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Are Plaintiffs Overcharging Wisconsin Wage-and-Hour Claims?

by: *Daniel Finerty, Lindner & Marsack, S.C. and Peter Nowak, Steinhilber Swanson LLP*



Chapter 109 authorizes employees to seek unpaid wages by filing a complaint with the Department of Workforce Development Equal Rights Division (DWD) and through a private right of action in circuit court.¹ In addition to

unpaid wages, the statute allows the circuit court to award attorney's fees and costs and order civil and criminal penalties.² Chapter 109 is, in essence, the state equivalent of the federal Fair Labor Standards Act (FLSA).

While a circuit court has explicit statutory authority to order a civil penalty under Wis. Stat. § 109.11(2), based on research and statutory analysis, it appears the civil penalty provision is generally misunderstood, and sometimes wrongly pled, to permit a 50% penalty upon unpaid wages, regardless of whether an employee has actually filed a DWD complaint prior to commencing suit in circuit court. As a result, counsel for employers and Employment Practice Liability Insurance (EPLI) carriers that provide wage-and-hour coverage³ should be aware that this position is not supported by the text of the statute, relevant cases (albeit unpublished), or the legislative history of Wis. Stat. § 109.11(2).

Defense counsel should uniformly raise a statutory defense that this provision does not authorize the circuit court to award a 50% penalty where a plaintiff has not filed a DWD labor standards

complaint. Correcting this misconception among practitioners will reduce the impact of wage-and-hour litigation upon businesses and, by extension, insurance carriers. It may also, hopefully, increase the likelihood that wage-and-hour cases will settle earlier, perhaps encouraging employees to bring them to the DWD instead of in court, permitting a less costly settlement without inflated attorney's fees. This would also lessen the burden on federal district courts⁴ and Wisconsin circuit courts to address these issues and for businesses to defend these suits.

I. Wisconsin's Wage Payments, Claims and Collections Act

The civil penalty provision, Wis. Stat. § 109.11(2), provides:

(a) In a wage claim action that is commenced by an employee *before* the department has completed its investigation under s. 109.09 (1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50 percent of the amount of wages due and unpaid.

(b) In a wage claim action that is commenced *after* the department

has completed its investigation under s. 109.09 (1) and its attempts to settle and compromise the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid to an employee and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 100 percent of the amount of those wages due and unpaid.

(Emphasis added.)

This section has been the foundation for discussion in Wisconsin cases, but, unfortunately, no published Wisconsin case has directly addressed whether this section authorizes a court to award damages in the absence of an administrative filing with DWD.

II. Wisconsin Caselaw – Published and Unpublished

In *Hubbard v. Messner*,⁵ the court of appeals acknowledged that “the administrative remedy is encouraged through the penalty structured” and that “DWD’s involvement is encouraged because the legislature trusts the DWD will be able to resolve most claims or the employer and employee will be able to settle their disputes without further court action or penalties.”⁶ However, the *Hubbard* court did not go so far as to acknowledge that the DWD filing is required in order to obtain either a 50% or 100% civil penalty because the plaintiff had filed a DWD claim, the investigation of which was completed prior to the commencement of suit.⁷

In *German v. Wisconsin Department of Transportation*, the court of appeals held that “the right of action created by § 109.03(5) permits employees to sue employers for wage claims deriving from hours and overtime regulations without first pursuing the claim with DWD.”⁸ In doing so, the *German* court rejected the argument that employees “may properly pursue their claim only under [Chapter 103, a different statute], which does not, in the [defendant’s] view, provide for

employee-initiated suits against employers.”⁹ The court recognized that “[s]ection 109.03(5), STATS., further provides that “[a]n employe[e] may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09(1).”¹⁰ Finally, the *German* court reviewed 1993 Wis. Act 86, which created the civil penalty section that is now Wis. Stat. 109.11(2), albeit in *dicta*, holding:

