



2019 SENATE BILL 366

August 22, 2019 - Introduced by Senators HANSEN, BEWLEY, CARPENTER, ERPENBACH, JOHNSON, LARSON, MILLER, RINGHAND, RISSER, SCHACHTNER, SHILLING, SMITH, L. TAYLOR and WIRCH, cosponsored by Representatives SINICKI, ZAMARRIPA, VRUWINK, VINING, C. TAYLOR, SUBECK, STUCK, STUBBS, SPREITZER, SHANKLAND, SARGENT, RIEMER, POPE, OHNSTAD, NEUBAUER, L. MYERS, MILROY, B. MEYERS, MCGUIRE, KOLSTE, HINTZ, HESSELBEIN, HEBL, HAYWOOD, GRUSZYNSKI, GOYKE, FIELDS, EMERSON, DOYLE, CROWLEY, CONSIDINE, CABRERA, BROSTOFF, BOWEN, BILLINGS and ANDERSON. Referred to Committee on Labor and Regulatory Reform.

1 **AN ACT to amend** 111.39 (4) (d), 111.39 (5) (b) and 814.04 (intro.); and **to create**
2 111.39 (5) (d) and 111.397 of the statutes; **relating to:** actions in circuit court
3 alleging discrimination in employment, unfair honesty testing, or unfair
4 genetic testing.

Analysis by the Legislative Reference Bureau

This bill allows the Department of Workforce Development or a person who is alleged or was found to have been discriminated against or subjected to unfair honesty or genetic testing to bring an action in circuit court in addition to or in lieu of filing an administrative complaint. The bill, however, does not allow an action for damages to be brought against certain local governmental units or against any employer employing fewer than 15 individuals.

Under the bill, if the circuit court finds that a defendant has committed an act of discrimination or unfair honesty or genetic testing, the circuit court may award back pay and any other relief that could have been awarded in an administrative proceeding. In addition, the circuit court must order the defendant to pay to the person discriminated against compensatory and punitive damages that the circuit court finds appropriate, except that the total amount of damage awarded for future economic losses and for pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses and punitive damages is subject to the following limitations:

1. If the defendant employs 100 or fewer employees, no more than \$50,000.

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2. If the defendant employs more than 100 but fewer than 201 employees, no more than \$100,000.

3. If the defendant employs more than 200 but fewer than 501 employees, no more than \$200,000.

4. If the defendant employs more than 500 employees, no more than \$300,000.

The bill requires DWD to annually revise these amounts based upon the change in the consumer price index in the previous year, if any positive change has occurred.

Under the current fair employment law, a person alleging discrimination in employment or unfair honesty or genetic testing may file a complaint with DWD seeking action that will effectuate the purpose of the fair employment law, including reinstating the employee, providing back pay, and paying costs and attorney fees. The fair employment law, however, does not authorize DWD to award compensatory or punitive damages to a complainant.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 111.39 (4) (d) of the statutes is amended to read:

2 111.39 (4) (d) The department shall serve a certified copy of the findings and
3 order on the respondent, the order to have the same force as other orders of the
4 department and be enforced as provided in s. 103.005. The department shall also
5 serve a certified copy of the findings and order on the complainant, together with a
6 notice advising the complainant about the right to seek, and the time for seeking,
7 review by the commission under sub. (5); about the right to bring, and the time for
8 bringing, an action for judicial review under s. 111.395; and about the right to bring,
9 and the time for bringing, an action under s. 111.397 (1) (a). Any person aggrieved
10 by noncompliance with the order may have the order enforced specifically by suit in
11 equity. If the examiner finds that the respondent has not engaged in discrimination,
12 unfair honesty testing, or unfair genetic testing as alleged in the complaint, the
13 ~~department shall serve a certified copy of the examiner's findings~~ served on the

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1 complainant, ~~together with~~ shall be accompanied by an order dismissing the
2 complaint.

3 **SECTION 2.** 111.39 (5) (b) of the statutes is amended to read:

4 111.39 (5) (b) ~~If no petition is filed~~ the respondent or complainant does not file
5 a petition under par. (a) within 21 days from the date that a copy of the findings and
6 order of the examiner is ~~mailed to the last-known address of the respondent~~ served
7 on that party, the findings and order shall be considered final for purposes of
8 enforcement under sub. (4) (d). If a timely petition is filed, the commission, on review,
9 may either affirm, reverse, or modify the findings or order in whole or in part, or set
10 aside the findings and order and remand to the department for further proceedings.
11 Such actions shall be based on a review of the evidence submitted. If the commission
12 is satisfied that a respondent or complainant has been prejudiced because of
13 exceptional delay in the receipt of a copy of any findings and order ~~it~~, the commission
14 may extend the time another 21 days for filing the petition with the department.

