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Court of Appeals No. 33174-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

LONGVIEW FIBRE COMPANY, INC.,

Appellant

v.

STACY L. HEGWINE,

Respondent

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STATE OF WASHINGTON
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CORRECTED BRIEF OF *AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION* AND *NORTHWEST WOMEN'S LAW CENTER*

Kathleen Phair Barnard
Schwerin Campbell Barnard & Iglitzin, LLP
WSBA No. 17896

Cooperating Attorney for *Amicus Curiae*:

Sarah A. Dunne, WSBA No. 34869
American Civil Liberties Union
of Washington Foundation
705 Second Ave., Ste. 300
Seattle Washington 98104
(206) 624-2184

Sara Ainsworth, WSBA No. 26656
Northwest Women's Law Center
907 Pine Street, Ste. 500
Seattle, Washington 98101
(206) 682-9552

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I. STATEMENT OF INTEREST

Amici's statements of interest are attached to this brief at Appendix 29.

II. SUMMARY ARGUMENT

When female employees are denied jobs, placed in less responsible positions, or terminated from employment because of their biological role in procreation, employers perpetuate the historical discrimination that assigned women to second-class status in the labor force simply because of their sex. That discrimination against pregnant employees is sex discrimination has been recognized under Washington law since the early 1970's, when RCW 49.60.180 first prohibited sex discrimination in employment. *See* WAC 162-30-020(2) ("Discrimination because of pregnancy or childbirth lessens the employment opportunities of women"); *see also Roberts v. Dudley*, 140 Wn.2d 58, 62 n.2, 993 P.2d 901 (2000) (allowing employee terminated due to pregnancy to proceed on claim of wrongful termination in violation of public policy on basis that RCW 49.60, among other statutes, embodies public policy against sex discrimination).

To ensure equal opportunity for female employees, Washington law requires employers to provide on-the-job accommodations for the

temporary inability to work[1] caused by pregnancy or pregnancy related conditions, and leaves of absence if on the job accommodation is not possible. This requirement is a matter of preventing sex discrimination, completely separate from the prohibition of disability discrimination, and not subject to the proviso found in RCW 49.60.180 limiting the duty to accommodate disabled employees to those who can, with accommodation, perform their particular job. (App.[2] at 1-3)

This conclusion is required by the purpose of the Washington Law Against Discrimination's (WLAD) prohibition of sex discrimination, which is "to equalize employment opportunities between men and women." *Johnson v. Goodyear Tire & Rubber Co.*, 790 F.Supp. 1516, 1521 (E.D.Wash. 1992) (quoting WAC 162-30-020). The law's mandate,

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[1] *Amici* will use the term "disability" to refer to the temporary inability to work without accommodation or leave needed due to pregnancy, conditions related to pregnancy and childbirth. However, pregnancy and childbirth are not "disabilities" under state or federal disability discrimination law; nor are many conditions related to pregnancy that may cause temporary inability to work considered disabilities. *See e.g.*, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA): "Pregnancy is not a disability for purposes of the ADA. 29 C.F.R. pt. 1630, app. §1630.2(h)(1998). However, discrimination on that basis may violate the Pregnancy Discrimination Act amendments to Title VII." Available at http://eeoc.gov/policy/docs/guidance-inquiries.html#N_7_. *See also McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006) (adopting ADA definition of disability for the WLAD).

[2] For the Court's convenience, text of statutes, regulations and other materials are included in the Appendix and referenced by "App." and page number.

as interpreted by the Washington Human Right Commission in its regulations, has been repeatedly approved by the Washington Legislature. *See, e.g.,* RCW 49.78.390 (providing that family leave is *in addition* to leave required by RCW 49.60).

Washington's early commitment to women's equality in employment progressed as our society's understanding of equality evolved. From its 1890 declaration that any work open to men must also be open to women, to the 1971 explicit requirement that employers not discriminate on the basis of sex, to the even later statutory provisions of leave from work for family obligations, the Washington Legislature has consistently maintained that a woman's place in employment must depend solely on her individual merit, and, at least since 1972, never on her temporary need for accommodation for her procreative function. This vigilance has been necessary because, unfortunately, women's second class status in the workplace remains a present-day reality. Without on-the-job accommodations for temporary inability to perform work which is caused by pregnancy or pregnancy-related conditions, or leaves of absence where accommodation is not possible, women are denied the equality promised to them by RCW 49.60.

III. ARGUMENT

A. The WLAD's requirement that employers accommodate disability related to pregnancy and childbirth reflects Washington's commitment to women's equality in light of their unique procreative role.

1. For more than 30 years, the WLAD has prohibited adverse treatment of a woman because of pregnancy or childbirth, regardless of the treatment of employees.

The WLAD prohibits sex discrimination, including discrimination based on pregnancy.[3] *See Dudley,* at 62 n.2. To effectuate this mandate, the Washington State Human Rights Commission promulgated WAC 162-30-020 which provides, in relevant part,

> (3)(a) It is an unfair practice for an employer, because of pregnancy or childbirth, to:
>
> (i) Refuse to hire or promote, terminate, or demote, a woman;

Pregnancy "includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions." WAC 162-30-020(2)(a).[4] In addition, WAC 162-30-020(4)(a) requires that an employer

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[3] Discrimination on the basis of sex was added to the WLAD in 1971. *See J. S. K. Enterprises, Inc. v. City of Lacey,* 6 Wn.App. 43, 53-54, 492 P.2d 600 (Wn. App. 1971) (discussing the amendment made by Chapter 81, Laws of 1971).

[4] *See also, Kuest v. Regent Assisted Living, Inc.*, 111 Wn. App. 36, 43 P.3d 23 (2002) (holding that WAC 162-30-020(2)(a) correctly interpreted the WLAD as prohibiting discrimination on the basis of the potential to become pregnant).

"provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth."

These requirements are part of the regulation of "employment practices that disadvantage women because of pregnancy or childbirth" in violation of RCW 49.60.180, which prohibits discrimination on the basis of sex, including discrimination in hiring. While there have been several amendments to WAC 162-30-020 since these pregnancy provisions were first promulgated in the early 1970's,[5] the prohibition of adverse action on the basis of pregnancy or childbirth and the requirement to provide leave for childbirth have remained.[6]

Thus, Washington law has long treated pregnancy discrimination as a *sui generis* component of sex discrimination, and forbids it without regard to the comparative treatment of other employees. Because only

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[5] See note 3, *supra.*

[6] The prohibition of adverse action and the leave requirement appeared in WAC 162-30-020(2)&(4), WAC 162-30-020(5) (1972) (App. at 12-14). In 1973, although there were amendments, the provisions remained. *See* WAC 162-30-020(4)&(5) (1973) (App. at 15-16). Subsequent amendments in 1999 provided the current version of the regulation and provided the definition of "pregnancy" at WAC 162-30-020(2)(a), carried the leave provision forward at WAC 162-30-020(5)(a)&(b), and replaced the former adverse treatment provision with the current list of unfair practices found at WAC 162-30-020(3), which includes discrimination in hiring practices. During the 1990's the WHRC revised its regulations to describe prohibited practices as "unfair practices." *See e.g.*, WSR 99-15-025 (App. at 4-9).

women experience pregnancy and child birth, the failure to provide accommodation for that unique circumstance would harm female employees. WAC 162-30-020(4)(b) (App at 12-14).[7]

2. The Washington Legislature, through other enactments, has endorsed the Washington State Human Rights Commission's regulation.

When the Washington Legislature regulated employment to allow parents time from work for family matters, including birth of children, it recognized the unique discriminatory effect of failure to accommodate temporary disability related to pregnancy and childbirth, by providing that parental leave under that legislation could not be reduced by leave taken under RCW 49.60 and WAC 162-30-020.

