and may move on to the next phase of the hearing. In the event a Complainant is unable to restrain himself or herself during the presentation of the Respondent's evidence, the administrative law judge may, after providing the Complainant with a clear warning, direct a Complainant to leave the hearing room while the hearing continues until such time as the Complainant is able to comport himself or herself appropriately. Vaserman v. Hayat Pharmacy (LIRC, 01/10/20).

In a "split" case, in which part of the complaint is before an administrative law judge on the issue of probable cause while another part is awaiting decision on the merits, the administrative law judge assigned to the probable cause hearing may not dismiss the entire complaint based upon the Complainant's failure to appear at the hearing, but only those portions that are pending before him or her. Birmingham v. Capital Finishing, LLC (LIRC, 07/31/18).

A Complainant's opportunity to challenge the credibility of a witness is through cross-examination at the hearing and not through a "motion for perjury." Rosneck v. UW Madison General Library System (LIRC 08/30/17), aff'd sub nom. Rosneck v. LIRC (Dane Co. Cir. Ct., 05/11/18), aff'd (Ct. App., Dist. IV, unpublished, 07/3/2019).

Where at the hearing the Complainant was not asked to explain any discrepancies between his testimony and what he wrote on his complaint form, and was not given an opportunity to provide an explanation for any apparent inconsistencies between the two, the Commission would not rely on the complaint form to impeach the Complainant's credibility. Hopson v. Actuant Corp. (LIRC, 05/8/14).

The Respondent's motion to dismiss was properly granted where the Complainant abruptly left the hearing without presenting any evidence. A Complainant bears the burden of proof. The Complainant's failure to present any evidence establishes as a matter of law that there has been a failure of proof. Robinson v. Schlossmann's Imports (LIRC, 05/31/12).

An Administrative Law Judge may require a party to provide competent medical evidence to support its request for relief from an order on the ground of illness. However, there is no absolute requirement that a party requesting relief from an order on the ground of illness must provide medical evidence in support of that request. Johnson v. Roma Pizza II (LIRC, 02/25/09).

A claim that a person has committed perjury is a criminal matter and, consequently, it is a matter over which neither the Equal Rights Division nor the Labor and Industry Review Commission has any authority. Bedynek-Stumm v. State of Wisconsin (LIRC, 02/08/08).

The concept of conforming the pleadings to the proof is not applicable in administrative proceedings under the Wisconsin Fair Employment Act. Hanson v. DOT (LIRC, 06/14/05).

A party who disagrees with rulings rendered by an Administrative Law Judge prior to hearing is required to proceed to hearing, preserving her objections to such rulings on the record for review on appeal. If the Complainant instead refuses to proceed with the hearing due to her objections to the Administrative Law Judge's rulings, and her complaint is dismissed as a result, the Complainant is deemed to have waived her objections to these rulings. Casetta v. Zales Jewelers (LIRC, 06/14/05).

While secs. 111.321 and 111.325 of the Wisconsin Fair Employment Act provide that no "person" may engage in an act of employment discrimination, the Act also expressly provides for employer liability for any financial remedies ordered as a result of a violation of the law "by an individual employed by the employer." Sec. 111.39(4)(c), Stats. Thus, individual supervisors acting as agents of the employer should not be named as separate Respondents in discrimination complaints. Yaekel v. DRS, Ltd. (LIRC, 11/22/96).

A Complainant was granted all of the procedural due process rights to which he was entitled in an administrative proceeding where he had an opportunity to present his case before an impartial Administrative Law Judge and to present witness testimony and documentary evidence on his behalf. Further, he was given ample notice to prepare for the hearing and to secure legal representation if he so desired. Jones v. Willowglen Acad. (LIRC, 03/28/95).

Where the Complainant elected to leave the hearing without explanation prior to the conclusion of her testimony, the Department properly dismissed her complaint because the evidence in the record did not support a finding of probable cause. LIRC declined to remand the matter for further hearing where the Complainant did not demonstrate that she had been unable to proceed with the hearing as originally scheduled. Hale v. Hearthside Rehab. Ctr. (LIRC, 02/08/94).

A Complainant continuously impeached his own credibility by asserting that he suffered from a mental illness which limited or destroyed altogether his ability to actually recall the alleged events in question. Jackson v. City of Milwaukee (LIRC, 10/28/93).

Allegations on appeal that the Administrative Law Judge appeared to be sleeping during the hearing must fail where (1) there was a disputed issue of fact as to the occurrence of the conduct, (2) the issue was waived by counsel's failure to make a timely objection to the Administrative Law Judge, and (3) even if true, the record was transcribed and the ALJ's decision was rendered on the complete record and briefs. Gronning v. Sch. Dist. of Viroqua Area (LIRC, 07/28/93).

Where the Respondent has not shown that there was undue delay in holding the hearing and where it never objected because the matter was not scheduled for hearing earlier, its argument that it has been unfairly penalized by delays is without merit. Holbrook v. Coffee Systems (LIRC, 01/26/89).

An Administrative Law Judge could properly reject the Complainant's testimony as being incredible, where the Complainant acknowledged that she suffered from a mental illness which involved "relentless" auditory hallucinations and that she heard her supervisor "talking to her" at home. Tatum v. LIRC, 132 Wis. 2d 411, 392 N.W.2d 840 (Ct. App. 1986).

770 Record of Hearing, Decisions and Orders

771 Hearing Record; Transcripts

The digital recording of a hearing on probable cause was lost due to a computer problem. The parties did not reach a stipulation regarding the content of the lost testimony, and the only substitute for the recording was a two-page summary written by the Administrative Law Judge. The summary was not sufficient to allow the commission to fully and fairly evaluate the findings and conclusions of the administrative law judge, making it necessary to remand for a new hearing on probable cause. Okerlund v. The Berquist Company (LIRC, 07/13/17).

Because of the poor quality of the recording of the hearing, the Division did not produce a summary of proceedings for the Commission. Instead, the ALJ produced a summary based on notes the ALJ took at the hearing. The Commission found the recording to be audible in part. Based on its auditing of the recording,

both to check the accuracy of the ALJ's notes and to glean additional testimony that was not contained in those notes, the Commission concluded that the record, while incomplete, was sufficient to allow it to fully and fairly evaluate the findings and conclusions of the ALJ. A remand for a repeat of the testimony was unnecessary. Schloemer v. Cupola House (LIRC, 06/14/13).

The decision of the Administrative Law Judge was set aside and the case was remanded to the Equal Rights Division for a new hearing where the testimony of the Complainant was not recorded and the Administrative Law Judge was not able to provide his own handwritten notes regarding the testimony. Dygon v. Smurfit Stone Container Corp. (LIRC, 02/28/07).

The hearing transcript is not part of the decision which is issued by the Equal Rights Division. Moreno v. Wis. Elec. Power Co. (LIRC, 06/21/96).

The Labor and Industry Review Commission would not give consideration to a transcript of the hearing which was not prepared by an independent, reputable court reporter or transcriptionist and that did not include a certification by the transcriptionist that it was an original, verbatim transcript of the proceedings, as required by sec. ILHR 218.19(2), Wis. Admin. Code. Maxberry v. Aldridge, Inc. (LIRC, 05/28/96).

The fact that a portion of a tape recording of the hearing was blank had no effect on the Labor and Industry Review Commission's ability to complete a full and fair review where the Commission had available to it the summary of proceedings prepared by the Administrative Law Judge. Popp v. Rhinelander Paper Co. (LIRC, 07/28/95).

The case was remanded for a new hearing where part of the original hearing was either not tape recorded, or the tape recording of that part of the hearing was either destroyed or lost. Saccomandi v. E. Pocus & Co. (LIRC, 09/09/93).

LIRC would not consider the partial transcripts filed by the Respondent since they were not a transcription of the entire hearing, and they lacked a sworn certification by the transcriptionist that they represented an accurate transcription of the taped record. The certification must be sworn and must represent that the person signing the certification was actually the transcriber, i.e., the person who transcribed the transcript. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

The Commission will not consider a transcript which does not appear to be a verbatim record of the testimony given at the hearing. Crawford v. School Dist. of Beloit (LIRC, 11/08/91).

The hearing was held twice because of equipment malfunction. The Complainant asserted that the testimony of one of the Respondent's witnesses changed between the first and the second hearing. Even though the testimony of the first hearing was lost, the Complainant was not prejudiced since the Complainant's attorney had the opportunity to cross-examine that witness and could have attempted to impeach her prior testimony at the second hearing. Smith v. Root River Inn (LIRC, 08/21/91).

Parties are entitled to inspect and copy transcripts which are filed with the Equal Rights Division since they are public records. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

A court reporter was adequately appointed by the Department as required by sec. 111.39(4)(b), Stats., where: (1) the Equal Rights Division sent the parties a notice indicating that any party wishing to engage a court reporter at the hearing would be allowed to do so, (2) the Administrative Law Judge stated on the record that a court reporter was recording the proceedings, and (3) the court reporter did in fact take down the entire proceedings. Duarte-Vestar v. Goodwill Indus. (LIRC, 11/09/90).

A case was remanded for rehearing where a portion of the Complainant's testimony was not recorded. Krenz v. Lauer's Food Mkt. (LIRC, 09/27/90).

Two court reporters ended up being present and reporting the hearing, and both filed transcripts with the Equal Rights Division. The Administrative Law Judge's decision was based on one of the transcripts, the other transcript not having been filed until after he issued his decision. Notwithstanding that there were some discrepancies in the two transcripts, they were not significant to the decision, and did not justify reversal. Campbell v. LIRC (Milwaukee Co. Cir. Ct., 02/19/88).

No due process rights of the Complainant were violated when the Hearing Examiner, who had initially failed to turn on the tape recorder, corrected the problem by having the testimony which had not been recorded repeated. Hill v. LIRC (Milwaukee Co. Cir. Ct., 09/21/85).

Rehearing was granted where the stenographic record of the hearing was lost. Hill v. Kitchen Reddy Foods (DILHR, 04/17/75).

772 Findings of Fact

Where the parties have chosen to submit their case entirely on a fact stipulation without offering any testimony, the stipulated facts will be accepted as true. Strayhorn v. Social Dev. Comm'n (LIRC, 11/21/13).

The fact that evidence material to issues which were not contained in the complaint became a part of the hearing record did not justify the Administrative Law Judge making findings in regard to these issues. The concept of conforming the pleadings to the proof is not applicable in administrative proceedings under the Wisconsin Fair Employment Act. Smith v. The Terrace at St. Francis (LIRC, 12/08/06).

Findings of fact need be only as to the ultimate facts where the evidence is sufficient to establish the ultimate facts found and such facts are inherent and necessary to the determination of the questions involved in arriving at the decision. Ultimate or general findings imply all facts necessary to support them, and a finding not explicitly made may be inferred from other properly made findings and from findings which, even though not made, would be supported by evidence in the record or inferences which can be drawn from the evidence. Polesky v. United Brake Parts (LIRC, 08/30/96).

The question of an employer's motivation presents a question of ultimate fact. Hoell v. LIRC, 186 Wis. 2d 608, 522 N.W.2d 234 (Ct. App. 1994).

There is no requirement that the Administrative Law Judge's decision provide a detailed account as to the resolution of all the evidence offered at the hearing. Sec. 227.47, Stats. requires only that "(t)he findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence." All that is required under this section is that the ALJ's decision adequately explains the basis for the decision. Patterson v. City of Milwaukee Dep't of Health (LIRC, 04/20/93).

When a witness offers testimony at hearing on a material issue, a finding of fact that "the witness testified . . ." is unsatisfactory, since it merely describes what happened at the hearing and does not resolve the question of whether what the witness testified to is considered by the trier of fact to be true. Where a witness has testified as to a matter and the Administrative Law Judge accepts the testimony as true, it is preferable for the findings of fact to simply recite the substance of the witness' testimony as a fact found by the Administrative Law Judge. Green v. Woodman's Food Mkts. (LIRC, 01/30/91).

The case was remanded for further hearing where the Administrative Law Judge failed to make findings of fact and conclusions of law with respect to an issue raised in the amended complaint. Krenz v. Lauer's Food Mkt. (LIRC, 09/27/90).

Neither findings nor an order should be made on allegations of discrimination not identified as issues for hearing in the notice of hearing. Yarie (Schroeder) v. The Pumphouse (LIRC, 9/14/90).

It was improper for the Administrative Law Judge to make a finding regarding the Complainant's difficulties in communicating when the Respondent had not raised those matters. Blohm v. Holiday Inn (LIRC, 01/31/90).

Where documents which were given to the investigator are not presented and received into the record, the Administrative Law Judge has no authority to reach into the file to consider those matters. Beach v. Best Buy (LIRC, 10/26/89).

The contents of an initial determination may not be considered by the examiner or the Commission in making factual determinations about a case when it has not been received as evidence or officially noticed. Schwantes v. Orbit Resort (LIRC, 05/22/86).

To the extent that the examiner's assessment of the demeanor of the witnesses is helpful in resolving the issue of whether a Respondent's articulated reasons for a challenged action are pre-textual, the examiner's assessment of that demeanor is entitled to deference. Footit v. Oshkosh Door Corp. (LIRC, 02/03/86).

Where the complaint, initial determination, notice of hearing, and hearing dealt only with the question of whether the Complainant was constructively discharged by virtue of sexual harassment, it was not appropriate to make findings on a claim that the Complainant was discharged in retaliation for complaining of discrimination. Winter v. Madison Home Juice Co. (LIRC, 07/19/85).

A finding of fact may not be based on a record contained in the investigative file but not introduced at hearing. Injazoulian v. J.I. Case (LIRC, 07/16/82).

The court is bound by a joint stipulation of fact entered into by the parties and incorporated by the examiner into the decision. Milwaukee Area Tech. College v. LIRC (Gilbert) (Milwaukee Co. Cir. Ct., 02/14/80).

While the hearing examiner's ruling that the discrimination did not fall within a statutory exception should have been labeled a finding of fact, the court may supply a missing finding where the evidence is clear and convincing. A mislabeled finding will be treated as what it is rather than what it is called. DHSS v. LIRC (Johns) (Dane Co. Cir. Ct., 11/28/79).

The hearing examiner may not reject testimony as to the existence of a fact without other evidence which renders that fact unlikely. The hearing examiner's skepticism did not justify rejecting the employer's testimony that the male applicant possessed superior job qualifications where there was no evidence to render that explanation unlikely. Waukesha Pub. Sch. v. DILHR (Coulson) (Dane Co. Cir. Ct., 07/06/78).

In concluding as a matter of law that there is no evidence to support probable cause, a hearing examiner must set forth the findings of fact upon which that conclusion is based. McMillan v. DILHR (Greyhound Lines) (Dane Co. Cir. Ct., 05/12/77).

The Equal Rights Division cannot base crucial or essential findings upon hearsay alone. Hunt v. City of Madison (DILHR, 02/11/75).

773 Conclusions of Law; opinions and decisions in general

The Complainant's request for a new hearing on the ground that the administrative law judge's decision contained no detailed analysis of the evidence or explanation of the credibility determinations that were made was rejected. It was clear from the factual findings that the administrative law judge found the Respondent's version of events to be credible and that he did not believe the Respondent was motivated to discriminate against the Complainant. The administrative law judge's decision was adequate for purposes of review. Volkmann v. Colonial Mgmt. Group LP (LIRC, 01/30/15), aff'd sub nom. Volkmann v. LIRC and Colonial Management Group, LP (Chippewa Co. Cir. Ct., 09/09/15).

When an investigation results in a determination of no probable cause and that is appealed to a hearing on the issue of probable cause, and when that hearing results in an ALJ's decision that there is probable cause and that the matter should proceed to a hearing on the merits, the proceedings on the merits which follow are entirely de novo. The record of the probable cause hearing is not part of the record on which the merits are to be decided, and the decision of the ALJ who presided at the probable cause hearing is of no relevance and of no weight in the merits proceedings. Neither the probable cause hearing record nor the decision resulting from it should be cited as having any significance, or accorded any significance, in the process of trying and deciding the merits of the case. Walker v. City of Eau Claire (LIRC, 03/28/13).

The concept of conforming the pleadings to the proof is not applicable in administrative proceedings under the Wisconsin Fair Employment Act. In this case, the Administrative Law Judge's decision exceeded the scope of the issues investigated by the Equal Rights Division, and noticed for hearing. Those issues were whether there was probable cause to believe that the Respondent had discharged the Complainant in retaliation for engaging in a protected activity, and whether there was probable cause to believe that the Respondent had discriminated against the Complainant in the terms or condition of her employment because of pregnancy. The Administrative Law Judge improperly made findings in regard to, and resolved, the issues of whether the Complainant was retaliated against in regard to terms and conditions of employment, and whether the Complainant was discharged because of pregnancy. No authority existed for making findings or rendering a decision in regard to these issues which had not been investigated by the Equal Rights Division, or noticed for hearing. Smith v. The Terrace at St. Francis (LIRC, 12/08/06).

An administrative law judge may carry out a careful and thoughtful review of all of the evidence, find himself more persuaded by one side's case than the other, and decide that the description of the facts and appropriate inferences which that side urged were substantially accurate. In such a case, adopting findings and conclusions urged in that party's brief would be a reasonable approach. It is common in federal civil rights litigation for courts to call for the parties to submit proposed findings of fact and to then simply adopt the entire set of proposed findings submitted by the party whose case the court has found most persuasive. It is not argued in such cases that this evidence is a lack of critical thinking on the part of the court. Nor is such an argument warranted where the administrative law judge has, in his decision, adopted arguments made by one of the parties. Wells v. Roadway Express (LIRC, 05/13/02).

There is no rule that an Administrative Law Judge must specifically describe or comment on demeanor and credibility issues in a written decision. Campbell v. Barch Communications (LIRC, 01/17/97).

There is no requirement that an administrative decision be entered with exacting specificity. In particular, it is not necessary for administrative agencies to give reasons for the implied rejection of all alternatives in the evidence, as this would be too onerous a burden. This also applies to credibility issues. A specific finding that the testimony of a party was not believed is not required. Polesky v. United Brake Parts (LIRC, 08/30/96).

An Administrative Law Judge improperly found that a particular individual discriminated against the Complainant in conditions of employment, where the Complainant had not so alleged in her complaint. In the complaint, the only allegations of discrimination in conditions of employment were expressly related to alleged mistreatment by another individual. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

An Administrative Law Judge may not issue a decision on the merits after a hearing on the issue of probable cause, absent a stipulation to do so by the parties. Campbell v. A.J. Sweet of Madison, Inc. (LIRC, 08/29/92).

Chapter 227, Stats., does not require an Administrative Law Judge to announce the reasons for a bench ruling. Even in a written decision, an administrative agency need not set out what evidence it believed and what it rejected. It has been deemed unnecessary for administrative agencies to give reasons for the implied rejection of all alternatives, as this would be too onerous a burden. Vaisman v. Aldridge, Inc. (LIRC, 10/21/91).

The Administrative Law Judge erred in concluding that a discharge was in retaliation for opposition to a discriminatory practice where the complaint alleged only that the Complainant was discharged because of marital status and where that was the only issue investigated by the Department and the only issue set forth in the notice of hearing. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

774 Orders

Where a specific act of discrimination against a specific individual was alleged in the complaint and specified in the notice of hearing, the agency could not order the employer to cease from discriminating against other individuals. Haynes v. Nat'l Sch. Bus Serv. (LIRC, 01/31/92).

Where the complaint and notice concerned alleged discrimination in compensation, the Department could not make findings or orders concerning discrimination in hiring. Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W.2d 405 (Ct. App. 1984).

The scope of DILHR findings, conclusions and orders is not limited by the initial determination, but by the notice of hearing. Where the notice of hearing pertained to issues affecting only a single employee and a single act of discrimination, DILHR's application of its order to "like situated employees or applicants for employment" and "ongoing acts of discrimination" was overly broad. Chicago, Milwaukee, St. Paul & Pacific R.R. v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W.2d 443 (1974).

It would be a presumptive denial of due process to extend a DILHR order to a hearing witness not named as a party. Anfang v. Whitcomb (DILHR, 11/26/74).

A DILHR order was invalid because it was based on agency pregnancy guidelines which were not adopted in conformity with the procedural requirements of Chapter 227. Dep't of Employe Trust Funds v. DILHR (Riedel) (Dane Co. Cir. Ct., 08/30/74).

Where the complaint and notice concerned an allegedly unlawful discharge and transfers, the Department could not make findings or orders concerning independent compensation issues. Wis. Tel. Co. v. DILHR, 68 Wis. 2d 345, 228 N.W.2d 649 (1975); Gen. Elec. Co. v. Wis. Employment Relations Bd., 3 Wis. 2d 227, 88 N.W.2d 691 (1958).

775 Delay in issuance of decision

The Wisconsin Fair Employment Act does not contain mandatory time limits within which decisions must be issued. Absent a mandatory requirement, administrative delay in issuing a decision is not reversible error. Zebrowski v. Woman's Club of Wis. (LIRC, 11/28/07).

A delay in the issuance of a decision under the Wisconsin Fair Employment Act does not constitute a deprivation of due process. Meier v. Whispering Oaks Care Ctr. (LIRC, 06/04/97).

Administrative delay in issuing a decision is not reversible error. Although the Respondent had a continuing responsibility for back pay while awaiting the Administrative Law Judge's decision, it could have terminated that loss and its continuing liability at any time by reinstating the Complainant. Crabtree v. Wilderness Home Supply (LIRC, 05/09/97).

The Wisconsin Fair Employment Act contains no mandatory time limits for issuing decisions. LaCoy v. Wis. Farmers Union (LIRC, 02/28/96).

It is unfortunate when cases take a long time to be decided, but delays do not constitute a deprivation of due process. Jones v. Milwaukee County (LIRC, 04/06/95).

Administrative delay in the issuance of a decision under the Wisconsin Fair Employment Act does not constitute a denial of due process. Binder v. Nercon Eng'g & Mfg. (LIRC, 12/18/90).

The Commission declined a Respondent's request that interest on the back pay award should not be imposed beyond 150 days after the date on which the Complainant's reply brief was filed with the hearing examiner, in a case in which it took the examiner more than two years from the hearing date to issue his decision, concluding that the Respondent had known since the initial determination of probable cause that the Complainant was likely to prevail and that the examiner's delay, while unfortunate, merely delayed payment of an award to the Complainant and his attorney and actually benefited the Respondent. Wetzel v. Clark County (LIRC, 06/05/87).

An Administrative Law Judge's delay of over a year in issuing an order of dismissal after orally dismissing a complaint at the hearing, while a regrettable circumstance, does not provide a basis for reversal or a new hearing. Neither do errors in the Administrative Law Judge's Summary of Proceedings justify a reversal or rehearing where the Commission reviewed the case based on listening to the actual tapes of the hearing and thus was not affected by any errors. Martin v. Indus. Combustion Div. (LIRC, 06/04/87).

The Complainant was not denied due process because of unreasonable administrative delay where DILHR's decision was issued almost two years after the complaint was filed. Sanchez v. LIRC (Dane County Community Action Comm.) (Dane Co. Cir. Ct., 11/20/80).

The Act contains no mandatory time limits for scheduling hearings or issuing decisions and therefore administrative delay is not a reversible error. There was no denial of due process because of unreasonable administrative delay where the complaint was filed in 1973, a hearing was held in 1975 and the examiner's proposed order was filed in 1977, and the employer will not be heard to complain that its liability to the employee accrues during litigation. Chicago & N.W. R.R. v. LIRC, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

779 Miscellaneous

Sec. 227.48, Stats., provides that every decision shall include notice of any right of the parties to petition for administrative review of adverse decisions. Settlement agreements may be adverse decisions. Therefore, the

Equal Rights Division should attach a notice of appeal rights to all orders in which a complaint is dismissed as a result of a settlement agreement. Fettig v. County of Fond du Lac (LIRC, 07/14/06).

Decisions by Administrative Law Judges of the Equal Rights Division are final decisions of the Department. They are reviewed by LIRC only if a petition for review is filed. Polesky v. United Brake Parts (LIRC, 08/30/96).

There is no requirement that an administrative decision be entered with exacting specificity. In particular, it is not necessary for administrative agencies to give reasons for the implied rejection of all alternatives in the evidence, as this would be too onerous a burden. This applies to credibility issues as well as other issues. A specific finding that the testimony of a party was not believed is not required. Polesky v. United Brake Parts (LIRC, 08/30/96).

It is not the Administrative Law Judge's duty to comment on all authorities cited in the arguments of the parties. The Administrative Law Judge need not provide an elaborate opinion, so long as the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

Where the Department's decision was made by an Administrative Law Judge other than the Administrative Law Judge who conducted the hearing, it was not necessary for the decision writer to consult with the presiding ALJ regarding his or her impressions of witness credibility because, in this case, the decision was based upon drawing inferences from the facts and not from making credibility determinations. Thwing v. Waukesha Engine Div., Dresser Indus. (LIRC, 03/07/94).

An Administrative Law Judge has no authority to alter his decision once the period for filing a petition for review from that decision has expired. However, before the deadline for the filing of a petition for review has passed, and if no petition has yet been filed, an Administrative Law Judge does have the discretion to alter his or her decision. Thus, an Administrative Law Judge does have the discretionary authority to set aside a decision on the merits and issue a dismissal based on withdrawal within the 21-day period following the issuance of the original decision on the merits if no petition for review has been filed. However, it is not enough that the request for withdrawal of the complaint be filed within the 21-day period. The Administrative Law Judge must also issue the amended decision within that time. Wuest v. Motel 6 (LIRC, 11/05/91).

An Administrative Law Judge was authorized to amend her final decision before the Respondent filed its petition for review and before the time for petitioning expired. Wood v. Purolator Courier Corp. (LIRC, 06/11/91).

Notwithstanding sec. 227.48, Stats., the Wisconsin Fair Employment Act does not require that separate copies of decisions be sent to separate parties whose mailing addresses are identical. Mundy v. Iselin Catering (LIRC, 08/08/90).

It is not improper for an Administrative Law Judge to state in his memorandum opinion that he agrees with one party's position and has accepted that party's brief in support of his decision. Richland Sch. Dist. v. DILHR (Richland Co. Cir. Ct., 04/20/90).

It would be a denial of due process if a case were decided by an Administrative Law Judge who had not presided over the hearing and the deciding judge did not have the benefit of the impressions of the presiding Administrative Law Judge, who heard the testimony, as to the demeanor of witnesses. In this case, however, the Judge who presided over the hearing prepared a memorandum which summarized her impressions of the demeanor of witnesses, which was placed in the file, and which the deciding Judge had the benefit of. Thus, there was no denial of due process. Saler v. Spencer Gifts (LIRC, 09/30/88).

The decision of the Administrative Law Judge in one Complainant's case was inconsistent with her decision in another Complainant's case against the same Respondent, but this was because the same testimony was not elicited at both hearings. Rogers v. Milwaukee County (LIRC, 09/19/88).

Where the decision was not dependent upon and was not based on any resolution of credibility or demeanor questions, the decision was not defective because it was issued by an examiner other than the examiner who presided at the hearing. Wilson v. Vollrath Co. (LIRC, 09/15/86).

An Administrative Law Judge is without authority to amend his or her decision after the time for appealing it has expired. Foster v. Crest Bldg. Maint. (LIRC, 01/30/84).

Where an examiner other than the one who held the hearing makes findings on the credibility of witnesses, that examiner should state in the record the personal impressions of the first examiner concerning witness demeanor. Muth v. LIRC (A.O. Smith) (Milwaukee Co. Cir. Ct., 07/22/83).

780 Reconsideration, rehearing

In order to justify a reopening of a hearing on the basis of newly discovered evidence, it must be shown that the evidence is strong enough to reverse or modify the Administrative Law Judge's decision and that such evidence could not have previously been discovered by due diligence. In her petition for Commission review, the Complainant failed to describe what evidence she sought to present, making it impossible to evaluate its strength, and failed to explain that it was newly discovered evidence that could not have been discovered by due diligence. There are no grounds, then, for remanding this case to take newly discovered evidence. Delgado v. Saint Gobain Performance Plastics Corp. (LIRC, 11/29/13).

The Respondent failed to provide the Complainant with copies of evaluations of potentially similarly-situated employees in response to a request for production of documents, based on the explanation that the documents were not in the Respondent's possession. The burden is on the party resisting production to prove that compliance is not possible because of non-possession of documents. The ALJ misallocated the burden of proof by requiring the Complainant to prove that the Respondent had possession of the documents. Reversal or remand is not required, however, because the ALJ's error did not prejudice the Complainant. In weighing the prejudicial effect of a mistaken procedural ruling, the error must be placed in the context of the evidence actually presented in the case. The Complainant failed to show that his situation was similarly situated to that of the employees who were the subjects of the evaluations sought by the Complainant in discovery, and failed to present other evidence raising an inference of discriminatory motive. Obasi v. Milwaukee Sch. of Eng'g (LIRC, 10/14/13).

Where it is alleged that the actions of an attorney adversely impacted the party who retained the attorney in a fair employment hearing, the Commission has consistently held that the actions of the attorney do not provide a basis for setting aside the ALJ's decision or granting further hearing. It is more equitable to allow the adverse consequences to fall on the shoulders of the party who has chosen the attorney, than on the adversary or other litigants. Ewing v. Kohl's Dept. Stores (LIRC, 07/22/13).

Actions by a party's attorney do not provide a basis for setting aside an ALJ's decision and granting a further hearing. Burt v. Skaleski Moving & Storage, Inc. (LIRC, 04/8/13).

An Administrative Law Judge has no authority to modify a decision once the 21-day period for petitioning for review by the Labor and Industry Review Commission has expired. However, an Administrative Law Judge may modify a decision if the period for petitioning for Commission review of that decision has not yet run and if no

petition for Commission review has yet been filed. In this case, the Respondent submitted a "motion to re-open proceedings" to the Equal Rights Division several months after the Administrative Law Judge's decision had been issued. The Administrative Law Judge appropriately referred the matter to the Labor and Industry Review Commission so that it could determine if the motion should be considered as an attempt to petition for Commission review of the ALJ's decision. Treige v. Servicemaster Clean (LIRC, 06/25/10).

Neither the Wisconsin Fair Employment Act nor the administrative rules of the Equal Rights Division allow an Administrative Law Judge to entertain requests for reconsideration. In this case, the Administrative Law Judge dismissed the complaint for the Complainant's failure to comply with discovery requests. When the Equal Rights Division received subsequent correspondence from the Complainant asking that consideration be given as to whether or not he had timely responded to the discovery requests, the Equal Rights Division should have treated the correspondence as a petition for review, rather than as a request for reconsideration. No statutory or administrative authority currently provides the Administrative Law Judges in the Equal Rights Division with the ability to reconsider or take further action on a decision they have issued (even within twenty-one days of the mailing of that decision when no petition for review has been filed). Nabors v. Kelly IT Resources (LIRC, 10/06/06).

An administrative re-hearing will be granted only on the basis of material error of law or fact, or newly discovered evidence which is sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence. A re-hearing was not granted in this case, where the Complainant did not contend that the expert medical evidence she wished to present was "newly discovered," but rather that the evidence would have been presented at the hearing had her original attorney properly presented her case. Patek v. Waukesha Engine Div., Dresser Indus. (LIRC, 08/31/95).

The Respondent's request for further hearing based on its allegation that it did not receive the notice of hearing was denied where LIRC could infer that the Respondent received the notice of hearing. The file indicated that the notice was sent to the Respondent, and was not returned by the post office. In addition, the Respondent's counsel filed an answer to the complaint, which permitted the inference that the Respondent received the notice since the Respondent's counsel had not yet filed a notice of retainer and had not been mailed a notice of hearing. Rogers v. FASTOP I (LIRC, 10/21/92).