The 1993 amendment also provided that employees could recover greater penalties by allowing the agency to investigate wage claims before filing their own wage claim actions. *See* [1993 Wis. Act 86,] § 12. But the 1993 amendment also added the following clarifying language to § 109.03(5), STATS.: “An employe may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09(1).” *See* 1993 Wis. Act, § 2. With this language, the legislature plainly stated its intent not to restrict an employee’s private right of action for wages due, even though it encouraged agency enforcement of wage claims...¹¹

However, there is no indication that the *German* court’s statement extends to the civil penalty provision. Clearly, an employee can go straight to circuit court without filing a DWD wage claim; however, failing to do so precludes the employee’s ability to recover civil penalties under the Wis. Stat. §109.11(2) provision. The express language of Wis. Stat. § 109.11(2) outlines the necessity to file an administrative claim, the right to relief under that section being dependent upon an employee’s prior filing of a DWD administrative claim prior to seeking relief in circuit court. Further, this conclusion makes sense because the legislature has stated a preference for wage claims to be resolved by those with the specialized knowledge at DWD, instead of the over-burdened circuit courts.¹²

One unpublished case provides very useful insight and support for this interpretation of the civil penalty provision; however, as an unpublished decision, it is of limited utility. In *Levin v. Gass & Riegert Auto Complex, Inc.*, the court of appeals concluded that an employee need not exhaust administrative remedies before litigating a wage claim in circuit court.¹³ In support of its conclusion, the court of appeals reviewed Wis. Stat. § 109.11(2) and explained:

Specifically, § 109.11(2)(a) provides an incentive to employees to seek the DWD's assistance in enforcing their wage claims and to complete the process before filing a wage claim action in circuit court. By doing so, a circuit court may award an employee not only wages owed and unpaid, but also an additional 50% of those wages. Subsection (b) of the §109.11(2) permits a circuit court to grant double damages to an employee who waits to file a wage claim in court until after the DWD has completed its investigation and all efforts to settle or compromise the matter have been exhausted.

We recognize that, by providing greater damages for administrative claims, the legislature has signaled a strong preference for the administrative resolution of these disputes. Nonetheless, the fact that the legislature indicated a preference for an administrative solution does not mean it intended to require an employee to exhaust the administrative process before seeking a remedy in court. Indeed, the existence of these incentives suggests that the legislature did not intend for the administrative remedies under that statute to be exclusive. An incentive to complete the administrative process would be unnecessary if the legislature

required an employee to exhaust administrative remedies before pursuing court action.¹⁴

The *Levin* court's reference to the incentive to file a DWD claim provides some support for the conclusion that, if a DWD claim is not filed or, if filed, not concluded, the civil penalty damages are not available or should be limited. As "[s]tatutory language is given its common, ordinary, and accepted meaning,"¹⁵ and "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results,"¹⁶ the *Levin* court's plain reading counsels that the incentive provided to, at least, file a DWD complaint and, at most, to permit DWD to complete its investigation and attempt to settle cannot be realized if circuit courts permit civil damage penalty claims where no DWD claim has been filed by the plaintiff. Additionally, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."¹⁷ Such a holding renders the portion of Wis. Stat. §§ 109.11(2)(a) and (b) regarding DWD claims to be mere surplusage.

III. Statutory Analysis and Legislative History

Because Wisconsin courts have not definitively concluded that an administrative claim is required prior to the circuit court awarding civil penalties under Wis. Stat. § 109.11(2), plaintiffs continue to request civil penalties while bypassing DWD. In fact, of the seventy complaints requesting penalties under § 109.11 available on Westlaw, only six referenced filing a labor standards complaint with DWD.¹⁸

