

2009 DRAFTING REQUEST

Bill

Received: 01/26/2009

Received By: gmalaise

Wanted: As time permits

Identical to LRB:

For: Administration-Budget

By/Representing: Weidner

This file may be shown to any legislator: NO

Drafter: gmalaise

May Contact:

Addl. Drafters:

Subject: Discrimination
Employ Priv - family leave
Employ Pub - miscellaneous

Extra Copies:

Submit via email: NO

Pre Topic:

DOA:.....Weidner, BB0535 -

Topic:

Hearings by administrative law judges

Instructions:

See attached

Drafting History:

Table with 8 columns: Vers., Drafted, Reviewed, Typed, Proofed, Submitted, Jacketed, Required. It contains two rows of drafting history data.

FE Sent For:

<END>

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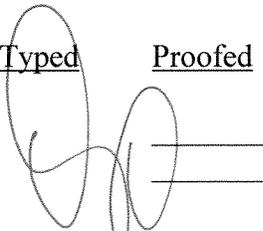
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/?	gmalaise	1 wlj 1/26					

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<END>

2007-09 Budget Bill Statutory Language Drafting Request

- Topic: Hearings by Administrative Law Judges
- Tracking Code: BB0535
- SBO team: General Government and Economic Development
- SBO analyst: Jenna Weidner
 - Phone: x 6-7329
 - Email: jenna.weidner@wisconsin.gov
- Agency acronym: DWD
- Agency number: 445
- Priority (Low, Medium, High): High

Intent: Eliminate an individual's right to a hearing by an Administrative Law Judge (ALJ) if his or her case has been dismissed because of a no probable cause determination.

The individual will be provided the right to sue in circuit court.



State of Wisconsin
2009 - 2010 LEGISLATURE

IN 1126

LRB-1800/2

GMM.../.....

WLj

DOA:.....Weidner, BB0535 - Hearings by administrative law judges

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

Do Not Gen

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

↓ EMPLOYMENT

Under current law, a person who believes that he or she has been discriminated against in employment, housing, or the full and equal enjoyment of a public place of accommodation; that his or her employer has violated the family and medical leave law; that he or she has been retaliated against for disclosing information demonstrating mismanagement or abuse of authority in state or local government (commonly referred to as "the whistleblower law"); or that he or she has been discriminated against for exercising any right relating to public employee occupational safety and health may file a complaint with DWD (complaint), and DWD must investigate the complaint to determine whether there is probable cause to believe that a violation occurred (probable cause). Under current DWD rules, if DWD determines that there is no probable cause, DWD must dismiss the complaint and the complainant may request a hearing on the issue of probable cause before an administrative law judge (ALJ).

administrative law judge → ALJ This bill eliminates the right of a complainant whose complaint is dismissed for lack of probable cause to request a hearing on the issue of probable cause before an administrative law judge (ALJ). Under the bill, if DWD determines that there is no probable cause and dismisses a complaint, the order of dismissal is the final decision of DWD, which may be appealed to the circuit court.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 101.055 (8) (cm) of the statutes is created to read:

2 101.055 (8) (cm) If the division of equal rights finds no probable cause to believe
3 that a violation of par. (ar) has occurred, the division shall dismiss the complaint.
4 If the division of equal rights dismisses the complaint, the order of dismissal is the
5 final determination of the division, which may be appealed under par. (d). The
6 division of equal rights shall, by a notice to be served with the determination, notify
7 the parties of the complainant's right to appeal the dismissal of the complaint to the
8 circuit court under par. (d).

9 **SECTION 2.** 103.10 (12) (bm) of the statutes is created to read:

10 103.10 (12) (bm) If the department finds no probable cause to believe that a
11 violation of sub. (11) (a) or (b) has occurred, the department shall dismiss the
12 complaint. If the department dismisses the complaint, the order of dismissal is the
13 final determination of the department, which may be appealed under s. 227.52. The
14 department shall, by a notice to be served with the determination, notify the parties
15 of the complainant's right to appeal the dismissal of the complaint to the circuit court
16 under s. 227.52.

