



State of Wisconsin
2015 - 2016 LEGISLATURE

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2015 ASSEMBLY BILL 231

May 19, 2015 - Introduced by Representatives POPE, YOUNG, JOHNSON, SUBECK, C. TAYLOR, SARGENT, SINICKI, ZAMARRIPA, BERCEAU, MASON, KESSLER, OHNSTAD and CONSIDINE, cosponsored by Senators MILLER, ERPENBACH, L. TAYLOR, C. LARSON and HARRIS DODD. Referred to Committee on Judiciary.

1 **AN ACT to amend** 102.03 (2), 102.81 (5), 102.82 (1) and 814.04 (intro.); and **to**
2 **create** 102.80 (1) (dm), 102.81 (4g), 103.08 and 893.997 of the statutes;
3 **relating to:** prohibiting abusive work environments and permitting a person
4 who has been subjected to such an environment to bring a civil action.

Analysis by the Legislative Reference Bureau

Current law. Under current law, worker's compensation is generally the exclusive remedy of an employee against his or her employer, a coemployee, or the employer's worker's compensation insurer for an injury sustained while performing services growing out of and incidental to employment.

Civil action for abusive work environment. This bill provides an exception to that exclusive remedy provision. Under this bill, an employee who alleges that he or she has been injured by being subjected to an abusive work environment or by being subjected to retaliation or a threat of retaliation for opposing an abusive work environment or for initiating, or in any manner participating in, an investigation, action, or proceeding to enforce the right not to be subjected to an abusive work environment (collectively "unlawful employment practice") may bring an action in circuit court against the employer or employee who allegedly engaged in the unlawful employment practice for such relief as the court may consider appropriate. The aggrieved employee must commence an action within one year after the last act constituting the unlawful employment practice occurred.

Relief. If the circuit court finds that an employer or employee has engaged in an unlawful employment practice, the court may enjoin the employer or employee

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from engaging in that practice and may grant such other relief as the court may consider appropriate, including reinstatement of the aggrieved employee, removal from the aggrieved employee's work area of the person who engaged in the abusive conduct, medical expenses, back pay, front pay, compensation for pain and suffering, compensation for emotional distress, punitive damages, and reasonable costs and attorney fees. If the circuit court orders payment of money because of an unlawful employment practice engaged in by an employee, the employer of the employee is liable for that payment. If an employer is found to have engaged in an unlawful employment practice that did not result in an adverse employment action against the aggrieved employee, the employer is not liable for compensation for emotional distress or punitive damages unless the abusive conduct was extreme and outrageous.

Affirmative defenses. The bill allows an employer or employee against whom an aggrieved employee brings an action for an unlawful employment practice to plead affirmative defenses as follows:

1. If the alleged unlawful employment practice did not result in an adverse employment action against the aggrieved employee, the employer may plead as an affirmative defense that a) the employer exercised reasonable care to prevent and promptly correct the abusive conduct that was the basis for the aggrieved employee's cause of action; and b) the aggrieved employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities the employer provided to prevent or correct that abusive conduct.

2. If the alleged unlawful employment practice resulted in an adverse employment action against the aggrieved employee, the employer may plead as an affirmative defense that the aggrieved employee's complaint is based on a) an adverse employment action that was reasonably taken for poor performance, misconduct, or economic necessity; b) an adverse employment action that was taken in response to a reasonable performance evaluation; or c) a reasonable investigation of a potentially illegal or unethical activity.

3. An employee who is alleged to have engaged in an unlawful employment practice may plead as an affirmative defense that the employee engaged in that practice at the direction of the employer under an actual or implied threat of an adverse employment action against the employee for not engaging in that practice.

Double recovery prohibited. The bill requires the court to reduce the amount awarded for medical expenses, back pay, or front pay in an action for an unlawful employment practice by the amount of medical expenses or disability benefits that the employer's worker's compensation insurer, the employer, if self-insured, or the Department of Workforce Development (DWD), if the employer is uninsured, has paid or is obligated to pay under the worker's compensation law for an injury arising out of the same underlying behavior as the behavior giving rise to the unlawful employment practice and to order the employer to reimburse the insurer or DWD for the amount of the medical expenses or disability benefits that the insurer or DWD has paid or is obligated to pay under the worker's compensation law or for the amount awarded in the action for medical expenses, back pay, or front pay, whichever is less.

