



LEXSEE 165 WN.2D 494

John L. Hale et al., *Petitioners*, v. Wellpinit School District No. 49, *Respondent*.

No. 80771-0

SUPREME COURT OF WASHINGTON

165 Wn.2d 494; 198 P.3d 1021; 2009 Wash. LEXIS 3; 21 Am. Disabilities Cas. (BNA) 877; 13 Accom. Disabilities Dec. (CCH) P13-202

October 21, 2008, Argued
January 15, 2009, Filed**PRIOR HISTORY:** [***1]

Appeal from Stevens County Superior Court. Docket No: 06-2-00194-8. Judgment or order under review. Date filed: September 21, 2007. Judge signing: Honorable Rebecca M Baker.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A former school district employee brought an action against the school district, claiming negligent infliction of emotional distress, breach of contract, and disability discrimination under the Law Against Discrimination. In the disability discrimination claim, the plaintiff alleged that he was disabled and that the school district failed to accommodate his disability.

Superior Court: The Superior Court for Stevens County, No. 06-2-00194-8, Rebecca M. Baker, J., on March 30, 2007, granted a partial summary judgment in favor of the school district on the disability discrimination claim. Shortly thereafter, the legislature enacted a statute defining "disability" under the Law Against Discrimination and declaring that the definition applied retroactively. The plaintiff moved for reconsideration of the court's decision based on the amendment, which the court denied on September 21, 2007, ruling that the statute violated the separation of powers doctrine by attempting to reverse the Supreme Court's interpretation of the Law Against Discrimination in *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006).

Supreme Court: Holding that the legislature's retroactive amendment of the Law Against Discrimination to provide a definition of "disability" did not violate the

separation of powers doctrine in the particular circumstances presented, the court *reverses* the partial summary judgment and *remands* the case for further proceedings.

HEADNOTES

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[1] **Appeal -- Review -- Constitutional Issues -- Standard of Review.** Constitutional questions are reviewed de novo.

[2] **Judgment -- Summary Judgment -- Partial Summary Judgment -- Review -- Standard of Review.** A partial summary judgment is reviewed de novo.

[3] **Constitutional Law -- Separation of Powers -- Purpose.** The separation of powers embodied in the state constitution creates a clear division of functions between each branch of government, thereby limiting the power of any one branch to interfere with the functions of another branch. The separation of powers doctrine recognizes that each branch of government has its own appropriate sphere of activity and ensures that the fundamental functions of each branch remain inviolate.

[4] **Constitutional Law -- Separation of Powers -- Overlapping Responsibilities -- Value.** The separation of powers doctrine does not depend on the branches of government being hermetically sealed off from one another. The doctrine recognizes that the separate branches must remain partially intertwined in order to maintain an effective system of checks and balances as well as an effective government.

[5] State -- Judiciary -- Fundamental Function -- Judicial Review. The fundamental function of the judicial branch of government is judicial review.

[6] Statutes -- Construction -- Judicial Authority -- In General. The judicial review function of the judicial branch of government includes the authority to interpret the law. It is emphatically the province and duty of the judicial department to say what the law is.

[7] Constitutional Law -- Separation of Powers -- Source of Doctrine. The principle of separation of powers was incorporated into the Washington State Constitution in 1889.

[8] Statutes -- Construction -- Effect -- Supreme Court Construction. It is a fundamental rule of statutory construction that once a statute has been construed by the Supreme Court, that construction operates as if it were originally written into the statute. It is within the Supreme Court's appropriate sphere of activity to determine what a statute means, and such determination relates back to the time the statute was enacted.

[9] Constitutional Law -- Separation of Powers -- Reciprocity -- Effect of Violation. The separation of powers doctrine is reciprocal in nature. Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded.

[10] Constitutional Law -- Separation of Powers -- Judicial Encroachment -- In General. The judicial branch of government violates the separation of powers doctrine when it assumes tasks that are more properly accomplished by another branch.

