

WASHINGTON STATE HUMAN RIGHTS COMMISSION

GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAWS



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WASHINGTON STATE HUMAN RIGHTS COMMISSION (WSHRC)

GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAW

In Washington State, there have been significant changes to disability law from July 2006 to July 2007. On July 6, 2006, in *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006), the Supreme Court of the State of Washington, in a 5-4 ruling, adopted the Americans with Disabilities Act (ADA) definition of disability. In doing so, the Court dispensed with its earlier decisions regarding the definition of disability, as well as with the Washington Administrative Code (WAC) regulation that had successfully served as the Washington State Human Rights Commission's (WSHRC) definition of disability since 1973.

In response to this decision, the Washington State Legislature enacted SB 5340 which effectively overturns the *McClarty* decision. This new statute, which was signed by Governor Gregoire, rejects the ADA definition of disability, returns the State to a broad definition of disability, and increases protections for persons with medical, psychological, and other impairments.

The definition of disability has changed, but other aspects of disability law remain the same. The reasonable accommodation process remains the same, protections against harassment have stayed in place, and undue hardship defenses for small businesses remain.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at www.hum.wa.gov.

Frequently Asked Questions

Questions For Everyone

What is the definition of disability in the state of Washington?

As of July 21, 2007, the definition of disability, found in RCW 49.60.040 is as follows:

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

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

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

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

- (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
- (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Does this definition cover all uses of the word “disability,” including services or benefits programs?

No, it only changes the definition for purposes of nondiscrimination.

How does this definition differ from the Americans with Disabilities Act (ADA or federal) definition?

The Washington State definition is broader and covers a greater number of impairments and medical, mental, or psychological conditions. Temporary conditions are covered under the Washington State definition, but are not covered under the ADA. Conditions that are ameliorated or mitigated by medication or other means are disabilities under the Washington State definition, but are often not considered to be disabilities under the ADA. Under the Washington State definition, there is no requirement that a condition must have an impact on a major life activity, or that the impact of the condition be substantially limiting.

What characteristics are not disabilities?

Personality traits such as chronic tardiness or irritability are not in and of themselves disabilities (although they may be symptoms of disabilities). Physical traits such as being left handed or being short are not disabilities. (Though there are medical and genetic conditions that cause extreme short stature that are disabilities.) A normal pregnancy is not considered to be a disability, although pregnancy related medical conditions, such as gestational diabetes or hypertension, can sometimes be disabilities. Discrimination against a pregnant woman is prohibited under the Washington Law Against Discrimination as sex discrimination. Pregnancy and maternity discrimination are covered by other sections of the Washington Law Against Discrimination.

Is drug or alcohol addiction a disability?

The use of illegal drugs is not protected. However if someone is recovering from drug addiction, they are considered to have a disability. Alcoholics are considered to have a disability. Behavior standards in the workplace and elsewhere continue to apply; nondiscrimination law is not an excuse for violent, threatening, or improper behavior anywhere. Please request the WSHRC's Questions and Answers on drug and alcohol addiction issues for more information.

What does it mean to have a "record of" a disability?

This means that the person was previously diagnosed with having a disability, or that the person has a history of having a disability. An example of this is a person who had a heart condition, and had open heart surgery, but is currently having no heart problems. Because of this person's past medical record of heart problems, this person is protected under the law.

Can a person self-diagnose a disability, that is to say, decide for themselves that they have a disability?

Generally, a disability should be medically cognizable. Medical diagnosis is one excellent way of determining this. Some disabilities, such as blindness, deafness, and paraplegia, are self-evident. Mental, emotional, and psychological disabilities should always be medically diagnosed by a certified and credentialed mental health practitioner. In some situations, such as depression, the medical profession has encouraged general practitioner medical doctors to diagnose and treat the condition. In almost no circumstances would a herbologist, naturopath, or

acupuncturist be able to make an acceptable diagnosis of a mental, emotional, or psychological condition that would qualify as a disability under the law.

What does it mean to be “regarded as” having a disability?

This means that the person is treated by a covered entity (employer, landlord, place of public accommodation, etc.) as though the person has a disability even though the person is not a person with a disability. An example of this may be a police officer who has gone through a traumatic shooting event, and is then assumed by her employer to have a psychological disorder, such as post traumatic stress disorder, due to the shooting, even though the officer does not have a psychological disorder.

What does it mean to have a “history of” a disability?

This means that in the past the person has been a person with a disability, but that presently, they may not be a person with a disability, or it may not be apparent that they are a person with a disability. Again, an example of this is the person who had a heart condition, and had open heart surgery, but is currently having no heart problems. Because of this person’s past history of heart problems, this person is protected under the law.

