

1983 Assembly Bill 240

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1983 Wisconsin Act 409

AN ACT to amend chapter 230 (title), 20.865 (1) (a), (g) and (q), 111.93 (3), 230.01 (2), 230.03 (4), 230.04 (3) and 230.45 (1) (b); and to create subchapter III of chapter 230, 230.45 (1) (gm) and 895.65 of the statutes, relating to employe disclosure of improper activities in governmental units and prohibiting retaliation because of such disclosure, granting rule-making authority 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, as affected by 1983 Wisconsin Act 27, 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, 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.

(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, 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, 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. 111.93 (3) of the statutes, as affected by 1983 Wisconsin Act 46, is amended to read:

111.93 (3) Except as provided in ss. 40.05 ~~and~~, 40.80 (3) ~~and~~ 230.88 (2) (b), if a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement.

SECTION 3. Chapter 230 (title) of the statutes is amended to read:

CHAPTER 230
STATE EMPLOYMENT RELATIONS DEPARTMENT

SECTION 4. 230.01 (2) of the statutes is amended to read:

230.01 (2) It is the policy of the state and the responsibility of the secretary and the administrator to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards. It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry, sexual orientation or political affiliation. If there are substantial disparities between the proportions of members of racial, ethnic, gender, or handicap groups in a classified civil service classification in an agency and the proportions of such groups in this state, it is the policy of this state to take affirmative action which is not in conflict with other provisions of this subchapter to correct the imbalances and to eliminate the present effects of past discrimination. Gender group does not include any group discriminated against because of sexual orientation. It is the policy of the state to ensure its employees opportunities for satisfying careers and fair treatment based on the value of each employee's services. It is the policy of this state to encourage disclosure of information under subch. III and to ensure that any employe employed by a governmental unit is protected from retaliatory action for disclosing information under subch. III.

SECTION 5. 230.03 (4) of the statutes is amended to read:

230.03 (4) ~~"Appointing authority"~~ Except as provided in s. 230.80 (1m), "appointing authority" means the chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes.

SECTION 6. 230.04 (3) of the statutes, as affected by 1983 Wisconsin Act 27, is amended to read:

230.04 (3) The secretary may issue enforceable orders on all matters relating to the administration, enforcement and effect of this chapter and the rules prescribed thereunder except on matters relating to the provisions of subch. III or to those provisions of subch. II for which responsibility is specifically charged to the administrator.

SECTION 7. 230.45 (1) (b) of the statutes is amended to read:

230.45 (1) (b) Receive and process complaints of discrimination under s. 111.375 (2). In the course of investigating or otherwise processing such a complaint, the commission may require that an interview with any state employe, except a management or supervisory employe who is a party to or immediately involved in the subject matter of the complaint, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employe voluntarily requests that presence. An appointing authority shall permit an employe to be interviewed without loss of pay and to have an employe representative present at the interview. An appointing authority of

an employe to be interviewed may require the commission to give the appointing authority reasonable notice prior to the interview.

SECTION 8. 230.45 (1) (gm) of the statutes is created to read:

230.45 (1) (gm) Receive and process complaints of retaliatory disciplinary action under s. 230.85.

SECTION 9. Subchapter III of chapter 230 of the statutes is created to read:

CHAPTER 230
SUBCHAPTER III
EMPLOYE PROTECTION

230.80 Definitions. In this subchapter:

(1) "Abuse of authority" means an arbitrary or capricious exercise of power.

(1m) "Appointing authority" means the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law.

(2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.

(b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.

(c) Reassignment.

(d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

(3) "Employe" means any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(4) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(5) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

(6) "Merit further investigation" means reasonably indicates the existence of a situation justifying inquiry.

(7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

(8) "Retaliatory action" means a disciplinary action taken because of any of the following:

(a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).

(b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employe.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).

(9) "Substantial waste of public funds" means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

230.81 Employee disclosure. (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:

(a) Disclose the information in writing to the employe's supervisor.

(b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.

(2) Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.

(3) Any disclosure of information by an employe to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

230.82 Processing of information. (1) A governmental unit to which an employe discloses information under s. 230.81 (1) shall process it as provided in this section. Within 30 days of receiving the information, the governmental unit shall either initially determine if it merits further investigation or refer the information to a governmental unit better able to initially determine if it merits further investigation. A governmental unit which initially determines information to merit further investigation shall, within 30 days of that determination, either commence a full investigation into the truth of the information or refer the information to a governmental unit better able to conduct such an investigation, which shall commence it within 30 days of referral. A governmental unit may disclose or refer information to an appropriate law enforcement agency or district or federal attorney as part of an investigation or in lieu of referral to another governmental unit, if the law enforcement agency or district or federal attorney is best able to conduct the investigation. Any full investigation commenced shall be completed within a reasonable time.