The Family Leave Act (FLA) was first enacted in 1989. This law required employers to allow employees to take leave for up to twelve weeks for care of newborn, and specifically provided that this leave "is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth." 1989 1st ex.s. c 11 s 3, codified at RCW

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[7] The 1973 WAC also provided that: "Pregnancy is an expectable incident in the life of a woman. ... Practices such as terminating pregnant women, refusing to grant leave or accrued sick pay for disabilities relating to pregnancy, or refusing to hire women for responsible jobs because they may become pregnant, impair the opportunity of women to obtain employment and to advance in employment on the same basis as men." WAC 162-30-020(1) (1973) (App. at 15-16).

49.78.030(4) (1989). The final bill report specifically referenced the WRHC's regulation as the source of the additionally required disability leave. *See* Rpt. 1581 at p. 2, available at http://search.leg.wa.gov/advanced /3.0/main.asp .[8] (App. at 17-21)

In 1997, the Legislature amended the FLA to suspend its enforcement after enactment of the 1993 federal Family and Medical Leave Act (FMLA), except those provisions that granted employees greater protection than that provided by the FMLA.[9] Specifically, the Legislature required continued enforcement of the provisions ensuring that the leave required by RCW 49.60 for temporary disability related to pregnancy and childbirth be in addition to leave under the FMLA.[10] The report on the final bill again referenced the WLAD as requiring this additional leave:

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[8] This internet address is the advanced search function of the Washington Legislature's, detailed legislative report page. Hereinafter this address will be referenced by "DLR". Citations herein to internet sources include the internet address for the document, and all such citations were last viewed on April 10, 2007, unless otherwise noted.

[9] *See* Ch. 16, Laws of 1997, available at DLR (App. at 25-27) (emphasis added).

[10] *Id.* A new section, codified at RCW 49.78.005 (1997), carried over the language from the 1989 statute, stating, in relevant part, "The family leave required by [the FMLA] shall be i*n addition* to any leave for sickness or temporary disability because of pregnancy or childbirth."

> This leave is in addition to leave for sickness or temporary disability related to pregnancy or childbirth. Under Washington's Law Against Discrimination, the Human Rights Commission has adopted a rule requiring employers to grant a woman a leave of absence for the actual period of time that she is sick or temporarily disabled because of pregnancy or childbirth, with some exceptions related to business necessity.

See Rpt. EHB 2093 at p. 1, available at DLR. (App. at 22-24)

In 2006, the legislature again amended RCW 49.78, *see* 2006 c 59 §§ 1-25, bringing the FLA into general conformity with the FMLA, and again retaining the provision requiring additional leave for pregnancy and childbirth disability under RCW 49.60. RCW 49.78.390(1).[11] The legislature thus reiterated its intention that pregnant employees receive unique accommodation.

3. Other states have also enacted similar statutes and promulgated regulations prohibiting pregnancy discrimination and requiring accommodation.

Washington law requires accommodation for pregnancy-related disability regardless of what accommodation was generally available for

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[11] That section provides: "Leave under this chapter and leave under the federal family and medical leave act of 1993 ... is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth." In addition, RCW 49.78.360 reinforced the requirement of providing that leave, by stating, in relevant part, that, "Nothing in this chapter shall be construed: (1) To modify or affect any state or local law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability... ." (App. at 28).

other disabled employees. Washington was not alone in taking its view concerning pregnancy as sex discrimination. During the 1970's and 1980s other states enacted similar statutory requirements. *See, e.g.,* Conn.Gen.Stat. § 31-126(g) (1977) and Mont.Rev.Codes § 41-2602 (Smith Supp.1977) (upheld in *Miller-Wohl Co., Inc. v. Commissioner of Labor*, 214 Mont. 238, 692 P.2d 1243 (1984), v*acated,* 479 U.S. 1050 (1987), *reinstated* 228 Mont. 505, 744 P.2d 871 (1987) (following the decision in *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987)).

Still other states enacted regulations similar to WAC 162-30-020. Hawai'i, Ohio and Kansas have similar regulatory requirements. *See*, e.g., *Sam Teague Ltd. v. Hawai'i Civil Rights Commission*, 89 Hawai'i 269, 278, 971 P.2d 1104, 1113 (1999) (agreeing with the Montana Supreme Court that the mandate of leave for pregnancy addressed the "disparate effect on women ...."); *McConaughy v. Boswell Oil Co.*, 126 Ohio App.3d 820, 711 N.E.2d 719 (1998) (denying summary judgment on claim that reasonable leave not provided under Ohio Admin. Code § 4112-5-05(g)(5)&(6); *Kansas Gas and Elec. Co. v. Kansas Com'n on Civil Rights*, 242 Kan. 763, 750 P.2d 1055 (1988) (regulation requiring employer to

consider pregnancy related disability justification for leave otherwise unavailable did not constitute discrimination against male employee).

4. RCW 49.60 requires on-the-job accommodation, when that is possible, rather than forced leave or termination.

The requirement to provide on-the-job accommodations must go hand-in-hand with the requirement that employers provide leaves for pregnant employees regardless of whether such leaves are generally available to temporarily disabled workers. The WLAD does not allow an employer to refuse to provide an on-the-job accommodation, with the result that a woman who is capable of working is forced to take a leave (often unpaid).[12] Such a reading of the statute is nonsensical; it allows adverse treatment on the basis of pregnancy, regardless of her ability to work, and without an overriding business necessity.[13]

A workplace that is structured around the "ideal" of a employee who has no childbearing function, and is able to work without on-the-job

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[12] Even under the Pregnancy Discrimination Act, employers are required to provide on-the-job accommodations to pregnant employees on an equal basis with other temporarily disabled workers, if possible, before placing an employee on leave. *See e.g.*, *Carney v Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987).

[13] *Amici* agree with *Amicus* Washington Employment Lawyers' Association that the employer should have the burden of proving business necessity.

accommodation or leave because of that function, is a workplace structured on the "ideal" male employee.[14] The WLAD does not permit such a gendered vision of Washington's workplaces. As the Washington Supreme Court explained in discussing the requirement to accommodate disabled employees,

> RCW 49.60 contains a strong statement of legislative policy. *See* RCW 49.60.010 and .030. When, in 1973, the legislature chose to make this policy applicable to discrimination against the handicapped, we believe it is clear it mandated positive steps to be taken. An interpretation to the contrary would not work to eliminate discrimination. *It would maintain the status quo wherein work environments and job functions are constructed in such a way that handicaps are often intensified because some employees are not physically identical to the ideal employee.*

Holland v. Boeing, 90 Wn.2d 384, 388-89, 583 P.2d 621 (1978) (emphasis added). The Legislature, consistent with the WLAD's strong statements of public policy, has also chosen to mandate that positive steps be taken to accommodate pregnancy related disabilities and childbirth.[15] Failure to

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[14] *See* Kaminer, Debbie N., The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace, 54 Am. U. L. Rev. 305, 310 (2004) (discussing this issue in the context of providing gender neutral attendance and leave policies, that are not male-centric and centered on an outdated version of the nuclear family).

[15] *Amici* do not contend, or mean to imply, that the WLAD's disability accommodation analysis is appropriate for pregnancy accommodation. The nature of the temporary disabilities, the need for leave for childbirth, if not for pregnancy related disabilities, and the requirements of business necessity in order to justify failure to accommodate, all counsel against unreasoned application of disability discrimination doctrine. However,

require on-the-job accommodations to pregnant workers when necessary and possible, would "not work to eliminate discrimination," *Id.*; rather, it would prevent women who are qualified and able to work from being hired and from continuing to work while pregnant, with all that that means for career advancement and economic security.

