



1995 ASSEMBLY BILL 643

October 27, 1995 – Introduced by Representatives VRAKAS, GREEN, JENSEN, FREESE, SERATTI, KLUSMAN, LADWIG, GROTHMAN, WALKER, SCHNEIDERS, ALBERS, BRANDEMUEHL, DUFF, OLSEN, KREIBICH, KELSO, OTT, OWENS and F. LASEE, cosponsored by Senators HUELSMAN, FITZGERALD and DARLING. Referred to Committee on Labor and Employment.

1 **AN ACT to create** 111.39 (4) (bm) and 111.39 (5m) of the statutes; **relating to:**
2 costs, attorney fees and settlement offers in proceedings under the fair
3 employment law.

Analysis by the Legislative Reference Bureau

The Wisconsin supreme court has held that under the current fair employment law the department of industry, labor and human relations (DILHR) and the labor and industry review commission (LIRC) may award attorney fees only to a complainant and not to a respondent (*Watkins v. LIRC*, 117 Wis. 2d 753 (1984)). The Wisconsin court of appeals has held that a court may award attorney fees to a respondent if a complainant frivolously brings a complaint under the fair employment law before the court on judicial review, but that the court may award to a respondent only the attorney fees that are incurred on judicial review and not at the agency level (*Tatum v. LIRC*, 132 Wis. 2d 411 (1986)).

This bill permits DILHR and LIRC to award to a party, whether complainant or respondent, in a proceeding under the fair employment law the costs, including expert witness fees, and reasonable actual attorney fees incurred in asserting any claim or defense on which that party prevailed.

The bill also permits DILHR and LIRC to award to a party, whether complainant or respondent, that has prevailed against a frivolous claim or defense the costs, including expert witness fees, and reasonable actual attorney fees incurred in prevailing against that frivolous claim or defense. To find that a claim or defense is frivolous, DILHR or LIRC must find that the claim or defense was asserted or continued in bad faith, solely for the purpose of harassing or maliciously injuring another, or that the party or party's attorney knew or should have known that the claim or defense 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, or both. Under the bill, costs and attorney fees for a frivolous claim or

defense may be assessed fully against the party or the party's attorney or apportioned between the party and the party's attorney.

Finally, the bill permits the respondent in a proceeding under the fair employment law to serve on the complainant a written offer of settlement regarding one or more of the complainant's claims. If the complainant accepts the offer, the claim is dismissed. If the complainant does not accept the offer and DILHR's order on the claim is less favorable to the complainant than the settlement offer, the complainant may not recover the costs and attorney fees incurred in asserting that claim after the date of the offer and must pay the costs and attorney fees incurred by the respondent in defending that claim after that date. An offer of settlement is binding on the respondent, unless not accepted by the complainant, and, if not accepted, is considered withdrawn and cannot be given as evidence or mentioned at the hearing, except to determine costs and reasonable actual attorney fees.

For further information see the *state and local* 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:

1 **SECTION 1.** 111.39 (4) (bm) of the statutes is created to read:

2 111.39 (4) (bm) 1. After the department issues and serves a notice of hearing
3 under par. (b) but at least 10 days before the hearing, a respondent may serve on a
4 complainant a written offer of settlement regarding one or more of the complainant's
5 claims. An offer of settlement shall be binding on the respondent, unless not accepted
6 by the claimant, and may offer back pay, compensation, reinstatement, costs,
7 including expert witness fees, and reasonable actual attorney fees accrued on the
8 claim to the date of the offer and such other action by the respondent as will
9 effectuate the purposes of this subchapter. An offer of settlement need not admit that
10 the respondent has engaged in discrimination, unfair honesty testing or unfair
11 genetic testing and may be contingent on the complainant settling all of his or her
12 claims against the respondent.

13 2. If within 10 days after service of the offer of settlement the complainant
14 serves on the respondent a written notice of acceptance, either party may file with

1 the department the offer of settlement, with proof of service of the notice of
2 acceptance, and the department shall dismiss the claim that is the subject of the offer
3 of settlement. If the complainant does not accept the offer of settlement, the offer of
4 settlement is considered withdrawn and cannot be given as evidence or mentioned
5 at the hearing, except to determine costs and reasonable actual attorney fees.

6 3. If the complainant does not accept the offer of settlement and if the order of
7 the department on the claim that is the subject of the offer of settlement is less
8 favorable to the complainant than the offer of settlement, the complainant,
9 notwithstanding sub. (5m), may not recover the costs and reasonable actual attorney
10 fees incurred in asserting that claim after the date of that offer and shall pay the
11 costs, including expert witness fees, and reasonable actual attorney fees incurred by
12 the respondent in defense of that claim after the date of that offer. In determining
13 whether the order of the department is less favorable to the complainant than the
14 offer of settlement, the department shall compare the offer of settlement to the losses
15 incurred by the complainant as of the date of the offer that are recoverable under this
16 section.

17 **SECTION 2.** 111.39 (5m) of the statutes is created to read:

18 111.39 (5m) (a) In any proceeding under this section, the department or
19 commission may, in its discretion, but subject to sub. (4) (bm) 3., award to a party the
20 costs, including expert witness fees, and reasonable actual attorney fees incurred in
21 asserting any claim or defense on which that party prevailed.

22 (b) 1. In any proceeding under this section, if the department or commission
23 finds that a party has asserted or continued a frivolous claim or defense, the
24 department or commission may, in its discretion, but subject to sub. (4) (bm) 3., award
25 to the party prevailing against that claim or defense the costs, including expert

1 witness fees, and reasonable actual attorney fees incurred in prevailing against that
2 claim or defense.

3 2. The department or commission may assess the costs and fees awarded under
4 subd. 1. fully against either the party asserting or continuing the claim or defense
5 or the attorney representing the party or may assess those costs and fees so that the
6 party and the attorney each pay a portion of those costs and fees.

7 3. To find that a claim or defense is frivolous under subd. 1., the department
8 or commission must find that the claim or defense was asserted or continued in bad
9 faith, solely for the purpose of harassing or maliciously injuring another, or that the
10 party or the party's attorney knew, or should have known, that the claim or defense
11 was without any reasonable basis in law or equity and could not be supported by a
12 good-faith argument for an extension, modification or reversal of existing law, or
13 both.

14 **SECTION 3. Initial applicability.**

15 (1) This act first applies to costs and attorney fees incurred in a proceeding
16 under section 111.39 of the statutes, as affected by this act, on the effective date of
17 this subsection.

18 (END)