



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-0886/P1
JAM:wlj

DOA:.....Kirschbaum, BB0283 - Civil actions regarding employment discrimination, unfair honesty, and unfair genetic testing

FOR 2021-2023 BUDGET -- NOT READY FOR INTRODUCTION

AN ACT relating to: the budget.

Analysis by the Legislative Reference Bureau

EMPLOYMENT

Civil actions regarding employment discrimination, unfair honesty, and unfair genetic testing

Under current fair employment law, an individual who alleges that an employer has violated employment discrimination, unfair honesty testing, or unfair genetic testing laws may file a complaint with DWD seeking action that will effectuate the purpose of the fair employment law, including reinstating the individual, providing back pay, and paying costs and attorney fees.

This bill permits DWD or an individual who is alleged or was found to have 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, unfair honesty testing, or unfair genetic testing, in addition to or in lieu of filing an administrative complaint. The action in circuit court must be commenced within 300 days after the alleged discrimination, unfair honesty testing, or unfair genetic testing occurred. The bill does not allow such an action for damages to be brought against a local governmental unit or against an employer that employs fewer than 15 individuals.

Under the bill, if the circuit court finds that a defendant has committed employment discrimination, unfair honesty testing, or unfair genetic testing, the

circuit court may award back pay and any other relief that could have been awarded in an administrative proceeding. In addition, the circuit court must order the defendant to pay to the individual found to have been discriminated against or found to have received unfair genetic testing or unfair honesty testing compensatory and punitive damages in the amount that the circuit court finds appropriate, except that the total amount of damage awarded for future economic losses and for pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses and punitive damages is subject to the following limitations:

1. If the defendant employs 100 or fewer employees, no more than \$50,000.
2. If the defendant employs more than 100 but fewer than 201 employees, no more than \$100,000.
3. If the defendant employs more than 200 but fewer than 501 employees, no more than \$200,000.
4. If the defendant employs more than 500 employees, no more than \$300,000.

The bill requires DWD to annually revise these amounts on the basis of the change in the consumer price index in the previous year, if any positive change has occurred.

For further information see the state 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:

SECTION 1. 111.39 (4) (d) of the statutes is amended to read:

111.39 (4) (d) The department shall serve a certified copy of the findings and order on the respondent, the order to have the same force as other orders of the department and be enforced as provided in s. 103.005. The department shall also serve a certified copy of the findings and order on the complainant, together with a notice advising the complainant about the right to seek, and the time for seeking, review by the commission under sub. (5); about the right to bring, and the time for bringing, an action for judicial review under s. 111.395; and about the right to bring, and the time for bringing, an action under s. 111.397 (1) (a). Any person aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity. If the examiner finds that the respondent has not engaged in discrimination, unfair honesty testing, or unfair genetic testing as alleged in the complaint, the

~~department shall serve a certified copy of the examiner's findings served on the complainant, together with~~ shall be accompanied by an order dismissing the complaint.

SECTION 2. 111.39 (5) (b) of the statutes is amended to read:

111.39 (5) (b) ~~If no petition is filed~~ the respondent or complainant does not file a petition under par. (a) within 21 days from the date that a copy of the findings and order of the examiner is ~~mailed to the last-known address of the respondent served on that party,~~ the findings and order shall be considered final for purposes of enforcement under sub. (4) (d). If a timely petition is filed, the commission, on review, may either affirm, reverse, or modify the findings or order in whole or in part, or set aside the findings and order and remand to the department for further proceedings. Such actions shall be based on a review of the evidence submitted. If the commission is satisfied that a respondent or complainant has been prejudiced because of exceptional delay in the receipt of a copy of any findings and order ~~it,~~ the commission may extend the time another 21 days for filing the petition with the department.

SECTION 3. 111.39 (5) (d) of the statutes is created to read:

111.39 (5) (d) The commission shall serve a certified copy of the commission's decision on the respondent. The commission shall also serve a certified copy of the commission's decision on the complainant, together with a notice advising the complainant about the right to bring, and the time for bringing, an action for judicial review under s. 111.395 and about the right to bring, and the time for bringing, an action under s. 111.397 (1) (a).