[11] State -- Legislature -- Authority -- Legislative Power -- Statute Drafting. The legislature's role is to set policy and to draft and enact laws. The drafting of a statute is a legislative, not a judicial, function.

[12] Constitutional Law -- Separation of Powers -- Overlapping Responsibilities -- Caution -- Necessity. The legislature and the judiciary must each be cautious when intruding upon the other's authority so as not to violate the separation of powers doctrine.

[13] Constitutional Law -- Separation of Powers -- Overlapping Responsibilities -- Flexibility and Practicality. The separate branches of government must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility between the

branches. Each branch must act with a spirit of interdependence.

[14] Constitutional Law -- Separation of Powers -- Test. The separation of powers doctrine is not violated unless the activity of one branch threatens the independence or integrity or invades the prerogatives of another branch.

[15] Statutes -- Construction -- Retroactivity -- Amendment -- Test. In general, a statutory amendment is presumed to operate prospectively only, but an amendment may operate retroactively if retroactive application is constitutionally permissible and the amendment is intended by the legislature to be retroactive or is curative.

[16] Statutes -- Construction -- Purpose -- Legislative Intent -- In General. In determining the meaning and scope of a statute, it is the Supreme Court's obligation to determine and carry out the legislature's intent.

[17] Statutes -- Construction -- Authority -- Judiciary -- Separation of Powers -- Legislative Retroactive Replacement of Judicial Construction -- Validity. When a statutory term that the legislature did not define is defined by the Supreme Court in the course of construing the statute, the legislature does not violate the separation of powers doctrine by later amending the statute retroactively to provide a legislative definition that is different from the Supreme Court's definition. Where the legislature is careful not to reverse the Supreme Court's decision and avoids interfering with any judicial function, it does not threaten the independence or integrity or invade the prerogatives of the judicial branch.

[18] Civil Rights -- Law Against Discrimination -- Definition of "Disability" -- Supreme Court Definition -- Amendment by Legislature -- Retroactivity -- Validity -- Separation of Powers. Laws of 2007, ch. 317, § 2, which amended chapter 49.60 RCW to provide a definition of "disability" that is different from the definition provided by the Supreme Court when it construed chapter 49.60 RCW in *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006), does not violate the separation of powers doctrine by expressly declaring that the legislative definition applies retroactively where it does not interfere with any judicial function. Madsen, J., concurs in the result only; Stephens, J., did not participate in the disposition of this case.

COUNSEL: *Paul J. Burns*, for petitioners.

Michael E. McFarland, Jr., and *Patrick M. Risken* (of *Evans Craven & Lackie, PS*), for respondent.

Robert M. McKenna, Attorney General, and Elizabeth C. Beusch, Assistant, on behalf of Washington State and the Washington State Human Rights Commission, amici curiae.

Jeffrey L. Needle and Sean M. Phelan on behalf of Washington Employment Lawyers Association, amicus curiae.

Michael C. Subit and Beth A. Bloom on behalf of Senators Adam Kline and others, amici curiae.

JUDGES: AUTHOR: Justice Tom Chambers. WE CONCUR: Chief Justice Gerry L. Alexander, Justice Charles W. Johnson, Justice Barbara A. Madsen, result only, Justice Richard B. Sanders, Justice Susan Owens, Justice Mary E. Fairhurst, Justice James M. Johnson, Philip J. Thompson, Justice Pro Tem.

