

HOUSE BILL REPORT

HB 1300

As Reported By House Committee On:
Judiciary

Title: An act relating to discrimination.

Brief Description: Revising laws relating to discrimination.

Sponsors: Representatives Appelwick, Padden, J. Kohl, Riley, Forner, Ballasiotes, Schmidt, Brough, Long, Thibaudeau, Karahalios, Franklin, Johanson, G. Cole, Wood, Casada, Jacobsen, Leonard and H. Myers.

Brief History:

Reported by House Committee on:
Judiciary, February 9, 1993, DPS.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 15 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Tate; and Wineberry.

Staff: Patricia Shelledy (786-7149).

Background: The law against discrimination provides that a person has a right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap. The law prohibits discrimination for those reasons against a person in employment, use of public accommodations, and real estate, credit, and insurance transactions, and prohibits discriminatory blacklists or boycotts in commerce. Additionally, discrimination due to the person's marital status is prohibited in some circumstances.

In addition, a person has a right to be free from age discrimination if the person is between the ages of 40 and 70. Employers and employment agencies may not express any limitation on the hiring of persons between the ages of 40 and 70, except the employer or agency may require the person to disclose the person's date of birth.

The term "sensory, mental, or physical handicap" does not expressly include the use of a trained guide dog or service dog by a disabled person. The law against discrimination and a separate chapter of the Revised Code of Washington prohibits discriminating against a person in the use of transportation or accommodation facilities because the person uses a guide dog or service dog. The only other specific provision in the law against discrimination which prohibits discrimination because the person uses a guide dog is the provision prohibiting discrimination in real estate transactions. Failure to refer to guide dogs in other sections may create a negative implication that the use of guide dogs in other areas is a legitimate basis for discrimination.

The term "sensory, mental, or physical handicap" is not defined in statute. Some courts interpreting the phrase have provided some guidance about its terms. One appellate court has held that "gender dysphoria" or transsexualism is a handicap under the law against discrimination. That case is on appeal before the Washington Supreme Court. The federal Americans with Disabilities Act (ADA), which became effective this summer, refers to "disabilities" rather than "handicaps," defines "disability," and contains certain express exclusions. Gender identity disorders and transsexualism are specifically excluded, among other categories. The ADA also explicitly sets forth rules governing when a person who uses illegal drugs may be considered disabled for purposes of the ADA. The state law against discrimination does not contain express statutory rules governing illegal drug use. State law is dependent upon the development of case law to establish rules regarding disabilities due to the use of illegal and legal drugs.

The law against discrimination specifically provides that discrimination, related to sex discrimination or discriminatory boycotts or blacklists, which is committed in the course of trade or commerce, is an unfair practice under the Consumer Protection Act. The law against discrimination does not explicitly state whether other forms of discrimination prohibited by the law against discrimination constitute a violation of the Consumer Protection Act. The Consumer Protection Act allows the person injured by the unfair practice to sue for treble damages, costs, and reasonable attorneys' fees. In general, the Consumer Protection Act does not apply to practices that have a reasonable relation to the development and preservation of business and are not injurious to the public interest.

A person claiming to be discriminated against may file a complaint with the Human Rights Commission. The complaint must be filed under oath. If an administrative law judge finds that the person was discriminated against, the judge may order a number of remedies, including awarding damages for humiliation and mental suffering not to exceed \$1,000.

Another provision of law designed to protect patients in nursing homes and state hospitals from abuse and neglect provides that any person who, in good faith, reports

an incident of suspected abuse or neglect, may not be dismissed by the person's employer. A dismissal under those circumstances is a violation of the law against discrimination.

References to the list of protected classes is somewhat erratic in the law against discrimination, and one or more of the protected classes are not included in certain sections. It is not readily apparent whether those deletions are deliberate or an oversight in drafting. For example, "age" and "marital status" are frequently not included in certain provisions. In addition, some sections do not include "sex" and another section does not include "national origin."

Summary of Substitute Bill: The phrase "sensory, mental, or physical handicap" is changed to "sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person."

The same exclusions from the definition of a disability under the Americans with Disabilities Act are included in the Washington law against discrimination. Those exclusions are as follows: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from illegal drug use, and except in limited circumstances, anyone engaging in the illegal use of drugs. An illegal drug user may be covered by the act if the person has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or is in a supervised treatment program and is no longer using illegal drugs, or is erroneously considered to have engaged in illegal drug use.

Any violation of the law against discrimination, not just those involving sex discrimination or discriminatory boycotts or blacklists, is a matter affecting the public interest. Additionally, any such violation is not reasonable in relation to the development and preservation of business and is an unfair practice under the Consumer Protection Act.

The upper age limit of 70 for purposes of age discrimination is removed. An employer may not discriminate against a person 40 or older due to the person's age. Further, an employer may no longer ask for the person's date of birth until after the person is hired.

The damage limit for recovery of damages for humiliation and mental suffering due to discrimination is increased from \$1,000 to \$10,000.

A person who reports an incident of suspected abuse or neglect of a patient in a nursing home or state hospital may not be dismissed, discharged, expelled, or otherwise discriminated against because of the report.

Various sections are amended to add references to other protected categories apparently excluded from the original law due to a drafting oversight. "Marital status" is defined.

A person may file a complaint in writing under oath or by declaration.

A few technical changes are made.

Substitute Bill Compared to Original Bill: Certain conditions are explicitly excluded from the meaning of the phrase, "sensory, mental, or physical disability." Those exclusions match the exclusions from the scope of the term "disability" in the federal American with Disabilities Act. A change in the original bill was not adopted: the term "groundless" is restored to the provision that the administrative law judge may award reasonable attorneys' fees and costs to the defendant if the plaintiff's complaint was "frivolous, unreasonable, or groundless."

Fiscal Note: Not requested.

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

Testimony For: The penalties under the existing law against discrimination are less severe than penalties for a variety of other violations which are arguably less serious than discriminating against a person because the person is a member of a particular class. Increasing the possible monetary penalty will make the remedy more effective. The change removing the upper age limit of 70 for purposes of age discrimination brings Washington into conformity with federal law. There is no reason to limit violations of the Consumer Protection Act to those involving sex discrimination and boycotts. The bill has many technical improvements. The definition of marital status adds clarity. Adding "sex" as a protected category to many of the provisions prohibiting discrimination will help prevent sex discrimination.

Testimony Against: The phrase "sensory, mental, or physical handicap" should be changed to the definition of "disability" under the federal American with Disabilities Act to reduce confusion and exposure of employers who try to comply with both acts. Complainants should be required to exhaust administrative remedies before filing a civil court action. The bill creates a significant expansion of the scope of the Consumer Protection Act, which may be appropriate in credit transactions but is inappropriate in employer/employee relationships. "Groundless" should not be deleted. Disabilities should apply only to immutable characteristics.

Witnesses: Lonnie Johns-Brown, National Organization for Women (pro); Judith Turpin, Northwest Women's Law Center (pro); Ann Simons, Washington Women

United (pro); Merritt Long, Human Rights Commission (pro); Deborah Addleman, Human Rights Commission (pro); Cliff Finch, Association of Washington Businesses (con); and Carolyn Logue, Association of Independent Businesses (con).