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No. 96335-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CERTIFICATION FROM THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
IN

CASEY TAYLOR and ANGELINA TAYLOR, husband and wife  
and the marital community composed thereof,

Plaintiffs-Appellants,

vs.

BURLINGTON NORTHERN RAILROAD HOLDINGS, INC., a  
Delaware Corporation licensed to do business in the State of Washington,  
and BNSF RAILWAY COMPANY, a Delaware Corporation licensed to do  
business in the State of Washington,

Defendants-Respondents.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the scope of protection against discrimination afforded to disabled persons in Washington under the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

Casey Taylor brings this action against Defendants Burlington Northern Railroad Holdings, Inc., and BNSF Railway Company (BNSF), for employment discrimination based on disability under the WLAD. The case is before this Court on a certified question of law from the Ninth Circuit Court of Appeals. The facts are drawn from the Ninth Circuit certification order and the briefing of the parties. *See Taylor v. Burlington Northern Railroad Holdings, Inc.*, 904 F.3d 846, 847-49 (9<sup>th</sup> Cir. 2018); Taylor Op. Br. at 2-8; BNSF Resp. Br. at 1-4.

Taylor sought employment with BNSF as an electronic technician. He received an offer of employment, conditioned on his completion of a medical questionnaire and physical examination. Despite meeting the physical qualifications for the position, Taylor was referred to BNSF's

chief medical officer because BNSF determined that Taylor was obese, based on a Body Mass Index (BMI) of 41. Under BNSF employment guidelines, a BMI of 40 or greater triggers additional medical screening requirements, which must be financed by the applicant. Taylor was unable to pay for the testing, and BNSF declined to hire him.

Taylor filed suit in Washington State court, asserting that BNSF's employment conditions were based on his perceived disability, and this conduct constituted disability discrimination under the WLAD. BNSF removed the case to federal district court for the Western District of Washington. It then filed a motion for summary judgment, asserting that obesity does not qualify as a disability under the WLAD unless it is the result of a physiological disorder and outside the normal range. The district court granted BNSF's motion. Taylor appealed to the Ninth Circuit Court of Appeals, which certified to this Court the question of law presented herein.

### **III. ISSUE PRESENTED**

Under what circumstances, if any, does obesity qualify as an impairment under the Washington Law Against Discrimination (WLAD), Wash. Rev. Code § 49.60.040?

### **IV. SUMMARY OF ARGUMENT**

The WLAD was enacted in 1949 to eliminate employment discrimination, and has been consistently expanded to apply in different contexts and extend to additional protected classes. Its central purpose — to eradicate discrimination — has been deemed a policy of the highest order.

The Legislature has mandated that its provisions be liberally construed to effectuate this purpose. When construing statutory terms in the WLAD, the Court applies the plain meaning rule, examining the statute in the full context of the WLAD as a whole, including its rule of liberal construction and its purpose of eradicating discrimination. Only if the statute is ambiguous should the Court resort to federal law to construe statutory text. In such cases, federal law should be used only to further, and not to frustrate, the WLAD purpose of eliminating discrimination.

The definition of impairment in RCW 49.60.040(7) includes any “condition” affecting any of a number of enumerated body systems. As a recognized disease adversely affecting multiple body systems, including the musculoskeletal, cardiovascular and respiratory systems, obesity is an impairment within the meaning of the statutory definition. Other indicia of legislative intent gleaned from the broader context of the WLAD reinforce that physiological cause is not a requirement in the determination of whether a condition qualifies as an impairment. Because the plain meaning of the statutory definition includes obesity, the Court need not and should consult federal law to construe this unambiguous provision.

If the Court deems the statutory text ambiguous, the Court should adopt the construction that best comports with evidence of the intent of the Washington State Legislature, which includes the legislative findings accompanying the 2007 amendment and the regulation promulgated by the

Human Rights Commission defining impairment. Examination of these sources supports a construction of the definition of impairment that is independent of federal law and extends protection against disability discrimination to those suffering from the disease of obesity, regardless of cause.

## **V. ARGUMENT**

The certified question asks this Court to determine under what circumstances, if any, obesity may qualify as an impairment under the WLAD. Relying on federal law, BNSF urges the following answer to this question: Obesity “can qualify as an ‘impairment’. . . only when the weight is both outside the statistically ‘normal’ range and is the result of a physiological disorder.” BNSF Resp. Br. at 1.

The Court should reject BNSF’s restrictive definition, as it would require the Court to ignore the plain meaning of the statutory text, read in context, and disregard the WLAD’s rule of liberal construction. The Court should instead answer the certified question as follows: Obesity qualifies as an impairment in all cases because it is a recognized disease, or “condition,” affecting several enumerated body systems, and therefore meets the definition of impairment under RCW 49.60.040(7).

### **A. Overview Of The Pertinent Rules Of Statutory Construction, Both Under Washington Law Generally And The WLAD In Particular.**

#### **1. Statutory construction under Washington law: the plain meaning rule.**

The fundamental inquiry in statutory construction is determining legislative intent. *See State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). To that end, the Court begins with an examination of the statutory text, as the “surest indication of legislative intent is the language enacted by the legislature.” *Id.* This Court has adopted a broad, contextual “plain meaning” rule of statutory construction, whereby meaning is gleaned from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002). The “plain meaning” inquiry includes “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (quoting *Dep’t of Ecology*, 146 Wn.2d at 11). Only if the text is reasonably susceptible to more than one meaning will the Court resort to legislative history or rules of construction. *See Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

## **2. Special rules of construction under the WLAD.**

The WLAD was enacted in 1949 to prohibit employment discrimination on the basis of race, creed, color or national origin. *See Laws of 1949*, ch. 183 (codified at ch. 49.60 RCW); *see also Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). Its purpose is to eliminate discrimination, which “threatens not only the rights and proper privi-

leges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. This Court has recognized that “the purpose of the WLAD — to deter and eradicate discrimination in Washington — is a policy of the highest order.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

The Legislature has declared that WLAD protections are grounded in both the rights guaranteed by the Washington State Constitution and the exercise of the police power “for the protection of the public welfare, health, and peace of the people of this state.” RCW 49.60.010. It mandates that the WLAD “be construed liberally for the accomplishment of the purposes” of eliminating and preventing discrimination. RCW 49.60.020. In keeping with its interpretive function, this Court has consistently complied with the Legislature’s mandate to construe the WLAD liberally, and has declared it will “view with caution any construction that would narrow the coverage of the law.” *Brown v. Scott Paper*, 143 Wn.2d 349, 357, 20 P.3d 921 (2001) (quoting *Marquis*, 130 Wn.2d at 108).