OPINION BY: Tom Chambers

OPINION

[*498] [**1022] ¶1 Chambers, J. -- Until 2007, the Washington Law Against [***2] Discrimination (WLAD), chapter 49.60 RCW, contained no definition of the term "disability." In 2006, this court found that the meaning of "disability" as used in the WLAD was consistent with the definition found in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12209. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). In reaction, [**1023] the legislature rejected the *McClarty* definition and amended the WLAD to provide a new statutory definition of "disability." Being careful not to reverse *McClarty*, the legislature explicitly declared the new statutory definition applied retroactively to causes of action occurring the day before the *McClarty* opinion was filed and to causes of action occurring on or after the effective date of the amendment. We are asked to determine whether this retroactive amendment to a statute previously construed by this court violates separation of powers. We hold that under the facts of this case, it does not. We reverse the trial court and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 John Hale was hired by the Wellpinit School District in February 2002 to provide student support services at Wellpinit [***3] High School. In May 2002, Hale was transferred to Fort Simcoe, a satellite school being opened by Wellpinit in White Swan, Washington. Hale provided classroom support and helped with any software problems that arose at Fort Simcoe.

¶3 During his time with Wellpinit, Hale came to believe that some of his supervisors were aggravating a medical [*499] condition. From February 2002 through May 2002, Hale claims he was subject to abusive conduct from his supervisor, Magne Kristiansen, including being criticized for problems with classroom computers and being made to feel "ignorant or stupid." Clerk's Papers at 55-60. After his move to Fort Simcoe, Hale continued to have problems with Kristiansen and another supervisor, Principal Phyllis Magden. These issues allegedly exacerbated Hale's previously diagnosed generalized anxiety disorder.

¶4 On August 25, 2002, Hale sent a letter to Wellpinit Superintendent Reid Riedlinger informing Riedlinger that he was having problems with his supervisor and that those problems were having an adverse effect on his health. On January 3, 2003, Hale sent a letter to the Wellpinit School Board (Board) concerning Riedlinger's failure to respond to the previous letter and outlining [***4] other issues he was concerned about at Fort Simcoe. Included with the letter to the Board was a December 20, 2002, letter written by Hale's physician, Dr. Robert Wigert, explaining that Hale suffered from an anxiety disorder and depression. Feeling that the work environment was exacerbating his condition and that he was receiving no help in trying to improve the situation, Hale left his position with Wellpinit on March 20, 2003.

¶5 In 2006, Hale filed suit in Stevens County Superior Court against his former employer, Wellpinit, alleging negligent infliction of emotional distress, breach of contract, and disability discrimination under the WLAD. The WLAD claim alleged that Hale was disabled and that Wellpinit had failed to accommodate his disability by failing to intervene and stop the abusive conduct Hale felt was exacerbating his anxiety disorder. Wellpinit filed a motion for partial summary judgment alleging that Hale had failed to establish that he was disabled under the WLAD. On March 30, 2007, the trial judge granted Wellpinit's motion for partial summary judgment on the WLAD claim, finding that there was no issue of material fact regarding whether Hale was disabled as that term is [***5] defined under *McClarty*.

[*500] ¶6 In April 2007, following the dismissal of Hale's accommodation claim, the legislature passed Substitute Senate Bill 5340, 60th Leg., Reg. Sess. (Wash. 2007) (S.S.B. 5340), which statutorily defined "disability" under the WLAD. The new legislative act explicitly declared that the definition applied retroactively. Hale filed a motion for reconsideration arguing that in light of the legislature's amendment of the WLAD and its retroactive effect, partial summary judgment should have been denied because his condition qualified as a disability under the new definition. The trial judge, relying largely on *In re Personal Restraint of Stewart*, 115 Wn.

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App. 319,75 P.3d 521 (2003), denied the motion for reconsideration, finding that S.S.B. 5340 violated the separation of powers doctrine by attempting to reverse this court's interpretation of the WLAD in *McClarty*. The superior court certified that the separation of powers issue involved a significant question of law under the constitution of the state of Washington and that immediate review [**1024] would materially advance the termination of litigation. We agreed and accepted review under RAP 2.3(b).