17 **SECTION 3.** 106.50 (6) (c) 4. of the statutes is amended to read:

18 106.50 (6) (c) 4. If the department initially determines that there is no probable
19 cause to believe that discrimination occurred as alleged in the complaint, it may the
20 department shall dismiss those allegations. If the department dismisses those
21 allegations, the order of dismissal is the final determination of the department,

1 which may be appealed under par. (j). The department shall, by a notice to be served
 2 with the determination, notify the parties of the complainant's right to appeal the
 3 dismissal of the claim to the ~~secretary for a hearing on the issue by a hearing~~
 4 ~~examiner circuit court under par. (j).~~ Service of the determination shall be made by
 5 certified mail, return receipt requested. ~~If the hearing examiner determines that no~~
 6 ~~probable cause exists, that determination is the final determination of the~~
 7 ~~department and may be appealed under par. (j).~~

History: 1971 c. 185 s. 1; 1971 c. 228 s. 42; 1971 c. 230; 1971 c. 307 s. 51; Stats. 1971 s. 101.22; 1975 c. 94, 275, 421, 422; 1977 c. 29; 1977 c. 418 s. 929 (55); 1979 c. 110; 1979 c. 177 s. 85; 1979 c. 188, 221, 355; 1981 c. 112, 180; 1981 c. 391 s. 210; 1983 a. 27, 189; 1985 a. 238, 319; 1987 a. 262; 1989 a. 47 ss. 2 to 5, 8 to 11; 1989 a. 94, 106, 139, 359; 1991 a. 295, 315; 1993 a. 27; 1995 a. 27 s. 3687; Stats. 1995 s. 106.04; 1995 a. 225; 1995 a. 448 ss. 66, 68; 1997 a. 112, 237, 312; 1999 a. 82 ss. 38 to 74; Stats. 1999 s. 106.50; 1999 a. 150 s. 672; 1999 a. 162; 2001 a. 30 s. 108; 2001 a. 109; 2005 a. 25; 2007 a. 11.

8 **SECTION 4.** 106.52 (4) (a) 4m. of the statutes is created to read:

9 106.52 (4) (a) 4m. If the department finds no probable cause to believe that any
 10 act prohibited under sub. (3) has been or is being committed, the department shall
 11 dismiss the complaint. If the department dismisses the complaint, the order of
 12 dismissal is the final determination of the department, which may be appealed under
 13 par. (c). The department shall, by a notice to be served with the determination, notify
 14 the parties of the complainant's right to appeal the dismissal of the complaint to the
 15 circuit court under par. (c).

16 **SECTION 5.** 106.52 (4) (c) of the statutes is amended to read:

17 106.52 (4) (c) *Judicial review.* Within 30 days after service upon all parties of
 18 an order of the department under par. (a) 4m. or an order of the commission under
 19 par. (b), the respondent or complainant may appeal the order to the circuit court for
 20 the county in which the alleged act prohibited under sub. (3) took place by the filing
 21 of a petition for review. The complainant appealing an order of the department shall
 22 receive a hearing on the issue of whether there is probable cause to believe that any
 23 act prohibited under sub. (3) has been or is being committed. The respondent or

1 complainant appealing an order of the commission shall receive a new trial on all
2 issues relating to any alleged act prohibited under sub. (3) and a further right to a
3 trial by jury, if so desired. The department of justice shall represent the department
4 or commission. In any such trial the burden shall be to prove an act prohibited under
5 sub. (3) by a fair preponderance of the evidence. Costs in an amount not to exceed
6 \$100 plus actual disbursements for the attendance of witnesses may be taxed to the
7 prevailing party on the appeal.

