

HOUSE BILL REPORT

HB 1322

As Reported by House Committee On:
Judiciary

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

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

Sponsors: Representatives McCoy, Grant, Sells, Cody, Conway, Schual-Berke, Roberts, Pettigrew, Lantz, Kagi, Moeller, Chase, Green, Kenney, Simpson, Darneille, Dickerson, Hankins, Santos, Ormsby and Flannigan.

Brief History:

Committee Activity:

Judiciary: 2/6/07, 2/13/07 [DPS].

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.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Lantz, Chair; Goodman, Vice Chair; Flannigan, Kirby, Moeller, Pedersen and Williams.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern and Ross.

Staff: Bill Perry (786-7123).

Background:

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.

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 on the presence of any sensory or physical disability. Under case law, employers are required to make "reasonable accommodations" for an employee with a disability. 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; or
- 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 Substitute Bill:

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;
- 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 substantially 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.

Substitute Bill Compared to Original Bill:

The substitute adds restrictive language regarding the definition of "disability" for purposes of an employer's duty to make reasonable accommodations. In a reasonable accommodation case, an employee's impairment must have a "substantially limiting" effect on job performance or access to job benefits or other conditions of employment.

The substitute bill removes a statement of legislative finding and intent regarding the *McClarty* decision.

Appropriation: None.**Fiscal Note:** Available.**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.**Staff Summary of Public Testimony:**

(In support) The *McClarty* decision will have disastrous consequences for persons in the disabled community. What courts allow in the way of amelioration under the ADA standard will deprive many people of services and accommodations they should have and are now receiving.

The substitute bill is a carefully worked out compromise with the business community. The substitute responds to the business community's concerns by reestablishing the "substantially limiting" standard in reasonable accommodation cases.

It would be false economy not to pass this bill. Without the bill, fewer people will be able to find employment and to contribute to the costs of their own needs. It would also be dangerous not to pass the bill since many people who have disabilities disclosed them under the pre-*McClarty* rules when they were protected. Without this bill, these same people may now turn out to have effectively exposed themselves to discrimination.

The ADA standards that now apply have been so narrowly construed by the courts that even disabilities like breast cancer, diabetes, multiple sclerosis, and asthma may not be protected from discrimination. Many other states also have state laws that are broader than the ADA.

(Neutral) There was no problem applying the Law Against Discrimination before *McClarty*. Now the HRC is having to turn down many complaints it previously could have taken. For 30 years people in this state have been protected by the state's law.

(Concerns) The inclusion of "cosmetic disfigurement" in the definition is unnecessary given the breadth of the rest of the definition. The requirement to make reasonable accommodation if there is a reasonable likelihood that an impairment will become substantially limiting is too broad. Whether or not employment may aggravate an impairment to the point of it becoming substantially limiting should be tied to whether or not it is medically necessary to accommodate the impairment.

(Opposed) No one wants to discriminate, but the bill is just too broad and vague. Small businesses do not have lawyers to help them figure out what they could do under a standard like that. Small business interests were not included in the discussions that produced the proposed substitute bill.

Persons Testifying: (In support) Jeffrey Needle, Washington Employment Lawyers Association; David Lord, Washington Protection and Advocacy System; Paul Miller, University of Washington School of Law; Jim Baker, Robert Blumenfeld, and Jeanette Murphy, Association of Centers for Independent Living-Washington; Marie Jubie, North Sound Mental Health Advisory Board; Kris Tefft, Association of Washington Business; Kevin Bernadt, King County Developmental Disabilities; Joelle Brouner, Washington State Rehabilitation Services; and Laurel Carter.

(Neutral) Marc Brenman, Washington State Human Rights Commission; and Toby Olson, Governor's Committee on Disability Issues and Employment.

(Concerns) Lisa Sutton, Attorney General's Office.

(Opposed) Gary Smith, Independent Business Association.

Persons Signed In To Testify But Not Testifying: None.