



2009 BILL

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 subject 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 permitting 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") to 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. Such an action must be commenced by the employee (aggrieved employee) within one year after the last act constituting the unlawful employment practice occurred or be barred.

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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 from engaging in that practice and may grant such other relief as the court may consider appropriate, including reinstatement of the aggrieved employee, removal of the person who engaged in the abusive conduct giving rise to the unlawful employment practice from the aggrieved employee's work area, medical expenses, back pay, front pay, compensation for emotional distress, punitive damages, and reasonable costs and attorney fees. If the circuit court orders any 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's liability for compensation for emotional distress may not exceed \$25,000 and the employer is not liable for punitive damages.

Affirmative defenses. The bill permits 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 opportunities provided by the employer 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 threat of an adverse employment action against the employee for not engaging in that practice.

Double recovery prohibited. Finally, 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

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law or for the amount awarded in the action for medical expenses, back pay, or front pay, whichever is less.

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 employee is subjected to abusive conduct that is so severe that it causes tangible harm, *i.e.*, material impairment of physical or mental health or bodily integrity, to the employee.

2. "Abusive conduct" means conduct, including acts or omissions, by an employer or employee, with malice, *i.e.*, intent to cause pain, injury, or distress to another person without legitimate cause or justification, that a reasonable person would find to be hostile 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 or physical conduct that is threatening, intimidating, or humiliating; sabotage or undermining of an employee's work performance; or exploitation of an employee's known psychological or physical vulnerability. "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, in whole or in part, 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 constructive discharge, which is defined in the bill as a situation in which an employee resigns from employment because the employee reasonably believes that he or she was subjected to abusive conduct and, prior to resigning, the employee notified the employer of the abusive conduct and the employer failed to take reasonable steps to eliminate the abusive conduct.

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.** 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

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1 be the exclusive remedy against the employer, any other employee of the same
2 employer, and the worker's compensation insurance carrier. This section does not
3 limit the right of an employee to bring action against any coemployee for an assault
4 intended to cause bodily harm, or against a coemployee for negligent operation of a
5 motor vehicle not owned or leased by the employer, against the employer or a
6 coemployee for an unlawful employment practice under s. 103.08 (3), or against a
7 coemployee of the same employer to the extent that there would be liability of a
8 governmental unit to pay judgments against employees under a collective
9 bargaining agreement or a local ordinance.

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

11 102.80 (1) (dm) Amounts received under s. 103.08 (6) (a) 1.

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

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

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

22 102.81 (5) The department of justice may bring an action to collect the payment
23 under sub. (4) or (4g).

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

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1 102.82 (1) An uninsured employer shall reimburse the department for any
2 payment made under s. 102.81 (1) to or on behalf of an employee of the uninsured
3 employer or to an employee's dependents and for any expenses paid by the
4 department in administering the claim of the employee or dependents, less amounts
5 repaid by the uninsured employer, employee, or dependents under s. 102.81 (4) (b)
6 or (4g). The reimbursement owed under this subsection is due within 30 days after
7 the date on which the department notifies the uninsured employer that the
8 reimbursement is owed. Interest shall accrue on amounts not paid when due at the
9 rate of 1% per month.

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

11 **103.08 Abusive work environments. (1) DEFINITIONS.** In this section:

12 (a) "Abusive conduct" means conduct, including acts or omissions, by an
13 employer or employee, with malice, that a reasonable person would find to be hostile
14 based on the severity, nature, and frequency of the conduct. "Abusive conduct"
15 includes repeated infliction of verbal abuse such as derogatory remarks, insults, and
16 epithets; verbal or physical conduct that is threatening, intimidating, or
17 humiliating; sabotage or undermining of an employee's work performance; or
18 exploitation of an employee's known psychological or physical vulnerability.
19 "Abusive conduct" does not include a single act unless that act is especially severe
20 or egregious.

21 (b) "Abusive work environment" means a work environment in which an
22 employee is subjected to abusive conduct that is so severe that it causes tangible
23 harm to the employee.

24 (c) "Adverse employment action" means an action taken by an employer with
25 respect to an employee that has the effect, in whole or in part, of a penalty, including

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1 dismissal or suspension from employment, demotion, denial of a promotion,
2 unfavorable transfer or reassignment, reduction in compensation, or denial of
3 increased compensation. “Adverse employment action” also includes a constructive
4 discharge.

