



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-0520/P7
MED:amn&klm

DOA:.....Kirschbaum, BB0060 - Equal Rights - WFEA Changes

FOR 2017-2019 BUDGET -- NOT READY FOR INTRODUCTION

AN ACT ...relating to: the budget.

Analysis by the Legislative Reference Bureau

EMPLOYMENT

This bill creates statutory offers of settlement procedures for resolving complaints involving violations of the state fair employment law, family and medical leave law, or organ and bone marrow donation law. The bill allows the parties to such complaints to make settlement offers to resolve claims and, in cases where a settlement offer is declined, provides for cost and fee shifting or interest depending on whether the complainant receives a more favorable award than what was included in the settlement offer.

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

SECTION 1. 103.10 (12) (b) of the statutes is amended to read:

103.10 **(12)** (b) An employee who believes his or her employer has violated sub. (11) (a) or (b) may, within 30 days after the violation occurs or the employee should reasonably have known that the violation occurred, whichever is later, file a

complaint with the department alleging the violation. Except as provided in s. 230.45 (1m), the department shall investigate the complaint and shall attempt to resolve the complaint by conference, conciliation or persuasion. The parties may also attempt to resolve the complaint through offers of settlement in accordance with s. 103.12. If the complaint is not resolved through settlement under s. 103.12 or otherwise and the department finds probable cause to believe a violation has occurred, the department shall proceed with notice and a hearing on the complaint as provided in ch. 227. The hearing shall be held within 60 days after the department receives the complaint.

SECTION 2. 103.10 (12) (d) of the statutes is amended to read:

103.10 (12) (d) The department shall issue its decision and order within 30 days after the hearing. If the department finds that an employer violated sub. (11) (a) or (b), it may, except as provided in s. 103.12 (12), order the employer to take action to remedy the violation, including providing requested family leave or medical leave, reinstating an employee, providing back pay accrued not more than 2 years before the complaint was filed and paying reasonable actual attorney fees to the complainant.

SECTION 3. 103.11 (12) (a) of the statutes is amended to read:

103.11 (12) (a) An employee who believes his or her employer has violated sub. (11) (a) or (b) may, within 30 days after the violation occurs or the employee should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation. The department shall investigate the complaint and shall attempt to resolve the complaint by conference, conciliation, or persuasion. The parties may also attempt to resolve the complaint through offers of settlement in accordance with s. 103.12. If the complaint is not

resolved through settlement under s. 103.12 or otherwise and the department finds probable cause to believe a violation has occurred, the department shall proceed with notice and a hearing on the complaint as provided in ch. 227. The hearing shall be held within 60 days after the department receives the complaint.

SECTION 4. 103.11 (12) (b) of the statutes is amended to read:

103.11 (12) (b) The department shall issue its decision and order within 30 days after the hearing. If the department finds that an employer violated sub. (11) (a) or (b), it may, except as provided in s. 103.12 (12), order the employer to take action to remedy the violation, including providing the requested bone marrow and organ donation leave, reinstating an employee, providing back pay accrued not more than 2 years before the complaint was filed, and paying reasonable actual attorney fees to the complainant.

SECTION 5. 103.12 of the statutes is created to read:

103.12 Offers of settlement. (1) In this section:

(a) “More favorable award” means an order under s. 103.10 (12) (d) or 103.11 (12) (b) to which either of the following applies:

1. The order includes an order of reinstatement, or for some other substantive or tangible benefit besides a mere finding that the law was violated, that was not provided for in a settlement offer made under this section.

2. The order includes a monetary award to the complainant that, exclusive of the complainant’s pre-offer costs and post-offer costs, exceeds the compensation provided for in a settlement offer made under this section.

(b) “Prejudgment interest” means interest at an annual rate equal to 1 percent plus the prime rate in effect on the date of the settlement offer.

(c) “Pre-offer costs” and “post-offer costs” include reasonable attorney fees, filing fees, subpoena fees, copying costs, court reporter fees, reasonable investigative costs, reasonable travel expenses, and all other similar fees and expenses related to litigating the complaint.

(2) This section applies with respect to complaints under s. 103.10 (12) or 103.11 (12).

