

CR 83-76

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RULES CERTIFICATE

OCT 4 1983

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STATE OF WISCONSIN)
) SS
DEPT. OF INDUSTRY,)
LABOR & HUMAN RELATIONS)

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TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Howard S. Bellman, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to Fair Employment Practices were duly approved and adopted by this department on 9/30/83 (Date) (Subject).

I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 4:00 pm in the city of Madison, this 30th day of September A.D. 19 83.

Howard S. Bellman
Secretary

ORDER OF ADOPTION

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Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s) 111.375(1), Stats., the Department of Industry, Labor and Human Relations hereby creates; amends; repeals and recreates; and repeals and adopts rules of Wisconsin Administrative Code chapter(s):

Ind. 88 Fair Employment Practices
(Number) *(Title)*

The attached rules shall take effect on the first day of the month following
publication in the Wis. Adm. Register, pursuant to section
227.026, Stats.

Adopted at Madison, Wisconsin, this 30th
day of September, A.D., 1983.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Howard S. Bellman
Secretary



RULES in FINAL DRAFT FORM

Rule: IND 88

Relating to: Fair Employment Practices

CLEARINGHOUSE NO. 83-76

Administrative rules to repeal and recreate chapter IND 88 relating to fair employment practices - complaint and hearing procedure.

ANALYSIS OF RULES

This rule is a revision of the department's current procedures for the Wisconsin Fair Employment Law. The proposed changes are intended to clean up the old rules and bring them into accord with most recent legislative changes. For example: Ind 88.08 on hearings does not conform to the changes made by the Legislature with respect to review by the new separate and distinct Labor and Industry Review Commission. Again Ind 88.085 refers to the filing of written exceptions whereas the law presently refers to Petitions for Review.

The definition section, Ind 88.01, has been expanded to include a definition on age to reflect the extension of the prohibition against discrimination on the basis of age to include individuals up to 70 years of age in contrast to the former law providing protection for such individuals up to the age of 65.

An attempt was also made to revise and put in plain understandable language those provisions which appeared to be too legalistic. The new rules allow an authorized representative to file a complaint on behalf of a complainant. Also new is the formalizing of a procedure for handling jurisdictional reviews by the Agency (Ind 88.03). It should be noted there is no appeal by a Complainant to the Labor and Industry Review Commission following an adverse decision of no jurisdiction. In such instances because the Labor and Industry Review Commission can only review findings of fact, the appropriate place to seek relief is in Circuit Court. The new rules give recognition of this fact.

An important change noted in the new rules is the elimination of hearings on the issue of probable cause following an initial determination of no probable cause(Ind 88.08). Instead Complainant would be entitled on a timely appeal to a hearing on the merits, i.e., on whether an act of discrimination had been committed. This would be in line with present federal law where Complainants following findings of no reasonable cause would be entitled to seek full remedy in federal court even though the finding of the investigator was one of no reasonable cause to believe an act of discrimination had been committed. This should make for a more expeditious handling of such complaints and would eliminate the second hearing that is the present procedure.

The current rules make no provision for pre-hearing discovery. The proposed rules (Ind 88.14) allow the same discovery procedures available in civil lawsuits with the exception tht discovery against an unrepresented complainant must be preceded by the complainant's written consent. In addition, the parties must file and exchange the names of witnesses and copies of exhibits at least ten days before the hearing; failure to do so in the absence of good cause will result in the exclusion of the witness' testimony or the exhibit from the hearing.

Pursuant to the authority vested in the State of Wisconsin, Department of Industry, Labor and Human Relations by s. 111.375(1), Stats., the department hereby repeals and recreates rules interpreting ss. 111.31 - 111.395, Stats., as follows:

SECTION 1: Chapter IND 88 is repealed and recreated to read:

Chapter Ind 88
EQUAL OPPORTUNITIES
Fair Employment

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.

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) "Age" in reference to individuals protected against age discrimination under the act means individuals who are at least 40 but less than 70 years of age.

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

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

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

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

(7) "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.

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 subsections (1) and (2) of this section shall not be accepted for filing.

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

(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 subsections (1) and (2) of this section, and is filed when received by the federal or local agency.

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. The department shall serve upon the parties, except where prevented by the anonymity requirement of s. 111.375(1), Stats., a preliminary determination and order dismissing any complaint which fails to meet these requirements.

(2) APPEAL. A complainant may appeal from an order dismissing a complaint under subsection (1) of this section 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.