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Similarly, the bill provides that, if the aggrieved employee recovers medical expenses, back pay, or front pay in an action for an unlawful employment practice arising out of the same underlying behavior as the behavior giving rise to an injury that is compensable under the worker's compensation law, the amount payable for medical expenses or disability benefits under the worker's compensation law for that injury is reduced by the amount recovered for medical expenses, back pay, or front pay under the unlawful employment practice action.

Definitions. For purposes of the bill:

1. "Abusive work environment" means a work environment in which an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm or psychological harm to that employee.

2. "Abusive conduct" means conduct, including acts or omissions, by an employer or employee, that a reasonable person would find to be abusive based on the severity, nature, and frequency of the conduct. "Abusive conduct" includes repeated infliction of verbal abuse such as derogatory remarks, insults, and epithets; verbal, nonverbal, or physical conduct that is threatening, intimidating, or humiliating; sabotage or undermining of an employee's work performance; or, as an aggravating factor, exploitation of an employee's known psychological or physical illness or disability. "Abusive conduct," however, does not include a single act unless that act is especially severe or egregious.

3. "Adverse employment action" means an action taken by an employer with respect to an employee that has the effect of a penalty, including dismissal or suspension from employment, demotion, denial of a promotion, unfavorable transfer or reassignment, reduction in compensation, or denial of increased compensation. "Adverse employment action" also includes a situation in which an employee resigns from employment because the employee reasonably believes that he or she was subjected to an abusive work environment and, prior to the employee resigning, the employer was aware of the abusive conduct that gave rise to the abusive work environment and the employer failed to stop it.

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

1 **SECTION 1.** 102.03 (2) of the statutes is amended to read:
 2 102.03 (2) ~~Where such~~ Except as provided in this subsection, when those
 3 conditions exist the right to the recovery of compensation under this chapter shall
 4 be the exclusive remedy against the employer, any other employee of the same
 5 employer, and the worker's compensation insurance carrier. This section does not
 6 limit the right of an employee to bring action against any coemployee for an assault

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1 intended to cause bodily harm, or against a coemployee for negligent operation of a
2 motor vehicle not owned or leased by the employer, against the employer or a
3 coemployee for an unlawful employment practice under s. 103.08 (3), or against a
4 coemployee of the same employer to the extent that there would be liability of a
5 governmental unit to pay judgments against employees under a collective
6 bargaining agreement or a local ordinance.

7 **SECTION 2.** 102.80 (1) (dm) of the statutes is created to read:

8 102.80 (1) (dm) Amounts received under s. 103.08 (6) (a) 1.

9 **SECTION 3.** 102.81 (4g) of the statutes is created to read:

10 102.81 (4g) If an injured employee who received one or more payments under
11 sub. (1) begins an action against the employee's employer or a coemployee under s.
12 103.08 (3) for an unlawful employment practice arising out of the same underlying
13 behavior as the behavior giving rise to the injury that is compensable under sub. (1),
14 the injured employee shall provide to the department a copy of all papers filed by any
15 party to the action. If the injured employee is awarded medical expenses, back pay,
16 or front pay under s. 103.08 (5) (a), the employer shall reimburse the department as
17 provided in s. 103.08 (6) (a) 1.

18 **SECTION 4.** 102.81 (5) of the statutes is amended to read:

19 102.81 (5) The department of justice may bring an action to collect the payment
20 under sub. (4) or (4g).

21 **SECTION 5.** 102.82 (1) of the statutes is amended to read:

22 102.82 (1) Except as provided in sub. (2) (ar), an uninsured employer shall
23 reimburse the department for any payment made under s. 102.81 (1) to or on behalf
24 of an employee of the uninsured employer or to an employee's dependents and for any
25 expenses paid by the department in administering the claim of the employee or

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1 dependents, less amounts repaid by the uninsured employer, employee, or
2 dependents under s. 102.81 (4) (b) or (4g). The reimbursement owed under this
3 subsection is due within 30 days after the date on which the department notifies the
4 uninsured employer that the reimbursement is owed. Interest shall accrue on
5 amounts not paid when due at the rate of 1% per month.