(3) Unless otherwise specified, a settlement offer made under this section is an offer to resolve all claims between the parties. Settlement offers made under this section shall be construed as including all compensation that may be awarded under s. 103.10 (12) (d) or 103.11 (12) (b) or in a civil action under s. 103.10 (13) or 103.11 (13).

(4) At any time between 10 days after a complaint is filed under s. 103.10 (12) (b) or 103.11 (12) (a) and 10 days prior to commencement of a hearing under s. 103.10 (12) (b) or 103.11 (12) (a), any party may serve an offer upon any other party to the action for settlement to be entered in accordance with the terms and conditions stated at that time.

(5) A settlement offer under sub. (4) shall include a citation to this section and shall satisfy all of the following:

- (a) Be in writing.
- (b) Identify parties making the offer and the parties to whom the offer is made.
- (c) Identify generally the claim the offer is attempting to resolve.
- (d) State the terms and conditions of the offer.
- (e) Include one of the following:

1. If the complainant is making the offer, the statement “In accordance with and subject to s. 103.12, Wis. Stats., if this offer is not accepted and a more favorable

award is obtained by the complainant, prejudgment interest will attach to the final award from the date this offer was received.”

2. If the respondent is making the offer, the statement “In accordance with and subject to s. 103.12, Wis. Stats., if this offer is not accepted and the complainant fails to obtain a more favorable award, the respondent will be entitled to post-offer costs and fees, including attorney fees, from the date this offer was received.”

(f) State the deadline by which the offer must be accepted, in accordance with sub. (11) (b).

(g) Include a provision that requires the accepting party and, if the accepting party is represented by an attorney, the accepting party’s attorney to indicate acceptance of the offer by signing a statement that the offer is accepted.

(h) Be signed by the offeror or the offeror’s attorney of record.

(i) Include a certificate of service and be served by certified mail.

(j) Be served on all parties to whom the offer is made.

(6) (a) A settlement offer may be made subject to a confidentiality requirement and such other reasonable conditions, including the execution of appropriate releases, indemnities, and other documents, as are typical of such settlement agreements.

(b) All terms and conditions included in a final and fully executed settlement agreement are presumed to be reasonable.

(c) 1. Notwithstanding subs. (12) and (13), if a settlement offer is declined by the offeree because of a condition the offeree believes to be unreasonable, and the condition is later determined by the department to be unreasonable under the circumstances of the case, the offer may not be the basis for an award of post-offer costs or prejudgment interest.

2. Notwithstanding subd. 1., if a complainant fails to obtain a more favorable award, the monetary amount in the settlement offer shall be considered reasonable.

(7) Service of a settlement offer tolls the offeror's obligations regarding discovery, responsive pleadings, and other investigative and litigation obligations until one of the following occurs:

(a) The offeree accepts or declines the offer as provided in sub. (10) (a) or (11) (a).

(b) If the offer expires as provided in sub. (11) (b), the offeree acknowledges receipt of the offer in writing, with the signature of the offeree and, if the offeree is represented by an attorney, the offeree's attorney.

(8) A settlement offer may be withdrawn in writing at any time prior to acceptance by the offeree. Once withdrawn, the offer is void.

(9) Any settlement offer, the acceptance or declination of any such offer, and any negotiations related to such offers may not be proffered or accepted as evidence nor mentioned in a hearing under s. 103.10 (12) (b) or 103.11 (12) (a) or in any other proceedings relating to the claim, except as provided in sub. (14), and shall be treated for all other purposes as provided in s. 904.08.

(10) (a) Any acceptance of a settlement offer shall, whether made on the document containing the offer or on a separate document of acceptance, be in writing, be promptly delivered to the offeror or the offeror's attorney, and include the signature of the accepting party and, if the accepting party is represented by an attorney, the accepting party's attorney. Upon acceptance, the parties are obligated to enter into good faith negotiations to memorialize the terms of the settlement and execute documents necessary to effectuate the settlement.

(b) If a settlement offer is accepted, the parties shall promptly file with the department a notice that settlement has been reached between the parties in accordance with this section, together with the complainant's request for dismissal of the complaint, and the department shall enter the settlement and dismissal of the complaint accordingly.