As in all cases of statutory construction, this Court applies the plain meaning rule to discern the meaning of statutory terms under the WLAD. See *Jin Zhu v. North Central Educational Svc. Dist - ESD 171*, 189 Wn.2d 607, 613-24, 404 P.3d 504 (2017); see also *State v. Arlene’s Flowers, Inc.*, 187 Wn.2d 804, 829-30, 389 P.3d 543 (2017), vacated on

other grounds by *Arlene's Flowers, Inc. v. Washington*, 138 S.Ct. 2671 (2018); *Fraternal Order of Eagles*, 148 Wn.2d at 239. As the Court's WLAD jurisprudence has developed, the Court has articulated considerations as to when federal law is persuasive in construing the protections afforded under state law. First, when the question presented is one of statutory construction, the Court applies the plain meaning rule, and generally looks to federal law only if it determines the text is ambiguous. *See, e.g., Fraternal Order of Eagles*, 148 Wn.2d at 239, 247-51 (examining outside state and federal antidiscrimination law in considering whether "fraternal organizations" must be distinctly private to enjoy exemption from the mandates of the WLAD, but only after concluding the WLAD was ambiguous). Second, where the Court has looked to federal law, it has generally been used in a way that expands, rather than restricts, the rights of victims of discrimination. *See, e.g., Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017) (eliminating the requirement that plaintiffs asserting employment discrimination prove they were replaced by someone outside the protected class). This approach is in keeping with the Court's interpretive role, as it has applied the statutory rule of liberal construction to resolve ambiguities in favor of victims of discrimination. *See, e.g., Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, 151 Wn.2d 203, 214, 87 P.3d 757 (2004) (finding the phrase "any other appropriate remedy" to be ambiguous and construing it

to provide additional remedies for victims of discrimination beyond those expressly enumerated). Finally, federal law is deemed persuasive only when it furthers the purposes of the WLAD. *See, e.g., Cornwell v. Microsoft Corp.*, \_\_ Wn.2d \_\_, 430 P.3d 229, 238 (2018) (adopting the federal “knew or suspected” standard for retaliation claims “because it furthers WLAD’s purpose to protect employees from retaliation”); *see also Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 491, 325 P.3d 193 (2014). As the Ninth Circuit recognized in its certification order, “where the Washington Supreme Court ‘has departed from federal antidiscrimination statute precedent, ... it has almost always ruled that the WLAD provides greater employee protections than its federal counterpart.’” *Taylor*, 904 F.3d at 849 (quoting *Kumar*, 180 Wn.2d at 491).

**B. Background Regarding Disability Discrimination Under The WLAD, The *McClarty* Decision And The Legislative Response.**

Disabled persons were added as a protected class under the WLAD in 1973. *See LAWS OF 1973*, 1st ex. sess., ch. 214; *McClarty v. Totem Elec.*, 157 Wn.2d 214, 221, 137 P.3d 844 (2006), *superseded by statute as stated in In re Estate of Hambleton*, 181 Wn.2d 802, 818, 335 P.3d 398 (2014).<sup>1</sup> In its initial form, the statute extended protection against discrimination based on “the presence of any sensory, mental, or physical handi-

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<sup>1</sup> Notably, state protection against disability discrimination under the WLAD pre-dates federal protection under the American with Disabilities Act of 1990, Pub.L. 101–336, 104 Stat. 327, 331 (1990), as well as its predecessor, Section 504 of the Rehabilitation Act of 1973. *See* Pub.L. 93–112, 87 Stat. 357 (1973).

cap.” In 1993, the Legislature substituted the word “disability” for “handicap.” *See* Laws of 1993, ch. 69. These terms are interchangeable, and the substitution did not alter the substantive protection against disability discrimination afforded under the WLAD. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 191 n.17, 23 P.3d 440 (2001), *abrogated by Mikkelsen*, 189 Wn.2d 516; *see also McClarty* 157 Wn.2d at 225.

Initially, there was no statutory definition for handicap, or later, for disability. As a result, several decisions of this Court examined the meaning of the term, adopting varying definitions. *See, e.g., Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 641, 639, 9 P.3d 787 (2000) (requiring a WLAD plaintiff asserting failure to accommodate a disability to show “that (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job”); *Doe v. Boeing Co.*, 121 Wn.2d 8, 14-16, 846 P.2d 531 (1993) (applying the definition of handicap provided by the Washington State Human Rights Commission (HRC) in WAC 162-22-040); *Chicago, Milwaukee, St. Paul & Pac. RR. v. Washington State Human Rights Comm'n*, 87 Wn.2d 802, 805, 557 P.2d 307 (1976) (rejecting a vagueness challenge for want of a statutory definition and employing the common meaning of the term).

In *McClarty v. Totem Elec.*, *supra*, this Court addressed whether an employee suffering from carpal tunnel syndrome had a disability within

the meaning of the WLAD. In the absence of a statutory definition, the Court considered whether to adopt the definition provided by prior Washington case law, including the Court’s decision in *Pulcino*, 141 Wn.2d at 641, by the HRC in its definition in WAC 162-22-020 (1975), or by federal law, under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12209. After examining these lines of authority, the Court in *McClarty* selected the federal definition of disability.<sup>2</sup> 157 Wn.2d at 228. In support of this conclusion, the Court stated that “[t]his court has held that federal law is instructive with regard to our state discrimination laws.” *Id.* (citations omitted; brackets added). The Court noted that reliance on federal law was appropriate, “given that the original federal and Washington laws against disability discrimination were enacted nearly contemporaneously and directed at the same issue.” 157 Wn.2d at 229 (citations omitted). Acknowledging its narrow definition, the Court explained this was necessary to “ensure that scarce judicial resources are available to those most in need of the WLAD’s protections.” 157 Wn.2d at 230.

