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State of Wisconsin
Department of Workforce Development

Report From Agency

Rule Analysis for Legislative Review

Proposed Rules Relating to Procedures for Civil Rights Complaints
DWD 218 to 225
CR 06-062

Basis and Purpose of the Proposed Rules

A new rule chapter is created to provide procedure for processing discrimination or retaliation complaints by public employees exercising their rights under the Public Employee Safety and Health Law under s. 101.055 (8), Stats.

All rules administered by the Civil Rights Bureau in the Equal Rights Division will be amended to provide that complaints and other documents may be filed by facsimile transmission. Documents may not be filed by electronic mail unless expressly authorized by the equal rights officer or the administrative law judge assigned to the case.

All rules will also be amended to provide that hearings may be recorded with either digital or tape recording equipment.

Other changes are minor substantive changes, technical corrections, and statutory updates.

Public Hearing Summary

A public hearing was held on June 26, 2006. No comments were received. Bill Smith of the National Federation of Independent Business observed for information only.

Response to Legislative Council Staff Recommendations

All recommendations were accepted, subject to the following exceptions and comments:

Comment 5.f. Section DWD 223.05 (3) should specify how a complaint is to be disposed of if a preliminary determination is modified.

Division response: The division deleted the reference to modifying a preliminary determination. The modifications referred to are just technical corrections to a name, date, or other minor detail and are in addition to affirming or reversing a preliminary determination in full or in part.

Comment 5.g. Are there situations in which the division will not advise a complainant that a complaint should be amended in s. DWD 223.06 (2)? If so, the rule should set forth standards

for the division to follow in determining whether to provide this advice. If not, then "may" should be changed to "shall."

Division response: Disagree. The division does not believe that this provision should be mandatory. The department cannot ultimately be responsible for what allegations the complainant intends to proceed on. The failure of the division to advise a complainant to amend a complaint should not be a basis for a complainant to later assert that their failure to raise a particular legal issue was the fault of the Equal Rights Division.

Comment 5.h. Section DWD 223.07 (3) states that if the division determines that there is no probable cause, it "may dismiss those allegations." Are there circumstances under which dismissal will not occur when the department determines that there is no probable cause? If so, the rule should explain those circumstances. If not, then "may" should be changed to "shall." Also, should the rule state that the complaint, rather than "those allegations," should be dismissed? This last comment also applies to s. DWD 223.19 (2) and (3).

Division response: Agree that "may" should be changed to "shall." Disagree that the rule should state that the complaint, rather than "those allegations," should be dismissed. In many cases, the department will issue a "split initial determination" finding that there was no probable cause to believe some of the allegations, but that there is probable cause to believe other allegations. It would not be appropriate to dismiss the entire complaint in these circumstances.

Comment 5.o. Some of the material set forth in s. DWD 223.19 (2) is redundant with the material in s. DWD 223.07 (3). Would it be preferable to delete the repetitive material in s. DWD 223.07 (3), place all of the information regarding the procedure to be followed if there is a finding of no probable cause in s. DWD 223.19 (2), and insert a cross-reference to that material in s. DWD 223.07 (3)?

Division response: The division disagrees. The material is not redundant.

Comment 5.p. Section DWD 223.21 (2) appears to penalize a state civil service employee whose witness testimony was not useful by denying them their salary or travel expenses for attending the hearing. Does this apply to a witness who has been subpoenaed and has no control over whether or not he or she must testify or whether his or her testimony is useful? What is the rationale for this provision? In addition, what is the purpose of the phrase "or would have been"? It implies that the person did not in fact attend the hearing. In that case, why would the issue of salary or travel reimbursement be an issue?

Division response: The Equal Rights Division retained this provision from the rules transferred from the former Personnel Commission. Apparently, the Personnel Commission wanted to avoid situations where state employee complainants asked other state employees to come to a hearing to provide moral support or to provide cumulative testimony. The purpose of the rule was to discourage state employees from taking time off of work to attend hearings where their testimony was irrelevant, immaterial, or unduly repetitious. Essentially, the rule regulates state employees.

The division agrees that this is not a significant issue that needs to be addressed in these rules. Therefore, the following language was deleted from proposed s. DWD 223.21 (2) and existing ss. DWD 218.24 (2), 224.23 (2), and 225.26 (2): ". . .unless the administrative law judge determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious."

Changes to Analysis Prepared under s. 227.14, Stats.

An explanation of the changes made to ss. DWD 218.24 (2), 224.23 (2), and 225.26 (2) based on the Legislative Council comment 5.p. is in the analysis.

Final Regulatory Flexibility Analysis

The proposed rule affects small businesses but does not have a significant economic impact on a substantial number of small businesses.

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