(11) (a) Any declination of a settlement offer shall, except as provided in par. (b), be in writing, be promptly delivered to the offeror or the offeror's attorney, and include the signature of the offeree and, if the offeree is represented by an attorney, the offeree's attorney.

(b) If a settlement offer is not accepted or declined in accordance with this section prior to a hearing or within 10 days after it is served, whichever occurs first, the offer shall expire and shall be deemed declined.

(12) (a) If a respondent's settlement offer is not accepted and the complainant fails to obtain a more favorable award, the complainant shall not recover any post-offer costs and shall pay the respondent's post-offer costs from the date of the offer. In addition, the complainant shall be required to pay a reasonable sum to cover the costs of services of any expert witness who is not a regular employee of any party that are actually incurred and reasonably necessary in preparation for the hearing or during the hearing. This subsection supersedes any statute awarding post-offer costs and fees to a prevailing complainant.

(b) If a respondent's settlement offer is not accepted and the complainant fails to obtain a more favorable award, the amounts under par. (a) shall be deducted from any award made in favor of the complainant. If the post-offer costs of the respondent exceed the amount awarded to the complainant, the net amount shall be awarded to the respondent and the award shall be entered accordingly.

(13) If a complainant's settlement offer is not accepted and the complainant obtains a more favorable award, the department shall do all of the following:

(a) Award prejudgment interest on the final award from the date of the offer.

(b) Require the respondent to pay a reasonable sum to cover the costs of services of any expert witness who is not a regular employee of any party that are actually incurred and reasonably necessary in preparation for the hearing or during the hearing, in addition to the complainant's costs.

(14) (a) After the department makes an order under s. 103.10 (12) (d) or 103.11 (12) (b), either party may make a subsequent motion to introduce evidence of a valid settlement offer made under this section that was declined. The motion shall be made within 10 business days after the date of the award and shall identify the parties in the offer, who made the offer, the amount of the offer, the date of the offer, and the date it was declined. The motion shall also identify the effect the declined offer has on the final award and how the department should proceed.

(b) A nonmoving party may file a response to a motion under par. (a) within 5 business days after the movant files the motion.

(15) Police officers shall be permitted to testify as expert witnesses for the purposes of this section. For purposes of this section, "complainant" includes a cross-complainant and "respondent" includes a cross-respondent.

SECTION 6. 111.39 (4) (b) of the statutes is amended to read:

111.39 (4) (b) If the department finds probable cause to believe that any discrimination has been or is being committed, that unfair honesty testing has occurred or is occurring, or that unfair genetic testing has occurred or is occurring, it may endeavor to eliminate the practice by conference, conciliation, or persuasion. The parties may also attempt to resolve the complaint through offers of settlement

in accordance with s. 111.392. If the department does not eliminate the discrimination, unfair honesty testing, or unfair genetic testing and the complaint is not resolved through settlement under s. 111.392 or otherwise, the department shall issue and serve a written notice of hearing, specifying the nature of the discrimination that appears to have been committed or unfair honesty testing or unfair genetic testing that has occurred, and requiring the person named, in this section called the “respondent”, to answer the complaint at a hearing before an examiner. The notice shall specify a time of hearing not less than 30 days after service of the complaint, and a place of hearing within either the county of the respondent’s residence or the county in which the discrimination, unfair honesty testing, or unfair genetic testing appears to have occurred. The testimony at the hearing shall be recorded or taken down by a reporter appointed by the department.

SECTION 7. 111.39 (4) (c) of the statutes is amended to read:

111.39 (4) (c) If, after hearing, the examiner finds that the respondent has engaged in discrimination, unfair honesty testing, or unfair genetic testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay, except as provided in s. 111.392 (12) and except that no attorney fees or costs shall be awarded to a complainant under this paragraph if no reinstatement, monetary relief, or other substantive or tangible benefit is ordered. If the examiner awards any payment to an employee because of a violation of s. 111.321 by an individual employed by the employer, under s. 111.32 (6), the employer of that individual is liable for the payment. If the examiner finds a respondent violated s. 111.322 (2m), the examiner shall award compensation in lieu of reinstatement if requested by all parties and may award compensation in lieu of reinstatement if requested by any party.

