



WSSFC 2023

Substantive Law Track – Session 1

The Alternative Universe of Administrative Law Practice

Moderator:

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Presented By:

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About the Presenters...

Jessica M. Kramer is the managing partner of Kramer, Elkins & Watt, LLC in Madison. Jessica has been practicing in the Madison area since earning her law degree in 2004 and focuses her practice on commercial real estate with an emphasis on representing landlords, including manufactured home communities, throughout Wisconsin. She provides landlords with comprehensive representation, including drafting customized lease packages, prosecuting evictions, defending administrative actions such as fair housing complaints, and providing day to day advice on tricky tenant issues. Jessica's approach to her practice involves providing the right balance of appropriately aggressive advocacy clients desire and the practical advice they need. Jessica is a trial attorney by training and regularly litigates landlord-tenant matters, employment matters, and business disputes in both trial courts and courts of appeals.

Erin Rome is an associate at Palmersheim Dettmann, concentrating her practice in business litigation, business law, and appellate practice. Erin is an experienced trial attorney, having handled multiple jury trials. Erin has handled cases before the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the Seventh Circuit Court of Appeals. Erin also represents employers before administrative agencies such as the Equal Rights Division and the Madison Equal Opportunities Division, including multiple hearings on the merits. Prior to joining Palmersheim Dettmann, Erin served as a judicial law clerk to the Honorable JoAnne Kloppenburg at the Wisconsin Court of Appeals.

David A. Lange is an Attorney who has been practicing Law for more than 34 years. This includes 18 years as a Compliance Attorney for the Wisconsin Department of Revenue, 3 years as an Attorney for the Wisconsin Department of Workforce Development Unemployment Division, and 12 years of private practice experience representing clients with matters before the Internal Revenue Service, the Wisconsin Department of Revenue, and the Wisconsin Department of Workforce Development. In the course of performing this work he has handled matters before the United States Tax Court, the Wisconsin United States Federal District Courts, the Wisconsin Court of Appeals, Wisconsin Circuit Courts, the Wisconsin Tax Appeals Commission, the Wisconsin Labor and Industry Review Commission, and Administrative Tribunal Hearings involving Wisconsin Unemployment taxes and benefits.

The Alternate Universe of Administrative Law Practice

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Erin E. Rome, Palmersheim Dettmann, S.C. and

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BACKGROUND of AGENCIES

A. History and Structure of U.S. Federal and State Agencies

1. Federal administrative agencies formally began in 1886 with the formation of the Interstate Commerce Commission (ICC). With the expansion of the railroads in the 1800s, there was a critical need to regulate trade across state lines.
 - a. From the Constitution to 1886. Most actions by the Federal Government and States were handled by elected officials and job positions they had created with only limited authority or power given to government agencies. This led to issues in:
 - i. Lack of consistency from administration to administration.
 - ii. An ever-increasing workload for those in the Executive, Legislative, and Judicial branches.
 - b. By 1886 interstate trade issues demanded consistent regulation.
 - i. The ICC (enacted and granted powers by statute) is created. In doing so, certain powers of the Executive, Legislative, and Judicial branches are given (delegated) to the ICC. (discussed later in this outline)
 - c. From 1886 to 1932 additional agencies continued to be created but at a very slow pace. However, in response to the Great Depression, an explosion of Agencies and agency powers were created under the National Recovery Act. The social policies that followed, and a need for new regulations due to technological advances, continued the expansion.
 - d. The delegation of power process used with the ICC has continued to be used and refined to the present.
 - e. The States have followed or used a similar process to create or empower State agencies.

