



**SENATE SUBSTITUTE AMENDMENT 1,
TO 2009 SENATE BILL 20**

April 8, 2009 – Offered by Senator HANSEN.

1 **AN ACT** *to amend* 111.39 (4) (d) and 814.04 (intro.); and *to create* 20.445 (1) (gr),
2 59.25 (3) (Lm), 111.39 (5) (d), 111.397, 814.61 (15) and 893.995 of the statutes;
3 **relating to:** authorizing the circuit court to order a person who engages in
4 discrimination in employment, unfair honesty testing, or unfair genetic testing
5 to pay compensatory and punitive damages and a fee and making an
6 appropriation.

Analysis by the Legislative Reference Bureau

Under the current fair employment law, a person alleging discrimination in employment or unfair honesty or genetic testing may file a complaint with the Department of Workforce Development (DWD) seeking action that will effectuate the purpose of the fair employment law, including reinstating the employee, providing back pay, and paying costs and attorney fees. The fair employment law, however, does not authorize DWD to award compensatory or punitive damages to a complainant or to impose any surcharges on the respondent.

This substitute amendment permits DWD or a person who has been discriminated against or subjected to unfair honesty or genetic testing to bring an action in circuit court to recover compensatory and punitive damages caused by the act of discrimination or unfair honesty or genetic testing, plus reasonable costs and

attorney fees incurred in the action, after the completion of all administrative proceedings before DWD and the Labor and Industry Review Commission concerning the violation. Those damages are in addition to any back pay or other amounts awarded in the administrative proceeding. The substitute amendment, however, does not permit an action for damages to be brought against the state, any agency of the state, or any local governmental unit or against any employer employing fewer than 15 individuals.

Under the substitute amendment, if the circuit court finds that a defendant has committed an act of discrimination or unfair honesty or genetic testing, the circuit court must order the defendant to pay to the person discriminated against compensatory and punitive damages in an amount that the circuit court finds appropriate, subject to the limitations, as follows:

1. If the defendant employs 100 or fewer employees, \$50,000.
2. If the defendant employs more than 100 but fewer than 201 employees, \$100,000.
3. If the defendant employs more than 200 but fewer than 501 employees, \$200,000.
4. If the defendant employs more than 500 employees, \$300,000.

Finally, the substitute amendment requires the circuit court to order the defendant to pay to the circuit court a fee equal to 10 percent of the amount of compensatory and punitive damages ordered. Fifty percent of a fee collected under the substitute amendment must be transmitted to the secretary of administration, deposited into the general fund, and credited to an appropriation account of DWD, which must use those moneys for the administration of the fair employment law. The balance must be retained by the county treasurer and used to pay for the operating costs of the circuit court.

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

1 **SECTION 1.** 20.445 (1) (gr) of the statutes is created to read:
2 20.445 (1) (gr) *Employment discrimination fees.* All moneys received from fees
3 collected under s. 111.397 (2) (b), for the administration of subch. II of ch. 111.

4 **SECTION 2.** 59.25 (3) (Lm) of the statutes is created to read:
5 59.25 (3) (Lm) Forward 50 percent of the fees received under s. 111.397 (2) (b)
6 to the secretary of administration for deposit in the general fund and credit to the
7 appropriation account under s. 20.445 (1) (gr).

8 **SECTION 3.** 111.39 (4) (d) of the statutes is amended to read:

1 111.39 (4) (d) The department shall serve a certified copy of the findings and
2 order on the respondent, the order to have the same force as other orders of the
3 department and be enforced as provided in s. 103.005. Any person aggrieved by
4 noncompliance with the order may have the order enforced specifically by suit in
5 equity. If the examiner finds that the respondent has not engaged in discrimination,
6 unfair honesty testing, or unfair genetic testing as alleged in the complaint, the
7 department shall serve a certified copy of the examiner's findings on the
8 complainant, together with an order dismissing the complaint. If the examiner finds
9 that the respondent has engaged in discrimination, unfair honesty testing, or unfair
10 genetic testing as alleged in the complaint, the department shall serve a certified
11 copy of the examiner's findings on the complainant, together with a notice advising
12 the complainant that after the completion of all administrative proceedings under
13 this section he or she may bring an action as provided in s. 111.397 (1) (a) to recover
14 compensatory and punitive damages as provided in s. 111.397 (2) (a) and advising the
15 complainant of the time under s. 111.397 (1) (b) within which the action must be
16 commenced or be barred.

17 **SECTION 4.** 111.39 (5) (d) of the statutes is created to read:

18 111.39 (5) (d) If the commission affirms a finding that the respondent has
19 engaged in discrimination, unfair honesty testing, or unfair genetic testing as
20 alleged in the complaint, the commission shall serve a certified copy of the
21 commission's decision on the complainant, together with a notice advising the
22 complainant that after the completion of all administrative proceedings under this
23 section he or she may bring an action as provided in s. 111.397 (1) (a) to recover
24 compensatory and punitive damages as provided in s. 111.397 (2) (a) and advising the

1 complainant of the time under s. 111.397 (1) (b) within which the action must be
2 commenced or be barred.