The Complainant's assertion in a petition for review of an Administrative Law Judge's decision that her attorney failed to provide her with proper legal representation was not an adequate basis for setting aside the Administrative Law Judge's decision or for granting a rehearing. Neuberger v. Twin Cities Storm Sash Co. (LIRC, 01/22/92).

A misunderstanding by a party as to the scope of the proceeding is not a sufficient basis upon which to grant a petition for rehearing. Beaverson v. DOT (Wis. Pers. Comm'n, 11/19/90).

The case was remanded for rehearing where a portion of the Complainant's testimony was not recorded. Krenz v. Lauer's Food Mkt. (LIRC, 09/27/90).

The Personnel Commission lacks the authority to reopen a contested case which was resolved and dismissed with prejudice two years earlier based upon a claim by the Complainant that the Respondent has been unable or unwilling to fulfill the terms of the settlement agreement upon which the case was resolved. Krueger v. DHSS (Wis. Pers. Comm'n, 01/10/90).

At the commencement of the hearing, the Complainant informed the Administrative Law Judge that his attorney was unavoidably delayed in returning to Wisconsin from out of state. The hearing proceeded and the Complainant presented his own testimony. The Administrative Law Judge then granted the Respondent's motion

to dismiss. The subsequent motion to vacate the proceedings filed by counsel for Complainant was without merit. Stoffel v. Briggs & Stratton (LIRC, 09/20/89).

The Complainant's claim that his attorney provided inadequate representation at the hearing is not a basis for reversing the Administrative Law Judge's decision or for ordering further hearing on appeal. McCabe v. All-Car Automotive (LIRC, 07/31/89).

The Complainant appeared at the hearing in person, without an attorney, and after hearing, the Administrative Law Judge dismissed the complaint. In his petition for review, the Complainant requested further hearing so that he might engage an attorney and witnesses to make a full presentation of the facts. Noting that the Complainant had a full and fair opportunity to present his case, and could have engaged the services of an attorney to prepare and present his case for hearing had he desired, and that the fact that he did not do so was his own decision, the Commission declined to order reopening of the hearing. Reykdal v. County of Bayfield (LIRC, 09/30/88).

The Commission will grant a "rehearing" on one of its decisions only on the basis of some material error of law, some material error of fact, or the discovery of new evidence sufficiently strong to reverse or modify the Commission's Order and which could not have been previously discovered by due diligence. An argument that a rehearing is necessary because of a party's attorney's failure to adduce all relevant evidence, and that such evidence not presented constitutes new evidence, fails to constitute a basis for granting a rehearing. Zurawski v. Dana Corp. (LIRC, 05/06/88).

In order to justify an order for further hearing based on newly discovered evidence, a Complainant must show that the request for such an order is based on new evidence sufficiently strong to reverse or modify the Administrative Law Judge's decision, which could not have been previously discovered by due diligence. Whipp v. DePaul Rehab. Hosp. (LIRC, 02/24/88).

The Complainant filed a letter with the Commission which stated that he wished to withdraw his complaint, and the Commission dismissed the charge. Several months later, the Complainant requested that his original charge of discrimination be reinstated, on the ground that he had withdrawn his original charge as part of a settlement agreement but that the settlement agreement had been breached. The Commission only has jurisdiction to reopen the case on a petition for rehearing if the request is filed within 20 days of the date of the order. Therefore, the Commission lacked authority to reopen the matter. The Commission does not have express or implied authority to enforce settlement agreements. Haule v. UW-Milwaukee (Wis. Pers. Comm'n, 8/26/87).

It was error for an Administrative Law Judge to vacate and remand for reconsideration and reinvestigation a matter in which an initial determination of probable cause had already been issued. Binder v. Nercon Eng'g & Mfg. Co. (LIRC, 07/23/87).

Treating the Complainant's petition for review, which argued that additional information was now available to support his case, as a request for further hearing to present additional evidence, the Commission denied the request. The evidence, which could potentially provide a basis for a finding that the Complainant was handicapped, could have been presented at the hearing already held. Additionally, it would not support an inference that the Respondent knew of the handicap at the time of the discharge or that the handicap played a part in the decision. Since this would not change the outcome of the Complainant's case, there was no reason to remand for further hearing. Braggs v. Pabst Brewing Co. (LIRC, 04/29/87).

A Complainant's claim of dissatisfaction with her attorney's handling of her case does not require that the dismissal of her complaint after hearing be reversed or that she be given a new hearing. If the Complainant's

attorney did mishandle her case, her remedy would be against her attorney in the form of a malpractice suit. Feaster v. Paul A. Laurence Co. (LIRC, 04/22/87).

A trial court order remanding the matter to the hearing examiner for the presentation of additional evidence was properly vacated because the claimed newly discovered evidence was not such as to create a reasonable certainty that, if introduced and considered, the moving party would be successful in challenging the prior decision. Although the claimed new evidence here arguably impeached the credibility of several witnesses on minor points, it did not establish any basis for believing that the finding of no discrimination would be altered. Welch v. LIRC (Ct. App., District III, unpublished opinion, 06/24/86).

Where the employer agreed to holding the hearing one day early, and did not raise any objection to the change in hearing date until after an unfavorable decision was received from the examiner, the Commission did not err in refusing to grant a motion to remand the matter for further hearing. Consol. Papers v. LIRC (Ct. App., Dist. IV, unpublished opinion, 04/17/86).

Alleged improper ex parte communication between the examiner and a party does not justify rehearing where the other side failed to protest in a timely fashion and did not present supporting affidavits. Stewart v. St. Croix County Highway Dep't (LIRC, 02/27/85).

A party is not entitled to a rehearing without showing that it was not possible to present all the relevant evidence at the hearing, or that new evidence had become available which was not previously known or available. The fact that a party was unrepresented at the hearing is not sufficient grounds for granting a rehearing. Delaney v. Consolidated Communications (LIRC, 09/06/84).

An administrative rehearing will be granted only on the basis of material error of law or fact, or newly discovered evidence which is sufficiently strong to reverse or modify the order, and which could not have previously been discovered by due diligence. Bodensack v. Milwaukee Area Tech. College (LIRC, 08/08/78).

Where a hearing examiner orally granted the employer's motion to dismiss a race complaint, but stated he might reopen the case later, he continued to have subject matter jurisdiction over the case until his recommended decision was issued and he could schedule another hearing. Further, even if the hearing was closed, the examiner was not precluded from granting a motion to reopen the hearing despite the provisions of Section Ind 88.09(3), Wis. Adm. Code, which states that motions not made at the hearing shall be decided by DILHR. State ex rel. A.O. Smith v. DILHR (Nickols) (Dane Co. Cir. Ct., 08/24/77).

Rehearing was granted where the stenographic record of the hearing was lost. Hill v. Kitchen Reddy Foods (DILHR, 04/17/75).

790 Appeal and review

791 Decisions not appealable to LIRC

A final decision, which may be appealed under Wis. Admin. Code §218.21(1), disposes of the entire complaint (all claims in the complaint) and leaves no further proceedings on that complaint pending before the division. An administrative law judge's dismissal of an appeal of a no probable cause decision, based on the Complainant's failure to file a timely appeal of the no probable cause decision, is not a final decision within the meaning of §218.21(1) because the Complainant's complaint included other claims which were still being decided before an administrative law judge. As a result, it cannot be appealed as a final decision or order. Wortman v. Verascape, Inc. (LIRC, 05/18/21).

The commission's review authority under the WFEA is limited, pursuant to Wis. Stat. sec. 111.39(5), to findings and orders of the Equal Rights Division's administrative law judges, and not the decisions of Equal Rights Division investigators or other employees. LIRC cannot accept a petition to review a determination by an Equal Rights Division investigator that was never appealed to the Equal Rights Division's hearing section. Balele v. State of Wis., Dep't of Corrections. (LIRC, 06/13/18).

Only final decisions may be appealed to LIRC. LIRC is unable to accept an appeal where some issues are still pending before the Equal Rights Division. Ford v. Briggs & Stratton, Corp. (LIRC, 04/19/18).

LIRC does not have authority to consider appeals of actions of Equal Rights Division employees other than administrative law judges; its review authority is limited to review of the administrative law judges' findings and orders. Therefore, LIRC will not consider an appeal of an action by a section chief of the ERD's Civil Rights Bureau. Balele v. PDQ Food Stores, Inc. (LIRC, 07/03/14).

The Commission continues to take the view that a Complainant who disagrees with rulings of an ALJ is required to proceed with the hearing in order to preserve his right to review of those rulings on appeal, and that if the Complainant instead refuses to proceed with the hearing due to his objections to the rulings, and his complaint is dismissed as a result, he is deemed to have waived his objections to those rulings. This rule is important to the integrity of the system in place for litigation, appeal and review of Equal Rights cases, because it secures the non-appealability of interlocutory decisions of ALJs. Mullins v. Wauwatosa Sch. Dist. (LIRC, 05/17/13).

LIRC's jurisdiction is restricted to the review of findings and orders by Administrative Law Judges. LIRC does not accept appeals from dismissals of complaints made by the Investigation Section of the Equal Rights Division. Burton v. United Gov't Serv. (LIRC, 11/21/11).

The Complainant refused to proceed at the hearing because he objected to the Administrative Law Judge's decision not to postpone the hearing. The Administrative Law Judge dismissed the complaint based on the Complainant's failure to present evidence to support his case. The Labor and Industry Review Commission rejected the Complainant's appeal of the decision. The Complainant waived his objections to the Administrative Law Judge's denial of his postponement request by his failure to proceed at the hearing. Jackson v. Transwood, Inc. (LIRC, 04/27/07).

The Administrative Law Judge issued a ruling concluding that the Complainant's position as a first grade teacher was not a ministerial position as that term is used for purposes of considering whether a state adjudication interferes with the free exercise clause of religion under the First Amendment to the U.S. Constitution, and that the Equal Rights Division had subject matter jurisdiction over the complaint. The ALJ's ruling was not a final decision and order; therefore, the Labor and Industry Review Commission was not authorized to review the Respondent's petition for review. Ostlund v. Coulee Catholic Schools (LIRC, 03/03/05) ; rev'd sub nom. Coulee Catholic Schools v. LIRC (La Crosse Co. Cir. Ct., 10/20/05). (See sec. 792, infra.)

Interlocutory rulings are not appealable at the time they are made. A party must wait until a final decision is issued in the case and it becomes appealable to LIRC to raise any claim that the ALJ erred in such an interlocutory ruling. Fauteck v. Sinai Samaritan Med. Ctr. (LIRC, 11/09/00).

The administrative rules do not give LIRC the authority to review a Department determination that an initial determination of no probable cause was not timely appealed. Geasland v. Society Ins. (LIRC, 07/27/99).

The Labor and Industry Review Commission will not exercise its appellate authority to entertain requests to review non-final decisions by Administrative Law Judges. Kielas v. Arcade Drivers School (LIRC, 06/17/94).

The Labor and Industry Review Commission has determined that it should not exercise its appellate authority to review non-final decisions and orders by an Administrative Law Judge. Erickson v. City of Menasha (LIRC, 01/27/94).

The Labor and Industry Review Commission will not exercise appellate authority to entertain requests to review non-final rulings by Administrative Law Judges. Callaway v. Madison Metro. Sch. Dist. (LIRC, 01/13/93). [Ed. note: This decision expressly reverses LIRC's decisions in Murphy v. Roundy's (LIRC, 05/11/92) and Bahr v. Levine & Epstein (LIRC, 06/05/92), found in Section 792 of this Digest.]

LIRC has generally not accepted appeals of interim or non-final orders. Its rationale for not accepting review in those cases is to avoid disruption of the orderly adjudication of cases before the Equal Rights Division. Mattson v. Green Bay Broad. Co. (LIRC, 08/28/90, amended 09/21/90).

LIRC will not accept petitions for review of non-final decisions, even if a party asserts that there are "compelling reasons" for doing so in a particular case. Here, LIRC declined to accept the Respondent's petition for review of an order by the Administrative Law Judge denying the Respondent's motion to dismiss the underlying complaint on the basis of res judicata. LIRC commented that it did so "notwithstanding the apparent meritoriousness of the Respondent's arguments" on the res judicata issue. Local 322, Allied Indus. Workers of Am. v. Johnson Controls (LIRC, 09/11/90).

LIRC will not grant a declaratory ruling which would functionally constitute an appeal from a decision by the administrator of the Equal Rights Division under sec. Ind 88.03(2), Wis. Admin. Code. Perrin v. Mequon Care Ctr. (LIRC, 11/13/89).

There is no right to LIRC review of preliminary determinations reviewed by the administrator of the Equal Rights Division under sec. Ind 88.03(2), Wis. Admin. Code. Berntson v. Wis. Winnebago Business Comm. (LIRC, 10/10/89).

The Commission declines review of non-final orders in order to avoid unnecessary delays and disruption of the orderly adjudication of cases. Giese & Field v. Wausau Ins. (LIRC, 10/25/88).

The Labor and Industry Review Commission is without authority to act on a petition for review of an Administrative Law Judge's decision finding that there is probable cause to believe allegations of a complaint and ordering the matter remanded to conciliation. Binder v. Nercon Eng'g & Mfg. Co. (LIRC, 07/23/87).

A complaint was dismissed for the Complainant's failure to appear at the hearing. The Labor and Industry Review Commission remanded the matter and ordered that a hearing be held to determine whether the Complainant had good cause for his failure to appear at the hearing. A subsequent decision of the hearing examiner that the Complainant did have good cause for his failure to appear at the hearing was not appealable to the Labor and Industry Review Commission because it was an interim order in the case. The Commission has consistently declined to review interim, or non-final, orders issued by department examiners. Vega v. Larsen Co. (LIRC, 07/03/85).

The Labor and Industry Review Commission does not have jurisdiction to review Equal Rights Division decisions issued under sec. 101.055, Stats., regarding public employee occupational safety and health. Marchewka v. Milwaukee County (LIRC, letter ruling, 04/16/85).

LIRC will not accept an appeal from a dismissal of a complaint by the Equal Rights Division's Investigation Bureau. Its appellate jurisdiction is restricted to review of examiners' findings and orders. Mathews v. Marc Plaza Hotel (LIRC, 03/31/83).

A hearing examiner's conclusion that a complaint is timely filed is not subject to appeal until the case has been decided on the merits. Fox v. Massey-Ferguson (LIRC, 02/28/83).

Where the Equal Rights Division dismissed a complaint as untimely prior to investigating the complaint, the proper appeal was by writ of mandamus to circuit court rather than to LIRC since LIRC's jurisdiction is limited by sec. 111.36(3m), Stats. Chester v. Int'l Harvester (LIRC, 06/05/80). [Ed. note: Sec. 111.36(3m), Stats, has been replaced by sec. 111.39 (5)(a), Stats.]

LIRC has no jurisdiction to review non-final findings and orders issued by the Equal Rights Division. Opolka v. Kolbe Millwork (LIRC, 12/20/79).

A probable cause finding made by a hearing examiner at a no probable cause hearing is not reviewable. Basile v. AMC (DILHR, 01/30/75).

792 Decisions appealable to LIRC

The Labor and Industry Review Commission has the authority to review appeals from an Administrative Law Judge's order dismissing a complaint pursuant to a settlement agreement. Fettig v. County of Fond du Lac (LIRC, 07/14/06).

The Labor and Industry Review Commission routinely reviews appeals in cases where an Administrative Law Judge has simply issued an order dismissing the complaint without the benefit of a hearing. Cases of this type include review of an ALJ's order of dismissal based upon a Complainant's failure to appear for the hearing; a Complainant's failure to file a complaint within 300 days of the alleged discrimination, and a Complainant's failure to respond within twenty days to correspondence sent by certified mail. Fettig v. County of Fond du Lac (LIRC, 07/14/06).

The Complainant was a first grade teacher at a Catholic school. She alleged that she had been discriminated against on the basis of age in violation of the Wisconsin Fair Employment Act. The Respondent filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the question of whether a position serves a ministerial or ecclesiastical function must be resolved because if the position involved is ministerial a discrimination complaint is blocked by constitutional concerns for separation of church and state under the Free Exercise Clause of the U.S. Constitution and the Freedom of Worship Clause of the Wisconsin Constitution. An Administrative Law Judge denied the motion to dismiss, ruling that the position was not ministerial, which allowed the discrimination claim to proceed. The Respondent petitioned the Labor and Industry Review Commission to review the ALJ's decision. LIRC denied the petition for review because the ALJ's decision was not a final decision and order. LIRC's decision was overturned and remanded by the circuit court after the Respondent filed petitions for immediate review and a writ of prohibition to delay any further proceedings until the review was completed. While LIRC's earlier refusal of review was understandable, constitutional concerns required LIRC to resolve the issue of whether the position involved was ministerial. Coulee Catholic Schools v. LIRC (La Crosse Co. Cir. Ct., 10/20/05).

Cases involving employer retaliation relating to Section 103.10 of the Family and Medical Leave Act of the type listed under sec. 111.322(2m) of the Fair Employment Act are appealable to the Labor and Industry Review Commission rather than to circuit court. Kayler v. Stoughton Trailers (LIRC, 10/27/97).

LIRC has authority to review a decision by an Administrative Law Judge dismissing a case for lack of jurisdiction. There is no right to appeal the ALJ's decision directly to Circuit Court because the order of dismissal of the ALJ is not a decision on appeal to the administrator as contemplated by sec. Ind 88.03, Wis. Admin. Code, for which direct appeal to Circuit Court is provided by rule. Heinritz v. Lawrence Univ. (LIRC, 09/30/93).

The Wisconsin Family and Medical Leave Act prohibits discharging or discriminating against an individual for opposing a practice prohibited under the Act. Other kinds of retaliation relating to the Family and Medical Act are now defined as discrimination under the omnibus anti-retaliation provision of the Wisconsin Fair Employment Act, sec. 111.322(2m), Stats. These cases are appealable to the Labor and Industry Review Commission, rather than to Circuit Court. Roncaglione v. Peterson Builders (LIRC, 08/11/93).

Sec. 808.03(2), Stats., governs permissive appeals to the Court of Appeals. Since Ind 88.14(2), Wis. Admin. Code, provides that discovery connected with hearings before the Equal Rights Division is to be the same as that set forth in Ch. 804, Wis. Stats., LIRC believes that by analogy it has the same authority to review an Administrative Law Judge's discovery order as the Court of Appeals has to review a discovery order of a circuit court. Bahr v. Levine & Epstein (LIRC, 06/05/92). [Ed. note: This decision was expressly reversed in Callaway v. Madison Metro. Sch. Dist. (LIRC, 01/13/93).]

LIRC has discretionary authority under sec. 808.03(2), Wis. Stats., to review non-final discovery orders and sanctions. LIRC may exercise its discretionary authority to review those matters when it determines that an interlocutory review will materially advance termination of the litigation or clarify further proceedings in the litigation, protect the petitioner from substantial or irreparable injury, or clarify an issue of general importance in the administration of justice. Grounds for discretionary review were not established by the Respondent's interlocutory appeal of an award of attorney fees as a discovery sanction. Murphy v. Roundy's (LIRC, 05/11/92). [Ed. note: This decision was expressly reversed in Callaway v. Madison Metro. Sch. Dist. (LIRC, 01/13/93).]

An order by the Administrative Law Judge which remanded a case to investigation and which also denied the Complainant's motion for leave to amend his complaint because the proposed amended complaint was time-barred is a final order with respect to the denial of permission to amend the complaint. It does not matter that the Equal Rights Division treats the order as being interlocutory. LIRC has authority to act on the Complainant's petition for review. James v. Associated Schools, Inc. (decision on petition for rehearing) (LIRC, 03/24/89).

LIRC has the authority to review a non-final order of an Administrative Law Judge which remanded a case to investigation and which also denied the Complainant's motion for leave to amend his complaint because the proposed amended complaint was time-barred. James v. Associated Schools, Inc. (LIRC, 02/03/89).

Where dismissal of a portion of a complaint on statute of limitation grounds is first made by an Administrative Law Judge after a hearing, and no preliminary determination has been made under Section Ind 88.03, Wis. Adm. Code, the untimeliness ruling is properly appealed to the Labor and Industry Review Commission and not to Circuit Court. Couillard v. Am. Family Mutual Ins. Co. (LIRC, 04/14/88). [Ed. note: sec. Ind. 88.03, Wis. Admin. Code, has been replaced by sec. DWD 218.05, Wis. Admin. Code.]

Only final orders are appealable. A final order is one which disposes of the entire matter in litigation as to one or more of the parties. Therefore, the dismissal of certain of the Complainant's claims at hearing because of untimeliness was not an appealable final order. When an appeal of that dismissal was included with the appeal from the final decision on the merits of the remaining allegations of the complaint, it was timely. Couillard v. Am. Family Mutual Ins. Co. (LIRC, 04/14/88).

Where the Hearing Examiner bifurcated the hearing and issued a decision finding liability and ordering that a hearing be scheduled on the remaining issue of remedy, the Commission concluded that it had the authority to accept and address an appeal of the Respondent from the liability finding prior to the holding of a hearing on remedy. Davis v. City of Milwaukee (LIRC, 09/05/86).

An examiner's dismissal of a complaint at a no probable cause hearing for failure of a Complainant to appear is appealable to the Commission, and the Commission may order that testimony be taken before an examiner as to whether the Complainant had good cause not to appear at the hearing. Schneeberger v. A.M.C. (LIRC, 01/27/84); Moore v. Roundy's Industrial, Inc. (LIRC, 02/16/84).

There is no provision for judicial review of an examiner's findings of fact, conclusions of law and order issued after hearing. Such decisions must first be appealed to the DILHR Commission. Foster v. DILHR (Dane Co. Cir. Ct., 02/24/77).

793 Decisions appealable to court

Appeals from decisions of ERD administrative law judges in whistleblower cases are not reviewed by the commission but instead go directly to circuit court. Further, the timeline for commencing a proceeding for judicial review does not begin to run until the ERD provides the parties with proper notice of their appeal rights. Woolever v. Univ. of Wis.–Whitewater (LIRC, 08/31/21).

A "newly discovered evidence"-based request for rehearing under Wis. Stat. § 227.49, and a motion to set aside, modify or change a decision under Wis. Stat. § 111.39(5)(c), both apply only to requests made after the final decision of the agency (LIRC) has been issued. They do not apply to asking LIRC to order further hearing in the course of its review. Once a petition for LIRC review is filed, an administrative law judge loses power to act in a case and cannot act on a motion for rehearing. However, LIRC's general review authority includes authority to order further hearing on grounds of newly discovered evidence - but in this case, evidence about an employment action occurring three years after the employment action was complained of, did not involve sufficient parallels to allow the conclusion that it would change the result in the case. Hafeman v. County of Sauk (LIRC, 04/04/14).

Violations of Sections 103.10(11)(a) or (b) of the Family and Medical Leave Act are expressly made subject to the remedial procedures of the Act itself. The Labor and Industry Review Commission has no jurisdiction in these cases. These cases are subject to review in circuit court. Kayler v. Stoughton Trailers (LIRC, 10/27/97).

794 Procedures for review by LIRC; scope of review

The commission dismissed a petition that was filed directly with the commission rather than with the department, as required by the commission's rules. The commission has no authority to accept as timely a petition that has been filed at the wrong address. Burks v. Perlick Corp. (LIRC, 07/29/22).

The statute requiring that petitions must be filed within 21 days from the date the decision is issued refers to calendar days, not business days. Owens v. Apex Properties, LLC (LIRC, 12/29/21).

Although the Complainant's petition was filed more than 21 days after the administrative law judge's order was issued, the commission does not consider it untimely because the administrative law judge's order was not accompanied by a notice of appeal rights. Osman v. JBS Green Bay, Inc. (LIRC, 03/30/20).

The petitioner did not establish that he faxed a timely petition for review to the Milwaukee Equal Rights Division office. His attempt to show a timely fax transmission failed because a transmission sheet, dated on the last day for filing, did not indicate a destination number for the fax, and did not show that it contained any statement of dissatisfaction with the administrative law judge's findings or order, or asked for a review. Puddy v. General Machinery Corp. (LIRC, 03/30/20), appeal dismissed sub nom. Puddy v. LIRC (Sheboygan Co. Cir. Ct., 10/19/20), appeal dismissed (Ct. App., Dist. II, 01/05/2021).

The petition was dismissed where the Complainant asserted that she did not receive the administrative law judge's decision on time but did not explain when she received it or provide any information that would allow the commission to conclude that, if received too late to file a timely appeal, this was due to exceptional delay. The commission indicated that it may reopen the matter under Wis. Stat. § 111.39(5)(c) if the Complainant provided such information within 28 days. Butler v. Kennedy Heights Cmty. Ctr. (LIRC, 04/30/19).

The statutory provision allowing the appeal deadline to be extended when an appeal is late due to an exceptional delay in the receipt of the decision does not apply to situations in which the Complainant herself is responsible for the delay. Cordero v. Milwaukee Bd. of Sch. Dir. (LIRC, 09/27/18).

Where the Notice of Appeal rights stated that the petition must be received within "21 days" the Complainant had no reason to presume that he had 21 "business days" to file his appeal. Banda v. Wis. Jobs Now (LIRC, 03/13/18).

There is no requirement that the petition for commission review contain any specific words or argument. "I appeal" is sufficient to trigger a review. Kennell v. County of Milwaukee (LIRC, 03/13/18).

The Equal Rights Division lacks jurisdiction to issue a decision addressing the timeliness of a petition for commission review. Although Wis. Admin. Code § DWD 218.21(2) requires that a petition for commission review be filed with the Equal Rights Division, it is the commission that decides whether the petition was timely filed and, if not, whether there is any basis to accept it. Piontek v. Curative Network (LIRC, 11/20/17).

The circuit court directed LIRC to determine whether the Equal Rights Division had accorded due process to the Respondent-employer by providing it with adequate notice of hearing. The Commission, having decided that additional evidence was required in order for it to make the due process determination, has authority to send the matter back to the Equal Rights Division for the taking of additional evidence, reserving jurisdiction to make the due process determination once the additional evidence has been taken by the Division and delivered to the Commission. Weil v. Supercuts (LIRC, 01/29/16).

Although the Commission has the authority to consider issues that were not the subject of a petition for review, it generally declines to exercise that authority. Where only the Complainant filed a petition (on the issue of remedy), and the Respondent did not file a petition on the merits, the Commission declined to take up the Respondent's argument that it did not discriminate. Brown, et al. v. Chippewa Valley Tech. College (LIRC, 11/28/14).

Because the ERD tells parties they can use the ERD's post office box address to mail petitions, a petition for review mailed to the post office box address of ERD is 'received' by the ERD when it is delivered to the ERD's post office box, even if DWD mail room employees do not pick it up and deliver it to the offices of the ERD until the next day. The burden of proving when the item was delivered to ERD's post office box is on the sending party. In this case, USPS Priority Express Mail tracking information established delivery to ERD's post office in time to make the petition timely. Musse v. Luther Midelfort Northland (LIRC, 09/30/14), dismissed on procedural grounds sub nom. Musse v. LIRC (Barron Cty. Cir. Ct. 04/16/2015.)

The Complainant petitioned for LIRC review on the grounds that the ALJ erred by applying a mixed-motive analysis and limiting the Complainant's remedy to a cease and desist order, based on the conclusion that the Respondent would have terminated the Complainant even in the absence of its discriminatory motive. The Respondent did not file a petition for review, but argued in its brief to LIRC that the ALJ incorrectly decided that the Respondent was even partially motivated by discriminatory animus. LIRC addressed the Respondent's argument on liability even though the Respondent had not filed a petition for review, because the issue raised by the Complainant, which concerned the degree to which the Respondent was motivated by discriminatory animus, opened the door to the possibility of concluding that there was insufficient evidence to find even a partial discriminatory motivation. Mattocks v. Village of Balsam Lake (LIRC, 09/04/14).

A "newly discovered evidence"-based request for rehearing under Wis. Stat. § 227.49, and a motion to set aside, modify or change a decision under Wis. Stat. § 111.39(5)(c), both apply only to requests made after the final decision of the agency (LIRC) has been issued. They do not apply to asking LIRC to order further hearing in the course of its review. Once a petition for LIRC review is filed, an administrative law judge loses power to act in a case and cannot act on a motion for rehearing. However, LIRC's general review authority includes authority to order further hearing on grounds of newly discovered evidence - but in this case, evidence about an employment action occurring three years after the employment action was complained of, did not involve sufficient parallels to allow the conclusion that it would change the result in the case. Hafeman v. County of Sauk (LIRC, 04/04/14).

In general, Commission review is based only on the evidence previously submitted at hearing. Wis. Admin. Code § 1.04. The Commission, however, has the authority to set aside a decision and remand a case to the Department for further evidentiary proceedings (see Wis. Stat. § 111.39(5)(b)), and has considered doing so in two kinds of situations: (1) when the petitioner claims to have newly discovered evidence to present; and (2) when the petitioner claims that in the initial hearing he or she was denied procedural due process. Delgado v. Saint Gobain Performance Plastics Corp. (LIRC, 11/29/13).

Petitions for Commission review may not be filed by e-mail. Goulet v. Senior Citizens Employment & Training, Inc. (LIRC, 02/21/12).

The "Notice of Appeal Rights" that accompanied the decision of the Administrative Law Judge in this case made it clear that a petition for review had to be sent to the Equal Rights Division. The Complainant's letter to an employee of the Division of Hearings & Appeals did not suffice as a petition for review by LIRC because such petitions *must* be filed with the Equal Rights Division. Goulet v. Senior Citizens Employment & Training, Inc. (LIRC, 02/21/12).

If the reason that a Complainant did not receive a copy of the decision of the Administrative Law Judge is that he had not kept the Equal Rights Division informed of his current address, this was not an "exceptional delay" which would warrant overlooking the lateness of the Complainant's petition for LIRC review. Avant v. Milwaukee Area Tech. College (LIRC, 08/11/11).

As a general matter LIRC conducts a de novo review and acts as an original fact-finder and reviewer of an ALJ's decision. However, where LIRC is asked to review an ALJ's exercise of discretion in ruling on discovery matters the standard is not whether LIRC believes that a particular position has been substantially justified and whether attorneys' fees and costs should have been awarded, but whether it finds the ALJ's decision on the issue to have been an abuse of discretion. A discretionary decision will be sustained if the ALJ has examined the relevant facts, applied the proper standard of law using a rational process, and reached a reasonable conclusion. Kutschenreuter v. Roberts Trucking (LIRC, 04/21/11).

The petition for LIRC review in this case was not timely. A copy of the Administrative Law Judge's decision was sent to the Complainant's address, where it was inadvertently placed with mail for someone else in the Complainant's household so that the Complainant did not discover it until after some time had passed. The Complainant was not prejudiced because of exceptional delay in the receipt of a copy of the decision within the meaning of sec. 111.39(5)(b), Stats. The decision had been "received" by the Complainant when it was delivered to her address by the U.S. Postal Service. The delay in her actually seeing the decision was caused by mishandling of received mail within her household. This did not constitute exceptional delay within the meaning of the statute. Vanderkin v. Ultra Mart Foods (LIRC, 02/10/11).

