Chapter 296-360 WAC
DISCRIMINATION, PURSUANT TO RCW 49.17.160

WAC

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WAC 296-360-005 Definitions. For the purposes of this chapter.

(1) "Assistant director" - The assistant director for the division of consultation and compliance.

(2) "Division" - The division of consultation and compliance of the department of labor and industries.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-005, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-005, filed 11/13/80.]

WAC 296-360-010 Introduction. (1) Chapter 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA), is designed to regulate employment conditions affecting industrial safety and health and to achieve safer and healthier work places throughout the state. WISHA requires every person who has employees to furnish each of his or her employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and to comply with industrial safety and health standards promulgated under WISHA.

(2) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under WISHA. Effective implementation of WISHA and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives.

(3) This chapter deals essentially with the rights of employees afforded under RCW 49.17.160. RCW 49.17.160 prohibits reprisals, in any form, against employees who exercise rights under WISHA. The purpose of this chapter is to make available in one place interpretations of the various provisions of section 16 of WISHA that will guide the assistant director in the performance of his or her duties thereunder.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-010, filed 11/13/80.]

WAC 296-360-020 General requirements of RCW 49.17.160 of WISHA. RCW 49.17.160 provides that no person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint under or related to WISHA, instituted or caused to be instituted any proceeding under or related to WISHA, testified or is about to testify in any proceeding under or related to WISHA, or exercised on his or her own behalf or on behalf of others any right afforded by WISHA. Any employee who believes that he/she has been discriminated against in violation of section 16 of WISHA may, within thirty days after the violation occurs, file a complaint with the assistant director alleging the violation. The division shall investigate the complaint and, if the assistant director determines that section 16 of WISHA has been violated, the division may bring a civil action against the violator in superior court. The suit may ask the court to restrain violations of RCW 49.17.160 and to grant other appropriate relief, including rehiring or reinstating the employee to his or her former position with back pay.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-020, filed 11/13/80.]

WAC 296-360-030 Filing a complaint of discrimination. (1) Who may file. A complaint of RCW 49.17.160 discrimination may be filed by the employee him- or herself, or by a representative authorized to do so on his or her behalf.

(2) Nature of filing. No particular form of complaint is required.

(3) Place of filing. The complaint should be filed with the division.

(4) Time for filing. RCW 49.17.160(3) provides that an employee who believes that he or she has been discriminated against in violation of RCW 49.17.160 "may, within thirty days after such violation occurs" file a complaint with the assistant director. A major purpose of the thirty-day period is to allow the assistant director to decline to entertain complaints that have become stale. Accordingly, the division will presume that complaints not filed within thirty days of an alleged violation are untimely. There may be circumstances, however, that justify tolling the thirty-day period on recognized equitable principles or because strongly extenuating circumstances exist, e.g., where the employer has concealed, or misled the employee regarding the grounds for, discharge or other adverse action. In the absence of circumstances justifying a tolling of the thirty-day period, the division shall not accept untimely complaints.

[Statutory Authority: RCW 49.17.040 and 49.17.050. WSR 82-13-045 (Order 82-22), § 296-360-030, filed 6/11/82. Statutory Authority: RCW

49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-030, filed 11/13/80.]

WAC 296-360-040 Notification of assistant director's determination. (1) RCW 49.17.160(3) provides that the assistant director is to notify a complainant within ninety days of the complaint of his determination whether prohibited discrimination has occurred. This ninety-day provision is directory, not mandatory. Although every effort will be made to notify complainants of the assistant director's determination within ninety days, there may be instances when it is not possible to do so.

(2) If a complainant receives a determination from the assistant director that prohibited discrimination has not occurred, the complainant may file a written request for review by the director within fifteen working days of receipt of the determination. The request for review must set forth the basis for the request. The request shall be filed by mailing or delivering the request to the Director of Labor and Industries, P.O. Box 44000, Olympia, Washington 98504-4000. Upon review the director may set aside the assistant director's determination, remand the matter for further investigation, or affirm the determination of the assistant director. The director shall notify the complainant of the decision after review.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-040, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040 and 49.17.050. WSR 85-10-004 (Order 85-09), § 296-360-040, filed 4/19/85. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-040, filed 11/13/80.]

WAC 296-360-050 Withdrawal of complaint. Enforcing the provisions of RCW 49.17.160 is not only a matter of protecting rights of individual employees, but also of protecting the public interest. Attempts by an employee to withdraw a filed complaint will not necessarily result in termination of the division's investigation. The division's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his/her complaint shall generally be accepted.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-050, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-050, filed 11/13/80.]

WAC 296-360-060 Arbitration or other agency proceedings. (1) General.

(a) An employee who files a complaint under RCW 49.17.160 may pursue remedies under grievance arbitration proceedings in collective bargaining agreements, and may also resort to other agencies, such as the National Labor Relations Board, for relief. The division's jurisdiction to entertain RCW 49.17.160 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The division may file an action in superior court regardless of the pendency of other proceedings.