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

7 (e) “Constructive discharge” means a situation in which an employee resigns
8 from employment because the employee reasonably believes that he or she was
9 subjected to abusive conduct and, prior to resigning, the employee notified the
10 employer of the abusive conduct and the employer failed to take reasonable steps to
11 eliminate the abusive conduct.

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

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

19 (h) “Malice” means the intent to cause pain, injury, or distress to another
20 person, without legitimate cause or justification.

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

23 (j) “Tangible harm” means any material impairment of a person’s physical or
24 mental health or bodily integrity.

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

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

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

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

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

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

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

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

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

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

6 2. The aggrieved employee unreasonably failed to take advantage of
7 appropriate opportunities provided by the employer to prevent or correct that
8 abusive conduct.

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

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

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

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

18 (c) An employee who is alleged to have engaged in an unlawful employment
19 practice may plead as an affirmative defense that the employee engaged in that
20 practice at the direction of the employer under threat of an adverse employment
21 action against the employee for not engaging in that practice.

22 **(5) RELIEF.** (a) Subject to par. (b) and sub. (6) (a) 1., if the circuit court finds
23 that an employer or employee has engaged in an unlawful employment practice, the
24 court may enjoin the employer or employee from engaging in that practice and may
25 grant such other relief as the court may consider appropriate, including

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1 reinstatement of the aggrieved employee, removal of the person who engaged in the
2 abusive conduct giving rise to the unlawful employment practice from the aggrieved
3 employee's work area, medical expenses, back pay, front pay, compensation for
4 emotional distress, punitive damages under s. 895.043, and reasonable costs and
5 attorney fees. If the circuit court orders any payment under this paragraph because
6 of an unlawful employment practice engaged in by an employee, the employer of the
7 employee is liable for that payment.

8 (b) If an employer is found to have engaged in an unlawful employment practice
9 that did not result in an adverse employment action against the aggrieved employee,
10 the employer's liability for compensation for emotional distress may not exceed
11 \$25,000 and the employer is not liable for punitive damages.

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

14 1. If the worker's compensation insurer of an employer that is ordered to pay
15 medical expenses under sub. (5) (a), the employer, if self-insured, or the department,
16 if the employer is uninsured, has paid or is obligated to pay medical expenses under
17 ch. 102 for an injury arising out of the same underlying behavior as the behavior
18 giving rise to the unlawful employment practice for which the employer is liable, or
19 if the worker's compensation insurer of an employer that is ordered to pay back pay
20 or front pay under sub. (5) (a), the employer, if self-insured, or the department, if the
21 employer is uninsured, has paid or is obligated to pay disability benefits under ch.
22 102 for such an injury for the same period as back or front pay is awarded under sub.
23 (5) (a), the court shall reduce the amount awarded under sub. (5) (a) for medical
24 expenses, back pay, or front pay by the amount of those medical expenses or disability
25 benefits that the insurer, employer, or department has paid or is obligated to pay

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1 under ch. 102. If the insurer or department has paid or is obligated to pay those
2 medical expenses or disability benefits under ch. 102, the court shall order the
3 employer to reimburse the insurer or department for the amount of those expenses
4 or benefits paid or for the amount awarded under sub. (5) (a) for medical expenses,
5 back pay, or front pay, whichever is less.

6 2. If the aggrieved employee recovers medical expenses under sub. (5) (a) for
7 an unlawful employment practice arising out of the same underlying behavior as the
8 behavior giving rise to an injury that is compensable under ch. 102 or recovers back
9 pay or front pay under sub. (5) (a) for such an unlawful employment practice for the
10 same period as disability benefits are payable under ch. 102, the amount payable for
11 medical expenses or disability benefits under ch. 102 for that injury shall be reduced
12 by the amount recovered for medical expenses, back pay, or front pay under sub. (5)
13 (a).

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

22 **SECTION 7.** 814.04 (intro.) of the statutes, as affected by 2009 Wisconsin Act 20,
23 is amended to read:

24 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)
25 (b), 100.30 (5m), 103.08 (5) (a), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9),

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1 281.36 (2) (b) 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.443 (3),
2 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51
3 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

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

5 **893.997 Abusive work environment.** Any civil action arising under s.
6 103.08 is subject to the limitations of s. 103.08 (3).

7 **SECTION 9. Initial applicability.**

8 (1) ABUSIVE WORK ENVIRONMENT. This act first applies to an unlawful
9 employment practice, as defined in section 103.08 (1) (k) of the statues, as created
10 by this act, committed on the effective date of this subsection.

11 (END)