(3) ADMINISTRATIVE REVIEW. 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 affirms the preliminary determination, it is the final decision of the department and shall be subject to review in court.

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, and such dismissal shall be with prejudice unless otherwise expressly stated.

(2) AMENDMENT. A complaint may be amended subject to the approval of the department, but not later than 10 days before hearing, unless good cause is shown for failure to amend the complaint prior to that time.

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 the complaint 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.

Ind 88.06 INVESTIGATIONS. 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.

Ind 88.07 INITIAL DETERMINATIONS OF CAUSE. (1) PROBABLE CAUSE. 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 discrimination or unfair honesty testing occurred. The initial determination shall state the facts upon which it is based and shall be served upon the parties. If the department initially determines that there is probable cause, it shall simultaneously notify the parties that conciliation services are available, but that if conciliation fails or is waived, the matter shall be set for hearing.

(2) NO PROBABLE CAUSE. If the department initially determines that there is not probable cause, it shall simultaneously serve upon the parties an order dismissing the complaint and a notice of the complainant's right to hearing as provided in s. Ind 88.08.

Ind 88.08 HEARING AFTER INITIAL DETERMINATION OF NO PROBABLE CAUSE. (1) RIGHT TO HEARING. Within 30 days after the date of an initial determination that there is not probable cause, a complainant may file with the division a written request for hearing. If no timely written request is filed, the complainant shall have waived the right to hearing, and the initial determination and order dismissing the complaint shall be final.

(2) HEARING. If a timely written request is filed, the department shall notify the parties that conciliation services

are available. If conciliation fails or is waived, a hearing shall be noticed and conducted in accordance with the provisions of the act and this chapter for hearings following initial determinations of probable cause.

Ind 88.09 CONCILIATION. (1) RESOLUTION OF DISPUTES. 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 and 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.

Ind 88.10 NOTICE OF HEARING. If conciliation fails to resolve the dispute or is waived, the department shall serve a notice of hearing and a copy of the complaint on each party. The notice shall fully identify the parties and the case number. It shall specify a time and date of hearing not less than 30 days after service 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 discrimination or unfair honesty testing appears to have occurred. It shall specify the nature of the discrimination or unfair honesty which appears to have occurred, and shall state the legal authority on which the hearing is based.

Ind 88.11 ANSWER. (1) CONTENT. An answer is a written statement which admits those allegations in the complaint which the respondent believes are true, denies those allegations which the respondent believes are false or which the respondent has insufficient knowledge to answer, and asserts any matters constituting a defense.

(2) FILING AND SERVICE. Each respondent shall file an answer within 10 days after the date of the notice of hearing. The department shall serve a copy of the answer upon all other parties.

Ind 88.12 PREHEARING CONFERENCE. In any case set for hearing, prehearings may be held in accordance with the provisions of s. 227.07(4), Stats.

Ind 88.13 SUBPOENAS AND MOTIONS. (1) SUBPOENAS. The examiner may issue subpoenas and subpoenas duces tecum, on the examiner's own motion or upon proper application of any party, whenever necessary to compel the attendance of witnesses or the production of documents. 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 examiner, 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 examiner or with the director of the division's bureau of legal services. Any party opposing the

motion may file a brief written response. The department shall serve a copy of all written motions and responses on the other parties. All written motions shall be decided without further argument unless requested by the examiner or director.

Ind 88.14 DISCOVERY. (1) EXCHANGE OF WITNESSES AND EXHIBITS. At least 10 days before the hearing, the parties shall file and exchange the names of witnesses and copies of exhibits which they intend to utilize at the hearing. With the exception of rebuttal matter and in the absence of good cause, the failure to timely file and exchange the names of witnesses and exhibits shall result in the exclusion of the witnesses' testimony and the exhibits.

(2) TAKING AND PRESERVATION OF EVIDENCE. Each party may take and preserve evidence prior to hearing as provided in ch. 804, Stats., except that discovery directed to an unrepresented complainant shall not be permitted in the absence of written consent.

Ind 88.15 DISQUALIFICATION OF EXAMINER. Upon the examiner's own motion or upon a timely and sufficient affidavit filed by any party, the examiner 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.

Ind 88.16 HEARINGS. (1) PROCEDURE. Hearings shall be conducted in conformity with the act, this chapter, 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 examiner or with the director within 10 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 hearing, either in person or by a representative, the examiner 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 examiner may reopen the hearing.