Compensation in lieu of reinstatement for a violation of s. 111.322 (2m) may not be less than 500 times nor more than 1,000 times the hourly wage of the person discriminated against when the violation occurred. Back pay liability may not accrue from a date more than 2 years prior to the filing of a complaint with the department. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against or subjected to unfair honesty testing or unfair genetic testing shall operate to reduce back pay otherwise allowable. Amounts received by the person discriminated against or subject to the unfair honesty testing or unfair genetic testing as unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against or subject to unfair honesty testing or unfair genetic testing and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making the payment.

SECTION 8. 111.392 of the statutes is created to read:

111.392 Offers of settlement. (1) In this section:

(a) “More favorable award” means an order under s. 111.39 (4) (c) to which either of the following applies:

1. The order includes an order of reinstatement, or for some other substantive or tangible benefit besides a mere finding that the law was violated, that was not provided for in a settlement offer made under this section.

2. The order includes a monetary award to the complainant that, exclusive of the complainant’s pre-offer costs and post-offer costs, exceeds the compensation provided for in a settlement offer made under this section.

(b) “Prejudgment interest” means interest at an annual rate equal to 1 percent plus the prime rate in effect on the date of the settlement offer.

(c) “Pre-offer costs” and “post-offer costs” include reasonable attorney fees, filing fees, subpoena fees, copying costs, court reporter fees, reasonable investigative costs, reasonable travel expenses, and all other similar fees and expenses related to litigating the complaint.

(2) This section applies with respect to complaints under s. 111.39.

(3) Unless otherwise specified, a settlement offer made under this section is an offer to resolve all claims between the parties. Settlement offers made under this section shall be construed as including all compensation that may be awarded under s. 111.39 (4) (c).

(4) At any time between 10 days after a complaint is filed under s. 111.39 (1) and 10 days prior to commencement of a hearing under s. 111.39 (4) (b), any party may serve an offer upon any other party to the action for settlement to be entered in accordance with the terms and conditions stated at that time.

(5) A settlement offer under sub. (4) shall include a citation to this section and shall satisfy all of the following:

- (a) Be in writing.
- (b) Identify parties making the offer and the parties to whom the offer is made.
- (c) Identify generally the claim the offer is attempting to resolve.
- (d) State the terms and conditions of the offer.
- (e) Include one of the following:

1. If the complainant is making the offer, the statement “In accordance with and subject to s. 111.392, Wis. Stats., if this offer is not accepted and a more favorable award is obtained by the complainant, prejudgment interest will attach to the final award from the date this offer was received.”

2. If the respondent is making the offer, the statement “In accordance with and subject to s. 111.392, Wis. Stats., if this offer is not accepted and the complainant fails to obtain a more favorable award, the respondent will be entitled to post-offer costs and fees, including attorney fees, from the date this offer was received.”

(f) State the deadline by which the offer must be accepted, in accordance with sub. (11) (b).

(g) Include a provision that requires the accepting party and, if the accepting party is represented by an attorney, the accepting party’s attorney to indicate acceptance of the offer by signing a statement that the offer is accepted.

(h) Be signed by the offeror or the offeror’s attorney of record.

(i) Include a certificate of service and be served by certified mail.

(j) Be served on all parties to whom the offer is made.

(6) (a) A settlement offer may be made subject to a confidentiality requirement and such other reasonable conditions, including the execution of appropriate releases, indemnities, and other documents, as are typical of such settlement agreements.

(b) All terms and conditions included in a final and fully executed settlement agreement are presumed to be reasonable.

(c) 1. Notwithstanding subs. (12) and (13), if a settlement offer is declined by the offeree because of a condition the offeree believes to be unreasonable, and the condition is later determined by the department to be unreasonable under the circumstances of the case, the offer may not be the basis for an award of post-offer costs or prejudgment interest.

2. Notwithstanding subd. 1., if a complainant fails to obtain a more favorable award, the monetary amount in the settlement offer shall be considered reasonable.