B. Because of sex discrimination, women have historically been precluded from professions, not hired in professions open to them if they were or might become pregnant, and were terminated or forced to take leave from their jobs because of pregnancy.

There are many examples of this. Women were precluded from working as lawyers because their "'paramount destiny and mission" [was] to fulfill the noble and benign offices of wife and mother," which made them "unfit[ ] for many of the occupations of civil life." *Bradwell v. Illinois,* 83 U.S. 130, 141-142 (1872) 16 Wall. (1873). Women's hours of work were also limited under the theory that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the

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accommodation under disability laws has provided employees with equal opportunity and employers with clear guidelines, and accommodation of pregnant employees should not be more complex.

burdens of motherhood are upon her...." *Muller v. Oregon,* 208 U.S. 412, 421 (1908).

These stereotypes that were applied to all women, regardless of their individual desire and ability to work, were applied over many years in many contexts. *See, e.g., Goesaert v. Cleary,* 335 U.S. 464 (1948) (upholding restriction preventing women from bartending). It was not until 1961 that a woman's individual decision was recognized legislatively as overriding her ascribed domestic function. *See, e.g., Hoyt v. Florida,* 368 U.S. 57, 62 (1961) (sustaining the legislative option granted to women as "the center of home and family" to refuse jury duty "unless she herself determines that such service is consistent with her own special responsibilities"). It was 1971 before the Supreme Court completely abandoned this separate spheres analysis, if it can be called that, to hold that the Fourteenth Amendment's Equal Protection Clause prohibited sex discrimination against women who sought to be active in the public sphere. *Reed v. Reed,* 404 U.S. 71 (1971) (invalidating a state law giving a mandatory preference to males over equally qualified females as potential estate administrators). *See also,* B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law, at 209-210 (1977).

Further, rules requiring that female applicants or employees not be married or become pregnant were commonplace and for a long time judicially enforced. *See, e.g., Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971); *Lansdale v. Air Line Pilots Ass'n,* 437 F.2d 454 (5th Cir. 1971). Pregnant women were fired or placed on mandatory maternity leave, C*leveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and were denied accrued seniority and other benefits. *Cf. Nashville Gas Co. v. Satty,* 434 U.S. 136 (1977). This sad history of the social and legal sanction of sex discrimination was not related in any way to the actual ability or inability of women to work, and modern sex discrimination jurisprudence rejects this approach.

Washington law has long recognized these principles. For example, in *J. S. K. Enterprises,* 6 Wn. App. 43, 55, 492 P.2d 600 (Wn. App. 1971), the court in construing the new addition of sex as a basis of prohibited discrimination in the WLAD stated that "the principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of a stereotyped characterization

attributed to women as a group."[16] As applied here, that principle means that each woman's ability to work while pregnant should be accepted as a matter of course. If *she* indicates that her pregnancy is affecting her ability to work and that she needs an accommodation that would allow her to continue to work, or if she needs a leave of absence because of pregnancy, then she should be accommodated according to her individualized needs, in a manner that most protects her equal opportunity in employment.

C. There is a continuing need for the prohibition against adverse action based in stereotypical assumptions about women and childbirth.

The WLAD thus prohibits failure to hire or termination of employees because of pregnancy. It requires that pregnant employees[17],

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[16] *See also*, *State v. Brown*, 7 Wash. 10, 34 P. 132 (1893) (quoting 1 Gen. St. & Codes, § 2961, the predecessor to RCW 49.12.200) (sustaining demurrer to information seeking to close saloon as a nuisance, on the ground that women worked there, because Washington law allowed women to work in any profession and state had failed to prove that the particular women involved "tended to draw together crowds of disorderly persons, or to debauch the morals of those resorting to the place.")

[17] Whether Ms. Hegwine is considered an applicant or an employee does not matter because the purpose of the WLAD is to ensure equal opportunity for women in employment, which would not be possible if an offer of employment could be denied because of a temporary pregnancy related disability without proof of business necessity. *Amici* join WELA's analysis on this point.

like Stacey Hegwine, with related disability[18] be accommodated on-the-job if possible, and if that is not possible, they should be placed on leave. As Justice O'Connor explained, "sometimes to treat men and women exactly the same is to treat them differently, at least with respect to pregnancy. Women do have the gift of bearing children, a gift that needs to be accommodated in the working world." Portia's Progress, 66 N.Y.U. L. Rev. 1546, 1557 (1991).

Although the *law* no longer incorporates stereotypes that assigned incompetence to women in the working world, that world remains one filled with unexamined biases against women, and especially against pregnant women, or women that may become pregnant. Significantly, research shows that women who become pregnant are viewed by their supervisors as less competent in the workplace. Halpert, Jane, et al., Pregnancy as a Source of Bias in Performance Appraisals, 14 J. Org. Behav. 649, 650-55 (1993). This study found that "performance reviews by managers plummeted after pregnancy." *Id.* at 650.

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[18] Whether or not any of the asserted lifting requirements were an "essential function" of Ms. Hegwine's job, she did experience a lifting restriction because of her pregnancy that must be accommodated.

Pregnant women are often seen as overly emotional, irrational, and less committed to their jobs. *Id.* at 655. Some co-workers avoid the pregnant woman, while others expect her to conform rigorously to the mandates of traditional femininity by being understanding, empathetic, nonauthoritarian, easy to negotiate with, gentle, and neither intimidating nor aggressive. *Id. See also,* Bistline, S.M. (1985). 'Make room for baby.' Association Management, 37(5), 96-98, 100 (with similar conclusions). These biases also negatively affect pregnant supervisors, causing impressions of incompetence and poor performance. *See e.g.,* Corse, S.J., 'Pregnant managers and their subordinates: The effects of gender expectations on hierarchical relationships.' Journal of Applied Behavioral Science, 26: 25-47 (1990).

Of particular relevance to the accommodation issue here is the fact that as recently as 10 years ago, a significant study found that "pregnant women are [frequently] regarded as invalids, not physically or emotionally capable of fulfilling the demands of their employment," without regard to their actual abilities. Pattison, H.M., Gross, H., Cast, C., Pregnancy and employment: The perceptions and beliefs of fellow workers. Journal of Reproductive and Infant Psychology, Aug/Nov 1997. Vol. 15, issue 3/4, p.

303-314. No wonder that despite a 9% drop in birth rates, pregnancy discrimination charges are on the rise.[19]

IV. CONCLUSION

With more than sixty-eight million women in the workforce, including 72.9 percent of women with children under age eighteen,[20] and with 78% of women between 18 and 64 working in the State of Washington,[21] it is imperative that the law simultaneously provide, as the WLAD does, equal opportunity by requiring temporary accommodation to their procreative function and the prohibition of adverse action based in stereotypical assumptions that WAC 162-30-020(3)(c) prohibits.

DATED this 10th day of April 2007.

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[19] *See* one third increase reported by the U.S. Equal Opportunity Employment Comm'n,, at Pregnancy Discrimination Charges: EEOC & FEPAs Combined: 1997 to 2006, available at http://www.eeoc.gov/stats/pregnanc.html, and the WHRC's report that the topic subject to the most hits on its website is pregnancy discrimination. WHRC Strategic Plan 2006-2011 Att. 1 at 2, Available at http://ofm.wa.gov/budget/manage/strategic/120strategicplan.pdf.

[20] Nat'l P'ship for Women & Families, Women at Work: Looking Behind the Numbers: 40 Years After the Civil Rights Act of 1964, at 12-13 (2004) ("Women at Work"), http://paidsickdays.nationalpartnership.org/site/DocServer/portals_p3_library_CivilRightsAffAction_WomenAtWorkCRA40.pdf?docID=590.