LEGISLATIVE BACKGROUND

¶7 Prior to the [***6] legislature's most recent amendment, the WLAD itself contained no definition of the term "disability." However, the Human Rights Commission (HRC) had earlier promulgated a definition, which stated in part that "a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal." WAC 162-22-020(2). In 2000, we reviewed the HRC definition and held that it was circular and "unworkable when an employee's claim is based upon an accommodation theory." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000). Instead we found that an accommodation [501] claimant could satisfy the "'handicap' ¹ element of his or her claim by proving that (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job." *Id.* The HRC definition remained in force for any claims under the WLAD not based on an accommodation theory.

1 The term "'disability'" was substituted for the word "'handicap'" under the WLAD in 1993. *See McClarty*, 157 Wn.2d at 225.

¶8 A closely divided court changed [***7] the definition of "disability" in 2006 in *McClarty*. There we rejected both the HRC definition and the definition we had adopted six years earlier in *Pulcino* in favor of the definition used by Congress in the ADA. *McClarty*, 157 Wn.2d at 228. Specifically, we found that the definition of "disability" employed by the ADA was better supported by the plain language of the WLAD's text and the legislature's intent. *Id.* Instead of requiring plaintiffs to prove they had an abnormality that substantially limited their ability to perform their job, we construed the WLAD as requiring that a plaintiff show he had "a physical or mental impairment that substantially limits one or more of his major life activities." *Id.* The *McClarty* definition provided a single definition of "disability" to be applied throughout the WLAD. ² *Id.*

2 To illustrate the potential reach of the change, the Washington Employment Lawyers Association (WELA) suggests in its amicus brief that conditions such as arthritis, carpal tunnel syndrome, chronic back pain, back and leg injuries, shoulder, arm, and hand injuries, diabetes, hemophilia, and hypertension were recognized as disabilities under the WLAD prior to our decision in [***8] *McClarty* but are not recognized under the ADA definition we adopted. Amicus Curiae Br. of WELA at 7 n.5.

¶9 The legislature responded to our decision in *McClarty* by enacting S.S.B. 5340 and statutorily defining the term "disability." The legislature specifically rejected the definition of "disability" adopted in *McClarty*, stating:

The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of [502] 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.

Laws of 2007, ch. 317, § 1. The legislature provided:

(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.

Id. § 2 (25) (codified at RCW 49.60.040(25)(a)). In addressing "impairment" as it relates to a reasonable accommodation claim under the WLAD, [***9] the statute now 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 individ-

ual's [**1025] 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.

RCW 49.60.040(25)(d)(i). The legislature also explicitly applied the new definition retroactively, stating, "[t]his 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." Laws of 2007, ch. 317, § 3. *McClarty* was published on July 6, 2006. The effect of this provision was to carefully carve out a window of time during which claims would still be controlled by the definition of "disability" we announced in *McClarty*. The new definition, among other things, eliminated the requirement that the plaintiff demonstrate that the allegedly disabling condition limits "one of his major life activities." It also [***10] broadens the meaning of disability and reinstates some of the language that was used in both the HRC definition and in *Pulcino*. The amendment applies the [**503] *Pulcino* standard to accommodation claims, stating the "impairment must have a substantially limiting effect upon the individual's ability to perform his or her job." RCW 49.60.040(25)(d)(i).

STANDARD OF REVIEW

[1, 2] ¶10 We are asked to determine if the retroactivity of RCW 49.60.040(25) violates the constitutional doctrine of separation of powers. We review all constitutional challenges de novo. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006). We also review a grant of partial summary judgment de novo. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000).

ANALYSIS

¶11 We begin our analysis by emphasizing that the only claim before us is Hale's disability accommodation claim under the WLAD and the only issue raised is separation of powers. There are no claims that the legislation may have contravened other constitutional limits.³ We do not decide whether or not Hale is in fact disabled.

3 Examples of constitutional limits on legislative power to enact retroactive legislation includes the ex post facto clause of the state [***11] or federal constitutions, the right to contract, and the due process clause. These, and other constitutional safeguards, limit the legislature's ability to enact retroactive statutes, but none of them have been raised here.

