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No. 96335-5
[Ninth Circuit No. 16-35205]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

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

Appellants,

v.

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,

Respondents.

BRIEF OF APPELLANTS ON CERTIFIED QUESTION

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TABLE OF CONTENTS

INTRODUCTION	1
CERTIFIED QUESTION	2
STATEMENT OF THE CASE	2
A. BNSF extended Casey Taylor a conditional offer of employment in October 2007.	2
B. Although Taylor cleared BNSF’s medical examination and passed its physical capacity test, BNSF required him to obtain and pay for additional medical testing due to his BMI, and rescinded his offer when he could not afford the test.	3
C. Procedural history.	4
D. The order on certified question.....	5
ARGUMENT	9
A. Morbid obesity is a WLAD impairment because it is a condition that affects multiple body systems.	9
1. The WLAD must be liberally construed to effectuate its purpose of remedying disability discrimination.	9
2. Morbid obesity is a WLAD impairment if it is a “condition” affecting one of the enumerated body systems.	10
3. Morbid obesity is a condition affecting the musculoskeletal, respiratory, cardiovascular, digestive, endocrine, and other body systems.	11
4. WLAD conditions need not be physiological, or have a physiological cause.	15
5. Even if a condition must be physiological, morbid obesity is physiological.	18
B. This Court should reject the federal cases the district court relied on, where they are inapposite and inconsistent with the WLAD.	19
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Andrews v. Ohio</i> , 104 F.3d 803 (6th Cir. 1997)	20, 21
<i>Clipse v. Commercial Driver Servs., Inc.</i> , 189 Wn. App. 776, 358 P.3d 464 (2015), <i>rev. denied</i> , 185 Wn.2d 1017 (2016)	10, 17, 18
<i>Cook v. Rhode Island Department of Mental Health, Retardation & Hospitals</i> , 10 F.3d 17 (1st Cir. 1993)	20, 21, 22
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006)	6
<i>EEOC v. BNSF Railway Co.</i> , No. 16-35457, 2018 U.S. App. LEXIS 24534, at *8-9, ___ F.3d ___ (9th Cir. Aug. 29, 2018)	5, 6, 8
<i>EEOC v. Watkins Motor Lines, Inc.</i> , 463 F.3d 436 (6th Cir. 2006)	<i>passim</i>
<i>Francis v. City of Meriden</i> , 129 F.3d 281 (2nd Cir. 1997)	20, 21, 25
<i>Grimwood v. Univ. of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988)	7, 20
<i>Hale v. Wellpinit Sch. Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009)	7
<i>Kumar v. Gate Gourmet, Inc.</i> , 180 Wn.2d 481, 325 P.3d 193 (2014)	<i>passim</i>
<i>Martini v. Boeing Co.</i> , 137 Wn.2d 357, 971 P.2d 45 (1999)	7, 10, 17

Morriss v. BNSF Railway Co., 817 F.3d 1104, 1108 (8th Cir. 2016).....	23
McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.2d 844 (2006).....	24
Rhodes v. Urm Stores, Inc., 95 Wn. App. 794, 799, 977 P.2d 651, <i>rev. denied</i> , 139 Wn.2d 1006 (1999).....	12
State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010).....	13
Taylor v. BNSF Railway Co., No. 16-35205, 2018 U.S. App. LEXIS 26224 (9th Cir. Sept. 17, 2018)	<i>passim</i>

Statutes

42 U.S. Code § 12101, et seq. (ADA).....	<i>passim</i>
Pub. L. No. 110-325.....	22, 23
RCW 49.60.010	9
RCW 49.60.030(1)(a).....	10
RCW 49.60.040 (WLAD).....	2
RCW 49.60.040(7)(c).....	16
RCW 49.60.040(7)(c)(i).....	10, 13, 14, 17
RCW 81.40.130	7

Other Authorities

29 C.F.R. § 1630.1(c)(4).....	22,23
29 C.F.R. § 1630.2(h).....	16, 22
www.npr.org/documents/2013/jun/ama-resolution- obesity.pdf	11, 14

www.who.int/dietphysicalactivity/media/en/gsfs_obesity	12
www.merriamwebster.com/	13
www.who.int/topics/obesity/en/	11, 13

INTRODUCTION

After receiving a conditional offer of employment from BNSF, appellant Casey Taylor cleared BNSF's medical examination and passed its physical capacity test. He was fit for the job.

But when BNSF learned Taylor is morbidly obese, it required him to obtain and pay for a series of additional medical tests to determine whether he has any "other health conditions" highly correlated with morbid obesity. When Taylor could not pay for an expensive sleep study, BNSF declined to hire him, citing his morbid obesity and the uncertain status of his knees and back. This was consistent with two BNSF practices: (1) declining to hire obese people; and (2) requiring applicants in the post-conditional-offer phase to pay for additional medical tests to rule out disabilities.

This certification raises an important question of first impression: whether and when morbid or extreme obesity is an impairment under the Washington Law Against Discrimination ("WLAD"). Obesity is widely recognized as a health condition affecting numerous body systems. As such, it is an impairment under the WLAD – no proof of a physiological cause is required. This Court should hold that morbid obesity is a WLAD impairment, consistent with the WLAD's purpose of remedying disability discrimination.

CERTIFIED QUESTION

The United States Court of Appeals for the Ninth Circuit certified the following question:

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

Taylor v. BNSF Railway Co., No. 16-35205, 2018 U.S. App. LEXIS 26224 (9th Cir. Sept. 17, 2018).

STATEMENT OF THE CASE

A. BNSF extended Casey Taylor a conditional offer of employment in October 2007.

Burlington Northern Santa Fe Railway Company (“BNSF”) extended Casey Taylor a conditional offer of employment as an electronic technician in October 2007. ER 129-30, 277. In addition to other conditions, BNSF required Taylor to complete a medical history questionnaire and undergo a physical examination. ER 277. Taylor immediately completed the medical questionnaire, disclosing his height and weight, as well as his prior experience with knee and back pain while in the Marine Corps. ER 153, 300-11. Taylor had no current knee and back issues, and denied experiencing any of the listed medical conditions, including diabetes, low blood sugar, sleep apnea, excessive snoring, or other sleep disorders. ER 302, 304-06, 309. His health was “excellent.” ER 283, 309.

- B. Although Taylor cleared BNSF's medical examination and passed its physical capacity test, BNSF required him to obtain and pay for additional medical testing due to his BMI, and rescinded his offer when he could not afford the test.**

Taylor "cleared" BNSF's medical examination and "pass[ed]" their physical capacity test, demonstrating he possessed adequate knee and shoulder strength for the position. ER 156-57, 159, 285, 287. BNSF's medical examiner nonetheless referred Taylor's results to BNSF's chief medical officer, Dr. Michael Jarred, having determined that his Body Mass Index (BMI) was 41.3. ER 160, 285, 295, 298. As the Ninth Circuit correctly stated it, a "BMI over 40 is considered 'severely' or 'morbidly' obese, and BNSF treats a BMI over 40 as a 'trigger' for further screening in the employment process." *Taylor*, 2018 U.S. App. LEXIS, at *2; see also ER 162.

BNSF's Dr. Jarred opined that "extreme obesity" is "highly correlated with" "other health conditions," including sleep apnea and diabetes, "the primary considerations for -- for this case." ER 164. BNSF notified Taylor that it was "unable to determine medical qualification for Electronic Technician position due to significant health and safety risks associated with extreme obesity (Body Mass Index near or above 40) and uncertain status of knees and back." ER 136, 147. BNSF offered to reconsider Taylor's medical qualification

if he provided, among other things, the results of a costly sleep study. ER 137-38, 147.

Taylor, who had no medical insurance or VA benefits, notified BNSF that he could not afford a sleep study, costing “at least a few thousand dollars.” ER 137-38, 143. BNSF refused to provide financial support, informing Taylor that it is “company policy” not to hire anyone with a BMI over 35. ER 139-41. Indeed, it is “very common for [BNSF] to medically disqualify people for that reason alone.” ER 141. BNSF rescinded the conditional offer. ER 242, 340, 343, 345.

C. Procedural history.

Taylor brought suit in King County Superior Court in August 2010, alleging that BNSF violated the Washington Law Against Discrimination by declining to hire him based on a perceived disability. ER 356, 359, 361. BNSF removed the case to the U.S. District Court for the Western District of Washington in August 2011. BNSF then moved for summary judgment, arguing that obesity is not a disability unless caused by a physiological disorder and that it did not perceive Taylor as having an obesity-related disability. ER 12. The district court granted partial summary judgment, ruling that “under the WLAD, a plaintiff alleging disability discrimination on the

basis of obesity must show that his or her obesity is caused by a physiological condition or disorder or that the defendant perceived the plaintiff's obesity as having such a cause." ER 23; see *also* ER 24-25. After later granting BNSF summary judgment on Taylor's claim that BNSF perceived him as disabled due to the condition of his knees and back, the district court dismissed Taylor's case with prejudice. ER 1, 25-26. Taylor timely appealed. ER 29-30.

D. The order on certified question.

To prevail under the WLAD, Taylor must establish both: (1) that morbid or extreme obesity constitutes a disability under the WLAD; and (2) that BNSF unlawfully discriminated against him by withdrawing the conditional offer of employment when he could not pay for additional medical testing. *Taylor*, 2018 U.S. App. LEXIS at *3-4. As to the first, the Ninth Circuit asked this Court to address if and under what circumstances obesity is a WLAD impairment. *Id.* at *16. The Ninth Circuit already resolved the second issue in the companion case *EEOC v. BNSF Railway Co.* *Id.* at *4-5 (citing No. 16-35457, 2018 U.S. App. LEXIS 24534, at *8-9, ___ F.3d ___ (9th Cir. Aug. 29, 2018)) (attached as App. A).

In *EEOC v. BNSF*, the Ninth Circuit held that an employer unlawfully discriminates under the ADA "when it withdraws a

conditional offer of employment based on a prospective employee's failure to pay for medical testing that the employer has required solely because of the prospective employee's perceived disability or impairment." 2018 U.S. App. LEXIS at *8-9. There, BNSF treated prospective-employee Russell Holt as though he declined a conditional job offer when he could not afford to pay for the MIR BNSF demanded after extending a conditional offer. *Id.* at *5, *10. The district court (the Honorable Marsha Pechman) granted the EEOC summary judgment that BNSF's actions violated the ADA, also issuing a nationwide injunction prohibiting BNSF from engaging in similar hiring practices. *Id.* at *11. The Ninth Circuit affirmed the judgment imposing ADA liability, but vacated the injunction, holding that although the applicable four-factor test would be satisfied, the district court needed to make further factual findings to establish the scope of the injunction. *Id.* at *27, *30-31 (referring to **eBay Inc. v. MercExchange, LLC**, 547 U.S. 388, 391 (2006)).

Noting that "the WLAD is *at least* as broad as the ADA," the Ninth Circuit "assume[d] that, as under the ADA, an employer discriminates in violation of the WLAD when it withdraws a conditional offer of employment based on a prospective employee's failure to pay for medical testing that the employer has required

solely because of the prospective employee's perceived disability or impairment." *Taylor*, 2018 U.S. App. LEXIS at *4-5 (citing *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988)). Thus, the Ninth Circuit saw no reason to certify that question to this Court.

The Ninth Circuit is, of course, correct that where this Court departs from ADA jurisprudence it is "almost always" to provide greater protection under the WLAD. *Kumar*, 180 Wn.2d at 491. Indeed, this Court has held that the WLAD "affords to state residents protections that are wholly independent of those afforded by the federal [ADA], and ... the law against discrimination has provided such protections for many years prior to passage of the federal act." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 501-02, 198 P.3d 1021 (2009); *see also, e.g., Kumar*, 180 Wn.2d at 498-99 (explaining why the WLAD is construed broadly); *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999) (departing from Title VII's restriction on back pay where its language differed from the WLAD). The Ninth Circuit is also correct under RCW 81.40.130, making it unlawful for any common carrier by rail doing business

within the state to require an applicant for employment to “pay the cost of a medical examination ... as a condition of employment.”

In ***EEOC v. BNSF***, the Ninth Circuit also resolved BNSF’s argument that it did not perceive an impairment when it required additional expensive medical testing “due to [the] uncertain prognosis of [Holt’s] back condition.” 2018 U.S. App. LEXIS at *8, *18-19. BNSF made the same claim here, arguing that it did not perceive Taylor to be impaired, but merely could not determine whether he was medically qualified “due to significant health and safety risks associated with extreme obesity ... and uncertain status of knees and back.” ER 136, 147. The Ninth Circuit held that in requiring Holt to obtain an “MRI at his own cost, BNSF assumed that Holt has a ‘back condition’ that disqualified him from the job unless Holt could disprove the proposition.” ***EEOC v. BNSF***, 2018 U.S. App. LEXIS at *18. That is, “BNSF chose to perceive Holt as having an impairment at the time it asked for the MRI and at the time it revoked his job offer.” *Id.* The same is true here. If morbid obesity is a WLAD impairment, then BNSF perceived Taylor as impaired when it required him to obtain a sleep study and when it rescinded his job offer because he could not afford to obtain one. *Id.*

ARGUMENT

A. Morbid obesity is a WLAD impairment because it is a condition that affects multiple body systems.

Morbid obesity is a WLAD “condition” and “impairment,” where it is widely recognized as a disease that affects multiple body systems, including the endocrine, cardiovascular, respiratory, and musculoskeletal systems. BNSF assumed that Taylor’s morbid obesity affected many of these systems when it rescinded his job offer based on his BMI. Under the WLAD’s plain language, a condition need not be physiological, but morbid obesity is in any event. This Court should hold that morbid obesity is itself a WALD impairment, without requiring proof of an underlying physiological cause.

1. The WLAD must be liberally construed to effectuate its purpose of remedying disability discrimination.

In enacting the WLAD, the Washington Legislature declared that “discrimination against any of [the state’s] inhabitants because of ... physical disability ... threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. The WLAD guarantees Washington’s citizens the “right to obtain and hold employment

without discrimination.” RCW 49.60.030(1)(a). Washington courts “apply [the WLAD’s] plain language and construe the statute liberally to effectuate its purpose of remedying disability discrimination.” ***Clipse v. Commercial Driver Servs., Inc.***, 189 Wn. App. 776, 793, 358 P.3d 464 (2015), *rev. denied*, 185 Wn.2d 1017 (2016) (citing ***Martini***, 137 Wn.2d at 364).

2. Morbid obesity is a WLAD impairment if it is a “condition” affecting one of the enumerated body systems.

To constitute a disability under the WLAD, obesity must be 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) (paragraphing omitted). BNSF diagnosed Taylor with “morbid” or “extreme” obesity, satisfying (i). ER 340, 343, 345; RCW 49.60.040(7)(a)(i). BNSF perceived that Taylor is extremely obese, satisfying (iii). ER 340, 343, 345; RCW 49.60.040(7)(a)(iii). Thus, Taylor’s extreme obesity is a WLAD disability, so long as it is an impairment as defined by the WLAD. RCW 49.60.040(7)(c)(i). A WLAD “impairment” includes “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss” that affect at least one of the body systems enumerated in the statute (*id.*):

For purposes of this definition, “impairment” includes, but is not limited to:

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; ...

3. Morbid obesity is a condition affecting the musculoskeletal, respiratory, cardiovascular, digestive, endocrine, and other body systems.

Obesity is an “abnormal or excessive fat accumulation that presents a risk to health.” World Health Organization (“WHO”), www.who.int/topics/obesity/en/. BMI, a person’s weight in kilograms divided by the square of his height in meters is a “crude” measure of obesity. *Id.* A person with a BMI of 25 or more is generally considered overweight, while a person with a BMI of 30 or more is generally considered obese. *Id.* By BNSF’s standards, a person with a BMI of 40 or more is morbidly obese. *Taylor*, 2018 U.S. App. LEXIS at *2.

The American Medical Association (“AMA”) declared that obesity is a disease, passing a Resolution introduced by the American Association of Clinical Endocrinologists (“AAACE”), the American College of Cardiology, the Endocrine Society, the American Society for Reproductive Medicine, the Society for

Cardiovascular Angiography and Interventions, the American Urological Association, and the American College of Surgeons. www.npr.org/documents/2013/jun/ama-resolution-obesity.pdf at 1-2 (attached as App. B). This is consistent with the WHO's 2003 conclusion that "obesity should be considered a disease in its own right." www.who.int/dietphysicalactivity/media/en/gsf Obesity. The AMA noted that the "World Health Organization, Food and Drug Administration (FDA), National Institutes of Health (NIH), the American Association of Clinical Endocrinologists," recognize obesity as a disease, as do the Internal Revenue Service and CIGNA, "one of the nation's largest health insurance companies." *Id.* at 2. The AMA dismissed the suggestion that obesity is not a disease but the consequence of lifestyle choices, as the "equivalent to suggesting that lung cancer is not a disease because it was brought about by individual choice to smoke cigarettes." *Id.*

As a "disease," morbid or extreme obesity is plainly a WLAD "condition." The term "condition" is not defined in the WLAD, and this Court has not had the opportunity to define it until now. In ***Rhodes v. Urm Stores, Inc.***, the Court of Appeals held that condition, as used in the WLAD, "is generally perceived as a 'particular mode of being[.]'" 95 Wn. App. 794, 799, 977 P.2d 651, *rev. denied*, 139

Wn.2d 1006 (1999). This is consistent with the plain language definition of “condition” both as “a state of being” and an “usually defective state of health.” Merriam-Webster online dictionary, www.merriamwebster.com/; **State v. Gonzalez**, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (turning to the dictionary where a statute does not define a term).

Obesity, an abnormal fat accumulation that presents health risks is plainly a defective mode or state of health. www.who.int/topics/obesity/en/. Indeed, BNSF’s chief medical officer Jarred all but admits morbid obesity is a “condition,” opining that it is a risk factor for “*other health conditions*,” or “*other medical conditions*.” ER 162, 164 (emphasis supplied).

As a condition, morbid or extreme obesity is a WLAD impairment if it affects one or more of the body systems enumerated in the statute: “Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine” RCW 49.60.040(7)(c)(i). It is readily apparent that morbid obesity affects many of these body systems and BNSF assumed as much when it discriminated against Taylor.

BNSF's Jarred opined that the other health and/or medical "conditions" extreme obesity is correlated with include obstructive sleep apnea, diabetes, and heart disease. ER 162, 164, 175-77. Jarred describes obstructive sleep apnea as affecting the respiratory system. ER 164-66. Diabetes plainly affects the endocrine system, and heart disease plainly affects the cardiovascular system. And although Taylor passed BNSF's physical capacity test proving his fitness for the job, BNSF cited the "uncertain status of knees and back" as a reason for rescinding his job offer, revealing its assumption that Taylor's extreme obesity affects his musculoskeletal system. ER 136, 147.

This is consistent with the AMA's findings that obesity is correlated with, among other things, endocrine dysfunction, joint pain, elevated blood pressure, and sleep apnea. www.npr.org/documents/2013/jun/ama-resolution-obesity.pdf at 1. And the comorbidities associated with obesity include type 2 diabetes, cardiovascular disease, osteoporosis, and some cancers. *Id.* Thus, by AMA standards, obesity affects at least the "musculoskeletal, ... respiratory, ... cardiovascular, [and] endocrine" systems. RCW 49.60.040(7)(c)(i).

4. WLAD conditions need not be physiological, or have a physiological cause.

In granting BNSF summary judgment, the district court ruled that “under the WLAD, a plaintiff alleging disability discrimination on the basis of obesity must show that his or her *obesity is caused by a physiological condition or disorder or that the defendant perceived the plaintiff’s obesity as having such a cause.*” ER 23 (emphasis supplied). This proclamation includes a number of errors.

First, the district court failed to recognize that obesity is a health condition in and of itself. *Supra*, Argument § A2. There is no reason to look for an independent underlying WLAD condition or disorder.

Second, the district court incorrectly imports a causal element into the WLAD, where there is nothing in the WLAD suggesting that cause is a factor in determining whether a job applicant has a WLAD impairment. No plaintiff should have to delineate between behavioral factors he can control, environmental factors he may be able to control, and other factors, such as genetics and biology, he cannot control. This type of causal analysis searches for fault, attempting to eliminate coverage for those who have some hand in their impairment.

Third, the district court wrongly concludes that condition, like disorder, must be physiological under the WLAD. ER 23. No reasonable reading of the WLAD supports that conclusion.

Under the WLAD, “‘impairment’ includes, but is not limited to ... any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the [enumerated] body systems.” RCW 49.60.040(7)(c). Under the applicable federal regulations, “impairment means ... Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more [of the enumerated] body systems.” 29 C.F.R. §1630.2(h). The district court incorrectly ruled that “the definitions of disability and impairment are substantially the same in all relevant respects under the WLAD and the ADA.” ER 17. There are two important differences between the WLAD and the applicable C.F.R.

While the C.F.R. reads “physiological disorder or condition,” the WLAD separates “physiological disorder” from “condition” with a comma: “physiological disorder, or condition, cosmetic disfigurement, or anatomical loss” *Compare* 29 C.F.R. § 1630.2(h) *with* RCW 49.60.040(7)(c). Under the WLAD, physiological simply does not modify condition any more than it modifies cosmetic disfigurement or anatomical loss. As the Ninth

Circuit succinctly stated it, “from a purely textual standpoint, the ADA regulation may apply only to ‘physiological’ conditions, whereas [the] WLAD appears to apply to conditions irrespective of physiological cause.” **Taylor**, 2018 U.S. App. LEXIS at *8-9.

Further, the federal definition of impairment is exhaustive, while the WLAD definition is not. The WLAD makes clear that WLAD impairments include *but are not limited to* physiological disorders, conditions, cosmetic disfigurements, and anatomical losses. RCW 49.60.040(7)(c)(i). In this way, the WLAD provides broader coverage than the ADA, consistent with this Court’s prior decisions. **Kumar**, 180 Wn.2d at 498-99; **Martini**, 137 Wn.2d at 364.

In **Clipse**, one of the few appellate opinions in this state addressing perceived disability, the appellate court broadly ruled that “under the plain language of the statute, any mental or physical condition may be a disability.” 189 Wn. App. at 793. **Clipse** is unconcerned with physiology (or causation).

Like Taylor, Clipse brought a perceived disability claim. *Id.* at 792. Noting that “case law about perceived disability claims in Washington is very sparse” and that it is inherently difficult for a plaintiff to make out a perceived disability claim, the appellate court held that “a plaintiff may make out a prima facie claim of disability

discrimination based on a perceived disability by presenting evidence that an employer perceived a disability.” *Id.* at 794. Clipse did not specify any disability, much less address whether it was physiological, or physiologically caused. *Id.* at 783. He met his burden under the WLAD by demonstrating that the employer had changing and inconsistent reasons for electing not to hire him, and, upon learning that he took methadone, commented that he needed to get “cleaned up” and might “relapse.” *Id.* at 794. Nothing more was, or should have been, required.

In short, the WLAD simply cannot be read to require conditions to be physiological, much less to have a physiological cause.

5. Even if a condition must be physiological, morbid obesity is physiological.

Throughout this matter, Taylor has argued in the alternative that even if WLAD conditions must be physiological, morbid obesity is a physiological condition, so is a WLAD impairment. OB 17-18; Reply 5-6. “Physiological” simply means “of or relating to physiology,” “a branch of biology that deals with the functions and activities of life or of living matter” such as “organs, tissues, [and] cells” *Supra*, Merriam-Webster online dictionary. Thus, if a condition must be

physiological under the WLAD, it is merely a defective state of health having to do with bodily functions and activities.

Morbid obesity fits this definition. As a disease, obesity is “an impairment of the normal functioning of some aspect of the body.” *Supra*, AMA at 1. Specifically, it is “a multi-metabolic and hormonal disease state including [among other things] impaired functioning of appetite dysregulation, ... endocrine dysfunction including elevated leptin levels and insulin resistance, ... blood pressure elevation, ... and systemic and adipose tissue inflammation.” *Id.* Even after weight loss, obesity causes “hormonal and metabolic abnormalities not reversible by lifestyle interventions” *Id.*

In sum, morbid or extreme obesity is itself a health condition that affects numerous enumerated body systems. As such, it is a WLAD impairment.

B. This Court should reject the federal cases the district court relied on, where they are inapposite and inconsistent with the WLAD.

As this Court recently noted in *Kumar*, “[e]ven though almost all of the WLAD’s prohibitions predate ... the ADA’s, ... Washington courts still look to federal case law interpreting [the ADA] to guide [its] interpretation of the WLAD.” *Kumar*, 180 Wn.2d at 491. That said, “Federal cases are not binding” 180 Wn.2d at 491. Rather,

this Court is “free to adopt those theories and rationale which best further the purposes and mandates of our state statute.” *Grimwood*, 110 Wn.2d at 361-62. When this Court departs from federal law in this area, “it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts.” *Kumar*, 180 Wn.2d at 491. Now is one of those times.

As addressed above, the applicable C.F.R. and WLAD definitions differ in that a condition need not be physiological under the WLAD. *Supra*, Argument § A4. That alone is reason to reject federal cases requiring that obesity must have a physiological cause to be an ADA impairment.

Further, three of the four circuits addressing this issue did so before Congress amended the ADA in 2008. See *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006); *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997); *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997); *Cook v. Rhode Island Department of Mental Health, Retardation & Hospitals*, 10 F.3d 17, 25 (1st Cir. 1993). The ADAAA renders those cases inapposite.

In *Andrews* and *Watkins*, the Sixth Circuit held that weight far outside the normal range is an ADA impairment only if it has an underlying physiological cause. In *Andrews*, state troopers did not

allege that their weights exceeded a normal range, but argued only that they were disciplined for exceeding the department's weight limit. 104 F.3d at 809-10. The court held that weight is a "physical characteristic," and without more, is not a "physiological disorder" under the ADA. *Id.* at 810; see also **Watkins**, 463 F.3d at 442-43 (holding that morbid obesity must have a physiological cause to be an ADA impairment).

Andrews classified the officers' weight as "simple obesity," distinguishing it from the "severe obesity" at issue in **Cook**. *Id.* at 809. There, the First Circuit affirmed a plaintiff's verdict supported by evidence that severe obesity "is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems." **Cook**, 10 F.3d at 23.

As in **Andrews**, **Francis** involved a firefighter's allegations that his employer violated the ADA by disciplining him for exceeding fire department weight guidelines. 129 F.3d at 286. The Second Circuit rejected that claim, holding that an employer does not violate the ADA by disciplining an employee for "failing to meet a general weight standard." *Id.* But the court recognized that "a cause of action

may lie against an employer who discriminates against an employee on the basis of the perception that the employee is morbidly obese ... or suffers from a weight condition that is the symptom of a physiological disorder.” *Id.* (citing **Cook**, 10 F.3d at 25; 29 C.F.R. § 1630.2(h)).

