



2009 ASSEMBLY BILL 36

February 12, 2009 – Introduced by Representatives MASON, GRIGSBY, VAN AKKEREN, POPE-ROBERTS, HIXSON, CULLEN, BENEDICT, PASCH, BERCEAU, MOLEPSKE JR., POCAN, ROYS, SOLETSKI, BLACK, SCHNEIDER, YOUNG and TURNER, cosponsored by Senators TAYLOR, RISSER, ROBSON, LEHMAN, COGGS and VINEHOUT. Referred to Committee on State Affairs and Homeland Security.

1 **AN ACT to create** 103.10 (15), 109.115 and 111.40 of the statutes; **relating to:**
2 liability of the state for a violation of the federal Family and Medical Leave Act
3 of 1993, Fair Labor Standards Act, or Age Discrimination in Employment Act
4 of 1967 or of Title I of the federal Americans with Disabilities Act of 1990.

Analysis by the Legislative Reference Bureau

Under the 11th Amendment to the U. S. Constitution and article IV, section 27, of the Wisconsin Constitution, the state may not be sued for damages unless it has waived its sovereign immunity. Specifically, the U.S. Supreme Court has recently held that, unless a state has waived its sovereign immunity, the state may not be sued for any of the following:

1. Damages for a violation of the Americans with Disabilities Act of 1990 (ADA), which prohibits an employer, including a state, from discriminating against an individual on the basis of disability. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

2. Damages for a violation of the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits an employer, including a state, from discriminating against an individual 40 years of age or over on the basis of age. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

3. Damages for a violation of the Fair Labor Standards Act (FLSA), which requires an employer, including a state, to pay the federal minimum wage and 1.5 times the employee's regular rate of pay for hours worked in excess of 40 hours per week (overtime pay). *Alden v. Maine*, 527 U.S. 706 (1999).

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The U.S. Supreme Court has also recently held that a state employee may sue for damages for a violation of the family leave provision of the federal Family and Medical Leave Act of 1993 (FMLA), regardless of whether the state has waived its sovereign immunity (*Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)), but did not rule on whether a state employee may sue for damages for a violation of the medical leave provision of the FMLA absent a waiver of sovereign immunity.

This bill provides that the state may be sued in a federal or state court of competent jurisdiction for a violation of the ADA, the ADEA, the FLSA or the FMLA and, in an action for a violation of any of those acts, is liable for all remedies that are available for such a violation to the same extent that a public entity other than a state is liable.

Accordingly, under the bill, if an employee of the state sues the state for a violation of the ADA, the ADEA, the FLSA or the FMLA, the state may be ordered as follows:

1. Under the ADA, to take appropriate action, including the provision of back pay, and to pay compensatory damages for future pecuniary losses and for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses of up to \$300,000, depending on how many employees are employed by the employer. The state Fair Employment Law, which similarly prohibits discrimination on the basis of disability, permits an award of back pay, but not of compensatory damages.

2. Under the ADEA, to take such action as will effectuate the purposes of the ADEA, including the provision of back pay, and, if the violation is willful, to pay an equal amount of liquidated damages. The state Fair Employment Law, which similarly prohibits discrimination on the basis of age, permits an award of back pay, but not of liquidated damages.

3. Under the FLSA, to provide back pay and to pay an equal amount of liquidated damages. The state Minimum Wage Law, which similar requires an employer to pay the state minimum wage and overtime pay, permits an award of the wages due, plus increased wages equal to 50 percent of the amount of wages due or, in certain cases, increased wages equal to 100 percent of the amount of wages due.

4. Under the FMLA, to provide back pay or pay actual monetary losses, plus interest, and to pay an equal amount of liquidated damages. The state Family and Medical Leave Law, which similarly requires an employer to provide family and medical leave, permits an award of back pay and damages, but not of liquidated damages.

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:

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1 103.10 (15) STATE LIABILITY UNDER FEDERAL FAMILY AND MEDICAL LEAVE ACT. The
2 state may be sued in a federal or state court of competent jurisdiction for a violation
3 of the federal Family and Medical Leave Act of 1993, 29 USC 2601 to 2654, and, in
4 an action for a violation of that act, is liable for all remedies that are available for such
5 a violation to the same extent that a public entity other than a state is liable.

6 **SECTION 2.** 109.115 of the statutes is created to read:

7 **109.115 State liability under Federal Fair Labor Standards Act.** An
8 employer, as defined in s. 103.01 (1) (b) or 104.01 (3) (b), may be sued in a federal or
9 state court of competent jurisdiction for a violation of the federal Fair Labor
10 Standards Act, 29 USC 201 to 219, and, in an action for a violation of that act, is liable
11 for all remedies that are available for such a violation to the same extent that a public
12 entity other than a state is liable.

13 **SECTION 3.** 111.40 of the statutes is created to read:

14 **111.40 State liability under federal age and disability discrimination**
15 **laws.** The state or an agency, as defined in s. 111.32 (6) (a), may be sued in a federal
16 or state court of competent jurisdiction for a violation of the federal Age
17 Discrimination in Employment Act of 1967, 29 USC 621 to 634, or Title I of the
18 federal Americans with Disabilities Act of 1990, 42 USC 12111 to 12117, and, in an
19 action for a violation of either of those acts, is liable for all remedies that are available
20 for such a violation to the same extent that a public entity other than a state is liable.

21 **SECTION 4. Initial applicability.**

22 (1) STATE LIABILITY UNDER FEDERAL EMPLOYMENT LAWS. This act first applies to
23 a violation of the federal Family and Medical Leave Act of 1993, 29 USC 2601 to 2654,
24 Fair Labor Standards Act, 29 USC 201 to 219, or Age Discrimination in Employment

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SECTION 4

1 Act of 1967, 29 USC 621 to 634, or of Title I of the federal Americans with Disabilities

2 Act of 1990, 42 USC 12111 to 12117, occurring on the effective date of this subsection.

3 (END)