
Judiciary Committee

SSB 5340

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Defining disability in the Washington law against discrimination.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser).

Brief Summary of Substitute Bill

- Provides a statutory definition of "disability" for purposes of the state's law against discrimination; and
- Replaces definitions of "disability" adopted by the Human Rights Commission and the Washington State Supreme Court.

Hearing Date: 3/21/07

Staff: Bill Perry (786-7123).

Background:

The state Law Against Discrimination provides that a person has the right to be free from discrimination based on a number of factors. One of these factors is the presence of any "sensory, mental, or physical disability."

The right to be free from discrimination based on such a disability applies to employment, public accommodations, real estate transactions, insurance, and commerce.

In addition, the Law Against Discrimination defines certain practices to be unfair. For example, it is an unfair practice to refuse to hire or fire a person, or to discriminate in a person's compensation, based the presence of any sensory or physical disability. Under case law, employers are required to make "reasonable accommodations" for an employee with a disability.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

There are also other specific unfair practices defined in the Law Against Discrimination with respect to public accommodations, real estate transactions, insurance, financial institutions, credit transactions, and labor union practices.

The Washington State Human Rights Commission (WSHRC) has responsibility for taking complaints of violations of the Law Against Discrimination and for seeking resolution of complaints and enforcement of the law.

There is no definition of "sensory, mental, or physical disability" in the Law Against Discrimination itself. There is, however, a definition in the administrative rules of the WSHRC. For purposes of those rules, the phrase means a condition that:

- is medically cognizable or diagnosable;
- exists as a record or history;
- is perceived to exist whether or not it exists in fact.

For purposes of employment discrimination under the WSHRC rules, a condition is a "sensory, mental, or physical disability" if it "is an abnormality and is a reason why" the person was discriminated against. This definition has been criticized by courts and commentators as circular because it appears to say a condition is a disability if it is a reason for discrimination.

In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629 (2000), the state Supreme Court noted the difficulties with the WSHRC rule and announced the test for disability in employment discrimination cases to be whether or not a claimant's condition:

- either: (1) is medically cognizable or diagnosable, or (2) exists as a record or history; and
- has a substantially limiting effect on the claimant's ability to perform his or her job.

The Federal Americans with Disabilities Act (ADA) has yet another definition of "disability." The state Supreme Court recently rejected both the WSHRC rule and its own earlier *Pulcino* test. The court adopted the ADA definition of "disability" in an employment discrimination case, *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006). The test for a "disability" announced by the court is whether or not a person:

- has a physical or mental impairment that substantially limits one or more major life activities; and
- has a record of such an impairment; or
- is regarded as having such an impairment.

Summary of Bill:

The Legislature finds that *McClarty* was incorrectly decided because it fails to recognize that Washington's law predates and is independent of the ADA.

A statutory definition is provided for the term "disability" within the state's Law Against Discrimination.

A disability is a sensory, mental, or physical impairment that:

- is medically cognizable or diagnosable; or
- exists as a history; or
- is perceived to exist.

A disability exists whether or not an impairment:

- is temporary, common, or mitigated; or
- limits the ability to work or do any other activity under the Law Against Discrimination.

An impairment includes any physiological disorder, cosmetic disfigurement, or anatomical loss affecting enumerated body systems, as well as mental, developmental, traumatic, or psychological disorders.

However, for purposes of the requirement for reasonable accommodation in employment, an impairment must either:

- have a substantial limiting effect on performing or applying for a job, or accessing equal job benefits, privileges, terms, or conditions; or
- present a reasonable likelihood that a job will aggravate the impairment so that it becomes substantially limiting.

These changes apply retroactively to all cases pending or not time barred on the effective date of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.