

# HOUSE BILL REPORT

## SSB 5340

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### As Reported by House Committee On: Judiciary

**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: 3/21/07, 3/23/07 [DPA].

#### Brief Summary of Substitute Bill (As Amended by House Committee)

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

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. 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:

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."

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*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 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.

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### **Summary of Amended 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 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.

#### **Amended Bill Compared to Substitute Bill:**

The amended bill does not contain the findings section that is in the substitute bill. The removed section finds that the *McClarty* opinion was incorrectly decided.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

#### **Staff Summary of Public Testimony:**

(In support) This is a carefully worked out bill that just synthesizes the pre-*McClarty* law in Washington. The bill gets its definition from three sources: the current WHRC regulation, but without the problem of circularity found in that rule; the regulations of the Equal Employment Opportunity Commission; and the *Pulcino* decision of the Washington Supreme Court.

The suggestion that the ADA definition adopted in *McClarty* is settled law is just wrong. There is no clarity at all in the ADA definition. The ADA definition prevents cases from ever being decided on the merits. It fails to cover many people with progressive disabilities such as Amyotrophic Lateral Sclerosis, diabetes, or cancer. It actually provides an incentive for employers to fire an employee with such a condition before it progresses to the point where the ADA does recognize a disability.

The broad definition in the bill will not produce a flood of litigation. On the other hand, the ADA has resulted in endless litigation over the definition of disability, with cases never even getting to the question of discrimination. The federal courts have taken a very narrow view of the meaning of disability under the ADA, and the case law is confusing and unclear.

No one with a trivial condition like a receding hairline has ever brought a discrimination claim. The far greater threat is that under the ADA standard adopted in *McClarty*, people with real disabilities are unable to protect themselves from discrimination.

(With concerns) The retroactive application of the bill will penalize employers who have been complying in good faith with the current law.

(Opposed) The *McClarty* decision provided a definition of disability when there was none. The Washington Supreme Court explicitly noted that state courts will not be bound by the federal courts' interpretation of the ADA standard. The trouble with the ADA is not the law itself, it is the federal courts' interpretation of it.

The bill is so broad that even a receding hairline might be a disability. An "inability to perform" standard should apply to the definition in all cases, not just employment cases involving reasonable accommodation. The bill is not a return to prior law, because prior law would not cover such trivial conditions.

The bill would also cover even voluntarily induced, temporary disabilities such as recovery from elective laser eye surgery.

This broad definition will have the effect of further spreading already thin resources so that those most in need of protection will get less.

The bill's definition is way too broad and is so confusing that small businesses that do not have lawyers or human resources specialists will be unable to deal with it.

**Persons Testifying:** (In support) Senator Kline, prime sponsor; Skip Dreps, Paralyzed Veterans of America; Toby Olson, Governor's Committee on Disability Issues and Employment; Joelle Brouner, Washington State Rehabilitation Council; Mark Brenman and Shawn Murinko, Washington State Human Rights Commission; Marie Jubie; Jill Pugh, Washington State Trial Lawyers Association; Cherie Tessier; Paul Miller, University of Washington School of Law; and David Lord, Washington Protection and Advocacy System.

(With concerns) Natividad Valdez, Department of Personnel.

(Opposed) William Jeffrey, Associated General Contractors, National Electrical Contractors Association, Mechanical Contractors Association, and Washington Construction Industry Council; Shannon Ragonesi, Washington Defense Trial Lawyers; Mark Matthews, Associated Grocers; Paul Nordsletten, Association of Washington Cities; Carolyn Logue, National Federation of Independent Business; Gary Smith, Independent Business Association; and Vicky Marin, Washington Retail Association.

**Persons Signed In To Testify But Not Testifying:** None.