

NO. 80771-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,

Appellants,

vs.

WELLPINIT SCHOOL DISTRICT NO. 49,

Respondent

PETITIONER'S
APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Petitioner, John Hale, brought this lawsuit against his former employer, Wellpinit School District, alleging, inter alia, a claim of disability discrimination under the Washington Law Against Discrimination (WLAD), RCW 49.60 (CP 3-8). The trial court granted the District's motion for summary judgment on the WLAD claim, holding that Mr. Hale did not have a disability under the definition of that term adopted by this court in *McClarty v. Totem Electric International*, 157 Wn.2d 214, 137 P.2d 844 (2006). (CP 304-306).

In April 2007, the legislature passed Senate Bill 5340, enacting a comprehensive definition of disability for purposes of the WLAD. RCW 49.60.040(25). The legislature rejected the *McClarty* definition of disability and provided that its new definition would apply to all causes of action (like Mr. Hale's) occurring before July 6, 2006 (the date *McClarty* was issued), and to all causes of action occurring on or after the effective date of the new legislation. Laws of 2007, ch. 317, § 3.

Hale moved for reconsideration of the summary judgment order, arguing the record demonstrated he had a disability under the new definition in RCW 49.60.040(25). (CP 307-331). The trial court denied his motion,

ruling that the separation of powers doctrine precluded retroactive application of the definition of disability adopted by the legislature. (CP 415-421). This court granted direct, discretionary review on the separation of powers issue.

Respondent advances one argument in support of its position that retroactive application of the recently adopted legislative definition of disability would violate the separation of powers doctrine. The District contends that the legislative definition of disability “clarified” the statute with respect to this term, and retroactive application of this clarifying legislation would contravene this court’s “construction” of the statute in *McClarty*, in violation of the separation of powers doctrine.

Respondent’s argument is without merit. First, whether the legislature “clarified” or “amended” the WLAD with respect to the definition of disability is irrelevant to the retroactivity analysis because the legislature expressly provided for retroactive application of the statutory definition of disability. Second, the *McClarty* court did not construe the WLAD in adopting the ADA definition of disability. Therefore, retroactive application of the statutory definition does not contravene a prior construction of the WLAD by this court, and there is no separation of powers violation. Third, independent of whether the *McClarty* court construed the statute in adopting

the ADA definition of disability, retroactive application of SB 5340 simply does not contravene this court's decision in that case. Therefore, there is no separation of powers concern.

Finally, the district argues this court should not determine, as a matter of fact, whether Mr. Hale had a disability. Petitioner Hale does not ask the court to make this factual determination. However, the record does demonstrate a genuine issue of material fact concerning whether Hale had a disability which warranted reasonable accommodation under the WLAD. That factual question precludes summary judgment and the orders of the trial court should be reversed.

II. ARGUMENT

1. Whether SB 5340 "clarifies" or "amends" the WLAD with respect to the definition of disability is irrelevant to the retroactivity analysis.

Respondent Wellpinit goes to some length to argue that SB 5340 cannot be applied retroactively because it "clarified" the WLAD with respect to the definition of disability. The district contends that legislative amendments may be applied retroactively, but "clarifying" legislation may not. It is not at all clear whether this is a correct statement of the law. However, because the legislature expressly provided for retroactive

application of SB 5340, whether the enactment clarified or amended the WLAD with respect to the definition of disability is irrelevant to the retroactivity analysis.

It is well established that newly enacted statutes are presumed to run prospectively. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). However, a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial, provided that retroactive application does not “run afoul of any constitutional prohibition.” *Id.*; (quoting *McGee Guest Home, Inc. v. Dept. of Social & Health Services*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000)). In enacting the statutory definition of disability, the legislature clearly stated that the act was remedial and was to be applied retroactively:

This act is remedial and retroactive and applies to all causes of action occurring before July 6, 2006 and to all causes of action occurring on or after the effective date of the act.