Following these circuit decisions, Congress amended the ADA in 2008 to reinstate the “broad coverage” Congress intended the ADA to provide. ADAAA, Pub. L. No. 110-325, § 2, 112 Stat. 3553 (2008). Congress’ intent in enacting the ADA was to eliminate discrimination against persons with disabilities. *Id.* at § 2(a)(1). But the federal courts failed to interpret “disability” under the ADA how Congress expected. *Id.* at § 2(a)(3). Instead, the courts “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” *Id.* at § 2(a)(4)-(5). As a result, many courts were incorrectly determining that people with ADA impairments were not disabled. *Id.* at § 2(a)(6).

Thus, the ADAAA “reinstat[es] a broad scope of protection to be available under the ADA.” *Id.* at § 2(b)(1). “The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA.” 29 C.F.R. § 1630.1(c)(4). Congress

mandated that courts must broadly construe the term “disability” to provide “expansive coverage to the maximum extent permitted by the terms of the ADA.” *Id.* Whether “an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADAAA, Pub. L. No. 110-325 at §2(b)(5); 29 C.F.R. § 1630.1(c)(4).

Despite Congress’ proclamation that federal courts incorrectly narrowed ADA coverage, the district court relied on the above circuit decisions predating the ADAAA amendments. ER 19. That inherently contradicts the very purpose of the ADAAA. Congress made abundantly clear that the federal courts’ overly restrictive approach did not live up to congressional intent. ADAAA, Pub. L. No. 110-325 at § 2. Continuing to rely on pre-ADAAA cases end-runs the ADAAA.

And in any event, these cases are inconsistent with the broad coverage the WLAD provides, as is ***Morriss v. BNSF Railway Co.***, the only post-ADAAA circuit decision that obesity must have a physiological cause to be an impairment. 817 F.3d 1104, 1108 (8th Cir. 2016). In its order on certification, the Ninth Circuit correctly recognized that “even if [it] were to decide that the ADA treats obesity as a disability in only limited circumstances, Washington law may well provide broader coverage.” ***Taylor***, 2018 U.S. App. LEXIS at *6. When this Court departs from federal law in this area, it is “almost

always” to provide greater protections. **Kumar**, 180 Wn.2d at 491. Here, that is consistent with legislative intent regarding disability discrimination.

In amending the WLAD after **McClarty v. Totem Electric**, the Legislature expressed significant concern about the federal definition of disability adopted in **McClarty**, noting that “many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig’s disease) Parkinson’s disease, diabetes, bipolar disorder, and cancer.” Senate SB 5340 Legislative History and House of Representatives SSB 5340 Legislative History, at 36, 39, 45, 52, 148 (attached as App. C) (discussing 157 Wn.2d 214, 137 P.2d 844 (2006)). The Legislative history notes concerns that the federal courts were preventing decisions on the merits by tying up litigants in battles about whether a disability exists, without ever reaching whether discrimination has occurred. App. C at 148. Even those opposed to the 2007 WLAD Amendments noted the “trouble” with the federal courts’ approach to the ADA. *Id.*

Morriss and the pre-ADAAA circuit decisions continue this overly-restrictive approach. It bears repeating that these federal cases all apply a definition of impairment that differs from the WLAD definition. The ADA’s plain language strongly suggests that both

disorders and conditions must be physiological, where the WLAD's plain language suggest the opposite.

But these cases go further than asking whether obesity is physiological, requiring an independent physiological disorder or condition that causes the obesity. **Morriss**, 817 F.3d at 1112; **Watkins Motor Lines**, 463 F.3d at 443; **Francis**, 129 F.3d at 286. Indeed, **Morriss** expressly rejected the assertion that morbid or severe obesity is itself an impairment. **Morriss**, 817 F.3d at 1112. As addressed above, this flawed approach is at odds with widely accepted medical findings that obesity is a disease, and impermissibly imports a fault-based standard into the ADA. *Supra*, Argument § A3, 4. This Court should reject that flawed approach to continue construing the WLAD to provide broader protections for Washington's citizens.

CONCLUSION

Obesity is a health condition affecting numerous body systems. Nothing more is required for WLAD protection. This Court should hold that obesity is a WLAD impairment in and of itself, rejecting BNSF's argument that WLAD plaintiffs must prove a physiological cause of their health conditions.

RESPECTFULLY SUBMITTED this 22nd day of October 2018.

MASTERS LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read "Ken Masters", written over a horizontal line.

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APPENDIX A

EEOC v. BNSF Railway Co., No. 16-35457, 2018 U.S.
App. LEXIS 24534 (9th Cir. Aug. 29, 2018)

[EEOC v. BNSF Ry. Co.](#)

United States Court of Appeals for the Ninth Circuit

February 8, 2018, Argued and Submitted, Seattle, Washington; August 29, 2018, Filed

No. 16-35457

Reporter

2018 U.S. App. LEXIS 24534 *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, v. BNSF RAILWAY COMPANY, Defendant-Appellant.

Subsequent History: Corrected by [EEOC v. BNSF Ry., 2018 U.S. App. LEXIS 25851 \(9th Cir. Wash., Sept. 12, 2018\)](#)

Substituted opinion at [EEOC v. BNSF Ry. Co., 2018 U.S. App. LEXIS 25852 \(9th Cir. Wash., Sept. 12, 2018\)](#)

Prior History: [*1] Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:14-cv-01488-MJP. Marsha J. Pechman, Senior District Judge, Presiding.

[EEOC v. BNSF Ry. Co., 2016 U.S. Dist. LEXIS 2557 \(W.D. Wash., Jan. 8, 2016\)](#)

Disposition: AFFIRMED in part; VACATED in part and REMANDED.

Syllabus

SUMMARY**

Americans with Disabilities Act

The panel affirmed the district court's judgment imposing liability on BNSF Railway Company under the [Americans with Disabilities Act \("ADA"\)](#); vacated the nationwide injunction that prohibited BNSF from engaging in certain hiring practices; and remanded with instructions for the district court to apply the traditional four-factor test to determine whether to issue a permanent injunction, and if so, the scope of the injunction.

Russell Holt received a conditional job offer from BNSF for the position of Senior Patrol Officer contingent on Holt's satisfactory completion of a post-offer medical review. BNSF demanded that Holt submit an MRI of his back at his own cost, which he could not afford. BNSF revoked Holt's job offer, and the Equal Employment Opportunity Commission sued BNSF for violations of the ADA.

The panel held that the EEOC demonstrated all three elements of a *42 U.S.C. § 12112(a)* claim by showing (1) that Holt had a "disability" within the meaning of [*2] the ADA because BNSF perceived him to have a back impairment; (2) that Holt was qualified for the job; and (3) that BNSF

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

impermissibly conditioned Holt's job offer on Holt procuring an MRI at his own expense because it assumed that Holt had a back impairment. The panel noted that BNSF offered no affirmative defense on appeal; and affirmed the district court's holding that the EEOC made a *prima facie* case for a violation of ADA, and was entitled to summary judgment.

The district court held that it could grant an injunction to the EEOC by statute, without looking to the four-factor test for injunctive relief. The panel held that it need not, and did not, decide whether the standard four-factor test for injunctive relief was required in the Title VII/ADA context, because even if the four-factor test applied, that test would be satisfied. Namely, the panel held that Holt suffered an irreparable injury, the remedies at law were inadequate, and the balance of equities, and the public interest weighed in favor of an injunction. The panel concluded that the district court properly entered an injunction.

The panel held that the district court must make further factual findings to support the [*3] scope of the injunction; and remanded for the district court to establish the proper scope of the injunction.

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Judges: Before: Raymond C. Fisher, Ronald M. Gould, and Richard A. Paez, Circuit Judges.

Opinion by: Ronald M. Gould

Opinion

GOULD, Circuit Judge:

Russell Holt received a conditional job offer from BNSF Railway Company ("BNSF") for [*4] the position of Senior Patrol Officer, contingent on Holt's satisfactory completion of a post-offer medical review. During that medical review, Holt disclosed that he had injured his back four years before, suffering a two-level spinal disc extrusion. Holt's primary care doctor, his chiropractor, and the doctor BNSF's subcontractor hired to examine Holt all determined that Holt had no current

limitations due to his back and found no need for follow-up testing. Yet as an effective condition to consider him further for the job, BNSF demanded that Holt submit an MRI of his back—at his own cost—or it would treat Holt as having declined the offer. Holt was in bankruptcy at that time and did not obtain an MRI. As a result, BNSF revoked Holt's job offer.

The district court concluded that BNSF's actions violated the Americans with Disabilities Act of 1990 ("ADA"), [42 U.S.C. § 12101 et seq.](#), as amended by the *ADA Amendments Act of 2008* ("ADAAA") *Pub. L. No. 110-325, 122 Stat. 3553*, and issued a nationwide injunction that prohibited BNSF from engaging in certain hiring practices. We affirm the district court's judgment imposing ADA liability, but we vacate the injunction and remand with instructions for the district court to apply the traditional four-factor test to determine [*5] whether to issue a permanent injunction, and, if so, the scope of the injunction.

I

In June 2011, Holt applied for a job with BNSF as a Senior Patrol Officer. BNSF describes the job duties of a Senior Patrol Officer as "essentially the same" as a city police officer: Patrol Officers protect the safety of people and property, prevent and respond to criminal activities, and arrest suspects, among other duties. At the time he applied to work for BNSF, Holt was working as a criminal investigator in the Pulaski County Sheriff's Office in Little

Rock, Arkansas, where he had worked for five years. After interviewing Holt, BNSF extended him an offer of employment—contingent upon him passing a background check and satisfactorily completing a post-offer medical exam.

BNSF contracts with Comprehensive Health Services ("CHS") to coordinate its medical evaluations nationwide. CHS requires applicants to take a strength test, have a basic physical examination, complete the CHS medical questionnaire, submit to a clinical exam, answer any follow-up questions, and potentially undergo a targeted medical examination. For any cases in which the decision to clear or reject an applicant is not routine, BNSF's [*6] medical department, not CHS, decides whether an applicant is medically qualified.

Holt proceeded through CHS's evaluation process. In his health questionnaire, Holt disclosed that he had injured his back in 2007 and suffered back pain as a result. An MRI had shown that he had a two-level disc extrusion, meaning that the nucleus pulposus had escaped from two of his spinal discs. In layman's terms, this was described as the "jellylike material" inside two of Holt's spinal discs having been pushed out of the discs and into the spinal column. A follow-up MRI in 2009 showed that one of Holt's spinal discs had broken off, and a chunk of that spinal disc was then floating in Holt's spinal canal.¹

After his back injury, Holt had regularly

¹ BNSF's doctor described this as progression in a "non-positive direction," while Holt's primary care doctor opined that in some areas Holt's back looked better, while in other areas his back looked worse.

visited a chiropractor for "maintenance."

Holt also suffered from knee pain in March 2011, as well as some associated back pain, which led him to see his primary care doctor, Dr. Richard Heck. Dr. Heck stated that an MRI of Holt's knee might be warranted, but one was never ordered, and Holt's knee and back pain appears to have resolved with medication, chiropractic care, and physical therapy.

On September 21, 2011, the day after Holt submitted his questionnaire [*7] disclosing his prior back injury, a CHS nurse called him with more questions about his back. Holt told her that he had kept the same job after his back was injured and that he had no current back issues. The nurse asked him to submit his medical records relating to his back. Within a week, Holt had submitted his medical records; a letter from his chiropractor stating that Holt had responded well to care; the 2007 MRI; and a note from Dr. Heck—who had just reexamined Holt that week—stating that Holt had no current back problems and had functioned normally since 2009.

CHS's subcontractor, Concentra, then assigned Dr. Marcia Hixson to conduct a medical exam of Holt. Dr. Hixson was informed generally of Holt's prior back injury,²

and she said that she looked at his back a "little more closely" than usual as part of her "very thorough" exam. Dr. Hixson's exam revealed no issues—with Holt's back or otherwise—that would prevent him from

performing the duties of the Patrol Officer job, and she saw no need for a follow-up exam; Dr. Hixson relayed these conclusions on the written examination report.

CHS then sent its medical file on Holt to BNSF for additional review. BNSF's Medical Officer, Dr. [*8] Michael Jarrard, reviewed Holt's file. Dr. Jarrard decided that he wanted additional information before he made an informed decision about whether Holt could perform the Senior Patrol Officer job. Specifically, on November 11, 2011, Dr. Jarrard requested (1) a current MRI and radiologist's report on Holt's back, (2) Holt's pharmacy records for the past two years for prescriptions related to treatment of Holt's back pain, and (3) any other medical records for Holt from the prior two years, including chiropractic notes. Dr. Jarrard stated that he wanted this information because—although Holt reported no current symptoms and all the reviewing doctors had agreed that he could perform the job—Dr. Jarrard was concerned that there was an underlying pathology that might disqualify Holt from the job. Dr. Jarrard told CHS to tell Holt that the additional information was necessary "due to [the] uncertain prognosis of [Holt's] back condition."

What happened next is the subject of some dispute between the parties. But based on the record, this picture emerges: In November, Holt contacted Dr. Heck's office and stated that he needed an MRI for his job application with BNSF. It is not clear whether [*9] Holt spoke directly with Dr. Heck about this request, although it appears likely that he did. In any event, it is uncontroverted that Holt at least spoke with

²Dr. Hixson was not provided with any of Holt's prior medical records.

Dr. Heck's office about getting an MRI and was told that because he was not currently in pain, the MRI was not medically necessary and so would not be covered by his insurance. An employee from Dr. Heck's office followed up to tell Holt that the office had checked with Holt's insurance company, and the insurance company had confirmed that it would not cover the MRI.

Holt then investigated paying out-of-pocket for the MRI, and was told it would cost more than \$2,500 to obtain an MRI without a doctor's referral. Holt was in bankruptcy at the time of his job application. Holt states that he could not afford to pay for an MRI, an allegation BNSF disputes. We do not rely on Holt's representation about his inability to pay in arriving at our holding here. It is not disputed that Holt told BNSF about the high cost of the MRI and that BNSF responded that he was expected to bear the cost of the MRI himself.

After some back-and-forth communications with BNSF in which Holt asked to have the MRI requirement waived, he was told that without [*10] the MRI he would not be hired. Holt did not obtain an MRI,³

and so on December 15, 2011, BNSF designated Holt as having declined the conditional job offer.⁴

³Holt also did not provide the other medical records that BNSF requested, but without the MRI, it would not have mattered whether Holt gave them to BNSF—he still would have been treated as having declined the job offer.

⁴It is undisputed that Holt later had serious back issues requiring him to undergo surgery in December 2013. Holt testified that those issues caused him to take a six-week medical leave, but that he worked as a law enforcement officer before and after the surgery. Regardless, that Holt later had back problems is not relevant to whether BNSF's actions were justified on the information it had before it in 2011. *See*

Holt next filed a charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC then sued BNSF for alleged violations of the ADA. BNSF moved to dismiss the complaint. The district court denied that motion, holding that the EEOC had properly pleaded a claim under the ADA, 42 U.S.C. § 12112(b)(6). The parties proceeded through discovery, and both sides moved for summary judgment—BNSF moving for summary judgment as to the entire case and the EEOC requesting only partial summary judgment on the issue of ADA liability.

The district court granted the EEOC's motion for partial summary judgment, and denied BNSF's motion. Although the district court had held in denying BNSF's motion to dismiss that the EEOC could bring its claim under § 12112(b)(6), the district court reversed course in its summary judgment order. It instead concluded that § 12112(b)(6) was a disparate impact, not a disparate treatment provision, and that the EEOC could not make out a § 12112(b)(6) claim absent a showing that BNSF had applied an across-the-board policy.

The district court held that the EEOC could, however, [*11] make out a "generic § 12112(a) claim" against BNSF. It determined that the EEOC had established all three elements of a *prima facie* case for disability discrimination under § 12112(a): The EEOC had shown that (1) BNSF had "regarded" Holt as having a disability due to his 2007 back injury; (2) Holt was qualified for the job; and (3) BNSF discriminated

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999).

against Holt by requiring an MRI because BNSF regarded Holt as having a disability. Holding that BNSF did not offer evidence sufficient to support any affirmative defense, the district court granted partial summary judgment to the EEOC.

The parties then reached an agreement on the amount to be awarded for damages, although BNSF did not waive its appellate rights. The district court adopted the damages agreement.

Subsequently, the parties briefed the issue of injunctive relief, and the district court entered a nationwide injunction. The district court concluded that because it found BNSF to have purposefully engaged in an unlawful employment practice and BNSF had expressed no intention of changing its behavior, by statute injunctive relief against BNSF was authorized under 42 U.S.C. § 2000e-5(g)(1). The district court's injunction mandated that "BNSF must bear the cost of procuring [*12] any additional information it deems necessary to complete a medical qualification evaluation." It also required that "[i]f BNSF chooses not to procure additional information, it must complete the medical examination process, i.e., it must use the medical information it does have to make a determination about whether the applicant is medically qualified for the job for which the applicant received the conditional offer." BNSF appeals.

II

We review *de novo* the district court's ruling on cross-motions for summary judgment.

Guatay Christian Fellowship v. Cty. of San Diego, 670 F.3d 957, 970 (9th Cir. 2011).

We can consider together the denial of BNSF's motion for summary judgment and the grant of the EEOC's motion for summary judgment. See *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). "Summary judgment is appropriate if there is no genuine dispute of material fact viewing the evidence in the light most favorable to the nonmoving party." *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018) (internal quotation marks and citation omitted).

We review for abuse of discretion the district court's decision to grant a permanent injunction, but review *de novo* the district court's legal conclusions underlying the decision. *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

III

Under the ADA, employer medical inquiries are divided into three categories, each with different rules: (1) inquiries conducted before employers make [*13] offers of employment; (2) inquiries conducted "after an offer of employment has been made but prior to the commencement of employment duties ('employment entrance examinations)"; and (3) inquiries conducted at any later point. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1273 (9th Cir. 1998) (alterations and quotation marks omitted); see also § 12112(d)(2)-(4). This case concerns the second category of rules, which govern employment entrance examinations.

"Unlike examinations conducted at any other time, an employment entrance examination need *not* be concerned solely with the individual's 'ability to perform job-related functions,' § 12112(d)(2); nor must it be 'job-related or consistent with business necessity,' § 12112(d)(4)." [*Norman-Bloodsaw*, 135 F.3d at 1273](#). However, these examinations must still be used in accord with the ADA and cannot violate the ADA's generic disability prohibitions set forth in § 12112(a). 42 U.S.C. § 12112(d)(1); see also [29 C.F.R. § 1630.14\(b\)\(3\)](#).

Under § 12112(a) of the ADA, an employer is generally prohibited from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures [or] hiring . . . and other terms, conditions, and privileges of employment." The EEOC contends that BNSF violated this prohibition. To make out a *prima facie* case for a violation of § 12112(a), the EEOC must show: (1) that Holt had a disability within the meaning [*14] of the ADA, (2) that Holt was qualified for the position, and (3) that BNSF discriminated against Holt because of his disability. See *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). The parties contend, and we agree, that this case turns on the first and third prongs: whether Holt had a disability and whether BNSF discriminated against Holt because of his disability.

A.

We first consider whether Holt had a

disability within the meaning of the ADA. See *Clark Cty. Sch. Dist.*, 727 F.3d at 955. The EEOC contends that BNSF "regarded" Holt as having a disability. Under the ADA, a person with a "disability" is defined to include an individual who is "regarded as having" an impairment. [42 U.S.C. § 12102\(1\)\(C\)](#).⁵

The ADA currently provides that:

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Id. [§ 12102\(3\)\(A\)](#). Notably, the ADAAA discarded the requirement that an impairment had to substantially limit a major life activity for the discrimination to be actionable under the "regarded as" prong. Compare [42 U.S.C. § 12102\(2\) \(2008\)](#), with [42 U.S.C. § 12102\(3\)\(A\) \(2009\)](#); [*15] see also [Mercado v. Puerto Rico](#), 814 F.3d 581, 588 (1st Cir. 2016). But the ADAAA does require that an impairment not be "transitory" or "minor." *Id.* [§ 12102\(3\)\(B\)](#). In regarded-as cases, thus, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have an impairment, and that the impairment was not transitory or minor. See [Adair v. City of Muskogee](#), 823 F.3d 1297, 1306 (10th Cir.

⁵ On appeal, the EEOC does not advance its prior argument that Holt had a record of disability based on his back injury.

[2016](#)).⁶

The parties agree that for BNSF to have regarded Holt as having a disability, BNSF must have regarded him as having a *current* impairment. This reading comports both with the statutory text, which prohibits discrimination on the basis of an "actual or perceived impairment" in the present tense, [42 U.S.C. § 12102\(3\)\(A\)](#), and with out-of-circuit case law, *see* [Morriss v. BNSF Ry. Co.](#), [817 F.3d 1104, 1113 \(8th Cir. 2016\)](#) ("The ADA prohibits an employer from discriminating against an individual on the basis of a *presently existing* 'physical impairment' as that term is defined under the Act." (emphasis added)). The EEOC bears the burden of establishing that BNSF regarded Holt as having an impairment when BNSF requested the MRI.

By regulation, the EEOC has defined an impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems." [29 C.F.R. § 1630.2\(h\)\(1\)](#). The definition of "impairment" remained unchanged following [*16] the enactment of the ADA. [29 C.F.R. § 1630\(h\)](#), *App.* The ADA, however, added language requiring that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." [42 U.S.C. § 12102\(4\)\(A\)](#). As a result, we construe

"perceived impairment," which forms part of the definition of "disability," broadly.

BNSF argues that it did not perceive Holt to have an impairment; its Medical Officer was simply unsure of the state of Holt's back and so sought more information. BNSF cites [Lanman v. Johnson County](#), [393 F.3d 1151 \(10th Cir. 2004\)](#), for the proposition that merely asking for an exam does not suggest that an employer perceived an employee to have an impairment. The EEOC argues that BNSF actually knew Holt had a current impairment because Holt's disc extrusion was a permanent condition. The EEOC points to Dr. Jarrard's deposition, during which he was asked whether "a disc extrusion, the material within the vertebra, ever regenerate . . . or be restored?" Dr. Jarrard answered, "No." The EEOC argues that because the nucleus pulposus would never be restored, Holt had an ongoing impairment, of which BNSF was aware.

First, BNSF's citation to *Lanman* is not persuasive. [*17] There, *Lanman* was a county sheriff's deputy. *Id.* at 1153. After receiving several reports that *Lanman* had behaved in a troubling manner, the county placed her on leave pending the outcome of a psychiatric evaluation. *Id.* at 1153-54. *Lanman* argued that she had been discriminated against in violation of the ADA. *Id.* at 1154. The Tenth Circuit disagreed. *Id.* at 1157. The court questioned whether *Lanman* had shown that the county perceived her as having an impairment, and cited the ADA for the proposition that an employer may "order a medical exam when it is 'shown to be job-related and consistent

⁶While the EEOC must also show that Holt was "subjected to an action prohibited under [the ADA]," [42 U.S.C. § 12102\(3\)\(A\)](#), we consider that issue in analyzing the third prong of a [§ 12112\(a\)](#) claim.

with business necessity." *Id.* (quoting 42 U.S.C. § 12112(d)(4)(A)). Critically, however, the court held that even if Lanman had been able to demonstrate the county regarded her as impaired, she was not able to show the county believed the impairment "substantially limited her in at least one major life activity." *Id.* Thus, Lanman was not "disabled" within the meaning of the ADA. *Id.* at 1158.

Lanman is not helpful here, because the principal basis of its holding has been superseded by statute. The ADA no longer requires a showing of a substantially limiting impairment, following the 2008 enactment of the ADAAA. Compare 42 U.S.C. § 12102(2) (2008), with 42 U.S.C. § 12102(3)(A) (2009). Thus, the EEOC need show only [*18] that BNSF considered Holt to have an impairment—not a substantially limiting impairment. See § 12102(3)(A); *Mercado*, 814 F.3d at 588. The other cases BNSF cites are similarly unhelpful.

Second, we decline to parse the nature of Holt's medical condition. Whether or not Holt's disc extrusion was a permanent condition is irrelevant here. In requesting an MRI because of Holt's prior back issues and conditioning his job offer on the completion of the MRI at his own cost, BNSF assumed that Holt had a "back condition" that disqualified him from the job unless Holt could disprove that proposition. And in rejecting Holt's application because it lacked a recent MRI, BNSF treated him as it would an applicant whose medical exam had turned up a back impairment or disability. BNSF chose to perceive Holt as

having an impairment at the time it asked for the MRI and at the time it revoked his job offer.

BNSF cannot hide behind its argument that there was some uncertainty as to the actual state of Holt's back when it assumed that Holt had a back condition that disqualified him from the Senior Patrol Officer job. Construing the definition of "perceived impairment" to encompass situations where an employer assumes an employee has an impairment [*19] or disability is consistent with the ADAAA's mandate that "the definition of disability . . . be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." See 42 U.S.C. § 12102(4)(A). We conclude that BNSF perceived Holt to have an impairment for the purposes of the ADA.

B

We next address whether BNSF discriminated against Holt because of his perceived impairment. See *Clark Cty. Sch. Dist.*, 727 F.3d at 955. Specifically, we consider whether it was permissible for BNSF to condition Holt's job offer on Holt obtaining an MRI at his own expense. This is not how the EEOC frames the discriminatory act—it instead refers to the "rescission of [Holt's] job offer" and focuses on the argument that Holt was unable to complete the testing process. But the key question, as we see it, is whether BNSF was entitled to condition Holt's continuation through the hiring process on Holt providing an MRI at his own cost. If BNSF

was entitled to do this, then disqualifying Holt because he failed to cooperate in the completion of the medical screening process, whatever the reason he could not complete the process, was likely permissible. Cf. [*Roberts v. City of Chicago*, 817 F.3d 561, 565-66 \(7th Cir. 2016\)](#) (finding no ADA violation where plaintiffs were not hired [*20] because the first eleven applicants to complete medical testing were hired, and plaintiffs were delayed in completing the medical testing because they were required to go through additional screening because of their disabilities); [*Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 709 n.13 \(9th Cir. 2005\)](#) ("We do not suggest that, when a medical examination is conducted at the proper time and in the proper manner, an applicant has an option to lie, or that an employer is foreclosed from refusing to hire an applicant who does."); [*Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 961 n.5 \(10th Cir. 2002\)](#) (suggesting that it is permissible to fire an applicant for lying on a medical questionnaire); [*EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 \(6th Cir. 1998\)](#).

The ADA prohibits discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Requiring that an applicant pay for an MRI—or else lose his or her job offer—because the applicant has a perceived back impairment is a condition of employment imposed discriminatorily on a

person with a perceived impairment. Moreover, given the indisputably high cost of MRIs, requiring an MRI as a condition of employment will for many individuals mean a disqualification from participating in the process.

BNSF, however, [*21] argues that § 12112(d)(3) authorizes exactly this type of action. BNSF highlights the following text of § 12112(d)(3):

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination.