History: 1971 c. 185 s. 1; 1971 c. 228 s. 42; 1971 c. 230; 1971 c. 307 s. 51; Stats. 1971 s. 101.22; 1975 c. 94, 275, 421, 422; 1977 c. 29; 1977 c. 418 s. 929 (55); 1979 c. 110; 1979 c. 177 s. 85; 1979 c. 188, 221, 355; 1981 c. 112, 180; 1981 c. 391 s. 210; 1983 a. 27, 189; 1985 a. 238, 319; 1987 a. 262; 1989 a. 47 ss. 2 to 5, 8 to 11; 1989 a. 94, 106, 139, 359; 1991 a. 295, 315; 1993 a. 27; 1995 a. 27 s. 3687; Stats. 1995 s. 106.04; 1995 a. 225; 1995 a. 448 ss. 66, 68; 1997 a. 112, 237, 312; 1999 a. 82 ss. 75 to 92, 102 to 105; Stats. 1999 s. 106.52; 1999 a. 186; 2003 a. 23; 2005 a. 155; 2005 a. 354 ss. 1 to 4, 6; 2007 a. 97.

8 **SECTION 6.** 111.39 (4) (bm) of the statutes is created to read:

9 111.39 (4) (bm) If the department finds no probable cause to believe that any
10 discrimination has been or is being committed, that unfair honesty testing has
11 occurred or is occurring, or that unfair genetic testing has occurred or is occurring,
12 the department shall dismiss the complaint. If the department dismisses the
13 complaint, the order of dismissal is the final determination of the department, which
14 may be appealed under s. 111.395. The department shall, by a notice to be served
15 with the determination, notify the parties of the complainant's right to appeal the
16 dismissal of the complaint to the circuit court under s. 111.395.

17 **SECTION 7.** 111.395 of the statutes is amended to read:

18 **111.395 Judicial review.** Findings and orders of the department under s.
19 111.39 (4) (bm) or of the commission under this subchapter s. 111.39 (5) are subject
20 to review under ch. 227. Orders of the commission shall have the same force as orders
21 of the department under chs. 103 to 106 and may be enforced as provided in s.
22 103.005 (11) and (12) or specifically by a suit in equity. In any enforcement action
23 the merits of any order of the commission are not subject to judicial review. Upon

1 such review, or in any enforcement action, the department of justice shall represent
2 the department or commission.

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

SECTION 8. 227.42 (7) of the statutes is created to read:

4 227.42 (7) This section does not apply to a determination issued under s.
5 101.055 (8) (cm), 103.10 (12) (bm), 106.50 (6) (c) 4., 106.52 (4) (a) 4m., 111.39 (4) (bm),
6 or 230.85 (2) (c).

7 Fix
Comp.?

SECTION 9. 230.85 (2) of the statutes is consolidated renumbered 230.85 (2) (a)

8 and amended to read:

9 230.85 (2) (a) The division of equal rights shall receive and, except as provided
10 in s. 230.45 (1m), investigate any complaint under sub. (1). In the course of
11 investigating or otherwise processing such a complaint, the division of equal rights
12 may require that an interview with any employee described in s. 230.80 (3), except
13 a management or supervisory employee who is a party to or is immediately involved
14 in the subject matter of the complaint, be conducted outside the presence of the
15 appointing authority or any representative or agent thereof of the appointing
16 authority unless the employee voluntarily requests that presence. An appointing
17 authority shall permit an employee to be interviewed without loss of pay and to have
18 an employee representative present at the interview. An appointing authority of an
19 employee to be interviewed may require the division of equal rights to give the
20 appointing authority reasonable notice prior to the interview.

