

CHAPTER 9
DISCRIMINATION AGAINST EMPLOYEES

[Previously Ch 8 IAC renumbered 12/24/80]

[Prior to 9/24/86, Labor, Bureau of [530]]

[Prior to 10/7/98, see 347—Ch 9]

875—9.1(88) Introductory statement.

9.1(1) The Occupational Safety and Health Act, Iowa Code chapter 88, hereinafter referred to as the Act, is designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the state. By the terms of the Act, every person engaged in a business, the state of Iowa and its various departments and agencies and any political subdivision of the state, who have employees is required to furnish each of its employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act.

9.1(2) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

9.1(3) This chapter deals essentially with the rights of employees afforded under Iowa Code section 88.9(3). Iowa Code section 88.9(3) prohibits reprisals, in any form, against employees who exercise rights under the Act.

875—9.2(88) Purpose of this chapter. The purpose of this chapter is to make available in one place interpretations of the various provisions of Iowa Code section 88.9(3), which will guide the commissioner of labor in the performance of duties.

875—9.3(88) General requirements of Iowa Code section 88.9(3). Section 88.9(3) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has:

1. Filed any complaint under or related to the Act;
2. Instituted or caused to be instituted any proceeding under or related to the Act;
3. Testified or is about to testify in any proceeding under the Act or related to the Act; or
4. Exercised on the employee's own behalf or on behalf of others any right afforded by the Act.

Any employee who believes that the employee has been discriminated against in violation of section 88.9(3) may, within 30 days after such violation occurs, lodge a complaint with the commissioner of labor alleging the violation. The commissioner shall then cause an appropriate investigation to be made. If, as a result of the investigation, the commissioner determines that the provisions of section 88.9(3) have been violated, civil action may be instituted in any appropriate district court, to restrain violations of section 88.9(3) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to the former position with backpay. Section 88.9(3) further provides for notification of complainants by the commissioner of determinations made pursuant to their complaints.

875—9.4(88) Persons prohibited from discriminating. Iowa Code section 88.9(3) provides that a person shall not discharge or in any manner discriminate against an employee because the employee has exercised rights under the Act. Section 88.3(9) defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Consequently, the prohibitions of section 88.9(3) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 88.9(3) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee.

875—9.5(88)¹ Persons protected by Iowa Code section 88.9(3).

9.5(1) All employees are afforded the full protection of section 88.9(3). For purposes of the Act, an employee is defined as “an employee of an employer who is employed in a business of his employer.”

9.5(2) Reserved.

This rule is intended to implement Iowa Code section 88.9(3).

¹ Objection was filed 6/5/79 to rule as appeared 5/16/79, see IAB 6/27/79 for text of objection as well as amended language intended to overcome objection.

875—9.6(88) Unprotected activities distinguished.

9.6(1) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of Iowa Code section 88.9(3) apply when the adverse action occurs because the employee has engaged in protected activities. An employee’s engagement in activities protected by the Act does not automatically render the employee immune from discharge or discipline for legitimate reasons, or from adverse action dictated by nonprohibited considerations.

9.6(2) At the same time, to establish a violation of section 88.9(3), 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” engagement in protected activity, section 88.9(3) has been violated. Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

875—9.7 and 9.8 Reserved.**875—9.9(88) Complaints under or related to the Act.**

9.9(1) Discharge of, or discrimination against, an employee because the employee has filed “any complaint . . . under or related to this Act . . . ” is prohibited by Iowa Code section 88.9(3). An example of a complaint made “under” the Act would be an employee request for inspection pursuant to Iowa Code section 88.6(5). However, this would not be the only type of complaint protected by Iowa Code section 88.9(3). The range of complaints “related to” the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application.

9.9(2) Complaints registered with other governmental agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints “related to” this Act. These types of complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

9.9(3) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

875—9.10(88) Proceedings under or related to the Act.

9.10(1) Discharge of, or discrimination against, any employee because the employee has “instituted or caused to be instituted any proceeding under or related to this Act” is also prohibited by Iowa Code section 88.9(3). Examples of proceedings which could arise specifically under the Act would be inspections of workplaces under Iowa Code section 88.6, an employee contest of an abatement date under Iowa Code section 88.8(3), an employee application for modification or revocation of a variance under Iowa Code section 88.5 and an employee appeal of an order of the employment appeal board under Iowa Code section 88.9(1). In determining whether a “proceeding” is “related to” the Act, the considerations discussed in rule 875—8.9(88) would also be applicable.

9.10(2) An employee need not directly institute the proceedings. It is sufficient if the employee sets into motion activities of others which result in proceedings under or related to the Act.

875—9.11(88) Testimony. Discharge of, or discrimination against, any employee because the employee “has testified or is about to testify” in proceedings under or related to the Act is also prohibited by Iowa Code section 88.9(3). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, the employee would be protected against discrimination resulting from such testimony.

875—9.12(88) Exercise of any right afforded by the Act.