§ 12112(d)(3). BNSF fails to mention, however, that the statute qualifies this by stating that these medical exams can only be given if "all entering employees are subjected to such an examination regardless of disability." § 12112(d)(3)(A).

BNSF further points out that the EEOC's 1995 Enforcement Guidance states that follow-up exams are permissible so long as they are "medically related to previously obtained medical information." This would appear to be a necessary implication of allowing employers to conduct medical examinations—it would be an odd and incomplete medical exam that could not include follow-up inquiries or testing based on red flags raised in the initial exam. But this does not support BNSF's position that the prospective employee may be forced to shoulder the cost of such follow-up exams.

It is true that follow-up exams will frequently be required [*22] of people with disabilities or impairments because they have disabilities or impairments. But this additional burden is implicitly authorized by § 12112(d)(3)'s authorization of medical exams. See [Roberts, 817 F.3d at 566](#). Indeed, the EEOC concedes that BNSF could have required Holt to get an MRI if BNSF had offered to pay for the MRI. The dispute is over cost allocation. Although it authorizes testing that may disproportionately affect persons with disabilities, § 12112(d)(3) does not, by extension, authorize an employer to further burden a prospective employee with the cost of the testing, however necessary the testing may be. The statute is silent as to who must bear the costs of testing.

BNSF argues that because the ADA allows an employer to "require a medical examination" and not to merely "give" or "request" one, the ADA empowers employers to force applicants to pay for the costs any of testing. BNSF reads too much into the word "require." Here, "require" is properly understood to mean that an employer can compel a medical exam, and that a conditionally hired person's participation in the medical exam is not optional. See *Requirement*, Black's Law Dictionary (10th ed. 2014) ("[s]omething that must be done"). But the word "require" [*23] indicates nothing about who must bear the costs of any medical testing. Accordingly, we hold that the standard anti-discrimination provision of the ADA and the ADA's policy purposes should control on the issue of who must bear the

costs of testing.

An employer would not run afoul of § 12112(a) if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense.⁷

That employer would be imposing a cost on its prospective employees across-the-board, with no regard for their actual or perceived disability or impairment status. Where, however, an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability.⁸

In the case of an expensive test like an MRI,⁹

making an applicant bear the cost will effectively preclude many applicants, which is at odds with the ADA's aim to increase opportunities for persons with disabilities.

In short, requiring an applicant to pay for follow-up testing is distinct from merely requiring an additional exam for a person with a disability if an [*24] additional exam is necessary to complete the medical

⁷This is not to say that such an action would necessarily be legal; we merely note that § 12112(a) would not prohibit it.

⁸For these reasons, [O'Neal v. City of New Albany, 293 F.3d 998 \(7th Cir. 2002\)](#), which BNSF cites extensively, is not relevant here, because there the plaintiff conceded that he did not have a disability and did not argue that the burden of paying for testing was imposed on him on account of his disability. See [id. at 1010](#).

⁹This is not to imply that an employer may require a prospective employee with a perceived or actual impairment to pay for an inexpensive medical test. On the contrary, our holding here applies regardless of the cost of the medical test at issue, as well as the employee's ability to pay.

examination contemplated in § 12112(d)(3). But it is not at all necessary that a person with an impairment pay for an exam for a thorough exam to be completed. To construe the statute otherwise would be to constrain and limit the general protections of the ADA beyond the necessary implications of the medical testing provision.

Further, elsewhere the ADA puts the financial burden on employers. The ADA requires *employers* to pay for reasonable accommodations unless it is an undue hardship—it does not require employees to procure reasonable accommodations at their own expense. 42 U.S.C. § 12112(a), (b)(5)(A); *see also* [29 C.F.R. § 1630.2\(o\)\(4\)](#).¹⁰

Allowing employers to place the burden on people with perceived impairments to pay for follow-up tests would subvert the goal of the ADA to ensure that those with disabilities have "equality of opportunity," § 12101(a)(7), and would force people with disabilities to face costly barriers to employment.

¹⁰ While the Fourth Circuit has found no ADA violation where an employer required an employee to obtain, at his own cost, a functional capacity evaluation before returning to work, the court did not explain why it was permissible to require the employee to pay for testing. *See Porter v. U.S. Alumoweld Co.*, 125 F.3d 243, 245 (4th Cir. 1997). The court instead focused on the fact that the requested test was "job-related and consistent with business necessity" under § 12112(d)(4). *Id.* at 246. The court also noted that in the absence of any testing, the plaintiff there could not make out a *prima facie* case of discrimination, as he could not demonstrate that he had a disability or that he was capable of doing his job with or without a reasonable accommodation. *Id.* at 246-47. That case also predated the ADAAA. Given the different factual context and that the court did not discuss why it was appropriate to require an employee to pay for testing, we are not persuaded that we should follow the *Porter* court here.

Additionally, requiring employers to bear the costs of this testing would discourage unnecessary and burdensome testing of persons with disabilities or impairments, and prevent employers from abusing their ability to require tests. As *amicus curiae* Washington [*25] Employment Lawyers Association points out, if employers are not required to pay for the additional medical tests that they require of people with disabilities, then employers might use the cost of medical testing to screen out disabled applicants.¹¹

Putting the burden to pay on employers helps to ensure that employers do not abuse their power to require testing at the post-offer, pre-employment stage.

BNSF also argues that the EEOC did not show that BNSF acted with a discriminatory motive, or that BNSF's justifications for its behavior were pretextual. But as we have held *en banc*, where it is clear that an action was taken because of an impairment or perception of an impairment, no further inquiry or burden-shifting protocol is necessary to establish causation. *See Bates v. UPS*, 511 F.3d 974, 988 (9th Cir. 2007). Here, there is no question that BNSF conditioned Holt's job offer on Holt obtaining an up-to-date MRI of his back because of BNSF's assumption that Holt had a back impairment. No further causation

¹¹ BNSF argues that this concern should not have any bearing here because requesting medical information for the purpose of deterring or screening out disabled applicants would be impermissible under the ADA. BNSF's argument ignores both the difficulty an applicant would face in proving discriminatory intent and that while an employer may not intentionally seek to screen out disabled applicants, a cavalier attitude toward applicant-paid testing may effectively screen out persons with disabilities in a way that violates the ADA.

inquiry is necessary.

C

The final element that we must consider on the § 12112(a) claim is whether Holt was a "qualified individual with a disability." This term means an "individual with a disability who, with or without reasonable accommodation, [*26] can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). BNSF makes no attempt to argue that Holt was not an otherwise qualified individual. Nor could it credibly do so: Holt received a conditional offer of employment, at the time of his application he was working as a law enforcement officer, and he was cleared by all three doctors who physically examined him.

That BNSF does not contest this element is telling. Effectively, BNSF has conceded that the medical information it had on Holt at the time it rejected him demonstrated that Holt could perform the Senior Patrol Officer job—yet BNSF still demanded that Holt procure an MRI at his own expense. This is not a case where the medical information previously adduced had been disqualifying and BNSF had provided Holt one last chance to show his ability to perform the job. In such a case, § 12112(a) would not prevent BNSF from choosing not to hire Holt because Holt would be unable to show he was "otherwise qualified for the job." BNSF had ample evidence that Holt could do the job. Yet in the face of all that evidence, BNSF nonetheless decided to

impose the burden of procuring an expensive medical test [*27] on Holt because of its perception that Holt had an underlying back problem.

We conclude that the EEOC has demonstrated all three elements of a § 12112(a) claim by showing (1) that Holt had a "disability" within the meaning of the ADA because BNSF perceived him to have a back impairment; (2) that Holt was qualified for the job; and (3) that BNSF impermissibly conditioned Holt's job offer on Holt procuring an MRI at his own expense because it assumed that Holt had a back impairment. BNSF offers no affirmative defense on appeal. We affirm the district court's holding on ADA liability.¹²

IV

BNSF argues that the district court erred in issuing its injunction, both because it applied the wrong legal standard and because it could not issue a nationwide injunction. BNSF argues that controlling Supreme Court authority required the district court to use the standard four-factor test—which considers (1) whether a plaintiff has suffered an irreparable injury, (2) whether remedies available at law are inadequate to compensate for that injury, (3) the balance of hardships, and (4) the public interest—before issuing a permanent injunction. *See eBay Inc. v. MercExchange,*

¹² Because we hold that the district court correctly concluded that the EEOC was entitled to summary judgment on its § 12112(a) claim, we do not reach the EEOC's alternative argument that BNSF violated § 12112(b)(6).

LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). In recent years, the four-factor test has commonly been applied [*28] by the Supreme Court to assess the propriety of injunctive relief. *See id.*; *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010)*.

The district court held that it could grant an injunction to the EEOC by statute, without looking to the four-factor test. It reached this conclusion because the ADA authorizes any person who proves an ADA violation to seek the remedies provided for in *Title VII of the Civil Rights Act of 1964*. *See 42 U.S.C. § 12117(a)*. The district court reasoned that under Title VII, when a court finds that a defendant has intentionally engaged in an unlawful employment practice, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate." *Id.* § 2000e-5(g)(1). Indeed, both our court and the Supreme Court have granted permanent injunctions in the Title VII context without analyzing the four-factor test. *See, e.g., Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1092, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983) (Marshall, J., concurring); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544 (9th Cir. 1987)*. Because the district court had already held that BNSF had violated the ADA and because it found that BNSF had no intention

of ceasing its unlawful practice, the district court determined that an injunction was authorized by statute.

We need not and do not decide today whether *eBay* and *Monsanto* require the application of the four-factor [*29] test in the Title VII/ADA context because we determine that even if the four-factor test is applied, that test would be satisfied here. *See Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1044 (9th Cir. 2012)*. First, if BNSF continued its practice, Holt and others like him would suffer the dignitary harm of being falsely told that their disability or perceived impairment rendered them unfit for certain work. *See Nelson v. NASA, 530 F.3d 865, 882 (9th Cir. 2008), rev'd on other grounds, 562 U.S. 134, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011)* ("[T]he loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages."). The harms a person suffers when denied a job on the basis of a disability are "emotional and psychological—and immediate." *Chalk v. U.S. Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 710 (9th Cir. 1988)*. And we are satisfied that these harms constitute irreparable injury. *See id.* Relatedly, while Holt can receive back pay and reinstatement at law, no legal remedy can fully right the wrong of such a dignitary affront. *See id.* We thus conclude that the second factor—insufficient remedies at law—is satisfied here too.

Further, preventing BNSF from continuing to discriminate in its hiring practices does

not result in any hardship to BNSF; BNSF is merely being forced to stop doing what it is not entitled to do. By contrast, absent [*30] an injunction, those with disabilities or perceived disabilities who receive conditional offers from BNSF will face serious hardship: they will either be deprived of a job on the basis of their disability, or else forced to pay large sums out of their own pocket for additional testing. The third factor is therefore satisfied. Finally, the public interest—the fourth factor—is served by preventing employment discrimination. See *Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 326, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."). We agree with the district court and hold that its injunction was appropriately entered here.

However, we agree with BNSF that the district court must make adequate factual findings to support the scope of the injunction. See *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 2018 WL 3637911, at *12-13 (9th Cir. 2018). We observe preliminarily that there are some reasons to support an injunction like that previously entered here. Although BNSF operates in dozens of states, its medical screening decisions are made out of a central medical office in Texas. Holt's own case demonstrates the difficulty of imposing a geographic constraint of the sort BNSF advocates: Holt lived in [*31] Arkansas at

the time of his application, applied for a position in Washington, and was rejected at the direction of employees in BNSF's Texas office.¹³

But the district court did not make factual findings or articulate its reasoning, and so we cannot yet properly review the scope of the injunction. Whether an injunction should be entered in exactly the form and scope of the injunction previously entered by the district court depends on the further review and findings to be made by the district court on remand.

We therefore vacate the injunction and remand for the district court to make further factual findings in order to establish the proper scope of the injunction.

Each party shall bear its own costs on appeal.

AFFIRMED in part; VACATED in part and REMANDED.

End of Document

¹³ BNSF argues that we should cabin the scope of any injunction to the Ninth Circuit because other circuits have authorized the conduct at issue. We need not decide this issue, which will be considered in the first instance by the district court. However, we observe that no other circuit court has yet ruled on the permissibility of requiring persons who have disabilities or perceived disabilities to pay for their own follow-up testing during the hiring process.

APPENDIX B

American Medical Association 2013 House of Delegates
Resolution regarding Recognition of Obesity as a Disease

AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES

Resolution: 420
(A-13)

Introduced by: American Association of Clinical Endocrinologists
American College of Cardiology
The Endocrine Society
American Society for Reproductive Medicine
The Society for Cardiovascular Angiography and Interventions
American Urological Association
American College of Surgeons

Subject: Recognition of Obesity as a Disease

Referred to: Reference Committee D
(Douglas W. Martin, MD, Chair)

1 Whereas, Our American Medical Association's Council on Science and Public Health Report 4,
2 A-05, has identified the following common criteria in defining a disease: 1) an impairment of the
3 normal functioning of some aspect of the body; 2) characteristic signs or symptoms; and 3)
4 harm or morbidity; and
5

6 Whereas, Congruent with this criteria there is now an overabundance of clinical evidence to
7 identify obesity as a multi-metabolic and hormonal disease state including impaired functioning
8 of appetite dysregulation, abnormal energy balanced, endocrine dysfunction including elevated
9 leptin levels and insulin resistance, infertility, dysregulated adipokine signaling, abnormal
10 endothelial function and blood pressure elevation, nonalcoholic fatty liver disease, dyslipidemia,
11 and systemic and adipose tissue inflammation; and
12

13 Whereas, Obesity has characteristic signs and symptoms including the increase in body fat and
14 symptoms pertaining to the accumulation of body fat, such as joint pain, immobility, sleep
15 apnea, and low self-esteem; and
16

17 Whereas, The physical increase in fat mass associated with obesity is directly related to
18 comorbidities including type 2 diabetes, cardiovascular disease, some cancers, osteoporosis,
19 polycystic ovary syndrome; and
20

21 Whereas, Weight loss from lifestyle, medical therapies, and bariatric surgery can dramatically
22 reduce early mortality, progression of type 2 diabetes, cardiovascular disease risk, stroke risk,
23 incidence of cancer in women, and constitute effective treatment options for type 2 diabetes and
24 hypertension; and
25

26 Whereas, Recent studies have shown that even after weight loss in obese patients there are
27 hormonal and metabolic abnormalities not reversible by lifestyle interventions that will likely
28 require multiple different risk stratified interventions for patients; and
29

30 Whereas, Obesity rates have doubled among adults in the last twenty years and tripled among
31 children in a single generation and a recent report by the Robert Wood Johnson Foundation
32 states evidence suggests that by 2040 roughly half the adult population may be obese; and

1 Whereas, The World Health Organization, Food and Drug Administration (FDA), National
2 Institutes of Health (NIH), the American Association of Clinical Endocrinologists, and Internal
3 Revenue Service recognize obesity as a disease; and

4
5 Whereas, Obesity is recognized as a complex disease by CIGNA, one of the nation's largest
6 health insurance companies; and

7
8 Whereas, Progress in the development of lifestyle modification therapy, pharmacotherapy, and
9 bariatric surgery options has now enabled a more robust medical model for the management of
10 obesity as a chronic disease utilizing data-driven evidenced-based algorithms that optimize the
11 benefit/risk ratio and patient outcomes; and

12
13 Whereas, The suggestion that obesity is not a disease but rather a consequence of a chosen
14 lifestyle exemplified by overeating and/or inactivity is equivalent to suggesting that lung cancer
15 is not a disease because it was brought about by individual choice to smoke cigarettes; and

16
17 Whereas, The Council on Science and Public Health has prepared a report that provides a
18 thorough examination of the major factors that impact this issue, the Council's report would
19 receive much more of the recognition and dissemination it deserves by identifying the enormous
20 humanitarian and economic impact of obesity as requiring the medical care, research and
21 education attention of other major global medical diseases; therefore be it

22
23 RESOLVED, That our American Medical Association recognize obesity as a disease state with
24 multiple pathophysiological aspects requiring a range of interventions to advance obesity
25 treatment and prevention. (New HOD Policy)

Fiscal Note: Minimal - less than \$1,000.

Received: 05/16/13

RELEVANT AMA POLICY

H-150.953 Obesity as a Major Public Health Program - Our AMA will: (1) urge physicians as well as managed care organizations and other third party payers to recognize obesity as a complex disorder involving appetite regulation and energy metabolism that is associated with a variety of comorbid conditions; (2) work with appropriate federal agencies, medical specialty societies, and public health organizations to educate physicians about the prevention and management of overweight and obesity in children and adults, including education in basic principles and practices of physical activity and nutrition counseling; such training should be included in undergraduate and graduate medical education and through accredited continuing medical education programs; (3) urge federal support of research to determine: (a) the causes and mechanisms of overweight and obesity, including biological, social, and epidemiological influences on weight gain, weight loss, and weight maintenance; (b) the long-term safety and efficacy of voluntary weight maintenance and weight loss practices and therapies, including surgery; (c) effective interventions to prevent obesity in children and adults; and (d) the effectiveness of weight loss counseling by physicians; (4) encourage national efforts to educate the public about the health risks of being overweight and obese and provide information about how to achieve and maintain a preferred healthy weight; (5) urge physicians to assess their patients for overweight and obesity during routine medical examinations and discuss with at-risk patients the health consequences of further weight gain; if treatment is indicated, physicians should encourage and facilitate weight maintenance or reduction efforts in their patients or refer them to a physician with special interest and expertise in the clinical management of obesity; (6) urge all physicians and patients to maintain a desired weight and prevent inappropriate weight gain; (7) encourage physicians to become knowledgeable of community resources and referral services that can assist with the management of overweight and obese patients; and (8) urge the appropriate federal agencies to work with organized medicine and the health insurance industry to develop coding and payment mechanisms for the evaluation and management of obesity. (CSA Rep. 6,

A-99; Reaffirmation A-09; Reaffirmed: CSAPH Rep. 1, A-09; Reaffirmation A-10; Reaffirmation I-10; Reaffirmation A-12; Reaffirmed in lieu of Res. 434, A-12)

H-440.902 Obesity as a Major Health Concern - The AMA: (1) recognizes obesity in children and adults as a major public health problem; (2) will study the medical, psychological and socioeconomic issues associated with obesity, including reimbursement for evaluation and management of obese patients; (3) will work with other professional medical organizations, and other public and private organizations to develop evidence-based recommendations regarding education, prevention, and treatment of obesity; (4) recognizes that racial and ethnic disparities exist in the prevalence of obesity and diet-related diseases such as coronary heart disease, cancer, stroke, and diabetes and recommends that physicians use culturally responsive care to improve the treatment and management of obesity and diet-related diseases in minority populations; and (5) supports the use of cultural and socioeconomic considerations in all nutritional and dietary research and guidelines in order to treat overweight and obese patients. (Res. 423, A-98; Reaffirmed and Appended: BOT Rep. 6, A-04; Reaffirmation A-10; Reaffirmed in lieu of Res. 434, A-12)

D-440.980 Recognizing and Taking Action in Response to the Obesity Crisis - Our AMA will: (1) collaborate with appropriate agencies and organizations to commission a multidisciplinary task force to review the public health impact of obesity and recommend measures to better recognize and treat obesity as a chronic disease; (2) actively pursue, in collaboration and coordination with programs and activities of appropriate agencies and organizations, the creation of a "National Obesity Awareness Month"; (3) strongly encourage through a media campaign the re-establishment of meaningful physical education programs in primary and secondary education as well as family-oriented programs on obesity prevention; (4) promote the inclusion of education on obesity prevention and the medical complications of obesity in medical school and appropriate residency curricula; and (5) provide a progress report on the above efforts to the House of Delegates by the 2004 Annual Meeting. (Res. 405, A-03; Reaffirmation A-04; Reaffirmation A-07)

D-440.971 Recommendations for Physician and Community Collaboration on the Management of Obesity - Our AMA will: (1) work with the Centers for Disease Control and Prevention to convene relevant stakeholders to evaluate the issue of obesity as a disease, using a systematic, evidence-based approach; (2) continue to actively pursue measures to treat obesity as an urgent chronic condition, raise the public's awareness of the significance of obesity and its related disorders, and encourage health industries to make appropriate care available for the prevention and treatment of obese patients, as well as those who have co-morbid disorders; (3) encourage physicians to incorporate body mass index (BMI) and waist circumference as a component measurement in the routine adult physical examination, and BMI percentiles in children recognizing ethnic sensitivities and its relationship to stature, and the need to implement appropriate treatment or preventive measures; (4) promote use of our Roadmaps for Clinical Practice: Assessment and Management of Adult Obesity primer in physician education and the clinical management of adult obesity; (5) develop a school health advocacy agenda that includes funding for school health programs, physical education and physical activity with limits on declining participation, alternative policies for vending machines that promote healthier diets, and standards for healthy a la carte meal offerings. Our AMA will work with a broad partnership to implement this agenda; and (6) collaborate with the CDC, the Department of Education, and other appropriate agencies and organizations to consider the feasibility of convening school health education, nutrition, and exercise representatives, parents, teachers and education organizations, as well as other national experts to review existing frameworks for school health, identify basic tenets for promoting school nutrition and physical activity (using a coordinated school health model), and create recommendations for a certificate program to recognize schools that meet a minimum of the tenants. (CSA Rep. 4, A-05; Reaffirmation A-07; Reaffirmation I-07; Reaffirmed: CSAPH Rep. 1, A-08; Reaffirmation I-10; Reaffirmed: BOT Rep. 21, A-12)

D-440.954 Addressing Obesity - Our AMA will: (1) assume a leadership role in collaborating with other interested organizations, including national medical specialty societies, the American Public Health Association, the Center for Science in the Public Interest, and the AMA Alliance, to discuss ways to finance a comprehensive national program for the study, prevention, and treatment of obesity, as well as public health and medical programs that serve vulnerable populations; (2) encourage state medical societies to collaborate with interested state and local organizations to discuss ways to finance a comprehensive program for the study, prevention, and treatment of obesity, as well as public health and

medical programs that serve vulnerable populations; and (3) continue to monitor and support state and national policies and regulations that encourage healthy lifestyles and promote obesity prevention. (BOT Rep. 11, I-06)

H-90.974 Opposition to Obesity as a Disability - Our AMA opposes the effort to make obesity a disability. (Res. 412, A-09)

H-440.866 The Clinical Utility of Measuring Body Mass Index and Waist Circumference in the Diagnosis and Management of Adult Overweight and Obesity - Our AMA supports: (1) greater emphasis in physician educational programs on the risk differences among ethnic and age groups at varying levels of BMI and the importance of monitoring waist circumference in individuals with BMIs below 35 kg/m²; (2) additional research on the efficacy of screening for overweight and obesity, using different indicators, in improving various clinical outcomes across populations, including morbidity, mortality, mental health, and prevention of further weight gain; and (3) more research on the efficacy of screening and interventions by physicians to promote healthy lifestyle behaviors, including healthy diets and regular physical activity, in all of their patients to improve health and minimize disease risks. (CSAPH Rep. 1, A-08)

H-170.961 Prevention of Obesity Through Instruction in Public Schools - Our AMA will urge appropriate agencies to support legislation that would require meaningful yearly instruction in nutrition, including instruction in the causes, consequences, and prevention of obesity, in grades 1 through 12 in public schools and will encourage physicians to volunteer their time to assist with such an effort. (Res. 426, A-12)

D-440.952 Fighting the Obesity Epidemic - 1. Our AMA Council on Science and Public Health (CSAPH) will critically evaluate the clinical utility of measuring body mass index (BMI) and/or waist circumference in the diagnosis and management of overweight and obesity, with input from leading researchers and key stakeholder organizations, with a report back at the 2007 AMA Interim Meeting. 2. Our AMA will consider convening relevant stakeholders to further examine the issue of incentives for healthy lifestyles. 3. Our AMA Council on Medical Service and CSAPH will collaborate to evaluate the relative merits of bariatric surgery and the issue of reimbursement for improving health outcomes in individuals with a BMI greater than 35. (BOT Rep. 9, A-07)

D-150.993 Obesity and Culturally Competent Dietary and Nutritional Guidelines - Our AMA and its Minority Affairs Consortium will study and recommend improvements to the US Department of Agriculture's Dietary Guidelines for Americans and Food Guide Pyramid so these resources fully incorporate cultural and socioeconomic considerations as well as racial and ethnic health disparity information in order to reduce obesity rates in the minority community, and report its findings and recommendations to the AMA House of Delegates by the 2004 Annual Meeting. (Res. 428, A-03)

H-150.933 Taxes on Beverages with Added Sweeteners - 1. Our AMA recognizes the complexity of factors contributing to the obesity epidemic and the need for a multifaceted approach to reduce the prevalence of obesity and improve public health. A key component of such a multifaceted approach is improved consumer education on the adverse health effects of excessive consumption of beverages containing added sweeteners. Taxes on beverages with added sweeteners are one means by which consumer education campaigns and other obesity-related programs could be financed in a stepwise approach to addressing the obesity epidemic. 2. Where taxes on beverages with added sweeteners are implemented, the revenue should be used primarily for programs to prevent and/or treat obesity and related conditions, such as educational ad campaigns and improved access to potable drinking water, particularly in schools and communities disproportionately effected by obesity and related conditions, as well as on research into population health outcomes that may be affected by such taxes. 3. Our AMA will advocate for continued research into the potentially adverse effects of long-term consumption of non-caloric sweeteners in beverages, particularly in children and adolescents. (CSAPH Rep. 5, A-12)

H-150.944 Combating Obesity and Health Disparities - Our AMA supports efforts to: (1) reduce health disparities by basing food assistance programs on the health needs of their constituents; (2) provide vegetables, fruits, legumes, grains, vegetarian foods, and healthful nondairy beverages in school lunches

and food assistance programs; and (3) ensure that federal subsidies encourage the consumption of products low in fat and cholesterol. (Res. 413, A-07; Reaffirmation A-12)

D-470.991 Adoption of a Universal Exercise Database and Prescription protocols for Obesity Reduction - Our AMA: (1) will collaborate with appropriate federal agencies and professional health organizations to develop an independent meta-database of evidence-based exercise guidelines to assist physicians and other health professionals in making exercise prescriptions; and (2) supports longitudinal research on exercise prescription outcomes in order to further refine prescription-based exercise protocols. (Res. 415, A-10)