21 (b) If the division of equal rights finds probable cause to believe that a
22 retaliatory action has occurred or was threatened, it the division may endeavor to
23 remedy the problem through conference, conciliation, or persuasion. If that
24 endeavor is not successful, the division of equal rights shall issue and serve a written

1 notice of hearing, specifying the nature of the retaliatory action ~~which~~ that has
2 occurred or was threatened, and requiring the person named, in this section called
3 the "respondent", to answer the complaint at a hearing. The notice shall specify the
4 place of hearing and a time of hearing not less than 30 days after service of the
5 complaint upon the respondent nor less than 10 days after service of the notice of
6 hearing. If, however, the division of equal rights determines that an emergency
7 exists with respect to a complaint, the notice of hearing may specify a time of hearing
8 within 30 days after service of the complaint upon the respondent, but not less than
9 10 days after service of the notice of hearing. The testimony at the hearing shall be
10 recorded or taken down by a reporter appointed by the division of equal rights.

History: 1983 a. 409; 1991 a. 39; 2003 a. 33; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii.

11 **SECTION 10.** 230.85 (2) (c) of the statutes is created to read:

12 230.85 (2) (c) If the division of equal rights finds no probable cause to believe
13 that a retaliatory action has occurred or was threatened, the division shall dismiss
14 the complaint. If the division of equal rights dismisses the complaint, the order of
15 dismissal is the final determination of the division, which may be appealed under s.
16 230.87. The division of equal rights shall, by a notice to be served with the
17 determination, notify the parties of the complainant's right to appeal the dismissal
18 of the complaint to the circuit court under s. 230.87.

19 **SECTION 11.** 230.88 (2) (c) of the statutes is amended to read:

20 230.88 (2) (c) No later than 10 days before the specified time of hearing under
21 s. 230.85 (2) (b), an employee shall notify the division of equal rights orally or in
22 writing if he or she has commenced or will commence an action in a court of record
23 alleging matters prohibited under s. 230.83 (1). If the employee does not
24 substantially comply with this requirement, the division of equal rights may assess

1 against the employee any costs attributable to the failure to notify. Failure to notify
2 the division of equal rights does not affect a court's jurisdiction to proceed with the
3 action. Upon commencement of such an action in a court of record, the division of
4 equal rights has no jurisdiction to process a complaint filed under s. 230.85 except
5 to dismiss the complaint and, if appropriate, to assess costs under this paragraph.

History: 1983 a. 409; 2003 a. 33.

6 **SECTION 9356. Initial applicability; Workforce Development.**

7 (1) APPEALS OF PROBABLE CAUSE DETERMINATIONS. The treatment of sections
8 101.055 (8) (cm), 103.10 (12) (bm), 106.50 (6) (c) 4., 106.52 (4) (a) 4m. and (c), 111.39
9 (4) (bm), 111.395, 22.42 (7), and 230.88 (2) (c) of the statutes, the renumbering and
10 amendment of section 230.85 (2) of the statutes, and the creation of section 230.85
11 (2) (c) of the statutes first apply to a complaint filed under section 101.055 (8) (b),
12 103.10 (12) (b), 106.50 (6) (a) 1., 106.52 (4) (a) 1., 111.39 (1), or 230.85 (1) of the statutes
13 on the effective date of this subsection.

14 (END)



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1800/1
GMM:wjl:rs

DOA:.....Weidner, BB0535 - Hearings by administrative law judges

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

1 **AN ACT ...; relating to:** the budget.

Analysis by the Legislative Reference Bureau

EMPLOYMENT

Under current law, a person who believes that he or she has been discriminated against in employment, housing, or the full and equal enjoyment of a public place of accommodation; that his or her employer has violated the family and medical leave law; that he or she has been retaliated against for disclosing information demonstrating mismanagement or abuse of authority in state or local government (commonly referred to as "the whistleblower law"); or that he or she has been discriminated against for exercising any right relating to public employee occupational safety and health may file a complaint (complaint) with DWD, and DWD must investigate the complaint to determine whether there is probable cause to believe that a violation occurred (probable cause). Under current DWD rules, if DWD determines that there is no probable cause, DWD must dismiss the complaint and the complainant may request a hearing on the issue of probable cause before an administrative law judge.