However, the statutory language and legislative history do not support this understanding. To the contrary, both support the proposition that § 109.11(2) requires plaintiffs to first file a DWD labor standards complaint as a condition precedent to the circuit court obtaining the discretion to consider whether to award civil penalties, the potential amount of which being dependent upon whether or not DWD completed its investigation

and its efforts to settle the case. As a result, the filing of a DWD complaint against an employer is *not* an administrative prerequisite to filing suit in circuit court unlike, for example, the requirement that an employee file an administrative complaint with DWD or its federal cousin, the Equal Employment Opportunity Commission (EEOC), in order to pursue discrimination litigation in state or federal court. However, as already noted, Wisconsin appellate courts have not yet directly applied the statutory language to the question of whether the DWD filing *is* a prerequisite to the award of any civil penalties outlined in Wis. Stat. § 109.11(2). Applying the plain language, an administrative filing *is* a statutory prerequisite to a circuit court's award of a civil penalty. In this regard, *only the amount* of the civil penalty is dependent upon whether or not the DWD has *completed* its investigation *and* its attempts to compromise and settle the wage claim. If the employee files suit seeking unpaid wages before DWD has completed its investigation and its attempts to compromise and settle the wage claim, then a circuit court may only order not more than 50 percent of the amount of wages due and unpaid.¹⁹ However, if the DWD has completed its investigation and its efforts to compromise and settle the wage claim, prior to the employee's suit in circuit court, the court would be authorized to award up to an amount of "increased wages of not more than 100 percent of the amount of those wages due and unpaid."²⁰

Additionally, the drafting history of § 109.11(2) indicates that plaintiffs must first file an administrative claim before the circuit court may award a 50% civil penalty. The first draft of § 109.11(2) in 1993 Wisconsin Act 86 provided that "[i]n addition to the amount of wages due and unpaid [illegible] and in addition to or in lieu of the criminal penalties specified in sub. (3), a circuit court may order an employer to pay to the employee increased wages equal to 100% of the amount of those wages due an unpaid."²¹ The second draft of the bill significantly revised this language to condition the extent of civil penalty on the status of the administrative proceedings. The revised text provided:

In a wage claim action that is commenced by an employee before the department has completed its investigation under s. 109.09(1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50% of the amount of wages due and unpaid.²²

The drafters rejected the initial language that would have allowed for civil penalties independent of the administrative process and chose to condition the scope of the civil penalties to the status of the administrative proceeding. This revised language withstood the third and fourth drafts of Act 86 and was passed by the legislature and, once again, demonstrated the legislature's preference for administrative resolution of wage claims.

Further, awarding civil penalties that are not authorized by the statute may actually be a direct violation of the limitation placed by the legislature into the statute itself. Specifically, Wis. Stat. § 109.03(6) provides that "[n]o person other than an employee or the department shall be benefited or otherwise affected by this subsection." Arguably, by awarding unauthorized civil penalties that are not authorized by the statute, in cases where the employee has counsel, could arguably act as a benefit to the counsel whose recovery is increased in proportion to the amount of the civil penalties wrongly awarded.

IV. Best Practices

Upon receipt of a wage claim filed under Wisconsin law in state or federal court with a plaintiff's request for assessment of a civil penalty under Wis. Stat. § 109.11(2), counsel should determine if the plaintiff filed a DWD claim prior to commencing suit.

If the plaintiff did not file a DWD claim, counsel should consider either a motion to dismiss the civil penalty claims or otherwise preserve the defense that the failure to file a DWD claim precludes the court from exercising its discretion to award or from awarding the plaintiff any civil penalty for a later summary judgment motion.

If the plaintiff did file a DWD claim, counsel should determine whether or not DWD concluded its investigation and its attempts to compromise and settle the wage claim prior to suit being filed. This is usually indicated by a closure letter from DWD's Labor Standards Investigator. If DWD did conclude its investigation and attempts to settle the claim,²³ a 100% civil penalty may be sought by the plaintiff, although the circuit court has discretion over the appropriate award of civil penalties.²⁴ If a closure letter was not sent or evidence of a closure of the investigation or DWD's settlement efforts cannot be found, after request for and review of the DWD file, counsel should consider preserving the defense that the 100% civil penalty is not due, and that any civil penalty, if awarded, must be limited to 50% of the amount the court determines is due.