B. Delegation of Authority to Agencies

1. The full scope of authority delegated to an agency is typically provided in its enabling statute.
 - a. This statute creates the agency and sets out its authority. See, e.g., 7 USC § 2201, establishing the Department of Agriculture.
 - b. In some cases, there is a separate enactment statute to establish the agency and the enabling statute sets out the agency's authority. See, e.g., Wis. Stat. § 15.43, establishing the Department of Revenue and Wis. Stat. § 73.03, defining the DOR's powers and duties.
2. The authority delegated to agencies includes:
 - a. Executive power – an agency has the ability to enforce the law and the agencies' rules and regulations.
 - i. The Executive branch (President or Governor) generally appoints the Secretary of an executive agency, and the Commissioner or Board Members of independent agencies, which allows it to influence how the agency enforces the rules and regulations it creates.
 - b. Quasi-Legislative power – an agency has the ability to create rules and regulations, but strict processes must be followed.
 - i. See State of Wisconsin Administrative Rules Procedures Manual: https://legis.wisconsin.gov/lc/media/1597/20adminrules_manual.pdf
 - c. Quasi-Judicial power – an agency has the ability to adjudicate violations of rules and regulations and is required to set up an appeal process when individual Constitutional rights are affected. To be Constitutional, this process must ultimately allow an appeal of the agency action to a Court. However, many times these initial actions have exclusive jurisdiction and must be followed to ultimately get a Court review.
 - i. An example of the Appeal process for the Wisconsin Department of Revenue:
 - a) First appeal is to the Department within 60 days (Wis. Stat. § 71.88(1));
 - b) Next appeal is to the Tax Appeals Commission within 60 days (Wis. Stat. § 71.88(2));

- c) Next appeal to the Wis. Circuit Court (Wis. Stat. § 73.015) within 30 days (Wis. Stat. § 227.53(1)(a)(2)).
 - ii. To successfully challenge an agency action, Agency Appeal processes and deadlines must be strictly adhered to. If initial appeal deadlines are missed, jurisdiction may be lost for further appeals, even to the Court.
- 3. Limitations on Authority Delegated to Agencies
 - a. Legislative Branch
 - i. Can pass a statute to reverse any Administrative Rule or Regulation created by an Agency. If signed into law, it will trump the administrative rule or regulation.
 - ii. Can pass sunset laws.
 - iii. Controls the purse.
 - iv. Confirms Executive branch appointments.
 - v. Can conduct legislative oversight hearings and investigations.
 - vi. May be influenced by political pressures and lobbying.
 - b. Executive Branch
 - i. Can appoint or remove executive agency secretaries.
 - ii. Can influence how money is spent within executive agencies.
 - iii. May be influenced by political pressures and lobbying.
 - c. Judicial Branch
 - i. Can review authority delegated or the actions of an agency to determine if either is unconstitutional. There are only 2 cases where SCOTUS has struck down delegated powers due to lack of standards and limitations. *Panama Refining Co. v. Ryan*, 93 U.S. 388 (1935); *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

C. Types of State and Federal Agencies Today

- 1. Regulatory versus Social Welfare
 - a. Regulatory – agency that controls or supervises the actions of people or industries, e.g., Occupational Safety and Health Agency (OSHA).

- b. Social Welfare – agency that administers the distribution of public funds or benefits, e.g., the Social Security Administration (SSA).
- c. Some agencies do both, e.g., Wis. Department of Workforce Development, which enforces compliance on employers and claimants, while also distributing certain benefits and protections to workers.

2. Executive vs. Independent Agencies

- a. Executive – The agency head (Secretary) is appointed by Executive (President or Governor) and approved by Senate. Examples include:
 - i. Social Security Administration (SSA)
 - ii. Wisconsin Department of Natural Resources (DNR)
- b. Independent – The agency has a Board or Commission where members serve specific staggered terms. Members can be removed only for neglect or malfeasance in office. When a Commissioner or Member's term is up, the Executive Branch gets to appoint the . These positions have staggered terms to prevent complete turnover when a new administration is elected. Examples include:
 - i. Equal Employment Opportunity Commission (EEOC)
 - ii. National Labor Relations Board (NLRB)

WHERE TO START WHEN A CLIENT HAS A PROBLEM WITH THE DOR or DWD

A. Department of Revenue (DOR) – tax issue

1. Remember! Get a signed Power of Attorney from your client. Only way the DOR will talk to you.
2. Determine at what stage the matter is.
 - i. Audit in progress
 - a) You can help with the audit process, start negotiating, and try to settle the matter.
 - ii. Notice of Adjustments from Audit has issued and within time to appeal
 - a) This is where I typically try to resolve my cases.
 - b) Within 60 days of receipt of Notice, file an appeal with DOR. DOR will assign it to a Resolution Unit. At this stage, you are allowed to provide additional information, negotiate, and try to settle.
 - c) If not resolved at the Resolution Unit, can file a petition for review with the Tax Appeals Commission (TAC) within 60 days. See TA 1.15 for the proper form of the petition.
 - 1) The TAC is the tribunal that will create the administrative record through a trial-like process.
 - 2) Use objections sparingly. The trier of fact typically will let in most evidence and then determine what weight to give it. But double-hearsay generally will not be allowed over an objection.
 - 3) Burden of proof rests with the Petitioner, except for cases involving personal liability corporation sales and withholding taxes.
 - 4) If unsuccessful at TAC, can file for review of the record with the Circuit Court. Due to expertise of agency tribunals, the Court may give deference to the agency's findings.
 - iii. After deadline to Appeal determination
 - a) State case law makes clear that an appeal filed even one day late ends the Appeal process due to lack of jurisdiction.

