

September 1985 Spec. Sess.  
Senate Bill 10

Date of enactment: November 12, 1985  
Date of publication: November 19, 1985

## 1985 Wisconsin Act 52

AN ACT to amend 20.865 (1) (a), (g) and (q) and 814.04 (intro.); and to create 227.115 and 814.245 of the statutes, relating to awards of costs to individuals, small nonprofit corporations and small businesses and making an appropriation.

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

SECTION 1. 20.865 (1) (a), (g) and (q) of the statutes are amended to read:

20.865 (1) (a) *Judgments and legal expenses.* A sum sufficient to pay for legal expenses under ss. 59.31 and 776.43, for costs under ss. 227.115 and 814.245 and for the costs of judgments, orders and settlements of actions, appeals and complaints under subch. II of ch. 111 or subch. II or III of ch. 230, and those judgments, awards, orders and settlements under ss. 21.13, 165.25 (6), 775.04 and 895.46 that are not otherwise reimbursable as liability costs under par. (fm). Release of moneys under this paragraph pursuant to any settlement agreement, whether or not incorporated into an order, is subject to approval of the attorney general.

(g) *Judgments and legal expenses; program revenues.* From the appropriate program revenue and program revenue-service accounts, a sum sufficient to pay for

legal expenses under ss. 59.31 and 776.43, for costs under ss. 227.115 and 814.245 and for the cost of judgments, orders and settlements of actions, appeals and complaints under subch. II of ch. 111 or subch. II or III of ch. 230, and those judgments, awards, orders and settlements under ss. 21.13, 165.25 (6), 775.04 and 895.46 that are not otherwise reimbursable as liability costs under par. (fm). Release of moneys under this paragraph pursuant to any settlement agreement, whether or not incorporated into an order, is subject to approval of the attorney general.

(q) *Judgments and legal expenses; segregated revenues.* From the appropriate segregated funds, a sum sufficient to pay for legal expenses under ss. 59.31 and 776.43, for costs under ss. 227.115 and 814.245 and for the cost of judgments, orders and settlements of actions, appeals and complaints under subch. II of ch. 111 or subch. II or III of ch. 230, and those judgments, awards, orders and settlements under ss. 21.13, 165.25

(6), 775.04 and 895.46 that are not otherwise reimbursable as liability costs under par. (fm). Release of moneys under this paragraph pursuant to any settlement agreement, whether or not incorporated into an order, is subject to approval of the attorney general.

SECTION 2. 227.115 of the statutes is created to read:

**227.115 Costs to certain prevailing parties.** (1) The legislature intends that hearing examiners and courts in this state, when interpreting this section, be guided by federal case law, as of the effective date of this subsection .... [revisor inserts date], interpreting substantially similar provisions under the federal equal access to justice act, P.L. 96-481.

(2) In this section:

(a) "Hearing examiner" means the agency or hearing examiner conducting the hearing.

(b) "Nonprofit corporation" has the meaning designated in s. 181.02 (8).

(c) "Small business" means a business entity, including its affiliates, which is independently owned and operated, and which employs fewer than 25 full-time employees or which has gross annual sales of less than \$2,500,000.

(d) "Small nonprofit corporation" means a nonprofit corporation which employs fewer than 25 full-time employees.

(e) "State agency" does not include the public intervenor or citizens utility board.

(f) "Substantially justified" means having a reasonable basis in law and fact.

(3) In any contested case in which an individual, a small nonprofit corporation or a small business is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

(4) In determining the prevailing party in cases in which more than one issue is contested, the examiner shall take into account the relative importance of each issue. The examiner shall provide for partial awards of costs under this section based on determinations made under this subsection.

(5) If the hearing examiner awards costs under sub. (3), he or she shall determine the costs under this subsection, except as modified under sub. (4). The decision on the merits of the case shall be placed in a proposed decision and submitted under ss. 227.10 and 227.11. The prevailing party shall submit, within 30 days after service of the proposed decision, to the hearing examiner and to the state agency which is the losing party an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were

computed. The state agency which is the losing party has 15 working days from the date of receipt of the application to respond in writing to the hearing examiner. The hearing examiner shall determine the amount of costs using the criteria specified in s. 814.245 (5) and include an order for payment of costs in the final decision.

(6) A final decision under sub. (5) is subject to judicial review under s. 227.15. If the individual, small nonprofit corporation or small business is the prevailing party in the proceeding for judicial review, the court shall make the findings applicable under s. 814.245 and, if appropriate, award costs related to that proceeding under s. 814.245, regardless of who petitions for judicial review. In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5).