SECTION 4. 111.397 of the statutes is created to read:

111.397 Civil action. (1) (a) Except as provided in this paragraph, the department or an individual alleged or found to have been discriminated against or

subjected to unfair honesty testing or unfair genetic testing may bring an action in circuit court requesting the relief described in sub. (2) (a) against an employer, labor organization, or employment agency that is alleged or found to have engaged in that discrimination, unfair honesty testing, or unfair genetic testing. The department or an individual alleged or found to have been discriminated against or subjected to unfair honesty testing or unfair genetic testing may not bring an action under this paragraph against a local governmental unit, as defined in s. 19.42 (7u), or against an employer, labor organization, or employment agency that employs fewer than 15 individuals for each working day in each of 20 or more calendar weeks in the current or preceding year.

(b) If a petition for judicial review of the findings and order of the commission concerning the same violation as the violation giving rise to the action under par. (a) is filed, the circuit court shall consolidate the proceeding for judicial review and the action under par. (a).

(c) An individual alleged or found to have been discriminated against or subjected to unfair honesty testing or unfair genetic testing is not required to file a complaint under s. 111.39 or seek review under s. 111.395 in order for the department or the individual to bring an action under par. (a).

(d) An action under par. (a) shall be commenced within 300 days after the alleged discrimination, unfair honesty testing, or unfair genetic testing occurred.

****NOTE: Please let me know if this 300-day deadline is consistent with your intent. Similarly, individuals have 300 days to file a complaint of this nature with DWD under s. 111.39 (1).

(2) (a) Subject to pars. (b) and (c), in an action under sub. (1) (a), if the circuit court finds that discrimination, unfair honesty testing, or unfair genetic testing has occurred, or if such a finding has been made by an examiner or the commission and

not been further appealed, the circuit court may order any relief that an examiner would be empowered to order under s. 111.39 (4) (c) after a hearing on a complaint filed under s. 111.39. In addition, the circuit court shall order the defendant to pay to the individual discriminated against or subjected to unfair honesty testing or unfair genetic testing any other compensatory damages, and punitive damages under s. 895.043 that the circuit court or jury finds appropriate, plus reasonable costs and attorney fees incurred in the action. If any relief was ordered under s. 111.39 or 111.395, the circuit court shall specify whether the relief ordered under this paragraph is in addition to or replaces the relief ordered under s. 111.39 or 111.395. The sum of the amount of compensatory damages for future economic losses and for pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, and other noneconomic losses and the amount of punitive damages that a circuit court may order may not exceed the following:

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

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

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

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

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

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

2. Except as provided in this subdivision, beginning on July 1, 2022, and on each July 1 after that, the department shall adjust the amounts specified in par. (a) 1., 2., 3., and 4. by calculating the percentage difference between the consumer price index for the 12-month period ending on December 31 of the preceding year and the consumer price index for the 12-month period ending on December 31 of the year before the preceding year and adjusting those amounts by that percentage difference. The department shall publish the adjusted amounts calculated under this subdivision in the Wisconsin Administrative Register, and the adjusted amounts shall apply to actions commenced under sub. (1) (a) beginning on July 1 of the year of publication. This subdivision does not apply if the consumer price index for the 12-month period ending on December 31 of the preceding year did not increase over the consumer price index for the 12-month period ending on December 31 of the year before the preceding year.

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

814.04 Items of costs. (intro.) Except as provided in ss. 93.20, 100.195 (5m) (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

SECTION 9350. Initial applicability; Workforce Development.

(1) EMPLOYMENT DISCRIMINATION DAMAGES. The treatment of ss. 111.39 (4) (d) and (5) (b) and (d), 111.397, and 814.04 (intro.) first applies to acts of employment discrimination, unfair honesty testing, or unfair genetic testing committed on the effective date of this subsection.

(END)