6 **SECTION 6.** 103.08 of the statutes is created to read:

7 **103.08 Abusive work environments. (1) DEFINITIONS.** In this section:

8 (a) “Abusive conduct” means conduct, including acts or omissions, by an
9 employer or employee, that a reasonable person would find to be abusive based on
10 the severity, nature, and frequency of the conduct. “Abusive conduct” includes
11 repeated infliction of verbal abuse such as derogatory remarks, insults, and epithets;
12 verbal, nonverbal, or physical conduct that is threatening, intimidating, or
13 humiliating; sabotage or undermining of an employee’s work performance; or, as an
14 aggravating factor, exploitation of an employee’s known psychological or physical
15 illness or disability. “Abusive conduct” does not include a single act unless that act
16 is especially severe or egregious.

17 (b) “Abusive work environment” means a work environment in which an
18 employer or one or more its employees, acting with intent to cause pain or distress
19 to an employee, subjects that employee to abusive conduct that causes physical harm
20 or psychological harm to that employee.

21 (c) “Adverse employment action” means an action taken by an employer with
22 respect to an employee that has the effect, in whole or in part, of a penalty, including
23 dismissal or suspension from employment, demotion, denial of a promotion,
24 unfavorable transfer or reassignment, reduction in compensation, or denial of

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1 increased compensation. “Adverse employment action” also includes a constructive
2 discharge.

3 (d) “Aggrieved employee” means an employee who brings an action under sub.
4 (3) alleging that he or she has been injured by an unlawful employment practice.

5 (e) “Constructive discharge” means a situation in which an employee resigns
6 from employment because the employee reasonably believes that he or she was
7 subjected to an abusive work environment and, prior to the employee resigning, the
8 employer was aware of the abusive conduct that gave rise to the abusive work
9 environment and the employer failed to stop it.

10 (f) “Employee” means an individual employed by an employer.

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

17 (h) “Physical harm” means the impairment of a person’s physical health or
18 bodily integrity.

19 (i) “Psychological harm” means the impairment of a person’s mental health.

20 (j) “Retaliate” means to take an action that negatively affects the terms,
21 conditions, and privileges of an employee’s employment.

22 (k) “Unlawful employment practice” means an unlawful employment practice
23 prohibited under sub. (2).

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1 **(2) ABUSIVE WORK ENVIRONMENT PROHIBITED.** (a) It is an unlawful employment
2 practice for an employer or employee to subject an employee to an abusive work
3 environment.

4 (b) It is an unlawful employment practice for an employer or employee to
5 retaliate or threaten to retaliate in any manner against an employee for any of the
6 following reasons:

7 1. Because the employee opposed an unlawful employment practice.

8 2. Because the employee initiated, testified in, assisted in, or in any other
9 manner participated in an investigation, action, or proceeding to enforce a right
10 under this section, including any internal investigation or proceeding, any mediation
11 or arbitration proceeding, or any court action.

12 3. Because the employer believes that the employee engaged in conduct
13 described in subd. 1. or 2.

14 (c) The prohibitions under pars. (a) and (b) may be enforced only by a civil cause
15 of action brought under sub. (3).

16 **(3) CIVIL CAUSE OF ACTION.** In addition to obtaining any other remedy provided
17 by law, an employee who alleges that he or she has been injured by an unlawful
18 employment practice may bring an action in circuit court against the employer or
19 employee who allegedly engaged in the unlawful employment practice for such relief
20 under sub. (5) as the court may consider appropriate. An action under this
21 subsection shall be commenced within one year after the last act constituting the
22 unlawful employment practice occurred or be barred.

23 **(4) AFFIRMATIVE DEFENSES.** (a) If the alleged unlawful employment practice did
24 not result in an adverse employment action against the aggrieved employee, the
25 employer may plead as an affirmative defense that all of the following are true:

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1 1. The employer exercised reasonable care to prevent and promptly correct the
2 abusive conduct that was the basis for the aggrieved employee's cause of action.

3 2. The aggrieved employee unreasonably failed to take advantage of
4 appropriate preventive or corrective opportunities the employer provided to prevent
5 or correct that abusive conduct.

6 (b) If the alleged unlawful employment practice resulted in an adverse
7 employment action against the aggrieved employee, the employer may plead as an
8 affirmative defense that the aggrieved employee's complaint is based on any of the
9 following:

10 1. An adverse employment action that was reasonably taken for poor
11 performance, misconduct, or economic necessity.

