

HOUSE BILL REPORT

SB 6236

As Reported by House Committee On:
Civil Rights & Judiciary

Title: An act relating to certain noneconomic damage waivers.

Brief Description: Concerning certain noneconomic damage waivers.

Sponsors: Senators Kuderer, Pedersen, Lovelett, Wellman and Hasegawa.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/25/20, 2/28/20 [DP].

Brief Summary of Bill

- Amends the Washington Law Against Discrimination with respect to when a claimant's request for noneconomic damages results in a waiver of health care privileges.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 12 members: Representatives Kilduff, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Hansen, Kirby, Orwall, Peterson, Rude, Valdez, Walen and Ybarra.

Minority Report: Without recommendation. Signed by 2 members: Representatives Dufault, Assistant Ranking Minority Member; Graham.

Minority Report: Do not pass. Signed by 1 member: Representative Klippert.

Staff: Nico Wedekind (786-7290) and Cece Clynch (786-7195).

Background:

Washington Law Against Discrimination.

Washington law recognizes the right of its inhabitants to be free from the practice of discrimination in employment, credit and insurance transactions, places of public resort,

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accommodation, or amusement, and real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

Any individual deeming himself or herself to be injured by a discriminatory act as defined above may bring a civil action to enjoin further violations, recover the actual damages sustained by the person, or both. Alternatively, the individual may file a complaint with the Human Rights Commission (HRC).

Damages.

Economic damages are objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

Noneconomic damages are subjective, nonmonetary 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.

Health Care Privileges.

Washington statutes and court rules protect, among certain other communications, the disclosure of information shared between a physician and patient and a psychologist and client.

A physician may not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient. However, 90 days after filing an action for personal injuries or wrongful death, the claimant is deemed to have waived this physician-patient privilege.

The statutory psychologist-client privilege provides that confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client. The attorney-client privilege, in turn, provides that an attorney shall not, without the consent of the client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

Seeking Noneconomic Damages under the Washington Law Against Discrimination.

Two years ago, a law was enacted to provide that when a claimant requests noneconomic damages under the Washington Law Against Discrimination, a claimant does not place his or her health at issue or waive the physician-patient or psychologist-client privilege, unless the claimant:

1. alleges a specific diagnosable physical or psychiatric injury as a proximate result of the respondents' conduct;
2. relies on the records or testimony of a health care provider or expert witness to seek general damages; or

3. alleges failure to accommodate a disability or alleges discrimination on the basis of a disability.

Any waiver under the exceptions above is limited to health care records and communication between a claimant and his or her provider(s):

- created and occurring in the period beginning two years before the first alleged unlawful act for which damages are sought, and ending at the last date for which damages are sought (unless the court finds exceptional circumstances to order a longer period of time); and
- relating specifically to the diagnosable injury, the health care provider on whom the claimant relies in the action, or the disability specifically at issue in the allegation.

Summary of Bill:

The Washington Law Against Discrimination is amended to combine the first two exceptions listed above and provide that a claimant seeking noneconomic damages waives his or her health care privilege in two, rather than three, situations:

1. when the claimant alleges a specific "diagnosed" (rather than "diagnosable") physical or psychiatric injury as a proximate result of the respondents' conduct and relies on the records or testimony of a health care provider or expert witness to seek general damages; or
2. when the claimant alleges failure to accommodate a disability or alleges discrimination on the basis of a disability.

Appropriation: None.

Fiscal Note: Not requested.

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

Staff Summary of Public Testimony:

(In support) Two years ago the Legislature passed what is now RCW 49.60.510 with bipartisan support. The bill was meant to preserve the medical privacy of women and others subjected to harassment, discrimination, and retaliation; prevent revictimization through abusive discovery practices; and provide uniformity in the courts. However, different courts have interpreted the law differently, leading to confusion.

Defendants are arguing that when a victim has expressed that he or she has felt an emotion such as sadness or anxiety about an event, that victim is alleging a diagnosable injury because it might be a symptom that is capable of being diagnosed. The courts are buying this argument, which guts the legislative intent of the statute and means that employers are

succeeding in getting access to and rummaging through victims' highly confidential, privileged, and typically completely irrelevant, medical records.

The exceptions created by the rule have swallowed the rule itself and made it ineffective. This is a reminder to legislators and stakeholders that when working on a piece of legislation, words do matter. One word in a slightly different form has made all of the difference in how the law has been applied and whether the intent of the Legislature was effectuated. This proposed legislation is a straightforward clarification to prevent this loophole from being exploited.

(Opposed) This is an extremely problematic bill for businesses, government entities, nonprofits, and other entities facing claims under the Washington Law Against Discrimination. This legislation turns the discovery rules upside down. Any of these entities could face a claim that the former employee cannot sleep, is suffering from depression, or displays PTSD-like symptoms, and that these damages all relate to the defendant's actions. Yet, the defendants are prohibited from examining the evidence surrounding this claim to determine whether the underlying factor to the symptoms being claimed pre-date the discrimination allegation. This legislation prohibits employers from being able to legitimately defend themselves in lawsuits.

Persons Testifying: (In support) Senator Kuderer, prime sponsor; Katherine Chamberlain and Mark Rose, Washington Employment Lawyers Association; and Larry Shannon, Washington State Association for Justice.

(Opposed) Mel Sorensen, Washington Defense Trial Lawyers and American Property and Casualty Insurance Association; and Robert Battles, Association of Washington Business.

Persons Signed In To Testify But Not Testifying: None.