The test for determining whether a writing filed with the Equal Rights Division after the issuance of an Administrative Law Judge's decision should be treated as a petition for Commission review has to do with its intent and purpose, specifically whether it expresses dissatisfaction with the ALJ's findings and order and asks for review of or changes in the finding and order. In this case, it was implicit in the Respondent's "motion to re-open proceedings" that the Respondent did not want the ALJ's earlier decision to stand, and that it sought to have that decision set aside. A party's characterization of the document filed with the Equal Rights Division after the issuance of an Administrative Law Judge's decision does not control the question of whether it should be treated as a petition for Commission review. In this case, given its substance, it was appropriate to treat the Respondent's "motion to re-open proceedings" as a petition for Commission review. Treige v. Servicemaster Clean (LIRC, 06/25/10).

The Respondent filed a "motion to re-open proceedings" several months after the Administrative Law Judge issued an order dismissing the complaint based upon the Respondent's failure to appear at hearing. The Respondent asserted that its failure to appear at hearing was caused by the neglect of the attorney who was representing it at the time. The Wisconsin Fair Employment Act contains no provision which would allow the Labor and Industry Review Commission to accept late petitions, even when it appears that there is good cause for the lateness of the petition or the lateness of the petition resulted from factors beyond the petitioner's control. Even if a party's failure to file a timely petition is the fault of their attorney, this does not excuse the lateness of the appeal or provide the Commission with any authority to act on the petition. Treige v. Servicemaster Clean (LIRC, 06/25/10).

The only statutory exception under which a late petition for review may be considered applies when a party has been prejudiced because of exceptional delay in the receipt of a copy of the Administrative Law Judge's decision. Under these circumstances, the Commission may extend the time in which to file a petition by another twenty-one days. Treige v. Servicemaster Clean (LIRC, 06/25/10).

The Labor and Industry Review Commission would not consider documents submitted by the Complainant for the first time on appeal from the decision of the Administrative Law Judge. The Commission is required to conduct its review based on the evidence which was submitted and received at the hearing. Powell v. Walgreen Drug Stores (LIRC, 04/09/10).

Writings filed with the Equal Rights Division in this case after the issuance of an Administrative Law Judge's decision, although they concerned the case, should not have been considered to have been petitions for Commission review. The test for determining whether a writing filed with the Equal Rights Division after the issuance of an ALJ's decision is a petition for review has to do with the its intent and purpose (specifically, whether it expresses dissatisfaction with the ALJ's findings and order and asks for review of, or changes in, the finding and order). In this case, a motion filed by the Respondent "for determination of frivolity and for an award of fees and costs" was not a petition for review within the meaning of sec. 111.39(5), Stats. The motion did not indicate that the Respondent was dissatisfied with the findings and order of the ALJ. On the contrary, the Respondent was instead asking for the issuance of a new and separate order on another matter, which was

a matter which had never been placed before the ALJ and which the ALJ had not addressed. Henderson v. DOC (LIRC, 03/19/09).

When a party fails to comply with a briefing schedule issued by the Commission, the Commission will generally overlook the failure where the lateness of the brief is minor, and where there is no reason to believe that there will be any prejudice to the other party from accepting the late brief. Johnson v. Roma Pizza II (LIRC, 02/25/09).

Where the notice of appeal rights issued by the Equal Rights Division misstated the appeal deadline, the time period for filing a petition for review never began to run. The petition filed by the Complainant, which was filed over one month after the ALJ's amended decision was issued, was, therefore, deemed to have been timely filed. Abraham v. Roundy's (LIRC, 06/20/08).

The Complainant faxed a petition for review to the Equal Rights Division after the close of business on the last day that a petition for review could be received. The petition for review was, thus, filed after the regular business hours of the Division and was considered filed on the following Monday, which was the next business day of the Division, in accordance with the Division's administrative rules. The petition for review would have been timely under the Labor and Industry Review Commission's administrative rule regarding the filing of petitions for review by facsimile. However, the Equal Rights Division's own rules governing the procedure for filing such petitions were controlling. Thomas v. ITT Technical Inst. (LIRC, 05/29/08).

Although the filing of a petition for review by either party vests the Labor and Industry Review Commission with jurisdiction to review the entire decision, the Commission will generally not exercise jurisdiction over issues that are neither expressly nor implicitly raised in a petition for review. Nunn v. Dollar General (LIRC, 03/14/08).

The Labor and Industry Review Commission is limited to reviewing the evidence of record in reaching its decision. This consists of the evidence offered and received at the hearing before the Administrative Law Judge. Metzger v. UGD Automotive (LIRC, 02/28/08).

The Labor and Industry Review Commission may consider a late petition for review only if it is satisfied that the party has been prejudiced because of exceptional delay in the receipt of a copy of the Administrative Law Judge's decision. Under these circumstances, the Commission may extend the time in which to file a petition by another 21 days. Sec. 111.39(5)(b), Stats. "Exceptional delay" refers exclusively to exceptional delay in the receipt of a copy of any findings and order which is the responsibility of the Equal Rights Division. In this case, the Complainant did not receive his copy of the Administrative Law Judge's decision because he had not kept the Division informed of his address. This does not constitute "exceptional delay" within the meaning of the statute. Accordingly, the petition for review was dismissed. Cotton v. Band Box (LIRC, 12/07/07).

On review, the Labor and Industry Review Commission will not consider documents which were not part of the evidentiary record made at hearing. LIRC is required to conduct its review based on the evidence submitted and received at the hearing. On appeal, the Complainant submitted various documents to the Commission which had not been introduced at the hearing. The Complainant asserted that they were not "new evidence" because these materials had been submitted to the EEOC and to the Equal Rights Division during their initial investigations. However, a party is required to present any evidence the party believes will support the party's case at the hearing. Whitmore v. Levy Premium Food Serv. (LIRC, 10/19/07).

The review authority of the Labor and Industry Review Commission is limited to petitions which are received by the Equal Rights Division within twenty-one days after a copy of the Administrative Law Judge's decision is mailed to the last-known address of the parties. The only statutory exception under which a late petition may

be considered is when LIRC is satisfied that a party has been prejudiced because of exceptional delay in the receipt of a copy of the Administrative Law Judge's decision. Under these circumstances, LIRC may extend the time in which to file a petition by another twenty-one days. Sec. 111.39(5)(b), Stats. However, the "exceptional delay" referenced in this statute refers exclusively to exceptional delay in the receipt of a copy of any findings and order which is the responsibility of the Equal Rights Division. Exceptional delay and receipt of a copy of a decision caused by factors external to the Equal Rights Division is not a basis for extending the time to file a petition. Strommen v. Cross Plains Citgo Station (LIRC, 03/29/07).

The Labor and Industry Review Commission denied the Complainant's request to forward to the Commission certain medical records which his doctor had failed to supply at the time of the hearing. By law, LIRC is required to conduct its review based only on the evidence submitted and received at the hearing. Schlesner v. Cooper Power Sys. (LIRC, 04/16/07).

The Labor and Industry Review Commission conducts a de novo review of the record upon appeal of an Administrative Law Judge's decision. Accordingly, all matters at issue, not simply those which form the basis for the petition, are properly within the scope of its review. Gaulke v. Sch. Dist. of Stratford (LIRC, 12/08/06).

Neither the Wisconsin Fair Employment Act, the rules of the Equal Rights Division nor the rules of the Labor and Industry Review Commission require that a petition for review contain any special language. The Complainant's correspondence to the Equal Rights Division in this case requesting reconsideration of an Administrative Law Judge's decision should have been treated as a petition for review since the Equal Rights Division ALJs have no authority to reconsider their decisions once issued. If the Equal Rights Division was allowed to decide what constitutes a petition for Commission review, this would be problematic as the Division should not be dictating whether or not a party is entitled to Commission review of a decision by an Administrative Law Judge. Nabors v. Kelly IT Resources (LIRC, 10/06/06).

The Complainant's petition for review was not timely filed where she slid it under the door of the Equal Rights Division's office after it had closed for business at 4:30 p.m. on the last day of the appeal period. The jurisdiction of the Labor and Industry Review Commission is dependent upon there being a written petition filed with the Department within twenty-one days from the date that a copy of the Administrative Law Judge's findings and order is mailed to the parties. A petition for review cannot be filed with the Equal Rights Division or physically received by the Division if its office is closed. Wilson v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/14/06).

There is no provision in the Wisconsin Fair Employment Act which would allow the Labor and Industry Review Commission to accept late petitions for review, even if it appears that there is good cause for the untimeliness. Smith v. Schwans Food Co. (LIRC, 01/31/06).

The Labor and Industry Review Commission conducts a de novo review, acting as an original fact-finder and reviewer of the Administrative Law Judge's decision. As a result, in the absence of some indication that an Administrative Law Judge's conduct of the hearing improperly influenced the creation of the record in some way, remand for hearing before a different Administrative Law Judge would not be necessary or appropriate, even if some bias or appearance of bias was present in the case below. Carbage v. Genesis Behavior Serv. (LIRC, 04/15/05).

The role of the Labor and Industry Review Commission is to act as an original and ultimate fact finder. The Commission, therefore, conducts a de novo review. Spearman v. Burleigh Dental (LIRC, 09/30/04); aff'd sub nom. Spearman v. LIRC, Milwaukee Co. Cir. Ct., 04/05/05.

Petitions for review by the Labor and Industry Review Commission may not be filed by e-mail. Farvour v. County of Winnebago (LIRC, 11/13/03).

Although the complaint was filed more than 300 days after some of the acts of alleged discrimination, the timeliness issue was not raised by the Respondent, and the Labor and Industry Review Commission will not raise this issue *sua sponte*. Merta v. Johnson Controls (LIRC, 10/30/03); aff'd sub nom. Merta v. LIRC, Ct. App., Dist. III, unpublished decision, 02/08/05.

The Labor and Industry Review Commission is not limited to deciding whether an Administrative Law Judge abused his discretion. The Commission conducts a de novo review, acting as an original fact finder and reviewer of the Administrative Law Judge's decision. Clemons v. Opportunities Industrialization Ctr. of Greater Milwaukee (LIRC, 02/14/03).

The Labor and Industry Review Commission reviews decisions by administrative law judges on awards of costs and attorneys' fees in discovery motions by treating them as exercises of discretion subject to a test of reasonableness. Wells v. Roadway Express (LIRC, 05/13/02).

The Respondent's motion to supplement the record was denied. The evidence cited as "newly discovered evidence" did not constitute newly discovered evidence. In order to constitute newly discovered evidence, a party must show that the evidence is sufficiently strong to reverse or modify the Administrative Law Judge's decision and that the evidence could not have been previously discovered by due diligence. McKnight v. Silver Spring Health & Rehab. (LIRC, 02/05/02).

LIRC will decline a party's request to file a brief where it has already completed its review of the case (although the decision was not yet issued) and where no request for a briefing schedule was made either with the petition for review, or when the transcript was submitted to LIRC. Barker v. Metz Baking Co. (LIRC, 12/15/00).

By law, LIRC is required to base its review solely upon the sworn testimony and documentary evidence submitted at the hearing. LIRC will neither consider nor address documents presented for the first time on appeal. Butler v. City of Madison (LIRC, 11/27/00).

On review, LIRC will not consider documents which were not part of the evidentiary record made at hearing. By law, LIRC is required to conduct its review based on the evidence submitted and received at the hearing. Sec. 111.39(5), Wis. Stats. Reinke v. Pick 'n Save Mega Food Ctrs. (LIRC, 01/28/00).

The Wisconsin Fair Employment Act, as well as the Commission's rules, provide that the Commission's review shall be based on the evidence submitted at the hearing. None of the documents submitted by the Complainant in support of his appeal were presented at the hearing and, therefore, LIRC will not consider them on appeal. Bounds v. United Parcel Serv. (LIRC, 07/08/99).

The Labor and Industry Review Commission has no authority to accept late petitions for review, even if it appears that there is good cause for the untimeliness or that the lateness of the petition resulted from factors beyond the petitioner's control. Lindell v. St. Croix Valley Mem'l Hosp. (LIRC, 12/10/97).

The Labor and Industry Review Commission will not consider factual assertions which a party has presented for the first time in its petition for review. Kilgore v. Social Dev. Comm'n (LIRC, 02/14/97).

Review by the Labor and Industry Review Commission is limited to the testimony or other evidence that was presented at the hearing. The Commission cannot consider any documents which were not submitted at the hearing. Wisneski v. Kimberly-Clark Corp. (LIRC, 01/29/97).

Issues raised in a notice of appeal but not briefed or argued to LIRC on appeal will be deemed abandoned. Hentges v. Dep't of Regulation & Licensing (LIRC, 01/12/96).

A petition for review was untimely where it was not received by the Equal Rights Division within 21 days of the date of the decision. It was not reasonable for the Complainant to believe that a letter mailed on the day before Thanksgiving would go from Los Angeles to Milwaukee by the day after Thanksgiving, which was the 21st day of the appeal period. Jackson v. Gateway Tech. College (LIRC, 01/12/95).

The Labor and Industry Review Commission will not consider issues which are raised for the first time in a reply brief. Ollenburg v. Milwaukee County Sheriff's Dep't (LIRC, 09/28/94).

In a case where the complaint alleged that the Complainants had been retaliated against by having their hours reduced after they filed a wage claim, the Labor and Industry Review Commission declined to address the issue whether the mere making of a threat to retaliate constitutes an independent violation of the Wisconsin Fair Employment Act. The complaint had not claimed that such a threat had been made, much less that it was an independent violation of the Act. The Initial Determination made no finding that any such threat had constituted an independent violation of the Act. The claim that the threat itself was an independent violation of the Act was first expressly raised only in the Complainants' post-hearing brief. The Commission will not attempt to dispose of a case on a theory other than the one alleged, initially investigated, and noticed for hearing. Blaser v. Oconto County Sheriff's Dep't (LIRC, 09/20/94).

The Wisconsin Fair Employment Act contains no provision allowing LIRC to accept late petitions for review, even if it appears that there is good cause for the untimeliness. Brown v. City of Madison (LIRC, 02/24/94).

The time period specified by statute for filing an administrative review by LIRC never began to run where the Administrative Law Judge's decision was not accompanied by the correct notice of the rights of the parties to petition for administrative review. Heinritz v. Lawrence Univ. (LIRC, 09/30/93).

The Labor and Industry Review Commission has the power to extend the time for filing a petition for review only where it has been satisfied that a party has been prejudiced by an exceptional delay in receipt of a copy of a decision. Receiving the decision four days after the day it was mailed is not an exceptional delay. The Complainant's inability to contact his lawyer during the appeal period is not a factor to be considered in deciding to extend the appeal period. Lami v. Tomah Prod. (LIRC, 07/14/93).

Although the filing of a timely petition for review by any party gives the Labor and Industry Review Commission the authority to review any and all aspects of a decision below, the Commission has determined as a matter of policy that it will generally not exercise that authority to address issues when they are neither expressly nor implicitly raised by a petition for review. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

The requirement of timely filing of a petition for LIRC review is jurisdictional. There is no exception which would allow LIRC to assume jurisdiction over an untimely petition for review on some theory that the lateness of the petition had been caused by a factor beyond the control of the petitioner or that the petitioner showed good cause for the failure to file the petition on a timely basis. Spaeth v. Prudential Preferred Properties (LIRC, 05/21/93).

While the filing of a petition for review by any party vests the Labor and Industry Review Commission with jurisdiction to review the entire decision, the Commission will generally not exercise that jurisdiction to address issues that are neither expressly nor implicitly raised by a petition for review. Neuman v. Hawk of Wis. (LIRC, 03/12/93).

Where the Complainant failed to file a timely appeal of an order of dismissal, the Labor and Industry Review Commission lacked jurisdiction to hear the Complainant's untimely appeal of the dismissal. Hill v. Units (LIRC, 09/30/92).

The Equal Rights Division incorrectly attached a Notice of Appeal Rights – Review by Court to an Administrative Law Judge's order dismissing a case for lack of jurisdiction. That notice apprised the parties that a petition for review must be filed within 30 days. The correct notice of appeal rights should have referenced a petition to LIRC, and noted that the time frame was 21 days and not 30 days. Thus, where the Complainant's petition to LIRC was received 26 days after the Administrative Law Judge's decision and order were mailed, LIRC accepted the petition as timely. Valeri v. Delco Electronics-Gen. Motors (LIRC, 07/17/92).

Review by the Labor and Industry Review Commission is not an appeal as such, but is a de novo determination. A petition for review by any party gives the Commission authority to review and decide all issues in the case. Forman v. Cardinal Stritch College (LIRC, 06/08/92).

The Complainant was not prejudiced because of exceptional delay in receipt of a copy of the Administrative Law Judge's decision where the cause of the delay in the receipt of the decision appeared to be the Complainant's failure to apprise the Department of his new address and there was no evidence that the Complainant's attorney had not received prompt notice of the ALJ's decision. Hadelli v. Essco, Inc. (LIRC, 04/09/92).

Sec. 111.39(5), Stats., which requires the filing of a petition for review within 21 days, contains no provision allowing the Commission to accept late petitions even when it appears that there is good cause for the lateness of the petition or the lateness of the petition resulted from factors beyond the petitioner's control. The only circumstances in which a late petition for review can be entertained are when the Commission is satisfied that a party has been prejudiced because of exceptional delay in the receipt of a copy of the findings and order. However, such exceptional delay must have been caused by circumstances beyond the party's control. Green v. Kimberly-Clark/Badger Globe Mill (LIRC, 04/09/92).

Where a Complainant mailed a petition for LIRC review via "Priority Mail" on a Thursday, which was one day prior to the expiration of the deadline, and was told by a postal clerk that delivery would take place the next day, the petition was determined to have been untimely filed where the petition was not actually received until the following Monday, which was three days after the deadline. Filing is not complete upon mailing but requires actual physical receipt at an office of the Equal Rights Division. McGuinness v. Milwaukee County (LIRC, 04/09/92).

The Commission may exercise its plenary review authority to review an issue which has not been appealed by either party where the issues appealed by one party are closely related to an issue which has not been appealed. Valentin v. Clear Lake Ambulance Serv. (LIRC, 02/26/92).

LIRC lacks authority to entertain late petitions for review even when the lateness of the petition was attributable to circumstances beyond the petitioner's control such that there was good cause for the untimeliness of the petition. In the relatively few cases in which a late petition has been accepted, it has been accepted on the basis of the conclusion that the petition was mailed within such time as to warrant a reasonable belief that it would be received by LIRC on time and that the petition could, therefore, be deemed timely. The language in sec. 111.39(6), Stats., referring to "exceptional delay" refers exclusively to exceptional delay in the receipt of a copy of any findings and order which is the responsibility of the Equal Rights Division. Exceptional delay in the receipt of a copy of a decision caused by factors external to the Equal Rights Division (such as the hospitalization of the Complainant) are not within the intendment of the statute. Lacy v. Briggs & Stratton (LIRC, 07/09/91).

The late filing of a petition for review could not be overlooked where the Respondent's corporate office in Texas, which made the determination to appeal the Administrative Law Judge's decision, received that decision within a week to ten days after it was mailed to the Respondent's local office in Wisconsin. The Respondent still had 11 to 14 days within which to file a petition for LIRC review. Orwen-Richter v. Royal Int'l Optical (LIRC, 05/03/91).

The filing of a petition for review by any party vests LIRC with jurisdiction to review the entire decision. However, LIRC will generally not exercise that jurisdiction to address issues that are neither expressly nor implicitly raised by a petition for review. Dude v. Thompson (LIRC, 11/16/90).

LIRC's review jurisdiction is not limited to specific issues mentioned in the petition for review. LIRC's jurisdiction extends to all issues presented in the case. Krenz v. Lauer's Food Mkt. (LIRC, 09/27/90).

The failure of a party's attorney to file a timely petition for review does not constitute an exception to the statutory requirement that a petition for review be timely filed. Laskowski v. Beloit (LIRC, 03/30/89).

The Administrative Law Judge's decision was issued on October 30, 1987, and on November 27, 1987 the Department received a petition for review from the Respondent in a soiled and crumpled envelope which had a postage meter date stamp of November 18, 1987, and a post office date stamp on the back of the envelope of November 25, 1987. The Respondent submitted an affidavit of a corporate officer who stated that he had personally deposited the Respondent's petition for review in a mail box on November 18, 1987. The Respondent's petition is deemed to have been timely filed since under normal circumstances the petition would have been received by November 20th, the last day in which to file a timely petition. Hasenohrl v. SFGP, Inc. (LIRC, 06/27/88).

Where the Respondent, appealing from a finding of discrimination, submitted affidavits of witnesses containing statements contrary to certain claims of fact made by the Complainant at hearing, the Commission held that sec. 227.49, Stats., did not allow for the submission of such evidentiary matter in a petition for review to the Commission since that section concerns only petitions for rehearing. The Commission held further that, in any event, the affidavits would not constitute new evidence since it could have been previously discovered by due diligence, and since submission of the statements with the petition for review could be nothing more than a guise to get around the Respondent's failure to disclose the names of its witnesses at least ten days prior to hearing as required by rule. Hasenohrl v. SFGP, Inc. (LIRC, 06/27/88).

The "substantial evidence in the entire record" standard applies to court review of findings of fact of an administrative agency, but is not applicable to the agency's review of findings of a hearing examiner. An agency's review of an examiner's finding is not an appeal, but a certain deference to the findings of the original finder of fact is required, particularly where the principal issues involve credibility. Where more than one finding may be supported by substantial evidence, it is the role of the agency and not the court to decide which finding should be accepted. Schenck v. LIRC (Rock Co. Cir. Ct., 02/09/88).

Even assuming that the failure of the Complainant to timely file a petition for review was the fault of her attorney, this would not excuse the lateness of the appeal. Lackey v. Miller Brewing Co. (LIRC, 07/06/87).

Where the Complainant's petition for review of the Administrative Law Judge's decision was mailed on the last day for filing a timely petition but was not received by the department until two days later, the petition was untimely and was dismissed. Skoog v. Impact Seven (LIRC, 02/12/87).

LIRC had jurisdiction to review an examiner's decision where the petition was received one day after the statutory period had elapsed at a time when the DILHR offices were temporarily relocated. Foth v. AMC (LIRC, 01/08/85).

A party who knew of the filing requirements to petition for review failed to file properly by delivering the petition to a DILHR Job Service Officer after the 20 day statutory limit, and where it was not received at the DILHR Legal Services Office until after 21 days had elapsed. Leece v. LIRC (DOT) (Dane Co. Cir. Ct., 02/10/84).

Failure to apprise an employer that LIRC interprets the 20 day period for filing an appeal as calling for actual receipt of the review petition does not violate the employer's due process rights; the date stamped on the employer's petition by LIRC is conclusive evidence of the date of receipt where the employer offered no documentary or other substantial evidence to refute its accuracy. UW Bd. of Regents v. LIRC (DeJong) (Dane Co. Cir. Ct., 1982).

795 Summary of proceedings as basis for review

Despite the fact that the hearing record was flawed, with only the ALJ's voice coming through clearly, the audible portions, plus the ALJ's notes, constituted a sufficient record for a full and fair consideration of the issues raised in the Complainant's petition for review, because the issues had to do mainly with the alleged conduct of the ALJ and Respondent's counsel, and could be dealt with without reference to the testimony of witnesses. Davis v. Oxbo Int'l Corp. (LIRC, 07/31/15).

Consideration of the tapes of the hearing is discretionary with the Labor and Industry Review Commission. (Sec. LIRC 1.04, Wis. Admin. Code). Gryzwa v. Goodwill Indus. (LIRC, 09/26/95).

The fact that a portion of a tape recording of the hearing was blank had no effect on the Labor and Industry Review Commission's ability to complete a full and fair review where the Commission had available to it the summary of proceedings prepared by the Administrative Law Judge. Popp v. Rhinelander Paper Co. (LIRC, 07/28/95).

Although the Labor and Industry Review Commission has the discretion to listen to the hearing tapes in order to verify the accuracy of an Administrative Law Judge's summary of proceedings, it will not do so where the Complainant is, in fact, disputing the factual content of witness testimony rather the authenticity of that testimony. In this case, even if the synopsis of testimony was inaccurate with respect to certain matters, such inaccuracies would in no way affect the outcome of the Complainant's case upon review. Therefore, LIRC deemed it unnecessary to listen to the hearing tapes. Hanson v. Exel Inns of Am. (LIRC, 08/25/94).

Where a transcript is prepared after the Administrative Law Judge's decision has been issued, its use in reviewing the ALJ's decision is discretionary with the Commission. LIRC has generally decided whether or not to use transcripts based on its assessment of whether they are complete and accurate. LIRC declined to rely on transcripts in this case because they were prepared from inadequate copies of the hearing tapes, with a large number of indications that parts of the testimony were omitted because they were inaudible. In this case, the Commission will rely a summary of proceedings prepared by the ALJ in lieu of the transcript. Roncaglione v. Peterson Builders (LIRC, 08/11/93).

On review, the Labor and Industry Review Commission reviewed the hearing tapes and determined that there were errors and omissions in the summary of proceedings. However, LIRC's review of the tapes also served to provide it with a degree of familiarity with the evidence of record at least equivalent to that which a summary of proceedings is intended to provide. Forman v. Cardinal Stritch College (LIRC, 06/08/92).

The summary of proceedings prepared by the Administrative Law Judge contained several errors and omissions. However, because LIRC's review was based upon listening to the tapes of the hearing, LIRC did provide the Complainant with a full and fair review. Yuhas v. Electrolux (LIRC, 06/25/91).

Errors in the Administrative Law Judge's summary of proceedings do not justify a reversal or rehearing where the Commission reviewed the case based on listening to the actual tapes of the hearing and thus was not affected by any errors. Martin v. Industrial Combustion Div. (LIRC, 06/04/87).

A review by LIRC based on the examiner's summary is permissible where there was no showing that the summary misstated the testimony, where LIRC consulted with the examiner and where its findings were based on undisputed testimony. Bidlack v. LIRC (Sola-Basis Indus.) (Walworth Co. Cir. Ct., 03/25/81).

It was not reversible error for an examiner who had not held the hearing to base the decision on a review of the summary of proceedings rather than the transcript where the evidence introduced at the hearing was adequately reported in the summary. Sanchez v. LIRC (Dane County Community Action Comm.) (Dane Co. Cir. Ct., 1980).

796 Requirement that LIRC consult with ALJ regarding credibility impressions

The law requires that when overriding an administrative law judge's factual findings LIRC must hold a credibility conference and explain its disagreement with the administrative law judge's credibility determination. However, there is no requirement that LIRC "investigate the administrative law judge's demeanor impressions," nor is there any standard procedure that LIRC is required to follow. Robles v. Thomas Hribar Truck & Equipment, Inc. and LIRC, 2020 WI App 74, 394 Wis. 2d 761, 951 N.W.2d 853.

Where in fulfillment of the requirement that LIRC consult with the Administrative Law Judge regarding any demeanor impressions affecting his decision and in response did not indicate any, it was inferred he had none, and that he assessed credibility based on content of testimony alone. Nielsen v. Sports Clips (LIRC, 03/28/14)

LIRC is not required to consult with the Administrative Law Judge when its decision does not hinge upon witness credibility. Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.

The Labor, Industry and Review Commission is not restricted to consulting with the Administrative Law Judge in only those situations where it intends to reverse the decision of the Administrative Law Judge based on credibility. Moreover, the consultation between the Commission and the Administrative Law Judge is not prohibited as an ex parte communication. The Commission, not the Administrative Law Judge, is the entity vested with the responsibility of making credibility determinations and finding the facts in the case. Wolf v. LIRC (Ct. App., Dist. II, unpublished opinion, 03/13/96).

Due process requires that the Labor, Industry and Review Commission submit a memorandum opinion explaining the basis for its decision if it reverses the Administrative Law Judge's findings. Wolf v. LIRC (Ct. App., Dist. II unpublished opinion, 03/13/96).

The Administrative Law Judge's characterization of a witness' outmoded view of women in the workplace may well constitute "demeanor" which defines the witness' personal characteristics or beliefs. But it is not "demeanor" as that term is used to define the nonverbal messages which a witness may give off while testifying. The former goes to the substance of the evidence; the latter goes to the credibility of the witness. In fact, the ALJ's conclusion flowed from the substance of the witness' testimony, and not from the witness' demeanor. LIRC is as well equipped to make such conclusions regarding credibility as the Administrative Law Judge. Schiller v. LIRC, (Ct. App., Dist. II, unpublished opinion, 11/16/94).

The Labor and Industry Review Commission is expressly empowered to reject the Administrative Law Judge's recommendation in rendering a final decision, provided that it consults with the Administrative Law Judge to determine his or her impressions of the credibility of witnesses and explains in a memorandum opinion why it disagreed with the Administrative Law Judge. Hoell v. LIRC, 186 Wis. 2d 608, 522 N.W.2d 234 (Ct. App. 1994).

An Administrative Law Judge's inability to provide LIRC with any impressions of the witness' demeanor was not critical to LIRC's review of the Complainant's testimony where there were sufficient inconsistencies in the testimony to undermine the Complainant's credibility. Haskett v. LIRC (Ct. App., District III, unpublished opinion, 08/24/93).

The requirement of consultation with a hearing officer arises from the rationale that there is a constitutional right to the benefit of demeanor evidence. Such consultations are necessary in order that the Administrative Law Judge can share his or her observations of the witness's manner of testifying, demeanor, hesitancies and inflections. Sullivan v. Sacred Heart Sch. Bd. (LIRC, 03/30/93).

The purpose of the consultation requirement is to allow the Administrative Law Judge to convey any information about witness demeanor that is unavailable to the decision maker relying on the record. When a case is ending before the Labor and Industry Review Commission, responsibility for making the ultimate inference about credibility on the basis of content of testimony and manner of testifying is the Commission's. Brye v. Brakebush Bros. (LIRC, 01/11/93).

Where the parties' versions of the facts conflict, unless the Commission finds a compelling reason in the testimony or elsewhere in the record, the Commission will defer to the Administrative Law Judge who had the opportunity to view the witnesses' demeanor and make a determination of credibility. Roberge v. Sch. Dist. of Stanley-Boyd (LIRC, 02/05/92).

Consultation with the Administrative Law Judge is required only when LIRC reverses the Administrative Law Judge's decision. Behm v. William Haasl, DDS, SC (LIRC, 10/21/91).

The Commission is not required to consult with the Administrative Law Judge where it reverses the Administrative Law Judge's decision solely based upon its drawing different inferences from the facts than the Administrative Law Judge. Not every question of fact implicates questions of credibility. Maline v. Wis. Bell (LIRC, 10/30/89).

Although the Commission had consulted with the ALJ before reversing his finding of discrimination, its decision was set aside where it did not adequately explain why it arrived at a different decision from that of the ALJ. Kelm v. LIRC (Watertown Pub. Library) (Dodge Co. Cir. Ct., 02/22/85).

Where an examiner other than the one who held the hearing makes findings on the credibility of witnesses, that examiner should state in the record the personal impressions of the first examiner concerning witness demeanor. Muth v. LIRC (A.O. Smith) (Milwaukee Co. Cir. Ct., 07/22/83).

Where the Commission sets aside as untruthful testimony relied upon by an examiner, it must consult with the examiner in a meaningful way and state the reasons for its disagreement. Phillips Plating v. LIRC (Olson) (Price Co. Cir. Ct., 12/21/82).

The Commission may reverse a hearing examiner's decision without consultation where the reversal was based on law. Laux v. LIRC (Dixon) (Winnebago Co. Cir. Ct., 10/15/82).

LIRC's failure to consult with the examiner before rejecting his proposed order was probably erroneous, but is not reversible error where rejection of the company doctor's testimony was not based on his demeanor, but because the substance of his testimony did not support his conclusion. AMC v. DILHR (Basile) (Dane Co. Cir. Ct., 01/13/82).

