

SENATE BILL REPORT

SSB 5340

As Amended by House, April 18, 2007

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 History:

Committee Activity: Judiciary: 1/12/07, 2/23/07 [DPS].

Passed Senate: 3/08/07, 42-6.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5340 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, or where the affected individual is regarded as having such impairment.

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.

Summary of Substitute Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

It is added that for purposes of qualifying for reasonable accommodation in employment, an impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. A limitation is substantial if it has more than a trivial effect.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

OTHER: While true that Section 25, part (a) of the bill does codify the Washington Administrative Code (WAC), courts have ruled that the WAC is circular. The problem is that the employment claims and cases that have arisen are not necessarily due to discrimination, but are due to the WAC's circular definition. Section (b) of the bill would broaden the scope of liability for employers. And specifically, the problem language is that the definition is not limited to whether the disability has anything to do with the employee's ability to perform the particular job the employee has, or with the job classification generally. Part (c) of the bill suggests that simply because an employee has an impairment, an employer would have a duty of reasonable accommodation, whether or not the disability affected the workplace. Further, the bill in its current state does not seem to acknowledge the sound analysis and workable doctrine handed down in a number of critical cases based on actual employment situations in which employees have requested accommodation, such as the Doe and Pulcino cases. In essence, these cases established 15 years of workable solution to the circular definition of the WAC, and provided some guidance or certainty for employers and employees, who both need certainty as to the boundaries regarding legal obligations.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

House Amendment(s): Includes a legislative findings section stating that the *McClarty* decision failed to recognize that Washington's anti-discrimination law provides protections independent of federal law.

For purposes of qualifying for reasonable accommodation in employment, the amendments require that the employee's impairment be known by the employer, or be shown through an interactive process to exist in fact. If the proposed basis for the accommodation is that the impairment would be aggravated otherwise, the employee must notify the employer of the impairment. Also, medical documentation must establish a reasonable likelihood that engaging in job functions without the accommodation would aggravate the impairment to the extent that it would substantially limit the employee in certain job aspects (e.g., job performance, consideration for the job, access to equal job benefits).

The section on retroactivity is limited to causes of action occurring before the Washington Supreme Court's issuance of the *McClarty* decision on July 6, 2006, and to causes of action occurring on or after the effective date of this act.