[21] Washington Office of Financial Management, Research Brief 27A, available at http://www.ofm.wa.gov/researchbriefs/brief027/brief027A.pdf.

Respectfully submitted,

ACLU OF WASHINGTON FOUNDATION
NORTHWEST WOMEN'S LAW CENTER

By: Kathleen Phair Barnard
Kathleen Phair Barnard, WSBA # 17896
Schwerin Campbell Barnard & Iglitzin, LLP

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WASHINGTON ADMINISTRATIVE CODE
TITLE 162. HUMAN RIGHTS COMMISSION (FORMERLY DISCRIMINATION, BOARD AGAINST)
CHAPTER 162-30. SEX DISCRIMINATION

Current with amendments included in the Washington State Register, Issue 07-06, dated March 21, 2007.

162-30-020. Pregnancy, childbirth, and pregnancy related conditions.

(1) **Purposes.** The overall purpose of the law against discrimination in employment because of sex is to equalize employment opportunity for men and women. This regulation explains how the law applies to employment practices that disadvantage women because of pregnancy or childbirth.

(2) **Findings and definitions.** Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.

(a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.

(b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

(3) **Unfair practices.**

(a) It is an unfair practice for an employer, because of pregnancy or childbirth, to:

(i) Refuse to hire or promote, terminate, or demote, a woman;

(ii) Impose different terms and conditions of employment on a woman.

(b) The sole exception to (a) of this subsection is if an employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months.

(c) It is an unfair practice to base employment decisions or actions on negative assumptions about pregnant women, such as:

(i) Pregnant women do not return to the job after childbirth;

(ii) The time away from work required for childbearing will increase the employer's costs;

(iii) The disability period for childbirth will be unreasonably long;

(iv) Pregnant women are frequently absent from work due to illness;

(v) Clients, co-workers, or customers object to pregnant women on the job;

(vi) The terms or conditions of the job may expose an unborn fetus to risk of harm.

(4) **Leave policies.**

(a) An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. Employers must treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities. For example:

(i) If an employer provides paid leave for sickness, or other temporary disabilities, the employer should provide paid leave for pregnancy related sickness or disabilities;

(ii) If the uniform policy requires a physician's statement to verify the leave period, a physician's statement may be required to verify the leave period relating to pregnancy or childbirth.

(iii) If the uniform policy permits the retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period for other temporary disabilities, the policy must also permit it during leave for pregnancy related temporary disabilities.

(iv) If the employer permits extensions of leave time (e.g., use of vacation or leave without pay) for sickness or other temporary disabilities, the employer should permit such extensions for pregnancy related sickness or disabilities.

(b) There may be circumstances when the application of the employer's general leave policy to pregnancy or childbirth will not afford equal opportunity for women and men. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.

(c) An employer shall allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating

to pregnancy or childbirth. Refusal to do so must be justified by adequate facts concerning business necessity.

(d) Employers may be required to provide family medical leave, in addition to leave under this chapter. Please see appropriate federal and state family and medical leave laws and regulations.

(5) **Employee benefits.** Employee benefits provided in part or in whole by the employer must be equal for male and female employees. For example, it is an unfair practice to:

(a) Provide full health insurance coverage to male employees but fail to provide full health insurance coverage, including pregnancy and childbirth, to female employees.

(b) Provide maternity insurance to the wives of male employees but fail to provide the same coverage to female employees.

(6) **Marital status immaterial.** The provisions of this chapter apply irrespective of marital status.

(7) **Labor unions and employment agencies.** The provisions of this chapter apply equally to employers, labor unions, and employment agencies.

CREDIT(S)

Statutory Authority: RCW 49.60.120(3). 99-15-025, S 162-30-020, filed 7/12/99, effective 8/12/99; Order 15, S 162-30-020, filed 9/28/73; Order 11, S 162-30-020, filed 6/26/72.

WAC 162-30-020, WA ADC 162-30-020

WSR 99-15-025

PERMANENT RULES

HUMAN RIGHTS COMMISSION

[Filed July 12, 1999, 3:51 p.m.]

Date of Adoption: June 25, 1999.

Purpose: To adopt improvements to current Human Rights Commission rules under Executive Order 97-02 relating to clarity, effectiveness, consistency with statutory intent and case law, need, and fairness.

Citation of Existing Rules Affected by this Order: Repealing WAC 162-16-020 through 162-16-170, 162-22-030, 162-22-040, 162-22-050, 162-22-060, 162-22-070, 162-16-080, 162-26-020, 162-26-030, 162-26-035, 162-26-050, 162-26-090, and 162-38-130; and amending WAC 162-22-010, 162-22-020, 162-22-090, 162-22-100, 162-26-010, 162-26-040, 162-26-060, 162-26-070, 162-26-080, 162-26-100, 162-26-110, 162-26-120, 162-26-140, 162-30-010, 162-30-020, 162-38-040, 162-38-100, and 162-38-110.

Statutory Authority for Adoption: RCW 49.60.120(3).

Adopted under notice filed as WSR 99-04-108 on February 3, 1999.

Changes Other than Editing from Proposed to Adopted Version: In WAC 162-16-240, restored phrase found in previous version of the rule (WAC 162-16-020).

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 1, Repealed 0; Federal Rules or Standards: New 0, Amended 1, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 17, Amended 17, Repealed 28.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 17, Amended 18, Repealed 28. Effective Date of Rule: Thirty-one days after filing.

July 12, 1999

Sue J. Jordan

Executive Director

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AMENDATORY SECTION(Amending Order 9, filed 9/23/71)

WAC 162-30-010
General ((~~approach~~)) purpose and scope.

((~~In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC § 2000e and following, where the federal act is comparable to the state act. See in particular part 1604 of the regulations of the United States Equal Employment Opportunity Commission, 42 [29] CFR Part 1604. The commission will not follow federal precedents where it believes that a different interpretation will better carry out the purposes of the state act.~~)) The general purpose of the law against discrimination in employment because of sex is to equalize employment opportunity for men and women. This chapter interprets and implements the sex discrimination protection of RCW 49.60.180, and provides guidance regarding certain specific forms of sex discrimination.

[Order 9, § 162-30-010, filed 9/23/71.]

AMENDATORY SECTION(Amending Order 15, filed 9/28/73)

WAC 162-30-020
((~~Maternity.~~)) Pregnancy, childbirth, and pregnancy related conditions.

(1) ((~~**Findings.** Pregnancy is an expectable incident in the life of a woman. Many women of childbearing age depend on their jobs for economic support. Practices such as terminating pregnant women, refusing to grant leave or accrued sick pay for disabilities relating to pregnancy, or refusing to hire women for responsible jobs because they may become pregnant, impair the opportunity of women to obtain employment and to advance in employment on the same basis as men. Such practices discriminate against women because of their sex.~~

~~(2)~~)) **Purposes.** The overall purpose of the law against discrimination in employment because of sex (((~~chapter 49.60 RCW~~))) is to equalize employment opportunity for men and women. This regulation explains how the law applies to employment practices ((~~which~~)) that disadvantage women because of pregnancy or childbirth.

(((~~(3) **Hiring pregnant women.** It is an unfair practice for an employer to refuse to hire a qualified woman because of pregnancy unless doing so would be unreasonable in view of the necessities of the business. The burden shall be on the employer to show that a decision not to hire a pregnant woman was based on adequate facts concerning her individual ability to perform the job or adequate facts concerning business necessity.~~)) (2) **Findings and definitions.** Pregnancy is an expectable incident in the life of a woman. Discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women.

(a) "Pregnancy" includes, but is not limited to, pregnancy, the potential to become pregnant, and pregnancy related conditions.

(b) "Pregnancy related conditions" include, but are not limited to, related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy.

