

Chapter Ind 88

EQUAL OPPORTUNITIES — FAIR EMPLOYMENT

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Note: Chapter Ind 88 as it existed on June 30, 1986, was repealed and new chapter Ind 88 was created effect July 1, 1986.

Ind 88.001 Purpose. The purpose of this chapter is to implement the law prohibiting employment discrimination and unfair honesty testing, to provide a constructive, impartial and speedy procedure for the resolution of disputes arising under the law and to work toward the goal of eliminating employment discrimination and unfair honesty testing in this state.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.01 Definitions. When used in this chapter or in the Wisconsin fair employment act:

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

(2) "Administrative law judge" means the examiner appointed to conduct hearings arising under ch. 111, Stats.

(3) "Commission," "complainant," "conciliation," "department," "discrimination," "discriminatory acts or practices," "examiner," "findings," "hearing," "investigation," "notice," "order," "petition," "respondent," "serve," "subpoena," "unfair honesty testing" and "unlawful" mean the same as those terms are used in the act.

(4) "Complaint" means either a complaint or an amended complaint.

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

(6) "Filing" means the physical receipt of a document at any division office.

(7) "Person" means one or more individuals, partnerships, associations, bodies politic or corporate, joint-stock or mutual companies, unincorporated organizations, trusts, legal representative, trustees or receivers.

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

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.02 Complaint. (1) **CONTENT.** A complaint shall identify the full name and address of each complainant and respondent. It shall state clearly and concisely the facts constituting the alleged unlawful discrimination or unfair honesty testing, including the dates of each occurrence.

(2) **FORM.** A complaint shall be written on a form which is available at any division office or job service office of the department, or on any other form acceptable to the department. The complaint shall be signed, notarized and verified.

(3) **PERSONS WHO MAY FILE.** A complaint may be filed by any person or by the person's duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(4) **FILING.** A complaint may be filed at any division office. A complaint which does not meet the requirements of subs. (1) and (2) shall not be accepted for filing.

(5) **ASSISTANCE.** Appropriate assistance in completing complaint forms shall be made available by the department.

(6) **DEFERRED COMPLAINTS.** A complaint deferred to the department by a federal or local equal employment opportunity agency with which the department has a work-sharing agreement complies with the requirements of subs. (1) and (2), and is filed when received by the federal or local agency.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.03 Review of complaints. (1) **PRELIMINARY REVIEW.** The department shall review every complaint filed to ascertain whether the complainant is protected by the act, whether the respondent is subject to the act, whether the complaint states a claim for relief under the act and whether it has been filed within the time period prescribed by the act. Except where prevented by the anonymity requirement of s. 111.375 (1), Stats., the department shall serve upon the parties a preliminary determination and order dismissing any complaint which fails to meet these requirements.

(2) **APPEAL TO THE ADMINISTRATOR.** A complainant may appeal from an order dismissing a complaint under sub. (1) by filing a written request with the administrator of the division. The request shall be filed within 20 days after the date of the order and shall state specifically the grounds upon which it is based. If a timely request is filed, the administrator, or a person designated by the administrator, shall review the preliminary determination and shall either affirm, reverse, modify or set aside the preliminary determination and order. Such decision shall be served upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be referred for investigation. If the decision af-

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firms the preliminary determination, it is the final decision of the department and shall be subject to review in court.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.04 Withdrawal and amendment of complaints. (1) **WITHDRAWAL.** A complaint may be withdrawn at any time. A request for withdrawal shall be written and shall be signed by the complainant or by the complainant's duly authorized representative or attorney of record. Upon the filing of a request for withdrawal, the department shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated.

(2) **AMENDMENT.** Subject to the approval of the department, a complaint may be amended no later than 10 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.05 Notice to respondents. Except where prevented by the anonymity requirement of s. 111.375 (1), Stats., the department shall serve a copy of a complaint which meets the requirements of s. Ind 88.03 (1) upon each respondent prior to the commencement of any investigation. The department shall simultaneously serve a notice requesting a response to the complaint within 10 days after the date of the notice.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.06 Investigations. (1) The department shall investigate all complaints which satisfy the review under s. Ind 88.03 and may subpoena persons or documents when related to an investigation. Subpoenas may be enforced pursuant to s. 885.12, Stats.