The Legislature responded to the *McClarty* decision one year later, for the first time adopting a definition of disability under the WLAD. *See* Laws of 2007, ch. 317 (codified at 49.60.040(7)). In the legislative find-

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<sup>2</sup> The definition adopted in *McClarty* provided: “[A] plaintiff bringing suit under the WLAD establishes that he has a disability if he (1) has a physical or mental impairment that substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.” *McClarty*, 157 Wn.2d at 228 (brackets added).

ings that accompanied the amendment, the Legislature explained that the statutory definition of disability specifically, and the WLAD more generally, operates as a body of law wholly independent of federal law. It stated:

The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.

Laws of 2007, ch. 317, § 1.

**C. The Plain Meaning Of The Definition Of Impairment In RCW 49.60.040(7), Read In Its Full Context, Unambiguously Includes Obesity, And Resort To Federal Law To Narrow Protection Against Discrimination Is Unnecessary And Improper.**

Obesity is defined by the Center for Disease Control, the National Institute of Health and the World Health Organization as a Body Mass Index (BMI)<sup>3</sup> of 30 or greater. *See* <https://www.cdc.gov/obesity/adult/defining.html>; [https://www.nhlbi.nih.gov/health/educational/lose\\_wt/BMI/bmi\\_dis.htm](https://www.nhlbi.nih.gov/health/educational/lose_wt/BMI/bmi_dis.htm); <https://www.who.int/topics/obesity/en/>. In 2013, the American Medical Association formally joined multiple medical organizations to pass a resolution recognizing obesity as a disease. *See* <https://www.npr.org/documents/2013/jun/ama-resolution-obesity.pdf>. The National Institute of Health reports that obesity affects numerous body systems, including the musculoskeletal, cardiovascular and respiratory systems. *See*

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<sup>3</sup> According to the World Health Organization, BMI is a measure of obesity that is calculated by dividing body weight by height. *See* <https://www.who.int/topics/obesity/en/>.

<https://www.cdc.gov/healthyweight/effects/index.html>. As a recognized disease affecting multiple body systems, obesity constitutes an impairment under the plain meaning of the WLAD.

**1. The plain meaning of the definition of impairment contained in RCW 49.60.040(7), read in its full context, unambiguously includes obesity regardless of its cause.**

As the “surest indication of legislative intent is the language enacted by the legislature,” *see Ervin*, 169 Wn.2d at 820, the proper interpretation of the WLAD’s statutory protection against disability discrimination must begin with the text. Taylor asserts disparate treatment based on disability under RCW 49.60.180, which makes it an “unfair practice for any employer . . . [t]o refuse to hire any person because of . . . any sensory, mental, or physical disability.” RCW 49.60.180, RCW 49.60.180(1) (brackets added). The definition adopted by the Legislature in 2007 defines disability to mean “the presence of a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact.” RCW 49.60.040(7)(a). The definition of impairment is illustrative and not exhaustive, providing that an impairment “*includes, but is not limited to . . . [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting [any of a number of] body systems*” (RCW 49.60.040(7)(c)(i) (italics and brackets added)). In construing the WLAD, this Court has relied on the illustrative nature of modi-

fiers to construe statutory terms and distinguish the scope of the WLAD from federal statutory provisions. *See, e.g., Brown*, 143 Wn.2d at 359 (concluding the plain meaning of the WLAD definition of employer contemplates individual supervisor liability, relying in part on its use of “includes,” which is a “term of enlargement,” as opposed to the use of “means” in Title VII, which is a term of limitation).

The most natural reading of this language is that an “impairment” may be established either by a showing of 1) a physiological disorder, or 2) a condition, cosmetic disfigurement, or anatomical loss affecting one of a list of enumerated body systems. “Condition” is not defined in the WLAD, but an apt dictionary definition is “the physical status of the body as a whole or one of its parts – usually used to indicate abnormality.” Webster’s Third New International Dictionary 473 (3d ed. 1993). *See State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002) (gleaning “plain and ordinary meaning” of statutory terms from dictionary definition, where terms not defined by statute). The plain meaning of “impairment” thus includes, but is not limited to “the physical status of the body” or “abnormality” that affects one of the body systems enumerated in the statute. As a disease affecting multiple body systems, obesity meets the definition of a “condition . . . affecting one or more of [enumerated] body systems.” RCW 49.60.040(7)(c)(i) (brackets added).

Elsewhere in the WLAD, the Legislature identifies as disabilities conditions that may be influenced by non-physiological causes. *See* RCW 49.60.172; *see also* RCW 49.60.174 (providing that “discrimination based on actual or perceived HIV or hepatitis C infection shall be evaluated in the same manner as other claims of discrimination based on sensory, mental, or physical disability”).<sup>4</sup> Inclusion of these provisions suggests the Legislature does not intend the presence of a disability or impairment to turn on one’s own role in creating or exacerbating the impairment.

Finally, the definition of impairment is found in a definition that defines disability broadly, evidencing an intent to provide expansive protection. Section 49.60.040(7)(b) states that a disability may exist whether “temporary or permanent, common or uncommon, mitigated or unmitigated.” It goes on to declare that protection against discrimination will extend beyond substantially limiting conditions, including “whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.” *Id.* These provisions, construed in the context of the statute as a whole under the rule of liberal construction, unambiguously provide that impairment includes a condition affecting numerous body systems, regardless of cause.

