

HOUSE BILL REPORT

SB 6027

As Passed House:
February 27, 2018

Title: An act relating to the discovery of privileged health care information and communications in claims for noneconomic damages under certain civil rights laws.

Brief Description: Concerning the discovery of privileged health care information and communications in claims for noneconomic damages under certain civil rights laws.

Sponsors: Senators Kuderer and Palumbo.

Brief History:

Committee Activity:

Judiciary: 2/22/18 [DP].

Floor Activity:

Passed House: 2/27/18, 97-1.

Brief Summary of Bill

- Provides that, except in certain limited circumstances, a claimant does not place his or her health at issue or waive any health care privilege by requesting noneconomic damages under the Washington Law Against Discrimination.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Graves, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Shea and Valdez.

Staff: Cece Clynch (786-7195).

Background:

Privilege.

A variety of privilege statutes protect certain communications from disclosure during all stages of litigation. Evidence Rule 501 includes a nonexclusive list of privileges, including

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the physician-patient privilege found in RCW 5.60.060 and the psychologist-client privilege found in RCW 18.83.110.

The statutory physician-patient privilege provides that a physician shall 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, except:

- in proceedings regarding a child's injury, neglect, or sexual abuse; and
- 90 days after filing an action for personal injury or wrongful death, a claimant is deemed to waive the privilege. Waiver for any one physician constitutes a waiver as to all physicians or conditions, subject to court imposed limitations.

The 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.

Both the physician-patient and psychologist-client privileges are subject to some limitations in the context of involuntary commitment proceedings.

Washington Law Against Discrimination.

The Washington Law Against Discrimination (WLAD) recognizes the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, 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. This right includes:

- the right to obtain and hold employment without discrimination;
- the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;
- the right to engage in real estate transactions without discrimination, including discrimination against families with children;
- the right to engage in credit transactions without discrimination;
- the right to engage in insurance transactions or transactions with health maintenance organizations without discrimination;
- the right to engage in commerce free from any discriminatory boycotts or blacklists; and
- the right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

In the event a WLAD complaint is filed, the Human Rights Commission (HRC) must investigate and issue written findings of fact as well as a finding as to whether there is or is not reasonable cause to believe that an unfair practice has been or is being committed. Upon a finding of reasonable cause, the HRC staff must endeavor to eliminate the unfair practice by conference, conciliation, and persuasion. If an agreement is reached, the HRC issues an order setting forth the terms of the agreement. If no agreement is reached, the HRC requests

the appointment of an administrative law judge (ALJ) to hear the complaint. An ALJ is empowered to: award damages (in the case of damages for humiliation and mental suffering, damages are limited to \$20,000); require that wrongful conduct cease and desist; and order affirmative action so as to effectuate the purposes of the law. There is a right of judicial review from the ALJ's final order.

In addition, rather than go through the HRC complaint process, a person may instead pursue arbitration, with the cost of arbitration shared equally. A person deeming himself or herself injured may also file a civil suit against the alleged wrongdoer. Available relief includes an injunction against further violations, the recovery of actual damages, and reasonable attorneys' fees.

Damages.

Economic and noneconomic damages are defined in statute as follows:

- "Economic damages" means 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" means 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.

Economic damages are sometimes referred to as special damages, and noneconomic damages as general damages.

Summary of Bill:

By requesting noneconomic damages under the Washington Law Against Discrimination, a claimant does not place his or her health at issue or waive any health care privilege under RCW 5.60.060 (physician-patient) or RCW 18.83.110 (psychologist-client) or any other law, 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 items one through three 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 and orders that the waiver applies to a longer time period); and
- relating specifically to the diagnosable injury, to the health care provider on whom relied, or to the disability at issue in the allegation.

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) When a victim of discrimination makes a claim, it is unlikely that there are any physical injuries at issue. Rather, the damages are typically loss of wages and natural emotional distress. These are not medical or psychological damages as they might be in a personal injury case, and employers should not get access to all of the plaintiff's medical records. Nevertheless, the defendant in such a case will ask to see all of a victim's medical records, sometimes back to birth, to see if she ever experienced a stressful event. As has been reported in the recent news, several powerful people have abused women at work. Allowing discovery of all medical history can have a chilling effect on the victim, and some victims walk away from making any claim in order to avoid providing an employer with access to all medical records. Sexual harassment causes damage, and the victim is entitled to seek noneconomic damages. This bill balances the field. If a plaintiff is going to rely on a health care provider or expert witness, or allege that the discrimination caused a diagnosable physical or psychiatric injury, then the defendant can get access to the records. If the records within the allowable time period reveal information that leads the defendant to believe he or she should be allowed to access more records, then he or she can ask the judge to so rule. Courts are not the same. Some courts have allowed a defendant to access a plaintiff's medical records back to birth, while others have allowed the defendant to go back 10 years. Going back two years is enough. This will keep victims from walking away, while still allowing discovery about the facts of injuries. What it does not allow is for an employer to inquire about confidential communications with a medical or psychological provider. The Washington Law Against Discrimination (WLAD) prohibits discrimination in employment as well as places of public accommodation and in real estate transactions. The vote in the Senate committee was close to unanimous, and the vote off of the Senate floor was 42 to five.

(Opposed) Discovery is not the same as admissibility. This would bar discovery of matters that are otherwise relevant in these cases, and allow the plaintiff's attorney to make these decisions. Motivation of the plaintiff can be key in these cases, and medical records may contain information that is important, critical, and relevant to the case. For instance, a defendant needs to know if the plaintiff suffers from any impairment. In addition, information found in medical records can have a bearing on damages. For instance, if a plaintiff has only a few months left to live, this could effect the plaintiff's mental health. The trier of fact should be informed of this, and the court should have the opportunity to determine relevancy. There are abuses out there, but in those cases a plaintiff can already get a protective order. This bill would treat these cases differently than any other cases in the state. This does not just come up in the employment context, but also with respect to places of public accommodation and in real estate transactions. Damages recoverable under the WLAD include health-related damages. The bill does not fairly balance the rights of plaintiffs and defendants.

Persons Testifying: (In support) Senator Kuderer, prime sponsor; Katherine Chamberlain, Washington Employment Lawyers Association; Sara Ainsworth, Legal Voice; and Elisabeth Smith, American Civil Liberties Union of Washington.

(Opposed) Mel Sorenson, Washington Defense Trial Lawyers Association; Bob Battles, Association of Washington Business; and Cliff Webster, Liability Reform Coalition.

Persons Signed In To Testify But Not Testifying: None.