H-425.994 Medical Evaluations of Healthy Persons - The AMA supports the following principles of healthful living and proper medical care: (1) The periodic evaluation of healthy individuals is important for the early detection of disease and for the recognition and correction of certain risk factors that may presage disease. (2) The optimal frequency of the periodic evaluation and the procedures to be performed vary with the patient's age, socioeconomic status, heredity, and other individual factors. Nevertheless, the evaluation of a healthy person by a physician can serve as a convenient reference point for preventive services and for counseling about healthful living and known risk factors. (3) These recommendations should be modified as appropriate in terms of each person's age, sex, occupation and other characteristics. All recommendations are subject to modification, depending upon factors such as the sensitivity and specificity of available tests and the prevalence of the diseases being sought in the particular population group from which the person comes. (4) The testing of individuals and of population groups should be pursued only when adequate treatment and follow-up can be arranged for the abnormal conditions and risk factors that are identified. (5) Physicians need to improve their skills in fostering patients' good health, and in dealing with long recognized problems such as hypertension, obesity, anxiety and depression, to which could be added the excessive use of alcohol, tobacco and drugs. (6) Continued investigation is required to determine the usefulness of test procedures that may be of value in detecting disease among asymptomatic populations. (CSA Rep. D, A-82; Reaffirmed: CLRPD Rep. A, I-92; Reaffirmed: CSA Rep. 8, A-03)

H-30.937 Setting Domestic and International Public Health Prevention Targets for Per Capita Alcohol Consumption as a Means of Reducing the Burden on Non-Communicable Diseases on Health Status - Our AMA will: (1) continue to address the role of alcohol use on health status and the impact of behaviorally-associated chronic illnesses (including obesity, diabetes, heart disease, chronic respiratory diseases, and many cancers) on the overall burden of disease and the costs of health care services in America; (2) encourage federal health services planning agencies and public health authorities to address the role of alcohol and tobacco consumption on health and to promote environmental interventions including evidence based tobacco control and alcohol control policies to improve the health status of Americans; and (3) encourage the World Health Organization to continue its work on the impact of Non Communicable Diseases (NCDs) on health status and to include targets for reduced per capita alcohol consumption among its major proposed interventions in developed and developing nations to reduce the incidence of, prevalence of, and rates of disability and premature deaths attributable to chronic non-communicable diseases. (Res. 413, A-12)

H-150.937 Reducing the Price Disparity Between Calorie-Dense, Nutrition-Poor Foods and Nutrition-Dense Foods - Our AMA supports: (1) efforts to decrease the price gap between calorie-dense, nutrition-poor foods and naturally nutrition-dense foods to improve health in economically disadvantaged populations by encouraging the expansion, through increased funds and increased enrollment, of existing programs that seek to improve nutrition and reduce obesity, such as the Farmer's Market Nutrition Program as a part of the Women, Infants, and Children program; and (2) the novel application of the Farmer's Market Nutrition Program to existing programs such as the Supplemental Nutrition Assistance Program (SNAP), and apply program models that incentivize the consumption of naturally nutrition-dense foods in wider food distribution venues than solely farmer's markets as part of the Women, Infants, and Children program. (Res. 414, A-10; Reaffirmation A-12)

H-150.965 Eating Disorders - The AMA (1) adopts the position that overemphasis of bodily thinness is as deleterious to one's physical and mental health as is obesity; (2) asks its members to help their patients avoid obsessions with dieting and to develop balanced, individualized approaches to finding the body weight that is best for each of them; (3) encourages training of all school-based physicians,

counselors, coaches, trainers, teachers and nurses to recognize unhealthy eating, dieting, and weight restrictive behaviors in adolescents and to offer education and appropriate referral of adolescents and their families for interventional counseling; and (4) participates in this effort by consulting with appropriate specialty societies and by assisting in the dissemination of appropriate educational and counseling materials pertaining to unhealthy eating, dieting, and weight restrictive behaviors. (Res. 417, A-92; Appended by Res. 503, A-98; Modified and Reaffirmed: CSAPH Rep. 2, A-08)

D-60.990 Exercise and Healthy Eating for Children - Our AMA shall: (1) seek legislation that would require the development and implementation of evidence-based nutrition standards for all food served in K-12 schools irrespective of food vendor or provider; and (2) work with the US Public Health Service and other federal agencies, the Federation, and others in a coordinated campaign to educate the public on the epidemic of childhood obesity and enhance the K-12 curriculum by addressing the benefits of exercise, physical fitness, and healthful diets for children. (Res. 423, A-02; Reaffirmation A-04; Reaffirmation A-07; Reaffirmation I-07; Reaffirmed: Res. 408, A-11)

D-440.978 Culturally Responsive Dietary and Nutritional Guidelines - Our AMA and its Minority Affairs Consortium will: (1) encourage the United States Department of Agriculture (USDA) Food Guide Pyramid Reassessment Team to include culturally effective guidelines that include listing an array of ethnic staples and use multicultural symbols to depict serving size in their revised Dietary Guidelines for Americans and Food Guide Pyramid; (2) seek ways to assist physicians with applying the final USDA Dietary Guidelines for Americans and Food Guide Pyramid in their practices as appropriate; and (3) monitor existing research and identify opportunities where organized medicine can impact issues related to obesity, nutritional and dietary guidelines, racial and ethnic health disparities as well as assist physicians with delivering culturally effective care. (BOT Rep. 6, A-04)

D-150.989 Healthy Food in Hospitals - Our AMA will urge (1) component medical societies, member physicians and other appropriate local groups to encourage palatable, health-promoting foods in hospitals and other health care facilities and oppose the sale of unhealthy food with inadequate nutritional value or excessive caloric content as part of a comprehensive effort to reduce obesity; and (2) health care facilities that contract with outside food vendors to select vendors that share their commitment to the health of their patients and community. (Res. 420, A-05)

H-150.954 Dietary Supplements and Herbal Remedies- (1) Our AMA will work with the FDA to educate physicians and the public about FDA's MedWatch program and to strongly encourage physicians and the public to report potential adverse events associated with dietary supplements and herbal remedies to help support FDA's efforts to create a database of adverse event information on these forms of alternative/complementary therapies. (2) Our AMA continues to urge Congress to modify the Dietary Supplement Health and Education Act to require that (a) dietary supplements and herbal remedies including the products already in the marketplace undergo FDA approval for evidence of safety and efficacy; (b) meet standards established by the United States Pharmacopeia for identity, strength, quality, purity, packaging, and labeling; (c) meet FDA postmarketing requirements to report adverse events, including drug interactions; and (d) pursue the development and enactment of legislation that declares metabolites and precursors of anabolic steroids to be drug substances that may not be used in a dietary supplement. (3) Our AMA work with the Federal Trade Commission (FTC) to support enforcement efforts based on the FTC Act and current FTC policy on expert endorsements. (4) That the product labeling of dietary supplements and herbal remedies contain the following disclaimer as a minimum requirement: "This product has not been evaluated by the Food and Drug Administration and is not intended to diagnose, mitigate, treat, cure, or prevent disease." This product may have significant adverse side effects and/or interactions with medications and other dietary supplements; therefore it is important that you inform your doctor that you are using this product. (5) That in order to protect the public, manufacturers be required to investigate and obtain data under conditions of normal use on adverse effects, contraindications, and possible drug interactions, and that such information be included on the label. (6) Our AMA continue its efforts to educate patients and physicians about the possible ramifications associated with the use of dietary supplements and herbal remedies. (Res. 513, I-98; Reaffirmed: Res. 515, A-99; Amended: Res. 501 & Reaffirmation I-99; Reaffirmation A-00; Reaffirmed: Sub. Res. 516, I-00; Modified: Sub. Res. 516, I-00; Reaffirmed: Sub. Res. 518, A-04; Reaffirmed: Sub. Res. 504, A-05; Reaffirmation A-05; Reaffirmed in lieu of Res. 520, A-05; Reaffirmation I-09; Reaffirmed in lieu of Res. 501, A-10; Reaffirmation A-11)

H-150.960 Improving Nutritional Value of Snack Foods Available in Primary and Secondary

Schools - The AMA supports the position that primary and secondary schools should replace foods in vending machines and snack bars, which are of low nutritional value and are high in fat, salt and/or sugar, with healthier food choices which contribute to the nutritional needs of the students. (Res. 405, A-94; Reaffirmation A-04; Reaffirmed in lieu of Res. 407, A-04; Reaffirmed: CSA Rep. 6, A-04; Reaffirmation A-07)

H-150.962 Quality of School Lunch Program - The AMA recommends to the National School Lunch Program that school meals be congruent with current U.S. Department of Agriculture/Department of HHS Dietary Guidelines. (Sub. Res. 507, A-93; Reaffirmed: CSA Rep. 8, A-03; Reaffirmation A-07)

H-150.964 Availability of Heart-Healthy and Health-Promoting Foods at AMA Functions - The AMA and its constituent medical societies strive to make heart-healthy and other health-promoting foods available as options at all functions. (Res. 406, I-92; Reaffirmed: CLRPD Rep. 5, A-03)

H-150.969 Commercial Weight-Loss Systems and Programs - It is the policy of the AMA to (1) continue to cooperate with appropriate state and/or federal agencies in their investigation and regulation of weight-loss systems and programs that are engaged in the illegal practice of medicine and/or that pose a health hazard to persons to whom they sell their services; (2) continue to provide scientific information to physicians and the public to assist them in evaluating weight-reduction practices and/or programs; and (3) encourage review of hospital-based weight-loss programs by medical staff. (CSA Rep. A, A-91; Reaffirmed: Sunset Report, I-01; Reaffirmed: CSAPH Rep. 1, A-11)

H-150.971 Food Labeling and Advertising - Our AMA believes that there is a need for clear, concise and uniform labeling on food products and supports the following aspects of food labeling: (1) Required nutrition labeling for all food products that includes a declaration of carbohydrates, protein, total fat, total saturated and polyunsaturated fatty acids, cholesterol, sodium and potassium content, and number of calories per serving. (2) Use of and/or ingredient labeling to declare the source of fats and oils. Knowledge of the degree of saturation is more important than knowing the source of oils in food products. It is not uncommon for manufacturers to use blends of different oils or to hydrogenate oils to achieve specific functional effects in foods. For example, vegetable oils that are primarily unsaturated may be modified by hydrogenation to more saturated forms that bring about desired taste, texture, or baking characteristics. This recommendation is therefore contingent upon nutrition labeling with saturated fat content. (3) The FDA's proposed rule on food labeling that requires quantitative information be provided on both fatty acid and cholesterol content if either one is declared on the label, as an interim step. (4) Warning statements on food labels are not appropriate for ingredients that have been established as safe for the general population. Moreover, the FDA has not defined descriptors for foods that are relatively higher in calories, sodium, fat, cholesterol, or sugar than other foods because there are no established scientific data indicating the level at which any of these substances or calories would become harmful in an individual food. (5) Our AMA commends the FTC for its past and current efforts and encourages the Commission to monitor misleading food advertising claims more closely, particularly those related to low sodium or cholesterol, and health claims. (6) Our AMA supports the timely approval of the Food and Drug Administration's proposed amendment of its regulations on nutrition labeling to require that the amount of trans fatty acids present in a food be included in the amount and percent daily value, and that definitions for "trans fat free" and "reduced trans fat" be set. (BOT Rep. C, A-90; Reaffirmed: Sunset Report, I-00; Appended: Res. 501, A-02; Reaffirmation A-04; Reaffirmed in lieu of Res. 407, A-04)

H-150.989 Weight Loss Clinics - The AMA encourages any person considering participation in a weight loss program to first consult his or her regular attending physician, or any other independent physician, for a physical examination and an objective professional evaluation of the proposed weight loss program as it relates to the individual's physical condition. (Res. 59, A-83; CLRPD Rep. 1, I-93; Reaffirmed: CSA Rep. 8, A-05)

APPENDIX C

Senate SB 5340 Legislative History and House of
Representatives SSB 5340 Legislative History

NOTE: The information on this page is current as of 4:04 PM Pacific Time on 3/5/2008, but is subject to change. Check online for the latest information.

HISTORY OF BILL: SB 5340
Wednesday, March 5, 2008 4:04 PM

Addressing the definition of disability.

Revised for 1st Substitute: Defining disability in the Washington law against discrimination.

Sponsors: Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman, Keiser

2007 REGULAR SESSION

Jan 17 First reading, referred to Judiciary.
 Jan 12 Public hearing in the Senate Committee on Judiciary at 1:30 PM.
 Feb 23 Executive action taken in the Senate Committee on Judiciary at 12:00 PM.
 Feb 27 **JUD - Majority; 1st substitute bill be substituted, do pass.**
 Passed to Rules Committee for second reading.
 Mar 1 Made eligible to be placed on second reading.
 Mar 6 Placed on second reading by Rules Committee.
 Mar 8 **1st substitute bill substituted.**
 Rules suspended. Placed on Third Reading.
 Third reading, passed; yeas, 42; nays, 6; absent, 0; excused, 1.

IN THE HOUSE

Mar 9 First reading, referred to Judiciary.
 Mar 21 Public hearing in the House Committee on Judiciary at 1:30 PM.
 Mar 23 Executive action taken in the House Committee on Judiciary at 8:00 AM.
 JUDI - Executive action taken by committee.
 JUDI - Majority; do pass with amendment(s).
 Minority; do not pass.
 Mar 27 Passed to Rules Committee for second reading.
 Apr 3 Placed on second reading by Rules Committee.
 Apr 10 Committee amendment adopted with no other amendments and floor amendment(s) also adopted.
 Rules suspended. Placed on Third Reading.
 Third reading, passed; yeas, 66; nays, 32; absent, 0; excused, 0.

IN THE SENATE

Apr 16 Senate refuses to concur in House amendments. Asks House to recede from amendments.

IN THE HOUSE

Apr 18 Rules suspended.
 Returned to second reading for amendment.
 Floor amendment(s) adopted.
 Rules suspended. Placed on Third Reading.
 Third reading, passed; yeas, 62; nays, 35; absent, 0; excused, 1.

IN THE SENATE

Apr 20 Senate concurred in House amendments.
 Passed final passage; yeas, 46; nays, 2; absent, 0; excused, 1.
 Apr 21 President signed.

IN THE HOUSE

Apr 22 Speaker signed.

OTHER THAN LEGISLATIVE ACTION

Delivered to Governor.

May 4 Governor signed.
Chapter 317, 2007 Laws.
Effective date 7/22/2007.

Senate Committee Services - Testimony/Attendance Roster

Committee: Judiciary

Bill number S-0543.2

Date: January 12, 2007

Short Title: Addressing the definition of disability

If you are from out of town and wish to testify, please mark the box to the right of your name.

Name	Organization	Mailing Address (No "on file," please)	Phone/E-mail	Testifying? (Yes/No)	If so, Pro/Con
Please Print LOREN M. FREEMAN <input type="checkbox"/>	FREEMAN - ASSOC.	Street 2323 WOODFIELD LP City OLYMPIA Zip 98501	Phone: 360-459-1354 E-mail:	NO YES	SUPPORT WPAS
Please Print Mary Hritzman <input type="checkbox"/>	Nami WA	Street PO Bx 167/ City Oly WA 98501 Zip	Phone: 753 9273 E-mail: mary.hei@netzero.com	Yes	Pro
Please Print MARC BRONMAN <input type="checkbox"/>	WASH ST. HUMAN RIGHTS COMMISSION	Street 711 S. CAP BLVD City OLY, WA 98504 Zip	Phone: E-mail: mbronman@hum.wa.gov	YES	Pro
Please Print JONNY HERBERT <input type="checkbox"/>	WASH ST HUMAN RIGHTS COMMISSION	Street City Zip 11	Phone: E-mail:	NO	Pro
Please Print JOHN WOODRING <input type="checkbox"/>	WASHINGTON APP ASSOC. RETAIL HOUSING AND PUBLIC MANUFACTURING ASSOC. SOUND COMMUNITIES WASHINGTON	Street 2120 STATE AVE. #261 City OLYMPIA WA Zip	Phone: 360 759-7667 E-mail:	YES	CON
Please Print Lynnae Rutledge <input type="checkbox"/>	DSHS / DVR	Street 4565 7th Ave SE City Lacey WA Zip	Phone: 360 725-310 E-mail: rutllime@hr.wa.gov		
Please Print JIM MORRIS <input type="checkbox"/>		Street 3712 ENTENNA 12 City OLY 98560 Zip	Phone: E-mail:	NO	PRO
Please Print Carolyn Hogue <input type="checkbox"/> (on panel w/Woodring)	NFIB	Street 4160 GRANVILLE City Lacey 98516 Zip	Phone: E-mail: 786-8675	Yes	CON
Please Print Jennifer Elias <input type="checkbox"/>	AGU - GCE	Street MS 40100 City Zip	Phone: E-mail:	NO	
Please Print TAMMIE HETRICK <input type="checkbox"/>	WASHINGTON RETAIL ASSOCIATION	Street City Zip	Phone: 360-943-9198 E-mail:	NO	CON

Senate Committee Services - Testimony/Attendance Roster

Committee: Judiciary

Bill number 3036250543-2

Date: January 12, 2007

Short Title: AN ACT RELATING TO DEFINITION OF DISABILITY
~~AN ACT relating to requirements for ignition interlock devices.~~

If you are from out of town and wish to testify, please mark the box to the right of your name.

Foster

Name	Organization	Mailing Address (No "on file," please)	Phone/E-mail	Testifying? (Yes/No)	If so, Pro/Con
Please Print SHAWN MURINKO <input type="checkbox"/>	WASHINGTON HUMAN RIGHTS COMMISSION	Street City Zip	Phone: E-mail:	Yes	Pro
Please Print JOELLE BROENER <input type="checkbox"/>	Washington Rehabilitation Council	Street City Zip	Phone: E-mail:	Yes	Pro
Please Print VON ELISON <input type="checkbox"/>	ACIL-WA	Street City Zip	Phone: E-mail:	Yes	Pro
Please Print MISTY FISCHER <input type="checkbox"/>	Central Washington Disability Rights	Street City Zip	Phone: E-mail:	Yes	Pro
Please Print TORY OLSON <input type="checkbox"/>	GOVERNOR'S COMMITTEE ON DISABILITY	Street City Zip	Phone: E-mail:	Yes	Pro
Please Print DAVID LORD <input type="checkbox"/>	Washington Protection + Advocacy System	Street City Zip	Phone: E-mail:	YES	PRO
Please Print Cherie R. Ferrin <input type="checkbox"/>	501 18 th Ave Olympia 98501	Street City Zip	Phone: 360 587 687 E-mail: megjubie@winzomn.org	NO	Pro
Please Print Marie C Jubie <input type="checkbox"/>	907 Columbia Ave #3 WHEN.	Street City Zip	Phone: 907 Columbia Ave #3 E-mail: Marysville WA 98122	Yes	Pro
Please Print DUANE HELMANN <input type="checkbox"/>	ARC of GH	Street City Zip	Phone: 360 612-3512 E-mail: 2112 Sumner Hoquiam 98550	NO	Pro
Please Print Pete RBLARAND Giff		Street City Zip	Phone: E-mail:		

Senate Committee Services - Testimony/Attendance Roster

Committee: Judiciary

Bill number S-0543.2

Date: January 12, 2007

Short Title: Addressing the definition of disability

If you are from out of town and wish to testify, please mark the box to the right of your name.

Name	Organization	Mailing Address (No "on file," please)	Phone/E-mail	Testifying? (Yes/No)	If so, Pro/Con
Please Print JEAN WESMAN <input type="checkbox"/>	WA ST. ASSOC OF COUNTIES	Street 206 10th SE City Olympia, WA 98501 Zip	Phone: 360-1886 E-mail: jwesman@wacounties.org	NO	Pro
Please Print She ELLOTT <input type="checkbox"/>	ARC of WA STATE	Street 2600 Martin Way City Olympia Zip 98506	Phone: 357-1586 E-mail: Sue@arcwa.org	NO	Pro
Please Print Donna Patrick <input type="checkbox"/>	Paralyzed Veterans Disability Council	Street 2600 Martin Way City Olympia Zip 98506	Phone: 360-566-3566 E-mail: donna@pvc.org	NO	Pro
Please Print Larry Shannon <input type="checkbox"/>	WA State Trial Lawyers Assoc	Street City Zip	Phone: E-mail:	NO	Pro
Please Print MISTY FISCHER <input checked="" type="checkbox"/>	CENTRAL WASH. DISABILITY RESOURCES	Street 422 N. PINE City ELLENSBURG Zip 98926	Phone: 509-962-9620 E-mail: misty@cwdrinfo.org	YES	PRO
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		

Senate Committee Services - Testimony/Attendance Roster

Committee: Judiciary

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Short Title: Addressing the definition of disability

If you are from out of town and wish to testify, please mark the box to the right of your name.

Name	Organization	Mailing Address (No "on file," please)	Phone/E-mail	Testifying? (Yes/No)	If so, Pro/Con
Please Print KRIS TEFFT <input type="checkbox"/>	AWB	Street City Zip Box 658 Oly WA 98501	Phone: E-mail: 943 1600	Yes	CON
Please Print Deborah Brookings <input type="checkbox"/>	WDTL	Street City Zip Keating Buildings Seattle, WA	Phone: E-mail: 206 483 5410	Yes	CON
Please Print LISA Sutton <input type="checkbox"/>	Attorney General's office	Street City Zip North Tinnwater office	Phone: E-mail: 360-586-6311	Yes	CON
Please Print Gary Smith <input type="checkbox"/>	IBA	Street City Zip Oly, WA	Phone: E-mail:	No	CON
Please Print NICK FEDERICI <input type="checkbox"/>	NATIONAL MULTIPLE SCLEROSIS SOCIETY	Street City Zip 3834 NE 178TH ST LAKE FOREST PARK 98155	Phone: 360-481-1936 E-mail: NICKF@EARTHLINK.NET	No	PRO
Please Print BRUCE TABBS <input type="checkbox"/>	Elmview	Street City Zip PO Box 66 Ellensburg	Phone: 509-925-6689 E-mail: bruce@elmview.org	No	PRO
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		

Senate Committee Services - Testimony/Attendance Roster

Committee: Judiciary

Bill number S-0543.2

Date: January 12, 2007

Short Title: Addressing the definition of disability.

If you are from out of town and wish to testify, please mark the box to the right of your name.

Name	Organization	Mailing Address (No "on file," please)	Phone/E-mail	Testifying? (Yes/No)	If so, Pro/Con
Please Print TRACI FRIEDL <input type="checkbox"/>	AGO/HUM	Street 1126 Wash St City PO Box 40100 Zip OLYMPIA WA 98501	Phone: 360 586 1912 E-mail: tracif@utg.wa.gov	No	P
Please Print Kathy Baros Friedl <input type="checkbox"/>	WSHRC	Street WA. St. Human City Rights Comm Zip	Phone: 943- E-mail: 6139	No	Pro
Please Print RICHARD REED <input type="checkbox"/>	ATTY AT LAW	Street 1218 3rd AVE #1500 City SEATTLE, WA Zip 98101	Phone: 206 447 9184 E-mail: REED20@aol.com	NO	PRO
Please Print Dennis Eagle <input type="checkbox"/>	WA Federation of State Employees	Street 1212 Jefferson St SE #300 City Olympia Zip 98501	Phone: 352-7603 E-mail: dennis@wfe.org	No	Pro
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		
Please Print <input type="checkbox"/>		Street City Zip	Phone: E-mail:		

FINAL BILL REPORT

SSB 5340

As Passed Legislature

Brief Description: Defining disability in the Washington law against discrimination.

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

Senate Committee on Judiciary

House Committee on Judiciary

Background: Washington's antidiscrimination law prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is a reason why the affected person suffered discrimination.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, or where the affected individual is regarded as having such impairment.

Summary: The Legislature finds that the *McClarty* decision failed to recognize that Washington's antidiscrimination law provides protections independent of federal law.

"Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within Washington's anti-discrimination law. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, and psychological disorders.

For purposes of qualifying for reasonable accommodation in employment, the employee's impairment must be known by the employer, or be shown through an interactive process to exist in fact. The impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that engaging in job functions without accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect. If the proposed basis for

accommodation is the reasonable likelihood that the impairment would be aggravated otherwise, the employee must notify the employer of the impairment. Also, medical documentation must establish this basis. A limitation is not substantial if it has only a trivial effect.

This act is retroactive, and applies to causes of action occurring before issuance of the *McClarty* decision on July 6, 2006, and to causes of action occurring on or after the effective date of this act.

Votes on Final Passage:

Senate	42	6	
House	62	35	(House amended)
Senate	46	2	(Senate concurred)

Effective: 90 days.

SENATE BILL REPORT

SSB 5340

As Amended by House, April 18, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Defining disability in the Washington law against discrimination.

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

Brief History:

Committee Activity: Judiciary: 1/12/07, 2/23/07 [DPS].

Passed Senate: 3/08/07, 42-6.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5340 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, or where the affected individual is regarded as having such impairment.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Substitute Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

It is added that for purposes of qualifying for reasonable accommodation in employment, an impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. A limitation is substantial if it has more than a trivial effect.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

OTHER: While true that Section 25, part (a) of the bill does codify the Washington Administrative Code (WAC), courts have ruled that the WAC is circular. The problem is that the employment claims and cases that have arisen are not necessarily due to discrimination, but are due to the WAC's circular definition. Section (b) of the bill would broaden the scope of liability for employers. And specifically, the problem language is that the definition is not limited to whether the disability has anything to do with the employee's ability to perform the particular job the employee has, or with the job classification generally. Part (c) of the bill suggests that simply because an employee has an impairment, an employer would have a duty of reasonable accommodation, whether or not the disability affected the workplace. Further, the bill in its current state does not seem to acknowledge the sound analysis and workable doctrine handed down in a number of critical cases based on actual employment situations in which employees have requested accommodation, such as the Doe and Pulcino cases. In essence, these cases established 15 years of workable solution to the circular definition of the WAC, and provided some guidance or certainty for employers and employees, who both need certainty as to the boundaries regarding legal obligations.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

House Amendment(s): Includes a legislative findings section stating that the *McClarty* decision failed to recognize that Washington's anti-discrimination law provides protections independent of federal law.

For purposes of qualifying for reasonable accommodation in employment, the amendments require that the employee's impairment be known by the employer, or be shown through an interactive process to exist in fact. If the proposed basis for the accommodation is that the impairment would be aggravated otherwise, the employee must notify the employer of the impairment. Also, medical documentation must establish a reasonable likelihood that engaging in job functions without the accommodation would aggravate the impairment to the extent that it would substantially limit the employee in certain job aspects (e.g., job performance, consideration for the job, access to equal job benefits).

The section on retroactivity is limited to causes of action occurring before the Washington Supreme Court's issuance of the *McClarty* decision on July 6, 2006, and to causes of action occurring on or after the effective date of this act.

SENATE BILL REPORT

SSB 5340

As Passed Senate, March 8, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Defining disability in the Washington law against discrimination.

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

Brief History:

Committee Activity: Judiciary: 1/12/07, 2/23/07 [DPS].

Passed Senate: 3/08/07, 42-6.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5340 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination. In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, and the affected individual is regarded as having such impairment.