(2) A governmental unit which initially determines that information merits further investigation, or which after a full investigation finds information to be true, shall so inform the employe and his or her appointing authority in writing. A governmental unit

which initially determines information not to merit further investigation, refers the information to another governmental unit or after a full investigation finds information to be untrue shall so inform the employe in writing.

(3) A governmental unit which investigates or otherwise processes information disclosed under s. 230.81 may require that an interview with any employe described in s. 230.80 (3), except a management or supervisory employe immediately involved in the subject matter of the information disclosed, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employe voluntarily requests that presence. An appointing authority shall permit an employe to be interviewed without loss of pay and to have an employe representative present at the interview. An appointing authority of an employe to be interviewed may require the governmental unit to give the appointing authority reasonable notice prior to the interview.

(4) A governmental unit shall keep the identity of the employe confidential until the governmental unit determines the information merits further investigation. If a governmental unit conducts a full investigation, it shall keep the identity of the employe confidential if it is reasonably possible to do so.

230.83 Retaliatory action prohibited. (1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe.

(2) This section does not apply to an employe who discloses information if the employe knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employe or for the employe's immediate family, unless the employe discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

(3) Nothing in this section restricts the right of an employer to take appropriate disciplinary action against an employe who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation.

230.85 Enforcement. (1) An employe who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the commission, specifying the nature of the retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

(2) The commission shall receive and investigate any complaint under sub. (1). In the course of investigating or otherwise processing such a complaint, the commission may require that an interview with any employe described in s. 230.80 (3), except a management or supervisory employe who is a party to or is immediately involved in the subject matter of the complaint, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employe voluntarily requests that presence. An appointing authority shall permit an employe to be interviewed without loss of pay and to have an employe representative present at the interview. An appointing authority of an employe to be interviewed may require the commission to give the appointing authority reasonable notice prior to the interview. If the commission finds probable cause to believe that a retaliatory action has occurred or was threatened, it may endeavor to remedy the problem through conference, conciliation or persuasion. If that endeavor is not successful, the commission shall issue and serve a written notice of hearing, specifying the nature of the retaliatory action which has occurred or was threatened, and requiring the person named, in this section called the "respondent", to answer the complaint at a hearing. The notice shall specify the place of hearing and a time of hear-

ing not less than 30 days after service of the complaint upon the respondent nor less than 10 days after service of the notice of hearing. If, however, the commission determines that an emergency exists with respect to a complaint, the notice of hearing may specify a time of hearing within 30 days after service of the complaint upon the respondent, but not less than 10 days after service of the notice of hearing. The testimony at the hearing shall be recorded or taken down by a reporter appointed by the commission.

(3) (a) After hearing, the commission shall make written findings and orders. If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. In addition, the commission may take any other appropriate action, including but not limited to the following:

1. Order reinstatement or restoration of the employe to his or her previous position with or without back pay.

2. Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

3. Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

4. Order payment of the employe's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the commission.

5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:

- a. Placement of information describing the respondent's violation of s. 230.83 in the respondent's personnel file.

- b. Issuance of a letter reprimanding the respondent.

- c. Suspension.

- d. Termination.

(b) If, after hearing, the commission finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The commission shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the commission finds by unanimous vote that the employe filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employe or the employe's attorney, or assessed so that the employe and the employe's attorney each pay a portion. To find a complaint frivolous the commission must find that either s. 814.025 (3) (a) or (b) applies or that both s. 814.025 (3) (a) and (b) apply.

(c) Pending final determination by the commission of any complaint under this section, the commission may make interlocutory orders.

(d) Interim earnings or amounts earnable with reasonable diligence by the person subjected to the retaliatory action or threat shall reduce back pay otherwise allowable. Amounts received by the person subjected to the retaliatory action or threat as unemployment benefits or welfare payments do not reduce the back pay otherwise allowable, but shall be withheld from the person subjected to the retaliatory action or threat and immediately paid to the unemployment reserve fund or to the welfare agency making the payment.

(4) The commission shall serve a certified copy of the findings and order on the respondent and, if the respondent is a natural person, upon the respondent's appointing authority.

(5) (a) If a respondent does not comply with any lawful order by the commission, for each such failure the respondent shall forfeit a sum of not less than \$10 nor more than \$100. Every day during which a respondent fails to comply with any order of the commission constitutes a separate violation of that order.