(3) **Unfair Practices.**

(a) It is an unfair practice for an employer, because of pregnancy or childbirth, to:

(i) Refuse to hire or promote, terminate, or demote, a woman;

(ii) Impose different terms and conditions of employment on a woman.

(b) The sole exception to (a) of this subsection is if an employer can demonstrate business necessity for the employment action. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months. ((~~On the other hand, negative assumptions about pregnant women in employment must not influence the hiring decision. Such assumptions include but are not limited to:~~

(~~a) That~~)) (c) It is an unfair practice to base employment decisions or actions on negative assumptions about pregnant women, such as:

(i) Pregnant women do not return to the job after childbirth;

(((~~(b) That~~)) (ii) The time away from work required for childbearing will increase the employer's costs;

(((~~(c) That~~)) (iii) The disability period for childbirth will be unreasonably long;

(((~~(d) That~~)) (iv) Pregnant women are frequently absent from work due to illness;

(((~~(e) That~~)) (v) Clients, co-workers, or customers object to pregnant women on the job;

(vi) The terms or conditions of the job may expose an unborn fetus to risk of harm.

(4) ((~~**Treatment of employed women.** It is an unfair practice for an employer to discharge a woman, penalize her in terms or conditions of employment, or in any way limit the job opportunities of a woman because she is pregnant or may require time away from work for childbearing.~~

~~(5)~~))) **Leave ((~~for temporary disability~~)) policies.**

(a) An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. ((~~A leave in excess of the actual period of sickness or disability is not required by the law or this regulation. The terms and conditions of the leave shall be determined by the employer's policy on temporary disability, unless the policy conflicts with this regulation.~~)) Employers must treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities. For example:

(i) If ((~~advance notice is required for a~~)) an employer provides paid leave for ((~~planned surgeries~~)) sickness, or other ((~~anticipated~~)) temporary disabilities, ((~~it may be required also for a leave for childbirth~~)) the employer should provide paid leave for pregnancy related sickness or disabilities;

(ii) If the uniform policy requires a physician's statement to verify the leave period ((~~for other disabilities~~)), a physician's statement may be required to verify the leave period ((~~for disabilities~~)) relating to pregnancy or childbirth.

(iii) If the uniform policy permits the retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period for other temporary disabilities, the policy must also permit it during leave for pregnancy related temporary disabilities.

(iv) If the employer permits extensions of leave time (e.g., use of vacation or leave without pay) for sickness or other temporary disabilities, the employer should permit such extensions for pregnancy related sickness or disabilities.

(b) ((~~While~~)) There may be circumstances when the application of the employer's general leave policy to ((~~disability because of~~)) pregnancy or childbirth will ((~~ordinarily~~)) not afford equal opportunity for women and men((~~, there may be circumstances when this is not so~~)). One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.

(c) An employer shall allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating to pregnancy or childbirth. Refusal to do so must be justified by adequate facts concerning business necessity.

WSR 99-15-025 excerpts
http://www.leg.wa.gov/documents/wsr/1999/15/99-15-025.htm
last viewed April 10, 2007

(((~~(6) **Disability**~~)) (d) Employers may be required to provide family medical leave, in addition to leave under this chapter. Please see appropriate federal and state family and medical leave laws and regulations.

(5) **Employee benefits.** ((~~Illness or disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are temporary disabilities and must be treated as such under any sick leave plan or temporary disability benefit plan provided in whole or in part by the employer. All written and unwritten policies and practices concerning disabilities must be applied to disabilities resulting from pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. For example, if the following benefits or privileges are available for other temporary disabilities, then they must be available also for disabilities resulting from pregnancy or childbirth:~~

~~(a) Payment in lieu of wages under a sick leave plan or temporary disability benefit plan. (If no leave pay is granted for other temporary disabilities, then it need not be granted for disabilities relating to pregnancy or childbirth.)~~

~~(b) Extensions of leave time (e.g., use of vacation or leave without pay);~~

~~(c) Retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period.~~

~~(7) **Insurance benefits.** Insurance~~)) Employee benefits provided in part or in whole by the employer must be equal for male and female employees. For example, it is an unfair practice to:

(a) ((~~If full health insurance coverage is provided for male employees, then full coverage, including maternity and abortion, must be provided for female employees;~~

~~(b) If maternity insurance is provided for the wives of male employees, then the same coverage must be provided for the female employees.~~

~~Subsection 7 applies only if the employer pays the premium in whole or in part or has participated in negotiating the terms of the insurance policy.~~

~~(8)~~)) Provide full health insurance coverage to male employees but fail to provide full health insurance coverage, including pregnancy and childbirth, to female employees.

(b) Provide maternity insurance to the wives of male employees but fail to provide the same coverage to female employees.

(6) **Marital status immaterial.** ((~~Discrimination because of marital status is an unfair practice. An employer's leave policies and benefits, including health insurance, must apply equally to married and unmarried employees.~~

~~(9)~~)) The provisions of this chapter apply irrespective of marital status.

(7) **Labor unions and employment agencies.** ((~~It is an unfair practice for a labor union or employment agency to conduct its own affairs so as to deny anyone his or her rights under the law and this regulation.~~

~~(10) **Commission rulings.** Any person in doubt as to the application of this regulation to a particular set of facts may request an opinion letter from the executive secretary of the Washington state human rights commission or a declaratory ruling of the commission under WAC 162-08-620.~~

~~(11) **Construction with federal law.** This regulation is intended to be consistent with Title VII of the United States Civil Rights Act of 1964 and the United States Equal Employment Opportunity Commission Employment Policies Relating to Pregnancy and Childbirth, 29 CFR § 1604.10, and shall be construed accordingly.~~)) The provisions of this chapter apply equally to employers, labor unions, and employment agencies.

[Order 15, § 162-30-020, filed 9/28/73; Order 11, § 162-30-020, filed 6/26/72.]

Chapter 162-30

SEX DISCRIMINATION

WAC

162-30-010 General approach.

WAC 162-30-010 GENERAL APPROACH. In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC §2000e and following, where the federal act is comparable to the state act. See in particular part 1604 of the regulations of the United States Equal Employment Opportunity Commission, 42 CFR Part 1604. The Commission will not follow federal precedents where it believes that a different interpretation will better carry out the purposes of the state act. [Order 9, §162-30-010, filed 9/23/71.]

Chapter 162-30

SEX DISCRIMINATION

WAC

162-30-010 General approach.
162-30-020 Maternity.

WAC 162-30-010 GENERAL APPROACH. In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC §2000e and following, where the federal act is comparable to the state act. See in particular part 1604 of the regulations of the United States Equal Employment Opportunity Commission, 42 CFR Part 1604. The Commission will not follow federal precedents where it believes that a different interpretation will better carry out the purposes of the state act. [Order 9, §162-30-010, filed 9/23/71.]

WAC 162-30-020. MATERNITY. (1) Findings and Purposes. Childbearing is an expectable incident in the life of a woman. Practices such as terminating pregnant women from employment and not hiring young woman for responsible jobs because they may become pregnant and have to be terminated have contributed substantially to present conditions of lack of job opportunity for women, limitation of women to low-paying clerical jobs, and lack of opportunity for women to advance to levels of employment enjoyed by men of equal ability. It is the objective of the law against discrimination in employment because of sex, Chapter 49.60 RCW, to equalize employment opportunity for men and women. This regulation defines how that law applies to childbearing by women workers.

(2) Employed Women. It is an unfair practice to discharge a woman or penalize her in terms and conditions of employment because she requires time away from work for childbearing.