Is AIDS/HIV a disability?

AIDS and HIV, as well as Hepatitis C, are considered to be disabilities. People with these conditions are protected under the law. These conditions are covered further under the Washington Law Against Discrimination, Revised Code of Washington (RCW) 49.60.172 and 49.60.174.

How will the retroactivity section of the 2007 disability legislation affect me?

The 2007 act relating to the definition of disability in the Washington Law Against Discrimination includes a retroactivity section which reads, “This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act.” If you have a case involving a claim of disability discrimination pending with a state court or had a pending claim at the time of the *McClarty* decision, you should consult your attorney for advice. If you had a case involving a claim of disability discrimination pending before the WSHRC that was closed between July 2006 and July 2007, your case will be reviewed by the WSHRC to determine if the

retroactivity clause affects your case. If your case was closed solely because of the *McClarty* decision and falls within the retroactivity clause, it will be reopened for a full investigation. You and the other party will be notified if this occurs.

Questions For Employers

What should I do to prepare for the new legislation?

Review all of your equal opportunity, harassment, and reasonable accommodation policies. Make sure that they are in writing, that they have been provided to all employees, and that they are followed. Thoroughly familiarize yourself with the new definition of disability, and ensure that all managers, supervisors and human resources personnel are aware of the changes in the law. Implement the new definition now, so that you will have all necessary reasonable accommodations in place as of July 21, 2007, and so that you can avoid continuing any behavior or practice that will be a violation after July 21, 2007.

How do I determine if an employee has a disability?

This determination must be made on a case-by-case basis. In some cases, the disability may be obvious, such as a person who uses a wheelchair. In most cases, the employee will need to inform you of the disability, either verbally or through doctor's notes. Remember that the definition of disability includes a person who is regarded by his or her employer as being disabled. If the person is not actually a person with a disability, but the employer regards them as having a disability, they are protected from discrimination under the law. In reasonable accommodation situations, the employee must self-identify as a person with a disability, and make the request.

Does the law cover harassment by co-workers?

Court cases have determined that harassment in the workplace against a person with a disability, because of the disability, is prohibited. If the harassment is offensive and unwelcome, is serious enough to affect the person's work or create a hostile working environment, is because of the disability, and if the employer knew of the harassment or should have known of the harassment and took no or ineffective action to stop it, then an employer is in violation of the law.

What disabilities need to be reasonably accommodated?

An employer must make reasonable accommodation for an impairment that substantially limits an employee's ability to do his or her job, to be considered for a job, or to have access to equal terms and conditions of the job. An employer must also make reasonable accommodation for a condition that will likely result in a substantially limiting impairment if the condition is not reasonably accommodated. The 2007 legislation states:

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

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

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

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

Generally, disabilities that are perceived only do not need to be accommodated.

What do I need to do when an employee asks for a reasonable accommodation?

The procedure for reasonable accommodations has remained the same through the rest of the changes in disability law. In most cases, the person needing the accommodation must request it. This can be verbal, in writing, or in the form of a doctor's note. The employer and employee must then enter into an interactive process, which involves both parties discussing the request and possible accommodations. The employer can request additional information from the employee's doctor or request that the employee get a physical capacities examination.

Does an employer need to implement the reasonable accommodation that the employee requests?

Not necessarily. The employer can implement a reasonable accommodation of its own choosing, as long as there is an interactive process and the reasonable accommodation works for the employee and is effective.

What are possible reasonable accommodations?

Think creatively, and work together with the employee to come up with a solution that works for both of you. A reasonable accommodation makes it possible for the person with a disability to do his or her job. The reasonable accommodation can be a schedule change, computer hardware or software, ergonomic furniture, alternate break times, allowing the employee to wear a brace, a stool to sit on, and more. If there is no solution that allows the employee to work at his or her current job, the employee must be put into an open position for which they are qualified. If there are no such positions, a medical leave might be a necessary accommodation.

What is not considered to be a reasonable accommodation?

Anything that creates an undue hardship for the employer is not considered to be reasonable. An undue hardship may be created when the requested accommodation is too costly, or will fundamentally alter the nature of the business. An undue hardship is determined on a case-by-case basis, in looking at the size and resources of the employer. The employer must demonstrate that the accommodation is an undue hardship. In addition, an employer does not need to accommodate the employee by lowering production standards, hiring an extra person to help the employee, or removing essential job functions.

What are essential job functions?

The essential job functions are the main tasks or duties of a particular position. These functions are determined by how often they are done, or how fundamental they are to the position. This does not include job duties that are peripheral to the main function or only done once in a while. Often, a written job description will outline what the essential job functions are, but the person in the position will still have to engage in those duties on a regular basis in order for the duty to be considered essential.

