



State of Wisconsin
2015 - 2016 LEGISLATURE

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**SENATE AMENDMENT 3,
TO SENATE BILL 44**

February 25, 2015 – Offered by Senators ERPENBACH, SHILLING, RISSER, CARPENTER, MILLER, VINEHOUT, RINGHAND, BEWLEY, HARRIS DODD, C. LARSON, L. TAYLOR, WIRCH, HANSEN and LASSA.

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 1, line 5: before “and providing” insert “, wrongful discharge from
3 employment.”.

4 **2.** Page 1, line 7: before that line insert:

5 “SECTION 1. 103.11 of the statutes is created to read:

6 **103.11 Wrongful discharge from employment. (1) DEFINITIONS.** In this
7 section:

8 (a) “Constructive discharge” means the voluntary termination of employment
9 by an employee because of a situation created by an act or omission of his or her
10 employer that an objective, reasonable person would find so intolerable that
11 voluntary termination is the only reasonable alternative. “Constructive discharge”
12 does not include voluntary termination because of an employer’s refusal to promote

1 the employee or improve wages, responsibilities, or other terms and conditions of
2 employment.

3 (b) “Discharge” means any termination of employment, including resignation,
4 elimination of a job, layoff for lack of work, failure to recall or rehire, and any other
5 reduction in the number of employees for a legitimate business reason. “Discharge”
6 includes a constructive discharge.

7 (c) “Employee” means a person who performs labor for an employer for
8 compensation.

9 (d) “Employer” means a person engaging in any activity, enterprise, or business
10 in this state employing one or more persons on a permanent basis. “Employer”
11 includes the state and any office, department, independent agency, authority,
12 institution, association, society, or other body in state government created or
13 authorized to be created by the constitution or any law, including the legislature and
14 the courts.

15 (e) “Good cause” means reasonable, job-related grounds for dismissal based on
16 a failure to satisfactorily perform job duties, disruption of the employer’s operation,
17 or any other legitimate business reason.

18 (f) “Lost fringe benefits” means the value of any employer-paid vacation leave,
19 sick leave, health insurance plan, disability insurance plan, life insurance plan, and
20 pension benefit plan in force on the date of termination of employment that the
21 employee would have received had the employee not been discharged.

22 (g) “Lost wages” means the gross amount of wages that would have been
23 reported to the Internal Revenue Service as gross income on form W-2 had the
24 employee not been discharged and includes additional compensation deferred at the
25 option of the employee.

1 (h) “Probationary period” means a period of 6 months from the date an
2 employee is hired, unless the employer, at the time the employee is hired, expressly
3 provides for a shorter probationary period or for no probationary period, in which
4 case “probationary period” means that period so provided.

5 (i) “Public policy” means a policy in effect at the time of the discharge
6 concerning the public health, safety, or welfare established by constitutional
7 provision, statute, or administrative rule or regulation.

8 (j) “Wrongful discharge” means a discharge from employment that is unfair for
9 a reason specified in sub. (2) (b) or that is for a wrongful reason specified in sub. (2)
10 (c).

11 **(2) WRONGFUL DISCHARGE; EXCEPTIONS.** (a) No employer may discharge an
12 employee unfairly or for any wrongful reason, except that this prohibition does not
13 apply to any of the following:

14 1. A discharge that the employee has chosen to contest under any other state
15 or federal law that provides a procedure or remedy for contesting the discharge.

16 2. A discharge that is covered by a written collective bargaining agreement.

17 3. A discharge that is covered by a written contract of employment for a specific
18 term.

19 4. A discharge of an employee who any other state or federal law specifically
20 provides is an employee at will or is to serve at the pleasure of a public official or other
21 appointing authority.

22 (b) Paragraph (a) does not preclude an employer from discharging an employee
23 for a violation of a work rule or performance standard if the procedures used to
24 discharge the employee are fair. For purposes of par. (a), a discharge of an employee

1 for a violation of a work rule or performance standard is unfair if any of the following
2 applies:

3 1. The work rule or performance standard was not made known to the employee
4 prior to the discharge.

5 2. The employer failed to enforce the work rule or performance standard in
6 similar situations for a prolonged period.