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<sup>4</sup> Of course, many diseases are influenced or caused by lifestyle factors, including type-2 diabetes, cancer and heart disease. BNSF concedes such conditions qualify as impairments, but attempts to equate the disease of obesity with the trait of body weight, and then argues it is akin to a characteristic, like height or hair color. *See* BNSF Resp. Br. at 11 n.9. This argument ignores the general agreement among the medical community that obesity itself constitutes a disease that adversely affects numerous body systems.

**2. The definition of impairment in RCW 49.60.040(7), read in context, is not reasonably susceptible to a construction that requires proof of physiological cause.**

Despite this plain language, BNSF asserts that the WLAD definition of impairment excludes cases of obesity that lack proof of a physiological cause. The statutory text, however, does not support BNSF's construction. To adopt this construction, the Court must either ignore the comma separating "physiological disorder" from condition, or insert the word "physiological" into the statute again, just before the word condition. Such an insertion is contrary to the rules of statutory construction. *See State v. Dennis*, 191 Wn.2d 169, 173, 421 P.3d 944 (2018) (noting the "well-established principle of statutory interpretation that [the Court] may not add words to an unambiguous statute when the legislature has chosen not to include that language" (citation omitted; brackets added)).

More broadly, BNSF's proposed construction ignores the broad definition of disability adopted by the Legislature, specific identified disabilities protected in other provisions that may not be solely based on physiological causes, and the larger context of the WLAD as whole, which suggests expansive protection that is to be liberally construed. BNSF's construction of the statute does not comport with its plain language, and the Court should decline BNSF's invitation to construe the statute in relation to a restrictive federal construction.

**D. If The Court Determines RCW 49.60.040(7) Is Ambiguous, The Court Should Reject BNSF’s Restrictive Federal Construction Requiring Proof Of Physiological Cause, And Instead Resolve The Ambiguity In Accordance With The Best Evidence Of The Intent Of The Washington State Legislature, Including The Legislative Findings Contemporaneous To The 2007 Amendment And The HRC Definition Of Condition in WAC 162-22-020.**

If the Court determines the statute is ambiguous, it may look to rules of statutory construction, legislative history, and relevant case law to resolve the ambiguity. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). In all cases, whether ascertaining plain meaning or resolving an ambiguity, the fundamental inquiry is legislative intent. *Id.*

BNSF contends the Court should resolve any ambiguity by resorting to federal law. It supports this position by noting that the definition of impairment adopted by the Washington Legislature is similar to the definition that had been adopted by the federal Equal Employment Opportunity Commission (EEOC) and was in effect at the time the WLAD definition was added. *See* BNSF Resp. Br. at 12 (comparing RCW 49.60.040(7)(c) with 29 C.F.R. § 1630.2(h)). It acknowledges federal law is not binding, but offers this: “[W]hen the evidence is so clear and uncontradicted that the legislature intended to adopt the EEOC’s original interpretive guidance approach to physical traits or characteristics as an ‘impairment,’ and the HRC agrees, this Court holding otherwise would be creating *new* ‘purposes and mandates’ of the WLAD.” BNSF Resp. Br. At 19-20 (brackets

added). For several reasons, the Court should decline BNSF's invitation to undertake this misguided and irrelevant detour into federal law.

Most fundamentally, the evidence of legislative intent is contrary to BNSF's position. Contemporaneous with its adoption of the definitions of disability and impairment, the Washington Legislature expressly declared its intent that the WLAD should operate as an independent body of law that does not rest on the scope of protection afforded under federal law.<sup>5</sup> It stated that the added section defining disability, and indeed, the WLAD generally, are intended to provide protections that are "wholly independent of those afforded by the federal Americans with Disabilities Act of 1990." Laws of 2007, ch. 317, § 1.<sup>6</sup> Given this statement of legislative

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<sup>5</sup> Of course, interpretation of a statute is a question of law that falls within the province of the Court. *See Overton v. Washington State Economic Assistance Authority*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981). The Legislature "is precluded by the constitutional doctrine of separation of powers from making *judicial* determinations." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 303-04, 174 P.3d 1142 (2007) (citation omitted). However, it is squarely within the Legislature's purview to "make inquiries and factual determinations as an incident to the process of making law." *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270, 534 P.2d 114 (1975). Where legislative findings of fact are provided, the Court will generally "not controvert or even question legislative findings of fact." *Id.* In this case, while the Court may not rely on the Legislature's findings as an interpretive mandate, they provide important factual evidence of legislative intent. *See Spokane County Health District v. Brockett*, 120 Wn.2d 140, 151, 839 P.2d 324 (1992) (recognizing that findings containing a statement of legislative intent "can be crucial to interpretation of a statute").

<sup>6</sup> The Court may also consider legislative findings in the context of its "plain meaning" analysis, to determine whether a given statute contains an ambiguity. *See, e.g., State v. Barnes*, 189 Wn.2d 492, 497, 502, 403 P.3d 72 (2017). In this case, the Legislative findings do not directly speak to the meaning of the specific term at issue — impairment. *See Five Corners Family Farmers*, 173 Wn.2d at 305 (noting plain meaning analysis considers "all that the Legislature has said in the statute and related statutes which disclose legislative intent *about the provision in question*" (italics added)). However, the findings would appear to be highly relevant in discerning the Legislature's general intent at the time of enactment.

intent, it would be counter to the best evidence of legislative intent to undertake the exercise urged by BNSF and attempt to discern the intent of the Washington State Legislature by examining interpretations of federal law.<sup>7</sup>

BNSF cites *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 510, 919 P.2d 62 (1996), for its claim that the legislature is presumed to “have been aware of that federal law when it adopted the federal guideline.” See BNSF Resp. Br. at 22. However, in contrast to the circumstances here, where the Legislature’s contemporaneous statement expressly evidenced an intent to disavow reliance on federal law, the Legislature in *Health Ins. Pool* included a phrase in the statute at issue that referenced federal law. See *Health Ins. Pool*, 129 Wn.2d at 510 (noting that the phrase “as soon as authorized by federal law” evidenced “the fact that the Legislature knew” of governing federal law).