Who can prescribe work restrictions for an employee?

Anyone who is licensed as a health care provider in Washington can prescribe work restrictions, as long as their area of practice aligns with the particular medical condition at issue (for example, it would probably be questionable when a podiatrist writes restrictions regarding a patient's heart condition).

Am I required to hire a certain number of persons with a disability?

No, there is no requirement to hire a certain number of persons with a disability. However, if a person is qualified to do the job, with or without a reasonable accommodation, and happens to have a disability, they must be considered for the position, and hired if they meet the merit criteria for the job. In employment situations, civil rights laws only prohibit use of protected criteria to make hiring and other employment-related decisions; that is to say, disability, race, color, national origin, sex, creed, age, HIV, AIDS, Hepatitis C, maternity and pregnancy, and, as of July 21, 2007, veterans and military status.

Can an employer hire a person of a particular protected class, such as a woman or a man, for a particular job?

Bona Fide Occupational Qualifications (BFOQs) can be requested from the Washington State Human Rights Commission. The WSHRC will evaluate the requests and grant or deny them. In the past, some have been granted on the basis of sex, primarily for correctional and drug testing positions. It would be unlikely that a BFOQ request for a non-disabled person would be granted.

Can I ask about an employee's medical condition during an interview or on an application?

You cannot ask about an employee's medical condition during the hiring process. This includes questions about medications, past medical history, or past workers compensation claims. You may ask if the employee is able to perform the essential functions of the job with or without accommodations.

Can an employer require a physical examination as part of a job application?

An employer can require that an applicant take a physical examination as part of a hiring process if the physical exam takes place after a conditional offer of employment. The employer must follow the same procedure and give the same physical examination to all conditional employees in a particular position.

Can I ask about an employee's medical condition after they are employed?

Generally, it is not permissible to ask questions about an employee's medical condition. You want to avoid the appearance of regarding the employee as disabled. An employer can ask about medical issues if there is a change in work performance, and if the questions are related to the person's ability to do the job. An employer can ask about medical information as part of the interactive process in a reasonable accommodation situation.

Do I need to allow a service animal at work?

If the animal provides a disability-related service to a person with a disability, you need to allow the service animal in the workplace. These animals are not pets, so a “no pets” policy does not apply. You can refuse to allow the service animal only if the animal poses an immediate or reasonably foreseeable risk or danger to people or property. Speculation that the animal poses a risk or danger is not enough to refuse the animal. A service animal must be trained, and owners can train their own service animals. Service animals should be under the control of their owners. Service animals should not create sanitary problems or make loud noises. There are certain very specific types of medical and food service operations where certain animals can be excluded under certain circumstances. There is no requirement that the employer provide food, water, or toileting facilities for service animals. There is further information in the Washington Administrative Code (WAC) 162-22-100.

When can I terminate the employment of an employee with a disability?

If the employee is unable to complete the essential functions of his or her job with or without reasonable accommodation, there are no other open jobs for which the employee is qualified, and time spent on medical leave will not alleviate the medical condition, then you may separate the employee, as you would any other employee. You may also apply workplace rules and regulations regarding production and behavior to employees with disabilities, as long as you consistently apply the same rules to all employees. However, be aware that a few courts have held that if the person’s disability is causing a particular behavior that violates a workplace rule, and the behavior and the disability are linked, then the employee cannot be terminated for the behavior. This is a difficult situation to analyze, so consult an attorney for advice, or contact the WSHRC for guidance. No court decision permits an employee to be violent, to harm others, to steal, to be insubordinate, or to refuse to follow a lawful order.

Do I have any other obligations to the employee after I let them go?

If you separated the employee because they were no longer able to complete the essential functions of the job due to a disability or medical restrictions, then you have a continuing obligation to inform the employee of job openings for which they are qualified and which meet their medical needs. The Ninth Circuit Court of Appeals has determined that reassignment to an open position constitutes a reasonable accommodation, and that an employer needs to continue to attempt to reassign an employee to another job for a “reasonable” period. This means that it

is a good idea for employers to be proactive about informing their former employees of openings, at least for a few months after a disability separation.

Questions for Employees

What protections do I have at work if I am a person with a disability?

You have the right to not be discriminated against. You can request reasonable accommodations in the job application process. On the job, as long as you are able to do your job, with or without a reasonable accommodation, you are protected. If you request a reasonable accommodation in order to do your job, your employer needs to enter into an interactive process with you to determine a reasonable accommodation. Your co-workers and managers are prohibited from harassing you because of your disability.

When do I have to discuss a medical condition with my employer?