(7) An individual is not eligible to recover costs under this section if the person's properly reported federal adjusted gross income was \$150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the case. This subsection applies whether the person files the tax return individually or in combination with a spouse.

(8) If a state agency is ordered to pay costs under this section, the costs shall be paid from the applicable appropriation under s. 20.865 (1) (a), (g) or (q).

(9) Each state agency that is ordered to pay costs under this section or that recovers costs under sub. (10) shall report annually, as soon as is practicable after June 30, to the presiding officer of each house of the legislature the number, nature and amounts of the claims paid, the claims involved in the contested case in which the costs were incurred, the costs recovered under sub. (10) and any other relevant information to aid the legislature in evaluating the effect of this section.

(10) If the examiner finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the examiner must find one or more of the following:

(a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.

(b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

SECTION 3. 814.04 (intro.) of the statutes is amended to read:

**814.04 Items of costs.** (intro.) Except as provided in s. ss. 814.025 and 814.245, when allowed costs shall be as follows:

SECTION 4. 814.245 of the statutes is created to read:

**814.245 Actions by state agencies.** (1) The legislature intends that courts in this state, when interpreting this section, be guided by federal case law, as of the effective date of this subsection .... [revisor inserts date], interpreting substantially similar provisions under the federal equal access to justice act, P.L. 96-481.

(2) In this section:

(a) "Nonprofit corporation" has the meaning designated in s. 181.02 (8).

(b) "Small business" means a business entity, including its affiliates, which is independently owned and operated, and which employs fewer than 25 full-time employees or which has gross annual sales of less than \$2,500,000.

(c) "Small nonprofit corporation" means a nonprofit corporation which employs fewer than 25 full-time employees.

(d) "State agency" does not include the public intervenor or citizens utility board.

(e) "Substantially justified" means having a reasonable basis in law and fact.

(3) If an individual, a small nonprofit corporation or a small business is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.115 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

(4) In determining the prevailing party in actions in which more than one issue is contested, the court shall take into account the relative importance of each issue. The court shall provide for partial awards of costs under this section based on determinations made under this subsection.

(5) If the court awards costs under sub. (3), the costs shall include all of the following which are applicable:

(a) The reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the case and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that:

1. No expert witness may be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency which is the losing party.

2. Attorney or agent fees may not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents, justifies a higher fee.

(b) Any other allowable cost specified under s. 814.04 (2).

(6) A party seeking an award under this section shall, within 30 days after final judgment in the action, submit to the clerk under s. 814.10 (1) an itemized application for fees and other expenses, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. Section 814.10 applies for the procedure for taxation of costs, except that the clerk shall allow the state agency 15 working days to respond under s. 814.10 (3).

(7) The court acting under s. 814.10 (4) may reduce the amount awarded under this section or deny an award if it finds that the prevailing party engaged in conduct which unduly and unreasonably delayed the action.

(8) An individual is not eligible to recover costs under this section if the person's properly reported federal adjusted gross income was \$150,000 or more in each of the 3 calendar years or corresponding fiscal years immediately prior to the commencement of the action. This subsection applies whether the person files the tax return individually or in combination with a spouse.

(9) If a state agency is ordered to pay costs under this section, the costs shall be paid from the applicable appropriation under s. 20.865 (1) (a), (g) or (q).

(10) Each state agency that is ordered to pay costs under this section or that recovers costs under sub. (11) shall report annually, as soon as is practicable after June 30, to the presiding officer of each house of the legislature the number, nature and amounts awarded, the claims involved in the action in which the costs were incurred, the costs recovered under sub. (11) and any other relevant information to aid the legislature in evaluating the effect of this section.

(11) If the court finds that the motion under sub. (3) is frivolous, the examiner may award the state agency all reasonable costs in responding to the motion. In order to find a motion to be frivolous, the court must find one or more of the following:

(a) The motion was submitted in bad faith, solely for purposes of harassing or maliciously injuring the state agency.

(b) The party or the party's attorney knew, or should have known, that the motion was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

**SECTION 5. Initial applicability.** This act applies to:

(1) Contested cases in which a written request for hearing was filed on or after the effective date of this subsection.

(2) Judicial reviews of contested cases in which the written request for a hearing in the contested case was filed on or after the effective date of this subsection.

- 633 -

85 WisAct 52

(3) Actions commenced on or after the effective date  
of this subsection.

---