(b) Where it is possible, however, the division favors voluntary resolution of disputes under procedures in collective bargaining agreements. Also, the division should defer to the jurisdiction of other forums established to resolve disputes that may also be related to RCW 49.17.160 complaints. Thus, where a complainant is pursuing remedies other than those provided by RCW 49.17.160 it may be proper to postpone the assistant director's determination whether discrimination has occurred, and defer to the results of such proceedings.

(2) Postponement of determination. Postponement of determination is justified where the rights asserted in other proceedings are substantially the same as rights under RCW 49.17.160 and those proceedings are not likely to violate the rights guaranteed by RCW 49.17.160. The factual issues in the such proceedings must be substantially the same as those raised by the RCW 49.17.160 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(3) Deferral to outcome of other proceedings. Determinations to defer to the outcome of another proceeding begun by a complainant must be made after careful scrutiny. It must be clear that the proceeding dealt adequately with all factual issues, that it was fair, regular, and free of procedural infirmities, and that its outcome did not violate the purpose and policy of WISHA. If another action begun by a complainant is dismissed without an adjudicatory hearing on the merits, the division will not necessarily regard the dismissal as determinative of the merits of the RCW 49.17.160 complaint.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-060, filed 11/13/80.]

WAC 296-360-070 Persons prohibited from discriminating. RCW 49.17.160 specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under WISHA. RCW 49.17.020(5), defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Consequently, the prohibitions of RCW 49.17.160 are not limited to actions taken by employers against their own employees. A person may be charged with discriminating against an employee of another person. RCW 49.17.160 extends to such entities as organizations representing employees in collective bargaining, employment agencies, or any other person in a position to discriminate against an employee. See Meek v. United States, 136 F.2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F.2d 37 (3rd Cir., 1943).

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-070, filed 11/13/80.]

WAC 296-360-080 Persons protected by RCW 49.17.160. (1) All employees are afforded the full protection of RCW 49.17.160. WISHA defines an employee as "an employee of an employer who is employed in a business of his/her employer which affects commerce." RCW 49.17.-020(4). WISHA does not define "employ"; however, the broad remedial nature of WISHA demonstrates a clear intent that the existence of an employment relationship, for purposes of RCW 49.17.160, is to be based upon economic realities rather than upon common law doctrines and concepts.

See U.S. v. Silk, 331 U.S. 704 (1947); Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947).

(2) For purposes of RCW 49.17.160, an applicant for employment could be considered an employee. See NLRB v. Lamar Creamery, 246 F.2d 8 (5th Cir., 1957).

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-080, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-080, filed 11/13/80.]

WAC 296-360-090 Unprotected activities distinguished. (1) An employer or others may base actions that adversely affect an employee upon nondiscriminatory grounds. An employee's engagement in activities protected by WISHA does not automatically render him/her immune from discharge or discipline for legitimate reasons, or from adverse action dictated by nonprohibited considerations. See NLRB v. Dixie Motor Coach Corp. 128 F.2d 201 (5th Cir., 1942).

(2) To establish a violation of RCW 49.17.160, the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" the employee's engagement in protected activity, RCW 49.17.160 has been violated.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-090, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-090, filed 11/13/80.]

WAC 296-360-100 Discrimination because of a complaint under or related to WISHA. RCW 49.17.160 prohibits discharge of, or discrimination against, an employee because the employee has filed any complaint under or related to this act.

(1) An example of a complaint made "under" WISHA would be an employee request for inspection pursuant to section 11 (RCW 49.17.110). This is not the only type of complaint protected by RCW 49.17.160, however. The range of complaints "related to" WISHA is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application.

(2) Complaints registered with other state or federal agencies that have the authority to regulate or investigate industrial safety and health conditions are complaints "related to" WISHA.

(3) The protection offered employees by WISHA would be seriously undermined if employees were discouraged from lodging complaints about industrial safety and health matters with their employers. Complaints to employers, if made in good faith, are related to WISHA, and an employee is protected against discharge or discrimination caused by a complaint to the employer.

(4) To come within the protection of RCW 49.17.160, a complaint must relate to conditions at the work place, as distinguished from complaints touching only upon general public safety and health.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-100, filed 11/13/80.]

WAC 296-360-110 Discrimination because of a proceeding under or related to the act. (1) RCW 49.17.160 prohibits discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to WISHA." Proceedings that can arise specifically under WISHA include inspections of worksites under RCW 49.17.070, employee contest of an abatement date under RCW 49.17.140, employee initiation of proceedings for promulgation of an industrial safety and health standard, employee application for modification or revocation of a variance under RCW 49.17.080, employee judicial challenge of a standard, and employee appeal of board of industrial insurance appeals order under RCW 49.17.140. In determining whether a "proceeding" is "related to" WISHA, the considerations discussed in WAC 296-360-100 are also applicable.

(2) An employee need not directly institute a proceeding. It is sufficient if he or she sets into motion acts of others that result in proceedings under or related to WISHA.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-110, filed 11/13/80.]