This bill eliminates the right of a complainant whose complaint is dismissed for lack of probable cause to request a hearing on the issue of probable cause before an administrative law judge. Under the bill, if DWD determines that there is no probable cause and dismisses a complaint, the order of dismissal is the final decision of DWD, which may be appealed to the circuit court.

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5 final determination of the division, which may be appealed under par. (d). The
6 division of equal rights shall, by a notice to be served with the determination, notify
7 the parties of the complainant's right to appeal the dismissal of the complaint to the
8 circuit court under par. (d).

9 **SECTION 2.** 103.10 (12) (bm) of the statutes is created to read:

10 103.10 (12) (bm) If the department finds no probable cause to believe that a
11 violation of sub. (11) (a) or (b) has occurred, the department shall dismiss the
12 complaint. If the department dismisses the complaint, the order of dismissal is the
13 final determination of the department, which may be appealed under s. 227.52. The
14 department shall, by a notice to be served with the determination, notify the parties
15 of the complainant's right to appeal the dismissal of the complaint to the circuit court
16 under s. 227.52.

17 **SECTION 3.** 106.50 (6) (c) 4. of the statutes is amended to read:

18 106.50 (6) (c) 4. If the department initially determines that there is no probable
19 cause to believe that discrimination occurred as alleged in the complaint, it may the
20 department shall dismiss those allegations. If the department dismisses those
21 allegations, the order of dismissal is the final determination of the department.

1 which may be appealed under par. (j). The department shall, by a notice to be served
2 with the determination, notify the parties of the complainant's right to appeal the
3 dismissal of the claim to the secretary ~~for a hearing on the issue by a hearing~~
4 ~~examiner~~ circuit court under par. (j). Service of the determination shall be made by
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9 106.52 (4) (a) 4m. If the department finds no probable cause to believe that any
10 act prohibited under sub. (3) has been or is being committed, the department shall
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13 par. (c). The department shall, by a notice to be served with the determination, notify
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15 circuit court under par. (c).

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17 106.52 (4) (c) *Judicial review.* Within 30 days after service upon all parties of
18 an order of the department under par. (a) 4m. or an order of the commission under
19 par. (b), the respondent or complainant may appeal the order to the circuit court for
20 the county in which the alleged act prohibited under sub. (3) took place by the filing
21 of a petition for review. The complainant appealing an order of the department shall
22 receive a hearing on the issue of whether there is probable cause to believe that any
23 act prohibited under sub. (3) has been or is being committed. The respondent or
24 complainant appealing an order of the commission shall receive a new trial on all
25 issues relating to any alleged act prohibited under sub. (3) and a further right to a

1 trial by jury, if so desired. The department of justice shall represent the department
2 or commission. In any such trial the burden shall be to prove an act prohibited under
3 sub. (3) by a fair preponderance of the evidence. Costs in an amount not to exceed
4 \$100 plus actual disbursements for the attendance of witnesses may be taxed to the
5 prevailing party on the appeal.

6 **SECTION 6.** 111.39 (4) (bm) of the statutes is created to read:

7 111.39 (4) (bm) If the department finds no probable cause to believe that any
8 discrimination has been or is being committed, that unfair honesty testing has
9 occurred or is occurring, or that unfair genetic testing has occurred or is occurring,
10 the department shall dismiss the complaint. If the department dismisses the
11 complaint, the order of dismissal is the final determination of the department, which
12 may be appealed under s. 111.395. The department shall, by a notice to be served
13 with the determination, notify the parties of the complainant's right to appeal the
14 dismissal of the complaint to the circuit court under s. 111.395.