Due process requires that the Commission have the benefit of the examiner's personal impressions of the material witnesses before rejecting the examiner's decision. The Commission must consult of record with the examiner to glean his impressions of the credibility of the witnesses. Rucker v. DILHR, 101 Wis. 2d 285, 304 N.W.2d 169 (Ct. App. 1981).

LIRC must have the benefit of the hearing examiner's personal impressions of the material witnesses when rejecting the examiner's recommendations and must include in a memorandum opinion an explanation for its disagreement with the examiner. Hamilton v. DILHR, 94 Wis. 2d 611, 288 N.W.2d 857 (1980); Walker v. DILHR (Snap-On-Tools) (Dane Co. Cir. Ct., 12/06/77).

In situations where a DILHR examiner hears conflicting testimony and makes findings based upon the credibility of witnesses, and the Commission thereafter reverses the examiner and makes contrary findings, the record should affirmatively show that the Commission had the benefit of the examiner's personal impressions of the material witnesses. This may take the form of either adequate notes of the examiner or personal consultation with him. The demands of due process cannot be satisfied with anything less. Braun v. Indus. Comm'n, 36 Wis. 2d 48, 153 N.W.2d 81 (1967).

797 Judicial review

Administrative agencies are no longer afforded deference in interpretations of law; supreme court review of an agency's conclusions of law is determined under the same standard it applies to a circuit court's conclusions of law -- de novo. Courts, however, may give persuasive "due weight" to an administrative agency's experience, technical competence and specialized knowledge. When considering persuasive value of an interpretation of law under a due weight standard, a court may analyze factors such as (1) whether the agency is responsible for administering a statute, (2) the duration of the interpretation, (3) the extent to which the agency used its expertise, and (4) whether the interpretation enhances the consistency of law. Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

A "newly discovered evidence"-based request for rehearing under Wis. Stat. § 227.49, and a motion to set aside, modify or change a decision under Wis. Stat. § 111.39(5)(c), both apply only to requests made after the final decision of the agency (LIRC) has been issued. They do not apply to asking LIRC to order further hearing in the course of its review. Once a petition for LIRC review is filed, an administrative law judge loses power to act in a case and cannot act on a motion for rehearing. However, LIRC's general review authority includes authority to order further hearing on grounds of newly discovered evidence - but in this case, evidence about an employment action occurring three years after the employment action was complained of, did not involve sufficient parallels to allow the conclusion that it would change the result in the case. Hafeman v. County of Sauk (LIRC, 04/04/14).

Case law has established that Ch. 227, Stats., limits judicial review to final agency orders. In this case, the Complainant contended that LIRC exceeded its authority when it remanded the case for further hearing on the ground that the Respondent had established good cause for failing to appear at the original hearing. LIRC's decision was not a final order. If, after the further hearing, the agency's final order was adverse to the Complainant, he could at that time seek judicial review of both LIRC's good cause determination and its determination on the merits. Deering v. LIRC, 2012 WI App 52, 340 Wis. 2d 742, 813 N.W.2d 248.

The Complainant's petition for judicial review was dismissed where it was filed one day late. The Complainant apparently read sec. 227.53(1)(a)2., Stats., to mean that he had one month from the issuance and mailing of the LIRC decision in which to file his petition for review. However, the statute says, "30 days," which is not the same as one month. Failure to strictly comply with the statutory requirement cannot be excused. Benthein v. LIRC (Manitowoc Co. Cir. Ct., 11/30/11).

The Complainant's employer appeared as a party in the administrative proceeding, and it was listed as a party in LIRC's memorandum decision. Accordingly, the Complainant was required to serve either the employer or its attorney with a copy of her petition for judicial review within 30 days after she instituted a circuit court proceeding. The Complainant had three options to effect service: (1) personal service, (2) service by certified mail, or (3) service by first class mail if such service was timely admitted in writing. In this case, the Complainant failed to serve the Respondent properly when she served its attorney by first class mail without securing an admission of service. The Complainant's petition for review was dismissed. Johnson v. LIRC & Wheaton Franciscan Health Care (Ct. App., Dist. I, unpublished opinion, 12/09/08).

The circuit court has no power to deal with allegations of perjury (which are allegations of a crime) in the context of a Chapter 227, Stats., review. Bedynek-Stumm v. LIRC (Dane Co. Cir. Ct., 10/10/08).

Parties are not entitled to the appointment of legal counsel in Chapter 227, Stats., court review cases. Bedynek-Stumm v. LIRC (Dane Co. Cir. Ct., 10/10/08).

A circuit court may not dismiss a petition for judicial review because it does not show the nature of the petitioner's interest or state a ground for relief under sec. 227.57, Stats., unless the petitioner has notice of the possibility of dismissal and a reasonable opportunity to request leave to amend the petition. Jackson v. LIRC, 2006 WI App 97, 293 Wis. 2d 332, 715 N.W.2d 654.

An agency decision is final if it conclusively determines the further legal rights of the person seeking review. Preliminary or interlocutory proceedings are excluded from judicial review in order to prevent administrative proceedings from being constantly interrupted and shifted between the administrative agencies and the courts. In this case, the Labor and Industry Review Commission remanded a case to the Equal Rights Division for further review on the merits. That decision was not final and, therefore, it was not subject to judicial review. Kimberly Area Sch. Dist. v. LIRC, 2005 WI App 262, 288 Wis. 2d 542, 707 N.W.2d 872.

The petitioner's use of facsimile transmission to present his petition for review to the circuit court did not constitute substantial compliance with the statutes for filing. Sec. 801.12(2), Stats., allows individual counties to accept facsimile transmissions only for papers that do not require a filing fee. This action required a filing fee. Ficken v. LIRC (Dane Co. Cir. Ct., 09/16/03).

The requirements for administrative appeals are unyielding. The petitioner argued that he missed deadlines in filing and serving his petition for review because he resides in Romania. Wisconsin's state procedural statutes do not depend on the location of the litigant. It was up to the petitioner to make arrangements to expedite his notification of the decision from the Labor and Industry Review Commission and to timely file any appeal. Ficken v. LIRC (Dane Co. Cir. Ct., 09/16/03).

A petitioner's failure to serve a petition for review on non-agency parties prevents the circuit court from acquiring subject matter jurisdiction. In this case, the court lacked jurisdiction because the Complainant failed to send a copy of his petition for review to the Respondent, although he did send a copy of the petition for review to LIRC. Josellis v. LIRC (Ct. App. Dist. IV, summary affirmance, 08/22/03).

The Complainant filed a petition for review in circuit court within the time limits set out in the notice of appeal rights sent to him by the Labor and Industry Review Commission. However, he did not serve LIRC until four days after the time limit expired. Because the petition was served on the Commission late, the court lacked subject matter jurisdiction to decide the appeal. Reed v. LIRC (Milwaukee Co. Cir. Ct., 08/18/03).

A court reviewing an administrative agency decision may not make an independent determination of the facts. The court is limited to determining whether there is substantial evidence of record to support the agency's findings. Knight v. LIRC (Dane Co. Cir. Ct., 05/15/03).

A reviewing court may not make credibility determinations on administrative review. Knight v. LIRC (Dane Co. Cir. Ct., 05/15/03).

The circuit court does not have jurisdiction or competency to review an administrative agency decision unless there is strict compliance with the requirements of the Wisconsin statutes. There is no authority permitting a circuit court to extend the time limits for serving and filing a petition for review. Cardinal TG Co. v. LIRC (Monroe Co. Cir. Ct., 06/29/01).

The circuit court does not have subject matter jurisdiction where the appealing party failed to serve a copy of the petition for review upon LIRC, personally or by certified mail, within thirty days of LIRC's decision. Sark v. LIRC (Dane Co. Cir. Ct., 06/21/00).

Service of process of an administrative appeal must be by personal service or by certified mail. Where an appealing party attempted to serve process by first class mail, the appeal was dismissed. South Side Spirit v. LIRC (Milwaukee Co. Cir. Ct., 06/01/93).

The Wisconsin Supreme Court has applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review is a mid-level standard that provides if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The third level of review is de novo and is applied when the case is clearly one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992). [Ed.'s Note: This decision has been supplanted by Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21].

Sec. 227.53(1), Stats., requires serving a petition for review personally or by certified mail upon the agency within thirty days after the date the agency decision is mailed. Where the Commission mailed its decision on November 15, 1991, and the Complainant's petition for review was mailed via first class mail in an envelope postmarked December 17, 1991, service on the agency was untimely. Also, where the Complainant's petition was not filed in the clerk's office until January 13, 1992, even if the Complainant mailed it on December 16, 1991, and even if it was received on December 18, 1991, as the Complainant contended, filing is not complete until receipt and the Complainant's petition was therefore untimely filed as well. Guel v. LIRC (Ct. App., Dist. II, summary decision, 12/09/92).

Sec. 227.48(2), Stats., requires that administrative agencies give notice of appeal rights, including any right to rehearing and other administrative review and judicial review. The time limitation for filing a petition for review is tolled if the proper notice is not given. Thus, where the notice given to a Complainant did not comply with the requirements of the statute, the 30-day time period for filing a petition for review did not begin to run and the Complainant's petition for review, which was filed more than 30 days following the Department's decision, was timely filed. Alexander v. DILHR, (Ct. App., unpublished opinion, 1991).

The petitioner did not comply with the statutory deadline requiring filing and service of a petition for review within 30 days of LIRC's decision where he arrived at the clerk of court's office after the close of business hours and had the petition time stamped at 6:43 p.m. on that date. Documents or petitions which are received after closing will be treated as having been filed on the following day. Leaving the petition for review in a conspicuous place in LIRC's offices after hours, likewise, did not constitute personal service on the agency or its officials. Watson v. LIRC (Ct. App., unpublished opinion, 08/22/91).

Sec. 227.53, Stats., requires that a petition for review to the circuit court be made personally or by certified mail within 30 days, commencing on the day after the decision is mailed. Ordinary first-class mail does not satisfy the statutory requirement of personal service or certified mail. Joseph v. LIRC (Ct. App., unpublished opinion, 06/25/91).

A decision of the Labor and Industry Review Commission concluding that it has jurisdiction to review a ruling of an Administrative Law Judge is not a final administrative decision subject to judicial review. Associated Schools, Inc. v. LIRC (Ct. App., unpublished opinion, 03/21/91).

The Commission reversed the dismissal of a complaint and remanded the matter for further hearing, and the employer filed a petition for judicial review of that order by the Commission. The Commission's order of remand sought to be reviewed was not an appealable order subject to judicial review. The continued prosecution of that petition for judicial review was frivolous. In addition to dismissing the petition for judicial review, the Court ordered the employer to pay the Complainant his actual attorney's fees in opposing the petition for judicial review. Best Foods Unit of CPC North Am. v. LIRC (Dane Co. Cir. Ct., 06/08/87).

A non-final order of the Commission (in this case, an order remanding a matter for hearing after a finding that the Complainant had demonstrated good cause for failing to appear at the first scheduled hearing date) is not subject to judicial review. Larsen Co. v. DILHR (Brown Co. Cir. Ct., 10/28/85).

799 Miscellaneous

The Labor and Industry Review Commission is not a court of equity. It is a legislative creation which lacks the authority to disregard a statutory scheme in order to achieve what it may perceive to be a more equitable result. Alarcon v. Ave. Bar (LIRC, 12/28/12).

On appeal, the Labor and Industry Review Commission affirmed an ALJ decision finding that the Respondent had unlawfully discriminated against the Complainant. However, because the Complainant did not make a specific, supported request for any further attorney's fees in connection with the review by LIRC, the Commission did not order any additional fees. Lundstad v. Management Computer Support (LIRC, 02/21/12).

A claim that a person has committed perjury is a criminal matter and, consequently, it is a matter over which neither the Equal Rights Division nor the Labor and Industry Review Commission has any authority. Bedynek-Stumm v. State of Wis. (LIRC, 02/08/08).

On appeal to the Labor and Industry Review Commission, the Complainant referenced certain information which she alleged was improperly presented to, and was improperly relied upon by, the Equal Rights Division investigator. However, upon appeal from an investigator's initial determination of no probable cause, a de novo proceeding is conducted by an Administrative Law Judge. As a result, the type of defect in the investigative process alleged would not affect either the Equal Rights Division's or the Labor and Industry Review Commission's disposition of the charge. Bock v. Shopko Stores (LIRC, 08/16/06).

A party who cannot read English, or who does not read English well, has an obligation to have documents translated. In this case, the Complainant was able to file a complaint, to read or have translated the initial determination, and to take appropriate action to file a timely appeal. She was also able to read or have translated the Administrative Law Judge's dismissal order, and she filed a timely petition for review. There was no reason to believe that the Complainant was not capable of understanding, or gaining understanding of, the hearing notice, not withstanding her lack of facility with English. Her failure to do so did not provide her with good cause for missing the hearing. Accordingly, the dismissal of her complaint was affirmed. Further, the Labor and Industry Review Commission denied the Complainant's request that it issue its decision in this matter in Spanish. If the Complainant had difficulty reading the decision of the Commission, it was her obligation to have it translated. Hernandez v. Sara Lee Corp. (LIRC, 05/21/04).

There is no provision in the Wisconsin Fair Employment Act that would allow parties to skip the administrative hearing and proceed directly to review by the Labor and Industry Review Commission. The Commission reviews the findings and order issued by the Administrative Law Judge. It provides a second level of administrative review. Hinkforth v. Bricklayers & Allied Craftsmen Dist. Council (LIRC, 02/23/04).

An administrative decision must include notice of any right of appeal and the time allowed for filing an appeal. Where the Complainant did not receive notice of appeal rights with the decision from the Labor and Industry Review Commission, the 30-day time period for appealing did not begin to run until the Commission sent the Complainant the proper notice. Josellis v. LIRC (Ct. App. Dist. IV, unpublished opinion, 08/22/03).

The Labor and Industry Review Commission's authority may not be expanded by stipulation of the parties. The Commission is not an arbitration panel which is available to rule on any issue which two parties agree to submit to it. Therefore, LIRC will not accept an appeal of a non-final decision relating to a portion of the case before the Equal Rights Division even though the Respondent indicated that it did not object. Woodford v. Norwood Health Ctr. (LIRC, 05/11/01).

The decisions of Administrative Law Judges of the Equal Rights Division under the Wisconsin Fair Employment Act are the final decisions of the Department. They are reviewed by the Labor and Industry Review Commission only if a petition for review is filed. Polesky v. United Brake Parts (LIRC, 08/30/96).

The Labor and Industry Review Commission is an independent agency which is "attached" to the Department of Industry, Labor and Human Relations, of which the Equal Rights Division is a part for administrative and budgeting purposes only. (See, sec. 15.225, Stats.). The decisions of the Equal Rights Division are issued by that agency, out of its separate offices. LIRC has no involvement with and no control over the procedures followed by the Equal Rights Division with respect to its preparation and service of decisions or transcripts. Moreno v. Wis. Elec. Power Co. (LIRC, 06/21/96).

Even if LIRC substituted its findings for that of the Administrative Law Judge, this would not constitute a due process violation. The ultimate responsibility for finding facts is on the Commission, not on the Administrative Law Judge. Hoell v. LIRC, 186 Wis. 2d 608, 522 N.W.2d 234 (Ct. App. 1994)

If a Complainant had not authorized his attorney to enter into a settlement on his behalf, or to dismiss his complaint with prejudice on his behalf, then the Complainant's remedy was to attempt to prove malpractice by that attorney. The Labor and Review Commission is not the appropriate tribunal to determine whether the obligations of attorney to client were properly complied with. Johannes v. County of Waushara Exec. Comm. (LIRC, 11/01/93).

The Labor and Industry Review Commission is only required by its rules to rely on a transcript when the transcript has been prepared before the Administrative Law Judge's decision was issued. Where the transcript

has been prepared after that point, consideration of it is discretionary. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

The Complainant's attorney argued that LIRC should reverse the Administrative Law Judge's award of significantly less in attorney's fees than she had sought. This did not constitute a valid petition for review as contemplated by the statute, since the attorney is neither a Complainant nor a Respondent in this matter. In this case, it was obvious that Complainant's attorney took this appeal without the knowledge and consent of the Complainant. Crosby v. Intertractor America Corp. (LIRC, 05/21/93).

LIRC may take jurisdiction of a case for the limited purpose of dismissing the complaint based upon the parties' settlement. It was clearly the parties' intent that their obligations should be defined not by the Administrative Law Judge's order but by their settlement agreement. Carey v. DeBoer, Inc. (LIRC, 06/11/92).

The Complainant's assertion in a petition for review of an Administrative Law Judge's decision that her attorney failed to provide her with proper legal representation was not an adequate basis for setting aside the Administrative Law Judge's decision or for granting a rehearing. Neuberger v. Twin Cities Storm Sash Co. (LIRC, 01/22/92).

Where the Commission remands a case to the Equal Rights Division for further hearing, the Administrative Law Judge should conduct a hearing and make further findings, which will then be subject to review by the Commission. It is uncertain whether the Commission has the authority to remand the case for further hearing, but without a further decision from the Administrative Law Judge, so that the Commission could make its own decision based upon the record made before the Administrative Law Judge. Pohlen v. Gen. Elec. Co. (amended order, LIRC, 04/26/91).

The requirement in sec. 111.39(4)(d), Stats., that the Department shall serve a "certified copy" of the findings and orders on the parties does not relate to questions of whether a petition for LIRC review has been timely filed so as to appropriately invoke the Commission's jurisdiction, since sec. 111.39(5), Stats., merely requires that a petition be filed within 21 days from the date "a copy" of the decision is mailed. LIRC expressed no opinion whether the Department's failure to serve certified copies of decisions would affect the enforceability of those orders in court under sec. 111.39(4)(d), Stats. Mundy v. Iselin Catering (LIRC, 08/08/90).

Section 800: Remedies

Attorney's fees & costs; frivolous claims & defenses

800 REMEDIES; ATTORNEY'S FEES AND COSTS; FRIVOLOUS CLAIMS AND DEFENSES

810 Burden of proof re: remedies

The Complainant made reasonable efforts to mitigate her loss of income by online job search methods. The Respondent did not establish that there was a reasonable likelihood that the Complainant might have found more comparable work than she did by exercising greater diligence. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

Instatement and back pay are the presumed remedy in a failure to hire case, and the discriminating employer bears the burden of establishing through clear and convincing evidence that such remedy should not be awarded. The Complainant did not bear the burden to prove that he would have been hired in the absence of discrimination. Zunker v. RTS Distributors (LIRC, 06/16/14).

In deciding what remedies are appropriate, uncertainties should be resolved against the discriminating employer. Lacking any reason to believe that the Complainant in this case would not have been offered a permanent store clerk position with the Respondent and, resolving any doubts on that question in her favor, the Labor and Industry Review Commission concluded that "make whole" relief for the Complainant had to include back pay extending beyond the date on which her temporary assignment would have ended. Nunn v. Dollar Gen. (LIRC, 03/14/08).

The goal in fashioning a remedy in a case under the Wisconsin Fair Employment Act is to recreate the conditions and relationships that would have existed had the unlawful discrimination not occurred, i.e., to determine how to make the employee "whole." Powell v. SBC Ameritech (LIRC, 04/21/03).

In deciding what remedy is appropriate, uncertainties are resolved against the discriminating employer. Where the Respondent was clearly in the best position to establish what, if any, jobs were available at its facility, it was not reasonable to penalize the Complainant for the Respondent's failure to present evidence on this point. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

Where discrimination has been found and a remedial order relating to earnings the Complainant would have received but for the Respondent's discriminatory action has been made, the Respondent has the burden of proving that the Complainant's earnings would have differed from that of comparable employees. Uncertainties in that regard are to be resolved against the Respondent. Hill v. F.W. Woolworth (LIRC, 08/15/89).

The Respondent has the burden of showing that the Complainant did not make reasonable efforts to mitigate her damages, thereby cutting off the back pay period. Compton v. Great Wall Restaurant (LIRC, 07/20/89).

The Personnel Commission is not constrained to consider only those remedies requested by a Complainant. Ingram v. UW-Milwaukee (Wis. Pers. Comm'n, 06/14/89).

Upon a finding that the Complainant was not promoted in part because of race, the Respondent has the burden of proving that relief should be limited because the Complainant would not have been promoted even in the absence of discrimination due to work performance problems. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

Where discrimination had been found and the Commission was structuring a remedial order relating to the amount of overtime earnings a Complainant would have received but for a Respondent's discriminatory action,

the employer had the burden of proving that the employee's overtime earnings would have differed from that of comparable employees. Am. Motors Corp. v. LIRC (Dane Co. Cir. Ct., 09/24/86).

Where a finding had been made that the Respondent discriminated against the Complainant in the hiring process, the Respondent had the burden of proving by clear and convincing evidence that the Complainant would not have been hired even in the absence of the unlawful discrimination. In determining this issue, uncertainties are resolved against the Respondent. Where the Respondent's evidence that the Complainant would not have been hired in any event was speculative, it was concluded that the Respondent had not met its burden. Silvers v. Madison Metro. Sch. Dist. (LIRC, 07/25/86).

While an employee has a duty to seek other employment in mitigation of damages, the employer has the burden of proof to establish that alternative employment was an available reality. Where there was evidence only that employment was available in the Complainant's field, but there was no comparison of pay, location, or other circumstances for the available positions, it was held that the employer failed to establish the existence of available alternative employment. UW-Whitewater v. LIRC (Ct. App., Dist. IV, unpublished opinion, 11/25/85).

An award of back pay should follow a finding of discrimination, unless the Respondent proves, by clear and convincing evidence, that the applicant would have been rejected for the position had there been no discrimination. Silvers v. LIRC (Madison Metro. Sch. Dist.) (Dane Co. Cir. Ct., 01/13/84).

Once an individual has proven discrimination, the burden shifts to the employer to show that, even absent the discrimination, the individual would not have received the promotion sought. Williams v. County of Milwaukee (LIRC, 04/15/81).

820 Right to liability finding when no remediable harm

The fact that an employer later remedies its own discriminatory act goes to the question of damages, not to the question of liability. In this case, the Complainant received a poor performance evaluation and was denied a pay increase in retaliation for having filed a sexual harassment complaint. The fact that she subsequently received the raise that was due her does not alter the conclusion that she was the victim of illegal discrimination. Muenzenberger v. County of Monroe (LIRC, 8/13/98).

Where a Complainant established that the employer did not do an individual case-by-case evaluation to determine whether his handicap affected his ability to undertake the job-related responsibilities, the Complainant was still not entitled to any monetary remedy because the Respondent later established that the Complainant's handicap posed a reasonable possibility of danger to himself or to others if he were allowed to work as a firefighter. However, the Respondent was ordered to cease and desist from failing to evaluate the Complainant if he again applied for employment with the Respondent. Leach v. Town of Pleasant Prairie Fire Dep't (LIRC, 04/23/91).

Upon a finding that the Complainant was not promoted in part because of race, the Respondent has the burden of proving that relief should be limited because the Complainant would not have been promoted even in the absence of discrimination due to work performance problems. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

Where an employer's refusal to hire a job applicant was discriminatory, the applicant was entitled to a finding of discrimination. However, no further relief was awarded because the Complainant had made misrepresentations on his application form which would have rendered him subject to dismissal at any time. Broeske v. American Can (LIRC, 02/16/79).

A female applicant who was rejected on the employer's assumption that women could not perform the job was entitled to a finding of discrimination, but not placement in the job or back pay where she was actually unqualified for the position. Wehrwein v. Atlas Forgings (DILHR, 04/25/77); Boettcher v. Doyle (LIRC, 05/19/77).

A security guard who was unlawfully transferred on the basis of race was entitled only to a finding of discrimination where there was no evidence that the employee's subsequent transfer and voluntary termination were on account of his race. Waldo v. Milwaukee Metro Security (DILHR, 04/08/76).

An employee was entitled to a determination as to whether or not her employer and union had discriminated against her even though she had been transferred to the job she sought. Watkins v. DILHR, 69 Wis. 2d 782, 233 N.W.2d 360 (1975).

830 Remedies which may be provided in discrimination cases

831 Back pay

831.1 Entitlement to back pay, generally

A prevailing Complainant is presumed to be entitled to back pay, and a discriminating employer has the burden of proving otherwise through clear and convincing evidence. In this case, the employer alleged, but failed to prove, that the Complainant had a history of absenteeism or that there was some reason to believe she would not have continued to work the same number of hours had her employment continued. Olson v. Whatever Bar (LIRC, 03/12/13).

The Administrative Law Judge issued a decision concluding that the Complainant was not entitled to back pay because he had not established the amount of his damages at hearing. However, the parties had stipulated to the Complainant's hourly wage, unemployment insurance benefits, and interim earnings at the start of the hearing. Given the stipulation made by the parties at the start of the hearing, together with the fact that the Complainant was proceeding pro se, the Administrative Law Judge had an obligation to raise the issue of back pay before concluding the hearing. While the stipulation of the parties was inadequate to determine the actual extent of the Complainant's damages, the Complainant should not have been denied any back pay at all. The case was remanded to the Equal Rights Division for further fact-finding and a decision on the issue of back pay. Erwin v. Don & Cary's Nokomis Inn (LIRC, 09/28/07).

Where an employee is terminated in part because of an impermissible motivating factor and in part because of other motivating factors, and where the termination would not have occurred in the absence of the impermissible motivating factor, the Department has the discretion to award some or all of the following remedies: a cease and desist order, reinstatement, attorney's fees, back pay and interest. Stoughton Trailers v. LIRC, 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102, aff'd, 2007 WI 105, 303 Wis. 2d 514, 735 N.W.2d 477.

The mixed motive test is applied in cases where an employer has made an employment decision in part due to a prohibited discriminatory reason and in part due to a legitimate business reason. An employer who has made such an employment decision is liable under the Wisconsin Fair Employment Act, but the remedy may be modified depending upon whether the termination would have taken place in the absence of the impermissible motivating factor. If the employer would have made the same employment decision in the absence of the impermissible discriminatory reason, the Complainant should be awarded only a cease and desist order and attorney's fees. If, however, the employment decision would not have been made in the

absence of the prohibited discriminatory reason, the Complainant can be awarded all of the remedies ordinarily allowed, such as back pay, reinstatement and attorney's fees. Holman v. Empire Bucket and Mfg. (LIRC, 08/15/03).

In "mixed motive" cases, where an employer has made an employment decision in part due to a prohibited discriminatory reason and in part due to a legitimate business reason, the employer is liable under the Act. However, the remedy may be modified depending upon whether the employment action would have taken place in the absence of the impermissible motivating factor. If the employer would have made the same employment decision in the absence of the impermissible discriminatory reason, then the Complainant should be awarded only a cease and desist order and attorney's fees. If, however, the employment decision would not have been made in the absence of the prohibited discriminatory reason, the Complainant can be awarded all of the remedies ordinarily allowed, such as back pay, reinstatement and attorney's fees. Miles v. Regency Janitorial Serv. (LIRC, 09/26/02).

Back pay should be awarded in a failure to hire case unless the Respondent establishes by clear and convincing evidence that, even in the absence of discrimination, the rejected applicant would not have been selected for the open position. Where the Respondent did not present evidence to establish that other applicants were better qualified than the Complainant, or that there were other non-discriminatory reasons which would have rendered the Complainant ineligible for the job, it was appropriate to award the Complainant back pay, along with instatement into the position. Moore v. Milwaukee Bd. of Sch. Dir. (LIRC, 07/23/99).

If an employee is terminated solely because of an impermissible motivating factor, the employee normally should be awarded a cease and desist order, reinstatement, back pay, interest and attorney's fees. If an employee is terminated in part because of an impermissible motivating factor and in part because of other motivating factors, but the termination would not have occurred in the absence of the impermissible motivating factor, the Department has the discretion to award some or all of the remedies ordinarily awarded. Finally, if an employee is terminated in part because of an impermissible motivating factor and in part because of other motivating factors and the termination would have taken place in the absence of the impermissible motivating factor, the employee should be awarded only a cease and desist order and attorney's fees. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

Although an employer cannot escape liability if a Complainant has been discriminated against "in part" on a prohibited basis, evidence that legitimate reasons also contributed to the employer's decision can be considered in fashioning an appropriate remedy. In this case, although the Complainant's marital status was a factor in the Respondent's decision not to hire him, the Respondent would not have hired the Complainant for the position even if his marital status had not been a factor considered in its selection. Accordingly, the Complainant's remedy is limited to a finding of discrimination, an order that the Respondent cease and desist from unlawfully discriminating against the Complainant because of his marital status, and an award of attorney's fees. Larson v. Tomah Police Dep't (LIRC, 07/20/94).

Where an employee proved that an employer has violated the Act by basing an employment decision at least in part on an impermissible motivation, it is appropriate to give the employee a formal finding to that effect and to order payment of appropriate reasonable attorney's fees. It may also be appropriate to provide further relief. However, if in such a case it is demonstrated by a preponderance of the evidence that the same employment action would have been decided on by the employer based on its legitimate motivating factors even in the absence of the impermissible motivating factor, no further remedy is appropriate. Baumgartner v. Tolibia Holdings (LIRC, 03/30/93), aff'd (Fond du Lac Co. Cir. Ct., 10/11/93).

An employee who was discriminated against in violation of the Wisconsin Fair Employment Act is not entitled to back pay and reinstatement after voluntarily quitting a job without being actually or constructively discharged by the employer. A voluntary resignation terminates the accrual of back pay and the employer's obligation to reinstate. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

The Complainant's entitlement to back pay was extinguished by her failure to accept an unconditional offer of reemployment communicated directly to her by the Respondent. An offer of reemployment does not need to be accompanied by an offer to make the Complainant whole for all financial losses in order to be "unconditional." It may leave the question of back pay and similar remedies entirely uncovered. All that is necessary is that it offer employment, unconditioned on any requirement that the employee abandon her right to pursue further remedies. Frostman-Messier v. Nancy Lee Employment Agency (LIRC, 02/22/91).

Where Complainant would have been ranked second on the eligibility list for a position but was moved to third place when a lower rated black candidate was moved to first place in an affirmative action effort found to have violated the law, no remedy was provided the Complainant. His contention that he lost future promotional opportunities was too speculative to serve as the basis for awarding a higher pay range or back pay. Holmes v. DILHR (Wis. Pers. Comm'n, 04/15/87).

An award of back pay should follow a finding of discrimination, unless the Respondent proves, by clear and convincing evidence, that the applicant would have been rejected for the position had there been no discrimination. Silvers v. LIRC (Madison Metro. Sch. Dist.) (Dane Co. Cir. Ct., 01/13/84).

831.2 Computation of amount, generally

Back pay does not terminate when the decision becomes final, but when the Complainant resumes employment with the Respondent, or would resume such employment but for his refusal of a valid offer of reinstatement to a substantially equivalent position. Smith v. RWS Trucking (LIRC, 11/18/09).

The general rule is that liability for back pay will continue to accrue after a retaliatory discharge until the date that the Respondent makes a valid offer of reinstatement, or the date the Complainant ceases making a reasonable effort to mitigate her damages. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

The accrual of back pay ceased when the Complainant stated at hearing that he was not seeking reinstatement. Metzger v. UGD Automotive (LIRC, 2/28/08).

The normal assumption is that the Complainant's salary would remain the same had he not been discharged. The Complainant has the burden of establishing that his earnings would have increased had he remained employed by the Respondent. Kaczynski v. WSR Corp. (LIRC, 10/29/97).