Other evidence of legislative intent reinforces the correctness of a construction independent of federal law. It is true the particular section defining “impairment” in the WLAD is similar to the definition adopted

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<sup>7</sup> Notably, Congress amended the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 and enacted the ADA Amendments Act of 2008 (ADAAA), Pub.L. No. 110–325, 122 Stat. 3553., in response to decisions of the United States Supreme Court that narrowed the ADA’s protections. See ADAAA, § 2(b)(2)–(4) (“The purposes of this Act are ... to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) and its companion cases”). Washington cases have at times refined or corrected state jurisprudence that was adopted in reliance on evolving federal standards. See, e.g., *Mikkelsen*, 189 Wn.2d at 528-29.

by the EEOC, but the context of the definition as a whole is markedly different in several ways. First, while the federal definition is exhaustive, the state definition is illustrative, and does not purport to contemplate all circumstances in which an impairment may exist. *See Brown*, 143 Wn.2d at 359. Second, § (b) of RCW 49.60.040(7), which immediately precedes § (c) defining impairment, indicates that the legislature intended to offer a broad meaning of disability, declaring a disability may be found whether “temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.” No equivalent section appears in the federal definition.

Administrative regulations also provide helpful guidance on the proper interpretation of a statute, and when promulgated pursuant to legislative delegation, the Court will defer to them if 1) the particular agency is charged with the administration and enforcement of the statute, 2) the statute is ambiguous, and 3) the statute falls within the agency’s expertise. *See Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.d 846 (2007).<sup>8</sup> Here, the WAC states that a condition is a disability if it is an “abnormality” that forms the basis for discrimination. *See WAC 162-22-020*. Impor-

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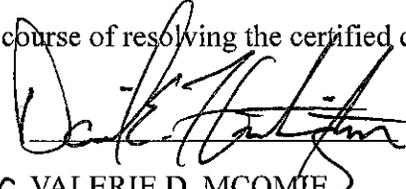
<sup>8</sup> The WAC provision was promulgated under the HRC’s delegated authority to implement WLAD protections. *See RCW 49.60.120(3)*; *WAC 162-22-010*. As such, it may also be considered binding. *See Washington Water Power Co. v. Washington State Human Rights Comm’n*, 91 Wn.2d 62, 68, 586 P.2d 1149 (1978). At a minimum, it may be evidence of legislative intent in resolving statutory ambiguities. *See Washington Water Power*, 91 Wn.2d at 68.

tantly, there is no mention of a requirement that an impairment have a physiological cause.

In sum, the evidence of legislative intent supports a liberal construction of RCW 49.60.040(7) independent of federal law and grounded in the unique provisions and purposes of the WLAD. The only reasonable interpretation of the Legislature's adoption of its definition of impairment and its contemporaneous statement that it intends the WLAD to operate wholly independently of federal law, is that the Legislature intended that WLAD terms, regardless of their origin, be construed in the context of the unique state protections afforded under Washington State law.<sup>9</sup>

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the certified question.

  
for VALERIE D. MCOMIE

  
DANIEL E. HUNTINGTON

On Behalf of WSAJ Foundation

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<sup>9</sup> Importantly, state protection against discrimination is provided, in part, "in fulfillment of the provisions of the Constitution of this state concerning civil rights." RCW 49.60.010. In examining the relationship between state and federal constitutional protections, this Court has observed that federal constitutional protections offer a floor, below which state constitutions may not fall. *See State v. Steyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). But states are free to "raise the ceiling to afford greater protections under their own constitutions." *Id.* The constitutional underpinnings of WLAD protections and its unique statutory scheme, combined with the contemporaneous legislative statements, suggest the Legislature's intent to supplement federal antidiscrimination law through the enhanced protections afforded under the WLAD.

# APPENDIX

RCW 49.60.040

Laws of 2007, Ch. 317

WAC 162-22-020

29 C.F.R. 1630.2



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version's Validity Called into Doubt by [Ockletree v. Franciscan Health System](#), Wash., Feb. 06, 2014

[West's Revised Code of Washington Annotated](#)  
[Title 49. Labor Regulations \(Refs & Annos\)](#)  
[Chapter 49.60. Discrimination--Human Rights Commission \(Refs & Annos\)](#)

West's RCWA 49.60.040

49.60.040. Definitions (Effective January 1, 2019)

Effective: January 1, 2019

[Currentness](#)

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) “Aggrieved person” means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) “Any place of public resort, accommodation, assemblage, or amusement” includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) “Commission” means the Washington state human rights commission.

(4) “Complainant” means the person who files a complaint in a real estate transaction.

(5) “Covered multifamily dwelling” means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) “Dog guide” means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) “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.

(10) “Employee” does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) “Employer” includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) “Employment agency” includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) “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.

(14) “Full enjoyment of” includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) “Honorably discharged veteran or military status” means a person who is:

(a) A veteran, as defined in [RCW 41.04.007](#); or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) “Labor organization” includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) “Marital status” means the legal status of being married, single, separated, divorced, or widowed.

(18) “National origin” includes “ancestry.”

(19) “Person” includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) “Premises” means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) “Real estate transaction” includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) “Real property” includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) “Respondent” means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) “Service animal” means any dog or miniature horse, as discussed in [RCW 49.60.214](#), that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks. This subsection does not apply to [RCW 49.60.222](#) through [49.60.227](#) with respect to housing accommodations or real estate transactions.

(25) “Sex” means gender.