- b) The liability will go delinquent if not paid and DOR will start collection actions via levy, wage certifications, tax liens, refund offsets, professional license revocation, executing on personal property, and in extreme cases, having a receiver appointed to liquidate real estate.
- c) If your client has a delinquent balance, the best option is to seek a payment plan, which can be done by completing the payment plan request form on the DOR website.
- d) Get a payment plan your client can afford and will stick with.
- e) The benefit of a payment plan is that if accepted, the collection actions (other than refund offsets) typically will cease. Also a payment plan that continues for a period of time can help with obtaining a compromise of the debt, depending on the client's ability to pay.

iv. WAY AFTER deadline to Appeal

- a) *See iv. above*

v. Department has started enforcement or collection actions

- a) *See iv. above*

B. Department of Workforce Development (DWD) – employer tax liability

1. Remember! Get a signed Power of Attorney from your client. More lax than DOR but best practice is to have one.
2. Determine at what stage the matter is.
 - i. Audit in progress
 - a) If appropriate, get involved and see if there are any potential areas that can be agreed on.
 - ii. Initial Determination has issued
 - a) An employer has 21 days from receipt of the initial determination to appeal.
 - 1) If the appeal is late, you are not out of luck. You can still make a Late Request for Hearing, but the Late Request will be successful only if the reason for late appeal was due to circumstances beyond the Petitioner's control. If successful, the appeal moves forward. If not, the appeal is dismissed.

- b) The appeal will be decided at an administrative tribunal hearing before an Administrative Law Judge. The hearing record is made here. Petitioner will need to put on all their witnesses. For the most part, Petitioner will have the burden of proof.
 - c) If unsuccessful, a Petition for Review can be filed with the Labor and Industry Review Commission (LIRC). LIRC has a very easy to use website and petition form. This again must be filed within 21 days.
 - d) If unsuccessful with LIRC, an appeal can be filed with the Circuit Court within 30 days of the Commission decision. The Department and the Commission (LIRC) must be named as Defendants in this appeal to the Circuit Court.
 - iii. After deadline to Appeal determination and reason for lateness is not due to circumstances beyond the Petitioner's control
 - a) Consider a payment and compromise of debt with DWD, similar to DOR above.
- 3. The appeal process for a case denying employee unemployment benefits and/or repayment of benefits works basically the same, except the time to file the initial appeal is 14 days from receipt of the initial determination.

C. Department of Workforce Development (DWD) – Equal Rights Division (ERD)

- 1. The ERD handles labor standards and civil rights issues.
 - i. The Labor Standards Division deals with child labor, wage payment, hours of work, and overtime complaints.
 - ii. The Civil Rights Division deals with employment discrimination claims under the Wisconsin Fair Employment Act (Wis. Stat. Ch. 111), complaints under the Wisconsin Family and Medical Leave Act (Wis. Stat. Sec. 103.10), and also discrimination in housing or places of public accommodation/amusement.
 - iii. The Wisconsin Fair Employment Act and the Wisconsin Family and Medical Leave Act have counterparts in the Wisconsin Administrative Code – Wis. Admin. Code Ch. DWD 218 for Fair Employment and Wis. Admin. Code Ch. DWD 225 for Family and Medical Leave.
- 2. Take note and advise your clients – Complaints filed with the ERD are not served in the same manner as a Summons & Complaint.

