Employment Law Alert

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Not So Fast...
Washington Legislature Overrules Employer Friendly Definition of Disability

For a short time, it appeared Washington workplaces would benefit from a Supreme Court decision creating consistency between Washington and federal discrimination law definitions of disability. That decision rejected a broad and confusing definition of disability under the Washington Law Against Discrimination (“WLAD”) and replaced it with the definition applied under the federal Americans With Disabilities Act (“ADA”). Unfortunately, the Washington legislature responded quickly with legislation that amends the WLAD to add a statutory definition of disability that restates the previous confusing and expansive definition. The legislation was signed into law on May 4, 2007 by Governor Gregoire.

Background

The WLAD is the state equivalent of federal employment discrimination statutes, including the ADA. However, there are important differences between Washington and federal law, especially as they concern disability discrimination.

The federal ADA protects a qualified individual with a disability in two ways: by prohibiting employers from discriminating against such a person (for example, by discharging, reassigning, or harassing the person due to the disability), and by establishing an affirmative obligation to reasonably accommodate the disability. These rights are potentially available to an employee or applicant with a disability; such a person must (1) have a physical or mental impairment that substantially limits one or more major life activities, (2) have a record of such impairment, or (3) be regarded as having such an impairment.

The WLAD did not, until now, define disability. From the inception in 1973 of the disability discrimination provisions of the WLAD, Washington employers had little guidance as to the types of medical conditions that came within its purview. In 1999, the Washington State Human Rights Commission (“WSHRC”), the agency that interprets the WLAD, adopted a circular definition of disability. That definition provided that a person is disabled by a sensory, mental, or physical condition if he or she is subject to discrimination because of the condition, and the condition is “abnormal.” Employers naturally found the vague parameters of this definition difficult to ascertain. Under the WSHRC definition, employees with even minor or transitory medical issues could be considered disabled, provided they were “abnormal,” and provided the employee experienced some form of negative personnel consequence related to the medical condition.

Shortly after the WSHRC’s announcement of its definition of disability, the Washington Supreme Court further complicated matters. In its 2000 decision in Pulcino v. Federal Express Corp., the Court acknowledged that “the circularity of the WAC definition makes it unworkable when an employee’s claim is based upon an accommodation theory.” As a result, the Pulcino Court created a new definition of disability for cases where it was alleged that the employer had failed to reasonably accommodate the employee’s condition. An employee could readily establish a protected disability and thus successfully claim a failure to accommodate, by showing that he or she had a sensory, mental, or physical
abnormality, that the abnormality had a substantially limiting effect upon the ability to perform the job, and that the employer failed to reasonably accommodate the disability.

Washington employers thus were left with not one but two equally confusing definitions of disability under the WLAD.

The Washington Supreme Court Adopts the ADA’s Definition of Disability, But the Legislature Overrules the Court

Six years later, in 2006, the Washington Supreme Court announced a new definition of disability, which created a measure of predictability to the workplace. In McClarty v. Totem Electric, the Court adopted the ADA’s more conservative disability definition described earlier. The Court found that the WSHRC’s definition of disability was flawed, unduly complicated, and could be interpreted too expansively to cover conditions such as a receding hairline, which would “trivialize the discrimination suffered by persons with disabilities.” Under McClarty, the ADA definition was to apply, whether the employee claimed disability discrimination or a failure to accommodate.

Unfortunately, McClarty did not last long. The Washington Legislature and the Governor quickly enacted a measure to restore the earlier definitions of disability. The new law even chides the Washington Supreme Court for failing “to recognize that the [WLAD] affords to state residents protections that are wholly independent of those afforded by the federal [ADA], and that the [WLAD] has provided such protections for many years prior to passage of the federal act.”

Current Definitions of Disability Under the WLAD

With the new statute, for discrimination (“disparate treatment”) claims, disability under the WLAD means the presence of a sensory, mental, or physical impairment that (1) is medically cognizable or diagnosable, (2) exists as a record or history, or (3) is perceived to exist whether or not it exists in fact. Such a disability may exist regardless of whether the impairment limits an employee’s ability to work generally or to work at a particular job. Although the WSHRC’s definition of disability required that the impairment be “abnormal,” the Legislature did not include this feature in the new definition of disability. Rather, the new law states that the term “impairment” includes, but is not limited to, “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting” the body or “[a]ny mental, developmental, traumatic, or psychological disorder.”

Under the new statute, a disability exists for failure to accommodate claims only if the impairment substantially limits an employee’s ability to perform the job, to apply or be considered for a job, or to access equal benefits, privileges, or terms or conditions of employment. For an employer to be liable for failure to accommodate, (1) the impairment must be known or shown through an interactive process to exist, (2) the employer must be aware or notified of the existence of an impairment, and (3) the individual must provide medical documentation establishing a reasonable likelihood that engaging in the job without the accommodation would aggravate the impairment. In this regard, a limitation is not substantial if it has only a trivial effect.

What This Means for Employers

Under the new legislation, many more employees likely are disabled and therefore protected by the WLAD. Unlike the ADA, impairments for Washington employees can be temporary or permanent, common or uncommon, or mitigated or unmitigated. For example, under the ADA, an employee who must wear glasses to read may not be considered disabled because the employee’s vision impairment can be mitigated, or corrected, with the use of glasses. On the other hand, vision impairment could be considered a disability in Washington regardless of the fact that the impairment can easily be corrected with glasses. Likewise, a broken leg probably would not be considered a disability under the ADA because the impairment is temporary. However, the same probably is not true under Washington’s new definition of disability.

Furthermore, the new law is intended to be “remedial and retroactive.” This means that the law covers all disability claims that arose before July 6, 2006 and to those occurring after July 22, 2007, which is the effective date of the new law. During the one-year period when McClarty applies, the law is completely different. This may prove challenging to employers if claims arose during the McClarty period, or if
claims arose in part during the *McClarty* period and in part before or after that one-year period. In fact, the WSHRC recently announced in a press release that it “closed many cases because the definition of disability under *McClarty* and the ADA was not met” and are currently “determining how it will apply this retroactivity.” This is troublesome to Washington employers because it is unclear from this statement whether the WSHRC intends to re-open previously closed cases and evaluate them under the new law.

With the complexity described above, Washington employers should consult with counsel for guidance in complying with current law.

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