3 **SECTION 5.** 111.397 of the statutes is created to read:

4 **111.397 Civil action. (1)** (a) Except as provided in this paragraph, after the
5 completion of all administrative proceedings under s. 111.39 concerning a violation
6 of s. 111.321, 111.37, or 111.372, the department or a person discriminated against
7 or subjected to unfair honesty testing or unfair genetic testing may bring an action
8 in circuit court against any employer, labor organization, or employment agency that
9 engaged in that discrimination, unfair honesty testing, or unfair genetic testing to
10 recover compensatory and punitive damages caused by the violation, plus
11 reasonable costs and attorney fees incurred in the action. Those damages are in
12 addition to any back pay or other amounts awarded under s. 111.39. The department
13 or a person discriminated against or subjected to unfair honesty testing or unfair
14 genetic testing may not bring an action under this paragraph against the state, any
15 agency of the state, or any local governmental unit, as defined in s. 19.42 (7u), or
16 against any employer, labor organization, or employment agency employing fewer
17 than 15 individuals for each working day in each of 20 or more calendar weeks in the
18 current or preceding year.

19 (b) An action under par. (a) shall be commenced within 60 days after the date
20 on which a copy of the final decision under s. 111.39 (4) (d) is mailed to the last-known
21 address of the complainant or, if that decision is reviewed by the commission, within
22 60 days after the date on which a copy of the final decision under s. 111.39 (5) (d) is
23 mailed to the last-known address of the complainant, or be barred.

24 (c) If a petition for judicial review of the findings and order of the commission
25 concerning the same violation as the violation giving rise to the action under par. (a)

1 is filed, the court shall consolidate the proceeding for judicial review and the action
2 under par. (a).

3 **(2)** (a) Subject to pars. (c) and (d), in an action under sub. (1) (a), the circuit court
4 shall order the defendant to pay to the person discriminated against or subjected to
5 unfair honesty testing or unfair genetic testing compensatory and punitive damages
6 in an amount that the circuit court or jury finds appropriate, plus reasonable costs
7 and attorney fees incurred in the action. Those damages are in addition to any back
8 pay or other amounts awarded under s. 111.39. The sum of the amount of
9 compensatory damages for future economic losses and for pain and suffering,
10 emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic
11 losses and the amount of punitive damages that a circuit court may order may not
12 exceed the following:

13 1. In the case of a defendant that employs 100 or fewer employees for each
14 working day in each of 20 or more calendar weeks in the current or preceding year,
15 \$50,000.

16 2. In the case of a defendant that employs more than 100 but fewer than 201
17 employees for each working day in each of 20 or more calendar weeks in the current
18 or preceding year, \$100,000.

19 3. In the case of a defendant that employs more than 200 but fewer than 501
20 employees for each working day in each of 20 or more calendar weeks in the current
21 or preceding year, \$200,000.

22 4. In the case of a defendant that employs more than 500 employees for each
23 working day in each of 20 or more calendar weeks in the current or preceding year,
24 \$300,000.

1 (b) Subject to par. (c), in an action under sub. (1) (a), the circuit court shall also
2 order the defendant to pay to the court a fee equal to 10 percent of the amount of
3 compensatory and punitive damages ordered under par. (a). The clerk of circuit court
4 shall collect and transmit the amount of any fee ordered under this paragraph to the
5 county treasurer, who shall pay 50 percent of the fee to the secretary of
6 administration under s. 59.25 (3) (Lm) and retain the balance to pay for the cost of
7 operating the circuit court of the county. The secretary of administration shall
8 deposit all moneys received under this paragraph into the general fund to be credited
9 to the appropriation account under s. 20.445 (1) (gr).

10 (c) If the circuit court orders any payment under par. (a) or (b) because of a
11 violation of s. 111.321, 111.37, or 111.372 by an individual employed by an employer,
12 the employer of that individual is liable for the payment.

13 (d) 1. In this paragraph, “consumer price index” means the average of the
14 consumer price index for all urban consumers, U.S. city average, as determined by
15 the bureau of labor statistics of the U.S. department of labor.

16 2. Except as provided in this subdivision, beginning on July 1, 2010, and on
17 each July 1 after that, the department shall adjust the amounts specified in par. (a)
18 1., 2., 3., and 4. by calculating the percentage difference between the consumer price
19 index for the 12–month period ending on December 31 of the preceding year and the
20 consumer price index for the 12–month period ending on December 31 of the year
21 before the preceding year and adjusting those amounts by that percentage
22 difference. The department shall publish the adjusted amounts calculated under
23 this subdivision in the Wisconsin Administrative Register, and the adjusted amounts
24 shall apply to actions commenced under sub. (1) (a) beginning on July 1 of the year
25 of publication. This subdivision does not apply if the consumer price index for the

1 12-month period ending on December 31 of the preceding year did not increase over
2 the consumer price index for the 12-month period ending on December 31 of the year
3 before the preceding year.

4 **SECTION 6.** 814.04 (intro.) of the statutes is amended to read:

5 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
6 (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 281.36 (2) (b)
7 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.443 (3), 895.444 (2),
8 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and
9 995.10 (3), when allowed costs shall be as follows:

10 **SECTION 7.** 814.61 (15) of the statutes is created to read:

11 **814.61 (15) ACTION FOR EMPLOYMENT DISCRIMINATION DAMAGES.** On ordering a
12 defendant to pay damages under s. 111.397 (2) (a), the fee prescribed in s. 111.397 (2)
13 (b).

14 **SECTION 8.** 893.995 of the statutes is created to read:

15 **893.995 Employment discrimination; civil remedies.** Any civil action
16 arising under s. 111.397 is subject to the limitations of s. 111.397 (1) (b).

17 **SECTION 9. Initial applicability.**

18 (1) EMPLOYMENT DISCRIMINATION DAMAGES. This act first applies to acts of
19 employment discrimination, unfair honesty testing, or unfair genetic testing
20 committed on the effective date of this subsection.

21 **SECTION 10. Effective date.**

22 (1) This act takes effect on the day after publication, or on the 2nd day after
23 publication of the 2009–11 biennial budget act, whichever is later.

24 (END)