7 3. The employer did not conduct an interview with the employee, or hold a
8 hearing, concerning the violation prior to the discharge, did not conduct that
9 interview or hearing promptly after the violation, or did not provide the employee
10 with a precise description of the conduct constituting the violation.

11 4. The employer did not prove by clear and convincing evidence that the
12 employee committed the violation.

13 5. The violation is the same as or substantially similar to a violation committed
14 by another employee who was not discharged for committing the same or a
15 substantially similar violation.

16 6. Unless the violation is egregious, the employer failed to first apply a less
17 drastic form of discipline for the violation.

18 7. The discharge is disproportionate to the gravity of the violation, taking into
19 consideration any mitigating or aggravating circumstances.

20 (c) For purposes of par. (a), a discharge is for a wrongful reason if any of the
21 following applies:

22 1. The discharge was in retaliation for the employee's refusal to violate a public
23 policy or reporting a violation of a public policy.

24 2. The employer violated the express provisions of its own written personnel
25 policy.

1 3. Except as provided in par. (d), the discharge was not for good cause.

2 (d) Paragraph (c) 2. does not apply to a discharge that occurs during a
3 probationary period of employment. During a probationary period of employment,
4 employment may be terminated at the will of either the employer or the employee
5 on notice to the other for any reason or for no reason, except as provided in par. (b)
6 or (c) 1. or 3. or as otherwise provided by law.

7 **(3) ACTION.** (a) Subject to par. (c), an employee may bring an action in circuit
8 court alleging a wrongful discharge committed by an employer in violation of sub. (2).
9 In any such action the employer has the burden of proving by clear and convincing
10 evidence that the employee was discharged fairly and not for a wrongful reason.

11 (b) If a court in an action filed under par. (a) finds that an employer has
12 committed a wrongful discharge, the court may award the employee lost wages and
13 lost fringe benefits for a period not to exceed 4 years from the date of discharge,
14 together with interest on the lost wages and lost fringe benefits and reasonable costs
15 and attorney fees incurred in the action, and may order such other action as will
16 effectuate the purpose of this section. The court shall deduct from the award interim
17 earnings, including amounts the employee could have earned with reasonable
18 diligence, except that before interim earnings are deducted from lost wages, the court
19 shall deduct from the interim earnings any reasonable amounts expended by the
20 employee in searching for, obtaining, or relocating to new employment. If the court
21 awards lost wages and lost fringe benefits under this paragraph and finds that the
22 standard under s. 895.043 (3) is violated, the court may also order the payment of
23 punitive damages based on that award in accordance with s. 895.043.

24 (c) 1. Subject to subds. 2. and 3., an action under par. (a) shall be commenced
25 within one year after the date of discharge, or be barred.

1 2. Except as provided in subd. 3., if an employer maintains written internal
2 procedures under which an employee may appeal a discharge within the
3 organizational structure of the employer, the employee shall first exhaust those
4 procedures prior to filing an action under par. (a). The employee’s failure to initiate
5 or exhaust available internal procedures is a defense to an action brought under par.
6 (a). If the employer’s internal procedures are not completed within 90 days after the
7 date the employee initiates the internal procedures, the employee may file an action
8 under par. (a) and for purposes of this subdivision the employer’s internal procedures
9 are considered exhausted. The limitation period in subd. 1. is tolled until the
10 procedures are exhausted, except that in no case may the provisions of the employer’s
11 internal procedures extend the limitation period under subd. 1. by more than 120
12 days.

13 3. If the employer maintains written internal procedures under which an
14 employee may appeal a discharge within the organizational structure of the
15 employer, the employer shall, within 7 days after the date of the discharge, notify the
16 discharged employee of the existence of those procedures and shall supply the
17 discharged employee with a copy of those procedures. If an employer to which this
18 subdivision applies fails to comply with this subdivision, the discharged employee
19 need not comply with subd. 2.

20 **(4) PREEMPTION OF COMMON-LAW REMEDIES.** Except as provided in this section,
21 no claim for discharge may arise from tort or express or implied contract.”.

22 **3.** Page 5, line 6: before that line insert:

23 “**SECTION 11r.** 814.04 (intro.) of the statutes is amended to read:

