

SENATE BILL REPORT

SB 6027

As Passed Senate, February 13, 2018

Title: An act relating to the discovery of privileged health care information and communications in claims for noneconomic damages under certain civil rights laws.

Brief Description: Concerning the discovery of privileged health care information and communications in claims for noneconomic damages under certain civil rights laws.

Sponsors: Senators Kuderer and Palumbo.

Brief History:

Committee Activity: Law & Justice: 1/18/18, 1/25/18 [DP, w/oRec].

Floor Activity:

Passed Senate: 2/13/18, 42-5.

Brief Summary of Bill

- Clarifies that a claimant's health is not at issue and no health care privilege is waived by requesting non-economic damages under the Washington Law Against Discrimination (WLAD).
- Provides three exceptions to the limit where the claimant alleges a diagnosable injury, or relies on testimony of a health care provider, or alleges discrimination on the basis of a disability.
- Limits the exceptions in time, starting two years prior to the first alleged unlawful act.
- Requires the application of any waiver to relate specifically to the provided exceptions.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Darneille and Frockt.

Minority Report: That it be referred without recommendation.

Signed by Senators Angel, Assistant Ranking Member; Wilson.

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.

Staff: Tim Ford (786-7423)

Background: The WLAD, first adopted in 1949, establishes that it is a civil right to be free from discrimination based on race; creed; color; national origin; families with children; sex; marital status; age; the presence of any sensory, mental, or physical disability; or the use of a trained dog guide or service animal by a disabled person. This right applies to employment; places of public resort, accommodation, assemblage, or amusement; commerce; and real estate, credit, and insurance transactions.

In a civil lawsuit under WLAD, a plaintiff may allege discrimination and also claim that the discriminatory action caused non-economic damages. Non-economic damages are defined in a different state law and mean subjective, non-monetary losses including but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

Summary of Bill: By requesting non-economic damages under WLAD, a claimant does not place their health at issue or waive any health care privilege except for the following circumstances:

- the claimant alleges a specific and diagnosable physical or psychiatric injury as a proximate cause of the respondents' conduct;
- the claimant relies on the records or testimony of a health care provider or expert witness to seek general damages; or
- the claimant alleges failure to accommodate a disability or alleges discrimination on the basis of a disability.

Any waiver under those three circumstances is limited to health care records and communications between the claimant and provider:

- created or occurring in a period beginning two years prior to the first alleged unlawful act and ending at the last date for which the claimant seeks damages; and
- relating specifically to the diagnosable injury, to the health care provider on which the claimant relies, or the disability specifically at issue in the allegation.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: This bill is changed from the version from last year. This year the bill relates to discovery and not admissibility of evidence. In cases where sexual harassment is alleged there is a spectrum of behavior from viewing pornography to rape and an assault. There is a consistent defense approach regardless of the behavior. There has been a request for medical records sometimes going back to birth. It has a chilling effect on women and some just drop the claims. The bill puts some uniformity on the discovery of health records. Any waiver goes back two years for discoverable health information. This is

a starting point and there is an avenue for a longer period of time for exceptional circumstances. Sexual harassment is real and ubiquitous. This is a step toward protecting women. The case law is problematic. When plaintiffs put their mental health at issue by alleging emotional distress, they waive their psychologist-patient privilege for relevant mental health records. It has nothing to do with the damages we are proving. This bill would provide reasonable protections.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Elisabeth Smith, ACLU of Washington; Jack Sheridan, Sheridan Law Firm, P.S.; Sara Ainsworth, Legal Voice; Katie Chamberlain, Washington Employment Lawyers Association; Jesse Wing, Washington State Association for Justice.

Persons Signed In To Testify But Not Testifying: No one.