

## 2007 SENATE BILL 85

March 8, 2007 – Introduced by Senators GROTHMAN, DARLING, LAZICH, ROESSLER and SCHULTZ, cosponsored by Representatives GUNDRUM, ALBERS, BALLWEG, GUNDERSON, HAHN, KESTELL, LEMAHIEU, MONTGOMERY, MURSAU, MUSSER, NASS, NERISON, OWENS, PETROWSKI, PRIDEMORE, STRACHOTA, VAN ROY, VOS and ZIPPERER. Referred to Committee on Judiciary and Corrections.

1     **AN ACT to amend** 230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.) and  
2             814.29 (3) (a); and **to create** 895.044 of the statutes; **relating to:** damages for  
3             frivolous claims.

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### *Analysis by the Legislative Reference Bureau*

Under current law, every document submitted to the court must be signed by a party or, if the party has an attorney, by the attorney. By signing the document, current law provides that the person is certifying that the document is not presented for any improper purpose, such as to harass or cause unnecessary delay, that the claims made in the document are warranted by existing law or a nonfrivolous extension, modification, or reversal of the law, that the facts presented in the document are likely to have evidentiary support, and that any factual denials in the document are warranted by evidence or, if so identified, reasonably based on a lack of information or belief. Currently, if the court determines that any of these conditions are not met, the court may impose an appropriate sanction on the responsible attorney or party. Under current law, the sanction is what is sufficient to deter repetition of the conduct, and may include payment of the reasonable attorney fees or other expenses resulting from the improper conduct. Monetary sanctions cannot be awarded against a represented party for making a claim that is not based on existing law or a nonfrivolous extension or modification of law, and before any monetary sanctions may be awarded by the court, the court must issue an order to show cause regarding the dismissal or settlement of the claim.

Under this bill, in civil actions, a party or his or her attorney is subject to damages for costs and fees for beginning, using, or continuing an action if that is done

**SENATE BILL 85**

solely for the purpose of harassing or maliciously injuring another and the party or attorney knew that there was no reasonable basis in law for the conduct or no good faith argument for an extension, modification, or reversal of the law. The bill allows a party to an action to ask the court by motion to determine if another party has violated these provisions, and if, by clear and convincing evidence, the court so finds, the court may do one of the following:

1. If the offending party withdraws or corrects the improper conduct within 21 days or a time set by the court, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees, taking into consideration the offending party's mitigating conduct.

2. If the offending party does not timely withdraw or correct the improper conduct, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees.

Under the bill, if an award of costs for violating these provisions is affirmed on appeal, the appellate court is required to send the action to the lower court to award the damages necessary to compensate the successful party for the actual reasonable attorney fees incurred in the appeal. In addition, if the appellate court finds that a party has committed a violation of one of these provisions in an appeal, the appellate court must, after completion of the appeal, send the action back to the lower court to award the damages necessary to compensate the offended party for the actual reasonable attorney fees incurred in the appeal.

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

1           **SECTION 1.** 230.85 (3) (b) of the statutes is amended to read:

2           230.85 (3) (b) If, after hearing, the division of equal rights finds that the  
3 respondent did not engage in or threaten a retaliatory action it shall order the  
4 complaint dismissed. The division of equal rights shall order the employee's  
5 appointing authority to insert a copy of the findings and orders into the employee's  
6 personnel file and, if the respondent is a natural person, order the respondent's  
7 appointing authority to insert such a copy into the respondent's personnel file. If the  
8 division of equal rights finds by unanimous vote that the employee filed a frivolous  
9 complaint it may order payment of the respondent's reasonable actual attorney fees  
10 and actual costs. Payment may be assessed against either the employee or the  
11 employee's attorney, or assessed so that the employee and the employee's attorney

**SENATE BILL 85**

1 each pay a portion. To find a complaint frivolous the division of equal rights must  
2 find that s. 802.05 (2) or 895.044 has been violated.

3 **SECTION 2.** 802.10 (7) of the statutes is amended to read:

4 **802.10 (7) SANCTIONS.** Violations of a scheduling or pretrial order are subject  
5 to ss. 802.05, 804.12 and, 805.03, and 895.044.

6 **SECTION 3.** 809.103 (2) (a) of the statutes is amended to read:

7 **809.103 (2) (a)** Is frivolous, as determined under s. 802.05 (2) or 895.044.