Summary of Substitute Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually

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exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

It is added that for purposes of qualifying for reasonable accommodation in employment, an impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. A limitation is substantial if it has more than a trivial effect.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

OTHER: While true that Section 25, part (a) of the bill does codify the Washington Administrative Code (WAC), courts have ruled that the WAC is circular. The problem is that the employment claims and cases that have arisen are not necessarily due to discrimination,

but are due to the WAC's circular definition. Section (b) of the bill would broaden the scope of liability for employers. And specifically, the problem language is that the definition is not limited to whether the disability has anything to do with the employee's ability to perform the particular job the employee has, or with the job classification generally. Part (c) of the bill suggests that simply because an employee has an impairment, an employer would have a duty of reasonable accommodation, whether or not the disability affected the workplace. Further, the bill in its current state does not seem to acknowledge the sound analysis and workable doctrine handed down in a number of critical cases based on actual employment situations in which employees have requested accommodation, such as the Doe and Pulcino cases. In essence, these cases established 15 years of workable solution to the circular definition of the WAC, and provided some guidance or certainty for employers and employees, who both need certainty as to the boundaries regarding legal obligations.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

SENATE BILL REPORT

SB 5340

As Reported By Senate Committee On:
Judiciary, February 23, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Addressing the definition of disability.

Sponsors: Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser.

Brief History:

Committee Activity: Judiciary: 1/12/07, 2/23/07 [DPS].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5340 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination. In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, and the affected individual is regarded as having such impairment.

Summary of Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as

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a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

EFFECT OF CHANGES MADE BY RECOMMENDED SUBSTITUTE AS PASSED COMMITTEE (Judiciary): It is added that for purposes of qualifying for reasonable accommodation in employment, an impairment must either have: (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. A limitation is substantial if it has more than a trivial effect.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

OTHER: While true that Section 25, part (a) of the bill does codify the Washington Administrative Code (WAC), courts have ruled that the WAC is circular. The problem is that the employment claims and cases that have arisen are not necessarily due to discrimination, but are due to the WAC's circular definition. Section (b) of the bill would broaden the scope of liability for employers. And specifically, the problem language is that the definition is not limited to whether the disability has anything to do with the employee's ability to perform the particular job the employee has, or with the job classification generally. Part (c) of the bill suggests that simply because an employee has an impairment, an employer would have a duty of reasonable accommodation, whether or not the disability affected the workplace. Further, the bill in its current state does not seem to acknowledge the sound analysis and workable doctrine handed down in a number of critical cases based on actual employment situations in which employees have requested accommodation, such as the Doe and Pulcino cases. In essence, these cases established 15 years of workable solution to the circular definition of the WAC, and provided some guidance or certainty for employers and employees, who both need certainty as to the boundaries regarding legal obligations.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

SENATE BILL REPORT

SB 5340

As Reported By Senate Committee On:
Judiciary, February 23, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Addressing the definition of disability.

Sponsors: Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser.

Brief History:

Committee Activity: Judiciary: 1/12/07.2/23/07 [DPS]

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5340 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination. In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, and the affected individual is regarded as having such impairment.

Summary of Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether

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it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

EFFECT OF RECOMMENDED SUBSTITUTE (Judiciary):
DoubleClickHereAndTypeText.

Appropriation: None.

Fiscal Note: Requested on January 9, 2007.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

OTHER: While true that Section 25, part (a) of the bill does codify the Washington Administrative Code (WAC), courts have ruled that the WAC is circular. The problem is that the employment claims and cases that have arisen are not necessarily due to discrimination, but are due to the WAC's circular definition. Section (b) of the bill would broaden the scope of liability for employers. And specifically, the problem language is that the definition is not limited to whether the disability has anything to do with the employee's ability to perform the particular job the employee has, or with the job classification generally. Part (c) of the bill suggests that simply because an employee has an impairment, an employer would have a duty

of reasonable accommodation, whether or not the disability affected the workplace. Further, the bill in its current state does not seem to acknowledge the sound analysis and workable doctrine handed down in a number of critical cases based on actual employment situations in which employees have requested accommodation, such as the Doe and Pulcino cases. In essence, these cases established 15 years of workable solution to the circular definition of the WAC, and provided some guidance or certainty for employers and employees, who both need certainty as to the boundaries regarding legal obligations.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelierine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

SENATE BILL REPORT

SB 5340

As of February 8, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Addressing the definition of disability.

Sponsors: Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser.

Brief History:

Committee Activity: Judiciary: 1/12/07.

SENATE COMMITTEE ON JUDICIARY

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination. In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, and the affected individual is regarded as having such impairment.

Summary of Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

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Appropriation: None.

Fiscal Note: Requested on January 9, 2007.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance.

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Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association.

OTHER: Lisa Sutton, Attorney General's Office.

SENATE BILL REPORT

SB 5340

As of January 17, 2007

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Addressing the definition of disability.

Sponsors: Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser.

Brief History:

Committee Activity: Judiciary: 1/12/07.

SENATE COMMITTEE ON JUDICIARY

Staff: Dawn Noel (786-7472)

Background: The Washington Law Against Discrimination (WLAD) prohibits discrimination based on the presence of any sensory, mental, or physical disability. The "presence of any sensory, mental, or physical disability" is not defined by statute, but is defined in an administrative regulation to include a sensory, mental, or physical condition that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist, whether or not it actually exists. The regulation regards a condition as a "sensory, mental, or physical disability" if it is an abnormality and is the reason why the affected person suffered discrimination. In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), a majority of the Washington Supreme Court rejected this definition, and adopted the definition of "disability" as set forth in the federal Americans with Disabilities Act. The federal definition provides that a "disability" is a physical or mental impairment that substantially limits one or more major life activities, where a record of such impairment exists, and the affected individual is regarded as having such impairment.

Summary of Bill: The majority opinion in *McClarty* is rejected. "Disability" is defined as a sensory, mental, or physical impairment that is medically cognizable or diagnosable, or exists as a record or history, or is perceived to exist, whether or not it actually exists. The "disability" exists whether it is temporary or permanent, mitigated or unmitigated, or whether it limits the ability to work or engage in any other activity encompassed within the WLAD. "Impairment" includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders. The provisions of the bill correct the previous law and are retroactive.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Appropriation: None.

Fiscal Note: Requested on January 9, 2007.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Widespread concern exists regarding discrimination claims for disabilities that are not readily apparent under the federal definition of "disability" adopted in *McClarty*. Federal precedent in the area of disability law has eroded protection for thousands. Under federal law, many conditions do not qualify as disabilities, such as epilepsy, multiple sclerosis, cerebral palsy, ALS (Lou Gehrig's disease), Parkinson's disease, diabetes, bipolar disorder, and cancer. Reasonable accommodations for people with disabilities are necessary to promote equality in the work force. It is important to ensure that people with disabilities can contribute to society, provide for themselves and their family, and minimize their reliance on resources such as welfare. Changes should be made to benefit people with disabilities without limiting them unnecessarily. This bill provides clarity in the law, and removes the circular language contained in the regulation. Small employers can still take advantage of defenses currently available to them, such as undue hardship in accommodating a disability.

CON: The Washington Supreme Court adopted the federal definition of "disability" in part because it was clear, and because the state regulation was difficult to apply due to its circularity. Fear exists that because the bill contains part of the regulation, the law would again become unclear and difficult to apply if the bill passed. The bill also contains language that defines disability too broadly, because it includes conditions that are temporary and correctable. This broad language would deprive resources from those people with true disabilities that require accommodation, and adversely affect smaller businesses and cities who must provide accommodation under the broadened definition. The bill is also problematic because it requires an employer to provide accommodation, regardless of whether the disability affects the individual's job performance. Certain decisions in Washington's case law such as *Boeing* and *Pulcino* already provide workable guidance regarding the definition of disability.

Persons Testifying: PRO: Senator Kline, prime sponsor; Mary Heitzman, Marc Brenman, Shawn Murinko, Washington State Human Rights Commission; Misty Fisher, Central Washington Disability Resources; Joelle Broener, Washington Rehabilitation Council; Von Elison, Association of Centers for Independent Living; Toby Olson, Governor's Committee on Disability; David Lord, Washington Protection and Advocacy System; Marie Jubie; Jason Pelerine.

CON: John Woodring; Rental Housing Association of Puget Sound; Carolyn Logue, National Federation of Independent Business; Kris Tefft, Association of Washington Business; Deborah Brookings, Washington Defense Trial Lawyer's Association; Lisa Sutton, Attorney General's Office.

REPORT OF STANDING COMMITTEE

February 23, 2007

Senate Bill

NO. 5340

Addressing the definition of disability

(reported by Committee on Judiciary) : (8)

Recommendation - Majority

1) Choose One:

Do pass

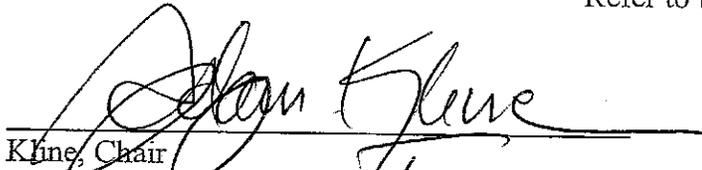
Do pass as amended

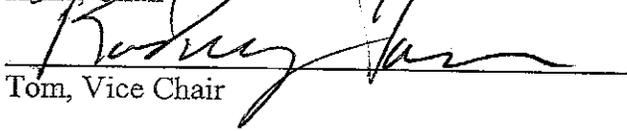
That the _____ substitute bill be substituted therefor and that the substitute bill do pass

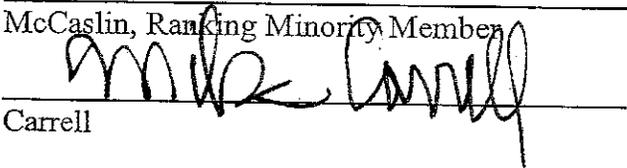
Without recommendation

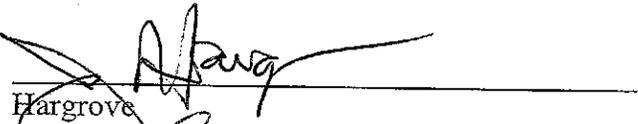
2) Complete if the bill is to be referred to a committee other than Rules:

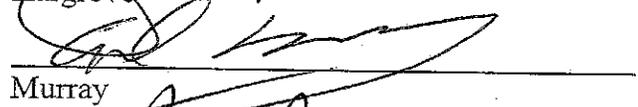
Refer to the committee on _____

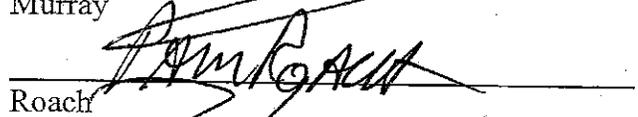

Kline, Chair


Tom, Vice Chair

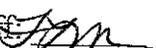

McCaslin, Ranking Minority Member
Carrell


Hargrove


Murray


Roach


Weinstein

Coordinator/Lead Staff 

MINORITY REPORT OF STANDING COMMITTEE

NO.

(reported by Committee on Judiciary) : (8)

Pursuant to Senate Rule 45, to be included in a minority report recommendation, committee members must sign and check only one box following each signature.

DNP = *Do Not Pass*
W/O Rec = *Without Recommendation*

	DNP	W/O		DNP	W/O
		Rec			Rec
_____ Kline, Chair	<input type="checkbox"/>	<input type="checkbox"/>	_____ Hargrove	<input type="checkbox"/>	<input type="checkbox"/>
_____ Tom, Vice Chair	<input type="checkbox"/>	<input type="checkbox"/>	_____ Murray	<input type="checkbox"/>	<input type="checkbox"/>
_____ McCaslin, Ranking Minority Member	<input type="checkbox"/>	<input type="checkbox"/>	_____ Roach	<input type="checkbox"/>	<input type="checkbox"/>
_____ Carrell	<input type="checkbox"/>	<input type="checkbox"/>	_____ Weinstein	<input type="checkbox"/>	<input type="checkbox"/>

Coordinator/Lead Staff: _____

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

SUBSTITUTE SENATE BILL 5340

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.

SUBSTITUTE SENATE BILL 5340

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)

Defining disability in the Washington law against discrimination.

HOUSE

SENATE

Filed/Received

1st Reading {Date/Com}

Reported Out of Committee {Date}

Majority Recommendation

Minority Recommendation

Referred to Committee on {Date}

Reported Out of Committee {Date}

Majority Recommendation

Minority Recommendation

2nd Reading {Date}

Adopted Amendments:

Rules 3

3rd Reading {Date/Action}

Final Passage {Date/Vote}

Notice of Reconsideration

Reconsideration #1 {Date/Vote}

Reconsideration #2 {Date/Vote}

Chief Clerk/Secretary

_____	_____
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_____ / _____ Yea _____ Nay _____	_____ / _____ Yea _____ Nay _____
_____ / <input type="checkbox"/> <small>Ind</small> <input type="checkbox"/> <small>Next Day</small> _____ <small>Member</small>	_____ / <input type="checkbox"/> <small>Ind</small> <input type="checkbox"/> <small>Next Day</small> _____ <small>Member</small>
_____ / _____ Yea _____ Nay _____	_____ / _____ Yea _____ Nay _____
_____ / _____ Yea _____ Nay _____	_____ / _____ Yea _____ Nay _____
X _____	X _____

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), was incorrect, in that it failed to recognize that the
8 law against discrimination affords to Washington residents protections
9 that are wholly independent of those afforded by the federal Americans
10 with Disabilities Act of 1990, and that the law against discrimination
11 has 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 have:

37 (i) A substantially limiting effect upon the individual's ability

1 to perform his or her job, the individual's ability to apply or be
2 considered for a job, or the individual's access to equal benefits,
3 privileges, or terms or conditions of employment; or

4 (ii) The reasonable likelihood that job-related factors will
5 aggravate it to the extent that it could create a substantially
6 limiting effect if not accommodated.

7 (e) For purposes of (d) of this subsection, a limitation is
8 substantial if it has more than a trivial effect.

9 NEW SECTION. Sec. 3. This act is remedial and retroactive, and
10 applies to all claims that are not time barred, as well as all claims
11 pending in any court or agency on the effective date of this act.

--- END ---

Effect: The proposed substitute includes language requiring that, for purposes of qualifying for reasonable accommodation in employment, an impairment must either have (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. The proposed substitute also specifies that a limitation is substantial if it has more than a trivial effect.

This proposed substitute changes the first section regarding legislative intent by making it less critical of the court's decision in *McClarty*.

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;
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), was incorrect, in that it failed to recognize that the
8 law against discrimination affords to Washington residents protections
9 that are wholly independent of those afforded by the federal Americans
10 with Disabilities Act of 1990, and that the law against discrimination
11 has 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
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 have:

37 (i) A substantially limiting effect upon the individual's ability

1 to perform his or her job, the individual's ability to apply or be
2 considered for a job, or the individual's access to equal benefits,
3 privileges, or terms or conditions of employment; or

4 (ii) The reasonable likelihood that job-related factors will
5 aggravate it to the extent that it could create a substantially
6 limiting effect if not accommodated.

7 (e) For purposes of (d) of this subsection, a limitation is
8 substantial if it has more than a trivial effect.

9 NEW SECTION. Sec. 3. This act is remedial and retroactive, and
10 applies to all claims that are not time barred, as well as all claims
11 pending in any court or agency on the effective date of this act.

--- END ---

Effect: The proposed substitute includes language requiring that, for purposes of qualifying for reasonable accommodation in employment, an impairment must either have (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. The proposed substitute also specifies that a limitation is substantial if it has more than a trivial effect.

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;
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), overstepped the court's constitutional role of
8 deciding cases and controversies before it, and engaged in judicial
9 activism by significantly rewriting the state law against
10 discrimination. The legislature further finds that the law changed by
11 the court is of significant importance to the citizens of the state, in
12 that it determines the scope of application of the law against
13 discrimination, and that the court's deviation from settled law was
14 substantial in degree. The legislature reaffirms its intent that the
15 law against discrimination affords to Washington residents protections
16 that are wholly independent of those afforded by the federal Americans
17 with Disabilities Act of 1990, and rejects the opinion stated in
1 *McClarty v. Totem Electric*.

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

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

5 (1) "Person" includes one or more individuals, partnerships,
6 associations, organizations, corporations, cooperatives, legal
7 representatives, trustees and receivers, or any group of persons; it
8 includes any owner, lessee, proprietor, manager, agent, or employee,
9 whether one or more natural persons; and further includes any political
10 or civil subdivisions of the state and any agency or instrumentality of
11 the state or of any political or civil subdivision thereof;

12 (2) "Commission" means the Washington state human rights
13 commission;

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

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

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22 the purpose, in whole or in part, of dealing with employers concerning
23 grievances or terms or conditions of employment, or for other mutual
24 aid or protection in connection with employment;

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

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

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

31 (9) "Full enjoyment of" includes the right to purchase any service,
32 commodity, or article of personal property offered or sold on, or by,
33 any establishment to the public, and the admission of any person to
34 accommodations, advantages, facilities, or privileges of any place of
35 public resort, accommodation, assemblage, or amusement, without acts
36 directly or indirectly causing persons of any particular race, creed,
37 color, sex, sexual orientation, national origin, or with any sensory,

1 mental, or physical disability, or the use of a trained dog guide or
2 service animal by a ~~((disabled))~~ person with a disability, to be
treated as not welcome, accepted, desired, or solicited;

4 (10) "Any place of public resort, accommodation, assemblage, or
5 amusement" includes, but is not limited to, any place; licensed or
6 unlicensed, kept for gain, hire, or reward, or where charges are made
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18 without charge, or where medical service or care is made available, or
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23 or educational institution, or schools of special instruction, or
24 nursery schools, or day care centers or children's camps: PROVIDED,
25 That nothing contained in this definition shall be construed to include
26 or apply to any institute, bona fide club, or place of accommodation,
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28 organizations, though where public use is permitted that use shall be
29 covered by this chapter; nor shall anything contained in this
30 definition apply to any educational facility, columbarium, crematory,
31 mausoleum, or cemetery operated or maintained by a bona fide religious
32 or sectarian institution;

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14 behavior, or expression, whether or not that gender identity, self-
15 image, appearance, behavior, or expression is different from that
16 traditionally associated with the sex assigned to that person at birth;

17 (16) "Aggrieved person" means any person who: (a) Claims to have
18 been injured by an unfair practice in a real estate transaction; or (b)
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28 personal or for business purposes, in which a service, finance, or
29 interest charge is imposed, or which provides for repayment in
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38 who have not attained the age of eighteen years being domiciled with a

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2 individuals, or with the designee of such parent or other person having
such legal custody, with the written permission of such parent or other
4 person. Families with children status also applies to any person who
5 is pregnant or is in the process of securing legal custody of any
6 individual who has not attained the age of eighteen years;

7 (21) "Covered multifamily dwelling" means: (a) Buildings
8 consisting of four or more dwelling units if such buildings have one or
9 more elevators; and (b) ground floor dwelling units in other buildings
10 consisting of four or more dwelling units;

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

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

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18 purpose of assisting or accommodating a ~~((disabled person's))~~ sensory,
19 mental, or physical disability of a person with a disability;

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

22 (i) Is medically cognizable or diagnosable; or

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

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

25 (b) A disability exists whether it is temporary or permanent,
26 common or uncommon, mitigated or unmitigated, or whether or not it
27 limits the ability to work generally or work at a particular job or
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29 chapter.

30 (c) For purposes of this definition, "impairment" includes, but is
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32 (i) Any physiological disorder, or condition, cosmetic
33 disfigurement, or anatomical loss affecting one or more of the
34 following body systems: Neurological, musculoskeletal, special sense
35 organs, respiratory, including speech organs, cardiovascular,
36 reproductive, digestive, genitor-urinary, hemic and lymphatic, skin,
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1 (ii) Any mental, developmental, traumatic, or psychological
2 disorder, including but not limited to cognitive limitation, organic
3 brain syndrome, emotional or mental illness, and specific learning
4 disabilities.

5 (d) Only for the purposes of qualifying for reasonable
6 accommodation in employment, an impairment must have:

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8 to perform his or her job, the individual's ability to apply or be
9 considered for a job, or the individual's access to equal benefits,
10 privileges, or terms or conditions of employment; or

11 (ii) The reasonable likelihood that job-related factors will
12 aggravate it to the extent that it could create a substantially
13 limiting effect if not accommodated.

14 (e) For purposes of (d) of this subsection, a limitation is
15 substantial if it has more than a trivial effect.

16 NEW SECTION. Sec. 3. This act is remedial and retroactive, and
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18 pending in any court or agency on the effective date of this act.

--- END ---

③ PSSB 0340

Effect: The proposed substitute includes language requiring that, for purposes of qualifying for reasonable accommodation in employment, an impairment must either have (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. The proposed substitute also specifies that a limitation is substantial if it has more than a trivial effect.

This proposed substitute eliminates the first section regarding legislative intent.

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13 whether one or more natural persons; and further includes any political
14 or civil subdivisions of the state and any agency or instrumentality of
15 the state or of any political or civil subdivision thereof;

16 (2) "Commission" means the Washington state human rights
17 commission;

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1 employer, directly or indirectly, who employs eight or more persons,
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3 organized for private profit;

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5 her parents, spouse, or child, or in the domestic service of any
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8 the purpose, in whole or in part, of dealing with employers concerning
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3 without charge, or where medical service or care is made available, or
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31 (14) "Sex" means gender;

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

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

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

6 (i) Is medically cognizable or diagnosable; or

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

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

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

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

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

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

26 (d) Only for the purposes of qualifying for reasonable
27 accommodation in employment, an impairment must have:

28 (i) A substantially limiting effect upon the individual's ability
29 to perform his or her job, the individual's ability to apply or be
30 considered for a job, or the individual's access to equal benefits,
31 privileges, or terms or conditions of employment; or

32 (ii) The reasonable likelihood that job-related factors will
33 aggravate it to the extent that it could create a substantially
34 limiting effect if not accommodated.

35 (e) For purposes of (d) of this subsection, a limitation is
36 substantial if it has more than a trivial effect.

1 NEW SECTION. Sec. 2. This act is remedial and retroactive, and
2 applies to all claims that are not time barred, as well as all claims
3 pending in any court or agency on the effective date of this act.

--- END ---

SSB 5340 - H AMD
By Representative Lantz

ADOPTED 04/18/2007

1 Strike everything after the enacting clause and insert the
2 following:

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

11 Sec. 2. RCW 49.60.040 and 2006 c 4 s 4 are each amended to read as
12 follows:

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

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

22 (2) "Commission" means the Washington state human rights
23 commission;

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

28 (4) "Employee" does not include any individual employed by his or

1 her parents, spouse, or child, or in the domestic service of any
2 person;

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

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

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

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

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

23 (10) "Any place of public resort, accommodation, assemblage, or
24 amusement" includes, but is not limited to, any place, licensed or
25 unlicensed, kept for gain, hire, or reward, or where charges are made
26 for admission, service, occupancy, or use of any property or
27 facilities, whether conducted for the entertainment, housing, or
28 lodging of transient guests, or for the benefit, use, or accommodation
29 of those seeking health, recreation, or rest, or for the burial or
30 other disposition of human remains, or for the sale of goods,
31 merchandise, services, or personal property, or for the rendering of
32 personal services, or for public conveyance or transportation on land,
33 water, or in the air, including the stations and terminals thereof and
34 the garaging of vehicles, or where food or beverages of any kind are
35 sold for consumption on the premises, or where public amusement,
36 entertainment, sports, or recreation of any kind is offered with or
37 without charge, or where medical service or care is made available, or
38 where the public gathers, congregates, or assembles for amusement,

1 recreation, or public purposes, or public halls, public elevators, and
2 public washrooms of buildings and structures occupied by two or more
3 tenants, or by the owner and one or more tenants, or any public library
4 or educational institution, or schools of special instruction, or
5 nursery schools, or day care centers or children's camps: PROVIDED,
6 That nothing contained in this definition shall be construed to include
7 or apply to any institute, bona fide club, or place of accommodation,
8 which is by its nature distinctly private, including fraternal
9 organizations, though where public use is permitted that use shall be
10 covered by this chapter; nor shall anything contained in this
11 definition apply to any educational facility, columbarium, crematory,
12 mausoleum, or cemetery operated or maintained by a bona fide religious
13 or sectarian institution;

14 (11) "Real property" includes buildings, structures, dwellings,
15 real estate, lands, tenements, leaseholds, interests in real estate
16 cooperatives, condominiums, and hereditaments, corporeal and
17 incorporeal, or any interest therein;

18 (12) "Real estate transaction" includes the sale, appraisal,
19 brokering, exchange, purchase, rental, or lease of real property,
20 transacting or applying for a real estate loan, or the provision of
21 brokerage services;

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

27 (14) "Sex" means gender;

28 (15) "Sexual orientation" means heterosexuality, homosexuality,
29 bisexuality, and gender expression or identity. As used in this
30 definition, "gender expression or identity" means having or being
31 perceived as having a gender identity, self-image, appearance,
32 behavior, or expression, whether or not that gender identity, self-
33 image, appearance, behavior, or expression is different from that
34 traditionally associated with the sex assigned to that person at birth;

35 (16) "Aggrieved person" means any person who: (a) Claims to have
36 been injured by an unfair practice in a real estate transaction; or (b)
37 believes that he or she will be injured by an unfair practice in a real
38 estate transaction that is about to occur;

1 (17) "Complainant" means the person who files a complaint in a real
2 estate transaction;

3 (18) "Respondent" means any person accused in a complaint or
4 amended complaint of an unfair practice in a real estate transaction;

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

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

25 (21) "Covered multifamily dwelling" means: (a) Buildings
26 consisting of four or more dwelling units if such buildings have one or
27 more elevators; and (b) ground floor dwelling units in other buildings
28 consisting of four or more dwelling units;

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

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

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

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

3 (i) Is medically cognizable or diagnosable; or

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

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

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

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

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

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

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

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

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

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

1 NEW SECTION. **Sec. 3.** This act is remedial and retroactive, and
2 applies to all causes of action occurring before July 6, 2006, and to
3 all causes of action occurring on or after the effective date of this
4 act."

5 Correct the title.

EFFECT: Adds to the House amendments to the Senate bill a
legislative findings section stating that the McClarty opinion fails to
recognize that Washington's antidiscrimination law provides protections
independent of federal law.

--- END ---

By Senator Kline

SB 5340 - S COMM AMD

By Committee on Judiciary

1 Strike everything after the enacting clause and insert the
2 following:

3 **"NEW SECTION. Sec. 1.** The legislature finds that the supreme
4 court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137
5 P.3d 844 (2006), overstepped the court's constitutional role of
6 deciding cases and controversies before it, and engaged in judicial
7 activism by significantly rewriting the state law against
8 discrimination. The legislature further finds that the law changed by
9 the court is of significant importance to the citizens of the state, in
10 that it determines the scope of application of the law against
11 discrimination, and that the court's deviation from settled law was
12 substantial in degree. The legislature reaffirms its intent that the
13 law against discrimination affords to Washington residents protections
14 that are wholly independent of those afforded by the federal Americans
15 with Disabilities Act of 1990, and rejects the opinion stated in
16 *McClarty v. Totem Electric*.