(26) “Sexual orientation” means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, “gender expression or identity” means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

### Credits

[2018 c 176 § 2, eff. Jan. 1, 2019. Prior: 2009 c 187 § 3, eff. July 26, 2009; prior: 2007 c 317 § 2, eff. July 22, 2007; 2007 c 187 § 4, eff. July 22, 2007; 2006 c 4 § 4, eff. June 8, 2006; 1997 c 271 § 3; 1995 c 259 § 2; prior: 1993 c 510 § 4; 1993 c 69 § 3; prior: 1985 c 203 § 2; 1985 c 185 § 2; 1979 c 127 § 3; 1973 c 141 § 4; 1969 ex.s. c 167 § 3; 1961 c 103 § 1; 1957 c 37 § 4; 1949 c 183 § 3; Rem. Supp. 1949 § 7614-22.]

### OFFICIAL NOTES

**Declaration--Finding--Purpose--Effective date--2018 c 176:** See notes following [RCW 49.60.215](#).

**Finding--2007 c 317:** “The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.” [2007 c 317 § 1.]

**Retroactive application--2007 c 317:** “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 July 22, 2007.” [2007 c 317 § 3.]

**Effective date--1995 c 259:** See note following [RCW 49.60.010](#).

**Severability--1993 c 510:** See note following [RCW 49.60.010](#).

**Severability--1993 c 69:** See note following [RCW 49.60.030](#).

**Severability--1969 ex.s. c 167:** See note following [RCW 49.60.010](#).

**Construction--1961 c 103:** “Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation with this act.” [1961 c 103 § 4.]

**Severability--1957 c 37:** See note following [RCW 49.60.010](#).

**Severability--1949 c 183:** See note following [RCW 49.60.010](#).

### Notes of Decisions (84)

West's RCWA 49.60.040, WA ST 49.60.040

The statutes and Constitution are current with all legislation from the 2018 Regular Session of the Washington Legislature.

CERTIFICATION OF ENROLLMENT

**SUBSTITUTE SENATE BILL 5340**

Chapter 317, Laws of 2007

60th Legislature  
2007 Regular Session

DISABILITY DEFINITION

EFFECTIVE DATE: 07/22/07

Passed by the Senate April 20, 2007  
YEAS 46 NAYS 2

BRAD OWEN

\_\_\_\_\_  
**President of the Senate**

Passed by the House April 18, 2007  
YEAS 62 NAYS 35

FRANK CHOPP

\_\_\_\_\_  
**Speaker of the House of Representatives**

Approved May 4, 2007, 3:27 p.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
**Governor of the State of Washington**

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5340** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

\_\_\_\_\_  
**Secretary**

FILED

May 7, 2007

**Secretary of State  
State of Washington**

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**SUBSTITUTE SENATE BILL 5340**

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AS AMENDED BY THE HOUSE

Passed Legislature - 2007 Regular Session

**State of Washington                      60th Legislature                      2007 Regular Session**

**By** Senate Committee on Judiciary (originally sponsored by Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser)

READ FIRST TIME 02/27/07.

1            AN ACT Relating to the definition of disability in the Washington  
2 law against discrimination, chapter 49.60 RCW; amending RCW 49.60.040;  
3 and creating new sections.

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

5            NEW SECTION.    **Sec. 1.** The legislature finds that the supreme  
6 court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137  
7 P.3d 844 (2006), failed to recognize that the Law Against  
8 Discrimination affords to state residents protections that are wholly  
9 independent of those afforded by the federal Americans with  
10 Disabilities Act of 1990, and that the law against discrimination has  
11 provided such protections for many years prior to passage of the  
12 federal act.

13            **Sec. 2.** RCW 49.60.040 and 2006 c 4 s 4 are each amended to read as  
14 follows:

15            The definitions in this section apply throughout this chapter  
16 unless the context clearly requires otherwise.

17            (1) "Person" includes one or more individuals, partnerships,  
18 associations, organizations, corporations, cooperatives, legal

1 representatives, trustees and receivers, or any group of persons; it  
2 includes any owner, lessee, proprietor, manager, agent, or employee,  
3 whether one or more natural persons; and further includes any political  
4 or civil subdivisions of the state and any agency or instrumentality of  
5 the state or of any political or civil subdivision thereof;

6 (2) "Commission" means the Washington state human rights  
7 commission;

8 (3) "Employer" includes any person acting in the interest of an  
9 employer, directly or indirectly, who employs eight or more persons,  
10 and does not include any religious or sectarian organization not  
11 organized for private profit;

12 (4) "Employee" does not include any individual employed by his or  
13 her parents, spouse, or child, or in the domestic service of any  
14 person;

15 (5) "Labor organization" includes any organization which exists for  
16 the purpose, in whole or in part, of dealing with employers concerning  
17 grievances or terms or conditions of employment, or for other mutual  
18 aid or protection in connection with employment;

19 (6) "Employment agency" includes any person undertaking with or  
20 without compensation to recruit, procure, refer, or place employees for  
21 an employer;

22 (7) "Marital status" means the legal status of being married,  
23 single, separated, divorced, or widowed;

24 (8) "National origin" includes "ancestry";

25 (9) "Full enjoyment of" includes the right to purchase any service,  
26 commodity, or article of personal property offered or sold on, or by,  
27 any establishment to the public, and the admission of any person to  
28 accommodations, advantages, facilities, or privileges of any place of  
29 public resort, accommodation, assemblage, or amusement, without acts  
30 directly or indirectly causing persons of any particular race, creed,  
31 color, sex, sexual orientation, national origin, or with any sensory,  
32 mental, or physical disability, or the use of a trained dog guide or  
33 service animal by a ((disabled)) person with a disability, to be  
34 treated as not welcome, accepted, desired, or solicited;

35 (10) "Any place of public resort, accommodation, assemblage, or  
36 amusement" includes, but is not limited to, any place, licensed or  
37 unlicensed, kept for gain, hire, or reward, or where charges are made  
38 for admission, service, occupancy, or use of any property or