8 **SECTION 4.** 814.04 (intro.) of the statutes is amended to read:

9 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)  
10 (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4)  
11 (d), 769.313, ~~814.025~~, 802.05, 814.245, 895.035 (4), 895.044, 895.506, 895.443 (3),  
12 895.444 (2), 895.445 (3), 895.446 (3), 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b),  
13 and 995.10 (3), when allowed costs shall be as follows:

14 **SECTION 5.** 814.29 (3) (a) of the statutes is amended to read:

15 **814.29 (3) (a)** A request for leave to commence or defend an action, proceeding,  
16 writ of error or appeal without being required to pay fees or costs or to give security  
17 for costs constitutes consent of the affiant and counsel for the affiant that if the  
18 judgment is in favor of the affiant the court may order the opposing party to first pay  
19 the amount of unpaid fees and costs, including attorney fees under ss. 802.05 and,  
20 804.12 (1) (c), and 895.044 and under 42 USC 1988 and to pay the balance to the  
21 plaintiff.

22 **SECTION 6.** 895.044 of the statutes is created to read:

23 **895.044 Damages for maintaining certain claims and counterclaims.**

24 **(1)** A party or a party's attorney is subject to damages for costs and fees under this  
25 section for commencing, using, or continuing an action, special proceeding,

**SENATE BILL 85****SECTION 6**

1 counterclaim, defense, cross complaint, or appeal to which any of the following  
2 applies:

3 (a) The action, special proceeding, counterclaim, defense, cross complaint, or  
4 appeal was commenced, used, or continued in bad faith, solely for purposes of  
5 harassing or maliciously injuring another.

6 (b) The party or the party's attorney knew, or should have known, that the  
7 action, special proceeding, counterclaim, defense, cross complaint, or appeal was  
8 without any reasonable basis in law or equity and could not be supported by a good  
9 faith argument for an extension, modification, or reversal of existing law.

10 **(2)** Upon either party's motion made at any time during the proceeding or upon  
11 judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b)  
12 applies to an action or special proceeding commenced or continued by a plaintiff or  
13 a counterclaim, defense, or cross complaint commenced, used, or continued by a  
14 defendant, the court:

15 (a) May, if the party served with the motion withdraws, or appropriately  
16 corrects, the action, special proceeding, counterclaim, defense, or cross complaint  
17 within 21 days after service of the motion, or within such other period as the court  
18 may prescribe, award to the party making the motion, as damages, the actual costs  
19 incurred by the party as a result of the action, special proceeding, counterclaim,  
20 defense, or cross complaint, including the actual reasonable attorney fees the party  
21 incurred, including fees incurred in any dispute over the application of this section.  
22 In determining whether to award, and the appropriate amount of, damages under  
23 this paragraph, the court shall take into consideration the timely withdrawal or  
24 correction made by the party served with the motion.

**SENATE BILL 85**

1           (b) Shall, if a withdrawal or correction under par. (a) is not timely made, award  
2 to the party making the motion, as damages, the actual costs incurred by the party  
3 as a result of the action, special proceeding, counterclaim, defense, or cross  
4 complaint, including the actual reasonable attorney fees the party incurred,  
5 including fees incurred in any dispute over the application of this section.

6           **(2m)** If a party makes a motion under sub. (2), a copy of that motion and a notice  
7 of the date of the hearing on that motion shall be served on any party who is not  
8 represented by counsel only by personal service or by sending the motion to the party  
9 by registered mail.

10           **(3)** If an award under this section is affirmed upon appeal, the appellate court  
11 shall, upon completion of the appeal, remand the action to the trial court to award  
12 damages to compensate the successful party for the actual reasonable attorney fees  
13 the party incurred in the appeal.

14           **(4)** If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the  
15 appellate court shall, upon completion of the appeal, remand the action to the trial  
16 court to award damages to compensate the successful party for all the actual  
17 reasonable attorney fees the party incurred in the appeal. An appeal is subject to this  
18 subsection in its entirety if any element necessary to succeed on the appeal is  
19 supported solely by an argument that is described under sub. (1) (a) or (b).

20           **(5)** The costs and fees awarded under subs. (2) to (4) may be assessed fully  
21 against the party bringing the action, special proceeding, cross complaint, defense,  
22 counterclaim, or appeal or the attorney representing the party, or both, jointly and  
23 severally, or may be assessed so that the party and the attorney each pay a portion  
24 of the costs and fees.