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

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

21 (1) "Person" includes one or more individuals, partnerships,
22 associations, organizations, corporations, cooperatives, legal
23 representatives, trustees and receivers, or any group of persons; it
24 includes any owner, lessee, proprietor, manager, agent, or employee,
25 whether one or more natural persons; and further includes any political
26 or civil subdivisions of the state and any agency or instrumentality of
27 the state or of any political or civil subdivision thereof;

28 (2) "Commission" means the Washington state human rights
29 commission;

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

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

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

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

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

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

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

28 (10) "Any place of public resort, accommodation, assemblage, or
29 amusement" includes, but is not limited to, any place, licensed or
30 unlicensed, kept for gain, hire, or reward, or where charges are made
31 for admission, service, occupancy, or use of any property or
32 facilities, whether conducted for the entertainment, housing, or
33 lodging of transient guests, or for the benefit, use, or accommodation
34 of those seeking health, recreation, or rest, or for the burial or
35 other disposition of human remains, or for the sale of goods,
36 merchandise, services, or personal property, or for the rendering of
37 personal services, or for public conveyance or transportation on land,
38 water, or in the air, including the stations and terminals thereof and

1 the garaging of vehicles, or where food or beverages of any kind are
2 sold for consumption on the premises, or where public amusement,
3 entertainment, sports, or recreation of any kind is offered with or
4 without charge, or where medical service or care is made available, or
5 where the public gathers, congregates, or assembles for amusement,
6 recreation, or public purposes, or public halls, public elevators, and
7 public washrooms of buildings and structures occupied by two or more
8 tenants, or by the owner and one or more tenants, or any public library
9 or educational institution, or schools of special instruction, or
10 nursery schools, or day care centers or children's camps: PROVIDED,
11 That nothing contained in this definition shall be construed to include
12 or apply to any institute, bona fide club, or place of accommodation,
13 which is by its nature distinctly private, including fraternal
14 organizations, though where public use is permitted that use shall be
15 covered by this chapter; nor shall anything contained in this
16 definition apply to any educational facility, columbarium, crematory,
17 mausoleum, or cemetery operated or maintained by a bona fide religious
18 or sectarian institution;

19 (11) "Real property" includes buildings, structures, dwellings,
20 real estate, lands, tenements, leaseholds, interests in real estate
21 cooperatives, condominiums, and hereditaments, corporeal and
22 incorporeal, or any interest therein;

23 (12) "Real estate transaction" includes the sale, appraisal,
24 brokering, exchange, purchase, rental, or lease of real property,
25 transacting or applying for a real estate loan, or the provision of
26 brokerage services;

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

32 (14) "Sex" means gender;

33 (15) "Sexual orientation" means heterosexuality, homosexuality,
34 bisexuality, and gender expression or identity. As used in this
35 definition, "gender expression or identity" means having or being
36 perceived as having a gender identity, self-image, appearance,
37 behavior, or expression, whether or not that gender identity, self-

1 image, appearance, behavior, or expression is different from that
2 traditionally associated with the sex assigned to that person at birth;

3 (16) "Aggrieved person" means any person who: (a) Claims to have
4 been injured by an unfair practice in a real estate transaction; or (b)
5 believes that he or she will be injured by an unfair practice in a real
6 estate transaction that is about to occur;

7 (17) "Complainant" means the person who files a complaint in a real
8 estate transaction;

9 (18) "Respondent" means any person accused in a complaint or
10 amended complaint of an unfair practice in a real estate transaction;

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

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

31 (21) "Covered multifamily dwelling" means: (a) Buildings
32 consisting of four or more dwelling units if such buildings have one or
33 more elevators; and (b) ground floor dwelling units in other buildings
34 consisting of four or more dwelling units;

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

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

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

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

9 (i) Is medically cognizable or diagnosable; or

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

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

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

17 (c)(i) Only for the purposes of qualifying for reasonable
18 accommodation in employment, an impairment must have:

19 (A) A substantially limiting effect upon the individual's ability
20 to perform his or her job, the individual's ability to apply or be
21 considered for a job, or the individual's access to equal benefits,
22 privileges, or terms or conditions of employment; or

23 (B) The reasonable likelihood that job-related factors will
24 aggravate it to the extent that it could create a substantially
25 limiting effect if not accommodated.

26 (ii) A limitation is substantial if it has more than a trivial
27 effect.

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

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

36 (B) Any mental, developmental, traumatic, or psychological
37 disorder, including, but not limited to cognitive limitation, organic

1 brain syndrome, emotional or mental illness, and specific learning
2 disabilities.

3 NEW SECTION. Sec. 3. This act is remedial and retroactive and
4 shall apply to all claims which are not time barred, as well as all
5 claims pending in any court or agency at the time of enactment."

SB 5340 - S COMM AMD

By Committee on Judiciary

6 On page 1, line 2 of the title, after "49.60 RCW;" strike the
7 remainder of the title and insert "amending RCW 49.60.040; and creating
8 new sections."

EFFECT: The amendment includes language requiring that, for purposes of qualifying for reasonable accommodation in employment, an impairment must either have (1) a substantially limiting effect upon the individual's ability to perform his or her job, to apply or be considered for a job, or to access equal benefits, privileges, or terms of employment; or (2) the reasonable likelihood that job-related factors will aggravate the impairment to the extent that it could create a substantially limiting effect if not accommodated. The amendment also specifies that a limitation is substantial if it has more than a trivial effect.

--- END ---

SENATE BILL 5340

State of Washington

60th Legislature

2007 Regular Session

By Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser

Read first time 01/17/2007. Referred to Committee on Judiciary.

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), overstepped the court's constitutional role of
8 deciding cases and controversies before it, and engaged in judicial
9 activism by significantly rewriting the state law against
10 discrimination. The legislature further finds that the law changed by
11 the court is of significant importance to the citizens of the state, in
12 that it determines the scope of application of the law against
13 discrimination, and that the court's deviation from settled law was
14 substantial in degree. The legislature reaffirms its intent that the
15 law against discrimination affords to Washington residents protections
16 that are wholly independent of those afforded by the federal Americans
17 with Disabilities Act of 1990, and rejects the opinion stated in
18 *McClarty v. Totem Electric*.

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

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

5 (1) "Person" includes one or more individuals, partnerships,
6 associations, organizations, corporations, cooperatives, legal
7 representatives, trustees and receivers, or any group of persons; it
8 includes any owner, lessee, proprietor, manager, agent, or employee,
9 whether one or more natural persons; and further includes any political
10 or civil subdivisions of the state and any agency or instrumentality of
11 the state or of any political or civil subdivision thereof;

12 (2) "Commission" means the Washington state human rights
13 commission;

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

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

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

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

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

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

31 (9) "Full enjoyment of" includes the right to purchase any service,
32 commodity, or article of personal property offered or sold on, or by,
33 any establishment to the public, and the admission of any person to
34 accommodations, advantages, facilities, or privileges of any place of
35 public resort, accommodation, assemblage, or amusement, without acts
36 directly or indirectly causing persons of any particular race, creed,
37 color, sex, sexual orientation, national origin, or with any sensory,

1 mental, or physical disability, or the use of a trained dog guide or
2 service animal by a (~~disabled~~) person with a disability, to be
3 treated as not welcome, accepted, desired, or solicited;

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

33 (11) "Real property" includes buildings, structures, dwellings,
34 real estate, lands, tenements, leaseholds, interests in real estate
35 cooperatives, condominiums, and hereditaments, corporeal and
36 incorporeal, or any interest therein;

37 (12) "Real estate transaction" includes the sale, appraisal,

1 brokering, exchange, purchase, rental, or lease of real property,
2 transacting or applying for a real estate loan, or the provision of
3 brokerage services;

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

9 (14) "Sex" means gender;

10 (15) "Sexual orientation" means heterosexuality, homosexuality,
11 bisexuality, and gender expression or identity. As used in this
12 definition, "gender expression or identity" means having or being
13 perceived as having a gender identity, self-image, appearance,
14 behavior, or expression, whether or not that gender identity, self-
15 image, appearance, behavior, or expression is different from that
16 traditionally associated with the sex assigned to that person at birth;

17 (16) "Aggrieved person" means any person who: (a) Claims to have
18 been injured by an unfair practice in a real estate transaction; or (b)
19 believes that he or she will be injured by an unfair practice in a real
20 estate transaction that is about to occur;

21 (17) "Complainant" means the person who files a complaint in a real
22 estate transaction;

23 (18) "Respondent" means any person accused in a complaint or
24 amended complaint of an unfair practice in a real estate transaction;

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

37 (20) "Families with children status" means one or more individuals
38 who have not attained the age of eighteen years being domiciled with a

1 parent or another person having legal custody of such individual or
2 individuals, or with the designee of such parent or other person having
3 such legal custody, with the written permission of such parent or other
4 person. Families with children status also applies to any person who
5 is pregnant or is in the process of securing legal custody of any
6 individual who has not attained the age of eighteen years;

7 (21) "Covered multifamily dwelling" means: (a) Buildings
8 consisting of four or more dwelling units if such buildings have one or
9 more elevators; and (b) ground floor dwelling units in other buildings
10 consisting of four or more dwelling units;

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

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

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

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

22 (i) Is medically cognizable or diagnosable; or

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

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

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

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

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

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

5 NEW SECTION. Sec. 3. This act is remedial and retroactive and
6 shall apply to all claims which are not time barred, as well as all
7 claims pending in any court or agency at the time of enactment.

--- END ---

SENATE BILL 5340

State of Washington 60th Legislature 2007 Regular Session

By Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser

Read first time 01/17/2007. Referred to Committee on Judiciary.

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), overstepped the court's constitutional role of
8 deciding cases and controversies before it, and engaged in judicial
9 activism by significantly rewriting the state law against
10 discrimination. The legislature further finds that the law changed by
11 the court is of significant importance to the citizens of the state, in
12 that it determines the scope of application of the law against
13 discrimination, and that the court's deviation from settled law was
14 substantial in degree. The legislature reaffirms its intent that the
15 law against discrimination affords to Washington residents protections
16 that are wholly independent of those afforded by the federal Americans
17 with Disabilities Act of 1990, and rejects the opinion stated in
18 *McClarty v. Totem Electric*.

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

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

5 (1) "Person" includes one or more individuals, partnerships,
6 associations, organizations, corporations, cooperatives, legal
7 representatives, trustees and receivers, or any group of persons; it
8 includes any owner, lessee, proprietor, manager, agent, or employee,
9 whether one or more natural persons; and further includes any political
10 or civil subdivisions of the state and any agency or instrumentality of
11 the state or of any political or civil subdivision thereof;

12 (2) "Commission" means the Washington state human rights
13 commission;

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

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

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

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

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

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

31 (9) "Full enjoyment of" includes the right to purchase any service,
32 commodity, or article of personal property offered or sold on, or by,
33 any establishment to the public, and the admission of any person to
34 accommodations, advantages, facilities, or privileges of any place of
35 public resort, accommodation, assemblage, or amusement, without acts
36 directly or indirectly causing persons of any particular race, creed,
37 color, sex, sexual orientation, national origin, or with any sensory,

1 mental, or physical disability, or the use of a trained dog guide or
2 service animal by a ((disabled)) person with a disability, to be
3 treated as not welcome, accepted, desired, or solicited;

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

33 (11) "Real property" includes buildings, structures, dwellings,
34 real estate, lands, tenements, leaseholds, interests in real estate
35 cooperatives, condominiums, and hereditaments, corporeal and
36 incorporeal, or any interest therein;

37 (12) "Real estate transaction" includes the sale, appraisal,

1 brokering, exchange, purchase, rental, or lease of real property,
2 transacting or applying for a real estate loan, or the provision of
3 brokerage services;

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

9 (14) "Sex" means gender;

10 (15) "Sexual orientation" means heterosexuality, homosexuality,
11 bisexuality, and gender expression or identity. As used in this
12 definition, "gender expression or identity" means having or being
13 perceived as having a gender identity, self-image, appearance,
14 behavior, or expression, whether or not that gender identity, self-
15 image, appearance, behavior, or expression is different from that
16 traditionally associated with the sex assigned to that person at birth;

17 (16) "Aggrieved person" means any person who: (a) Claims to have
18 been injured by an unfair practice in a real estate transaction; or (b)
19 believes that he or she will be injured by an unfair practice in a real
20 estate transaction that is about to occur;

21 (17) "Complainant" means the person who files a complaint in a real
22 estate transaction;

23 (18) "Respondent" means any person accused in a complaint or
24 amended complaint of an unfair practice in a real estate transaction;

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

37 (20) "Families with children status" means one or more individuals
38 who have not attained the age of eighteen years being domiciled with a

1 parent or another person having legal custody of such individual or
2 individuals, or with the designee of such parent or other person having
3 such legal custody, with the written permission of such parent or other
4 person. Families with children status also applies to any person who
5 is pregnant or is in the process of securing legal custody of any
6 individual who has not attained the age of eighteen years;

7 (21) "Covered multifamily dwelling" means: (a) Buildings
8 consisting of four or more dwelling units if such buildings have one or
9 more elevators; and (b) ground floor dwelling units in other buildings
10 consisting of four or more dwelling units;

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

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

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

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

22 (i) Is medically cognizable or diagnosable; or

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

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

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

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

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

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

5 NEW SECTION. **Sec. 3.** This act is remedial and retroactive and
6 shall apply to all claims which are not time barred, as well as all
7 claims pending in any court or agency at the time of enactment.

--- END ---

Multiple Agency Fiscal Note Summary

Bill Number: 5340 S SB	Title: Definition of disability
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Estimated Cash Receipts

Agency Name	2007-09		2009-11		2011-13	
	GF- State	Total	GF- State	Total	GF- State	Total
Total \$						

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

Estimated Expenditures

Agency Name	2007-09			2009-11			2011-13		
	FTEs	GF- State	Total	FTEs	GF- State	Total	FTEs	GF- State	Total
Administrative Office of the Courts	.0	0	0	.0	0	0	.0	0	0
Office of Financial Management	.0	0	0	.0	0	0	.0	0	0
Human Rights Commission	.0	0	0	.0	0	0	.0	0	0
Total	0.0	\$0	\$0	0.0	\$0	\$0	0.0	\$0	\$0

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

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Prepared by: Nick Lutes, OFM	Phone: 360-902-0570	Date Published: Final 2/28/2007
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* See Office of the Administrator for the Courts judicial fiscal note

** See local government fiscal note
FNPID: 16833

Judicial Impact Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 055-Admin Office of the Courts
-------------------------------	--	---

Part I: Estimates

No Fiscal Impact

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Julia Appel	Phone: (360) 705-5229	Date: 02/28/2007
Agency Approval: Jeff Hall	Phone: 360-357-2131	Date: 02/28/2007
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 02/28/2007

Request # -1

Bill # 5340 S SB

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

The substitute bill does not change the expected fiscal impact to the courts.

This bill provides a definition of "Disability" under RCW 49.60.040. According to the Washington State Human Rights Commission, this bill essentially restores the definition of disability under RCW 49.60 to the status quo before the State Supreme Court decision in McClarty v. Totem Electric. As such, no change in civil filings is expected.

II. B - Cash Receipts Impact

II. C - Expenditures

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Individual State Agency Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 105-Office of Financial Management
-------------------------------	--	---

Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Betty Reed	Phone: 360-902-7304	Date: 02/28/2007
Agency Approval: Aaron Butcher	Phone: 360-902-0406	Date: 02/28/2007
OFM Review: Mike Woods	Phone: 360-902-9819	Date: 02/28/2007

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

The purpose of the bill is to amend RCW 49.60.040 to include the definition of disability.

Section 1 states that the legislature finds the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), was incorrect, in that it failed to recognize that the law against discrimination affords to Washington 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.

Section 2 (25) adds the definition of disability to RCW 49.60.040.

Section 2 (25)(d)(ii) states that "The reasonable likelihood that job-related factors will aggravate it to the extent that it could create a substantially limiting effect if not accommodated." While this language might expand liability, we don't think it's direct enough to justify a fiscal impact.

Please keep in mind the OFM fiscal note only deals with potential cost of claims, not the cost to agencies for reasonable accommodation.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

Individual State Agency Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 120-Human Rights Commission
-------------------------------	--	--

Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Renee Knight	Phone: 360-753-6777	Date: 02/28/2007
Agency Approval: Marc Brenman	Phone: (360) 753-2558	Date: 02/28/2007
OFM Review: Nick Lutes	Phone: 360-902-0570	Date: 02/28/2007

Request # SSB 5340-1

Bill # 5340 S SB

From Don Moreland
2/23/2007
Not distributed
eg

Advisory Council on Aging and Disability Services

Creating choices for elders and adults with disabilities in Seattle-King County

Mailing Address: PO Box 34125, Seattle, WA 98124-4215

Office Address: Seattle Municipal Tower, 700 5th Ave, 51st Floor

Tel: 206-684-0660 TTY: 206-684-0274 FAX: 206-684-0689

www.adsadvisorycouncil.org

January 19, 2007

The Honorable Adam Kline
223 John A. Cherberg Building
PO Box 40437
Olympia, WA 98504-0437

Dear Senator Kline,

I would like to thank you and your co-sponsors for championing Senate Bill 5340, which would reject the Supreme Court's majority opinion in *McClarty v. Totem*. The Seattle-King County Advisory Council on Aging and Disability Services strongly supports this bill, as well as its House counterpart HB 1322.

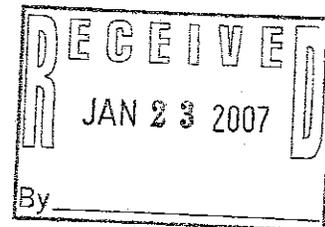
The Supreme Court's decision represents a severe setback for the rights of people with disabilities. As you know, federal law does not classify several conditions – such as epilepsy, multiple sclerosis, Lou Gehrig's disease, and bipolar disorder – as disabilities. Adopting the federal standards will likely result in the failure of thousands of Washingtonians to receive the accommodations they need to function effectively in the workplace. Perversely, it will likely result in higher costs to taxpayers as fewer Washingtonians with disabilities are able to support themselves.

We find the proposed definition of "disability" in SB 5340 much more realistic and accommodating to the needs of persons with disabilities, and strongly support the passage of this important measure.

Sincerely,

Don Moreland
gc

Don Moreland
Chair



In association with the Area Agency on Aging for Seattle-King County and sponsored by:



From 3
2/23/2007
Not Distributed

eg

Houghton, Bryn

From: Kris Tefft [KrisT@AWB.ORG]
Sent: Monday, February 12, 2007 11:47 AM
To: Kline, Sen. Adam; murray.ed@leg.wa.gov; Tom, Sen. Rodney; McCaslin, Sen. Bob; Carrell, Sen. Michael; Hargrove, Sen. Jim; Roach, Sen. Pam; Weinstein, Sen. Brian
Subject: AWB position on SB 5340 (Definition of "Disability" for Law Against Discrimination)

Dear Members of the Senate Judiciary Committee:

I am writing this e-mail at the request of Chairman Kline to update you on AWB's position with respect to SB 5340, clarifying the definition of "disability" for purposes of Washington's Law Against Discrimination, RCW ch. 49.60. AWB initially testified opposed to this bill when it was heard in committee. In the meantime, some very fruitful discussions took place between myself, Senator Kline, and advocates for the bill. Some very reasonable accommodations were made resulting in a substitute version of the bill. With respect to the proposed substitute, AWB is neutral and favorably views the direction the amendment is going.

Please feel free to get in touch with me if you would like any further specific information.

Best regards,

Kris

Kristopher I. Tefft
General Counsel
Governmental Affairs Director, Employment Law
Association of Washington Business
1414 Cherry Street SE
PO Box 658
Olympia, WA 98507
(360) 943-1600
(360) 870-2914 cellular
(360) 943-5811 facsimile
krist@awb.org
www.awb.org

Restoration of Protection Against Discrimination for People with Disabilities

POSITION PAPER

Association of Centers for Independent Living in Washington

The Association of Centers for Independent Living in Washington (ACIL-WA) works with many of the over 1 million Washington residents with disabilities who choose to live independently in the community. ACIL-WA consists of seven Centers for Independent Living -- Alliance of People with Disabilities (Redmond and Seattle), Center For Independence (Lakewood), Central Washington Disability Resources (Ellensburg), Coalition of Responsible Disabled (Spokane), disAbility Resource Connection (Everett), and disAbility Resources of Southwest Washington (Vancouver)

For thirty years, people with disabilities living in the State of WA have been protected from discrimination in housing, employment, public accommodation (stores, hotels, government services, etc.) credit and insurance by the Washington's Law Against Discrimination (RCW 49.60). WA State's Law provided protection independent from those in the federal Americans with Disabilities Act (ADA) of 1990 (Public Law 101-336).

In *McClarty v Totem Electric* (July 6, 2006), the Washington State Supreme Court eliminated the WA State definition and chose the narrowed ADA definition. The federal definition provides a floor of protection that has been narrowed through years of federal court decisions. The *McClarty* decision narrows the scope of application and eliminates protection for people with temporary disabilities and conditions that can be ameliorated or mitigated by medication. As a result of the *McClarty* decision, many people with disabilities such as mental illness, diabetes, epilepsy, heart conditions and multiple sclerosis have lost protection from discrimination in housing, employment, credit and insurance.

Until the *McClarty* decision, Washington State had been a leader in assuring protection from discrimination for people with disabilities. ACIL-WA strongly urges the legislature to consider the importance of restoring WA State's Law of Discrimination to people with disabilities in the State of WA. For information, please contact any of the Directors of the Center for Independent Living in WA.

Signed,

The Board of Directors and Staff of
Alliance of People with Disabilities (Redmond and Seattle),
Center For Independence (Lakewood),
Central Washington Disability Resources (Ellensburg),
Coalition of Responsible Disabled (Spokane),
disAbility Resource Connection (Everett), and
disAbility Resources of Southwest Washington (Vancouver)

5340

January 23, 2007

disAbility Resource Connection
607 SE Everett Mall Way, Suite C
Everett, WA 98208
Phone/TTY: (425) 347-5768
Fax: (425) 710-0767
Email: drcnet@drconline.net
www.drconline.net

disAbility Resources of Southwest Washington (DARSW)
2700 NE Andresen Rd. Suite D-5
Vancouver, WA 98662
Phone: (360) 694-6790
Fax/TTY: (360) 882-1324
Email: disabilityresources@darswa.com

DARSW Extension Office for Cowlitz & Wahkiakum Counties
1339 Commerce Av. Suite 302
Longview, WA. 98632
360-425-0340

Alliance of People with disAbilities

ROBERT BLUMENFELD
Manager, East King County Office

16315 NE 87th St Suite B-3
Redmond, WA 98052
robert@disabilitypride.org
www.disabilitypride.org

425.558.0993 V
425.861.9588 TTY
425.558.4773 Fax
1.800.216.3335

Testimony by Attorney General on Proposed Substitute HB 1322

1. This bill in Section (25)(a) codifies the HRC's WAC definition of "disability" found in WAC 162-22-020.

In Section (25)(b), this bill codifies and expands the definition of "disability" to clarify that a disability exists regardless of whether the condition is temporary, permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability of an individual to work generally or at a particular job, or limits any other activity in the chapter.

2. Section (25)(c) expands the definition of "disability" to include "impairments." The impairments are broadly defined, to include emotional or mental illness. The EEOC has issued guidance on the federal definition under the Americans with Disabilities Act (ADA) and that guidance discusses impairments. Historically, having an impairment did not necessarily qualify a person as being disabled under the ADA.

3. Section (25)(d)(i) qualifies the definition of "disability" for accommodation purposes. The bill adopts the definition for accommodation purposes adopted by the Washington Supreme Court in Pulcino (that the disability for accommodation purposes must have a substantially limiting effect upon the individual's ability to perform his or her job). The bill clarifies that this more narrow definition also applies to the hiring process, and also to an individual's access to equal benefits, privileges, or terms or conditions of employment.

4. Section (25)(d)(ii) provides for a significant expansion of Washington law, well beyond the law that existed pre-McClarty v. Totem Electric (which decision the Washington Supreme Court issued on July 6, 2006 adopted the federal ADA definition of disability for all purposes under Washington's Law Against Discrimination). This section requires an employer to accommodate an employee who has a condition that doesn't qualify for accommodation under section (d)(i), but who has a "reasonable likelihood" that job-related factors "will aggravate" the condition, if it continued.

This section would require an employer to second guess or speculate on how the job might impact the employee's potential "disability" or potential "impairment," even in the absence of medical documentation or a medical necessity to accommodate. The bill does not specify how the employer would determine the "reasonably likelihood" factors.

This section would require the employer to perceive the employee as if he/she were "disabled" in the future or had an "impairment" in the future in order to determine if the position's essential functions would be aggravated if the disability or impairment existed and then was aggravated. Washington's law against discrimination prohibits "perceived as" discrimination under Section (25)(a)'s definition and in prior Washington case law. Implementation of this section would be problematic and would lead to significantly increased potential liability for employers. Disputes over the meaning of the terms used in this section would result in increased litigation and costs and increased uncertainty for employers and employees in Washington about when the duty to accommodate existed.

This is particularly true because no other state would have such a broad duty to accommodate nor is there existing case law to provide guidance on how far such a duty should extend. The EEOC's interpretative guidance would not be helpful because the intent of this legislation is to overturn the McClarty decision and the EEOC's interpretive guidance only applies to the ADA definition of disability. Further, all other disability legislation requires the employer to examine the individual as they currently are, without looking back (record of claims) and without looking forward (perceived as claims). This section rejects that approach and stands unique among all other federal or state anti-discrimination statutes.

The retroactivity provision should be limited to the date of the decision in McClarty, which was July 6, 2006. Otherwise, the bill would penalize employers who were following existing Washington law over the past several years and allow for a reexamination of every denial of a reasonable accommodation or hiring decision over the past three years.

Recommendation:

1. Delete Section (25)(d)(ii) in its entirety.
2. Amend Section 2 to read as follows:

This act is remedial and retroactive to July 6, 2006 on the effective date of this act.

Noel, Dawn

From: Sutton, Lisa (ATG) [LisaS1@ATG.WA.GOV]
Sent: Wednesday, February 07, 2007 11:36 AM
To: Noel, Dawn
Subject: Disability bill

On the sign in sheet, please list my name in the "Other" category and for the Bill Report.
Thank you.

Please save paper by printing only when necessary.