V. Conclusion

The conventional understanding of Wis. Stat. § 109.11(2) is not supported by the text of the statute or its drafting history. A proper reading mandates that a plaintiff must first, at least, file a DWD wage claim prior to commencing any action in circuit court seeking any civil penalty. Thus, counsel should uniformly raise the defense that Wis. Stat. § 109.11(2) does not authorize any penalty where a plaintiff has not filed a labor standards complaint with DWD first and, when a DWD complaint has been filed but not concluded, the potential civil penalty is limited. Broad consensus on this position among Wisconsin counsel will ensure uniform protections for Wisconsin businesses and, when included, their insurance carriers.

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References

- 1 Wis. Stat. § 109.03(5).
- 2 Wis. Stat. §§ 109.03(6), 109.11.
- 3 While EPLI typically may not cover claims for unpaid wages, a claim for unpaid wages may still be outlined in a circuit court action alleging wrongful discharge or other claims that may be covered by an insured client's EPLI policy. Further, more and more carriers are wading into limited coverage of claims for unpaid wages.
- 4 A review of the Eastern District of Wisconsin PACER records between July 1, 2019 and February 27, 2020 to determine the number of cases filed under the headings for 445 Civil Rights: Americans with Disabilities-Employment (discrimination) and 710: Labor: Fair Standards (FLSA), among others. During that period, 32 discrimination cases were filed while 44 FLSA cases were filed during that same time period.
- 5 *Hubbard v. Messner*, 2003 WI App 15, ¶¶ 9, 13, 259 Wis. 2d 654, 656 N.W.2d 475, *aff'd* 2003 WI 145, 267 Wis. 2d 92, 673 N.W.2d 676.
- 6 *Id.*
- 7 *Id.* ¶ 2.
- 8 *German v. Wis. Dept. of Transp.*, 223 Wis. 2d 525, 528, 589 N.W.2d 651 (Ct. App. 1998), *aff'd* 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50.
- 9 *Id.* at 536.
- 10 *Id.* at 537.
- 11 *Id.* at 541, n. 7.
- 12 "We recognize that agency enforcement of agency regulations promotes uniformity in the development and application of regulations within agency's specialized expertise." *Id.* at 544 (when both court and agency have jurisdiction over a dispute, the court should exercise discretion to relinquish jurisdiction to the agency in technical matters beyond the expertise of the court) (*citing*

- City of Brookfield v. Milwaukee Sewerage Dist.*, 171 Wis. 2d 400, 416-24, 491 N.W.2d 484 (1992)).
- 13 *Levin v. Gass & Riegert Auto Complex, Inc.*, 2009 Wisc. App. LEXIS 207, ¶¶ 11-12, 2009 WI App 56, 317 Wis. 2d 730, 768 N.W.2d 62 (unpublished decision).
- 14 *Id.* (citing *Hubbard*, 267 Wis. 2d 92, ¶ 27).
- 15 *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.
- 16 *Id.* ¶ 46.
- 17 *Id.*
- 18 To make this determination, the author searched Westlaw for all cases that cited Wis. Stat. § 109.11 since 2010. The author then reviewed each complaint to see if the plaintiff referenced filing a labor standards complaint with DWD.
- 19 Wis. Stat. § 109.11(2)(a).
- 20 Wis. Stat. § 109.11(2)(b).
- 21 LRB Analysis, 3595-1, Page 7.
- 22 LRB Analysis, 3595-2, Insert 7-12.
- 23 Typically, DWD's Labor Standards Bureau will issue a Final Determination outlining any wages owed to the employee, request that employer forward a check made out to the employee for the wages found due in the determination, less standard deductions, send it directly to the employee, provide a copy of the enclosure letter and check to the DWD . DWD usually requests the employer do so within 15 days of the date of this determination. If it does not, a file closure letter, signaling its efforts have failed and advising the employee of the right to file in circuit court or contact the district attorney, will follow.
- 24 A circuit court ultimately has discretion under Wis. Stat. § 109.11(2)(b) to award few or no civil penalties. *Johnson v. Roma II - Waterford LLC*, 2013 WI App 38, 346 Wis. 2d 612, 829 N.W.2d 538 (citing *Hubbard*, 267 Wis. 2d 92, ¶ 40).

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