12 2. An adverse employment action that was taken in response to a reasonable
13 performance evaluation.

14 3. A reasonable investigation of a potentially illegal or unethical activity.

15 (c) An employee who is alleged to have engaged in an unlawful employment
16 practice may plead as an affirmative defense that the employee engaged in that
17 practice at the direction of the employer under and actual or implied threat of an
18 adverse employment action against the employee for not engaging in that practice.

19 **(5) RELIEF.** (a) Subject to par. (b) and sub. (6) (a) 1., if the circuit court finds
20 that an employer or employee has engaged in an unlawful employment practice, the
21 court may enjoin the employer or employee from engaging in that practice and may
22 grant such other relief as the court may consider appropriate, including
23 reinstatement of the aggrieved employee, removal from the aggrieved employee's
24 work area of the person who engaged in the abusive conduct giving rise to the
25 unlawful employment practice, medical expenses, back pay, front pay, compensation

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1 for pain and suffering, compensation for emotional distress, punitive damages under
2 s. 895.043, and, notwithstanding s. 814.04, reasonable costs and attorney fees. If the
3 circuit court orders any payment under this paragraph because of an unlawful
4 employment practice engaged in by an employee, the employer of the employee is
5 liable for that payment.

6 (b) If an employer is found to have engaged in an unlawful employment practice
7 that did not result in an adverse employment action against the aggrieved employee,
8 the employer is not liable for compensation for emotional distress or punitive
9 damages unless the abusive conduct was extreme and outrageous.

10 **(6) EFFECT ON OTHER LAWS.** (a) This section does not relieve any person from
11 any duty, liability, or penalty provided by any other law except as follows:

12 1. If the worker's compensation insurer of an employer that is ordered to pay
13 medical expenses under sub. (5) (a) or the department, if the employer is uninsured,
14 has paid or is obligated to pay medical expenses under ch. 102 for an injury arising
15 out of the same underlying behavior as the behavior giving rise to the unlawful
16 employment practice for which the employer is liable, or if the worker's
17 compensation insurer of an employer that is ordered to pay back pay or front pay
18 under sub. (5) (a) or the department, if the employer is uninsured, has paid or is
19 obligated to pay disability benefits under ch. 102 for such an injury for the same
20 period as back or front pay is awarded under sub. (5) (a), the court shall order the
21 employer to reimburse the insurer or department for the amount of those expenses
22 or benefits paid and to pay to the aggrieved employee any balance of the amount
23 awarded under sub. (5) (a) remaining after that reimbursement.

24 2. If a self-insured employer has paid or is obligated to pay medical expenses
25 under ch. 102 for an injury arising out of the same underlying behavior as the

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1 behavior giving rise to the unlawful employment practice for which the employer is
2 liable, or a self-insured employer has paid or is obligated to pay disability benefits
3 under ch. 102 for such an injury for the same period as back or front pay is awarded
4 under sub. (5) (a), the court shall reduce the amount awarded under sub. (5) (a) for
5 medical expenses, back pay, or front pay by the amount of those medical expenses or
6 disability benefits that the employer has paid or is obligated to pay under ch. 102 and
7 order the employer to pay to the aggrieved employee any balance remaining of the
8 amount awarded under sub. (5) (a) remaining after that reduction.

9 (b) An aggrieved employee who has claimed worker's compensation or
10 payments under s. 102.81 (1) for an injury arising out of the same underlying
11 behavior as the behavior giving rise to the unlawful employment practice for which
12 the aggrieved employee brings an action under sub. (3) shall provide notice of the
13 action and copies of all papers filed by a party to the action to the employer's worker's
14 compensation insurer or, if the employer is uninsured, to the department and notice
15 of the worker's compensation proceeding and copies of all papers filed by a party to
16 the proceeding to the court and to all parties to the action.

17 **SECTION 7.** 814.04 (intro.) of the statutes is amended to read:

18 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
19 (b), 100.30 (5m), 103.08 (5) (a), 106.50 (6) (i) and (6m) (a), 115.80 (9), 767.553 (4) (d),
20 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3),
21 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),
22 when allowed costs shall be as follows:

23 **SECTION 8.** 893.997 of the statutes is created to read:

24 **893.997 Abusive work environment.** Any civil action arising under s.
25 103.08 is subject to the limitations of s. 103.08 (3).