[2007 c 317 § 3]. Because the legislature has clearly stated its intention that SB 5340 be applied retroactively, whether the legislation is properly characterized as an “amendment” or a “clarification” is simply irrelevant.

The issue is whether retroactive application of the statute violates the separation of powers doctrine. Generally, courts have expressed separation of powers concerns if retroactive application of a statute contravenes a prior judicial construction of the statute. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997); *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976); *Marine Power & Equipment Co. v. Washington State Human Rights Commission*, 39 Wn. App. 609, 694 P.2d 697 (1985). However, in *In re the Detention of Brooks*, 145 Wn.2d 275, 285-286, 36 P.3d 1034 (2001), this court expressly left open the issue of “whether amendments to a statute may be applied retroactively where the legislature expressly intends them to apply retrospectively and where the amendments contravene a judicial construction of the original statute.”

Just as in *Brooks*, this court need not decide this issue in this case. This is because retroactive application of SB 5340 simply does not contravene a prior judicial construction of the statute. Therefore, there is no separation of powers violation in following the legislative mandate that the statutory definition of disability be applied retroactively. The trial court’s ruling that retroactive application of SB 5340 violates the separation of powers doctrine should be reversed.

2. The *McClarty* court did not construe the WLAD with respect to the definition of disability.

Respondent contends retroactive application of SB 5340 would contravene this court's construction of the statute in *McClarty v. Totem Electric International*, 157 Wn.2d 214, 137 P.2d 844 (2006), and therefore, violate the separation of powers doctrine. Contrary to respondent's argument, *McClarty* did not construe statutory language in the WLAD. Therefore, no separation of powers concern arises.

In *Johnson v. Morris*, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976), this court explained:

It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it. *In re Elliott's Estate*, 22 Wash.2d 334, 156 P.2d 427 (1945); *Yakima Valley Bank & Trust Co. v. Yakima County*, 149 Wash. 552, 271 P. 820 (1928). In other words, there is no 'retroactive' effect of the court's construction of a statute, rather, once the court has determined the meaning, that is what the statute has meant since its enactment.

Six years prior to *McClarty* this court considered the proper definition of "disability" for purposes of disability/accommodation claims under the

WLAD. *Pulcino v. Federal Express Corporation*, 141 Wn.2d 629, 9 P.3d 787 (2000). The court expressly rejected the ADA definition of “disability” for purposes of disability discrimination (failure to accommodate) claims under the WLAD. 141 Wn.2d, at 641-642. (“To . . . adopt either the federal definition or choose one from another state, would be to undertake a task more appropriate for the legislature.”). The *Pulcino* court considered the same issue as the one decided by *McClarty*. If the court construed the statute in adopting the ADA definition of disability in *McClarty*, it must have engaged in the same exercise in rejecting the ADA definition in *Pulcino*. If the court construed the statute in defining disability in *Pulcino*, “that construction operates as if it were originally written into it.” *Johnson v. Morris*, 87 Wn.2d, at 927. If the court construed the statute in *Pulcino*, then its subsequent decision in *McClarty*, adopting the ADA definition of disability, was necessarily an act of judicial legislation. *Pulcino*, 141 Wn.2d, at 642. This would be absurd.¹ Because the WLAD contained no definition of “disability” at the time of the court’s decision in *Pulcino* and *McClarty*, neither decision construed the statute.

¹ Alternatively, if the court construed the statute in *Pulcino*, and “reconstructed” the statute in *McClarty*, then the *McClarty* decision represents an act of judicial legislation, in violation of the separation of powers doctrine, and should be overruled.

“In requiring proof that a disability substantially limits a major life activity, the *McClarty* court did not interpret an existing Washington statute, but rather imported a definition from a different source, namely federal law.” *Delaplaine v. United Airlines, Inc.*, 518 F. Supp.2d 1275, 1279 (W.D. Wash, 2007). Because the *McClarty* court did not construe the WLAD in adopting the ADA definition of disability, there is no separation of powers violation in retroactive application of SB 5340. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). The trial court erred in holding that retroactive application of SB 5340 violates the separation of powers doctrine. That decision should be reversed.