- i. Individuals can file ERD complaints online or by submitting a paper complaint. The Discrimination Complaint Form is a four-page document designed to be completed by people who are *pro se*.
 - ii. Once the ERD receives the complaint, it will be reviewed by an Equal Rights Officer. If the Equal Rights Officer does not notice any defects on the face of the complaint, a copy of the complaint will be sent to the employer, who is called the “Respondent”.
 - iii. **This is where to watch out** – Your client will receive this document in the mail. It just looks like a normal letter. Oftentimes clients ignore this, or fail to read through it completely and realize there are deadlines.
3. Responding to an ERD Complaint
 - i. Respondent has 30 days from the date of the letter from ERD to respond.
 - ii. Respondent must respond to all allegations in the complaint and raise any jurisdictional or timely filing issues.
 - a) There is a 300-day statute of limitations period – meaning the complaint must be filed within 300 days from the date the allegedly discriminatory act was taken, or the individual was made aware the action was taken.
 - b) Check whether the 300-day statute of limitations period has passed! ERD strictly enforces the limitations period.
 - iii. Examples of other jurisdictional issues: lack of an employment relationship; alleged discrimination did not occur in Wisconsin.
 - iv. Failure to timely respond has consequences. Pursuant to Wis. Admin. Code. Ch. DWD 218.04: “[I]f 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.”
4. What should Respondent’s answer contain?
 - i. Provide a detailed narrative with supporting documents.
 - ii. Documentation is key. Consider providing: (1) employee handbook or personnel policies; (2) any relevant written communication between the employer and the employee; (3) relevant material from the personnel file.
 - iii. Start compiling documentation early. It can be cumbersome, so don’t wait until the last minute.

- iv. Documentation – especially contemporaneous documentation of the issues – tends to speak louder than what the lawyer argues in the response.
5. What happens after the response is filed? >> Investigation Phase.
- i. Complaint enters the investigation phase.
 - ii. ERD assigns an “Equal Rights Officer” to investigate the claim.
 - iii. Equal Rights Officer will send a letter or an email with a list of questions to answer and/or a request for additional documentation.
 - iv. Respondent must respond. Be as thorough as possible. Start gathering documents and preparing the response right away.
 - v. Currently, investigations seem to be taking a long time.
 - a) Example from current case – Respondent filed Answer on April 18, 2023; have received no request for additional information or any communication from ERD.
 - vi. Sign up for Case Portal. Electronic filing system where you can file documents and see case file, including communications issued to the Complainant.
6. Probable Cause Determination.
- i. Upon completion of the investigation, Equal Rights Officer issues a decision of probable cause or no probable cause.
 - ii. Wis. Admin. Code Ch. DWD 218.07: “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.”
 - iii. If there is an initial determination of **probable cause**, the case is certified to a hearing on the merits. *See* Wis. Admin. Code Ch. DWD 218.07(2).
 - iv. If there is an initial determination of **no probable cause**, the case is dismissed. However, the Complainant has the right to appeal. *See* Wis. Admin. Code Ch. DWD 218.07(3).
7. Appeal from No Probable Cause Determination.
- i. There will be a hearing before an Administrative Law Judge on the issue of whether there is probable cause to believe that an act of employment discrimination occurred.

- ii. ALJs tend to agree with the ERD investigators and uphold the no probable cause determination.
 - iii. Deadline to file an appeal of a no probable cause determination is 30 days.
8. Probable Cause Determination >> Hearing on the Merits.
- i. A determination of probable cause means that the Equal Rights Officer believed there was evidence of discrimination.
 - ii. Following a probable cause determination, the case is certified to a hearing on the merits.
 - iii. This is when discovery may begin. *See Wis. Admin Code Ch. DWD 218.14* (“Discovery may not be used prior to the time that a matter is certified to a hearing, except that the taking and presentation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45(7), Stats.”).
 - iv. An ALJ will be assigned to the case. The ALJ will hold a pre-hearing conference to set the schedule for the case, including: (1) time for discovery; (2) dispositive motions deadline; (3) date for submitting witness and exhibit lists; (4) date for the hearing.
 - v. Discovery practice is similar to what you see in a civil case in circuit court – you can serve requests for production of documents, interrogatories, and requests for admissions, and you can take depositions.
 - vi. Consider deposing the Complainant and witnesses who may not be friendly to you. Example: HR person who made the termination decision but has since left the company. Short depositions to get statements on the record can greatly help your preparation and increase your chances of success.
9. Conduct of Hearing on the Merits.
- i. Similar to a bench trial, except held in a conference room instead of a courtroom.
 - ii. No court reporter. You can choose to hire a stenographer if you want a written record.
 - iii. You will be required to exchange exhibits and witness lists beforehand.
 - iv. Pursuant to Wis. Stat. § 227.45, the “hearing examiner shall not be bound by common law or statutory rules of evidence.” The Wisconsin Court of Appeals has described the statute as requiring “very relaxed rules of evidence,” both as to testimonial and documentary evidence. *Rutherford v. LIRC*, 2008 WI App 66, ¶¶21-22, 309 Wis. 2d 498, 752 N.W.2d 897.