(b) As an alternative to par. (a), the commission may enforce an order by a suit in equity.

(6) (a) If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.

(b) Paragraph (a) applies to a disciplinary action under s. 230.80 (2) (a) which occurs or is threatened within 2 years, or to a disciplinary action under s. 230.80 (2) (b), (c) or (d) which occurs or is threatened within one year, after an employe discloses information under s. 230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

230.87 Judicial review. Findings and orders of the commission under this subchapter are subject to judicial review under ch. 227. Upon that review, or in any enforcement action, the department of justice shall represent the commission unless a conflict of interest results from that representation. A court may order payment of a prevailing appellant employe's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to appear before the court. If the court finds that the appeal is frivolous, it shall award to the respondent reasonable attorney fees and costs. Payment may be assessed fully against the appellant, including a governmental unit, or the appellant's attorney or assessed so that the appellant and the appellant's attorney each pay a portion. To find an appeal frivolous, the court must find one or more of the following:

(a) The appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The appellant or appellant's attorney knew, or should have known, that the appeal 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.

230.88 Payment of award, judgment or settlement; effect of order, arbitration award or commencement of court action. (1) **PAYMENT.** Any award, judgment or settlement obtained by an employe under this subchapter shall be paid from the funds appropriated under s. 20.865 (1) (a), (g) and (q).

(2) **EFFECT.** (a) A final order issued under s. 230.85 or 230.87 which has not been appealed and for which the time of appeal has passed binds all parties who were subjected to the jurisdiction of the commission or the court and who received an opportunity to be heard. With respect to these parties, the decree is conclusive as to all issues of law and fact decided.

(b) No collective bargaining agreement supersedes the rights of an employe under this subchapter. However, nothing in this subchapter affects any right of an employe to pursue a grievance procedure under a collective bargaining agreement under subch. V of ch. 111, and if the commission determines that a grievance arising under such a collective bargaining agreement involves the same parties and matters as a complaint under s. 230.85, it shall order the arbitrator's final award on the merits conclusive as to the rights

of the parties to the complaint, on those matters determined in the arbitration which were at issue and upon which the determination necessarily depended.

(c) No later than 10 days before the specified time of hearing under s. 230.85 (2), an employe shall notify the commission orally or in writing if he or she has commenced or will commence an action in a court of record alleging matters prohibited under s. 230.83 (1). If the employe does not substantially comply with this requirement, the commission may assess against the employe any costs attributable to the failure to notify. Failure to notify the commission does not affect a court's jurisdiction to proceed with the action. Upon commencement of such an action in a court of record, the commission has no jurisdiction to process a complaint filed under s. 230.85 except to dismiss the complaint and, if appropriate, to assess costs under this paragraph.

230.89 Rule making and reporting. (1) The commission shall promulgate rules to carry out its responsibilities under this subchapter.

(2) Every 2 years, the commission shall report to the presiding officer of each house of the legislature regarding complaints filed, hearings held and actions taken under this subchapter, including the dollar amount of any monetary settlement or final monetary award which has become binding on the parties.

SECTION 10. 895.65 of the statutes is created to read:

895.65 Government employer retaliation prohibited. (1) In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3 of the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds that retaliation was the primary factor in an employer's or employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent

would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe, the court shall take any appropriate action, including but not limited to the following:

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding the employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.

3. Suspension.

4. Termination.

SECTION 11. Nonstatutory provisions. (1) (a) Except as provided in paragraph (b), within 90 days after the effective date of this act each governmental unit, as defined in section 230.80 (4) of the statutes, as created by this act, shall inform its employes of their rights under this act.

(b) No employer in the office of the governor, any court, the legislature or a service agency under subchapter IV of chapter 13 of the statutes is required to comply with paragraph (a).

(2) The personnel commission shall submit its first report under section 230.89 (2) of the statutes no later than 2 years after the effective date of this act.

SECTION 12. Program responsibility changes. In the sections of the statutes listed in Column A, the program responsibilities references shown in Column B are deleted and the program responsibilities references shown in Column C are inserted:

(1) JUSTICE.

A	B	C
Statute Sections	References Deleted	References Inserted
15.251 (intro.)	none	230.87

(2) PERSONNEL COMMISSION.

A	B	C
Statute Sections	References Deleted	References Inserted
15.801	none	subch. III of ch. 230

SECTION 13. Initial applicability. The treatment of section 230.88 (2) (b) of the statutes by this act applies to any employe covered by a collective bargaining agreement in effect on the effective date of this act, unless the collective bargaining agreement contains a specific provision to the contrary regarding employer retaliation or threat thereof for employe disclosure of information.