15 **SECTION 3.** 111.39 (5) (d) of the statutes is created to read:

16 111.39 (5) (d) The commission shall serve a certified copy of the commission's
17 decision on the respondent. The commission shall also serve a certified copy of the
18 commission's decision on the complainant, together with a notice advising the
19 complainant about the right to bring, and the time for bringing, an action for judicial
20 review under s. 111.395 and about the right to bring, and the time for bringing, an
21 action under s. 111.397 (1) (a).

22 **SECTION 4.** 111.397 of the statutes is created to read:

23 **111.397 Civil action.** (1) (a) Except as provided in this paragraph, the
24 department or a person alleged or found to have been discriminated against or
25 subjected to unfair honesty testing or unfair genetic testing may bring an action in

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1 circuit court requesting the relief described in sub. (2) (a) against any employer, labor
2 organization, or employment agency that is alleged or found to have engaged in that
3 discrimination, unfair honesty testing, or unfair genetic testing. The department or
4 a person alleged or found to have been discriminated against or subjected to unfair
5 honesty testing or unfair genetic testing may not bring an action under this
6 paragraph against any local governmental unit, as defined in s. 19.42 (7u), or against
7 any employer, labor organization, or employment agency employing fewer than 15
8 individuals for each working day in each of 20 or more calendar weeks in the current
9 or preceding year.

10 (b) If a petition for judicial review of the findings and order of the commission
11 concerning the same violation as the violation giving rise to the action under par. (a)
12 is filed, the circuit court shall consolidate the proceeding for judicial review and the
13 action under par. (a).

14 (c) A person alleged or found to have been discriminated against or subjected
15 to unfair honesty testing or unfair genetic testing is not required to file a complaint
16 under s. 111.39 or seek review under s. 111.395 in order for the department or the
17 person to bring an action under par. (a).

18 **(2)** (a) Subject to pars. (b) and (c), in an action under sub. (1) (a), if the circuit
19 court finds that discrimination, unfair honesty testing, or unfair genetic testing has
20 occurred, or if such a finding has been made by an examiner or the commission and
21 not been further appealed, the circuit court may order any relief that an examiner
22 would be empowered to order under s. 111.39 (4) (c) after a hearing on a complaint
23 filed under s. 111.39. In addition, the circuit court shall order the defendant to pay
24 to the person discriminated against or subjected to unfair honesty testing or unfair
25 genetic testing any other compensatory damages, and punitive damages under s.

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1 895.043 that the circuit court or jury finds appropriate, plus reasonable costs and
2 attorney fees incurred in the action. If any relief was ordered under s. 111.39 or
3 111.395, the circuit court shall specify whether the relief ordered under this
4 paragraph is in addition to or replaces the relief ordered under s. 111.39 or 111.395.
5 The sum of the amount of compensatory damages for future economic losses and for
6 pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and
7 other noneconomic losses and the amount of punitive damages that a circuit court
8 may order may not exceed the following:

9 1. In the case of a defendant that employs 100 or fewer employees for each
10 working day in each of 20 or more calendar weeks in the current or preceding year,
11 \$50,000.

12 2. In the case of a defendant that employs more than 100 but fewer than 201
13 employees for each working day in each of 20 or more calendar weeks in the current
14 or preceding year, \$100,000.

15 3. In the case of a defendant that employs more than 200 but fewer than 501
16 employees for each working day in each of 20 or more calendar weeks in the current
17 or preceding year, \$200,000.

18 4. In the case of a defendant that employs more than 500 employees for each
19 working day in each of 20 or more calendar weeks in the current or preceding year,
20 \$300,000.

21 (b) If the circuit court orders any payment under par. (a) because of a violation
22 of s. 111.321, 111.37, or 111.372 by an individual employed by an employer, the
23 employer of that individual is liable for the payment.

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1 (c) 1. In this paragraph, “consumer price index” means the average of the
2 consumer price index for all urban consumers, U.S. city average, as determined by
3 the bureau of labor statistics of the federal department of labor.

4 2. Except as provided in this subdivision, beginning on July 1, 2021, and on
5 each July 1 after that, the department shall adjust the amounts specified in par. (a)
6 1., 2., 3., and 4. by calculating the percentage difference between the consumer price
7 index for the 12-month period ending on December 31 of the preceding year and the
8 consumer price index for the 12-month period ending on December 31 of the year
9 before the preceding year and adjusting those amounts by that percentage
10 difference. The department shall publish the adjusted amounts calculated under
11 this subdivision in the Wisconsin Administrative Register, and the adjusted amounts
12 shall apply to actions commenced under sub. (1) (a) beginning on July 1 of the year
13 of publication. This subdivision does not apply if the consumer price index for the
14 12-month period ending on December 31 of the preceding year did not increase over
15 the consumer price index for the 12-month period ending on December 31 of the year
16 before the preceding year.

17 **SECTION 5.** 814.04 (intro.) of the statutes is amended to read:

18 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
19 (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 767.553 (4) (d),
20 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3),
21 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),
22 when allowed costs shall be as follows:

23 **SECTION 6. Initial applicability.**