When you request a reasonable accommodation for a medical condition, be prepared to provide medical information. If your work performance has declined due to a medical reason, your employer may request information about your medical condition as it relates to your ability to do your job. This medical information is protected by privacy laws.

Should I inform a potential employer about my disability during an interview?

This is up to you, but you are not required to disclose that you are a person with a disability. An employer cannot ask about disabilities during an interview or on an application.

How can I request a reasonable accommodation?

The best way to request a reasonable accommodation is to put the request in writing, or obtain a note from your doctor stating the request. Present the request to your manager or to the human resources department. The request must relate to your disability, must assist you in doing your job, or must lower barriers to your performance of your job.

What should happen after I request a reasonable accommodation?

You and your employer should enter into an “interactive process” – that is, you both participate in a discussion about potential accommodations. The employer may accept the request, might offer other suggestions, or might need further medical information. You need to be an active participant in the process, and provide necessary medical information. Do not stop taking part in this process.

Questions For Public Accommodations

How does the new definition of disability affect places of public accommodation?

Places of public accommodation must be accessible for all persons who meet the new definition of disability, not just to persons who meet the ADA definition of disability. There are special rules about architectural accessibility. For further information, consult the Washington State Building Code at WAC 51-40, WAC 38-97-410, RCW 35.68.075, the Americans with Disabilities Act at 42 U.S.C. 12101 et. seq., and the Federal Fair Housing Act at 42 U.S.C. 3601 et.seq. You do not need to provide personal attendant or medical services, unless you are in the medical services field.

How do I determine if a person has a disability?

The disability may be obvious, such as a person who uses a wheelchair. In other cases a person using a public accommodation may need to inform you of the disability so that you can make the place of public accommodation accessible for that person.

Is a place of public accommodation required to make reasonable accommodation to persons with a disability?

It is an unfair practice for a public accommodation to fail or refuse to make reasonable accommodation for a known disability. Reasonable accommodations might include the use of a freight elevator if that is the only available elevator; bringing information, services, or merchandise to a patron; providing a sign language interpreter; or installing grab bars in restrooms. Note that services provided are only required to be equally effective to those provided to people without disabilities.

When is an accommodation not considered to be reasonable?

An accommodation is not considered to be reasonable when the cost or difficulty in providing the accommodation is prohibitive to the providing entity. The size of the place of public accommodation, the availability of staff, the organization's total budget, and the resources available are considered when determining reasonableness.

What if a person has a dog or other animal with them?

A service animal is an animal that is trained for the purpose of assisting a person with a disability. You may ask the person if the animal is a service animal, and what service the animal provides. If the animal is a service animal, you cannot ask for proof or ask about the person's disability. The animal does not need to wear a vest or special tags. You must allow service animals into any parts of the premises that are available to members of the public. This includes dining areas, restroom areas, and areas in which foods are sold. Service animals are not considered to be pets, so a "no pets" policy does not apply. The service animal will often be a dog, but can also be another kind of animal. You can refuse to allow the service animal only if the animal poses an immediate or reasonably foreseeable risk or danger to people or property. Speculation that the animal poses a risk is not enough to refuse the animal. You can find more information in Washington Administrative Code (WAC) 162-26-130 and 162-26-135. See also information on services animals elsewhere in this document.

What does it mean when an animal is a "trained" service animal?

The animal is trained to assist the person with a disability in a way connected to the disability. This could be a guide dog which guides a blind person, a small dog which makes its owner aware of a pending seizure, or a cat that knows to comfort and be close to a person who has a diagnosed anxiety disorder. The animal does need training, but the training does not need to be formal and the animal does not need to be certified. Generally, use of a service animal, especially those that provide unusual services, should not be self-prescribed. Animals in-training are not covered.

What if a building is not physically accessible?

If a building is old and has not been recently remodeled, it may be "grandfathered in" under the building code, meaning that the building does not need to meet current accessibility requirements. Newer construction, or buildings that have undergone a major remodel recently, need to meet current accessibility standards. If you suspect that a building should meet accessibility standards but does not, you

may contact the WSHRC for guidance. There are special rules about architectural accessibility. For further information, consult the Washington State Building Code at WAC 51-40, WAC 38-97-410, RCW 35.68.075, the Americans with Disabilities Act at 42 U.S.C. 12101 et. seq., and the Federal Fair Housing Act at 42 U.S.C. 3601 et.seq.

Additional Resources Include:

Equal Employment Opportunity Commission (206) 220-6883 (800) 435-7232

Governor's Committee on Disability Issues and Employment (360) 438-3168

Department of Justice (ADA issues) (202) 514-0301

Job Accommodation Network (800)232-9675