

1979 Assembly Bill 139

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**CHAPTER 319, Laws of 1979**

AN ACT to amend 111.33 and 111.36 (1) and (3), (4) and (5); and to create 111.31 (4), 111.32 (6), 111.326, 111.351, 905.065 and 942.06 of the statutes, relating to restricting the use of polygraphs and similar tests and providing penalties.

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

SECTION 1. 111.31 (4) of the statutes is created to read:

111.31 (4) The practice of requiring employes or prospective employes to submit to honesty tests without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employes and prospective employes.

SECTION 2. 111.32 (6) of the statutes is created to read:

111.32 (6) "Unfair honest testing" means any test or testing procedure which violates s. 111.326.

SECTION 3. 111.326 of the statutes is created to read:

**111.326 Use of honesty testing devices in employment situations.** (1) (a) Except as provided in par. (b), no employer or agent of an employer may directly or indirectly solicit, require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test the honesty of any employe or prospective employe. No person may sell to or interpret for an employer or agent of an employer a test that he or she knows has been solicited or required by an employer or agent of an employer to test the honesty of an employe or prospective employe. If an employe requests a test purporting to test the employe's honesty, any employer or agent administering the test shall inform the employe that taking the test is voluntary.

(b) This subsection does not apply to the use of an instrument or device for the purpose of verifying truthfulness or detecting deception, or assisting in the reporting of a diagnostic opinion as to either of these, which, at a minimum, is capable of recording visually, permanently and simultaneously indications of a person's cardiovascular pattern and changes therein and a person's respiratory pattern and changes therein.

(2) Any agreement by an employer or agent of the employer and an employe or prospective employe offering employment or any pay or job benefit to an employe or prospective employe in return for taking a test permitted under sub. (1) (b) is void.

(3) (a) If an employer or agent of an employer gives an employe or prospective employe a permitted test, the employer or agent shall follow the procedure under this subsection.

(b) The employer or agent shall inform the test subject, in writing and orally, of all rights which the subject has under this section and ss. 905.065 and 942.06. The employer or agent shall not proceed further with the test until the subject has provided written consent to take the test. The employer or agent shall conduct an interview prior to the test in which he or she discusses any questions to be asked of the subject.

(c) If a person is given a permitted test under par. (a), each question shall be directly related to the person's performance or conduct in past or present employment, shall be designed to establish a known false response for comparison purposes or shall be used to verify the truthfulness of answers on a written employment application. The employer or agent shall not ask any question during the test regarding the subject's sexual practices, religious affiliation or beliefs, marital relationship, political affiliation or beliefs or labor union activities.

(d) The employer or agent shall inform the subject of the results of the test and offer the subject the opportunity to explain any questionable responses or to retake the examination or both. If the subsequent responses or the reexamination clarify any questionable response, the results of the initial test question shall not be reported further.

(4) No employer may take any disciplinary action against or make a decision on hiring or firing an employe or prospective employe based on the results of a permitted test, unless the employer has relevant evidence or information, obtained independently from the permitted test, which tends to support the test results, or based on the refusal of the employe to take the test.

SECTION 4. 111.33 of the statutes is amended to read:

**111.33 Department to administer.** (1) Except as provided under sub. (2), this subchapter shall be administered by the department. The department may make, amend and rescind such rules as are necessary to carry out this subchapter. The department or the commission may, by such agents or agencies as it designates, conduct in any part of this state any proceeding, hearing, investigation or inquiry necessary to the performance of its functions. The department shall preserve the anonymity of any employe who is the

aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment or of unfair honesty testing against his or her present employer until a determination as to probable cause has been made, unless the department determines that ~~such~~ the anonymity will substantially impede the investigation.

(2) This subchapter ~~shall apply~~ applies to each agency of the state except that complaints of discrimination or unfair honesty testing against ~~such~~ the agency as an employer shall be filed with and processed by the personnel commission under s. 230.45 (1) (b). Decisions of the commission shall be subject to review under ch. 227, except that a party may, within 30 days after service of the decision upon all parties, file a petition with the department to review the decision. Review by the department shall be based on the record. The scope of review shall be the same as judicial review under s. 227.20. Decisions of the department shall be reviewed under s. 111.36 (3m) except that the commission shall issue a decision on a review under this subsection within 90 days after the filing of the petition for review.

SECTION 5. 111.351 of the statutes is created to read:

**111.351 Study of unfair honesty testing.** The department shall study the problems of honesty testing, the scientific advancements in devices purporting to test honesty and the interests of both employers and employes in honesty testing. The department may make recommendations to the legislature which are reasonable in light of the department's findings.

SECTION 6. 111.36 (1), (3), (4) and (5) of the statutes are amended to read:

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

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

(b) If, after hearing, the department finds that the respondent has engaged in discrimination or unfair honesty testing, it shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay. Back pay liability shall not accrue from a date more than 2 years prior to the filing of a complaint with the department. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against or subjected to unfair honesty testing shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to the unfair honesty testing and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making ~~such~~ the payment.

(c) The department shall serve a certified copy of the findings and order on the respondent, the order to have the same force as other orders of the department and be enforced as provided in ch. 101. Any person aggrieved by noncompliance with the order may have the same enforced specifically by suit in equity. If the department finds that the respondent has not engaged in discrimination or unfair honesty testing as alleged in the complaint, it shall serve a certified copy of its findings on the complainant together with an order dismissing the complaint.

(4) ~~It is unlawful for any~~ No organization or person referred to in s. 111.32 (1), (2) and (3) or ~~for any~~ employment agency which undertakes to procure employes or opportunities to work, ~~to~~ may engage in any discrimination pursuant to or unfair honesty testing under this subchapter.

(5) If an order issued under sub. (3) is unenforceable against any labor organization in which membership is a privilege, the employer with whom ~~such~~ the labor organization has an all-union shop agreement shall not be held accountable under this chapter, when ~~such~~ the employer is not responsible for the discrimination or unfair honesty testing.

SECTION 8. 905.065 of the statutes is created to read:

**905.065 Honesty testing devices.** (1) DEFINITION. In this section, "honesty testing device" means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

(3) WHO MAY CLAIM PRIVILEGE. The privilege may be claimed by the person, by the person's guardian or conservator or by the person's personal representative, if the person is deceased.

(4) EXCEPTION. There is no privilege under this section if there is a valid and voluntary written agreement between the test subject and the person administering the test.

SECTION 9. 942.06 of the statutes is created to read:

**942.06 Use of polygraphs and similar tests.** (1) No person may require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty without the prior written and informed consent of the subject.

(2) No person may disclose that another person has taken a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty and no person may disclose the results of such a test to any person except the person tested, without the prior written and informed consent of the subject.

(3) Whoever violates this section is guilty of a Class B misdemeanor.

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