9.12(1) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, Iowa Code section 88.9(3) also protects employees from discrimination occurring because of the exercise “of any right afforded by this chapter.” Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings. Certain other rights exist by necessary implication. For example, employees may request information from the bureau of occupational safety and health of the division of labor services of the department of workforce development; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the commissioner in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

9.12(2) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to its attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to Iowa Code section 88.6(5), or to seek assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of Iowa Code section 88.9(3) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

9.12(3) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or being subjected to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to be exposed to the dangerous condition, the employee would be protected against subsequent discrimination if the following conditions are met:

- a. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury.
- b. The employee, where possible, first sought to:
 - (1) Eliminate the danger through resorting to regular statutory enforcement channels, unless there has been insufficient time due to the urgency of the situation, or
 - (2) Obtain from the employer a correction of the dangerous condition but was unable to do so.

875—9.13 and 9.14 Reserved.

875—9.15(88) Filing of complaint for discrimination.

9.15(1) A complaint of Iowa Code section 88.9(3) discrimination may be filed by the employee, or by a representative authorized to do so on the employee’s behalf. No particular form of complaint is required. A complaint should be filed with the commissioner of labor.

9.15(2) Iowa Code section 88.9(3) provides that an employee who believes discriminatory actions have occurred in violation of section 88.9(3) “may, within 30 days after such violation occurs,” file a complaint with the commissioner. The major purpose of the 30-day period in this provision is to allow the commissioner to decline to entertain complaints which have become stale. Accordingly, complaints not

filed within 30 days of an alleged violation will ordinarily be presumed to be untimely. However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency, among others, are circumstances which do not justify tolling of the 30-day period. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

875—9.16(88) Notice of determination. Iowa Code subsection 88.9(3) provides that within 90 days of the filing of a complaint, the commissioner is to notify a complainant whether prohibited discrimination occurred. This 90-day provision is considered to be directory in nature. While every effort will be made to notify complainants of the commissioner's determination within 90 days, there may be instances when it is not possible to meet the directory period set forth in Iowa Code subsection 88.9(3).

875—9.17(88) Withdrawal of complaint. Enforcement of the provisions of Iowa Code section 88.9(3) is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the commissioner's investigation. The commissioner'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 the complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

875—9.18(88) Arbitration or other agency proceedings.

9.18(1) An employee who files a complaint under Iowa Code section 88.9(3) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board or the Iowa department of personnel. The commissioner's jurisdiction to entertain section 88.9(3) complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of the other agencies or bodies. The commissioner may file action in district court regardless of the pendency of other proceedings. However, the commissioner also recognizes the policy favoring voluntary resolution of disputes under proceedings in collective bargaining agreements. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 88.9(3) complaints. Where a complainant is in fact pursuing remedies other than those provided by section 88.9(3), postponement of the commissioner's determination and deferral to the results of such proceedings may be in order.

9.18(2) Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 88.9(3) and those proceedings are not likely to violate the rights guaranteed by section 88.9(3). The factual issues in such proceedings must be substantially the same as those raised by a section 88.9(3) complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

9.18(3) A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis, after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, the dismissal will not ordinarily be regarded as determinative of the section 88.9(3) complaint.

875—9.19 and 9.20 Reserved.

875—9.21(88) Walkaround pay disputes. An employer's failure to pay employees for time during which they are engaged in walkaround inspections, or in other inspection-related activities, such as

responding to questions of compliance officers, or participating in the opening and closing conferences, is discriminatory under section Iowa Code section 88.9(3) so long as neither the number of employees participating nor the time required to express employee concerns is excessive. An authorized employee representative shall be given the opportunity to accompany on the physical inspection pursuant to Iowa Code section 88.6(4) and 875—3.6(88).

This rule is intended to implement Iowa Code section 88.9(3).

875—9.22(88) Employee refusal to comply with safety rules. Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations will not ordinarily be regarded as discriminatory action prohibited by Iowa Code section 88.9(3). This situation should be distinguished from refusals to work, as discussed in rule 875—8.12(88).

These rules are intended to implement Iowa Code sections 84A.1, 84A.2, 88.2, and 88.9(3).

[Filed 4/27/79, Notice 11/29/78—published 5/16/79, effective 6/25/79]

[Filed emergency 5/11/79—published 5/30/79, effective 6/25/79]

[Filed emergency 6/8/79—published 6/27/79, effective 6/25/79]

[Filed 12/5/80, Notice 10/29/80—published 12/24/80, effective 1/28/81]

[Filed emergency 9/5/86—published 9/24/86, effective 9/24/86]

[Filed 4/17/87, Notice 9/24/86—published 5/6/87, effective 6/10/87]

[Filed 3/17/89, Notice 9/21/88—published 4/5/89, effective 5/10/89]

[Filed 1/21/00, Notice 8/25/99—published 2/9/00, effective 3/15/00]

[Filed 5/16/07, Notice 4/11/07—published 6/6/07, effective 8/13/07]