Lisa Sutton, AAG
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300 Office
(360) 586-6655 Fax

Legal Assistant, Beverly Gunkel
(360) 586-6421
Paralegal, Linda Foster
(360) 586-6421

Noel, Dawn

From: Sutton, Lisa (ATG) [LisaS1@ATG.WA.GOV]
Sent: Wednesday, February 07, 2007 5:30 PM
To: Noel, Dawn
Subject: RE: Disability bill
Attachments: AG testimony on SB 5340.doc

I had a chance after the brief to finalize this.

Testimony on S-0124, SB 5340

The Attorney General's Office testified on SB 5340 on behalf of state agency employers.

The Attorney General's testimony addressed concerns with the bill as drafted.

The bill defines "disability" more broadly than had previously been defined in Washington case law or in the Human Rights Commission's WAC 162-22-020.

The bill defines "impairment" broadly and such overly broad definition would result in providing protected legal status for unintended situations. The result of this expanded definition of "disability" will greatly expand liability and related litigation.

The bill contains the unnecessary and erroneous assumption that the definition of "disability" for purposes of preventing discrimination against persons with disabilities needs to be the same as the definition of "disability" for purposes of accommodation. The bill does not address the differences between these two distinct purposes in this area of law. The bill does not require that the disability impact the employee's ability to perform the essential functions of his/her position. The bill does not codify the trilogy of cases which have clarified Washington's definition of "disability" and provided a workable approach. The bill also goes beyond overturning the Washington Supreme Court's decision in McClarty v. Totem Electric.

The bill contains a remedial and retroactive provision which will impact existing accommodations that have been reached between employees and employers.



City of Seattle

Gregory J. Nickels, Mayor

Seattle Office for Civil Rights

Germaine W. Covington, Director

January 10, 2006

H. Senator Adam Kline
37th Legislative District
Olympia Office:
223 John A. Cherberg Building
PO Box 40437
Olympia, WA 98504-0437

Dear Senator Kline:

I wholeheartedly endorse the Senate Judiciary Committee's efforts to repair the damage done to Washington State disability laws by the McClarty State Supreme Court decision.

The State Supreme Court's decision in this case is difficult to understand. At no time was the court asked to redefine the definition of "disability"; in fact in the dissent of this decision, three justices asked why the court was even contemplating this action, as it was not the issue placed before them. With no legal briefs submitted to show if such a determination was needed or to illustrate the effects of such a decision, the court handed down a ruling that will negatively impact thousands of Washington residents.

With this ruling, many Washington residents who have received disability protection under state law are no longer covered under the more restrictive definition of disability articulated in the federal Americans with Disabilities Act (ADA). Washington residents who may have been discriminated against based on disability must now prove that they are disabled under federal guidelines before the complaint can proceed. Situations involving service animals now turn on whether complainants qualify as disabled under federal law, not if they were discriminated against.

Washington has always been a leader in civil rights, and the state's laws protecting people with disabilities were part of that effort. These laws have been in place for over 30 years and have not created a groundswell of opposition; yet now they have been pared back to match the federal government's more meager protection.

The State Supreme Court's ruling runs counter to the state's commitment to all of its residents. In November 2006, the Washington State Building Code Council decided not to reduce the 5% requirement for accessible housing in apartment buildings with 10 or more units. The Council's decision came after citizens pointed out that the state's disabled community was growing and that we needed to ensure the availability of accessible housing. The Council listened to all sides of the argument and adopted the appropriate policy.

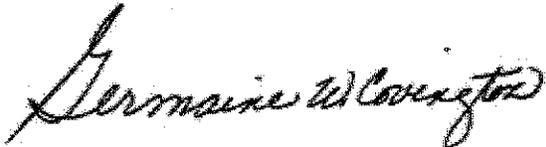
700 Third Avenue, Suite 250, Seattle, WA 98104-1849

Tel: (206) 684-4500, Fax: (206) 684-0332, TYY (206) 684-4503, website <http://www.cityofseattle.net/civilrights/>
An equal opportunity - affirmative action employer. Accommodations for people with disabilities provided upon request.

Neither the people of Washington State nor its elected legislature have requested reduced protection for people with disabilities. The State Legislature has always supported granting its citizens greater protections than those offered by the federal ADA.

I urge the Legislature to demonstrate this commitment once again.

Respectfully

A handwritten signature in cursive script that reads "Germaine Covington". The signature is written in black ink and is positioned above the typed name.

Germaine Covington
Director

Restore protection from disability discrimination

Amend the definition of disability in RCW 49.60

SUPPORTERS

- A Village Project II Parent Partners
- Alliance of People with DisAbilities
- Arc of Washington
- Center for Independence
- Central Washington Disability Resource
- Coalition of Responsible Disabled
- Community Transformation Partnership
- Consumer Voices are Born
- disAbility Resource Connection
- disAbility Resources of Southwest Washington
- Fetal Alcohol Syndrome (FAS) Family Resource Institute
- Governors Committee on Disability Issues & Employment
- National Alliance of the Mentally Ill (NAMI) of Greater Seattle
- New Century Coalition
- Paralyzed Veterans of America (PVA)
- People First of Washington
- Rose House Consumer Clubhouse
- Self-Advocates in Leadership (SAIL)
- Statewide Ombuds Providers
- WA Centers for Independent Living Association
- WA Employment Lawyers Association
- Washington Health Empowerment Network (WHEN)
- Washington PAVE
- Washington Protection & Advocacy System (WPAS)
- Washington State Clubhouse Coalition
- Washington State Human Rights Commission
- Washington State Labor Council
- Washington State Rehabilitation Council
- Mary McKnew, President, Washington State Special Ed Coalition

PROBLEM

The Washington Law Against Discrimination (RCW 49.60) no longer protects a person with a disability from discrimination if the disability can be "mitigated" or "ameliorated" by medications, treatments, or other means. People with "temporary" disabilities are also no longer protected.

BACKGROUND

On July 6, 2006, in the case of *McClarty v Totem Electric*, the Washington State Supreme Court abruptly eliminated protection from discrimination for thousands of people with disabilities. The decision severely narrowed the scope of the definition of disability in the Washington State Law Against Discrimination.

Our state's anti-discrimination law protects people from discrimination at work, in housing, in public accommodations (stores, hotels, government services, etc.), and with credit and insurance. In the past, our state's law protected people with a broad range of disabilities – broader than the Americans with Disabilities Act (ADA). Unfortunately, the United States Supreme Court has narrowed the ADA definition to exclude individuals whose disability could be "ameliorated".

In the *McClarty* case, the Washington Supreme Court adopted this narrower ADA definition of disability for Washington State. As a result, individuals with a wide range of significant disabilities no longer have protection against discrimination.

WHO IS NO LONGER PROTECTED FROM DISCRIMINATION?

As a result of the *McClarty* decision, discrimination is no longer prohibited against many people who had been protected by state law for the past thirty years. People with the disabilities listed below or any disability that can be "ameliorated" may lose protection from discrimination:

<i>Epilepsy</i>	<i>Mental illness</i>	<i>Post-traumatic stress</i>
<i>Multiple sclerosis</i>	<i>Hypertension</i>	<i>Heart Conditions</i>
<i>Diabetes</i>	<i>Depression</i>	<i>Temporary disabilities</i>

Unfortunately, people with disabilities continue to face stigma and discrimination in employment, housing, education, and other areas.

LEGISLATION

Advocates are working for legislation to restore protections from discrimination to people with disabilities cast out by the *McClarty* case.

FOR MORE INFORMATION

David Lord *Washington Protection and Advocacy System*
(800) 562-2702 ext 219; davidl@wpas-rights.org

Marc Brenman, *Washington State Human Rights Commission*
(360) 753-2558 mbrenman@hum.wa.gov

Jeanette Murphy, *Alliance of People with disAbilities*
206-545-7055; jeanette@disabilitypride.org

Central Washington Disability Resources

422 North Pine St., Ellensburg, WA 98926

Phone (509)-962-9620 V/TTY Toll Free (800)-240-5978 V/TTY Fax (509)-933-1571

Email yon@cwdrinfo.org

January 9th, 2006

Attn: Senator Adam Kline, Chair
Senate Judiciary Committee

From: Von M. Elison, Executive Director
Center Washington Disability Resources (CWDR)
422 North Pine St.
Ellesnburg, WA 98926

Re: S-0543.2

On July 6, 2006, the Washington State Supreme Court, in *McClarty v. Totem Electric*, significantly narrowed the definition of disability in Washington State by no longer providing protection from discrimination to those individuals whose disabilities can be ameliorated or treated. Until the *McClarty* decision, Washington State had been a leader in granting the broadest protection from discrimination to the greatest number of individuals with disabilities. As it currently stands, people with mental illnesses, epilepsy, diabetes, multiple sclerosis, heart conditions, and those with temporary disabilities may no longer be considered disabled and therefore not protected from discrimination.

The result of this narrowed definition has tremendous implications for people with disabilities in all areas of life, including housing, public accommodations such as stores, hotels, government services, credit and insurance issues and, most notably, employment situations. As a person with epilepsy whose accommodations are critical to my own independence, financial solvency, and quality of life, and as a supervisor who provides accommodations to individuals who have similar barriers, I am convinced that the *McClarty* decision will actually reduce the ability of many individuals to continue to be employed.

The Washington State Legislature has the opportunity to demonstrate justice and continue to protect all persons with disabilities from discrimination through supporting S-0543.2.

Dear Senator Adam Kline and Committee Members:

My name is CHERIE R. TESSIER, I am writing about the Senate Bill that has to do with the definition of Disability.

First I want to thank you for two reasons: One is for introducing this bill and hearing it today.

Secondly: for catching the mistakes of using the Respectful Language, when you started just using the old way.

I need to clarify in section 2 paragraph 9, the last three lines of this. About the statement of guide dogs and service animals, in here you mention that they are not welcomed or accept and others. But further down in paragraph 23 and 24 there mention again and or welcome. I believe the American Disability Law says that they are supposed to be welcome and accepted in all places. Especially in courthouses, libraries and other places, these animals are necessary for people to use.

Thank you for reading my written testimony as I could not testified today as I have no voice.

Sincerely yours:



CHERIE R. TESSIER
120 NE State Ave #273
Olympia, WA 98501-8212
360-943-6399

Washington Council of the Blind



P.O. Box 1085
Tracyton, WA 98393-1085

<http://www.wcbinfo.org>
1-800-255-1147

January 10, 2007

To: the members of the Senate Judiciary Committee
From: Cindy Van Winkle, President Washington Council of the Blind
RE: Support of the Restoration of Civil Rights to Washingtonians with disabilities

I am writing on behalf of the Washington Council of the Blind to advise the committee that our organization is in support of restoring the state's definition of disability under the Washington Law Against Discrimination to the original definition that has successfully been in use for over 30 years, or to one being proposed, through a legislative remedy, that is much broader than the ADA one. This definition explicitly covers temporary disabilities, ameliorated and mitigated disabilities, and disability from doing a particular job.

The Washington Council of the Blind believes that civil rights should be for anybody with a physical, mental or sensory disability, per the law, and people shouldn't be denied coverage solely on the basis of certain physical mental or sensory conditions.

The Washington Council of the Blind is the largest consumer organization of blind people in the state of Washington. While blindness is the primary disability of the majority of our members, the narrowing of the definition of disability significantly impacts blind people with secondary conditions such as diabetes and psychiatric disabilities.

Anyone can become a person with a disability. As we grow older, the more likely it becomes. Disability access issues affect us all.

I am available to answer questions regarding this issue at any time. Your consideration in this matter is greatly appreciated.

Testimony of Frank Jose and Joyce Abraham

National Alliance on Mental Illness Greater Seattle (NAMI GS)

Senate Judiciary Committee

January 12, 2007

No. 75024-6
SUPREME COURT
OF THE STATE OF WASHINGTON

KENNETH McCLARTY,

Respondent,

v.

TOTEM ELECTRIC COMPANY,

Petitioner.

**DECLARATION OF FRANK JOSE IN SUPPORT OF MOTION TO
APPEAR AS AMICUS CURIAE**

Deborah A. Dorfman
WSBA No. 23823
Washington Protection and
Advocacy System, Inc.
315 - 5th Avenue South, Suite 850
Seattle, Washington 98104
(206) 324-1521

Proposed Amicus Curiae

illness and that people are not "cured". The new definition will not only affect the individual with a mental illness but also involved family members who will be required to deal with the consequences of the loss of protections for their loved one.

4. I am currently a member of the Board of Directors of the Washington Coalition for Insurance Parity ("WCIP"). I have served on the Board for four years. I served on the Executive Committee from 2003 until 2005. WCIP has a mission to end discrimination in mental health insurance coverage in Washington State. WCIP has a membership of over 140 organizations statewide. These organizations represent a broad cross-section of the community, including advocacy groups; non-profit organizations; hospitals, physicians, nurses, and other providers; unions; several businesses; and religious organizations. The coalition is governed by a board of 15 directors. The board members manage and coordinate the legislative and advocacy agenda for the coalition. WCIP successfully advocated for the enactment of mental health parity legislation. The legislation was signed into law by Governor Gregoire on March 9, 2005. As a result of this new parity law, health plan coverage of mental health services for nearly 1.5 million Washington residents will improve over the next several years. Many people are now able to access mental health coverage through employer sponsored health insurance. With the limiting

definition under the ADA we believe an employee is at higher risk for discrimination based on their mental health status.

5. I am familiar with the arguments presented by the parties in this case. I have reviewed the opinions of the Court, and am familiar with the facts and issues in this case.

6. NAMI GS joins WPAS in seeking leave of court to file an amicus curiae brief in support of petitioner McClarty's Motion to Reconsider, by addressing the urgent need for the Court to reconsider its decision with regard to the adoption of the definition of disability as set forth in the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* and defined by the United States Supreme Court in *Toyota Motor Mfg. Kentucky Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 1991 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), in disability discrimination cases brought in Washington state under the Washington Law Against Discrimination (WLAD), RCW 49.60. The brief that proposed amici submits to this Court with its Motion to Appear as Amicus Curiae specifically addresses the negative impact upon people with disabilities in the state of Washington as result of the adoption of the ADA definition of disability in WLAD disability discrimination cases.

7. Additional support is necessary on these issues as the parties have not sufficiently addressed these significant issues. Given their in-depth knowledge regarding issues involving people with disabilities, including but not limited to issues as they relate to employment discrimination based upon disability, proposed amici are in the best position to address these issues in their proposed amicus curiae brief filed herewith.

8. I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 27th day of July, 2006 at Seattle, Washington.

Frank Jose, Executive Director
NAMI Greater Seattle

SUBSTITUTE SENATE BILL 5340

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), was incorrect, in that it failed to recognize that the
8 law against discrimination affords to Washington residents protections
9 that are wholly independent of those afforded by the federal Americans
10 with Disabilities Act of 1990, and that the law against discrimination
11 has 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 have:

37 (i) A substantially limiting effect upon the individual's ability

1 to perform his or her job, the individual's ability to apply or be
2 considered for a job, or the individual's access to equal benefits,
3 privileges, or terms or conditions of employment; or

4 (ii) The reasonable likelihood that job-related factors will
5 aggravate it to the extent that it could create a substantially
6 limiting effect if not accommodated.

7 (e) For purposes of (d) of this subsection, a limitation is
8 substantial if it has more than a trivial effect.

9 NEW SECTION. Sec. 3. This act is remedial and retroactive, and
10 applies to all claims that are not time barred, as well as all claims
11 pending in any court or agency on the effective date of this act.

--- END ---

REPORT OF STANDING COMMITTEE

HOUSE OF REPRESENTATIVES

Olympia, Washington

March 23, 2007

(date reported out of committee)

Substitute Senate Bill

NO. 5340

Prime Sponsor: Committee on Judiciary

Addressing the definition of disability.

As reported by Committee on Judiciary (11)

MAJORITY recommendation: Do pass.

MAJORITY recommendation: The substitute bill be substituted therefor and the substitute bill do pass.

MAJORITY recommendation: Do pass as amended.

MAJORITY recommendation on consecutively referred bill:

(7)

Signed by Representatives



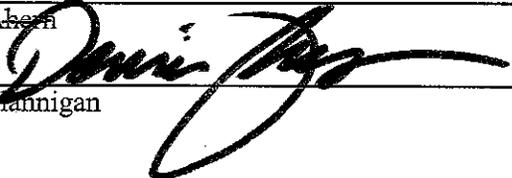
Lantz Chair



Goodman Vice Chair

Rodne Ranking Minority Member

Warrick Assistant Ranking Minority Member



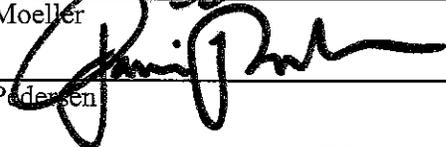
Abern
Flannigan



Kirby



Moeller



Pedersen

Ross



Williams

Check here if Minority Report requested (see attached).
Attachment: Roll Call Vote

REPORT OF STANDING COMMITTEE

HOUSE OF REPRESENTATIVES

Olympia, Washington

March 23, 2007

(date reported out of committee)

Substitute Senate Bill

NO. 5340

Prime Sponsor: Committee on Judiciary

Addressing the definition of disability.

As reported by Committee on Judiciary (11)

MINORITY recommendation: Do not pass.
 MINORITY recommendation: Without recommendation.

(4)

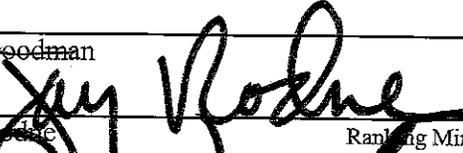
Signed by Representatives


Eantz Chair

Kirby

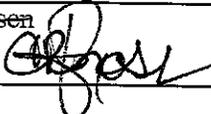
Goodman Vice Chair

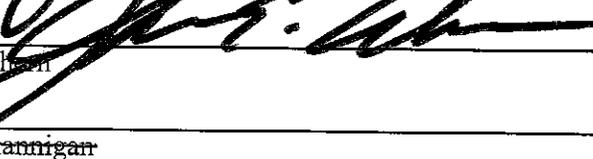
Moeller


Rodne Ranking Minority Member

Pedersen


Warrick Assistant Ranking Minority Member


Ross


Flannigan

Williams

MINORITY REPORT

HOUSE BILL REPORT

SSB 5340

As Reported by House Committee On:
Judiciary

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Defining disability in the Washington law against discrimination.

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

Brief History:

Committee Activity:

Judiciary: 3/21/07, 3/23/07 [DPA].

Brief Summary of Substitute Bill
(As Amended by House Committee)

- Provides a statutory definition of "disability" for purposes of the state's law against discrimination that replaces definitions of "disability" adopted by the Human Rights Commission and the Washington State Supreme Court.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 7 members: Representatives Lantz, Chair; Goodman, Vice Chair; Flannigan, Kirby, Moeller, Pedersen and Williams.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern and Ross.

Staff: Bill Perry (786-7123).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

The state Law Against Discrimination provides that a person has the right to be free from discrimination based on a number of factors. One of these factors is the presence of any "sensory, mental, or physical disability."

The right to be free from discrimination based on such a disability applies to employment, public accommodations, real estate transactions, insurance, and commerce.

In addition, the Law Against Discrimination defines certain practices to be unfair. For example, it is an unfair practice to refuse to hire or fire a person, or to discriminate in a person's compensation, based on the presence of any sensory or physical disability. Under case law, employers are required to make "reasonable accommodations" for an employee with a disability. There are also other specific unfair practices defined in the Law Against Discrimination with respect to public accommodations, real estate transactions, insurance, financial institutions, credit transactions, and labor union practices.

The Washington State Human Rights Commission (WSHRC) has responsibility for taking complaints of violations of the Law Against Discrimination and for seeking resolution of complaints and enforcement of the law.

There is no definition of "sensory, mental, or physical disability" in the Law Against Discrimination itself. There is, however, a definition in the administrative rules of the WSHRC. For purposes of those rules, the phrase means a condition that:

- is medically cognizable or diagnosable;
- exists as a record or history;
- is perceived to exist whether or not it exists in fact.

For purposes of employment discrimination under the WSHRC rules, a condition is a "sensory, mental, or physical disability" if it "is an abnormality and is a reason why" the person was discriminated against. This definition has been criticized by courts and commentators as circular because it appears to say a condition is a disability if it is a reason for discrimination.

In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629 (2000), the state Supreme Court noted the difficulties with the WSHRC rule and announced the test for disability in employment discrimination cases to be whether or not a claimant's condition:

- either: (1) is medically cognizable or diagnosable, or (2) exists as a record or history; and
- has a substantially limiting effect on the claimant's ability to perform his or her job.

The federal Americans with Disabilities Act (ADA) has yet another definition of "disability." The state Supreme Court recently rejected both the WSHRC rule and its own earlier *Pulcino* test. The court adopted the ADA definition of "disability" in an employment discrimination

case, *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006). The test for a "disability" announced by the court is whether or not a person:

- has a physical or mental impairment that substantially limits one or more major life activities; and
 - has a record of such an impairment; or
 - is regarded as having such an impairment.
-

Summary of Amended Bill:

A statutory definition is provided for the term "disability" within the state's Law Against Discrimination.

A disability is a sensory, mental, or physical impairment that:

- is medically cognizable or diagnosable; or
- exists as a history; or
- is perceived to exist.

A disability exists whether or not an impairment:

- is temporary, common, or mitigated; or
- limits the ability to work or do any other activity under the Law Against Discrimination.

An impairment includes any physiological disorder, cosmetic disfigurement, or anatomical loss affecting enumerated body systems, as well as mental, developmental, traumatic, or psychological disorders.

However, for purposes of the requirement for reasonable accommodation in employment, an impairment must either:

- have a substantial limiting effect on performing or applying for a job, or accessing equal job benefits, privileges, terms, or conditions; or
- present a reasonable likelihood that a job will aggravate the impairment so that it becomes substantially limiting.

These changes apply retroactively to all cases pending or not time-barred on the effective date of the act.

Amended Bill Compared to Substitute Bill:

The amended bill does not contain the findings section that is in the substitute bill. The removed section finds that the *McClarty* opinion was incorrectly decided.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) This is a carefully worked out bill that just synthesizes the pre-*McClarty* law in Washington. The bill gets its definition from three sources: The current WHRC regulation, but without the problem of circularity found in that rule; the regulations of the Equal Employment Opportunity Commission; and the *Pulcino* decision of the Washington Supreme Court.

The suggestion that the ADA definition adopted in *McClarty* is settled law is just wrong. There is no clarity at all in the ADA definition. The ADA definition prevents cases from ever being decided on the merits. It fails to cover many people with progressive disabilities such as Amyotrophic Lateral Sclerosis, diabetes, or cancer. It actually provides an incentive for employers to fire an employee with such a condition before it progresses to the point where the ADA does recognize a disability.

The broad definition in the bill will not produce a flood of litigation. On the other hand, the ADA has resulted in endless litigation over the definition of disability, with cases never even getting to the question of discrimination. The federal courts have taken a very narrow view of the meaning of disability under the ADA, and the case law is confusing and unclear.

No one with a trivial condition like a receding hairline has ever brought a discrimination claim. The far greater threat is that under the ADA standard adopted in *McClarty*, people with real disabilities are unable to protect themselves from discrimination.

(Concerns) The retroactive application of the bill will penalize employers who have been complying in good faith with the current law.

(Opposed) The *McClarty* decision provided a definition of disability when there was none. The Washington Supreme Court explicitly noted that state courts will not be bound by the federal courts' interpretation of the ADA standard. The trouble with the ADA is not the law itself, it is the federal courts' interpretation of it.

The bill is so broad that even a receding hairline might be a disability. An "inability to perform" standard should apply to the definition in all cases, not just employment cases involving reasonable accommodation. The bill is not a return to prior law, because prior law would not cover such trivial conditions.

The bill would also cover even voluntarily induced, temporary disabilities such as recovery from elective laser eye surgery.

This broad definition will have the effect of further spreading already thin resources so that those most in need of protection will get less.

The bill's definition is way too broad and is so confusing that small businesses that do not have lawyers or human resources specialists will be unable to deal with it.

Persons Testifying: (In support) Senator Kline, prime sponsor; Skip Dreps, Paralyzed Veterans of America; Toby Olson, Governor's Committee on Disability Issues and Employment; Joelle Brouner, Washington State Rehabilitation Council; Mark Brenman and Shawn Murinko, Washington State Human Rights Commission; Marie Jubie; Jill Pugh, Washington State Trial Lawyers Association; Cherie Tessier; Paul Miller, University of Washington School of Law; and David Lord, Washington Protection and Advocacy System.

(Concerns) Natividad Valdez, Department of Personnel.

(Opposed) William Jeffrey, Associated General Contractors, National Electrical Contractors Association, Mechanical Contractors Association, and Washington Construction Industry Council; Shannon Ragonesi, Washington Defense Trial Lawyers; Mark Matthews, Associated Grocers; Paul Nordsletten, Association of Washington Cities; Carolyn Logue, National Federation of Independent Business; Gary Smith, Independent Business Association; and Vicky Marin, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: None.

By Representative Rodne

①
WITHDRAWN
3/23/07

SSB 5340 - H COMM AMD
By Committee on Judiciary

1 On page 5, line 13, after "means" strike everything through
2 "effect" on page 6, line 8, and insert ", with respect to an
3 individual:

4 (a) A physical or mental impairment that substantially limits
5 one or more of the major life activities of the individual;

6 (b) A record of such an impairment; or

7 (c) Being regarded as having such an impairment"

EFFECT: Defines "disability" with the definition found in the federal Americans with Disabilities Act, 42 USC §12102.

By Representative Lantz

(2)
ADOPTED
3/23/07

SSB 5340 - H COMM AMD
By Committee on Judiciary

- 1 On page 1, beginning on line 5, strike all of section 1
- 2 Renumber the remaining sections accordingly

EFFECT: Removes the legislative findings section of the bill that states that the *McClarty* opinion is incorrect for failing to recognize that Washington's anti-discrimination law is independent of the federal law.

Judiciary Committee

SSB 5340

Title: An act relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW.

Brief Description: Defining disability in the Washington law against discrimination.

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

Brief Summary of Substitute Bill

- Provides a statutory definition of "disability" for purposes of the state's law against discrimination; and
- Replaces definitions of "disability" adopted by the Human Rights Commission and the Washington State Supreme Court.

Hearing Date: 3/21/07

Staff: Bill Perry (786-7123).

Background:

The state Law Against Discrimination provides that a person has the right to be free from discrimination based on a number of factors. One of these factors is the presence of any "sensory, mental, or physical disability."

The right to be free from discrimination based on such a disability applies to employment, public accommodations, real estate transactions, insurance, and commerce.

In addition, the Law Against Discrimination defines certain practices to be unfair. For example,

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

it is an unfair practice to refuse to hire or fire a person, or to discriminate in a person's compensation, based on the presence of any sensory or physical disability. Under case law, employers are required to make "reasonable accommodations" for an employee with a disability. There are also other specific unfair practices defined in the Law Against Discrimination with respect to public accommodations, real estate transactions, insurance, financial institutions, credit transactions, and labor union practices.

