

MAY 2007

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Pacific Northwest Employment Law News

Washington Oregon Alaska Idaho

New Definition of "Disability" Under WLAD

In April 2007, the Washington State Legislature passed legislation to define "disability" under Washington's Law Against Discrimination (RCW Ch. 49.60). Governor Christine Gregoire signed the bill into law on May 4, 2007.

The WLAD prohibits employers with 8 or more employees from discriminating based on the presence of any sensory, mental or physical disability. But until now, the phrase "sensory, mental, or physical disability" has not been defined in the statute.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), the Washington Supreme Court adopted a definition of "disability" consistent with the federal Americans with Disabilities Act (42 U.S.C. §12120). The federal definition limits the concept of "disability" to only those impairments that limited one or more major life activity and excludes temporary disabilities.

The state legislature found that the *McClarty* decision failed to recognize that the state discrimination statute is

intended to be broader than federal law. It thus determined that the decision should be overturned by statute.

Under the new provision of RCW 49.60.040, a "disability" is defined to include any sensory, mental, or physical impairment that is (i) 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.

This new statute provides that a "disability" will exist whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, and whether or not it limits the ability to work generally, or to work at a particular job.

The word "impairment" is also now defined by statute to specifically include any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting body systems, such as neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive,

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digestive, genitor-urinary, hemic and lymphatic, skin, or endocrine.

Also specifically covered are mental, developmental, traumatic, or psychological disorders, including “cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

To qualify for reasonable accommodation, the employee’s impairment must be known to the employer or be shown to exist through what’s called “an interactive process.” (We are not sure exactly what this is intended to mean).

In addition, the employee must demonstrate that the disability has a substantially limiting effect on his or her ability to perform the job, or a reasonable likelihood that engaging in job functions without accommodation would aggravate the impairment to such an extent that it would substantially limit the employee’s ability to perform the job.

If an employee contends that engaging in the job without accommodation will aggravate an impairment, that employee must provide medical documentation to prove this contention.

Because the change in the statute is deemed “remedial” in nature, the legislature has made it retroactive to the date of the *McClarty* decision, to July 6, 2006.

For employers covered by the WLAD, we recommend that you develop an

analytical checklist consistent with this new definition to ensure you are complying with the law:

1. Has an employee disclosed a condition that may be a disability?
2. Is this condition “a sensory, mental or physical impairment?” OR
3. Is it “a physiological disorder, cosmetic disfigurement or anatomical loss affecting a body system?” OR
4. Is it “a mental, developmental, traumatic or psychological disorder?”
5. Has the employee sought accommodation?
6. If so, does the impairment substantially limit the employee’s ability to perform his or her job?
7. Is the limitation “substantial” or merely “trivial?”
8. Does the employee have medical documentation to show that engaging in the job without accommodation would aggravate the impairment to an extent that it would substantially limit his or her ability to perform the job?

On its face, the new statutory definition of “disability” significantly expands the scope of those who fall within its protections.

For further questions, feel free to give us a call at (206) 623-6501.

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