(3) Hiring Pregnant Women. It is an unfair practice for an employer to refuse to hire a woman because she is pregnant, unless the pregnant condition of the individual woman currently prevents her from performing the job. The burden shall be on the employer to show that his decision not to hire a woman because of pregnancy was based on adequate facts concerning her individual ability to currently perform the job. It is an unfair practice to refuse to hire a woman applicant because she will be entitled to maternity leave, or because she may become entitled to maternity leave.

(4) Maternity Leave. A woman who substantially fulfills the notice requirements of this section shall be entitled to take a leave of absence for childbirth for a reasonable length of time and thereafter return to her job under the same uniform terms and conditions as any other employee consistant with company policy on temporary disability. She shall not be required to leave work at the expiration of any arbitrary time period during pregnancy but shall be allowed to work as long as she is capable of performing the duties of her job and as long as her physician concurs. To be entitled to maternity leave under this section, a woman shall inform her employer in advance of her intention to take leave and the approximate time she expects to return to work, and within 30 days after childbirth shall inform the employer of the specific day when she will return to work. If the employer and woman cannot agree on what is a reasonable time, either may submit the facts to the executive secretary of the Washington State Human Rights Commission for a ruling by him or her, or a member of the Commission's staff designated by him or her, after he or she has obtained the pertinent facts from both sides by telephone or otherwise.

(5) Leave Benefits. Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the availability of extensions of leave time, the accrual of benefits and privileges, such as seniority, retirement, pension rights, and other service credits and benefits, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(6) Insurance Benefits. If an employer provides maternity insurance coverage to wives of male employees, the same coverage must also be provided to female employees.

(7) Marriage Immaterial. The law against discrimination and these rules apply to married and unmarried women alike. An employer's maternity leave policy and benefits must apply equally to married and unmarried women.

(8) Labor Unions and Employment Agencies. It is an unfair practice for a labor union or employment agency to conduct its own affairs so as to deny women their rights under the law and these regulations. [Order 11, §162-30-020, filed 6/26/72.]

preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.

(d) Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track.

(e) School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

(2) This section is intended to be consistent with the requirements of section 601 the United States Civil Rights Act of 1964, 42 USC section 2000d, and the regulations of the United States Department of Health, Education and Welfare, 45 CFR Part 80, and HEW guidelines to selected school districts dated 10 July 1970, 35 Fed. Reg. 11595, as interpreted in *Lau v. Nichols*, 39 L. ed 2d 1, 94 S. Ct. . . . , (1974). Parts (a), (c), (d), and (e) of paragraph (1) are taken verbatim from the 10 July 1970 HEW guideline.

[Order 17, § 162-28-040, filed 6/28/74.]

Chapter 162-30 WAC
SEX DISCRIMINATION

WAC

162-30-010 General approach.
162-30-020 Maternity.

WAC 162-30-010 General approach. In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC § 2000e and following, where the federal act is comparable to the state act. See in particular part 1604 of the regulations of the United States Equal Employment Opportunity Commission, 42 [29] CFR Part 1604. The commission will not follow federal precedents where it believes that a different interpretation will better carry out the purposes of the state act.

[Order 9, § 162-30-010, filed 9/23/71.]

WAC 162-30-020 Maternity. (1) **Findings.** Pregnancy is an expectable incident in the life of a woman. Many women of childbearing age depend on their jobs for economic support. Practices such as terminating pregnant women, refusing to grant leave or accrued sick pay for disabilities relating to pregnancy, or refusing to hire women for responsible jobs because they may become pregnant, impair the opportunity of women to obtain employment and to advance in employment on the same basis as men. Such practices discriminate against women because of their sex.

(2) **Purposes.** The purpose of the law against discrimination in employment because of sex (chapter 49.60 RCW) is to equalize employment opportunity for men and women. This regulation explains how the law applies to practices which disadvantage women because of pregnancy or childbirth.

(3) **Hiring pregnant women.** It is an unfair practice for an employer to refuse to hire a qualified woman because of pregnancy unless doing so would be unreasonable in view of the necessities of the business. The burden shall be on the employer to show that a decision not to hire a pregnant woman was based on adequate facts concerning her individual ability to perform the job or adequate facts concerning business necessity. For example, an employer hiring workers into a training program that cannot accommodate absences for the first two months might be justified in refusing to hire a pregnant woman whose delivery date would occur during those first two months. On the other hand, negative assumptions about pregnant women in employment must not influence the hiring decision. Such assumptions include but are not limited to:

(a) That pregnant women do not return to the job after childbirth;

(b) That the time away from work required for childbearing will increase the employer's costs;

(c) That the disability period for childbirth will be unreasonably long;

(d) That pregnant women are frequently absent from work due to illness;

(e) That clients, co-workers, or customers object to pregnant women on the job.

(4) **Treatment of employed women.** It is an unfair practice for an employer to discharge a woman, penalize her in terms or conditions of employment, or in any way limit the job opportunities of a woman because she is pregnant or may require time away from work for childbearing.

(5) **Leave for temporary disability.**

(a) An employer shall provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth. A leave in excess of the actual period of sickness or disability is not required by the law or this regulation. The terms and conditions of the leave shall be determined by the employer's policy on temporary disability, unless the policy conflicts with this regulation. For example:

(i) If advance notice is required for a leave for planned surgeries, or other anticipated disabilities, it may be required also for a leave for childbirth;

(ii) If the uniform policy requires a physician's statement to verify the leave period for other disabilities, a physician's statement may be required to verify the leave period for disabilities relating to pregnancy or childbirth.

(b) While application of the employer's general leave policy to disability because of pregnancy or childbirth will ordinarily afford equal opportunity for women and men, there may be circumstances when this is not so. One circumstance would be where the employer allows no leave for any sickness or other disability by any employee, or so little leave time that a pregnant woman must terminate employment. Because such a leave policy has a disparate impact on women, it is an unfair practice, unless the policy is justified by business necessity.

(c) An employer shall allow a woman to return to the same job, or a similar job of at least the same pay, if she has taken a leave of absence only for the actual period of disability relating to pregnancy or childbirth. Refusal to do

so must be justified by adequate facts concerning business necessity.

(6) **Disability benefits.** Illness or disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are temporary disabilities and must be treated as such under any sick leave plan or temporary disability benefit plan provided in whole or in part by the employer. All written and unwritten policies and practices concerning disabilities must be applied to disabilities resulting from pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. For example, if the following benefits or privileges are available for other temporary disabilities, then they must be available also for disabilities resulting from pregnancy or childbirth:

(a) Payment in lieu of wages under a sick leave plan or temporary disability benefit plan. (If no leave pay is granted for other temporary disabilities, then it need not be granted for disabilities relating to pregnancy or childbirth.)

(b) Extensions of leave time (e.g., use of vacation or leave without pay);

(c) Retention and accrual of benefits, such as seniority, retirement, and pension rights, during the leave period.

(7) **Insurance benefits.** Insurance benefits provided by the employer must be equal for male and female employees. For example:

(a) If full health insurance coverage is provided for male employees, then full coverage, including maternity and abortion, must be provided for female employees;

(b) If maternity insurance is provided for the wives of male employees, then the same coverage must be provided for the female employees.

Subsection 7 applies only if the employer pays the premium in whole or in part or has participated in negotiating the terms of the insurance policy.

(8) **Marital status immaterial.** Discrimination because of marital status is an unfair practice. An employer's leave policies and benefits, including health insurance, must apply equally to married and unmarried employees.

(9) **Labor unions and employment agencies.** It is an unfair practice for a labor union or employment agency to conduct its own affairs so as to deny anyone his or her rights under the law and this regulation.

(10) **Commission rulings.** Any person in doubt as to the application of this regulation to a particular set of facts may request an opinion letter from the executive secretary of the Washington state human rights commission or a declaratory ruling of the commission under WAC 162-08-620.