The quarterly method of computing back pay entitlement is the most equitable way of dealing with the twin problems of accounting for offsetting earnings and determining interest owing on a liability which has accrued over a period of time. The quarterly method requires that each calendar quarter of the back pay period be looked at separately. For each such quarter there needs to be a determination of the dollar amount the Complainant would have earned from employment with the employer in that quarter but for the discrimination, and a determination of what the Complainant did earn from other employment (or received from unemployment compensation or welfare benefits) during that quarter. The difference between these amounts is the back pay due for that quarter. Interest is also due on that amount from the

last day of that quarter until the day of payment. The total award in any given case is the sum of all such amounts for all calendar quarters in the back pay period. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

Where a Complainant was earning at least $350 a week and was able to do so only by virtue of working overtime, the Respondent was not entitled to reduce its back pay liability by figuring an hourly wage for the Complainant and multiplying by forty. The Complainant's opportunity to work those overtime hours and to thus earn the amount he did was one of the advantages of the job which the Respondent's discriminatory actions deprived him of. In a quarterly back pay system, hourly wage is irrelevant; the question is how much the Complainant would have earned in a quarter. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

In calculating back pay, the normal expectation would be that a Complainant's earnings would have stayed the same had he not been discharged. The Respondent has the burden of proof to show that the Complainant's earnings would have gone down and the Complainant has the burden of proof to show that his earnings would have gone up. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

The Administrative Law Judge properly calculated the amount of back pay where he used the actual earning experiences of employees who held the Complainant's former position. The actual earning history of successor employees in the Complainant's former position included amounts earned by these employees when they were transferred to the first shift during times when the second shift was shut down. Given the Complainant's work experience and layoff history, it was reasonable to assume that the Complainant would have had the same opportunity to work on the first shift as her successors. Olson v. Phillips Plating (LIRC, 02/11/92).

Difficulty in calculating the precise amount of back pay should not defeat the right to a back pay award. In determining the amount of back pay, unrealistic exactitude is not required and uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the employer. Sahr v. Tastee Bakery (LIRC, 01/22/91).

In this case, back pay is ordered based on an average of the earnings of three comparably situated employees. Woolridge v. Chicago Northwestern Transp. Co. (LIRC, 08/22/86).

The Personnel Commission adopts the method of computing back pay and interest thereon on a calendar quarterly basis, that being the standard practice used by the National Labor Relations Board and a practice followed by the Equal Rights Division. Under this method, earnings in one quarter can offset only back pay due within the same calendar quarter, and may not reduce back pay for other quarters. Hollinger v. UW-Milwaukee (Wis. Pers. Comm'n, 07/11/86).

A statement in the remedial order that back pay should be computed on a "calendar quarter basis" means that earnings from other employment will only offset the back pay otherwise payable to the Complainant in the same calendar quarter during which the interim earnings were received. Sheriff v. Bishops Car Wash (LIRC, 02/04/86).

While working for the employer by whom she was subsequently terminated and against whom she subsequently prevailed in the discrimination claim, the Complainant was also drawing unemployment compensation benefits based on previous employment with a prior employer. In determining the amount of back pay due the Complainant, the Commission elected to look not at the evidence the Complainant gave at the hearing as to what she earned working for the employer, but rather as to the declarations she made to the Unemployment Compensation Division, during the period of her employment, concerning the wages she was earning. Schaeffer v. Alexander's Rest. & Lounge (LIRC, 11/13/85).

An employee was laid off temporarily, recalled, and then laid off permanently. The first layoff was found discriminatory. Noting that the unemployment benefits the employee received during the second layoff were less than they would have been had he not been laid off the first time (because he had fewer benefit credit weeks), the Commission approved an order that, to remedy the first, discriminatory layoff, the employer pay the employee the difference. Heisel v. Manufacturers Box Co. (LIRC, 10/04/84); also, Vicherman v. Neuendorf Transp. (LIRC, 06/08/81), aff'd sub nom. Neuendorf Transp. v. LIRC (Dane Co. Cir. Ct., 05/07/82).

Lost overtime wages are a proper component of a back pay award. Toonen v. Brown County (LIRC, 10/15/82), aff'd sub nom. Brown County v. LIRC (Brown Co. Cir. Ct., 11/14/83).

Back pay may be calculated by averaging the earnings of the employer's other workers performing the same job. Poeschl v. Mercury Marine (LIRC, 04/01/81).

Back pay may not be denied simply because it cannot be exactly calculated or is difficult to calculate. Buyatt v. C.W. Transport (LIRC, 07/25/77).

831.3 Offsets from back pay

The payment the Complainant received from a business he owned did not constitute "interim earnings" within the meaning of the statute. Therefore, those earnings were not deducted from the back pay award. The amount the Complainant earned was a fixed sum that he had drawn from his outside business throughout the course of his employment with the Respondent, and this income had continued following his discharge. Smith v. Wis. Bell (LIRC, 04/19/12).

Back pay was not cut off as of the date the Complainant, who had been terminated by the Respondent, received a raise at a subsequent job with another employer (in May of 1987) since the Complainant's earnings per calendar quarter were still less than they would have been had he continued at the Respondent. The question is not hourly rate, but earnings. However, back pay liability was terminated at the end of calendar year 1988 because the Complainant's quarterly earnings after that time were consistently higher than what he would have earned had he continued working for the Respondent and the new job was comparable in terms of career path considerations. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

A uniform charge which a subsequent employer deducted from the Complainant's wages served to reduce the amount of interim earnings which offset back pay. The uniform charge was subtracted from the interim earnings on a quarterly basis and not as a lump sum. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

The back pay award was reduced where the Respondent sustained its burden of proving that from the time the Complainant was discharged until the time her baby was born she did not actively seek employment and, thus, failed to reasonably mitigate her wage loss. Davis v. Braun-Hobar Corp. (LIRC, 04/18/90).

In a case brought under the Employees' Right to Know Law, secs. 101.58-101.599, Stats., the Department exceeded its authority when it ordered that the Complainant recoup all back pay without deducting the unemployment benefits he had received. The effect of this order was to overcompensate the Complainant. Door County Highway Dep't v. DILHR, 137 Wis. 2d 280, 404 N.W.2d 548 (Ct. App. 1987).

An employer may deduct from back pay amounts it can show would not have been earned because of the Complainant's predictable history of absenteeism. Szczerbiak v. Forest Labs (LIRC, 07/06/83).

LIRC does not have authority to reduce a back pay award by the amount of sick leave benefits received, especially where the employer did not pay those benefits. Roessler v. LIRC (Chicago & N.W. R.R.) (Eau Claire Co. Cir. Ct., 09/08/82).

LIRC did not abuse its discretion in refusing to reduce the applicant's interim earnings to reflect a 40 hour work week where the applicant worked 50 hours per week. While some federal cases argue that earnings are "supplemental" where the employee could have earned them and still worked at the position which he was discriminatorily denied, LIRC could reasonably conclude that the Act requires it to deduct all actual earnings from lost wages. Neuendorf Transp. v. LIRC (Vicherman) (Dane Co. Cir. Ct., 05/07/82).

831.4 Events limiting back pay liability

Back pay issues discussed in this case include: standards and burdens for evaluating an argument that back pay would have increased because the Complainant would have been promoted in the normal course of her employment if it had continued; the effect of there having been parts of the back pay period in which the Complainant was physically unable to work, once because of an injury incurred in a job which the Complainant had taken in order to mitigate her losses and once because of an illness unconnected to work; and whether and when the back pay period should be considered terminated because of the Complainant's acceptance of other employment. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

An Administrative Law Judge's award of reinstatement and back pay up to the time of reinstatement was improper where the Complainant expressly stated at the hearing that she was only asking that she be awarded back pay up to the time of the hearing. Given the Complainant's waiver of reinstatement, the Complainant was only entitled to be awarded back pay up to the time of the hearing. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93).

Where a Complainant was not actually discharged by an employer, the remedies of reinstatement and back pay can only be awarded if the Complainant establishes that the Complainant was constructively discharged. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

A decision by a Circuit Court that the Complainant was "not willing to work," so as to be unavailable for work within the meaning of the Unemployment Compensation Act, is equivalent to a determination that the Complainant failed to exercise reasonable diligence to obtain other employment. That finding precludes an award of back pay for the time that the Complainant was not willing to work. Frostman-Messier v. Nancy Lee Employment Agency (LIRC, 02/22/91).

831.41 Unconditional offer of reinstatement

A valid offer of reinstatement will end the accrual of back pay. To be valid, an offer of reinstatement must be specific and unconditional. It must be for the same position, or a substantially equivalent position. Further, the employee must be afforded a reasonable time to respond to the offer of reinstatement. In addition, the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual. In this case, there was no indication what type of job the Respondent's attorney had discussed with the Complainant prior to the hearing. Further there was some suggestion that there was some impediment as a reason for the Complainant's unwillingness to go back to work for the Respondent. Further, the record failed to disclose whether the Respondent's attorney had the authority to make an offer of reinstatement to the

Complainant. Therefore, the Complainant's statement prior to the hearing that he declined to return to the job did not cut off his back pay as of the date of the hearing. Goldsworthy v. Elite Marble (LIRC, 10/15/04).

A valid offer of reinstatement terminates the accrual of the employer's backpay obligation. The offer of reinstatement must be for the same position or a substantially equivalent position. "Substantially equivalent" employment means employment that affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status. Ramos v. Stoughton Trailers (LIRC, 08/16/01).

The Respondent's offer to reinstate the Complainant to a second shift supervisor position (as opposed to the first shift position the Complainant had previously held) tolled the Respondent's backpay liability. There was no evidence to establish that the working conditions on the second shift were worse on the day shift. The Respondent's practice has been to transfer supervisors to different shifts and plants. The Complainant had been transferred to another plant before. There was a good chance, due to changes in the Respondent's operations, that had the Complainant's employment not been terminated he would have been assigned to a different plant location anyway. A travel distance of twenty-six miles to work does not appear to be an unreasonable distance for the Complainant to travel to work. The Complainant's position is not a unique position. Finally, requiring the Respondent to reinstate the Complainant to his former position would likely have required the displacement of another employee at that location. Ramos v. Stoughton Trailers (LIRC, 08/16/01).

The Respondent's offer to reinstate the Complainant did not end the accrual of the Complainant's back pay period where the offer of reinstatement was made with the condition that the Complainant withdraw her complaint. Cintron v. Phil Wrobbel Serv. Corp. (LIRC, 04/29/96).

A Respondent's liability for back pay terminates at the point a Complainant waives an offer of reinstatement. The Complainant in this case had been constructively discharged by the Respondent when she quit after being subjected to unlawful sexual harassment. The Complainant testified at hearing that she did not want reinstatement and that she could not go back to work for the Respondent. The Complainant's testimony amounted to an unequivocal waiver of reinstatement and the Respondent's liability for back pay ended as of that date. Miller v. Oak-Dale Hardwood Prod. (LIRC, 12/13/94), remanded on other grounds sub nom. Oak-Dale Hardwood Prod. v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

In order to toll the accrual of back pay, an offer of reinstatement must be for the same position, or a position which is substantially equivalent to the position that the employee held prior to the alleged discriminatory act. In a Wisconsin Family and Medical Leave Act case, Kelley Co. v. Marquardt, the Wisconsin Supreme Court stated that comparability in salary is only one factor to be considered in determining whether a new position was substantially equivalent to the employee's previous position, and that comparability in status is another important factor. In this case, the Respondent made a valid offer of reinstatement to the Complainant when it offered him a punch press operator position, which was not substantially different from the position of large press set-up person that the Complainant had worked in prior to his discharge. Because the positions were substantially equivalent, the Complainant's failure to accept the offer of reinstatement constituted a failure to mitigate his damages. The Respondent's reinstatement offer tolled the accrual of back pay as of the date of the Complainant's refusal to accept the position. Woltman v. Atlas Metal Parts Co. (LIRC, 01/07/94).

The Family and Medical Leave Act does not state that constructive discharge is a requirement for reinstatement or back pay. The fact that an employee voluntarily quit her employment with an employer

is an appropriate factor for the Department to consider in determining whether the employee mitigated her damages. Not all voluntary terminations constitute a lack of reasonable diligence. On remand the Department must determine whether the employee acted reasonably in quitting after her return from family leave. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992).

The Complainant's entitlement to back pay was extinguished by her failure to accept an unconditional offer of reemployment communicated directly to her by the Respondent. An offer of reemployment does not need to be accompanied by an offer to make the Complainant whole for all financial losses in order to be "unconditional." It may leave the question of back pay and similar remedies entirely uncovered. All that is necessary is that it offer employment, unconditioned on any requirement that the employee abandon her right to pursue further remedies. Frostman-Messier v. Nancy Lee Employment Agency (LIRC, 02/22/91).

Back pay liability ends at the time the employer's valid offer of reinstatement is rejected. To be valid, the offer must: 1) be for the same or a substantially similar position; 2) be unconditional; 3) afford the Complainant a reasonable time to respond; and 4) be made directly by the employer or agent authorized to hire and fire. A Complainant's rejection of an offer because she was happily working elsewhere does not waive the requirement that the offer be unconditional. Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

831.42 Accepting comparable job at same or higher wage

Liability for back pay is not automatically cut off when the Complainant is re-employed at a higher wage. In this case, the Complainant accepted higher paying work after he had been discharged by the Respondent. However, the Complainant was not asked whether he would have accepted the job at the second employer even if he had still been employed by the Respondent. While the Complainant was not eligible for back pay during the time he worked for the second employer (where he earned more than he would have earned from the Respondent), his acceptance of that employment did not completely cut off his potential entitlement to back pay. Nor did it terminate his right to reinstatement with the Respondent. Robertson v. Family Dollar Stores (LIRC, 10/14/05)

If a person obtains alternate employment with a higher wage in a position which he would have accepted even if he had been employed by the original employer, then the subsequent employment terminates the original employer's liability for back pay and reinstatement despite the person's layoff from the subsequent employment. Anderson v. UW-Whitewater (LIRC, 12/03/80), aff'd sub nom. UW-Whitewater v. LIRC (Ct. App., Dist. IV, unpublished opinion, 11/25/85).

831.43 Quitting or being fired from comparable job

Just because an employee is discharged from a subsequent job does not necessarily establish that he failed to reasonably mitigate his damages arising from a previous act of discrimination. In this case, the Complainant's discharge from his subsequent job did not cut off his entitlement to back pay because the record did not establish that his actions were unreasonable or wrongful. Matousek v. Sears Roebuck & Co. (LIRC, 02/17/06); vacated and remanded for further proceedings sub nom. Sears Roebuck & Co. v. LIRC (Milwaukee Co. Cir. Ct., 09/29/06).

It is appropriate to reduce a back pay award by the amount the Complainant would have earned had he exercised reasonable diligence in seeking new employment. However, quitting a subsequent job is not

necessarily an event which completely cuts off the Respondent's liability for back pay. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

There is no *per se* rule that discharge from subsequent employment ends the Respondent's back pay liability, even when the Complainant's discharge was for poor performance. The question is whether the discharge indicated that the Complainant did not act reasonably to mitigate his damages. In this case, the Complainant was fired for failing to record the correct number of pallets at his subsequent place of employment. There was nothing in the record to suggest that this anything more than an inadvertent performance error on his part. Therefore, there was no reason to regard it as a deliberate failure to mitigate his damages. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

The Complainant did not fail to exercise reasonable diligence in mitigating her damages when she was fired from her subsequent employment for having three absences which, under the circumstances, were understandable absences U.S. Paper Converters v. LIRC, 208 Wis. 2d 523, 561 N.W.2d 756 (Ct. App. 1997).

Not all voluntary quits of subsequent jobs constitute a lack of reasonable diligence in mitigating a wage loss. The burden is on the employer to prove that the Complainant did not have any justifiable reason for quitting. In this case, the Complainant established that the job she took after being discharged by the Respondent was not comparable in terms of working conditions or compensation. Under the circumstances, the Complainant's quitting that job should have no adverse effect on her eligibility for back pay. Crivello v. Target Stores (LIRC, 06/13/95), aff'd sub nom. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

The burden is on the employer to prove that the employee has failed to exercise reasonable diligence in mitigating her wage loss. Not all voluntary quits of subsequent jobs constitute a lack of reasonable diligence in mitigating a wage loss. Davis v. Braun-Hobar Corp. (LIRC, 04/18/90).

A Complainant's quitting a subsequent job three days after she began it did not toll the back pay period where the job required an excessive number of hours and did not include any breaks. State ex rel. Badger Produce v. MEOC (Dane Co. Cir. Ct., 09/02/80).

A part-time grocery store cashier who was discriminatorily discharged due to pregnancy was allowed back pay from the date of discharge to the date she voluntarily quit her cleaning job. Peterke v. Jolly Foods (LIRC, 10/03/78), aff'd sub nom. Jolly Foods v. LIRC (Dane Co. Cir. Ct., 05/08/79), aff'd, (Ct. App., Dist IV, unpublished opinion, 05/23/80).

Because a complaining party quit a comparable job which he had taken after being discriminatorily refused hire as a brakeman, it was reasonable to conclude that he would have also quit the first job and he was therefore not entitled to back pay and retroactive seniority. Soo Line R.R. v. LIRC (Bergeman) (Dane Co. Cir. Ct., 09/07/78).

831.44 Unavailability for work

Because the Complainant could not return to his job due to the conditions of his probation, which prohibited him from having any unsupervised contact with minors, no reinstatement or back pay was granted as a remedy. Ionetz v. Dolgencorp LLC (LIRC, 08/6/15), rev'd on other grounds sub nom. Ionetz and Dolgen Corp., LLC v. LIRC (Jefferson Co. Cir. Ct. 08/25/16), aff'd (Ct. App. Dist. IV, 07/14/17, summary decision).

The Complainant made reasonable efforts to mitigate her loss of income by online job search methods. The Respondent did not establish that there was a reasonable likelihood that the Complainant might have found more comparable work than she did by exercising greater diligence. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

The concept of make-whole relief does not include reinstating the Complainant into a job that he would have been unable to keep even in the absence of any discrimination by the Respondent. There is no reason to distinguish between an employee who loses his job because of unavailability to work related to criminal conduct and one who loses his job because of unavailability to work due to illness. The relevant point is that, due to circumstances over which the Complainant had no control, the Complainant would have been completely unable to perform any work over a prolonged period of time. Assuming that the Respondent can establish that it would have discharged the Complainant based upon his unavailability for work, the Complainant's right to reinstatement would be cut off at the point when he would have been unavailable to work. (Because the Complainant was completely unable to work, the only accommodation that would have been available for his disability was a leave of absence. The Respondent would not have been required to hold a job open indefinitely by way of reasonable accommodation if there was no foreseeable return to work date.) Knight v. Walmart Stores East (LIRC, 10/11/12).

The Complainant testified that he had not looked for work after the time that he was discharged from the employer who hired him after he was discharged by the Respondent. He indicated that he was planning to enroll in school on a full-time basis and to help out at a family-run business without pay. The Complainant was not entitled to back pay from the Respondent while he was a full-time student or where he had otherwise removed himself from the labor market. Robertson v. Family Dollar Stores (LIRC, 10/14/05).

A Complainant's decision to relocate to another state does not sever her entitlement to a back pay award. In this case, the Respondent did not establish that the Complainant failed to exercise reasonable diligence in seeking employment after she moved out of state. Further, the Respondent did not establish that it ever extended her an offer of reinstatement, whether before or after her move. Miller v. Oak-Dale Hardwood Prod. (LIRC, 12/13/94), aff'd sub nom. Oak-Dale Hardwood Prod. v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

The Respondent's argument that a back pay award should not have extended until the date the Complainant (who was discharged because of pregnancy) delivered because it was not "logical" to believe she would have worked up to her delivery date embodies the same type of preconceptions about the effects of pregnancy on the employee's abilities as was found to have violated the Wisconsin Fair Employment Act. Howard v. The Cloisters (LIRC, 08/24/90).

Where a Complainant stated at the hearing that she had no interest in returning to work for the Respondent and that she had abandoned her search for other work at a definite point in time after her termination by the Respondent, this was sufficient to eliminate the Complainant's right to reinstatement and to cut off her right to back pay as of the point at which she abandoned her search for work. Kelm v. Watertown Pub. Library (LIRC, 07/19/85).

The discharged employee was awarded back pay until the date he enlisted in the U. S. Army and was therefore no longer available for employment with the employer. Scheidel v. Am. Council of the Blind (LIRC, 04/06/82).

It was discrimination to discharge a retail counselor in her third month of pregnancy on the unsupported speculation that pregnant employees are frequently ill, and she was awarded back pay from the date of her discharge to the date her doctor indicated she would have had to stop work. Chojnacki v. Rental Directory (DILHR, 01/13/77).

831.45 Showing that job would have ended anyway

The Respondent did not meet its burden of showing that back pay should be cut off without an offer of reinstatement. There was no evidence in the record to support a finding that the store where the Complainant worked would have closed after she was discharged. Moreover, when an employer operates several facilities in Wisconsin, the fact that it no longer operates the facility in which the Complainant was employed does not serve as a bar to an offer of reinstatement. There is no reason to presume that the Complainant would not have been offered a transfer to one of the Respondent's other store or restaurant locations, had she remained employed, nor any reason to believe that the Respondent could not offer the Complainant instatement into a job at one of its other stores or restaurants within a reasonable commuting distance from the Complainant's home. Weaver v. V&J Holding Companies Inc. (LIRC, 12/23/13).

Back pay was not cut off when the Respondent sold its facility following the Complainant's discharge. Where the Respondent has been found to have retaliated against the Complainant because of prior opposition to allegedly discriminatory practices, it had the burden of proving that it would not have recommended him for hire by its successor. Savage v. Stroh Container (LIRC, 09/20/89).

Where the discharge of a restaurant employee was found to have been discriminatory and back pay was ordered, the owners of the restaurant could not escape liability for back pay owing after the date on which those owners sold their interest in the restaurant, where the evidence suggested that most, if not all, of the former employees were hired by the new owners of the restaurant and continued working there. Discrimination having been established, the burden was on the Respondent to prove that its back pay liability should be reduced. The Respondent here failed to prove that the Complainant would not have continued to receive income from employment at the restaurant even after it sold its interest in it. Buehler v. Schlueter Inv. Co. (LIRC, 06/05/87).

A qualified black applicant who was refused hire was entitled to the back pay he would have received from the date of the refusal to the time he would have been laid off. Lewis v. Safeguard Security Serv. (DILHR, 01/26/77); Kostroski v. Am. Can (DILHR, 04/28/77).

It was discrimination to terminate a part-time clerical employee pursuant to a policy of discharging employees in their fourth month of pregnancy where the employer could not show that the termination was caused by its computerization of the clerical work; however, her back pay was limited to the date on which her duties were actually phased out. Rech v. Glearson (LIRC, 10/26/77).

831.46 After-acquired evidence

After-acquired evidence of a legitimate basis for an employee's termination cannot shield the employer from liability for its discriminatory conduct. However, it may be used in fashioning the remedy. As a general rule, neither reinstatement nor front pay is an appropriate remedy in such cases, as it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event upon lawful grounds. The beginning point in the formulation

of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered. However, the Respondent must first establish that the wrongdoing was of such severity that the employee would, in fact, have been terminated on those grounds alone if the employer had known of it at the time of the discharge. In this case, the Complainant established that the Respondent discriminated against her on the basis of conviction record when it terminated her employment. However, the Respondent later learned that the Complainant had falsely reported that she had never been convicted of any offense. The Respondent considers falsification of documents in the application process to be cause for immediate discharge. Accordingly, the Complainant was not entitled to reinstatement; however, she was entitled to back pay from the date of her discharge until the date of the hearing. McKnight v. Silver Spring Health & Rehab. (LIRC, 02/05/02).

The employer attempted to limit its liability for back pay at a damage hearing by arguing that if it had not unlawfully discharged the Complainant when it did, it would have conducted an investigation of the Complainant's conduct which may have uncovered a legitimate reason for discharging the Complainant. Because the Respondent was not actually in possession of any after-acquired evidence of misconduct, it was appropriate to prohibit the Respondent from presenting testimony about any such investigation and what it might have uncovered. Schneider v. Stoughton Trailers (LIRC, 02/24/95).

831.5 Limitation to two years prior to filing of complaint

Pension benefits are a component of back pay and may, therefore, not be awarded for any period more than two years prior to the filing of a complaint. Davis v. City of Milwaukee (LIRC, 08/23/82).

Back pay cannot be awarded where liability accrued more than two years prior to the filing of the complaint. Bemis Mfg. v. LIRC (Sheboygan Co. Cir. Ct., 02/28/80).

An employee who was discriminated against was not awarded her lost earnings because her disability occurred more than two years prior to the filing of her complaint. DeWitt v. Appleton Papers (LIRC, 06/07/78).

831.6 Respondent's obligation for back pay payment, exceptions and limitations

While it might be satisfying to hold the individual who committed the sexual harassment of the Complainant financially responsible for his actions, the law does not sanction such a result. The employer is liable for any financial remedies ordered as a result of a violation of the law by an individual employed by that employer. (sec. 111.39(4)(c), Stats.). Powell v. Salter (LIRC, 07/11/97).

Sec. 111.39(4)(c), Wis. Stats., states that "[I]f an examiner awards any payment to an employee because of a violation of sec. 111.321 by an individual employed by the employer, under sec. 111.32(6), the employer of that individual is liable for payment." The bill drafting file provides no hint as to the intended purpose of this language. It appears, however, that it is an attempt to hold employers responsible for the discriminatory acts of their agents, and to provide a "deep pocket" so that prevailing Complainants are able to collect back pay awarded to them. Ninham v. Oneida Tribe of Indians of Wis. (LIRC, 06/25/91).

The employer was responsible for paying the Complainant's reasonable attorney's fees and costs because it responded inadequately when it learned of a supervisor's acts of sexual harassment against the Complainant and because the supervisor was acting under color of his authority. Sec. 111.39(4)(c), Stats., provides that the employer should pay, and there is no authority for the proposition that a supervisor who

is not an employer may be ordered to make payment to the Complainant. Nelson v. Waybridge Manor, Inc. (LIRC, 04/06/90).

The employer does not have a right to contribution from a union to offset its own liability for violations of the Act. There is no direct case precedent in Wisconsin that requires a union to bear such costs where an individual is adversely affected by a discriminatory practice sanctioned in a collective bargaining agreement. Austin v. Waukesha Joint School Dist. #1 (LIRC, 05/27/81).

Because the Wisconsin Constitution protects a county from liability for acts of its sheriff, an employee who was discriminatorily denied reemployment could not be awarded back pay even though the sheriff who was responsible for the denial was not vested by ordinance with authority to make such a decision. Algozino v. Waupaca County Law Enforcement Comm. (LIRC, 03/24/81).

Because the legislative intent is to narrowly construe exemptions from the coverage of the Act, a municipality not named as a party will be considered a party to a complaint which names only an agency created by the municipality, and the municipality may be liable for the back pay obligation of that agency even where the municipality was not added as a party until after the liability of the agency had been determined at a hearing. City of Milwaukee v. LIRC (Kirk) (Dane Co. Cir. Ct., 02/04/79).

831.9 Miscellaneous

The Complainant failed to provide a basis for voiding the settlement agreement in his case where he argued that the Respondent had made misrepresentations regarding the tax consequences of the settlement. The Respondent correctly informed the Complainant that the settlement amount was taxable as income. Sec. 104(a)(2), of the Internal Revenue Code, provides a statutory exception for taxation of gross income for the amount of any damages (other than punitive damages) which are received (whether by suit or agreement, and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. The Complainant in this case did not receive income from the settlement on account of personal physical injuries or physical sickness. The amount which he received as the settlement amount represented a cash payment in lieu of paid leave following his resignation, a cash payment for his overtime hours and accrued vacation and personal holiday accounts, and severance pay equal to one and one-quarter times his annual salary. For this, and other reasons, the Administrative Law Judge appropriately dismissed the Complainant's claims that the settlement agreement should be voided. Sullivan v. UW-Marathon County (LIRC, 09/27/07).

The fact that the Complainant received social security disability benefits following her discharge by the Respondent does not necessarily render her ineligible for back pay. While the Complainant's disability may have been sufficiently severe to entitle her to social security benefits, the Respondent in this case did not establish that her disability would have prevented her from continuing her employment with the Respondent or from attempting to find other employment. Even if the Complainant was completely unable to work, this would not constitute proof that she failed to make a good-faith effort to mitigate her damages. Crivello v. Target Stores (LIRC, 06/13/95), aff'd sub nom. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

An employer was not to reduce the wages of a male employee to comply with an equal pay order for females. Allison v. Jensen's Cleaners (DILHR, 06/14/74); Biermann v. Larson Pallet (DILHR, 11/02/73).

832 Front pay

The Wisconsin Fair Employment Act does not authorize the award of front pay in cases other than those implicating sec. 111.322(2m), Stats. The mention of front pay in the Act only for sec. 111.322(2m), Stats., retaliation cases implies that that remedy is not available in other cases. An administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates. Therefore, any reasonable doubt as to the existence of an implied power should be resolved against the exercise of such authority, and liberal construction does not give a court or administrative agency the right to expand the terms of the legislation. Legislative history supports the conclusion that the Wisconsin Fair Employment Act does not authorize front pay as a remedy for discrimination. Suttle v. DOC (LIRC, 05/22/09), aff'd sub nom. DOC & Suttle v. LIRC (Dane Co. Cir. Ct., 06/02/10).

Front pay in lieu of reinstatement is unavailable to a prevailing Complainant under the Wisconsin Fair Employment Act, except in claims under sec. 111.322(2m), Stats. Venneman v. UW-La Crosse (LIRC, 12/17/09).

The Labor and Industry Review Commission takes the position that sec. 111.39(4)(c), Wis. Stats., does not authorize the award of front pay in cases other than those implicating sec. 111.322(2m), Wis. Stats. The Legislature did not intend to permit front pay awards in cases other than those involving retaliation. Current anti-retaliation laws are adequate to protect individuals from further retaliation if they are required to return to their former workplace. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

In a wrongful discharge case, Kempfer v. Automated Finishing, Inc., 211 Wis. 2d 100, 564 N.W.2d 692 (1997), the Court noted that in those situations where reinstatement is not feasible an award of front pay is still limited by the concepts of foreseeability and mitigation. Assuming it appropriate to award front pay, it is necessary in any particular case to determine the extent of front pay, if any, foreseeable under the circumstances of the case and what effect the Complainant's mitigation of damages will have on the award of front pay. Kaczynski v. WSR Corp. (LIRC, 10/29/97).

The Department has the authority to award front pay in appropriate cases. In part, a decision to order front pay would need to consider whether it would be reasonable for the Complainant to return to the workplace. This would depend to some extent on whether the employer had now remedied the situation that caused the Complainant to leave in the first place. Oak-Dale Hardwood Prod. v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

833 Reinstatement; hire

The employer eliminated the Complainants' jobs and created new jobs which the Complainants were strongly discouraged from applying for, and for which they did not apply. The Administrative Law Judge found discrimination based upon the Complainants' ages, but did not order reinstatement or back pay because the Complainants had not applied for the new jobs despite not having been prohibited from doing so. However, failure to apply for the newly posted jobs does not preclude a remedy. Where a Complainant is discouraged from applying for a job based upon discriminatory factors, he or she should be eligible for instatement and back pay unless the Respondent can establish by clear and convincing evidence that, due to a neutral, non-discriminatory reason, the Complainant would not have been hired for the position. Brown, et al. v. Chippewa Valley Tech. College (LIRC, 11/28/14).