3. Retroactive application of SB 5340 does not contravene this court’s decision in *McClarty*.

Regardless of whether the *McClarty* court construed the WLAD in adopting the ADA definition of disability, retroactive application of SB 5340 simply does not contravene that decision. Petitioner Hale was employed with the Wellpinit School District from February 2002 through March 2003. The events which gave rise to this litigation occurred during that time period. *McClarty* was decided in July 2006. When the events giving rise to this litigation occurred the operative definition of disability for purposes of

accommodation cases under the WLAD was the one adopted by this court in *Pulcino v. Federal Express Corporation*, 141 Wn. 2d 629. At the time Mr. Hale's cause of action accrued he had a disability under the WLAD as defined by the court in *Pulcino*.

The legislature was precise with respect to the retroactivity of SB 5340. It provided that the new definition of disability would apply retroactively only to those cases which arose prior to the *McClarty* decision, and after the effective date of the new legislation. See 2007 c 317 § 3. *McClarty* applies to those cases which arose after the date of that decision, and prior to the effective date of SB 5340. Therefore, retroactive application of SB 5340, as mandated by the legislature, simply does not contravene this court's decision in *McClarty*. *Delaplaine v. United Airlines Inc.*, 518 F. Supp. 2d, at 1278.

Because retroactive application of SB 5340 does not contravene this court's decision in *McClarty*, there is no separation of powers violation. Again, the trial court's decision to the contrary should be reversed.

4. The record contains a genuine issue of material fact concerning whether Petitioner had a disability which warranted reasonable accommodation under the WLAD.

The District objects to Petitioner's factual argument, contending that this court may not make findings of fact regarding whether Mr. Hale has a disability under the WLAD. Contrary to respondent's argument, Hale does not ask this court to make any findings of fact. Rather, petitioner asks the court to recognize that the record demonstrates a genuine issue of material fact concerning whether Mr. Hale had a disability warranting reasonable accommodation under the WLAD. This factual question requires reversal of the trial court's order granting defendant's Motion for Summary Judgment, and dismissing Mr. Hale's disability discrimination claim.

It has long been established that whether an employee had a disability warranting accommodation under the WLAD is a question for the trier of fact. *Pulcino v. Federal Express Corp.*, 141 Wn. 2d, at 642; *Doe v. Boeing Co.*, 121 Wn. 2d 8, 17-18, 846 P. 2d 531 (1993); *Phillips v. City of Seattle*, 111 Wn. 2d 903, 766 P. 2d 1099 (1989). To establish a disability under the WLAD, the plaintiff must demonstrate (1) he had a sensory, mental, or physical abnormality, and (2) the abnormality had a substantially limiting effect on his ability to perform his job. RCW 49.60.040 (25); in accord, *Pulcino v. Federal Express Corp.*, 141 Wn. 2d, at 641. In the instant case, petitioner's treating physician, Dr. Robert Wigert, testified that Mr. Hale had

a long standing history of depression and anxiety that was being significantly aggravated by his working environment. Further, the testimony of both Dr. Wigert and Mr. Hale demonstrated that the anxiety/depression substantially impaired Hale's ability to perform his job. Therefore, there is evidence in the record to support findings by the trier of fact that Mr. Hale had an abnormal mental condition that substantially impaired his ability to perform his job. The record demonstrates a genuine issue of material fact concerning whether Mr. Hale had a disability warranting reasonable accommodation under the WLAD. That factual question precludes summary judgment, and the decision of the trial court should be reversed.

III. CONCLUSION

For the reasons set forth above, and in his opening brief, Petitioner Hale respectfully requests the court to reverse the decision of the Stevens County Superior Court, and remand his disability discrimination claim for trial on the merits.

RESPECTFULLY SUBMITTED this 20 day of June, 2008.

PAUL J. BURNS, P.S.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 23 day of June, 2008, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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