The Washington State Human Rights Commission (WSHRC) has responsibility for taking complaints of violations of the Law Against Discrimination and for seeking resolution of complaints and enforcement of the law.

There is no definition of "sensory, mental, or physical disability" in the Law Against Discrimination itself. There is, however, a definition in the administrative rules of the WSHRC. For purposes of those rules, the phrase means a condition that:

- is medically cognizable or diagnosable;
- exists as a record or history;
- is perceived to exist whether or not it exists in fact.

For purposes of employment discrimination under the WSHRC rules, a condition is a "sensory, mental, or physical disability" if it "is an abnormality and is a reason why" the person was discriminated against. This definition has been criticized by courts and commentators as circular because it appears to say a condition is a disability if it is a reason for discrimination.

In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629 (2000), the state Supreme Court noted the difficulties with the WSHRC rule and announced the test for disability in employment discrimination cases to be whether or not a claimant's condition:

- either: (1) is medically cognizable or diagnosable, or (2) exists as a record or history; and
- has a substantially limiting effect on the claimant's ability to perform his or her job.

The Federal Americans with Disabilities Act (ADA) has yet another definition of "disability." The state Supreme Court recently rejected both the WSHRC rule and its own earlier *Pulcino* test. The court adopted the ADA definition of "disability" in an employment discrimination case, *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006). The test for a "disability" announced by the court is whether or not a person:

- has a physical or mental impairment that substantially limits one or more major life activities; and
- has a record of such an impairment; or
- is regarded as having such an impairment.

Summary of Bill:

The Legislature finds that *McClarty* was incorrectly decided because it fails to recognize that Washington's law predates and is independent of the ADA.

A statutory definition is provided for the term "disability" within the state's Law Against Discrimination.

A disability is a sensory, mental, or physical impairment that:

- is medically cognizable or diagnosable; or
- exists as a history; or
- is perceived to exist.

A disability exists whether or not an impairment:

- is temporary, common, or mitigated; or
- limits the ability to work or do any other activity under the Law Against Discrimination.

An impairment includes any physiological disorder, cosmetic disfigurement, or anatomical loss affecting enumerated body systems, as well as mental, developmental, traumatic, or psychological disorders.

However, for purposes of the requirement for reasonable accommodation in employment, an impairment must either:

- have a substantial limiting effect on performing or applying for a job, or accessing equal job benefits, privileges, terms, or conditions; or
- present a reasonable likelihood that a job will aggravate the impairment so that it becomes substantially limiting.

These changes apply retroactively to all cases pending or not time barred on the effective date of the act.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Multiple Agency Fiscal Note Summary

Bill Number: 5340 S SB	Title: Definition of disability
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Estimated Cash Receipts

Agency Name	2007-09		2009-11		2011-13	
	GF-State	Total	GF-State	Total	GF-State	Total
Total \$						

Local Gov. Courts *						
Local Gov. Other **						
Local Gov. Total						

Estimated Expenditures

Agency Name	2007-09			2009-11			2011-13		
	FTEs	GF-State	Total	FTEs	GF-State	Total	FTEs	GF-State	Total
Administrative Office of the Courts	.0	0	0	.0	0	0	.0	0	0
Office of Financial Management	.0	0	0	.0	0	0	.0	0	0
Human Rights Commission	.0	0	0	.0	0	0	.0	0	0
Total	0.0	\$0	\$0	0.0	\$0	\$0	0.0	\$0	\$0

Local Gov. Courts *									
Local Gov. Other **									
Local Gov. Total									

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Prepared by: Nick Lutes, OFM	Phone: 360-902-0570	Date Published: Final 2/28/2007
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* See Office of the Administrator for the Courts judicial fiscal note

** See local government fiscal note

Judicial Impact Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 055-Admin Office of the Courts
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Part I: Estimates

No Fiscal Impact

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Responsibility for expenditures may be subject to the provisions of RCW 43.135.060.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Julia Appel	Phone: (360) 705-5229	Date: 02/28/2007
Agency Approval: Jeff Hall	Phone: 360-357-2131	Date: 02/28/2007
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 02/28/2007

Request # -1

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact on the Courts

The substitute bill does not change the expected fiscal impact to the courts.

This bill provides a definition of "Disability" under RCW 49.60.040. According to the Washington State Human Rights Commission, this bill essentially restores the definition of disability under RCW 49.60 to the status quo before the State Supreme Court decision in McClarty v. Totem Electric. As such, no change in civil filings is expected.

II. B - Cash Receipts Impact

II. C - Expenditures

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Individual State Agency Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 105-Office of Financial Management
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Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Betty Reed	Phone: 360-902-7304	Date: 02/28/2007
Agency Approval: Aaron Butcher	Phone: 360-902-0406	Date: 02/28/2007
OFM Review: Mike Woods	Phone: 360-902-9819	Date: 02/28/2007

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

The purpose of the bill is to amend RCW 49.60.040 to include the definition of disability.

Section 1 states that the legislature finds the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), was incorrect, in that it failed to recognize that the law against discrimination affords to Washington 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.

Section 2 (25) adds the definition of disability to RCW 49.60.040.

Section 2 (25)(d)(ii) states that "The reasonable likelihood that job-related factors will aggravate it to the extent that it could create a substantially limiting effect if not accommodated." While this language might expand liability, we don't think it's direct enough to justify a fiscal impact.

Please keep in mind the OFM fiscal note only deals with potential cost of claims, not the cost to agencies for reasonable accommodation.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

Individual State Agency Fiscal Note

Bill Number: 5340 S SB	Title: Definition of disability	Agency: 120-Human Rights Commission
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Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact:	Phone:	Date: 02/28/2007
Agency Preparation: Renee Knight	Phone: 360-753-6777	Date: 02/28/2007
Agency Approval: Marc Brenman	Phone: (360) 753-2558	Date: 02/28/2007
OFM Review: Nick Lutes	Phone: 360-902-0570	Date: 02/28/2007

Prepared Written Testimony

To: Representative Patricia Lantz, Chair, Judiciary
CC: Representative Roger Goodman, Vice Chair, Judiciary

Subject: SSB 5340: An Act Relating to the Definition of Disability in the Washington Law Against Discrimination

From: Mary Lou Powers, MS
Founder and Director
Citizens' Health Advocacy Group

To: Representatives Lantz, Chair, Vice Chair, Goodman, Members of Judiciary Committee:

Dear Madam Chair and Members of the Committee:

I am Mary Lou Powers, MS, Founder and Director, Citizens' Health Advocacy Group. I thank you for reading this written testimony so close to an Executive Meeting. I have been ill this week and unable to testify. I am writing in full support of the definitional changes, although I will question one statement, and leave it to the judgment and expertise of the Committee to decide if there needs to be remedy.

Introduction:

As you know, because of the limited definition of "disability" in the ADA, and the narrow Supreme Court and Lower Court Rulings since the inception of the law, many worthy and competent people were discounted as "not otherwise qualified individuals", were discriminated against, had no redress, and were marginalized, effectively closing them out employment as productive citizens.

They were either "too disabled, or not disabled enough", though the original intent by President Bush and Congress was to empower individuals with disabilities to "achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society" (DREDF).

The Council on Disabilities attempted to rectify the situation with Congressional Amendments in 2004 and 2006 via the Americans With Disabilities Restoration Act" (Righting the ADA: The Impact of the Supreme Court's ADA Decisions on the Rights of Persons with Disabilities, February 25, 2003). Petitions are presently still being signed to push Congress to enact this legislation.

As you know, five areas were noted where the Courts had narrowed ADA, all in effect, in some way definitional, which shoved many people to the margins that would otherwise have gainful employment and be contributing members included in our society:

1. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Ruled that Persons Who Use Mitigating Measures are Not Protected by the ADA
- 2... As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Ruled that Persons Whose Impairments Could be Mitigated by Medication are Not Protected by the ADA
3. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Made it Much More Difficult For Individuals to Establish That They Are Substantially Limited in the Major Life Activity of Working
4. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Made it Almost Impossible For Individuals to Establish That They Fall Within the "Regarded As" Prong of the ADA's Definition of Disability
- 5.. The Supreme Court's Definition Cases Have Had a Chilling Effect on Whether and How Individuals With Disabilities and Their Attorneys Pursue ADA Claims In Court (Council on Disabilities)

Because of my experience at this institution, I entered politics to make an attempt to make some real difference, however small, though I was disabled, (I had a hyperparathyroid tumor and latent myelodysplastic syndrome, a type of bone cancer), my program stated that I did not fit the ADA definition of disability and therefore could not obtain accommodation. My office mate was legally blind, but because she could walk without a cane, she was "not disabled enough", if she got the cane. Another woman developed a hearing problem, for which there was no aid, she too, was "not disabled enough" to obtain accommodation.

We each were severely impacted by these decisions: I could not continue to attend "double time all the time" and became more ill. After 8 years, I was unable to finish my doctorate in Business.

Further, because of our conditions, we were deemed "not qualified individuals", and marginalized in our program in ways that most people would not believe if I spoke of them.

Sallie Mae also forced part-time students to pay the interest on their loans, even though they were truly disabled, whereas the Government paid the interest on the loans of full time students, forcing disabled students to pay far more for the same education, which many could not do.

I fought Sallie Mae for almost two years from 1992 to 1996 to change their policy for disabled students, and pushed members of Congress to amend the ADA, to no avail. One day I received a call from the ADA committee, which included the late Senator Paul Simon, Senator Kennedy, and others. My entire educational loans, graduate and undergraduate, approximately \$75,000 were to be written off, but no amendment would occur, nor would the policy for similarly situated students be changed, unless they addressed it as I.

Now Washington is taking a heroic step and changing the definition of ADA to follow the model of the ADA Restoration Act, which I applaud, and for which I am deeply thankful to Senator Kline, and others who made this Bill possible.

Concern:

My concern is line 1, p. 6, regarding impairment, because I still believe there is room to discriminate if there is not more clarity. I propose adding "without accommodation" at the end of the sentence: "substantially limiting effect upon the individual's ability to perform his or her job", otherwise that section may allow discrimination based on the implication an individual is not qualified, even though that standard has been removed.

Summary:

I appreciate at this late date that the Committee would read this Testimony, and again, call it a heroic Bill which includes all citizens of Washington.

I ask that you consider my concern, and I bow to you and everyone who has made this Bill a priority of this Legislative Session.

My warmest regards,

Mary Lou Powers, MS

Lou Powers

—

Mary Lou Powers, MS
Founder and Director
Citizens' Health Advocacy Group



ASSOCIATED GROCERS, INC.

TO: Chair Lantz and Members of the House Judiciary Committee
DATE: March 21, 2007
RE: Oppose SSB 5340 - Disability

Madame Chair & Members of the Committee:

I am Mark Matthews, Human Resources Manager of Associated Grocers. I am here speaking on behalf of my company, our 325 independent, family owned grocery retailers and the WA Food Industry – our trade organization.

We are opposed to SSB 5340 in its current form. The definition of disability is so broad and vague that it is impossible for the average employer to interpret. Our independent grocers don't have staffs of attorneys and HR people to interpret and guide them in their everyday business. At Associated Grocers we do have attorneys and HR people like myself and we are challenged to think about the application of this bill in our workplace. I would like to give you a couple examples of how this bill, if it became law would apply in the real world:

For example, I myself had voluntary laser eye surgery two weeks ago. It took nearly a full week before I could see well enough to view my computer and read documents, and many other normal tasks associated with my position. Under the proposed law, I could have asked for and been eligible for accommodations, even though this was a temporary condition. If I had performance issues only remotely relating to my temporary inability to see or view my computer, this overly broad definition of disability would prevented my employer from taking disciplinary action against me.

Another very realistic situation could occur when an employee takes time off work for a temporary, mitigated medical condition and the employee does not qualify for FMLA protection, or the condition does not meet the very broad definition of a "Serious Health Condition". The employee could hide behind this definition of a disability to avoid discipline if they have attendance problems. This then would make attendance policies at any employer invalid. Companies would be unable to effectively manage and discipline their workforce for attendance related issues.

We do not condone discrimination of people with "real" disabilities. We believe that the American Disability Act is very adequate to protect those who need protecting. We request that you not pass this bill and allow the federal definition to remain as the state's definition.

Thank You,
Mark Matthews
Human Resources Manager
Associated Grocers, Inc.
3301 S. Norfolk St.
Seattle, WA 98124
206-767-8887

RE ESB 5340 / SHP 1322

FOR YOUR INFORMATION
CARNEY BADLEY SPELLMAN, P.S.
CLIFFORD A. WEBSTER

(206) 622-8820

TO: Bill Perry

DATE: 3/21/07



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2007 Legislative Session – SSB 5340 Addressing the Definition of Disability

SSB 5340 Addressing the Definition of Disability. The Department of Personnel, on behalf of all state agencies, would like to address concerns with the proposed legislation regarding the state definition of disability.

Concern. Section 3 of the proposed legislation indicates that the bill is remedial and retroactive, applying to all claims that are not time barred and are currently pending. This section penalizes employers for following existing law and would create confusion with respect to what actions qualified for “retroactive” “remedial” treatment; e.g. Voluntary disability separation, accommodation claims, disparate treatment.

Solution. The retroactive remedial provision should be limited to the portions of law that were in effect prior to the July 6, 2006 decision in *McClarty v. Totem Electric*.

Concern. Section 2 (25)(d)(ii) expands the definition of disability beyond what was in place prior to the *McClarty* decision. In this section “impairment” is a disability if there is a “reasonable likelihood” that “job-related factors” will aggravate the impairment. There are three problems with this language:

1. The bill does not define “reasonable likelihood” or “job-related factors”. This would likely result in employers and employees being uncertain about when the duty to accommodate existed. Since no other state or federal law has such a broad definition, guidance on the issues would be non-existent and employer liability would increase.
2. The section would require an employer to accommodate an employee because the condition *could* substantially limit work. The section would require an employer to second guess or speculate on how the job *might* impact the employee’s potential “impairment” even in the absence of medical documentation or a medical necessity to accommodate.
3. The language would require the employer to perceive the employee as “disabled” in order to determine if the “job-related factors” would aggravate the impairment. Washington’s law prohibits “perceived as” discrimination; therefore, an employer reasonably acting upon a “perception” and offering an accommodation could in fact be violating federal and state law. This internal contradiction makes the section problematic.

Solution. Delete Section 2 (25)(d)(ii) in its entirety.

TESTIMONY/ATTENDANCE ROSTER

Committee: Judiciary

Bill No.: SSB 5340

Date/Time: March 21, 2007 1:30 PM

Short Title: Defining disability in the Washington law against discrimination

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print ✓ Skip Dregs	Yes	Pro	NORTHWEST CHAPTER Paralyzed Veterans of America	Street 616 SW 152nd Street, City, Zip Burien, WA 98166 e-mail	206-241-1843
Please Print ✓ MARC BRENNAN	Yes	Pro	WASH ST HUM/HR RIGHTS COMMISSION	Street 711 S CAP BLVD City, Zip OLY, WA 98504 e-mail	360-753-2558
Please Print ✓ NATIVIDAD VALDEZ	Yes	CONCERNS	Dept. of Personnel	Street 521 CAPITOL WAY SOUTH City, Zip Olympia, WA 98504 e-mail	360-664-6378
Please Print ✓ JOELLE BROUWER	Yes	Pro	WA State Rehab Council	Street 4565-7th Ave SE City, Zip PO Box 4538 e-mail OLY, WA 98501-4538	360-725-2940
Please Print NICK FEDERICI	NO	Pro	NAT'L MULTIPLE SCLEROSIS SOCIETY	Street 2927 COVERFIELD PL SE City OLYMPIA Zip 98501	360-421-1936
Please Print Carole Willey	No	Pro	Adaptive Health + Advocacy	Street 201 Lee St. SW #210 City, Zip Tumwater, 98501 e-mail	360-752-5361
Please Print Bob Guenther	no	Pro	IBEW 77	Street City, Zip e-mail on file	360-520-9575
Please Print ✓ SHAWN MURINKO	Yes	PRO	Wa State Human Rights Comm	Street 7008 Southwick Ct SW City, Zip Tumwater WA 98512 e-mail	360 915-6635

TESTIMONY/ATTENDANCE ROSTER

Committee: Judiciary

Bill No.: SSB 5340

Date/Time: March 21, 2007 1:30pm

Short Title: Defining Disability in the Washington Law Against Discrimination

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print Larry Stevens	No	CON	NAT'L ELECTRICAL CONTRACTORS (PUEBLO SPAND, SOUTHWEST, INLAND EMPIRE CHAPTERS)	Street 9715-77th ST. SW. City, Zip Lakewood WA. 98498 e-mail	(253) 380-2394
Please Print Larry Stevens	NO	CON	MECHANICAL CONTRACTORS ASS'N -	Street City, Zip e-mail SAME	SAME
Please Print William Jeffrey	Yes	Con	Associated General Contractors National Electrical Contractors Mechanical Contractors Assn. WA Construction Industry	Street 11300 Pinehurst Way NE City, Zip Seattle 98125 e-mail	(206) 363-7600
Please Print Shannon Ragonesi	Yes	Con	WA Defense Trial Law	Street 800-5th Ave, #4141 City, Zip Seattle 98104 e-mail	(206) 623-8861
Please Print Mark Matthews	Yes	Con	Associated Grocers WA Food Industry	Street 3301 So. Norfolk City, Zip Seattle 98118 e-mail	(206) 767-8887
Please Print Paul Nordstetten	Yes	Con	Assn. of WA Cities	Street 701-5th Ave, #4046 City, Zip Seattle 98104 e-mail	(206) 447-0182
Please Print Carrie Tellefson	No	Con	WA Food Industry Assn.	Street 3110 Ruston Way, Ste F City, Zip Tacoma 98402 e-mail	253-576-9908
Please Print				Street City, Zip e-mail	

2007
 3/21/07
 1:30pm

TESTIMONY/ATTENDANCE ROSTER

(3)

Committee: Judiciary

Bill No.: SSB 5340

Date/Time: March 21, 2007 1:30pm

Short Title: _____

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print NELSON SCHMITZ	NO	Pro	PARENT/ADVOCATE	Street 13232 NE 193 RD PL City, Zip WOODINVILLE 98072 e-mail photonel5@comcast.net	425-489-4253
Please Print Elizabeth Masnari	NO	Pro	Arc of King Co. Parent	Street 12122 SE 15th St City, Zip Bellevue WA 98005 e-mail emasnari@yahoo.com	425-562-7015
Please Print Betsy McAlister	NO	Pro	Arc of King County King County Parent Coalition for D.D.	Street 233 6th Ave N. City, Zip Sea, WA 98109 e-mail	425-867-3810
✓ Please Print Marie C Jubie	Yes	Pro	Sno County, Mental Health ABPA	Street 907 Columbia Blvd #307 City, Zip Marysville WA 98240 e-mail	360-652-7687
Please Print Kathy Baros Friedt	NO	Pro	Chair, WA State Human Rts Comm.	Street 2510 Moore Ct SE City Oly 98501 Zip	360-943-6139
Please Print Margaret-Lee Thompson	no	pro	The Arc of King Co for D.D. King Co Parent Coalition	Street 6510 143rd Ave NE City, Zip Redmond 98052 e-mail	
Please Print Gary Gillett	no	Pro	Disability Law Group ARC of Washington	Street 2722 Eastlake Ave E City, Zip Seattle WA 98102 e-mail	(206) 546-8897
Please Print Bred Towel	No	Con	Schuster Steel Inc.	Street City, Zip e-mail	360 402 6900

TESTIMONY/ATTENDANCE ROSTER

Committee: Judiciary
 Date/Time: 3-21-07 1:30pm

Bill No.: SSB 5340
 Short Title: _____

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print Carey Morris	NO	Pro	Lifelong AIDS Alliance	Street City, Zip e-mail 1527 Columbia St Oly 98501	360.961.7125
Please Print Jill Pugh	Yes	Pro	Law office of DJill Pugh / WSTLA	Street City, Zip e-mail 520 E Denny Way Seattle WA 98122 jill@EmploymentLawWA.com	206 325 2801
Please Print Anne Bryant	NO	con	Physicians Association ^{Association}	Street City, Zip e-mail Seattle, wa	206 343-7300
Please Print Carolyn Coguel	Yes	con	NFIB	Street City, Zip e-mail Olympia, wa	786-8675
Please Print Bob Mitchell	No	Con	WASHINGTON REALTORS	Street City Zip PO Box 719 Oly, WA 98507	951-2781
Please Print DAVID LORD	Yes	Pro	Wash. Protection ^{Advocacy} System	Street City, Zip e-mail	
Please Print TOBY OLSON	YES	PRO PRO	Gov. Committee on Disability Issues	Street City, Zip e-mail	
Please Print PAUL MILLER	Yes	PRO	EMPLOYER	Street City, Zip e-mail	

PANEL

TESTIMONY/ATTENDANCE ROSTER

5

Committee: Judiciary

Bill No.: SSB 5340

Date/Time: 3-21-07 1:30 PM

Short Title: _____

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print DAVID WESTBERG	No	Pro	STATIONARY/ OPERATING ENGINEERS	Street City, Zip e-mail 2800-1st Ave #311 Seattle, 98121	206-255-7452
Please Print Cherie Tessier	Y	Pro		Street City, Zip e-mail 120 NE State OLY	
Please Print Matt Zivich	No	Pro	WFSE	Street City, Zip e-mail 1212 Jefferson OLY WA	352 7603
Please Print Donna Patrick	No	Pro	Developmental Disabilities Council	Street City, Zip e-mail PO Box 48314 Oly 98504	586-3566
Please Print Sue Elliott	No	Pro	Arc of Wash State	Street City Zip 2600 Martin Way E Suite B Oly 98506	357-5596
Please Print HOLLY CHIST	NO	CON	Staffing Assoc of WA	Street City, Zip e-mail	791-6647
Please Print Earl Tower	NO	CON	WA Independent Bankers of Community Banks	Street City, Zip e-mail	402-6900
Please Print Vicky Marin	Yes	Con	WA Retail Association	Street City, Zip e-mail PO Box 2227 Olympia, WA 98507 vicky.marin@retailassociation.org	(360)943-9198

TESTIMONY/ATTENDANCE ROSTER

6

Committee: Judiciary

Bill No.: SSB 5340

Date/Time: 3-21-07 1:50 pm

Short Title: _____

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print Galy Smith	Yes	Con	Ind. Bus. Assoc	Street City, Zip e-mail Redmond	425 453 8621
Please Print Peter Thein	NO	Concerns	WA. State Transit Assoc.	Street City, Zip e-mail 2629 12 th St SW OLY 98502	360 786-9134
Please Print Kathleen Collins	NO	concerns	Spokane Transit Authority	Street City, Zip e-mail	360 352 2452
Please Print Susie Tracy	No	concerns	Small and Mid size Transit Associations	Street City, Zip e-mail	
Please Print George Adams			Saw	Street City Zip 360-377-1240	
Please Print DOUG LEVY	NO	CONCERNED	Federal Way, Kent Renton, Puyallup, Everett	Street City, Zip e-mail 15619 42 nd NE Kenmore 98028 LEVY4@WSA.COM	425 925 3999
Please Print Susan Chumplan	no	concerns	Boeing	Street City, Zip e-mail susan.w.chumplan@boeing.com	206-437-0535
Please Print				Street City, Zip e-mail	

TESTIMONY/ATTENDANCE ROSTER

Committee: Judiciary
 Date/Time: 3-21-07 1:30pm

Bill No.: SSB 5340
 Short Title: _____

Name	Wish to Testify? (Yes/No)	If so, Indicate Pro/Con	Organization	Mailing Address (Fill out completely) Do Not Say "On File"	Telephone
Please Print LOUISE RYAN	NO	PRO	LONGTERM CARE OMBUDSMAN	Street PO Box 23699 City, Zip Federal Way 98093 e-mail louiser@multiservicecenter.com	253 838 6810
Please Print LAURIE HOLSCHER	NO	PRO	_____	Street 4809 4809 48th SW City, Zip Seattle WA 98106 e-mail laurie l.h.schler@aol.com	206 547 4174
Please Print NOREN M VANDER	NO	PRO	OTHER GROUP	Street 3815 North Pacific City, Zip Tacoma WA 98407 e-mail BASE BATTLESHP@comcast.net	253 754 4031
Please Print Sharon Kuylik	NO	Some Concerns	KITSAP Co CLARK CO C-TRAN	Street 2000 Kaveman Ave City, Zip Vancouver WA 98660 e-mail	360 921 5710
Please Print Emily J Rogers	NO	PRO	3323 9th Ave SW Apt. 21-10 Olympia WA 98502	Street City Zip →	(360) 352-3121
Please Print Toni McKinley	NO	CON	NW Grocery Assoc	Street City, Zip e-mail	704-9191
Please Print				Street City, Zip e-mail	
Please Print				Street City, Zip e-mail	



Judiciary Committee
House of Representatives
State of Washington

Meeting Notes

Date: 3/21/07		Time: 1:30 pm		Location: HHK A		Page 2 OF	
Time	Name/ Bill/Item	Position	Organization, Notes, committee action, etc.				
1:45	Bill Perry		Staff intro to SSB 5340				
1:47	Senator Kline	Pro	Prime Sponsor				
1:53	Skip Dregs	Pro	Northwest Chapter, Paralyzed Veterans of America				
1:56	Toby Olson	Pro	Governor's Committee on Disability Issues & Employment				
1:59	Joelle Brovner	Pro	WA State Rehabilitation Council				
2:02	Mark Brennan	Pro	WA State Human Rights Commission				
2:04	Rep. Rodne		Q				
2:06	Sharon Murinko	Pro	WA State Human Rights Commission				
2:07	Rep. Rodne		Q				
2:09	William Jeffrey	Con	Associated General Contractors, Nat'l Electrical Contractors Assn, Mechanical Contractors Assn, and WA Construction Industry Council				
2:13	Shannon Roguesi	Con	WA Defense Trial Lawyers				
↓	↓	↓					
2:16	Mark Matthews	Con	Associated Grocers Handout #1				
2:19	Paul Nordsetten	Con	Assn of WA cities				
2:21	Carolyn Cogul	Con	Nat'l Federation of Independent Business				
2:23	Rep. Ahern		Q				
2:24	Motividad Valdez	Concerns	Dept of Personnel Handout #2				
2:27	Gary Smith	Con	Independent Business Assn.				
2:28	Vicky Marin	Con	WA Retail Assn.				
2:30	Marie Jubie	Pro	Snohomish County Mental Health Advisory Board				
2:31	Jill Pugh	Pro	Law office of DJill Pugh/ WSTLA				

MASTERS LAW GROUP

October 22, 2018 - 4:56 PM

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Appellate Court Case Number: 96335-5
Appellate Court Case Title: Casey Taylor, et al v. Burlington Northern Railroad Holdings, Inc., et al

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