1 facilities, whether conducted for the entertainment, housing, or  
2 lodging of transient guests, or for the benefit, use, or accommodation  
3 of those seeking health, recreation, or rest, or for the burial or  
4 other disposition of human remains, or for the sale of goods,  
5 merchandise, services, or personal property, or for the rendering of  
6 personal services, or for public conveyance or transportation on land,  
7 water, or in the air, including the stations and terminals thereof and  
8 the garaging of vehicles, or where food or beverages of any kind are  
9 sold for consumption on the premises, or where public amusement,  
10 entertainment, sports, or recreation of any kind is offered with or  
11 without charge, or where medical service or care is made available, or  
12 where the public gathers, congregates, or assembles for amusement,  
13 recreation, or public purposes, or public halls, public elevators, and  
14 public washrooms of buildings and structures occupied by two or more  
15 tenants, or by the owner and one or more tenants, or any public library  
16 or educational institution, or schools of special instruction, or  
17 nursery schools, or day care centers or children's camps: PROVIDED,  
18 That nothing contained in this definition shall be construed to include  
19 or apply to any institute, bona fide club, or place of accommodation,  
20 which is by its nature distinctly private, including fraternal  
21 organizations, though where public use is permitted that use shall be  
22 covered by this chapter; nor shall anything contained in this  
23 definition apply to any educational facility, columbarium, crematory,  
24 mausoleum, or cemetery operated or maintained by a bona fide religious  
25 or sectarian institution;

26 (11) "Real property" includes buildings, structures, dwellings,  
27 real estate, lands, tenements, leaseholds, interests in real estate  
28 cooperatives, condominiums, and hereditaments, corporeal and  
29 incorporeal, or any interest therein;

30 (12) "Real estate transaction" includes the sale, appraisal,  
31 brokering, exchange, purchase, rental, or lease of real property,  
32 transacting or applying for a real estate loan, or the provision of  
33 brokerage services;

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

- 1           (14) "Sex" means gender;
- 2           (15) "Sexual orientation" means heterosexuality, homosexuality,  
3           bisexuality, and gender expression or identity. As used in this  
4           definition, "gender expression or identity" means having or being  
5           perceived as having a gender identity, self-image, appearance,  
6           behavior, or expression, whether or not that gender identity, self-  
7           image, appearance, behavior, or expression is different from that  
8           traditionally associated with the sex assigned to that person at birth;
- 9           (16) "Aggrieved person" means any person who: (a) Claims to have  
10          been injured by an unfair practice in a real estate transaction; or (b)  
11          believes that he or she will be injured by an unfair practice in a real  
12          estate transaction that is about to occur;
- 13          (17) "Complainant" means the person who files a complaint in a real  
14          estate transaction;
- 15          (18) "Respondent" means any person accused in a complaint or  
16          amended complaint of an unfair practice in a real estate transaction;
- 17          (19) "Credit transaction" includes any open or closed end credit  
18          transaction, whether in the nature of a loan, retail installment  
19          transaction, credit card issue or charge, or otherwise, and whether for  
20          personal or for business purposes, in which a service, finance, or  
21          interest charge is imposed, or which provides for repayment in  
22          scheduled payments, when such credit is extended in the regular course  
23          of any trade or commerce, including but not limited to transactions by  
24          banks, savings and loan associations or other financial lending  
25          institutions of whatever nature, stock brokers, or by a merchant or  
26          mercantile establishment which as part of its ordinary business permits  
27          or provides that payment for purchases of property or service therefrom  
28          may be deferred;
- 29          (20) "Families with children status" means one or more individuals  
30          who have not attained the age of eighteen years being domiciled with a  
31          parent or another person having legal custody of such individual or  
32          individuals, or with the designee of such parent or other person having  
33          such legal custody, with the written permission of such parent or other  
34          person. Families with children status also applies to any person who  
35          is pregnant or is in the process of securing legal custody of any  
36          individual who has not attained the age of eighteen years;
- 37          (21) "Covered multifamily dwelling" means: (a) Buildings

1 consisting of four or more dwelling units if such buildings have one or  
2 more elevators; and (b) ground floor dwelling units in other buildings  
3 consisting of four or more dwelling units;

4 (22) "Premises" means the interior or exterior spaces, parts,  
5 components, or elements of a building, including individual dwelling  
6 units and the public and common use areas of a building;

7 (23) "Dog guide" means a dog that is trained for the purpose of  
8 guiding blind persons or a dog that is trained for the purpose of  
9 assisting hearing impaired persons;

10 (24) "Service animal" means an animal that is trained for the  
11 purpose of assisting or accommodating a ~~((disabled person's))~~ sensory,  
12 mental, or physical disability of a person with a disability;

13 (25)(a) "Disability" means the presence of a sensory, mental, or  
14 physical impairment that:

15 (i) Is medically cognizable or diagnosable; or

16 (ii) Exists as a record or history; or

17 (iii) Is perceived to exist whether or not it exists in fact.

18 (b) A disability exists whether it is temporary or permanent,  
19 common or uncommon, mitigated or unmitigated, or whether or not it  
20 limits the ability to work generally or work at a particular job or  
21 whether or not it limits any other activity within the scope of this  
22 chapter.

23 (c) For purposes of this definition, "impairment" includes, but is  
24 not limited to:

25 (i) Any physiological disorder, or condition, cosmetic  
26 disfigurement, or anatomical loss affecting one or more of the  
27 following body systems: Neurological, musculoskeletal, special sense  
28 organs, respiratory, including speech organs, cardiovascular,  
29 reproductive, digestive, genitor-urinary, hemic and lymphatic, skin,  
30 and endocrine; or

31 (ii) Any mental, developmental, traumatic, or psychological  
32 disorder, including but not limited to cognitive limitation, organic  
33 brain syndrome, emotional or mental illness, and specific learning  
34 disabilities.

35 (d) Only for the purposes of qualifying for reasonable  
36 accommodation in employment, an impairment must be known or shown  
37 through an interactive process to exist in fact and:

1        (i) The impairment must have a substantially limiting effect upon  
2 the individual's ability to perform his or her job, the individual's  
3 ability to apply or be considered for a job, or the individual's access  
4 to equal benefits, privileges, or terms or conditions of employment; or

5        (ii) The employee must have put the employer on notice of the  
6 existence of an impairment, and medical documentation must establish a  
7 reasonable likelihood that engaging in job functions without an  
8 accommodation would aggravate the impairment to the extent that it  
9 would create a substantially limiting effect.