(11) **Construction with federal law.** This regulation is intended to be consistent with Title VII of the United States Civil Rights Act of 1964 and the United States Equal Employment Opportunity Commission Employment Policies Relating to Pregnancy and Childbirth, 29 CFR § 1604.10, and shall be construed accordingly.

[Order 15, § 162-30-020, filed 9/28/73; Order 11, § 162-30-020, filed 6/26/72.]

Chapter 162-36 WAC
REAL ESTATE TRANSACTIONS

WAC

162-36-001 Definitions.
162-36-005 Discrimination.
162-36-006 Retaliation.
162-36-010 Soliciting buyers from neighbors of listed house.
162-36-020 Content and language of solicitation.

WAC 162-36-001 Definitions. (1) "Brokerage services" means access to or membership or participation in a multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings;

(2) "Dwelling" means any building, structure or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof;

(3) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years;

(4) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property; transacting or applying for a real estate loan; the provision of brokerage services; or the making or purchasing of loans secured by residential real estate;

(5) "Real property" includes buildings, structures, dwellings, real estate, land, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

(6) "Unfair practices on the basis of creed" or "discrimination on the basis of creed" includes, but is not limited to religious discrimination under the federal Fair Housing Amendments Act of 1988.

[Statutory Authority: RCW 49.60.120(3) and 49.60.240. 96-13-045, § 162-36-001, filed 6/13/96, effective 7/14/96.]

WAC 162-36-005 Discrimination. (1) It is an unfair practice for any person, whether acting for himself, herself, or another, because of sex, marital status, race, creed, color, national origin, families with children status, the presence of any sensory, mental, or physical disability, or the use of a trained guide dog or service dog by a disabled person:

(a) To refuse to engage in a real estate transaction with a person;

(b) To discriminate against a person in the terms, conditions, or privileges or a real estate transaction or in the furnishing of facilities or services in connection therewith;

(c) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person;

FINAL BILL REPORT

SHB 1581

C 11 L 89 E1

BY House Committee on Commerce & Labor (originally sponsored by Representatives Wang, Brough, Cole, Miller, Vekich, Anderson, R. King, Winsley, Hankins, Rector, Brekke, Appelwick, Jacobsen, Leonard, Dellwo, Nutley, Locke, Belcher, H. Sommers, R. Fisher, Wineberry, Sayan, Prentice, Valle, Crane, Nelson, Ebersole, Fraser, Phillips, Rust and Basich)

Providing for **family** and medical **leave**.

House Committe on Commerce & Labor

Rereferred House Committee on Appropriations

Senate Committee on Economic Development & Labor

SYNOPSIS AS ENACTED

BACKGROUND:

The growth in two wage-earner families, single parent families, and working women, among other factors, has prompted an examination of employer **leave** policies to better accommodate employees.

In 1987, the House of Representatives passed **family leave** legislation which would have provided for 16 weeks of unpaid, job-protected **leave** to care for a newborn or adoptive child or a **family** member with a serious health condition. The bill died in the Senate and the Legislature established a Select Committee on Employment and the **Family** to study **family leave** and related issues. The Select Committee recommended what became known as the "**family** care" law, which was enacted in 1988. The **family** care law requires all

employers to allow employees covered by industrial welfare (all major employee groups except agricultural employees) to use accrued sick **leave** to care for their children with health conditions requiring treatment or supervision.

Human Rights Commission rules also address **leave** from employment in a limited way. All employers with eight or more employees must grant a woman a **leave** of absence for the period of maternity disability. No **leave** is generally required beyond the period of a woman's disability or for other new parents, such as fathers and adoptive parents. However, an employer must treat men and women equally. If, for example, an employer grants **leave** to women to care for newly adopted children, the employer must also grant **leave** to men.

SUMMARY:

FAMILY LEAVE

Coverage

Employees of covered Washington employers are entitled to unpaid, job-protected **family leave**. The **family leave** provisions apply to an employee who worked for a covered employer at least 35 hours per week during the previous year. Private business or local government must provide **family leave** if the employer employs 100 or more persons either at the place where the employee reports for work, or if the employer maintains a central hiring location and customarily transfers employees among workplaces, within a 20 mile radius of the place where the employee reports for work. The state government must also provide **family leave**.

An employer may limit or deny **family leave** to up to 10 percent of the employer's workforce in the state which the employer designates as key personnel, or to the highest paid 10 percent of the employer's employees in the state. Limitations are placed on an employer's designation of key personnel.

Leave

An employee is entitled to 12 weeks of **family leave** during any 24 month period for the following reasons:

- To care for a newborn biological child or stepchild, or adopted child under the age of six. The **leave** must be completed within 12 months of the birth or adoption placement, or

- To care for a child with a terminal health condition.

The **leave** is in addition to any maternity disability **leave.**

Job protection and benefits

An employee returning from **leave** is entitled to reinstatement to the same position or a position with equivalent benefits and pay within 20 miles of the employee's workplace, or, if the employer's circumstances have changed, to any other position which is vacant and for which the employee is qualified. The right to reinstatement does not apply if the employee's position is eliminated by a bona fide restructuring or reduction-in-force, the workplace is shut down or moved, or if the employee takes another job, fails to provide timely notice of **leave**, or fails to return on the established ending date of **leave.**

If an employer provided medical or dental benefits prior to **leave**, the employee may continue coverage by paying for the continued coverage.

Other provisions

Notice. An employee planning to take **family leave** for the birth or adoption of a child must give the employer at least 30 days' written notice of the dates of **leave.** The employee must adhere to the dates unless the birth is premature, the mother is incapacitated such that she is unable to care for the child, or an adoption placement is unanticipated, in which case the employee must state revised dates as soon as possible but at least within one working day. The employer and employee may also agree to alter the dates of **leave.**

If **leave** to care for a child with a terminal health condition is foreseeable, the employee must give the employer at least 14 days' notice of the **leave** and make a reasonable effort to schedule the **leave** so as not to unduly disrupt the operations of the employer. If the **leave** is not foreseeable, the employee shall notify the employer of the **leave** as soon as possible, but at least within one working day.

If an employee fails to give the required notice the employer may reduce or extend the **leave** by three weeks.

Use of paid **leave**. An employer may require an employee to use the employee's paid **leave** before taking unpaid **leave**.

Reduced **leave** schedule. With the employer's approval, an employee may take **leave** by working fewer than the employee's usual hours or days per week.

Confirmation by health care provider. An employer may require confirmation by a health care provider in case of a dispute regarding premature birth, incapacitation of the mother, maternity disability, or terminal health condition of a child.

General provisions. The Department of Labor & Industries is directed to administer the **family leave** provisions. The department must furnish employers with a poster which describes the law.

An employee may file a complaint with the department within 90 days of an alleged violation of the **family leave** or adoptive **leave** provisions. The department may fine an employer up to $200 for the first violation and up to $1000 for each subsequent violation. The department may also order an employer to reinstate an employee, with or without back pay. Employees do not have a private cause of action.

The department is directed to cease enforcing the act upon the effective date of any federal act which the department determines, with the consent of the Legislative Budget Committee, to be substantially similar to Washington law.

LEAVE FOR ADOPTIVE AND OTHER PARENTS

An employer must grant a parent adopting a child under the age of six and a stepparent of a newborn child **leave** under the same terms as the employer grants **leave** to biological parents. An employer must also grant **leave** to men and women upon the same terms. An employer is not required to grant men **leave** equivalent to maternity disability **leave**. The provisions for adoptive and other **leave** apply to all employees covered by industrial welfare. The Department of Labor and Industries is directed to administer and enforce the adoptive **leave** provision. The department may assess penalties for infractions.