- v. If there are lawyers representing both Complainant and Respondent, ALJ may be stricter on application of rules of evidence.
 - vi. Plan for the hearing as though the normal rules of evidence *will* apply. Think through issues like hearsay within hearsay, business records, etc.
 - vii. Be prepared to subpoena witnesses. Subpoenas are permitted under Wis. Stat. § 227.45(6m).
 - viii. Presentation of evidence proceeds as you would expect in a civil case.
 - a) Complainant has the burden of proving a discriminatory act, so Complainant presents witnesses/evidence first.
 - b) Burden shifts to Respondent to provide a legitimate, non-discriminatory reason for the challenged action.
 - c) If Respondent carries its burden of providing a non-discriminatory reason for the challenged action, burden shifts back to Complainant to prove that the proffered non-discriminatory reason is pretextual.
 - ix. Typically no opening statements or closing arguments, but ALJs often request post-hearing briefing.
10. Appeal Following Hearing on the Merits.
- i. The ALJ will issue a written decision with findings of fact and conclusions of law and will issue an ultimate decision on whether the challenged employment action was discriminatory.
 - ii. Any Respondent or Complainant who is dissatisfied with the ALJ's written order may file a written petition with the ERD for review by LIRC.
 - iii. Petition for review must be filed with the ERD, and it must be **received** by ERD **within 21 days** from the date that a copy of the findings and order of the ALJ is mailed to the Respondent. Petitions for review may be filed by mail or by fax. There is **no provision** for electronic filing of petitions for review in ERD cases.
 - iv. There is no provision in the Wisconsin Fair Employment Act allowing LIRC to accept a late petition for review based on a finding that there was "good cause" for the late filing. If a petition is untimely, it **must** be dismissed unless the petitioner satisfies LIRC that the petitioner was prejudiced by "exceptional delay" in receipt of the ALJ's decision.
 - v. LIRC review the record made before the ALJ and does not hold a separate hearing. LIRC may either affirm, reverse, or modify the findings or order

of the ALJ in whole or in part, or set aside the findings and order and remand to the ERD for further proceedings.

11. Appeal to Circuit Court.
 - i. A party aggrieved by a final LIRC decision is entitled to judicial review in circuit court.
 - ii. Legal proceedings for judicial review of the decision must be commenced within 30 calendar days of the date of the decision.
 - iii. Judicial review proceedings are commenced by:
 - a) Filing a petition for judicial review with the clerk of the circuit court for the county where the judicial review proceedings are to be held; and
 - b) Serving a copy of the petition for judicial review upon LIRC.

AND FINALLY, BEST PRACTICES FOR HANDLING MATTERS BEFORE AGENCIES:

The 4 P's: Be Polite, Prepared, Patient, but Persistent

STATUTES AND HELPFUL RESOURCES:

Statutes:

- Wis. Stat. Ch. 73 – Tax Appeals Commission and Department of Revenue:
<https://docs.legis.wisconsin.gov/statutes/statutes/73>
- Wis. Stat. Ch. 227 – Administrative Procedure and Review:
<https://docs.legis.wisconsin.gov/statutes/statutes/227>
- Wis. Admin. Code Ch. DWD 218 – Fair Employment:
https://docs.legis.wisconsin.gov/code/admin_code/dwd/218_226/218

Helpful Resources:

- **Overview of Procedure in LIRC Cases:**
https://lirc.wisconsin.gov/procedures_before.htm#er
- **LIRC Equal Rights Decisions:**
https://lirc.wisconsin.gov/er_decisions.htm
- **LIRC Unemployment Insurance Decision Digest:**
https://lirc.wisconsin.gov/ui_digest.htm

- **LIRC Worker's Compensation Decision Digest:**
https://lirc.wisconsin.gov/wc_digest.htm
- **Appeal Rights from a LIRC Fair Employment Decision:**
<https://lirc.wisconsin.gov/pdf/LIR5456-P%200716.pdf#zoom=100>