10       (e) For purposes of (d) of this subsection, a limitation is not  
11 substantial if it has only a trivial effect.

12       NEW SECTION. Sec. 3. This act is remedial and retroactive, and  
13 applies to all causes of action occurring before July 6, 2006, and to  
14 all causes of action occurring on or after the effective date of this  
15 act.

Passed by the Senate April 20, 2007.

Passed by the House April 18, 2007.

Approved by the Governor May 4, 2007.

Filed in Office of Secretary of State May 7, 2007.

Washington Administrative Code  
Title 162. Human Rights Commission  
Chapter 162-22. Employment--Handicapped Persons (Refs & Annos)

WAC 162-22-020

162-22-020. Definitions.

Currentness

In this chapter the following words are used in the meaning given, unless the context clearly indicates another meaning:

- (1) "Disability" is short for the statutory term "the presence of any sensory, mental, or physical disability," except when it appears as part of the full term.
- (2) "The presence of a sensory, mental, or physical disability" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
  - (a) Is medically cognizable or diagnosable;
  - (b) Exists as a record or history;
  - (c) Is perceived to exist whether or not it exists in fact.

A condition is a "sensory, mental, or physical disability" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.

- (3) An "able worker with a disability" is a person whose disability does not prevent the proper performance, with or without reasonable accommodation, of the particular job in question.
- (4) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons."
- (5) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a disabled person's sensory, mental, or physical disability."
- (6) "Health care professional" means a person whose license to practice includes diagnosis and assessment of the particular disability for which she or he issues a health care opinion.

**Credits**

Statutory Authority: [RCW 49.60.120\(3\)](#). WSR 99-15-025, S 162-22-020, filed 7/12/99, effective 8/12/99. Statutory Authority: [RCW 49.60.120\(3\)](#) and [1997 c 271](#). WSR 98-08-035, S 162-22-020, filed 3/23/98, effective 4/23/98; Order 23, S 162-22-020, filed 7/21/75.

Current with amendments adopted through the 18-19 Washington State Register, dated October 3, 2018.

WAC 162-22-020, WA ADC 162-22-020

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version's Validity Called into Doubt by [Niimi-Montalbo v. White](#), D.Hawai'i, Jan. 15, 2003

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter XIV. Equal Employment Opportunity Commission

Part 1630. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act (Refs & Annos)

29 C.F.R. § 1630.2

§ 1630.2 Definitions.

Effective: April 4, 2012

[Currentness](#)

<Notes of Decisions for 29 CFR § 1630.2 are displayed in separate documents. Notes of Decisions for subdivision I are contained in this document. For Notes of Decisions for subdivisions II to end, see documents for 29 CFR § 1630.2, post.>

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 ([42 U.S.C. 2000e-4](#)).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 ([42 U.S.C. 2000e](#)).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer—

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under [section 501\(c\) of the Internal Revenue Code of 1986](#).

(f) Employee means an individual employed by an employer.

(g) Definition of “disability.”

(1) In general. Disability means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (1) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the “actual disability” prong), (g)(1)(ii) (the “record of” prong), and/or (g)(1)(iii) (the “regarded as” prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (g): See [§ 1630.3](#) for exceptions to this definition.

(h) Physical or mental impairment means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major life activities—

(1) In general. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. ADAAA [section 2\(b\)\(4\)](#) (Findings and Purposes). Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(j) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month “transitory” part of the “transitory and minor” exception to “regarded as” coverage in § 1630.15(f) does not apply to the definition of “disability” under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) Non-applicability to the “regarded as” prong. Whether an individual's impairment “substantially limits” a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the “regarded as” prong) of this section.

(3) Predictable assessments—

(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) Condition, manner, or duration—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the “actual disability” or “record of” prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) Examples of mitigating measures—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by [42 U.S.C. 12103\(1\)](#));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) Ordinary eyeglasses or contact lenses—defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) Has a record of such an impairment—

(1) In general. An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) Reasonable accommodation. An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

(l) “Is regarded as having such an impairment.” The following principles apply under the “regarded as” prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in [§ 1630.15\(f\)](#), an individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include

but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

(2) Except as provided in § 1630.15(f), an individual is “regarded as having such an impairment” any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

(m) The term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition.

(n) Essential functions—

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

- (iv) The consequences of not requiring the incumbent to perform the function;
  - (v) The terms of a collective bargaining agreement;
  - (vi) The work experience of past incumbents in the job; and/or
  - (vii) The current work experience of incumbents in similar jobs.
- (o) Reasonable accommodation.
- (1) The term reasonable accommodation means:
    - (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
    - (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
    - (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
  - (2) Reasonable accommodation may include but is not limited to:
    - (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
    - (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.
  - (3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.
  - (4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a

reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section).

(p) Undue hardship—

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

**Credits**

[[76 FR 17000](#), March 25, 2011; [77 FR 20295](#), April 4, 2012]

AUTHORITY: [42 U.S.C. 12116](#) and [12205a](#) of the Americans with Disabilities Act, as amended.

[Notes of Decisions \(1996\)](#)

Current through Jan. 10, 2019; 84 FR 102.

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I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 15<sup>th</sup> day of January, 2019, I served the foregoing document by email to the following persons:

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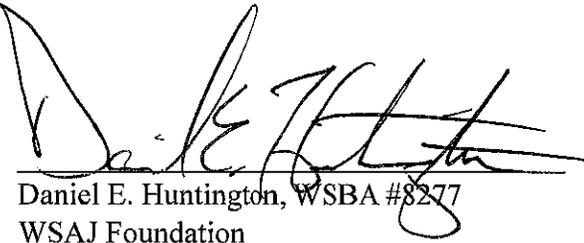
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