



2015 SENATE BILL 270

September 29, 2015 - Introduced by Senators ERPENBACH, WIRCH, CARPENTER, HANSEN and HARRIS DODD, cosponsored by Representatives OHNSTAD, HESSELBEIN, BERCEAU, BOWEN, CONSIDINE, GENRICH, GOYKE, HEBL, JOHNSON, KESSLER, MILROY, SARGENT, SINICKI, SUBECK, C. TAYLOR, YOUNG, ZAMARRIPA and ZEPNICK. Referred to Committee on Labor and Government Reform.

1 **AN ACT** *to amend* 814.04 (intro.) and 893.43; and *to create* 103.11 and 893.995
2 of the statutes; **relating to:** wrongful discharge from employment.

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, the employer-employee relationship is governed by the employment-at-will doctrine, under which an employer may discharge an employee “for good cause, for no cause, or even for a cause morally wrong, without being thereby guilty of a legal wrong.” *Hausman v. St. Croix Care Center*, 214 Wis. 2d 655 (1997).

This bill prohibits an employer, including the state, from discharging an employee unfairly or for any wrongful reason, except that this prohibition does not apply to: 1) a discharge that the employee has chosen to contest under any other state or federal law that provides a procedure or remedy for contesting the discharge; 2) a discharge that is covered by a written collective bargaining agreement; 3) a discharge that is covered by a written contract of employment for a specific term; or 4) a discharge of an employee who any other state or federal law specifically provides is an employee at will or is to serve at the pleasure of a public official or other appointing authority.

The bill, however, does not preclude an employer from discharging an employee for a violation of a work rule or performance standard if the procedures used to discharge the employee are fair. Under the bill, a discharge of an employee for a violation of a work rule or performance standard is unfair if any of the following applies:

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

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

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

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

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

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

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

Also, under the bill, a discharge is for a wrongful reason if: 1) the discharge was in retaliation for the employee's refusal to violate a public policy or reporting a violation of a public policy; 2) the employer violated the express provisions of its own written personnel policy; or 3) except during an employee's probationary period, the discharge was not for good cause, which is defined in the bill as reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or any other legitimate business reason.

The bill permits an employee to bring an action in circuit court alleging a wrongful discharge committed by an employer in violation of the bill within one year after the date of the discharge and provides that in any such action the employer has the burden of proving by clear and convincing evidence that the employee was discharged fairly and not for a wrongful reason. If the court finds that an employer has committed a wrongful discharge, the court may award the employee lost wages and lost fringe benefits for a period not to exceed four years from the date of discharge, together with interest, costs, and attorney fees, less earnings that the employee earned or with reasonable diligence could have earned during the interim. The court may also order such other action, for example reinstatement, as will effectuate the purpose of the bill and, if the court finds that the employer acted maliciously or in intentional disregard of the employee's rights, may order punitive damages based on the amount of lost wages and lost fringe benefits awarded.

For further information see the *state and local* 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:

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

3 (a) “Constructive discharge” means the voluntary termination of employment
4 by an employee because of a situation created by an act or omission of his or her
5 employer that an objective, reasonable person would find so intolerable that
6 voluntary termination is the only reasonable alternative. “Constructive discharge”
7 does not include voluntary termination because of an employer’s refusal to promote
8 the employee or improve wages, responsibilities, or other terms and conditions of
9 employment.

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

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

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

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

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1 (f) "Lost fringe benefits" means the value of any employer-paid vacation leave,
2 sick leave, health insurance plan, disability insurance plan, life insurance plan, and
3 pension benefit plan in force on the date of termination of employment that the
4 employee would have received had the employee not been discharged.

5 (g) "Lost wages" means the gross amount of wages that would have been
6 reported to the Internal Revenue Service as gross income on form W-2 had the
7 employee not been discharged and includes additional compensation deferred at the
8 option of the employee.

9 (h) "Probationary period" means a period of 6 months from the date an
10 employee is hired, unless the employer, at the time the employee is hired, expressly
11 provides for a shorter probationary period or for no probationary period, in which
12 case "probationary period" means that period so provided.

13 (i) "Public policy" means a policy in effect at the time of the discharge
14 concerning the public health, safety, or welfare established by constitutional
15 provision, statute, or administrative rule or regulation.

16 (j) "Wrongful discharge" means a discharge from employment that is unfair for
17 a reason specified in sub. (2) (b) or that is for a wrongful reason specified in sub. (2)
18 (c).

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

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

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

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

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

6 (b) Paragraph (a) does not preclude an employer from discharging an employee
7 for a violation of a work rule or performance standard if the procedures used to
8 discharge the employee are fair. For purposes of par. (a), a discharge of an employee
9 for a violation of a work rule or performance standard is unfair if any of the following
10 applies:

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

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

15 3. The employer did not conduct an interview with the employee, or hold a
16 hearing, concerning the violation prior to the discharge, did not conduct that
17 interview or hearing promptly after the violation, or did not provide the employee
18 with a precise description of the conduct constituting the violation.

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

21 5. The violation is the same as or substantially similar to a violation committed
22 by another employee who was not discharged for committing the same or a
23 substantially similar violation.

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

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

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

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

7 2. The employer violated the express provisions of its own written personnel
8 policy.

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

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

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

19 (b) If a court in an action filed under par. (a) finds that an employer has
20 committed a wrongful discharge, the court may award the employee lost wages and
21 lost fringe benefits for a period not to exceed 4 years from the date of discharge,
22 together with interest on the lost wages and lost fringe benefits and reasonable costs
23 and attorney fees incurred in the action, and may order such other action as will
24 effectuate the purpose of this section. The court shall deduct from the award interim
25 earnings, including amounts the employee could have earned with reasonable

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1 diligence, except that before interim earnings are deducted from lost wages, the court
2 shall deduct from the interim earnings any reasonable amounts expended by the
3 employee in searching for, obtaining, or relocating to new employment. If the court
4 awards lost wages and lost fringe benefits under this paragraph and finds that the
5 standard under s. 895.043 (3) is violated, the court may also order the payment of
6 punitive damages based on that award in accordance with s. 895.043.

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

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

21 3. If the employer maintains written internal procedures under which an
22 employee may appeal a discharge within the organizational structure of the
23 employer, the employer shall, within 7 days after the date of the discharge, notify the
24 discharged employee of the existence of those procedures and shall supply the
25 discharged employee with a copy of those procedures. If an employer to which this

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1 subdivision applies fails to comply with this subdivision, the discharged employee
2 need not comply with subd. 2.

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

5 **SECTION 2.** 814.04 (intro.) of the statutes is amended to read:

6 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
7 (b), 100.30 (5m), 103.11 (3) (b), 106.50 (6) (i) and (6m) (a), 115.80 (9), 767.553 (4) (d),
8 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3),
9 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),
10 when allowed costs shall be as follows:

11 **SECTION 3.** 893.43 of the statutes is amended to read:

12 **893.43 Action on contract.** An Except as provided in ss. 893.40 and 893.995,
13 an action upon any contract, obligation, or liability, express or implied, including an
14 action to recover fees for professional services, ~~except those mentioned in s. 893.40,~~
15 shall be commenced within 6 years after the cause of action accrues or be barred.

16 **SECTION 4.** 893.995 of the statutes is created to read:

17 **893.995 Wrongful discrimination; civil remedy.** Any civil action arising
18 under s. 103.11 is subject to the limitations of s. 103.11 (3) (c).

19 **SECTION 5. Initial applicability.**

20 (1) This act first applies to a discharge that occurs on the effective date of this
21 subsection.

22 (END)