

SENATE BILL REPORT

SB 6236

As Passed Senate, February 19, 2020

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: Law & Justice: 1/27/20, 1/30/20 [DP, w/oRec].

Floor Activity:

Passed Senate: 2/19/20, 45-3.

Brief Summary of Bill

- Makes grammatical changes to the Washington Law Against Discrimination.
- Conjoins exceptions that may result in a waiver of health care privilege in discrimination claims for non-economic damages.
- Requires allegations of injuries to be diagnosed as an exception that may result in a waiver.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Kuderer and Salomon.

Minority Report: That it be referred without recommendation.

Signed by Senators Holy and Wilson, L..

Staff: Tim Ford (786-7423)

Background: The Washington Law Against Discrimination (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,

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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 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.

In 2018, the Legislature amended WLAD to clarify that by requesting non-economic damages under WLAD, a claimant does not place their health at issue or waive any health care privilege. Exceptions are provided and are grammatically structured in state law as follows where a claimant:

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

The exceptions above are disjunctive, which means each exception is a mutually exclusive alternative by which a health care privilege may be waived or have the claimant's health placed at issue.

Summary of Bill: Grammatical changes are made to the law. The exceptions are changed as follows:

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

The effect of the grammatical changes requires a conjunctive condition for the first and second exception before a health care privilege may be waived. Conjunctive means that both exceptions must exist before a health care privilege is waived. The disjunctive for the third exception is retained.

Diagnosable injuries is changed to diagnosed injuries. Using the term diagnosed in the past tense has the effect of limiting waivers of any health care privilege and potential discovery to past injuries.

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 is a fix to the bill in 2018 that was designed to prevent the weaponization of the request for medical records in discrimination cases. It had a chilling effect in sexual harassment cases. The intent was that if someone had an actual diagnosed condition of emotional distress then that would allow discovery. This bill fulfills that intent. The changes are straightforward. Some defense counsels has argued to misread the law to remove the protections of the law if it possible to diagnose a condition. The law from 2018 was adopted with overwhelming bipartisan support and this fix should be supported.

CON: A claimant can currently make claims of diagnosable conditions but now the new language would not allow discovery of the claimed diagnosable condition. Some of these diagnosable conditions may have been caused by other factors such as alcoholism. Do not deny the right of discovery for these claims.

Persons Testifying: PRO: Senator Patty Kuderer, Prime Sponsor; Larry Shannon, Washington State Association for Justice; Jesse Wing, Washington Employment Lawyers Association.

CON: Mel Sorensen, Washington Defense Trial Lawyers; American Property and Casualty Insurance Association; Cliff Webster, Washington Liability Reform Coalition.

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