(2) If during an investigation it appears that the respondent has engaged in discrimination or unfair honesty testing against the complainant other than that alleged in the complaint, the department may advise the complainant that the complaint should be amended to so allege. If the complaint is so amended, the department shall investigate the allegations of the amended complaint as well as the allegations of the initial complaint.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.07 Initial determinations as to cause. (1) **GENERAL.** At the conclusion of the investigation, the department shall issue a written initial determination which shall state whether or not there is probable cause to believe that any discrimination or unfair honesty testing occurred as alleged in the complaint. The initial determination shall state the facts upon which it is based and shall be served upon the parties.

(2) **PROBABLE CAUSE.** If the department initially determines that there is probable cause to believe that any discrimination or unfair honesty testing occurred as alleged in the complaint, it may refer those allegations to conciliation. The department may, by a notice to be served with the initial determination, notify the parties that conciliation services are available but that if conciliation fails or is waived the matter shall be set for hearing.

(3) **NO PROBABLE CAUSE.** If the department initially determines that there is no probable cause to believe that discrimination or unfair hon-

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esty testing occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be served with the initial determination, notify the parties of the complainant's right to appeal as provided in s. Ind 88.08.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.08 Appeals of initial determinations of no probable cause. Within 30 days after the date of an initial determination that there is no probable cause, a complainant may file with the division a written request for a hearing on the issue of probable cause. If no timely written request is filed, the initial determination's order of dismissal shall be final. If a timely written request is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. Ind 88.10 and 88.12-88.18, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.09 Conciliation. (1) **RESOLUTIONS OF DISPUTES.** When a matter is referred to conciliation following a determination of probable cause, the department shall attempt to resolve the dispute between the parties by conciliation unless either party waives conciliation in writing.

(2) **CONCILIATION AGREEMENT.** If conciliation resolves the dispute, a written conciliation agreement shall be prepared which shall state all measures to be taken by any party. The agreement may provide for dismissal of the complaint, provided that such dismissal is without prejudice to the complainant's right to pursue the complaint against any respondent who fails to comply with the terms of the agreement.

(3) **WAIVER OR FAILURE OF CONCILIATION; CERTIFICATION TO HEARING.** If an attempt at conciliation is waived or unsuccessful, the department shall issue a notice certifying the matter to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. Ind 88.10-88.18.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.10 Notice of hearing. In any matter which has been certified to hearing pursuant to either s. Ind 88.08 or 88.09 (3), the department shall advise the parties and their representatives in writing of the specific time, date and place established for the hearing by issuance of a notice of hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date of hearing not less than 30 days after the date of mailing of the notice of hearing and a place of hearing either in the county of the respondent's residence or in the county in which the alleged discrimination or unfair honesty testing appears to have occurred. It shall specify the nature of the discrimination or unfair honesty testing which is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86; reprinted to restore dropped copy, Register, July, 1988, No. 391.

Ind 88.11 Answer. (1) **WHEN REQUIRED; FILING AND SERVICE.** Within 21 days after the date of a notice of hearing on the merits, each respondent Register, July, 1988, No. 391

shall file with the division an answer to the allegations of the complaint. The department shall serve a copy of the answer upon all other parties.

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

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.12 Pre-hearing conference. In any case set for hearing, pre-hearings may be held in accordance with the provisions of s. 227.44 (4), Stats.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86; am. Register, October, 1991, No. 430, eff. 11-1-91.

Ind 88.13 Subpoenas and motions. (1) **SUBPOENAS.** The administrative law judge may issue subpoenas whenever necessary to compel the attendance of witnesses or the production of documents. This may be done on the administrative law judge's own motion or upon proper application of any party. Service of subpoenas shall be made in the manner prescribed by law. Subpoenas may be enforced pursuant to s. 885.12, Stats.

