



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1633/1
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2019 ASSEMBLY BILL 116

March 25, 2019 - Introduced by Representatives POPE, HEBL, VRUWINK, SARGENT, CROWLEY, SPREITZER, SINICKI, OHNSTAD, HESSELBEIN, SUBECK, BROSTOFF, BOWEN, MYERS and C. TAYLOR, cosponsored by Senators CARPENTER, L. TAYLOR, JOHNSON, LARSON and SMITH. Referred to Committee on Labor and Integrated Employment.

AUTHORS SUBJECT TO CHANGE

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) and 103.08 of the statutes; **relating to:**
3 prohibiting abusive work environments and allowing an individual who has
4 been subjected to such an environment to bring a civil action.

Analysis by the Legislative Reference Bureau

This bill prohibits abusive work environments and allows an individual who has been subjected to such an environment to bring a civil action.

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.

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.

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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 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.

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:

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

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

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

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

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

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

12 102.81 (5) The department of justice may bring an action to collect the payment
13 under sub. (4) or (4g).

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

15 102.82 (1) Except as provided in sub. (2) (ar), an uninsured employer shall
16 reimburse the department for any payment made under s. 102.81 (1) to or on behalf
17 of an employee of the uninsured employer or to an employee's dependents and for any
18 expenses paid by the department in administering the claim of the employee or
19 dependents, less amounts repaid by the uninsured employer, employee, or
20 dependents under s. 102.81 (4) (b) or (4g). The reimbursement owed under this
21 subsection is due within 30 days after the date on which the department notifies the
22 uninsured employer that the reimbursement is owed. Interest shall accrue on
23 amounts not paid when due at the rate of 1 percent per month.

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

25 **103.08 Abusive work environments. (1) DEFINITIONS.** In this section:

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

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

14 (c) “Adverse employment action” means an action taken by an employer with
15 respect to an employee that has the effect, in whole or in part, of a penalty, including
16 dismissal or suspension from employment, demotion, denial of a promotion,
17 unfavorable transfer or reassignment, reduction in compensation, or denial of
18 increased compensation. “Adverse employment action” also includes a constructive
19 discharge.

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

22 (e) “Constructive discharge” means a situation in which an employee resigns
23 from employment because the employee reasonably believes that he or she was
24 subjected to an abusive work environment and, prior to the employee resigning, the

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1 employer was aware of the abusive conduct that gave rise to the abusive work
2 environment and the employer failed to stop it.

3 (f) "Employee" means an individual employed by an employer.

4 (g) "Employer" means a person engaging in any activity, enterprise, or business
5 in this state employing one or more persons on a permanent basis. "Employer"
6 includes the state and any office, department, independent agency, authority,
7 institution, association, society, or other body in state government created or
8 authorized to be created by the constitution or any law, including the legislature and
9 the courts.

10 (h) "Physical harm" means the impairment of an individual's physical health
11 or bodily integrity.

12 (i) "Psychological harm" means the impairment of an individual's mental
13 health.

14 (j) "Retaliate" means to take an action that negatively affects the terms,
15 conditions, and privileges of an employee's employment.

16 (k) "Unlawful employment practice" means an unlawful employment practice
17 prohibited under sub. (2) (a) or (b).

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

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

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

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

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

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

9 **(3) CIVIL CAUSE OF ACTION.** In addition to obtaining any other remedy provided
10 by law, an employee who alleges that he or she has been injured by an unlawful
11 employment practice may bring an action in circuit court against the employer and,
12 if applicable, the employee who allegedly engaged in the unlawful employment
13 practice for such relief under sub. (5) as the court considers appropriate. An
14 employee must commence an action under this subsection within one year after the
15 last act constituting the unlawful employment practice occurred or be barred from
16 commencing an action.

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

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

22 2. The aggrieved employee unreasonably failed to take advantage of
23 appropriate preventive or corrective opportunities the employer provided to prevent
24 or correct the abusive conduct described under subd. 1.

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

5 1. An adverse employment action that was reasonably taken for poor
6 performance or misconduct by the aggrieved employee or for the employer's economic
7 necessity.

8 2. An adverse employment action that was taken in response to a reasonable
9 performance evaluation of the aggrieved employee.

10 3. A reasonable investigation of a potentially illegal or unethical activity by the
11 aggrieved employee.

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

16 **(5) RELIEF.** (a) Subject to par. (b) and sub. (6) (a) 1., if the circuit court finds
17 that an employer or employee has engaged in an unlawful employment practice, the
18 court may enjoin the employer or employee from engaging in that practice and may
19 grant other relief the court considers appropriate, including reinstatement of the
20 aggrieved employee, removal of the person who engaged in the abusive conduct
21 giving rise to the unlawful employment practice from the aggrieved employee's work
22 area, medical expenses, back pay, front pay, compensation for pain and suffering,
23 compensation for emotional distress, punitive damages under s. 895.043, and,
24 notwithstanding s. 814.04, reasonable costs and attorney fees. If the circuit court
25 orders any payment under this paragraph because of an unlawful employment

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1 practice engaged in by an employee, the employer of the employee who engaged in
2 an unlawful employment practice is liable for that payment.

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

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

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

21 2. If a self-insured employer has paid or is obligated to pay medical expenses
22 under ch. 102 for an injury arising out of the same underlying behavior as the
23 behavior giving rise to the unlawful employment practice for which the employer is
24 liable, or a self-insured employer has paid or is obligated to pay disability benefits
25 under ch. 102 for such an injury for the same period as back or front pay is awarded

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1 under sub. (5) (a), the court shall reduce the amount awarded under sub. (5) (a) for
2 medical expenses, back pay, or front pay by the amount of those medical expenses or
3 disability benefits that the employer has paid or is obligated to pay under ch. 102 and
4 order the employer to pay to the aggrieved employee any balance of the amount
5 awarded under sub. (5) (a) remaining after that reduction.

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

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

15 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
16 (b), 100.30 (5m), 103.08 (5) (a), 106.50 (6) (i) and (6m) (a), 115.80 (9), 767.553 (4) (d),
17 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3), 895.444 (2), 895.445 (3),
18 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),
19 when allowed costs shall be as follows:

20 **SECTION 8. Initial applicability.**

21 (1) ABUSIVE WORK ENVIRONMENT. This act first applies to an unlawful
22 employment practice, as defined in s. 103.08 (1) (k), committed on the effective date
23 of this subsection.

24

(END)