WAC 296-360-120 Discrimination because of testimony. RCW 49.17.160 prohibits discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to WISHA. This protection is not limited to testimony in proceedings instituted or caused to be instituted by the employee, but extends to any statements given in the course of judicial, quasijudicial, and administrative proceedings, including inspections, investigations, administrative adjudications, and rules hearings.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-120, filed 11/13/80.]

WAC 296-360-130 Discrimination because of exercise of any right afforded by WISHA—In general. In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to WISHA, RCW 49.17.160 also protects employees from discrimination occurring because of the exercise "of any right afforded by this chapter." Certain rights are explicitly stated in WISHA. Other rights exist by necessary implication. For example, employees may request information from the occupational safety and health administration or the department of labor and industries. Also, employees interviewed by agents of the division in the course of inspections or investigations cannot subsequently be discriminated against because of their cooperation.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-130, filed 11/13/80.]

WAC 296-360-140 Discrimination because of exercise of right afforded by WISHA—Walkaround pay. Employee participation in walkaround inspections under RCW 49.17.100 is essential. Employees are a vital source of information to the division about work place hazards. Employees must be able freely to exercise their statutory

right to participate in walkarounds without fear of economic loss, such as the denial of pay for the time spent helping WISHA inspectors during the walkaround. To ensure the unimpeded flow of information to the inspectors, and the unfettered statutory right of employees to participate in walkaround inspections, an employer's failure to pay employees for time they spend in walkaround inspections is discrimination under RCW 49.17.160. In addition, an employer's failure to pay employees for time spent in other inspection-related activities, such as answering questions of inspectors or participating in the opening and closing conferences, is discrimination under RCW 49.17.160.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-140, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-140, filed 11/13/80.]

WAC 296-360-150 Discrimination because of exercise of right afforded by WISHA—Refusal to work in an unsafe condition. (1) Review of WISHA and examination of the legislative history discloses that, as a general matter, WISHA grants no specific right to employees to walk off the job because of potential unsafe conditions at the work place. A hazardous condition that may violate WISHA will ordinarily be corrected by the employer, once brought to its attention. If the employer does not correct a hazard, or if there is a dispute about the existence of a hazard, the employee normally can ask the division to inspect the work place pursuant to RCW 49.17.110, or can seek help from other public agencies that have responsibility for safety and health. Under such circumstances, an employer would not violate RCW 49.17.-160 by disciplining an employee who refuses to work because of an alleged safety or health hazard.

(2) Occasions arise, however, when an employee is confronted with a choice between not performing assigned tasks or subjecting him- or herself to serious injury or death arising from a hazard at the work place. If the employee, with no reasonable alternative, refuses in good faith to expose him- or herself to the dangerous condition, he or she is protected against subsequent discrimination.

(3) An employee's refusal to work is protected if he or she meets the following requirements:

(a) The refusal to work must be in good faith, and must not be a disguised attempt to harass the employer or disrupt the employer's business;

(b) The hazard causing the employee's apprehension of death or injury must be such that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; and

(c) There must be insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

(4) As indicated in subsection (3), an employee's refusal to work is not protected unless it is a good faith response to a hazardous condition. To determine whether an employee has acted in good faith, the division will consider, among other factors, whether the employee:

(a) Asked the employer to correct the hazard;

(b) Asked for other work;

(c) Remained on the job until ordered to leave by the employer; or

(d) Informed the employer that, if the hazard was not corrected, the employee would refuse to work.

The lack of one or more of these factors shall not necessarily preclude a finding of good faith if other factors do establish good faith. The division will also consider whether the employer knew that the hazard could cause serious injury or death, or that the hazard was prescribed by a specific safety standard promulgated under WISHA or any other law that relates to the safety and health of a place of employment.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-150, filed 11/13/80.]

WAC 296-360-160 Payment of damages to employee discriminated against. (1) If an employer discriminates against an employee such that the employee earns less than he or she would have earned absent the discrimination, the employer shall pay the employee the difference between the wages that the employee would have earned absent the discrimination and the wages the employee actually earned after the discrimination.

(2) If an employer discriminates against an employee for a refusal to work that is protected under WAC 296-360-150, the employer need not pay the employee's wages for the time spent fixing the hazard, or that would have been spent fixing the hazard, if the employer (a) had to or would have had to shut down the job to make the repair and (b) had not other work the employee could have done.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-160, filed 11/13/80.]

WAC 296-360-170 Employee's refusal to comply with safety rules. An employee who refuses to comply with industrial safety and health standards or valid safety rules implemented by the employer in furtherance of WISHA is not exercising a right afforded by WISHA. Discipline taken by employers solely in response to an employee's refusal to comply with appropriate safety rules and regulations is not discrimination prohibited by RCW 49.17.160. This situation should be distinguished from refusals to work discussed in WAC 296-360-150.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-170, filed 11/13/80.]