VOTES ON FINAL PASSAGE:

House 57 39

First Special Session
House 50 31
Senate 27 18 (Senate amended)
House 78 16 (House concurred)

EFFECTIVE: September 1, 1989
SHB 1581 6/15/99 [ ]

FINAL BILL REPORT

EHB 2093

C 16 L 97

Synopsis as Enacted

Brief Description: Achieving consistency between state and federal family leave requirements.

Sponsors: Representatives Boldt, McMorris, Lisk, Clements and Honeyford.

House Committee on Commerce & Labor

Senate Committee on Commerce & Labor

Background: State family leave law. In 1989, the state family leave law was enacted. The family leave law applies to employers of 100 or more employees and to all state government employers. The law entitles a covered employee to up to 12 work weeks of unpaid family leave during any 24-month period to care for the employee's newborn child or adopted child under the age of six, or to care for the employee's terminally ill child who is under age 18.

An employee must give 30 days' written notice of his or her plan to take family leave except in specified circumstances when notice must be given as soon as possible. On return from leave, the employee is entitled to the same employment position as he or she held when leave commenced or to a position with equivalent benefits and pay at a workplace within 20 miles of the original workplace.

This leave is in addition to leave for sickness or temporary disability related to pregnancy or childbirth. Under Washington's Law Against Discrimination, the Human Rights Commission has adopted a rule requiring employers to grant a woman a leave of absence for the actual period of time that she is sick or temporarily disabled because of pregnancy or childbirth, with some exceptions related to business necessity. Generally, an employer's policy on leave for disability must treat pregnancy and childbirth the same as other disabilities.

If the family leave entitlements are violated, the employee may file a complaint with the Department of Labor and Industries. The department may issue a notice of infraction and employers found to have committed an infraction are subject to a penalty of up to $200 for a first offense and up to $1,000 per infraction for continuing to violate the family leave law. If an employer fails to reinstate an employee, reinstatement may be ordered with or without back pay.

Federal family and medical leave law. The federal Family and Medical Leave Act was enacted in 1993. The federal law applies to employers of 50 or more employees and entitles employees to up to 12 weeks of unpaid leave in any 12-month period. Employees may take leave to care for the employee's newborn child or adopted child under age 18 or to care for a spouse, child, or parent with a serious health condition, or because of the serious health condition of the employee that makes the employee unable to perform his or her job. "Serious health condition" includes any period of incapacity due to pregnancy or prenatal care. Special leave rules apply to certain educational employees.

The employee must provide 30 days' notice when the leave is foreseeable. On return from leave, an employee generally is entitled to be restored to the same employment position as he or she held when leave commenced or to a position with equivalent pay and benefits. Rules adopted to implement the federal law require the employee to be reinstated to the same or a geographically proximate worksite.

The U.S. Department of Labor is authorized to investigate complaints and bring actions in court to recover damages for violations. Employers are liable for wages lost by the employee or actual monetary damages, and double damages may be awarded. Employees may be ordered reinstated. Employees may also file civil actions to recover these damages.

Under the federal law, a state law that provides greater family or medical leave rights is not superseded by the federal law.

Summary: The Department of Labor and Industries is directed to cease administration and enforcement of the state family leave law until the earlier of the following dates:

$the effective date of repeal of the federal family and medical leave law; or

$July 1 of the year following the year that the federal family and medical leave law is amended to provide less leave than the state law. In determining whether the federal law

provides the same or more leave, the department must only consider whether: (1) the total period of leave under the federal law is 12 or more weeks in a 24-month period; and (2) whether the types of leave under the federal law are similar to the types of leave under the state law.

Two requirements under the state family leave law will continue to be enforced, however. First, an employee's right, upon returning from leave, to be returned to a workplace within 20 miles of the original workplace remains in effect. Second, the family leave entitlement under federal law is in addition to leave for sickness or temporary disability because of pregnancy or childbirth. These requirements will be enforced as provided under the state family leave law, except that an employer receiving an initial notice of infraction will have 30 days to take corrective action and no infraction or penalty may be assessed if the employer complies with the requirements of the initial notice.

Votes on Final Passage:

House 96 0

Senate 47 0

Effective:July 27, 1997

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 2093

Chapter 16, Laws of 1997

55th Legislature
1997 Regular Session

FAMILY LEAVE--CONSISTENCY WITH FEDERAL REQUIREMENTS

EFFECTIVE DATE: 7/27/97

Passed by the House March 15, 1997
Yeas 96 Nays 0

CLYDE BALLARD
Speaker of the
House of Representatives

Passed by the Senate April 8, 1997
Yeas 47 Nays 0

BRAD OWEN
President of the Senate

Approved April 15, 1997

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is ENGROSSED HOUSE BILL 2093 as passed by the House of Representatives and the Senate on the dates hereon set forth.

TIMOTHY A. MARTIN
Chief Clerk

FILED

April 15, 1997 - 5:18 p.m.

GARY LOCKE
Governor of the State of Washington

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 2093

Passed Legislature - 1997 Regular Session

State of Washington 55th Legislature 1997 Regular Session

By Representatives Boldt, McMorris, Lisk, Clements and Honeyford

Read first time 02/20/97. Referred to Committee on Commerce & Labor.

AN ACT Relating to achieving consistency between state and federal family leave requirements; and adding a new section to chapter 49.78 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. A new section is added to chapter 49.78 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, the department shall cease to administer and enforce this chapter beginning on the effective date of this section, and until the earlier of the following dates:

(a) The effective date of the repeal of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6); or

(b) July 1st of the year following the year in which amendments to the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6) take effect that provide less family leave than is provided under RCW 49.78.030. In determining whether the federal law provides the same or more leave, the department shall only consider whether (i) the total period of leave allowed under the

amended federal law is twelve or more workweeks in a twenty-four month period, and (ii) the types of leave authorized under the amended federal law are similar to the types authorized in this chapter.

(2) An employee's right under RCW 49.78.070(1)(b) to be returned to a workplace within twenty miles of the employee's workplace when leave commenced shall remain in effect. The family leave required by U.S.C. 29.2612(a)(1)(A) and (B) of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6) shall be in addition to any leave for sickness or temporary disability because of pregnancy or childbirth. The department shall enforce this subsection under RCW 49.78.140 through 49.78.190, except that an initial notice of infraction shall state that the employer has thirty days in which to take corrective action. No infraction or penalty may be assessed if the employer complies with the requirements of the initial notice of infraction.

Passed the House March 15, 1997.
Passed the Senate April 8, 1997.
Approved by the Governor April 15, 1997.
Filed in Office of Secretary of State April 15, 1997.

Family Leave 49.78.

RCW 49.78.390
Relationship to federal family and medical leave act.

(1) Leave under this chapter and leave under the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6) is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth.

(2) Leave taken under this chapter must be taken concurrently with any leave taken under the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6).

RCW 49.78.360
Effect on other laws.

Nothing in this chapter shall be construed: (1) To modify or affect any state or local law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability; or (2) to supersede any provision of any local law that provides greater family or medical leave rights than the rights established under this chapter.

[2006 c 59 § 17.]

AMICI'S STATEMENTS OF INTEREST

The American Civil Liberties Union of Washington ("ACLU") is a state-wide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to protecting and advancing civil rights and civil liberties throughout Washington. The ACLU has appeared frequently in courts in Washington involving women's right to receive equal treatment in family courts, to be free from discrimination on the basis of pregnancy, and to be free from government policies that place women at increased danger of domestic violence.

The Northwest Women's Law Center ("NWLC") is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWLC has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Throughout its history, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. Toward that end, NWLC has participated as counsel and as amicus curiae in Washington in numerous cases involving the rights of women to work free from sex discrimination and sexual harassment.