



## Washington Supreme Court Adopts ADA Definition of “Disability”

By Mark R. Busto

Since the federal Americans With Disabilities Act (ADA) was adopted in 1993, we have consistently counseled our clients that the Act is largely irrelevant in Washington because our Washington Law Against Discrimination (WLAD) defined “disability” so much more broadly than the ADA. Now, in a recent decision that is a welcome relief to employers, the Washington Supreme Court adopted the definition of “disability” contained in the federal ADA, thereby providing for the first time a consistent approach to disability discrimination under both statutes. *McClarty v. Totem Electric*, 2006 Wash. LEXIS 504 (2006).

**Underlying Facts.** Plaintiff McClarty was an apprentice electrician dispatched to Totem Electric to work on the renovation of the Old Tumwater High School. He performed various duties, including using a jackhammer and shovel to level trenches dug by a backhoe, installing conduit pipe, and doing rough-in work in classrooms. After about 2½ months on the job, McClarty told his foreman that he was experiencing pain in his hands and asked for a break from digging. Totem Electric told him to go to his doctor, who diagnosed McClarty with bilateral carpal tunnel and restricted him from repeated “push/pull,” “simple grasp,” and “fine manipulation” not to exceed 33% of an eight-hour workday. Totem Electric terminated him the same day, citing “Reduction in work forces/lay-off.” The following week Totem Electric hired two apprentices dispatched from the same union at a lower rank and pay.

McClarty received progressively lower work evaluations from the apprenticeship program: three ratings of “Below Average;” one rating of “Unsatisfactory.” The program terminated him about two months after he lost his job at Totem Electric.

**Action of the Lower Courts.** The trial court granted Totem Electric’s motion for summary judgment, dismissing McClarty’s disability discrimination claim, including claims of disparate treatment and failure to accommodate, among others. The Court of Appeals affirmed the grant of summary judgment on McClarty’s accommodation claim, but reversed the grant of summary judgment on his disparate treatment claim. Totem Electric appealed “the issue regarding the definition of disability in disparate treatment claims.”

**A Consistent Approach Adopted.** The WLAD was extended to prohibit discrimination against “handicapped” persons in 1973. In 1993, three years after Congress passed the ADA, the Legislature replaced all uses of the term “handicap” with “disability.” However, it never defined the term within the WLAD. Instead, the Washington State Human Rights Commission adopted a regulation that defined “handicap” (and, later, “disability”) as: “A condition is a ‘sensory, mental, or physical disability’ if it is an *abnormality* and *is a reason why the person having the condition did not get or keep the job in question....*” (emphasis added)

In *McClarty*, the Court first reviewed its prior cases that criticized this regulation because it was circular, *i.e.*, it required a factual finding that the plaintiff was discriminated against “because of the condition” in order to determine the initial question of whether the condition

was a “disability.” The Court then stated that the definition was at odds with the plain meaning of the term, *i.e.*, the definition should require that a claimant prove the “abnormality” substantially limits the ability to perform *something* before s/he is deemed disabled. For these reasons, the Court adopted the ADA definition of “disability” and stated that federal ADA cases would guide Washington courts interpreting the WLAD.

Now, to establish a “disability” under the WLAD, a plaintiff must prove s/he has (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) is regarded as having such an impairment.

“Substantially limited” means “unable to perform a major life activity that the average person in the general population can perform;” and “major life activities” are “those activities that are of central importance in daily life.” *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).

Importantly, the federal courts have applied the ADA definition of “disability” very narrowly, in sharp contrast to the broad interpretation previously applied to the term by Washington state courts under the WLAD. For example, in the *Williams* case noted above, carpal tunnel was not deemed a “disability” because it did not limit most activities of daily life.

**What Does It Mean?** As noted, the most important result of the decision should be to bring consistency to the approaches of state and federal courts to disability discrimination cases. And, if past decisions of the federal courts are a guide to the future decisions of Washington state courts, we can expect a narrowing of the application of the WLAD in disability cases. One caution, however – the case was decided by five justices, with four justices dissenting, and employee advocacy groups may seek to roll back the decision in the State Legislature. So, we may not have heard the last word on the subject. Stay tuned!