15 **SECTION 7.** 111.395 of the statutes is amended to read:

16 **111.395 Judicial review.** Findings and orders of the department under s.
17 111.39 (4) (bm) or of the commission under this subchapter s. 111.39 (5) are subject
18 to review under ch. 227. Orders of the commission shall have the same force as orders
19 of the department under chs. 103 to 106 and may be enforced as provided in s.
20 103.005 (11) and (12) or specifically by a suit in equity. In any enforcement action
21 the merits of any order of the commission are not subject to judicial review. Upon
22 such review, or in any enforcement action, the department of justice shall represent
23 the department or commission.

24 **SECTION 8.** 227.42 (7) of the statutes is created to read:

1 227.42 (7) This section does not apply to a determination issued under s.
2 101.055 (8) (cm), 103.10 (12) (bm), 106.50 (6) (c) 4., 106.52 (4) (a) 4m., 111.39 (4) (bm),
3 or 230.85 (2) (c).

4 **SECTION 9.** 230.85 (2) of the statutes is renumbered 230.85 (2) (a) and amended
5 to read:

6 230.85 (2) (a) The division of equal rights shall receive and, except as provided
7 in s. 230.45 (1m), investigate any complaint under sub. (1). In the course of
8 investigating or otherwise processing such a complaint, the division of equal rights
9 may require that an interview with any employee described in s. 230.80 (3), except
10 a management or supervisory employee who is a party to or is immediately involved
11 in the subject matter of the complaint, be conducted outside the presence of the
12 appointing authority or any representative or agent thereof of the appointing
13 authority unless the employee voluntarily requests that presence. An appointing
14 authority shall permit an employee to be interviewed without loss of pay and to have
15 an employee representative present at the interview. An appointing authority of an
16 employee to be interviewed may require the division of equal rights to give the
17 appointing authority reasonable notice prior to the interview.

18 **(b)** If the division of equal rights finds probable cause to believe that a
19 retaliatory action has occurred or was threatened, it the division may endeavor to
20 remedy the problem through conference, conciliation, or persuasion. If that
21 endeavor is not successful, the division of equal rights shall issue and serve a written
22 notice of hearing, specifying the nature of the retaliatory action ~~which~~ that has
23 occurred or was threatened, and requiring the person named, in this section called
24 the "respondent", to answer the complaint at a hearing. The notice shall specify the
25 place of hearing and a time of hearing not less than 30 days after service of the

1 complaint upon the respondent nor less than 10 days after service of the notice of
2 hearing. If, however, the division of equal rights determines that an emergency
3 exists with respect to a complaint, the notice of hearing may specify a time of hearing
4 within 30 days after service of the complaint upon the respondent, but not less than
5 10 days after service of the notice of hearing. The testimony at the hearing shall be
6 recorded or taken down by a reporter appointed by the division of equal rights.

7 **SECTION 10.** 230.85 (2) (c) of the statutes is created to read:

8 230.85 (2) (c) If the division of equal rights finds no probable cause to believe
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10 the complaint. If the division of equal rights dismisses the complaint, the order of
11 dismissal is the final determination of the division, which may be appealed under s.
12 230.87. The division of equal rights shall, by a notice to be served with the
13 determination, notify the parties of the complainant's right to appeal the dismissal
14 of the complaint to the circuit court under s. 230.87.

15 **SECTION 11.** 230.88 (2) (c) of the statutes is amended to read:

16 230.88 (2) (c) No later than 10 days before the specified time of hearing under
17 s. 230.85 (2) (b), an employee shall notify the division of equal rights orally or in
18 writing if he or she has commenced or will commence an action in a court of record
19 alleging matters prohibited under s. 230.83 (1). If the employee does not
20 substantially comply with this requirement, the division of equal rights may assess
21 against the employee any costs attributable to the failure to notify. Failure to notify
22 the division of equal rights does not affect a court's jurisdiction to proceed with the
23 action. Upon commencement of such an action in a court of record, the division of
24 equal rights has no jurisdiction to process a complaint filed under s. 230.85 except
25 to dismiss the complaint and, if appropriate, to assess costs under this paragraph.