There was some evidence that reinstatement would be unreasonable for both parties in this case. However, the Labor and Industry Review Commission determined that front pay is not available as an alternative to reinstatement, except in cases under sec. 111.322(2m), Stats. If the Respondent was not ordered to reinstate the Complainant and an award of front pay is unavailable as remedial relief, the Complainant would not be

made "whole" for the Respondent's discriminatory conduct. Furthermore, to not require the Respondent to reinstate the Complainant would only serve to reward the Respondent for its discriminatory conduct. In this case, the Complainant indicated that he would be willing to return to work for the Respondent. Under these circumstances, an order of reinstatement was appropriate. Suttle v. DOC (LIRC, 05/22/09) , aff'd sub nom. DOC & Suttle v. LIRC (Dane Co. Cir. Ct., 06/02/10).

Front pay in lieu of reinstatement is unavailable to a prevailing Complainant under the Wisconsin Fair Employment Act. Reinstatement (or, "instatement," in the case where an individual was unlawfully denied hire) is the preferred remedy in discrimination cases. Reinstatement is not required where the result would be a working relationship fraught with hostility and friction. However, an employer must not be able to use its anger or hostility toward the Complainant for having filed a lawsuit as an excuse to avoid the Complainant's reinstatement. In this case, the Respondent argued that the Complainant would not enjoy the confidence and approval of the current provost and chancellor of the university. However, there are factors which should lessen the Respondent's stated concern. First of all, the Complainant already had a long history of employment with the Respondent. Secondly, since the current provost and chancellor are relatively new in their positions at the university, there is no reason to believe that there would be any obstacle preventing them from gaining confidence in the Complainant. If the Respondent was not ordered to reinstate the Complainant, the Complainant would not be made whole for the Respondent's discriminatory conduct against him. A failure to order instatement should be considered only in the most unusual circumstances, which did not exist in this case. Venneman v. UW-La Crosse (LIRC, 12/17/09).

Since the Respondent operates several other facilities in Wisconsin, the fact that it no longer operates the facility in which the Complainants were employed did not serve as a bar to an offer of reinstatement. The tone and content of the hearing record suggested that there was some degree of mistrust and antagonism between the Complainants and the owners of the Respondent. However, given the protections of the Wisconsin Fair Employment Act and other anti-retaliatory statutes, this suggestion alone was an insufficient basis upon which to conclude that reinstatement would not be a viable remedy. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

There is precedent under federal law for displacing (i.e., "bumping") an incumbent employee in order to reinstate an individual who has been unlawfully discriminated against. One federal court case set forth a number of factors to consider in determining whether bumping is appropriate. They include the following: (1) the effect on the Complainant of the refusal to displace the incumbent; (2) the culpability of the incumbent; (3) the disruption to the incumbent; (4) the degree of culpability of the employer; (5) the uniqueness of the position and the availability of comparable positions; (6) the Complainant's diligence in taking steps to assure that the position remains available should he prevail; and (7) whether there would be undue disruption of the employer's business. Ramos v. Stoughton Trailers (LIRC, 08/16/01).

The criteria stated in the Wisconsin Family and Medical Leave Act relating to "equivalent employment positions" is not the same standard that is applied in cases under the Wisconsin Fair Employment Act, which requires that an offer of reinstatement be for a position which is "substantially equivalent." Ramos v. Stoughton Trailers (LIRC, 08/16/01).

A Complainant's decision to relocate to another state does not sever her entitlement to a back pay award. In this case, the Respondent did not establish that the Complainant failed to exercise reasonable diligence in seeking employment after she moved out of state. Further, the Respondent did not establish that it ever extended her an offer of reinstatement either before or after her move. Miller v. Oak-Dale Hardwood Products (LIRC, 12/13/94), aff'd sub nom. Oak-Dale Hardwood Prod. v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

An Administrative Law Judge's award of reinstatement and back pay up to the time of reinstatement was improper where the Complainant expressly stated at the hearing that she was only asking that she be awarded back pay up to the time of the hearing. Given the Complainant's waiver of reinstatement, the Complainant was only entitled to be awarded back pay up to the time of the hearing. Marquardt v. Wal-Mart Stores (LIRC, 06/14/93), remanded on other grounds sub nom. Oak-Dale Prod. v. LIRC (Pierce Co. Cir. Ct., 02/16/96).

An employee who was discriminated against in violation of the Wisconsin Fair Employment Act is not entitled to back pay and reinstatement after voluntarily quitting a job without being actually or constructively discharged by the employer. A voluntary resignation terminates the accrual of back pay and the employer's obligation to reinstate. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

An employee who was unable to perform her job because of permanent medical restrictions was not entitled to reinstatement where the employer could not reasonably accommodate her restrictions. Macara v. Consumer Coop. of Walworth County (LIRC, 02/14/92).

If an employer is no longer operating a second shift, the Department's order directing that the Complainant be reinstated to her second shift head inspector position does not require the employer to displace a head inspector on a different shift. The order requires that the employer place the Complainant in a substantially equivalent position if the second shift is no longer operating. Olson v. Phillips Plating (LIRC, 02/11/92).

In order to be a valid offer of reinstatement, the offer must be for the same or a substantially equivalent position. Comparability in salary is only one factor to be considered. In this case, the Respondent's offer of a stripper position to the Complainant did not satisfy its obligation to reinstate the Complainant as a head inspector because the Complainant was not able to perform the stripper position due to a back problem. Olson v. Phillips Plating (LIRC, 02/11/92).

The Commission denied the Respondent's request that the Commission modify its decision to add a requirement that the Complainant be required to pass a physical examination before reinstatement. Elemental fair play requires that the Complainant, having proven that the Respondent refused to hire him on the basis of a handicap which did not render him unable to perform the duties of the job, must be made whole with the next available opening and not merely another opportunity to run another medical gauntlet to get what should have been his in the first place. Hansen v. City of Kenosha (LIRC, 07/06/88).

Where the Commission found that the Complainant had been terminated because of his race, and awarded back pay to continue through reinstatement, the Commission did not order immediate reinstatement because such an order, which would probably displace a current employee, would be likely to result in animosities and other problems. Rather, the Commission ordered that the Complainant be reinstated in the next available position substantially equivalent to the position he held prior to his discharge, with back pay to continue until such time. Taylor v. Hampton Shell (LIRC, 06/27/88).

Back pay was awarded, but not reinstatement, because the employee was now employed elsewhere and was earning more than he did before his discharge, and because the animosity of the employer would prevent desirable working conditions. Krejci v. Jonathan Furniture (LIRC, 11/06/81).

A rule requiring pregnant employees to take a leave in their fifth month regardless of their physical or medical condition was arbitrary and sex-biased where the employer could not demonstrate a compelling interest in the rule, and an employee discharged for violating the five month rule should be reinstated even

where the employer could also have discharged her for unsatisfactory work performance. Nursing Homes v. DILHR (Dane Co. Cir. Ct., 01/22/74).

834 Other remedial orders

834.1 Remedies for insurance benefit denial

Had the Complainant not been discharged, he would have continued to receive health insurance and pension contributions. The Complainant does not have the burden to establish the specific cost of his health care or the value of his pension benefits at the hearing. Those are matters the parties can resolve during the compliance phase of the litigation. Smith v. Wis. Bell (LIRC, 04/19/12).

A Respondent is liable for the Complainant's out-of-pocket medical expenses if they would have been covered had the Complainant not been discharged in violation of the Wisconsin Fair Employment Act. However, the Respondent in this case was not liable for medical expenses for which the Complainant did not submit a bill since the Respondent had little opportunity to defend that claim. Bodoh v. US Paper Converters (LIRC, 11/14/95), aff'd sub nom. US Paper Converters v. LIRC (Outagamie Co. Cir. Ct., 06/14/96); aff'd, 208 Wis. 2d 523, 561 N.W.2d 756 (Ct. App. 1997).

Where, among other things, the Complainant's testimony on the issue was contradictory, the Complainant failed to prove entitlement to an alleged insurance cost differential between what he paid when employed by the Respondent and what he paid at a subsequent job. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

Amounts which a Respondent would have paid for insurance covering a Complainant are not to be figured in the back pay award. Actual out-of-pocket medical expenses incurred by a Complainant, or amounts expended by a Complainant to purchase substitute insurance coverage, may be included in such an award. Woolridge v. Chicago Northwestern Transp. Co. (LIRC, 08/22/86).

Where the employee was discriminatorily denied medical insurance, the employer must reimburse the employee for the amount of the least expensive insurance premium paid on a monthly basis by the employer and for any out-of-pocket medical expenses incurred by the employee that would have been covered by the employer's medical insurance program had the employee been allowed to participate. LeDoux v. Wis. Book Bindery (LIRC, 04/10/81).

A black employee who was discriminatorily denied group health insurance was entitled to reimbursement for his out-of-pocket medical expenses accrued during the period of the denial. Howard v. Cassel Box (DILHR, 09/28/76).

834.2 Remedies for loss of seniority

An award of retroactive seniority to the date an applicant would have been hired but for handicap discrimination did not exceed DILHR's authority. The expectations of other employees which may have arisen from the seniority system are superseded by the Act, which furthers a strong public policy interest. Milwaukee County v. LIRC (Lade) (Dane Co. Cir. Ct., 09/07/78); Soo Line R.R. v. LIRC (Bergeman) (Dane Co. Cir. Ct., 09/07/78).

Two females who had forfeited their seniority under discriminatory transfer rules should have that seniority reinstated. Haug v. Ohio Med. Products (DILHR, 08/05/75).

Where an employer maintained unlawful seniority units and a no-transfer policy, female employees who had been denied transfers could bid on any job on a plant-wide seniority basis, and one female employee whose transfer bid had been denied in favor of a less senior male was allowed that transfer. Bruce v. Parker Pen (DILHR, 11/14/72).

834.3 Remedies for loss of fringe benefits

The remedy provided in this case does not include payment of the costs of the health care that would have been paid by the insurance the Complainant would have had, because she did not take reasonable steps to mitigate her loss by attempting to obtain insurance comparable to that by which she would have been covered if the Respondent had not discriminated against her. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

The Respondent discriminated against the Complainant in compensation on the basis of disability by failing to pay her for hours worked. Because, however, it was clear that the underpayment of wages was the subject of a separate wage and hour complaint which had been settled with a payment to the Complainant, the Complainant was not entitled to any monetary relief on her discrimination complaint. Even though there was no evidence that the Complainant executed a release of her discrimination claim when she accepted the settlement of the wage claim, the Complainant is not entitled to a second recovery for the same underpayment. Schloemer v. Cupola House (LIRC, 06/14/13).

Had the Complainant not been discharged, he would have continued to receive health insurance and pension contributions. The Complainant does not have the burden to establish the specific cost of his health care or the value of his pension benefits at the hearing. Those are matters the parties can resolve during the compliance phase of the litigation. Smith v. Wis. Bell (LIRC, 04/19/12).

The Complainant was not entitled to compensation for loss of paid vacation because such a loss was not financial. If someone was entitled to 52 weeks of back pay and would have been eligible for two weeks of paid vacation with the employer that discharged him, the fact that the Complainant may not have been entitled to any paid vacation with a subsequent employer was a non-financial loss that could not be quantified and remedied. The Complainant would have received back pay for the entire period including the controverted two weeks and would have lost only the vacation; i.e., the right not to have worked for the controverted two weeks of pay. Holbrook v. Coffee Sys. (LIRC, 04/10/92).

It would go beyond the boundaries of the Act to award a cash payment in lieu of restoration of sick leave and vacation days. Ray v. UW-La Crosse (Wis. Pers. Comm'n, 07/07/83).

Where an employer had an informal policy of paying employees for sick leave except for pregnancy-related absences, an employee disabled for 37 days because of her pregnancy was awarded sick pay for 30 days, the use of vacation time for the remainder of the days, and was credited with vacation time where she would not have had to use vacation time had she been treated like employees with other temporary disabilities. Payrow-Ouia v. Marshall & Ilsley (LIRC, 05/15/79).

An unlawfully discharged firefighter was entitled to all the benefits he would have received absent the discrimination, including outside part-time earnings, lost medical expenses incurred after his health insurance coverage lapsed and veteran's benefits he would have received if he had been allowed to complete his probationary period. Berndt v. City of Wis. Rapids (DILHR, 12/01/76), aff'd sub nom. City of Wis. Rapids v. DILHR (Wood Co. Cir. Ct., 08/23/77).

834.4 Remedies for emotional harm in administrative forum

[Ed. Note: The Wisconsin Open Housing Law, Wis. State 106.50, allows for economic and noneconomic (compensatory) damages, injunctive relief, forfeiture, attorneys fees and costs. *https://docs.legis.wisconsin.gov/document/statutes/106.50(6)(h).]*

Legal damages, as opposed to equitable relief, are not available under the Wisconsin Fair Employment Act. The Act provides for "make whole" remedies such as back pay only. Hentges v. Dep't of Regulation & Licensing (LIRC, 01/12/96).

There is no authority for awards of damages for emotional distress and similar injuries under the Wisconsin Fair Employment Act. The Act provides for "make whole" type remedies such as back pay only. Kesterson v. DILHR (Wis. Pers. Comm'n, 04/04/88).

The Act does not provide a remedy, either from DILHR or through a private cause of action, for emotional distress resulting from discrimination. While Yanta v. Montgomery Ward, 66 Wis. 2d 53 (1974) indicates that recovery for emotional harm in the absence of physical injuries may be possible if certain criteria are met, that recovery is separate and distinct from any remedy sanctioned by the Act. Bachand v. Connecticut Gen. Life, 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981).

834.5 Miscellaneous remedial orders

834.51 Clearing file, neutral references

An employee who was unlawfully discharged because of a handicap was entitled to an order correcting the employer's records concerning her discharge. Macara v. Consumer Coop. of Walworth County (LIRC, 02/14/92).

An employer was ordered to reinstate an unlawfully discharged employee, instructed to remove all documents and entries from his personnel file that related to the discharge and mention only the nature and duration of his employment if requested to give references. Coates v. Guardsmark (LIRC, 08/04/77).

834.52 Post order, notices

In a case in which an employer retaliated against an employee for her protests concerning sexual harassment by a supervisor, it was an appropriate remedy to order the employer to post in its premises a notice stating that it had been found to have violated the Act and that it would take corrective action. Giessel v. Glaze Dental Lab (LIRC, 11/20/85).

An employer whose promotion and transfer policies were discriminatory was ordered to post the DILHR order and all subsequent job openings in conspicuous places in the plant and administration building. Haug v. Ohio Med. Prod. (DILHR, 08/05/75).

834.53 Counseling or discipline of offending supervisor

Where the employer discriminated against an employee by subjecting her to abusive sexual advances, it was required to, among other things, provide its managerial and supervisory employees with training as to what constitutes unlawful sexual harassment, and provide the personnel manager with additional

counseling. While LIRC would normally order the employer to take action to discipline the employee's immediate supervisor who engaged in the sex discrimination, that supervisor had left the employer's business. Hamilton v. Appleton Elec. (LIRC, 08/08/80).

An employer was ordered to advise company supervisors how to interpret the bargaining agreement in order not to deny female employees their rights under the Act. Tyler v. Pacon (DILHR, 11/30/72).

An employer was ordered to change the job title of "housekeeper," recruit males for the position, fully explain its new transfer rules to all employees and communicate to DILHR within 90 days its compliance with the order. Bruce v. Parker Pen (DILHR, 11/14/72).

834.59 Miscellaneous

The WFEA does not contain any provision allowing LIRC to order a fine or other monetary sanction against a discriminating employer. Vernon v. Wackenhut Corp. (LIRC, 10/31/13).

An Administrative Law Judge's order that the Respondent should cease and desist from discriminating against the Complainant or any of its employees was modified to apply only to the Complainant. Neither the Equal Rights Division nor the Labor and Industry Review Commission have the authority to entertain a class action under the Wisconsin Fair Employment Act. Metzger v. UGD Auto. (LIRC, 2/28/08).

The Administrative Law Judge improperly issued an order which required, in part, that the Respondent promulgate a policy that did not automatically exclude employees who have arrest or conviction records. This order exceeded the ALJ's scope of authority. The issue noticed for hearing was whether the Respondent had violated the Wisconsin Fair Employment Act by refusing to hire or employ the Complainant because of arrest or conviction record. An order under the Act must not be broader in its scope than the issue noticed for hearing. The issue noticed for hearing failed to specify any ongoing acts of discrimination other than that perpetrated in the complaint. Although this part of the Administrative Law Judge's order might be appropriate in regard to an action brought by or on behalf of a class of persons, the Equal Rights Division doe not have the authority to entertain a class action under the Wisconsin Fair Employment Act. Rowser v. Upper Lakes Foods (LIRC, 10/29/04).

The Administrative Law Judge was within his authority to order staff-wide training on the provisions of the Wisconsin Fair Employment Act as a remedial measure. Muenzenberger v. County of Monroe (LIRC, 8/13/98).

835 Interest on award

Pre-judgment interest may be awarded where the amount due, though not truly liquidated, is capable of determination by some fixed standard. In the case of discrimination awards, sec. 111.39(4)(c), Stats., provides the fixed standard for calculating back pay awards and thus, allows for the calculation of interest. [Note: Sec. DWD 218.20(4), Wis. Admin. Code, provides that interest shall be computed at an annual rate of 12 percent simple interest.] Olson v. Phillips Plating (LIRC, 02/11/92).

The Respondent's argument that no interest should be awarded to the Complainant was rejected where the record indicated that both parties were responsible for the long delay in resolving the damage issues after the Department's initial order. However, the interest award was reduced for a one-year period as a result of the Complainant's attorney's failure to submit a brief to the Administrative Law Judge after the damage hearing for a period of over one year. Olson v. Phillips Plating (LIRC, 02/11/92).

Interest on back pay is to be computed on the net back pay due, i.e., after offsets are made for unemployment compensation and other amounts received. Woolridge v. Chicago Northwestern Transp. Co. (LIRC, 08/22/86).

Where the examiner's remedial order provided for interest on the back pay award at the rate of 7 percent, and where the Commission's order affirming the examiner's decision provided for interest at the rate of 12 percent because, in the interim, the Equal Rights Division had adopted an administrative rule prescribing interest at the rate 12 percent, the court held that the Commission's order of 12 percent interest was in error. Because the rate of interest deemed proper was 7 percent at the time the loss was incurred, at the time the complaint was filed, at the time the examiner's order was issued, and at the time the petition for review was filed, the Commission exceeded its authority in modifying the original order to impose the higher rate of interest. Glaze Dental Lab. v. LIRC (Waukesha Co. Cir. Ct., 06/03/86).

The Division has the authority to increase back pay awards to reflect accrual of prejudgment interest from the date of the employee's discharge. (Interest at the rate of seven percent per annum was awarded by the court in this case.) Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W.2d 594 (1983).

836 Attorney's fees, costs

836.1 Complainant's right to attorney's fees and costs
[See Sec. 860 re: right to attorney's fees and costs for opposing frivolous defenses.]

836.11 Generally

The Respondent requested a reduction of the attorney fee award based on an argument that some of the Complainant's attorney's billing entries were in the form of "block-billing," in which several items were lumped together in a single entry. However, "block billing" is not disallowed provided it is possible to discern from the billing entry what the general activities were and that they appear to be reasonable. Ionetz v. Dolgencorp, LLC (LIRC, 08/6/15), rev'd on other grounds sub nom. Ionetz and Dolgen Corp., LLC v. LIRC (Jefferson Co. Cir. Ct., 08/25/16), aff'd (Ct. App. Dist. IV, 07/14/17, summary decision).

Attorney's fees or costs involving the Complainant's federal claim were not reimbursable through the proceedings before the Equal Rights Division. Therefore, the Respondent did not have to pay the time attributed to telephone calls and communications with EEOC which were claimed in the Complainant's attorney fee petition. Venneman v. UW-La Crosse (LIRC, 12/17/09).

An attorney's fee award should not be reduced because the Complainant declined to settle the case prior to hearing by accepting the Respondent's offer of payment of the amount of salary he had lost. The Complainant should not be penalized because he refused to accept a cash offer which would have compensated him for his lost salary, but which did not address his interest in pursuing the question whether the Respondent had discriminated against him. Lutze v. DOT (Wis. Pers. Comm'n, 02/26/01).

Any attorney's fees or costs involving the Complainant's federal claim are not reimbursable through the proceedings before the Equal Rights Division. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

Where a union successfully prevented a school district from pursuing a published official policy of unlawful employment discrimination against certain of its members it was acting as a private attorney

general to implement a public policy that the legislature considered to be of major importance. Even though the policy was never implemented, this was no mere "moral" or "technical" victory. The union was properly awarded attorney's fees. Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

The employer was responsible for paying the Complainant's reasonable attorney's fees and costs because it responded inadequately when it learned of a supervisor's acts of sexual harassment against the Complainant and because the supervisor was acting under color of his authority. Sec. 111.39(4)(c), Stats., provides that the employer should pay, and there is no authority for the proposition that a supervisor who is not an employer may be ordered to make payment to the Complainant. Nelson v. Waybridge Manor (LIRC, 04/06/90).

Attorney's fees are allowable even though they were not demanded at the outset of the litigation. Rusch v. City of La Crosse Police & Fire Comm'n (LIRC, 12/19/88).
In a decision issued prior to the decision in Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), the Commission found discrimination but denied a request for attorney's fees. That decision was affirmed in its entirety by the Circuit Court, was appealed to the Court of Appeals and ultimately affirmed, and then remanded to the Commission for determination of an appropriate remedy. In the interim, the Supreme Court decided the Watkins case, holding that prevailing Complainants were entitled to attorney's fees. On remand, it was proper for the Commission to grant attorney's fees. Brown County v. LIRC (Toonen) (Ct. App., Dist. III, unpublished opinion, 02/23/88).

The decision in Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), was interpreting remedial language in the Wisconsin Fair Employment Act as it existed in 1975. That interpretation is applicable to cases commenced under that and similar language whether or not an express request for attorney's fees was included in the complaint when filed. Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86).

A Complainant who prevails on a complaint of discrimination under the Act should ordinarily be awarded attorney's fees in all but special circumstances. Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86).

The Labor and Industry Review Commission has the authority to award attorney's fees, without a prior hearing or determination on the matter by DILHR, in cases resolved by DILHR prior to the decision in Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). Retrospective application of the Watkins decision was appropriate in cases that were still pending before LIRC at the time that decision was issued. Kelm v. Watertown Pub. Library (LIRC, 07/19/85).

The purpose of awarding attorneys fees is not only to "make whole" a prevailing Complainant who received no monetary award, but to discourage discriminatory practices as well. Ploetz v. Schirl, Inc. (LIRC, 01/28/85).

The Department has the authority to award reasonable attorney's fees to a Complainant who prevails in an action brought pursuant to the Wisconsin Fair Employment Act. The authority to award reasonable attorney's fees to a prevailing Complainant is necessary in order to fully enforce and give meaning to the rights created by the Act. One of the more invidious aspects of discrimination is that its targets are frequently the economically weak, who are often unable to afford the assistance of counsel. Without the assistance of counsel, the ability to vindicate one's rights under the Act is so impaired that it renders the existence of those rights nearly meaningless. Placing the cost of vindicating the rights of a victim of discrimination on the party responsible for denying those rights, rather than on the person discriminated against, effectuates the legislative purpose of proscribing employment discrimination because it will

deter employers from engaging in conduct prohibited under the Act. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).

836.12 Prevailing party; partial success

[Ed. note: This topic collects decisions concerning the general right of Complainants to receive an award of attorney's fees and costs in the case of partial success. Decisions on the computation of awards in partial success are collected in sec. 836.45.]

The fact that the Complainant succeeded in getting an ALJ's dismissal order overturned does not entitle him to attorney's fees. He must be the prevailing party by proving discrimination in order to be entitled to attorney's fees. Owens v. SBC Commc'n (LIRC, 08/22/14).

The Complainant succeeded in demonstrating that she was unlawfully discharged because of an arrest. She did not establish that she had been discriminated against on the basis of her race, as she had alleged in her complaint. The fact that she did not establish that she was discriminated against on multiple bases does not weaken the success of her case and has no effect on her entitlement to a remedy. Where a Complainant has obtained excellent results, the fee award should not be reduced simply because the Complainant failed to prevail on every contention raised in the complaint. Nunn v. Dollar Gen. (LIRC, 03/14/08).

While the addition of several potential bases for discrimination does not generally add much time to the overall litigation, in those cases when time spent litigating an issue of an additional basis is quantifiable, a reduction of attorney's fees may be appropriate. Nunn v. Dollar Gen. (LIRC, 03/14/08).

A party who proves discrimination on any issue is a prevailing party entitled to costs and attorney's fees. It is not necessary to establish that the actual relief ordered materially altered the legal relationship between the parties by modifying the Respondent's behavior in any way that directly benefits the Complainant. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

The Court of Appeals has adopted the Supreme Court's approach in Hensley v. Eckerhart, 461 U.S. 424 (1983), which provides that a party may not be entitled to attorney's fees where only partial success is obtained. In Hensley, the Court indicated that it should focus on the "significance of the overall relief obtained by the Plaintiff in relation to the hours reasonably expended on the litigation. Where Plaintiff has obtained excellent results the fee award should not be reduced simply because the Plaintiff failed to prevail on every contention raised in the lawsuit." Racine Unified Sch. Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).

836.13 Pro se Complainants

Pro se litigants are not entitled to recover costs under the Wisconsin Fair Employment Act in the event that they prevail. Costs are recoverable incident to an award of attorneys' fees, and therefore are not available to a Complainant who represents himself in proceedings under the Act. Plummer v. Univ. of Wis. (Wis. Pers. Comm'n, 07/30/01).

836.14 Complainant's personal costs

A Complainant's requested reimbursement for her own personal costs associated with pursuing her complaint (including mileage and parking expenses incurred for trips to the Equal Rights Division offices

and to her attorney's office, and wages she lost on days she attended an Equal Rights Division's investigative interview and the hearing) was denied. While the Department has authority under the Wisconsin Fair Employment Act to order reimbursement for the costs reasonably incurred by a Complainant's attorney, the Act does not grant authority to the Department to order reimbursement for costs personally incurred by a Complainant. Halverson v. Milwaukee County (LIRC, 05/22/87).

836.15 A party's right to attorney's fees and costs where the party was not charged for legal services

The Complainant refused to pay the Department of Employment Relations and the Division of Merit Recruitment and Selection the money he was ordered to pay towards their attorney's fees as a discovery sanction in his proceeding before the Wisconsin Personnel Commission. The Complainant argued that a sanction compensating the State for attorney's fees was inappropriate because, by relying on the services of an attorney already within its employment, a state agency was in essence proceeding pro se and did not incur any additional fees for legal counsel's services. This argument was rejected. The fact that legal counsel is permanently employed by an entity does not mean that a reasonable amount of compensation for the time counsel spent on one particular matter cannot be fairly calculated for purposes of a discovery violation sanction. State of Wis. v. Balele (Ct. App., Dist. IV, unpublished opinion, 07/18/02).

A prevailing Complainant who was represented by a non-profit legal organization may receive an award of attorney's fees for legal representation. Richland Sch. Dist. v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

A Complainant's request for attorney's fees should not be denied because the attorney did not bill the Complainant for attorney's fees. Legal services attorneys are entitled to be compensated for their *representation* of a prevailing Complainant. An award of attorney's fees to a prevailing Complainant promotes the purpose of the Act to discourage discriminatory practices in employment and to deter employers from engaging in prohibited conduct. Ray v. Ramada Inn-Sands West (LIRC, 03/05/91).

A prevailing Complainant who is represented by a legal services attorney is entitled to attorneys fees just the same as one who has retained a private attorney providing the same type of representation. Stark v. C & C Liquidators (LIRC, 11/27/84).

836.16 Right to award of attorney's fees and costs from the State

The State of Wisconsin is liable for attorney's fees to prevailing Complainants in equal rights cases. Smith v. State of Wis. Dep't of Workforce Devel. (LIRC, 01/04/19).

Attorney's fees have long been recoverable under the Wisconsin Fair Employment Act as a "make whole" remedy for discrimination, even though they are not specifically provided for in the Act. State agencies are expressly included in the definition of "employer." Therefore, their sovereign immunity against liability under the Wisconsin Fair Employment Act has been waived because the state has consented to both suit and liability. Accordingly, attorney's fees may be recovered from state agencies. DOC & Suttle v. LIRC (Dane Co. Cir. Ct., 05/14/10).

The Department is not authorized to order a state agency to pay a Complainant's attorney's fees. No express statutory authority exists to tax costs and attorney's fees against the State. Blunt v. DOC (LIRC, 02/04/05).

Express statutory authority is required in order to tax costs and attorney fees against the State. The Western Wisconsin Technical College is not an agency of the State. Simply because an entity is created by state law does not mean it is "in state government" within the meaning of sec. 111.32(6)(a), Stats. Since a technical college is not a State agency, the college was liable for costs and attorney's fees. Naill v. Western Wis. Tech. College (LIRC, 02/12/99).

No attorney's fees may be awarded against the State, or an agency of the State, even in cases where the State is acting as a licensing agency and where it has been found that the State violated the Wisconsin Fair Employment Act by denying a Complainant a license. Deshon v. Dep't of Regulation & Licensing (LIRC 01/12/96).

Attorney's fees and costs cannot be taxed against the State or a state agency in an administrative proceeding absent express statutory authority. DOT v. Wis. Pers. Comm'n, 176 Wis. 2d 731, 500 N.W.2d 664 (1993).

The Personnel Commission, as well as the Department of Industry, Labor and Human Relations, has the authority to award reasonable attorney's fees to a prevailing Complainant under the Wisconsin Fair Employment Act. Gray v. Univ. of Wis. Sys. (Wis. Pers. Comm'n, 05/09/85).

836.17 Proceedings on appeal

The briefing schedule issued by LIRC contained express instructions that any request for additional attorney's fees for work performed in connection with the petition for review was to be included along with the Complainant's initial brief, but the prevailing Complainant's brief did not include a request for additional attorney's fees. LIRC therefore concluded that the Complainant had waived the right to request additional attorney's fees, and ordered no additional fees. Krueger v. County of Waupaca (LIRC, 08/22/18).

Where a prevailing Complainant has been given instructions to request additional attorney fees related to the petition for Commission review when filing the Complainant's brief, but does not do so, the Commission will consider that the right to request additional attorney fees has been waived. Peterson v. TCAT Corp. (LIRC, 04/30/15), aff'd sub nom. TCAT Corporation v. LIRC and Peterson (Richland Co. Cir. Ct. 04/29/16), aff'd (Ct. App., Dist. IV, per curiam, 08/24/2017).

The Respondent contended that because the Labor and Industry Review Commission assumed responsibility for handling the matter on appeals through the Supreme Court, the briefing and oral argument done by the Complainant's personal attorney were unnecessary. The Respondent maintained that the Complainant should be denied any fees for the time expended briefing and preparing her oral argument. This argument was rejected by the Supreme Court in Richland School District v. DILHR, 174 Wis. 2d 878, 914-15, 498 N.W.2d 826 (1993). In that case, involving the Wisconsin Family and Medical Leave Act, the Department joined in at the court level to defend its administrative rules and its interpretation of the FMLA. The court held that the Complainant had a right to participate in the judicial review proceedings and that he was not required to rely on the agency to represent his interests. Roytek v. Hutchinson Tech. (LIRC, 02/15/05).

