

Chapter DWD 218

FAIR EMPLOYMENT

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Note: Chapter Ind 88 as it existed on June 30, 1995 was repealed and chapter ILHR 218 was created effective 7-1-95. **Chapter ILHR 218 was renumbered chapter DWD 218 under s. 13.93 (2m) (b) 1., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, November, 1997, No. 503.**

DWD 218.01 Purpose. The purpose of this chapter is to implement the law prohibiting employment discrimination, unfair honesty testing and unfair genetic testing; to provide a constructive, impartial and speedy procedure for resolving disputes arising under the law; and to work toward the goal of eliminating employment discrimination, unfair honesty testing and unfair genetic testing in this state.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.02 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 under the act.
- (3) "Complainant" means the person who files a complaint alleging that an action prohibited by the act has been committed.
- (4) "Day", when used in time computations in this chapter, means a calendar day, except that if the last day of the time period is a Saturday, Sunday or legal holiday, the last day shall be the next business day.
- (5) "Division" means the equal rights division of the department of workforce development.
- (6) "Filing" means the physical receipt of a document.
- (7) "Person" includes, but is not limited to, one or more individuals, partnerships, associations, corporations, joint stock companies, trusts, unincorporated organizations, trustees, or trustees or receivers in bankruptcy.
- (8) "Probable cause" means 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.
- (9) "Respondent" means the person alleged to have committed an action prohibited by the act.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.03 Complaints. (1) WHO MAY FILE COMPLAINTS. 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.

(2) WHERE TO FILE COMPLAINTS. A complaint may be filed in person with any division office, or it may be mailed to one of the following division offices:

(a) Equal Rights Division, 201 East Washington Avenue, Madison, Wisconsin 53702.

(b) Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203.

(3) FORM AND CONTENT OF COMPLAINT. A complaint shall be written on a form which is available at any division office or on any form acceptable to the department. Each complaint shall be signed by the person filing the complaint or by the person's duly authorized representative. The signature constitutes an acknowledgment that the party or the representative has read the complaint; that to the best of that person's knowledge, information and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

- (a) The name and address of the complainant.
- (b) The name and address of the respondent.
- (c) A concise statement of the facts, including pertinent dates, constituting the alleged act of employment discrimination, unfair honesty testing or unfair genetic testing.

(4) ASSISTANCE BY THE DEPARTMENT. The department shall, upon request, provide appropriate assistance in completing and filing complaints.

(5) DATE OF FILING OF COMPLAINT DEFERRED BY ANOTHER AGENCY. A complaint which is deferred to the department by a federal or local employment opportunity agency with which the department has a worksharing agreement complies with the requirements of sub. (3) and is considered filed when received by the federal or local agency.

(6) AMENDMENT OF COMPLAINT. A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than 20 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that discrimination has been committed as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 218.05 (1).

(7) WITHDRAWAL OF COMPLAINT. A complaint may be withdrawn at any time. A request for withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. 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 in the order.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.04 Notification of respondent. (1) **WHEN NOTICE IS TO BE SENT.** 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. DWD 218.03 upon each respondent prior to the commencement of any investigation.

(2) **CONTENT OF NOTICE.** The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the department. The notice shall further state that, if the respondent fails to answer the complaint in writing, the department may make an initial determination as to whether an act of employment discrimination, unfair honesty testing or unfair genetic testing has occurred based only on the department's investigation and the information supplied by the complainant.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.05 Preliminary review of complaints. (1) **REVIEW OF COMPLAINT.** The department shall review every complaint filed to determine all of the following:

- (a) Whether the complainant is protected by the act.
- (b) Whether the respondent is subject to the act.
- (c) Whether the complaint states a claim for relief under the act.
- (d) Whether the complaint was filed within the time period set forth in the act, if that issue is raised in writing by the respondent.

(2) **PRELIMINARY DETERMINATION DISMISSING COMPLAINT.** The department shall issue a preliminary determination dismissing any complaint which fails to meet the requirements of sub. (1). In the event the respondent raises a jurisdictional defense, including but not limited to federal preemption, and the respondent admits that but for the lack of jurisdiction the allegations are not disputed and constitute a violation, the department shall proceed to only decide the jurisdictional issue, and shall issue the appropriate order. The order of dismissal shall be sent by first class mail to the last known address of each party and to their attorneys of record.