(2) **MOTIONS.** Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge or with the director of the division's bureau of legal services. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge or director.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.14 Pre-hearing disclosure and discovery. (1) **EXCHANGE OF NAMES OF WITNESSES AND COPIES OF EXHIBITS.** By no later than the tenth day prior to the day of the hearing, the parties shall file with the division and serve upon the other party a written list of the names of witnesses and copies of the exhibits which the parties intend to use at the hearing. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not have reasonably anticipated using prior to the hearing.

(2) **PRE-HEARING DISCOVERY.** A party may obtain discovery prior to hearing, except that discovery directed to a complainant who is not represented by legal counsel shall not be permitted in the absence of written consent by the administrative law judge. The scope of discovery, the methods of discovery and the use of discovery at hearing will be the same as set forth in ch. 804, Stats. The administrative law judge has the same authority to compel discovery, to issue protective orders and to impose

sanctions as the court has under ch. 804, Stats. Copies of all demands for discovery and responses to demands for discovery shall be filed with the division when they are served. Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86; am. (2), Register, October, 1991, No. 430, eff. 11-1-91.

Ind 88.15 Disqualification of the administrative law judge. Upon the administrative law judge's own motion or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other disqualification. Such determination shall be made a part of the record and decision in the case.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.16 Hearings. (1) **PROCEDURE.** Hearings shall be conducted in conformity with the act and the provisions of ch. 227, Stats.

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

(3) **ACCELERATION OF HEARING.** The parties may file a written stipulation that the hearing be held less than 30 days after service of the notice of hearing.

(4) **POSTPONEMENTS AND CONTINUANCES.** All requests for postponements shall be filed with the administrative law judge or with the director within ten days after the date of the notice of hearing, except where emergency circumstances arise thereafter and prior to hearing. Postponements and continuances shall be granted only for good cause shown and not for the mere convenience of the parties, their attorneys or their representatives.

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

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.17 Record of proceedings. (1) **TRANSCRIPTION OF RECORD.** A stenographic, electronic or other record of oral proceedings shall be made at all hearings conducted under the act. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription, at a reasonable compensatory fee as determined by the department. The record shall be transcribed into a written transcript at the department's expense only for the purpose of judicial review.

(2) **TRANSCRIPTS.** Copies of the written transcripts shall be at the expense of any party who requests the transcript, at a reasonable fee as determined by the department, except that copies shall be made available. Register, October, 1991, No. 430.

able without cost to a party who submits a sworn affidavit of indigency and the inability to pay the cost of the transcript.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.18 Decision and order. (1) **GENERAL.** After the close of the hearing, including any briefing which may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision which shall include findings of fact, conclusions of law and an order, and which may be accompanied by a memorandum opinion. A copy of the administrative law judge's decision shall be served on the parties by the department.

(2) **CONTENTS OF DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE.** After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and an order which dismisses the allegations of the complaint or which orders the matter remanded for conciliation pursuant to s. Ind 88.09, depending upon the administrative law judge's findings and conclusions on the issue of probable cause.

(3) **CONTENTS OF DECISION AND ORDER AFTER HEARING ON THE MERITS.** After a hearing on the merits, the administrative law judge shall issue a decision and an order which shall either dismiss the allegations of the complaint or shall order such action by the respondent as will effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint.

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

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86; emerg. r. (5), eff. 4-29-91; r. (5), Register, October, 1991, No. 430, eff. 11-1-91.

Ind 88.19 Petition for review. Any party may file a written petition for review of the administrative law judge's decision and order by the labor and industry review commission. The petition shall be filed with the division's Madison or Milwaukee office within 21 days after the date that a copy of the administrative law judge's decision and order is mailed to the last known addresses of the parties.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.20 Pre-employment inquiries and employment records. An employer subject to the act may make such pre-employment inquiries and keep such employment records as will enable the employer to determine statistically the age, race, color, creed, handicap, sex, national origin, ancestry or marital status of applicants and employees. Pre-employment inquiries and employment records which tend directly or indirectly to disclose such information do not constitute unlawful discrimination per se.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.21 Posting requirement. Every employer, employment agency, labor organization and licensing agency subject to the act shall post in conspicuous places upon its premises a poster prepared and made avail-

able by the department relating to the provisions of the act and this chapter.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.