In addition to attorney's fees for work prior to the issuance of the Administrative Law Judge's decision, the Complainant is also entitled to attorney's fees in conjunction with a petition for review to LIRC. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

The record indicated that both parties were responsible for the long delay in resolving the damage issues after the Labor and Industry Review Commission's initial order. LIRC rejected the Respondent's argument that no attorney's fees should be awarded for that time period. Olson v. Phillips Plating (LIRC, 02/11/92).

The motion by the Complainant's attorney for additional fees to cover the cost of his legal representation of the Complainant on appeal was granted. Dushek v. LIRC (Radloff) (Brown Co. Cir. Ct., 11/02/89).

The Labor and Industry Review Commission awarded additional attorney's fees for the Complainant's attorney's work in connection with responding to a petition for review filed by the Respondent. LIRC's reversal of one portion of the Administrative Law Judge's decision which had found in favor of the Complainant did not warrant a reduction in the attorney's fees award. Savage v. Stroh Container (LIRC, 09/20/89).

836.2 Respondent's right to attorney's fees and costs from the Complainant [See Sec. 860 re: right to attorney's fees and costs for defending frivolous claims]

[Ed. note: Some of the decisions collected under this topic concerning the right of Respondents to receive attorney's fees and costs from a Complainant as a sanction for a frivolous claim are also collected in sec. 860. Decisions concerning the right of either party to receive an award of attorney's fees and costs from the other party as a discovery sanction are collected in sec. 745.]

The Labor and Industry Review Commission has no authority to grant a Respondent attorney's fees and costs where the Complainant withdrew her complaint prior to answering the Respondent's discovery. Equal Rights Division rules allow Complainants to withdraw their complaints at any time and require the Division to dismiss complaints upon request. They do not authorize the Division to award sanctions or fees against a Complainant for making such a request. The WFEA allows for sanctions against a Complainant in only two circumstances, (1) where a Complainant has failed to obey an order to provide or permit discovery, and (2) where there is a finding that a hearing or claim was frivolous. Oldigs v. Pine Valley Residential Servs. (LIRC, 12/15/16).

Complainants cannot be ordered to pay attorney's fees incurred for the defense of a discrimination claim by Respondents who have prevailed on the merits. While the purpose for allowing such orders would be the hope that they would deter persons from making frivolous complaints of discrimination, the stronger countervailing policy is that such orders could also deter persons from bringing valid complaints which might be hard to prove and, therefore, should not be issued. However, ordering a Complainant who has wrongfully refused to cooperate in discovery to pay attorney's fees incurred by a Respondent in connection with the Complainant's refusal, has different purposes than ordering payment of all of a Respondent's fees based on the fact that the Respondent prevailed in the proceeding. Such a limited attorney's fee award does not risk the effect of deterring Complainants from bringing complaints. It deters only unreasonable refusal to cooperate in discovery. Dobbs v. Super 8 Motel (LIRC, 10/15/96).

The Wisconsin Fair Employment Act does not allow the Department to order any type of relief for a prevailing employer, including an award of attorney's fees. Kasonda v. Aldridge, Inc. (LIRC, 11/30/93).

Neither the Department nor the Labor and Industry Review Commission have any authority to grant attorney's fees to prevailing employers, or in fact to order any type of relief for a prevailing employer other than dismissing the complaint, irrespective of the arguable frivolousness of a claim. Sec. 814.025(1), Stats., does not apply in administrative proceedings. However, a circuit court may properly award reasonable

attorney's fees to a prevailing employer if it finds that any single claim of a petitioner in an Equal Rights matter is frivolously brought before the court for judicial review. Tatum v. LIRC, 132 Wis. 2d 411, 392 N.W.2d 840 (Ct. App. 1986).

The Labor and Industry Review Commission has no authority to award attorney's fees to an employer after the Complainant withdraws her complaint of employment discrimination. Sec. 814.025, Stats., does not authorize the Commission to make determinations of frivolousness or to assess costs and reasonable attorney's fees against Complainants in favor of Respondents. Jeffries v. Cameo Convalescent Ctr. (LIRC, 08/09/85); aff'd sub nom. Cameo Convalescent Ctr. v. LIRC (Milwaukee Co. Cir. Ct., 09/02/86).

The Wisconsin Fair Employment Act does not impliedly authorize the Labor and Industry Review Commission to award attorney's fees to prevailing employers in employment discrimination actions. Sec. 814.025, Stats., relating to awards of fees for bringing a frivolous claim in courts, applies only to court proceedings. Niles v. Fleet Farm of Green Bay (LIRC, 07/25/85); aff'd sub nom. Fleet Farm of Green Bay v. LIRC (Ct. App., Dist. III, unpublished summary disposition, 07/16/86).

A prevailing employer is not entitled to an award of attorney's fees under the Wisconsin Fair Employment Act. Rick v. Fore Way Express (LIRC, 07/25/85).

DILHR is without authority to award attorney's fees to a prevailing Respondent after the Complainant's failure to appear at the hearing resulted in the dismissal of the complaint. Dantzler v. Briggs & Stratton (LIRC, 02/19/85).

836.3 Procedures used in determining fees

Ideally, an attorney's fee affidavit should contain some information from which the Administrative Law Judge can determine what types of fees are customarily charged in the locality by lawyers of reasonably comparable skill, experience and reputation. Anderson v. MRM Elgin (LIRC, 01/28/04).

Attorneys must maintain billing time records that are sufficiently detailed to enable a review of the reasonableness of the hours expended. It is not required that each minute be described in great detail, but counsel should at least identify the general subject matter of the time expenditures. Moore v. Cedar Grove-Belgium Sch. Dist. (LIRC, 04/29/92).

A hearing on attorney's fees is not necessary. MMFHC v. South Side Spirit (LIRC, 08/26/92).

Carefully reconstructed time records can be used as proof of time expended if contemporaneous time records are not available. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 07/17/89).

Where counsel for the Complainant submitted a sworn affidavit attesting to the accuracy of the pages of attached information detailing the dates, description of work performed, and time spent to the nearest tenth of an hour, and where the detail thus provided was adequate to allow a reasonable evaluation of the fee request, the Respondent was denied the opportunity to have access to the Complainant's counsel's original time entries and law office accounts payable ledgers and to have an opportunity to cross-examine the Complainant's counsel at a hearing concerning the attorney fee petition. Eklund v. Tomah-Mauston Broad. Co. (LIRC, 09/19/86).

836.4 Amount of fees

836.41 Generally

Attorney's fee issues discussed in this case include: 'partial success' reduction for allegedly not prevailing on an arrest record discrimination theory as well as a conviction record discrimination theory; alleged lack of specificity in billing entries; lack of 'billing judgment' reductions in bills; lack of delegation of work to clerks, paralegals, junior associates; fee reduction because billing was in quarter hour units rather than tenth of an hour units; and the necessity of, and sufficiency of, affidavits from other attorneys as to prevailing rates. Hill v. Stanton Optical (LIRC, 09/26/14), dismissed by stipulation sub nom. Stanton Optical v. LIRC and (Hill) Martin (Dane Co. Cir. Ct. 08/17/15).

The Administrative Law Judge awarded attorney's fees to the Complainant in the amount of $137,534.20. The Respondent's contention that it was unable to find any case in which the Commission had awarded more than $18,000 in attorney's fees was rejected. There are numerous occasions in which attorney's fees well in excess of $18,000 have been made. The determination as to what amount of fees is reasonable will depend on the specific circumstances of the case. The mere fact that the Respondent incurred costs defending the litigation is not a basis to deny the Complainant's request for attorney's fees. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

Attorney's fees may be awarded even if they are significantly higher than the total back pay award. Nickell v. County of Washburn (LIRC, 07/29/05).

In evaluating fees, the criterion to consider is not what the parties agreed on, but what is reasonable. Where a Complainant's attorneys charged significantly higher hourly rates in the latter stages of the litigation as it made its way up through the Supreme Court, the fact that the Complainant may have agreed to a fee increase does not dispose of the matter. Any increase in the complexity of the case could be accounted for by the fact that the attorneys were permitted to bill for all work hours reasonably expended, including the time spent preparing for oral argument and the additional time that may have been necessary to comply with the more stringent filing requirements at the Court of Appeals and Supreme Court levels. The Complainant's attorneys had to demonstrate that the hourly rate requested was consistent with the prevailing market rate in the community for similar services. Roytek v. Hutchinson Tech. (LIRC, 02/15/05).

The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. Olson v. Phillips Plating (LIRC, 02/11/92).

An attorney's time spent in establishing entitlement to fees for the hours spent in connection with the preparation of the fee petition is normally recoverable. Donovan v. Graebel Van Lines (LIRC, 05/23/90, amended 06/08/90).

While the amount of back pay received by a Complainant is certainly relevant to the amount of attorney's fees to be awarded, it is only one of many factors that must be considered. The amount of attorney's fees is not to be limited by the amount of damages recovered. Thus, the Complainant was appropriately awarded the full attorney's fees she sought after prevailing on her claim for relief in a sexual harassment matter, notwithstanding that she did not receive the full back pay she sought. Collicott v. Riverside Plating Co. (LIRC, 04/01/87).

The fact that an attorney has represented a Complainant on a contingent fee basis does not establish an upper limit or otherwise control attorney's fees in equal rights cases. Collicott v. Riverside Plating Co. (LIRC, 04/01/87).

An attorney's fees award of over $18,000 was reasonable in a discrimination case in which back pay of less than $5,000 was awarded. There is no authority or persuasive reason to limit the recovery of attorney's fees and costs to the amount of the award. Since the hours claimed were not excessive, the award was appropriate. Hibbard v. Kelly Photo Serv. (LIRC, 09/30/85).

836.42 Amount of time expended

LIRC declined to require the Respondent to pay the attorney fees for two separate attorneys at the law firm. The Complainant's attorneys did not provide any reason why a second chair should be paid. Gilbertson v. Wingra Redi-Mix, Inc. (LIRC, 12/10/20), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct. 10/12/21), appealed 11-23-21 and awaiting decision as of 5-10-23.

The attorney fee applicant bears the burden of documenting the appropriate hours expended. Counsel should at least identify the general subject matter of time expenditures. Roytek v. Hutchinson Tech. (LIRC, 02/15/05).

There is no precedent for comparing the Complainant's attorneys fees to those of the Respondent's attorney, and the question of how many hours are reasonably expended on litigation in any given case is not adjudged on that basis. The Administrative Law Judge has experience in evaluating how many hours are reasonably expended on litigation in an Equal Rights case. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

Where the documentation of hours is inadequate, the attorney's fee award may be reduced accordingly. Overly general listed activities may be disallowed because they provide no means of evaluating the reasonableness of the activity. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

An award of attorney fees may be reduced where the documentation of hours is inadequate. Counsel should at least identify the general subject matter of time expenditures. Overly general listed activities that provide no indication as to the subject matter of the task provide no means of evaluating the reasonableness of the activity. Where activities are grouped, time should be appropriately apportioned. Olson v. Phillips Plating (LIRC, 02/11/92).

836.43 Hourly rate

LIRC declined to apply the Complainant's attorney's most recent hourly rates to the entire litigation. The Complainant's attorney's hourly fees rose significantly during the course of the litigation, and the majority of the work was performed when the fees were lower. Gilbertson v. Wingra Redi-Mix, Inc. (LIRC, 12/10/20), aff'd sub nom. Gilbertson v. LIRC (Dane Co. Cir. Ct. 10/12/21), appealed 11-23-21 and awaiting decision as of 5-10-23.

Wis. Stat. § 814.045, potentially limiting an attorney fee award in consideration of the amount of compensatory damages awarded, does not apply in cases under the WFEA, where the monetary remedy is a make-whole remedy, not compensatory damages. When a Complainant's attorney submits her own affidavit, unaccompanied by affidavits of other attorneys to show that her fee rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation, the Commission can look to the fee rate it has approved for the attorney in prior similar

cases. The Respondent's evidence based on a state bar survey did not contradict the reasonableness of the rate requested, based on past fee awards for the attorney that were found to be reasonable. Halbrucker v. Building & Landscape Serv., Inc. (LIRC, 03/21/14).

Along with a fee petition, an attorney requesting payment of attorney's fees should submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience and reputation. An hourly rate determination based on such affidavits is normally deemed to be reasonable. However, the Complainant's attorney in this case did not submit supporting affidavits. While the Labor and Industry Review Commission has in the past referred to a State Bar of Wisconsin publication for information on the median hourly rates charged by attorneys in various parts of the state, the most recent publication does not contain such statistical information and provides no guidance in determining a reasonable hourly fee. The Respondent raised an objection to the reasonableness of the hourly rate. The Complainant's attorney's hourly rate was reduced from the amount requested. Harper v. Menard, Inc. (LIRC, 09/18/09).

A reasonable fee is calculated according to the prevailing market rates in the relevant community. It is anticipated that, along with the fee petition, the attorney requesting payment will submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience and reputation. An hourly rate determined based on such affidavits is normally deemed to be reasonable. VanDenElsen v. County of Brown (LIRC, 06/14/05).

The Complainant bears the burden of demonstrating that the rate requested is prevailing in the community. Upon securing a favorable judgment, an attorney cannot reasonably request an hourly rate of reimbursement which exceeds the rate the attorney habitually charges clients for legal services. VanDenElsen v. County of Brown (LIRC, 06/14/05).

An affidavit from an attorney who practices in a major metropolitan area located in a different state is of little value in determining the prevailing hourly rates for attorneys of comparable skill, experience and reputation providing similar services in a smaller community. Roytek v. Hutchinson Tech. (LIRC, 02/15/05).

The hourly rates requested in the Complainant's attorney's fee application will not be disturbed where there has been no showing that the hourly rates requested are outside of the prevailing rates in the community for similarly qualified civil rights attorneys. Bond v. Michael's Family Rest. (LIRC, 03/30/94).

Even if the hourly rate requested by the Complainant's attorney might be slightly high for the work done in the years 1988 and 1989 (the attorney's work on the case continued until 1991), this rate was certainly appropriate for the service performed by counsel during the latter years. The courts have regularly utilized a higher rate to compensate for all of the work performed by an attorney in order to compensate for the delay in payment of the attorney's fees. Neuman v. Hawk of Wis. (LIRC, 03/12/93).

A reasonable fee is to be calculated according to the prevailing market rates in the relevant community. An hourly rate determined based on affidavits that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation is normally deemed to be reasonable. Olson v. Phillips Plating (LIRC, 02/11/92).

Where a case has a litigation history of 11 years and the Respondent had already paid part of the attorney's fees and interest approximately half way through the case, it would be an inequitable windfall to the Complainant to allow her to recover all her remaining attorney's fees at the current hourly rate charged by her attorney. To avoid this inequitable result, the eight-year period for which fees had not been paid was split into two four-year periods. The hours during these two periods were then multiplied by different rates, with only the latter four years being multiplied by the higher current hourly rate. Olson v. Phillips Plating (LIRC, 02/11/92).

The determination whether an hourly rate is reasonable is based upon whether that rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The rate charged by counsel for the Respondent is not necessarily relevant to this determination. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 07/17/89).

A rate of $100 per hour is appropriate, notwithstanding that $75 per hour may be a median range of an hourly charge for legal activities for attorneys in general practice in the area in which the hearing was held. The law on employment discrimination is specialized and complex and often necessitates obtaining counsel with expertise in the area, and such expertise may not always be available among general practitioners in the immediate area. A Door County Complainant's choice of a Milwaukee attorney with an established reputation in the area of employment discrimination is understandable and quite reasonable under the circumstances. Schwantes v. Orbit Resort (LIRC, 05/22/86).

Attorney's travel time may be compensated at the usual hourly rates. Schwantes v. Orbit Resort (LIRC, 05/22/86).

836.44 Multipliers, "lodestar" enhancement

During the course of their representation of the Complainant in this case, the Complainant's attorneys were successful in obtaining a Court of Appeals decision clarifying the law on continuing violations. However, LIRC is aware of no authority allowing it to enhance the Complainant's attorneys' fee request to reflect success before a higher court. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

The use of an enhancement or multiplier in contingent fee cases is inappropriate under the Wisconsin Fair Employment Act. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

No enhancement for risk is appropriate unless the applicant for fees is able to show that without such a risk adjustment, the Complainant would have faced substantial difficulties in finding counsel in the local or other relevant market. Many courts accept affidavits from other attorneys in the relevant market as sufficient evidence that a plaintiff would have encountered substantial difficulties in obtaining counsel without a risk enhancement. In this case, where the affidavits of two attorneys in the relevant market only state that one was "less likely" to accept civil rights cases without a risk enhancement and the other stated that there are only a handful of attorneys who will take on civil rights cases on a wholly contingent fee basis, the affidavits were deemed insufficient to establish an entitlement to an enhancement for risk of nonpayment. Olson v. Phillips Plating (LIRC, 02/11/92).

A Respondent's vigorous resistance of the Complainant's claim is not an appropriate basis for enhancing the lodestar amount. This resistance is already reflected in the number of hours expended and the attorney's hourly rate. Olson v. Phillips Plating (LIRC, 02/11/92).

The results achieved by an attorney generally will be subsumed in other factors used to calculate a reasonable attorney's fee award and normally should not be used as an independent basis for enhancing the lodestar amount. Olson v. Phillips Plating (LIRC, 02/11/92).

Two basic criteria must be met in order to obtain an enhancement of the lodestar amount. The fee applicant must establish that: (1) the rates of compensation in the relevant market for contingent fee cases as a class differ from the rates in non-contingent fee cases, and (2) the Complainant would have faced substantial difficulty in finding counsel without enhancement for risk. Racine Educ. Ass'n v. Racine Unified Sch. Dist. (LIRC, 07/17/89).

An hourly rate of $100 per hour was deemed appropriate in an attorney's fee award, but the Commission declined to increase the lodestar figure. The quality of representation and the favorable results achieved were already considered in arriving at the lodestar figure, and the financial risk that the Complainant would be unable to pay was counter-balanced by the probability of success in the matter. The Commission declined to increase the lodestar amount because of the Respondent's vigorous defense of the case, concluding that to do so would be in effect to punish Respondents for exercising their right to defend a case. Wetzel v. Clark County (LIRC, 06/05/87).

A 50 percent multiplier to the amount of the attorney's fee award was granted because of the novelty and difficulty of the issues involved in the case (whether an applicant for a position as a traffic officer who has uncorrected vision of 20/400 in each eye is a handicapped person) and the results obtained and the quality of the representation. Toonen v. Brown County (LIRC, 10/31/86).

An upward adjustment in the amount of attorney's fees to compensate for the risk of non-recovery because the case is taken on a contingent fee basis is appropriate. A 20 percent multiplier would be appropriate in this case, particularly because it was taken on a contingent fee basis. Benson v. Bumper & Auto of Milwaukee (LIRC, 02/10/86).

An upward adjustment of the basic fee award by a contingency factor is intended to insure that the fee award is consistent with prevailing market rates and adequate to attract competent counsel to represent other civil rights clients. Watkins v. Milwaukee County (LIRC, 07/03/85).

Where counsel pursued with great skill and persuasiveness, and despite unfavorable case law and the absence of any express statutory provision supporting the claim, a case in which the Complainant ultimately prevailed and established the principle that prevailing Complainants were entitled to an award of attorney's fees, it was concluded that an enhancement of the basic lodestar attorney's fee by a factor of 50 percent was appropriate. Watkins v. Milwaukee County (LIRC, 07/03/85).

836.45 Reduction due to partial success

A partial success reduction is not usually applied in cases where the Complainant contends that he or she was discriminated against on multiple bases (in this case, creed, sexual orientation, and conviction record) but only establishes discrimination on a single basis (conviction record). The Complainant's various claims involved a similar core of facts, and litigating alternate bases of discrimination did not add a significant amount of time to the preparation of the case. Smith v. State of Wis. Dep't of Workforce Devel. (LIRC, 01/04/19).

LIRC does not generally order a fee reduction based upon the time spent filing unsuccessful motions. Smith v. State of Wis. Dep't of Workforce Devel. (LIRC, 01/04/19).

No partial success reduction was appropriate where the Complainant prevailed on the merits of his claim that he was unlawfully discharged based upon his conviction record, even though he was not awarded any back pay or reinstatement. The lack of a remedy does not preclude an award of attorney's fees. An employee may file a claim simply to vindicate his or her rights under the statute, even if there is no chance of a monetary recovery. Ionetz v. Dolgencorp, LLC *(LIRC, 08/6/15), rev'd on other grounds sub nom.* Ionetz and Dolgen Corp., LLC v. LIRC (Jefferson Co. Cir. Ct. 08/25/16), aff'd (Ct. App. Dist. IV, 07/14/17, summary decision).

The Complainant prevailed in her claim of sexual harassment, but failed in her claim of discharge for opposing the harassment. Because the two claims form a common core of facts, the attorney's time would not have been significantly shortened if it were spent litigating only the successful claim. Nevertheless, a 33% reduction in attorney's fees is appropriate when the issue on which the Complainant did not succeed was the one that would have provided a back pay remedy for her. There is no precedent, however, for reducing fees by comparing the Complainant's fees to the Respondent's, or by comparing the number of witnesses each side called at hearing. Charles v. Welsing & Assoc. (LIRC, 02/28/14).

Because the Complainant did not prove termination due to sexual harassment or opposition to discrimination, remedy is limited to a cease-and-desist order and attorney's fees. The Complainant's attorney's fees, based on her brief to the Commission, were reduced in proportion to the number of pages in the brief devoted to the issue on which the Complainant prevailed. Cooper v. Options for Community Growth, Inc. (LIRC, 07/29/13).

No partial success reduction is appropriate where the Complainant prevailed on both issues (sexual harassment and constructive discharge) and obtained significant pecuniary benefits (10 months back pay) as a result. Olson v. Whatever Bar (LIRC, 03/12/13).

There is no formula for deciding what portion of requested attorney's fees should be awarded where the Complainant has prevailed on only some of his claims. In this case, the Administrative Law Judge reduced the Complainant's requested attorney's fees by sixty percent of the total amount of fees incurred in order to reflect the Complainant's partial success. The Respondent made no compelling argument for an additional reduction. Bowen v. Stroh Die Casting Co. (LIRC, 10/28/11).

In determining a fee award, the most critical factor is the degree of success obtained. There is no precise rule or formula for making this determination. An attempt may be made to identify specific hours that should be eliminated, or the entire award may simply be reduced to account for the limited success. The Labor and Industry Review Commission has generally adopted the approach of applying an across-the-board percentage reduction. Even where there is a common core of facts and much of counsel's time is devoted generally to the litigation as a whole, this does not mean that no reduction is appropriate. In this case, the most significant issue presented in the case, and the one which would have entailed the most substantial remedy, was the constructive discharge issue, upon which the Complainant did not prevail. The Complainant obtained no substantive relief whatever for prevailing only on the issue of sexual harassment. A 33% reduction in the attorney's fees award was, therefore, appropriate in this case. Harper v. Menard, Inc. (LIRC, 09/18/09).

Since the Complainant did not prevail on each issue, there should be a reduction in the attorney's fees and costs awarded. However, since the issue on which the Complainant prevailed was by far the most significant issue and the one which involved the most substantial and meaningful remedy, this reduction

should only be twenty percent in this case. Cleary v. Federal Express (LIRC, 07/30/03); aff'd sub nom. Cleary v. LIRC (Waukesha Co. Cir. Ct., 03/18/04).

Where the Complainant did not prevail on the most significant aspect of her claim, she has failed to achieve "significant success" in the case. Accordingly, she should not receive fully compensatory attorney's fees. Foust v. City of Oshkosh Police Dep't (LIRC, 04/09/98).

In trying to decide on an appropriate reduction in attorney's fees where the Complainant prevailed on only some allegations of the complaint, it is worthwhile to consider the question of how a case would probably have been litigated and how much time would have been spent if the Complainant had actually set out to prove only the allegations upon which she prevailed. Tobias v. Jim Walter Color Separations (LIRC, 08/13/97), rev'd on other grounds sub nom. Jim Walter Color Separations v. LIRC (Rock Co. Cir. Ct., 06/19/98).

A reduced fee award is appropriate if the relief obtained by the Complainant, however significant, is limited in comparison to the scope of the litigation as a whole. Roden v. Federal Express (LIRC, 06/30/93).

Where the Complainant successfully proved that the Respondent violated the Wisconsin Open Housing Act by causing to be published the advertisement in question, the Complainant's success was not partial even though the Commission found only that the advertisement stated or indicated discrimination based on lawful source of income, rather than on both lawful source of income and marital status as alleged in the complaint. MMFHC v. South Side Spirit (LIRC, 08/26/92).

The Complainant was entitled to be paid interest on attorney's fees awarded by a federal court on May 31, 1984 through the date of payment on August 25, 1986. Olson v. Phillips Plating (LIRC, 02/11/92).

It is appropriate to reduce the attorney's fee award where the Complainant's success has been only limited. In determining the appropriate reduction, the Department may either attempt to identify specific hours that should be eliminated or simply reduce the award to account for the limited success. Cangelosi v. Robert E. Larson & Assoc. (LIRC, 11/09/90).

LIRC's reversal of one portion of the Administrative Law Judge's decision which had found in favor of the Complainant did not warrant a reduction in attorney's fees. Savage v. Stroh Container (LIRC, 09/20/89).

A Complainant who proved that he was not promoted in part because of his race, but who could not refute the Respondent's proof that his work record would have prevented his promotion in any case, prevailed on a significant issue and thus may be awarded attorneys fees, although a reduction in the fee award is appropriate due to the partial success the Complainant achieved. Jones v. Dy-Dee Wash (LIRC, 11/04/88).

A reduction of the fee award by 20 percent reflected a proper balancing of the fact of the Complainant's partial success where she prevailed on the essential and difficult sex harassment issue which had been the primary focus through the case, but failed to prevail on a layoff wage claim. Schwantes v. Orbit Resort (LIRC, 05/22/86).

Where the Complainant paid her legal bills as they were incurred over the course of a case taking many years to litigate, in the eventual award to her of an amount for those attorney's fees, interest on the amount at seven percent per annum compounded quarterly should be added, to compensate the

Complainant for the fact that she lost use of the money paid in legal fees through the pendency of the case. Watkins v. Milwaukee County (LIRC, 07/03/85).

836.46 Interest on fee award

The Complainant was entitled to be paid interest on attorney's fees awarded by a federal court on May 31, 1984 through the date of payment on August 25, 1996. Olson v. Phillips Plating (LIRC, 02/11/92).

Where the Complainant paid her legal bills as they were incurred over the course of a case taking many years to litigate, in the eventual award to her of an amount for those attorney fees, interest on the amount at seven percent per annum compounded quarterly should be added, to compensate the Complainant for the fact that she lost use of the money paid in legal fees through the pendency of the case. Watkins v. Milwaukee County (LIRC, 07/03/85).

840 Remedies in particular types of cases

841 Refusal to hire

Generally, the failure to promote an employee will not be construed as a failure to hire, except in rare cases where the position sought by an employee and the position offered by the employer are so different that the employer's action can be considered a failure to hire rather than to promote. Marten Transport v. DILHR, 176 Wis. 2d 1012, 501 N.W.2d 391 (1993).

The evidence showed that the Complainant, who was ranked third on the list of candidates, would not have been offered the vacant position even absent the discrimination of the Respondent. The Complainant's argument that the consequences of the Respondent's actions would still lessen his promotional opportunities in the future was deemed speculative, and relief was therefore restricted to a cease and desist order. Holmes v. DILHR (Wis. Personnel Comm'n, 04/15/87).

Where a job applicant's score for her oral interview was discriminatory, she was given a score based upon the average for all those who had passed the interview, and the employer was ordered to determine the position she would have had on the hiring list if she had received that score and to pay her back pay if she would have thereafter been certified to a hiring authority. Bullock v. Milwaukee County (LIRC, 10/15/82).

Where the employer denied a teacher a position as a volleyball coach because she had a wage discrimination complaint pending, the employer should reimburse the teacher for all back wages and offer her the next year's volleyball coach position. If another person is already under contract for the coming year, the employer shall have the option of paying the teacher the amount of the coach's salary for the year and offering her the position for the year following. Hayward Community Sch. v. DILHR (Hedin) (Sawyer Co. Cir. Ct., 05/04/82).

Where a job applicant was discriminatorily denied a position because of his age, he is entitled to the next available position and back wages minus his interim earnings. He is also entitled to the money he would have received in unemployment compensation benefits during periods he would have been laid off with the employer, lost medical benefits and contributions to a pension fund, but any unemployment compensation actually received was offset against his award and the employer should pay those amounts to the Unemployment Compensation Reserve Fund. Vicherman v. Neuendorf Transp. (LIRC, 06/08/81), aff'd sub nom. Neuendorf Transp. v. LIRC (Dane Co. Cir. Ct., 05/07/82).

LIRC ordered the employer to cease discrimination, put the applicant back in the exam process regardless of his handicap and, if the applicant passed either exam, to appoint him to the next available position. To require the Complainant to be hired immediately would put the applicant in a better position than he would have had absent discrimination. City of Madison v. LIRC (Scott) (Dane Co. Cir. Ct., 10/22/79).

The employer's refusal to enroll the applicant in its welder training school entitled the applicant to an award of back pay until he was offered a welder trainee position and either rejected it or failed to complete the training program. A.O. Smith v. LIRC (Perry) (Milwaukee Co. Cir. Ct., 12/13/79).

To remedy an employer's discriminatory hiring practices, it is within DILHR's power to order the employer to hire a job applicant with all rights, benefits, privileges, pay increases and seniority that he would have had if he had been employed when he first applied. Int'l Harvester v. DILHR (Ham) (Dane Co. Cir. Ct., 05/15/78), aff'd, (Ct. App., Dist. IV, unpublished opinion, 11/06/79).

An employer who discriminatorily failed to contact a qualified black applicant for two years was required to offer the applicant the next available general factory job with all rights, privileges and wages she would have earned from the date of her original application until the date she was hired. Easter v. AMC (DILHR, 07/27/76), aff'd sub nom. AMC v. DILHR (Dane Co. Cir. Ct., 04/05/78).

DILHR did not exceed its authority in ordering an employer to offer a job applicant the next available position where the employer had unlawfully refused to hire him rather than simply refusing to certify him on the eligibility list. Dep't of Agric. v. LIRC (Anderson) (Dane Co. Cir. Ct., 05/25/78).

A qualified black applicant was awarded an offer of the next available position and back pay from the date a white co-applicant was hired to the date the black applicant was offered the position. Buchanan v. Barkow (DILHR, 03/11/77).

Where a job applicant was discriminatorily denied hire after being certified to four positions, the employer was ordered to offer her the next available position with all seniority rights and benefits she would have been entitled to had she been hired when originally certified, and back pay from that date to the date of the final DILHR order. Janssen v. Milwaukee County (LIRC, 10/12/76), aff'd sub nom. Milwaukee County v. DILHR (Dane Co. Cir. Ct., 10/20/77).

A white male applicant discriminatorily denied consideration for civil service employment as a steamfitter apprentice was not entitled to back pay, reinstatement in the application process, or hire to a like position where certification for the position was withdrawn and the position was never filled. Gibson v. DOA (DILHR, 12/13/76).

A white male applicant who was discriminatorily denied consideration for civil service employment as a painter apprentice was awarded the right to take the competitive exam and, if he passed, to be hired into the next available painter apprentice position. Patzer v. DOA (DILHR, 12/13/76).