(3) **APPEAL OF PRELIMINARY DETERMINATION.** A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the department. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify or set aside the preliminary determination. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it shall be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.06 Investigations. (1) **CONDUCT OF INVESTIGATION.** The department shall investigate all complaints which satisfy the review under s. DWD 218.05 (1). In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements

of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) **ADVISING COMPLAINANT TO AMEND COMPLAINT.** If, during an investigation, it appears that the respondent has engaged in discrimination against the complainant which is not alleged in the complaint, the department may advise the complainant that the complaint should be amended.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.07 Initial determination. (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 an act of employment discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) **INITIAL DETERMINATION OF PROBABLE CAUSE.** If the department initially determines that there is probable cause to believe that any discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 218.11 to 218.20.

(3) **INITIAL DETERMINATION OF NO PROBABLE CAUSE.** If the department initially determines that there is no probable cause to believe that employment discrimination, unfair honesty testing or unfair genetic testing occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 218.08.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.08 Appeal of initial determination of no probable cause. (1) **WHEN FILED.** Within 30 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The department shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) **DISMISSAL FINAL IF NO APPEAL FILED.** If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the department.

(3) **CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS.** If a timely appeal 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. DWD 218.11 to 218.20, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues the department may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.09 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the department. The department may assist the parties to reach a settlement agreement. The parties shall notify the department immediately upon reaching a settlement.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.10 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed based upon the conditions set forth in s. DWD 218.05 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 218.07 (2) or 218.08 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts which may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.11 Notice of hearing. (1) CONTENT. In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 218.07 (2) or an appeal of an initial determination of no probable cause under s. DWD 218.08 (3), the department shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 30 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the act of employment discrimination, unfair honesty testing, or unfair genetic 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.

(2) PLACE OF HEARING. The hearing shall be held in the county where the alleged act of discrimination occurred, or at another location with the consent of the parties. For purposes of this subsection, the county where the alleged act of discrimination occurred is the county where the respondent resides or where the alleged discrimination, unfair honesty testing or unfair genetic testing occurred.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.12 Answer. (1) WHEN REQUIRED. Within 21 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause. The department shall serve a copy of the answer upon all other parties.

(2) CONTENT OF ANSWER. The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each 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 shall 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 previously been raised by a motion in writing. Failure to raise the affirmative defense that a complaint is barred by the statute of limitations in an answer filed within the time permitted under sub. (1) may, in the absence of good cause, be held to constitute a waiver of such affirmative defense.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.13 Pre-hearing conference. In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.14 Pre-hearing discovery. (1) WHEN DISCOVERY MAY BEGIN. 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.

(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL. In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery must, not less than 10 days prior to conducting such discovery, state in writing to the chief of the hearing section, or the administrative law judge if one has been assigned to the case, that it intends to seek discovery. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

(3) SCOPE, METHOD AND USE OF DISCOVERY. The scope of discovery, the methods of discovery and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY. 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. All motions to compel discovery or motions for protective orders must be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

(5) FILING WITH DEPARTMENT. Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.15 Subpoenas and motions. (1) SUBPOENAS. The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, 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 assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. 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.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.16 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 reason. The

administrative law judge's determination shall be made a part of the record and decision in the case.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.17 Exchange of names of witnesses and copies of exhibits. By no later than the tenth day prior to the day of hearing, the parties shall file with the division and file upon all other parties a written list of names of witnesses and copies of 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.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.18 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with the act and the provisions of ch. 227, Stats.

(2) POSTPONEMENTS AND CONTINUANCES. All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

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

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

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.19 Record of hearing. (1) METHOD OF RECORDING HEARING. A stenographic, electronic or other record of oral proceedings shall be made at all hearings conducted under the act. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is tape-recorded, the original tapes shall remain in the division for 5 years following the hearing, after which they may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim, transcript of the proceedings.

(3) COST FOR TRANSCRIPTION OF RECORD. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the department shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. Where a transcript has been provided to the court for the purpose of judicial review, the department shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.20 Decision and order. (1) GENERAL. After the close of the hearing, including any briefs 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 an opinion.

(2) 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 order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to the labor and industry review commission if it is a final decision and order as defined in s. DWD 218.21 (1).

(3) 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 shall effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint. A certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

(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, 1995, No. 474, eff. 7-1-95.

DWD 218.21 Petition for review by the labor and industry review commission. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS. Any party may file a written petition for review of a final decision and order of the administrative law judge by the labor and industry review commission. Only final decisions and orders of the administrative law judge are appealable. A final decision is one which disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

(2) REQUIREMENTS FOR FILING PETITION FOR REVIEW. The petition for review shall be filed 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. The petition shall be filed with the division's Madison or Milwaukee office.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.

DWD 218.22 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, 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, 1995, No. 474, eff. 7-1-95.

DWD 218.23 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 available by the department relating to the provisions of the act and this chapter.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95.