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 transcript 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 without cost upon submission of a sworn affidavit of indigency and inability to pay the cost of the transcript. Indigency shall be determined in the manner provided in s. 977.07(2), Stats.

Ind 88.18 DECISION AND ORDER. (1) SUMMARY OF PROCEEDINGS. The examiner shall prepare a summary of the proceedings and a formal written decision. If the record is transcribed before the examiner prepares a decision, the written transcript may be substituted for the summary of proceedings.

(2) DECISION. The examiner's decision shall include findings of fact, conclusions of law, and an order. An opinion may accompany the decision.

(3) ORDER. The examiner's order shall either dismiss the complaint or direct such action by the respondent as will effectuate the purpose of the act, with or without back pay and interest. The order is subject to review only by the commission, and in the absence of a timely petition for review, the order is final for purposes of enforcement.

(4) SERVICE. A copy of the examiner's summary of proceedings, decision and order shall be served on the parties.

NOTE: In Anderson v. Labor & Industry Rev. Comm., 111 Wis. 2d 245, 260, 330 N.W.2d 594 (1983), the court held that back pay

awards under the act should be increased to reflect the accrual of interest at the rate of seven percent per annum.

Ind. 88.19 COMMISSION REVIEW. Any party may file a written petition for review by the commission of the examiner's decision and order. The petition shall be filed with the division's Milwaukee or Madison office within 20 days after the date that a copy of the examiner's decision and order is mailed to the last known addresses of the parties.

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.

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

Ind 88.22 METHOD FOR ADJUSTING THE AMOUNT OF RETIREMENT BENEFITS FOR PURPOSES OF THE EXEMPTION FOR BONA FIDE EXECUTIVES AND HIGH POLICY-MAKING EMPLOYES. (1) EXEMPTION FOR BONA FIDE EXECUTIVE AND HIGH POLICY-MAKING EMPLOYES. The prohibition against mandatory retirement based on age does not apply to any

employee who has attained age 65 but not age 70 and who for the two-year period before retirement has been employed in a bona fide executive or high policy-making position, if that employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan offered by the employer, or from any combination of those plans, which benefit equals in the aggregate at least \$27,000.

(2) FORM OF RETIREMENT BENEFIT. If the retirement benefit referred to in subsection (1) is in a form other than a straight life annuity with no ancillary benefits, or if employees contribute to the plan or make roll-over contributions, the benefit shall be adjusted in accordance with this section so that the benefit is equivalent to a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no roll-over contributions are made.

(3) BENEFIT OPTIONS. The requirement that an employee be entitled to the equivalent of a straight life annuity of \$27,000, with no ancillary benefits, is satisfied where the employee has the option of receiving (a) an annual payment each year following retirement of at least \$27,000 as adjusted, or periodic payments on a more frequent basis which, in the aggregate, equal at least \$27,000 per year as adjusted; (b) a lump sum payment upon retirement with which it is possible to purchase a single life annuity with no ancillary benefits yielding at least \$27,000 per year as adjusted; (c) benefits upon retirement whose aggregate value upon retirement, with respect to those payments which are scheduled to be made within the period of the employee's life

expectancy, is \$27,000 per year as adjusted; or (d) any other option selected by the employe. The benefits computed under options (a) - (c) may be aggregated for purposes of determining whether the \$27,000 requirement has been met. Benefits available only after the employe's death may not be included. The determination of the value of the benefits shall be made on the basis of reasonable actuarial assumptions with respect to mortality and interest.

(5) PERMISSIBLE EMPLOYE BENEFIT PLANS. The only retirement benefits which may be counted towards the \$27,000 annual benefit are those from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans. Such plans include, but are not limited to, stock bonus, thrift and simplified employe pensions. The value of benefits from any other employe benefit plans, such as health or life insurance, may not be counted.

(6) ADJUSTMENT OF RETIREMENT BENEFIT. In calculating the value of a pension, profit-sharing, savings or deferred compensation plan, or any combination of those plans, amounts attributable to social security, employe contributions, contributions of prior employers, and roll-over contributions shall be excluded.

NOTE: The United States Equal Employment Opportunity Commission has promulgated a similar regulation, 29 C.F.R. § 1627.17, for adjusting the amount of retirement benefits for purposes of the identical exemption contained in the Federal Age Discrimination in Employment Act for bona fide executives and high policy-making employes.

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EFFECTIVE DATE

Pursuant to s. 227.026 (1), Intro., Stats., these rules shall take effect on the first day of the month following publication in the Wis. Adm. Register.

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