842 Termination of employment

The Respondent was found to have violated the Wisconsin Fair Employment Act by discharging the Complainant because of arrest record; however because the underlying criminal charges against the Complainant were not yet resolved, the Complainant was not entitled to a monetary remedy. The Respondent could have suspended the Complainant without pay or other benefits until the charges against

him were resolved. The appropriate remedy is to order the Complainant reinstated to "suspended" status. Maline v. Wis. Bell (LIRC, 10/30/89).

Where the employer violated the Act by terminating an employee because of arrest, but where the acts the employee was arrested for were substantially related to her job so that suspension of the employee would have been permitted, and where the employer permanently went out of business prior to the resolution of the charges against the Complainant, no remedy of any sort was granted. No back pay was appropriate since the Complainant would have appropriately been on suspension for all time periods up to the closing of the business, and neither reinstatement nor a cease and desist order would be appropriate since the Respondent was permanently out of business. Shipley v. Town & Country Rest. (LIRC, 07/14/87).

Where the Complainant and another employee had both engaged in disruptive conduct, but the Complainant and not the other employee was discharged, and the Commission found that the discharge was discriminatory, the Commission properly held that the Complainant's back pay entitlement ended at the time that the employer subsequently terminated the other employee whose conduct had been the same as that of the Complainant's. It was a rational interpretation of the statute that the discrimination was eliminated by the firing of the other employee. Pike v. LIRC (Waukesha Co. Cir. Ct., 08/08/85).

An employee who was unlawfully discharged as a welder was granted reinstatement with all rights, privileges, benefits, seniority and remuneration he would have received but for the unlawful disqualification, including loss of pay and other benefits, from the date he was certified by his physician as able to safely return to work until the date of his reinstatement. Chicago & N.W. R.R. v. LIRC, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).

A male who was discriminatorily discharged received, in addition to an award of reinstatement and full seniority, back pay, including lost earnings and compensation for four weeks of vacation pay and three paid holidays he would have received but for the unlawful discrimination. Lienhardt v. Pacon (LIRC, 09/16/77).

An unlawfully discharged firefighter was entitled to all the benefits he would have received absent the discrimination, including outside part-time earnings, lost medical expenses incurred after his health insurance coverage lapsed and veteran's benefits he would have received if he had been allowed to complete his probationary period. Berndt v. City of Wis. Rapids (DILHR, 12/01/76), aff'd sub nom. City of Wis. Rapids v. DILHR (Wood Co. Cir. Ct., 08/23/76).

843 Suspension

Where discrimination was found on the basis of the unequal treatment of a Complainant who had been guilty of some misconduct, his first suspension would be rescinded to comport with the discipline imposed on a white employee with a similar record, the second suspension would be reduced in length on the theory that there would have been a less severe penalty on a first offense, but the third suspension would not be reduced because it could not be said that that suspension would have been unlikely to have occurred even if it had been handled non-discriminatorily. McGhie v. DHSS (Wis. Pers. Comm'n, 03/19/82).

844 Pregnancy discrimination

Where an employer had terminated as Accounting Department Manager both because she was pregnant and because of her inferior job performance, this was a mixed motive case. Because there was a finding that the Complainant would have been terminated even if she had not been pregnant, the Complainant's remedies were limited to a cease and desist order and payment of attorney's fees and costs. Hoell v. Narada

Productions (LIRC, 12/18/92), aff'd sub nom. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994).

The Respondent's argument that a back pay award should not have extended until the date the Complainant (who was discharged because of pregnancy) delivered because it was not "logical" to believe she would have worked up to her delivery date embodies the same type of preconceptions about the effects of pregnancy on the employee's abilities as was found to have violated the Wisconsin Fair Employment Act. Howard v. The Cloisters (LIRC, 08/24/90).

A pregnant employee discriminatorily denied accident and sickness coverage was awarded reimbursement for her additional insurance premiums and hospital costs, as well as seniority and other employee benefits she would have received if disabled for other than pregnancy reasons. King v. Wis. Tel. (LIRC, 05/16/79).

Where pregnancy disability had not been treated like other disabilities, the pregnant employee was entitled to disability payments, accumulated sick leave, seniority, cost of medical and hospitalization insurance premiums, and reimbursement for medical expenses. Stewart v. AT&T (DILHR, 05/17/74).

845 Discriminatory compensation

The Complainant established that the Respondent violated the Wisconsin Fair Employment Act by discriminating against her on the basis of sex and age with respect to salary increases. Since the U.S. Supreme Court issued its decision in Amtrak v. Morgan, 536 U.S. 101, 122 S. Ct. 153 (2002), a number of federal courts that have considered claims of discriminatory compensation have limited recovery in such actions to discriminatory paychecks received within the limitations period. They treat each of the prevailing plaintiff's paychecks that included discriminatory pay as a discrete discriminatory act. Following these cases, the Complainant in this case could only recover for the discriminatory pay raises that she received within the 300 days before she filed her complaint with the Equal Rights Division. Gaulke v. Sch. Dist. of Stratford (LIRC, 12/08/06).

849 Miscellaneous

[Ed. Note: Wis. State 106.50 allows for economic and noneconomic (compensatory) damages, injunctive relief, forfeiture, attorneys fees and costs. *https://docs.legis.wisconsin.gov/document/statutes/106.50(6)(h)*]

While the retaliatory use of a negative evaluation to affect a former employee's job opportunities can form the basis of a discrimination complaint, such an allegation cannot be piggy-backed onto a separate complaint merely by characterizing it as evidence going to "damages" following a finding of liability. Swanson v. County of Chippewa (LIRC, 05/11/07).

Section 111.39(4)(c), Stats., provides that when there is a finding of a violation of sec. 111.322(2)(m), Stats., compensation (of not less than 500 times nor more than 1,000 times the hourly wage of the person discriminated against when the violation occurred) shall be awarded in lieu of reinstatement if requested by all parties, and may be awarded if requested by any party. This provision has no applicability where there was no request made by either party for an award of compensation in lieu of reinstatement. The Complainant here simply stated at the hearing that he was not seeking to be reinstated to employment with the Respondent. The Administrative Law Judge appropriately made a remedial order which directed the Respondent to pay the Complainant his lost pay and benefits from the date of his discharge until the date of the hearing. Grulke v. Q & E Constr. (LIRC, 08/10/06).

The Complainant established that she was discharged for opposing sexual harassment. However, she was not entitled to compensation in lieu of reinstatement under sec. 111.39(4)(c), Stats., because compensation in lieu of reinstatement may be awarded only on proof of a discharge for opposing a discriminatory practice under sec. 111.322(2m), Stats. Clark v. Golden Basket Rest. (LIRC, 05/28/96).

850 Duty to mitigate damages

851 Generally, burdens and proof

Even though the record did not demonstrate that the Complainants were diligent in searching for full-time work following their discharge, there was no showing that such full-time work was reasonably available. It was the Respondent's burden to make this showing. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

The Wisconsin Fair Employment Act requires that back pay awards be reduced by amounts earnable with reasonable diligence. The burden of proving a failure of reasonable mitigation is on the Respondent. The Respondent can sustain this burden by demonstrating: (1) that the Complainant failed to make a diligent effort to seek new employment and that there was a reasonable likelihood that the Complainant might have found comparable work by exercising reasonable diligence, or (2) that the Complainant unreasonably rejected proffered employment that was comparable to the job that she had with the Respondent. In this case, the Complainant's failure to present documentary evidence of her job search efforts did not in and of itself call into question her testimony that she searched for work. Job seekers do not necessarily keep records of the jobs they have applied for unless they are required to do so for unemployment insurance or other purposes. Nunn v. Dollar Gen. (LIRC, 03/14/08).

While presentation of classified advertisements is a common method for establishing that a Complainant has failed to mitigate her damages by making a diligent effort to seek new employment, such evidence was unpersuasive in this case where the Complainant had an arrest record which might deter prospective employers from giving her serious consideration (as it did the Respondent). Thus, even if the Complainant failed to make a diligent effort to seek new employment, and the Respondent had established there were numerous appropriate jobs available, these facts would not necessarily warrant a conclusion that there was a reasonable likelihood that the Complainant could have found comparable work any sooner than she did. Nunn v. Dollar Gen. (LIRC, 03/14/08).

The Respondent has the burden of proving a failure of reasonable mitigation of damages. To meet the burden of proving the affirmative defense of failure to mitigate, the employer must establish: (1) that the Complainant failed to exercise reasonable diligence to mitigate his damages; and (2) that there was a reasonable likelihood that the Complainant might have found comparable work by exercising reasonable diligence. Goldsworthy v. Elite Marble (LIRC, 10/15/04).

The mitigation of damages concept is used to determine whether a terminated employee exercised reasonable diligence in seeking comparable employment after her discharge. Powell v. SBC Ameritech (LIRC, 04/21/03).

Once a Complainant establishes the amount of damages she claims resulted from the employer's conduct, the burden shifts to the employer to show that the Complainant failed to mitigate her damages, or that the damages were in fact less than she asserts. Haas v. Jerry Sark (LIRC, 03/19/03).

The ultimate inquiry in a mitigation of damages question is whether the Complainant acted reasonably in attempting to gain other employment or in rejecting proffered employment. The Respondent bears the

burden of proving the affirmative defense of a failure to mitigate. Ramos v. Stoughton Trailers (LIRC, 08/16/01).

A Complainant has an obligation to mitigate his damages, and if the Respondent can demonstrate that he failed to make a diligent effort to do so, the back pay award may be reduced by the amount the Complainant could have earned had he exercised reasonable diligence in seeking new employment. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

The use of classified advertisements showing the availability of different positions during the back pay period is a common method of proof of failure to mitigate damages. Whether opportunities for other comparable employment existed, such that the employer can be considered to have satisfied its burden of proving that there was a reasonable likelihood that the Complainant might have found comparable work by exercising reasonable diligence, is primarily a question of fact. Where the employer introduces *no* evidence that any alternative employment was available to a former employee during the back pay period, the employer has not sustained its burden of proof. Mueller v. Schedulesoft (LIRC, 10/27/00).

The Respondent attempted to show that the Complainant failed to mitigate her damages by, among other things, introducing statistics published by the Department of Workforce Development showing that the unemployment rate in the area during the back pay period was between 1.5% and 1.7%. These general statistics lump all kinds of employment together; they cannot help answer the question of whether there was *comparable* work available to the Complainant. Furthermore, the suggested fact that a low unemployment rate means a high rate of open and available jobs is one which is not actually established by the mere unemployment rate figures themselves, but instead requires some additional knowledge of and analysis of labor market conditions. Mueller v. Schedulesoft (LIRC, 10/27/00).

To meet the burden of proving the affirmative defense of failure to mitigate damages, the employer must establish that the Complainant failed to exercise reasonable diligence to mitigate her damages, and that there was a reasonable likelihood that the Complainant might have found comparable work by exercising reasonable diligence. Biggers v. Isaac's Lounge (LIRC, 10/29/99).

Not all voluntary quits of subsequent jobs constitute a lack of reasonable diligence in mitigating a wage loss. The burden is on the employer to prove that the Complainant did not have any justifiable reason for quitting. In this case, the Complainant established that the job she took after being discharged by the Respondent was not comparable in terms of working conditions or compensation. Under the circumstances, the Complainant's quitting that job should have no adverse effect on her eligibility for back pay. Crivello v. Target Stores (LIRC, 06/13/95), aff'd sub nom. Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998).

The manner in which the Complainant treated the Respondent at the hearing is irrelevant to the issue of mitigation of damages. The question of mitigation of damages is simply whether, after a legal wrong has been committed causing damage to another party, that party makes reasonable efforts to avoid or lessen the damage. Dude v. Thompson (LIRC, 11/16/90).

In order to satisfy its burden of proving that the Complainant failed to mitigate damages, the Respondent must prove both that the Complainant was not reasonably diligent in seeking other employment and that, with the exercise of reasonable diligence, there was a reasonable chance that the Complainant might have found comparable employment. Lambert v. All Lighting, Inc. (LIRC, 08/28/90).

The burden is on the employer to prove that the employee has failed to exercise reasonable diligence in mitigating her wage loss. Not all voluntary quits of subsequent jobs constitute a lack of reasonable diligence in mitigating a wage loss. Davis v. Braun-Hobar Corp. (LIRC, 04/18/90).

The Respondent has the burden of showing that the Complainant did not make reasonable efforts to mitigate her damages, thereby cutting off the back pay period. Compton v. Great Wall Rest. (LIRC, 07/20/89).

Where unlawful discrimination has occurred, the employer has the burden of proving its contention that the Complainant has failed to adequately mitigate his or her back pay losses by seeking other employment. Rusch v. City of La Crosse Police & Fire Comm'n (LIRC, 12/19/88).

While an employee has a duty to seek other employment in mitigation of damages, the employer has the burden of proof to establish that alternative employment was an available reality. Where there was evidence only that employment was available in the Complainant's field, but there was no comparison of pay, location, or other circumstances for the available positions, it was held that the employer failed to establish the existence of available alternative employment. UW Whitewater v. LIRC (Ct. App., Dist. IV, unpublished opinion, 11/25/85).

The Wisconsin Fair Employment Act requires that back pay awards be reduced by "amounts earnable with reasonable diligence." The burden of proving a failure of reasonable mitigation is on the employer. Anderson v. LIRC, 111 Wis. 2d 245, 255, 330 N.W.2d 594 (1983).

Where the employer did not show that there were any suitable jobs available during the back pay period or that the job applicant turned down any jobs, it failed to meet its burden of proof on the question of mitigation of damages. Neuendorf Transp. v. LIRC (Vicherman) (Dane Co. Cir. Ct., 05/07/82).

Failure to mitigate damages is an affirmative defense, and where the employer failed to show that there were suitable jobs available during the back pay period or that the applicant turned down any jobs, the employer failed to meet its burden on that issue. Appleton Elec. v. LIRC (Kreider) (Dane Co. Cir. Ct., 05/12/81).

852 Cases

A failure to accept suitable replacement employment can serve to cut off the entitlement to back pay. However, the Complainant was not expected to accept a job offer where he did not satisfy the requirements of the job. Gilbertson v. Wingra Redi-Mix, Inc. (LIRC, 12/10/20), aff'd sub nom. Wingra Redi-Mix v. LIRC (Dane Co. Cir. Ct. 10/12/21), appealed 11-23-21 and awaiting decision as of 5-10-23.

The Complainant attended a technical school in order to gain the skills necessary to become employed with a specific employer in the area. He also attempted to continue in paid employment while attending school, but quit that employment when it interfered with his schoolwork. There was no reason to believe that the Complainant's efforts were not undertaken in mitigation of his damages. It would not be appropriate to reduce his back pay as a result. Knight v. Walmart Stores East (LIRC, 10/11/12).

The Complainant did not attempt to mitigate his damages. The Complainant was not eligible for back pay following his discharge where he did not seek employment and he made no contention that his failure to do so was because of a lack of job opportunities in the labor market. Smith v. Wis. Bell (LIRC, 04/19/12).

Self-employment is an acceptable method of mitigating damages. The Complainant did not fail to mitigate his damages in the first year following his discharge where he enrolled in taxidermy school and set up his own

taxidermy business. The evidence did not suggest that at the time the Complainant decided to go to taxidermy school and start his own business he lacked a reasonable expectation that the business could be successful. Nor was there any evidence to indicate that the Complainant's efforts to get the business off the ground were inadequate. However, while it might be reasonable to expect a new business to founder in its early days, there comes a point at which the Complainant's self-employment efforts are recognized to be failing and can no longer be deemed a reasonable effort to mitigate damages. At some point the Complainant should have recognized that he was not going to be able to support himself on his taxidermy business alone. At that point he was no longer attempting to mitigate his wage loss and, therefore, cannot expect to pass his continuing wage loss on to the Respondent. Fields v. Cardinal TG Co. (LIRC, 02/16/01).

After the hearing, and after the Administrative Law Judge issued a preliminary decision finding that the Respondent had unlawfully discriminated against the Complainant, the Respondent moved to amend its answer to raise a question of failure to mitigate damages. The administrative rules relating to hearings before the Equal Rights Division provide that a complaint may not be amended less than twenty days before hearing unless good cause is shown. Although the rule dealing with answers is silent on when amendment is permitted, one may infer a twenty-day rule applies to amendments offered to raise affirmative defenses in answers as well. Further, even if sec. 802.09(2), Stats., applied to cases before the Equal Rights Division, the statute does not authorize raising entirely new, un-litigated causes of action or affirmative defenses after the conclusion of the hearing. Kalsto v. Village of Somerset (LIRC, 10/03/00).

The employer offered evidence in the form of classified advertisements showing the availability of work during the back pay period. That evidence was a "random" sample of advertisements which showed that there were 78 bartender positions and 125 waitressing positions available during the two and one half year back pay period. Biggers v. Isaac's Lounge (LIRC, 10/29/99).

The Complainant did not fail to exercise reasonable diligence in mitigating her damages when she was fired from her subsequent employment for having three absences which, under the circumstances, were understandable absences US Paper Converters v. LIRC, 208 Wis. 2d 523, 561 N.W.2d 756 (Ct. App. 1997).

A certified teacher who was discriminatorily refused hire as an accountant was thereafter justified in pursuing teaching rather than accounting positions. Anderson v. UW-Whitewater (LIRC, 02/16/83), aff'd sub nom. UW-Whitewater v. LIRC (Dane Co. Cir. Ct., 03/09/84).

Self-employment is an acceptable method of mitigating damages, and a rejected job applicant who became owner-operator of a tavern qualified under this method. Neuendorf Transp. v. LIRC (Dane Co. Cir. Ct., 05/07/82).

A discharged employee did not use reasonable diligence to mitigate his lost earnings where he did not seek other employment because of a belief that the nature of his discharge made him unemployable. Fruehwald v. City of Milwaukee (LIRC, 12/18/81).

The discharged employee's actions in applying for factory jobs and working as a waitress satisfied her mitigation duty. Appleton Elec. v. LIRC (Kreider) (Dane Co. Cir. Ct., 05/12/81).

Where a job applicant made an exhaustive effort to find work before she was discriminatorily denied employment, her failure to make additional efforts should not diminish her back pay award because she was justified in believing that it would be fruitless, she had already registered with various job services and she did not have the money to travel downtown. Janssen v. Milwaukee County (DILHR, 10/12/76).

860 FRIVOLOUS CLAIMS AND DEFENSES

861 Administrative law judge authority to determine that a claim or defense is frivolous, (Sec. 227.483, Stats.)

[Sec. 227.483, Stats., provides that if a hearing examiner finds, at any time during the proceeding, that an administrative hearing commenced or continued by a petitioner or a claim or defense used by a party is frivolous, the hearing examiner shall award the successful party the costs and reasonable attorney's fees that are directly attributable to responding to the frivolous petition, claim, or defense. If the costs and fees awarded are awarded against the party other than a public agency, those costs may be assessed fully against either the party or the attorney representing the party, or they may be assessed so that the party and the attorney each pay a portion of the costs and fees.]

The Commission reviews an ALJ's decision whether to impose sanctions for making a frivolous claim according to an "abuse of discretion" standard. The Commission was not given authority to make its own findings under sec. 227.483, and therefore cannot conduct a *de novo* review. Under the abuse of discretion standard, the question is whether the ALJ "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Loy v. Bunderson, 107 Wis. 2d 400, 415, 520 N.W.2d 175 (1982); Paytes v. Kost, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992). The ALJ failed to meet that standard, where she told the parties she would decide the issue based on the record and briefs, then proceeded to gather documents outside the record, and decided the issue based in part on those documents. Although the documents were in the possession of the agency in case files other than the one in front of the ALJ, and it may have been possible to take administrative notice of them under sec. 227.45(2), in this case the ALJ did not provide the parties an adequate opportunity to rebut the documents or offer countervailing evidence as required by sec. 227.45(2). Reed v. Heiser Ford, Inc. (LIRC, 05/31/13).

A party requesting an award of attorney's fees and costs pursuant to sec. 227.483, Stats., ("Costs Upon Frivolous Claims") must do so prior to the end of the proceedings before the Administrative Law Judge. LIRC cannot act on a request made for the first time before LIRC. Drabek v. Major Indus. (LIRC, 06/09/11).

Any request for an award under the frivolous claims statute, sec. 227.483, Stats., must be made to the Administrative Law Judge. LIRC can then review the ALJ's ruling on the request. LIRC cannot act on a request made for the first time before LIRC. Kutschenreuter v. Roberts Trucking (LIRC, 04/21/11).

The authority of the Labor and Industry Review Commission extends only to review of an ALJ's final findings and orders in a case within the meaning of sec. 111.39, Stats. From this it is clear that the *only way* in which LIRC can review a ruling by an ALJ under sec. 227.483, Stats., is in the course of conducting a review of an ALJ's final findings and order in a case, when the findings and order

include such a ruling. A party who wishes to have a ruling on a request for a finding of frivolousness and an award of costs and fees under sec. 227.483, Stats., must make such a request before the Administrative Law Judge issues his or her final findings and order in the case. The Administrative Law Judge can then include a ruling on the request in the ALJ's final findings and order in the case. If this procedure is followed, then the ALJ's ruling on the 227.483 request will be reviewable by the Labor and Industry Review Commission. Henderson v. DOC (LIRC, 03/19/09).

It seems obvious that in order to qualify as frivolous under sec. 227.483, Stats., the petition, claim, or defense in question must have been an unsuccessful one. In this case, the claims were found to be meritorious by the

ALJ. Therefore, they could not be considered frivolous. Achilli v. Sienna Crest Assisted Living (LIRC, 07/18/08).

Prior to the hearing, the Respondent submitted a Motion for Sanctions for Frivolous Claim against the Complainant pursuant to sec. 227.483, Stats. The Respondent asserted that sanctions were appropriate because the Complainant had both commenced and continued this action in bad faith, solely for the purpose of harassing and injuring the Respondent, and without any reasonable basis in law or equity to bring or continue his claim. The Administrative Law Judge indicated that she would consider the motion for sanctions after the hearing. However, the Complainant withdrew his complaint on the day of the scheduled hearing. The Administrative Law Judge then dismissed his complaint, without ruling on the motion for sanctions. On appeal to the Labor and Industry Review Commission, the Respondent asserted that the Complainant should not be allowed to engage in a tactic of initiating charges and lawsuits against employers, only to abandon them. The Respondent argued that an interpretation that deprived the Equal Rights Division of jurisdiction the instant a notice of withdrawal was presented would allow any petitioner to file a frivolous charge and maintain it until the very moment it became apparent that defeat was imminent and that sanctions would be awarded. This would render sec. 227.483, Stats., meaningless, as it would not serve as a deterrent for a Complainant (especially in a case like this, where the Complainant had filed multiple claims against many different employers over the past several years). The Labor and Industry Review Commission agreed with the Respondent's arguments that the Administrative Law Judge should retain jurisdiction to rule on a sec. 227.483, Stats., motion once a Complainant submitted a request to withdraw his complaint. The case was remanded to the Equal Rights Division for further proceedings with respect to the Respondent's motion for sanctions against the Complainant for a frivolous claim. Reed v. Heiser Ford (LIRC, 12/07/07).

862 Court authority to determine that a claim or defense is frivolous (Sec. 802.05, Stats.; former sec. 814.025, Stats.)

[Ed. Note: Sec. 814.025(1), Stats., was repealed by Supreme Court Order No. 03-06, effective July 1, 2005. Sec. 802.05, Stats., was also repealed by the Supreme Court. It was re-created to conform with Rule 11 of the Federal Rules of Civil Procedure. The cases summarized below were decided before sec. 814.025(1), Stats., was repealed.]

Wis. Admin Code DWD §218.03(7) allows a Complainant to withdraw a complaint at any time, and there is no requirement that the request to withdraw be made prior to the beginning of discovery. The rule requires that the department dismiss the complaint upon request. It does not authorize the department to award any sanctions or fees against a Complainant making such a request. Chapter 805 of the Wisconsin Statutes applies to actions in court and does not confer authority upon an administrative law judge to award attorney's fees when a Complainant seeks to voluntarily withdraw a complaint at the ERD. The WFEA allows for sanctions against a Complainant in only two circumstances: (1) where there has been a failure to obey an order to provide or permit discovery, and (2) where there has been a finding that a hearing or a claim was frivolous. Oldigs v. Pine Valley Residential Servs. (LIRC, 12/15/16)

The commissions jurisdiction to entertain a request for sanctions under Wis. Stat. §227.483 is confined to reviewing the administrative law judge's decision. The commission cannot act on requests for sanctions made to it for the first time. Davis v. Oxbo Int'l Corp. (LIRC, 07/31/15)

The Labor and Industry Review Commission affirmed the decision of an Administrative Law Judge that there was no probable cause to believe that the Respondent had violated the Wisconsin Public Accommodations and Amusements Law by giving preferential treatment on the basis of race. The Complainant then filed an action against the Respondent in circuit court under sec. 106.52(4)(c), Stats., pursuant to which a

Complainant may receive a new trial and a decision de novo by the circuit court on public accommodations discrimination claims. The circuit court decided on a motion for summary judgment that there had been no discrimination. The circuit court also concluded that the court action had been frivolous under sec. 814.025, Stats. It awarded the Respondent reasonable costs and attorney's fees pursuant to that statute. The court found that the action was frivolous because both the Equal Rights Division and LIRC had found that there was no probable cause to believe that discrimination had occurred, and the Complainant had presented no new evidence in his appeal to the circuit court to provide a factual basis for the claim, but relied only upon unsubstantiated conclusory statements. The Complainant should have known that without more than conclusory statements his claim would be as unsuccessful in court as it was in the previous administrative proceeding. Harris v. Curley (Dane Co. Cir. Ct., 08/11/04).

A trial court must generally hold a separate hearing on the issue of frivolousness in a court proceeding under sec. 814.025, Stats. However, a finding of frivolousness may be made without a hearing if the facts are undisputed and only a question of law remains. A claim is not frivolous under sec. 814.025, Stats., simply because there is a failure of proof, or because it was later shown to be incorrect, or it lost on the merits. The critical question is whether the party or the party's attorney knew or should have known that the needed facts did not exist or could not be developed to support the claim. Harris v. Curley (Dane Co. Cir. Ct., 08/11/04)

Circuit court review of an administrative case is analogous to an action originating in the circuit court. A circuit court may properly award reasonable attorney's fees if it finds that any single claim of a petitioner was frivolously brought before the court on review under Ch. 227, Stats. The circuit court cannot award attorney's fees incurred at the various agency levels, however. In this case, the Complainant jettisoned her arguably frivolous race discrimination claim at the agency hearing stage. The Complainant did not "continue" her race discrimination claim on appeal before the circuit court under sec. 814.025, Stats. Therefore, the circuit court could make no finding as to its frivolousness., and the Respondent presumably incurred no attorney's fees at that level. Tatum v. LIRC, 132 Wis. 2d 411, 392 N.W.2d 840 (Ct. App. 1986).

863 LIRC's lack of authority to determine that a claim or defense is frivolous

[Ed. Note: Sec. 814.025(1), Stats., was repealed by Supreme Court Order No. 03-06, effective July 1, 2005. Sec. 802.05, Stats., was also repealed by the Supreme Court. It was re-created to conform with Rule 11 of the Federal Rules of Civil Procedure.]

An allegation that the Complainant's discrimination claim was frivolous requires an evidentiary hearing by the administrative law judge and a factual finding regarding the Complainant's intent. The Commission does not have the authority to make its own findings as to frivolousness and must remand to the administrative law judge so that the appropriate findings may be made. Jackson v. Klemm Tank Lines (LIRC, 03/26/15).

A party requesting an award of attorney's fees and costs pursuant to sec. 227.483, Stats., ("Costs Upon Frivolous Claims") must do so prior to the end of the proceedings before the Administrative Law Judge. LIRC cannot act on a request made for the first time before LIRC. Drabek v. Major Indus. (LIRC, 06/09/11).

Any request for an award under the frivolous claims statute, sec. 227.483, Stats., must be made to the Administrative Law Judge. LIRC can then review the ALJ's ruling on the request. LIRC cannot act on a request made for the first time before LIRC. Kutschenreuter v. Roberts Trucking (LIRC, 04/21/11).

Section 227.483, Wis. Stats., does not address the question of exactly *when* during a case a party should make a motion for a finding that a claim or defense was frivolous. However, some matters of timing are implicit in

the fact that the statute authorizes an administrative law judge to make a finding under the statute "at any time during the proceeding." From this it is implicit that a party does not have to wait until the end of the proceeding. It is also implicit that a party must request such a finding *prior to the end of the proceedings* before the ALJ. Other considerations relevant to the timing question arise from limitations implicit in the Wisconsin Fair Employment Act. The authority of the Labor and Industry Review Commission extends only to review of an ALJ's final findings and orders in a case within the meaning of sec. 111.39, Wis. Stats. From this it is clear that the *only way* in which LIRC can review a ruling by an ALJ under sec. 227.483, Wis. Stats., is in the course of conducting a review of an ALJ's final findings and order in a case, when the findings and order include such a ruling. A party who wishes to have a ruling on a request for a finding of frivolousness and an award of costs and fees under sec. 227.483, Wis. Stats., must make such a request before the Administrative Law Judge issues his or her final findings and order in the case. The Administrative Law Judge can then include a ruling on the request in the ALJ's final findings and order in the case. If this procedure is followed, then the ALJ's ruling on the 227.483 request will be reviewable by the Labor and Industry Review Commission. Henderson v. DOC (LIRC, 03/19/09).

The Respondent requested that LIRC remand a case to the Administrative Law Judge with directions to grant the Respondent its costs and attorney's fees on the ground that the Complainant's appeal of the decision by the Administrative Law Judge was frivolous under sec. 227.483, Stats. LIRC denied the request. While the record evidence did not support the Complainant's underlying discrimination claim, it also did not support the Respondent's assertions that the Complainant had no evidence to reasonably support his discrimination claim, or that he had maintained that claim in bad faith or solely for the purpose of harassing the Respondent. Dobberstein v. NSight Teleservices (LIRC, 02/23/07).

The arguments raised by the Respondent in an effort to establish that the Complainant's position in this case was frivolous were not addressed. It would be superfluous to do so under the controlling decision in Tatum v. LIRC, 132 Wis. 2d 411, 392 N.W.2d 849 (Ct. App. 1986). Ring v. Midwest Directories (LIRC, 01/26/96).

Neither Ch. 227, Wis. Stats., nor the Wisconsin Fair Employment Act expressly or impliedly authorizes the Labor and Industry Review Commission to award attorney's fees to an employer for frivolous employment discrimination claims brought by an employee. Tatum v. LIRC, 132 Wis. 2d 411, 392 N.W.2d 840 (Ct. App. 1986).

The Labor and Industry Review Commission has no authority to award attorney's fees to an employer after the Complainant withdraws her complaint of employment discrimination. Sec. 814.025, Stats., does not authorize the Commission to make determinations of frivolousness or to assess costs and reasonable attorney's fees against Complainants in favor of Respondents. Jeffries v. Cameo Convalescent Ctr. (LIRC, 08/09/85); aff'd sub nom. Cameo Convalescent Ctr. v. LIRC (Milwaukee Co. Cir. Ct., 09/02/86).

The Wisconsin Fair Employment Act does not impliedly authorize the Labor and Industry Review Commission to award attorney's fees to prevailing employers in employment discrimination actions. Sec. 814.025, Stats., relating to awards of fees for bringing a frivolous claim in courts, applies only to court proceedings. Niles v. Fleet Farm of Green Bay (LIRC, 07/25/85); aff'd sub nom. Fleet Farm of Green Bay v. LIRC (Ct. App., Dist. III, unpublished summary disposition, 07/16/86).