(7) Service of a settlement offer tolls the offeror's obligations regarding discovery, responsive pleadings, and other investigative and litigation obligations until one of the following occurs:

(a) The offeree accepts or declines the offer as provided in sub. (10) (a) or (11) (a).

(b) If the offer expires as provided in sub. (11) (b), the offeree acknowledges receipt of the offer in writing, with the signature of the offeree and, if the offeree is represented by an attorney, the offeree's attorney.

(8) A settlement offer may be withdrawn in writing at any time prior to acceptance by the offeree. Once withdrawn, the offer is void.

(9) Any settlement offer, the acceptance or declination of any such offer, and any negotiations related to such offers may not be proffered or accepted as evidence nor mentioned in a hearing under s. 111.39 (4) (b) or in any other proceedings relating to the claim, except as provided in sub. (14), and shall be treated for all other purposes as provided in s. 904.08.

(10) (a) Any acceptance of a settlement offer shall, whether made on the document containing the offer or on a separate document of acceptance, be in writing, be promptly delivered to the offeror or the offeror's attorney, and include the signature of the accepting party and, if the accepting party is represented by an attorney, the accepting party's attorney. Upon acceptance, the parties are obligated to enter into good faith negotiations to memorialize the terms of the settlement and execute documents necessary to effectuate the settlement.

(b) If a settlement offer is accepted, the parties shall promptly file with the department a notice that settlement has been reached between the parties in accordance with this section, together with the complainant's request for dismissal

of the complaint, and the department shall enter the settlement and dismissal of the complaint accordingly.

(11) (a) Any declination of a settlement offer shall, except as provided in par. (b), be in writing, be promptly delivered to the offeror or the offeror's attorney, and include the signature of the offeree and, if the offeree is represented by an attorney, the offeree's attorney.

(b) If a settlement offer is not accepted or declined in accordance with this section prior to a hearing or within 10 days after it is served, whichever occurs first, the offer shall expire and be deemed declined.

(12) (a) If a respondent's settlement offer is not accepted and the complainant fails to obtain a more favorable award, the complainant shall not recover any post-offer costs and shall pay the respondent's post-offer costs from the date of the offer. In addition, the complainant shall be required to pay a reasonable sum to cover the costs of services of any expert witness who is not a regular employee of any party that are actually incurred and reasonably necessary in preparation for the hearing or during the hearing. This subsection supersedes any statute awarding post-offer costs and fees to a prevailing complainant.

(b) If a respondent's settlement offer is not accepted and the complainant fails to obtain a more favorable award, the amounts under par. (a) shall be deducted from any award made in favor of the complainant. If the post-offer costs of the respondent exceed the amount awarded to the complainant, the net amount shall be awarded to the respondent and the award shall be entered accordingly.

(13) If a complainant's settlement offer is not accepted and the complainant obtains a more favorable award, the department shall do all of the following:

(a) Award prejudgment interest on the final award from the date of the offer.

(b) Require the respondent to pay a reasonable sum to cover the costs of services of any expert witness who is not a regular employee of any party that are actually incurred and reasonably necessary in preparation for the hearing or during the hearing, in addition to the complainant's costs.

(14) (a) After the department makes an order under s. 111.39 (4) (c), either party may make a subsequent motion to introduce evidence of a valid settlement offer made under this section that was declined. The motion shall be made within 10 business days after the date of the award and shall identify the parties in the offer, who made the offer, the amount of the offer, the date of the offer, and the date it was declined. The motion shall also identify the effect the declined offer has on the final award and how the department should proceed.

(b) A nonmoving party may file a response to a motion under par. (a) within 5 business days after the movant files the motion.

(15) Police officers shall be permitted to testify as expert witnesses for the purposes of this section. For purposes of this section, "complainant" includes a cross-complainant and "respondent" includes a cross-respondent.

SECTION 9. 230.85 (3) (b) of the statutes is amended to read:

230.85 **(3)** (b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds ~~by unanimous vote~~ that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees

and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that s. 802.05 (2) or 895.044 has been violated.

(END)