Separation of Powers

¶12 "The brilliance of our constitution is in its multiplicity of checks and balances." *State v. Evans*, 154 Wn.2d 438, 445, 114 P.3d 627 (2005). "At least 26 distinct provisions of the federal constitution are founded on the separation of powers principle." *In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 238, 552 P.2d 163 (1976). That the United States Constitution has endured since it was drafted in 1787 is a testament to the fact that its creators understood both the [**504] need for a stronger national government and mistrusted power. The Constitution replaced the Articles of Confederation that had presided over an impotent government and was more of a compact among states than a charter for a governing body. David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution* 24 (2007). At the time of the constitutional convention, some individual states had begun to issue their own currencies, appoint ambassadors, and enter into treaties with foreign nations. [***12] *Id.* at 18-21. Nine states claimed to have their own navies. *Id.* at 22. States mistrusted one another, New Englanders mistrusted Southerners, slave owners mistrusted nonslave owners. *Id.* at 18-19. The delegates who met in Philadelphia in 1787 to draft a constitution sought to remedy these problems by creating a strong national government while avoiding the danger of tyranny. Those delegates were revolutionaries who had overthrown one tyrannical government and did not intend to create another.

[3, 4] ¶13 In response to this desire for a stronger yet limited national government, the delegates adopted a plan based largely on the concept of separation of powers. They hoped to ensure liberty by defusing and limiting power. Separation of powers created a clear division of functions among each branch [**1026] of government, and the power to interfere with the exercise of another's functions was very limited. *In re Juvenile Dir.*, 87 Wn.2d at 238; *see also Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The doctrine recognizes that each branch of government has its own appropriate sphere of activity. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court* [***13] *Systems*, 22 Seattle U. L. Rev. 695 (1999). It ensures that the fundamental functions of each branch remain inviolate. *Carrick*, 125 Wn.2d at 135. However, separation of powers "does not depend on the branches of government being hermetically sealed off from one another." *Id.* It recognizes that the separate branches must remain partially intertwined in order to "maintain an effective system of checks and balances, as well as an effective government." *Id.*

[**505] [5-8] ¶14 Within this framework the fundamental function of the judicial branch is judicial review.

This includes the authority to interpret the law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Judicial review was also familiar to the delegates who convened in 1787. Even before the constitutional convention, judges in some states "had actually set aside laws as being against the [State] Constitution." Peter Irons, *A People's History of the Supreme Court* 45 (1999) (quoting Elbridge Gerry). The debate on judicial review at the convention centered around whether federal law was supreme and whether federal judges could strike down state law. *Id.* at 44. Elbridge Gerry of Massachusetts, a professed opponent of the "excesses" [***14] of democracy, was a proponent of judicial review. *Id.* at 45. "Gerry insisted that judges should be independent of the other branches of government in 'their exposition of the laws, which involved a power of deciding on their constitutionality.'" *Id.* On the other hand, one of the strongest opponents of judicial review was John Mercer of Maryland, who spoke in opposition to James Madison's proposed "Council of Revision" and disapproved of the notion that judges, as expositors of the Constitution, should have the authority to declare laws void. *Id.* at 44. He believed laws ought to be "well and cautiously made, and then to be uncontrollable." ⁴ *Id.* William Johnson of Connecticut offered an amendment to give the court jurisdiction over "all cases arising under this Constitution and laws." *Id.* It was a sweeping enlargement of the Court's powers from Madison's Virginia plan, which would have given the national legislature a "negative" over state laws. Johnson's amendment passed with little debate. *Id.* Thus, the Court's power of review was extended to the states under the "supreme law of the land" provision. "Should the executive veto be insufficient to restrain the legislature then the [***15] courts would be able to declare unconstitutional acts void." *In re Juvenile Dir.*, 87 Wn.2d at 241 (quoting M.J.C. Vile, *Constitutionalism and the Separation of Powers* 158 (1967)).

4 Perhaps ironically, neither Gerry nor Mercer signed the Constitution and both opposed its ratification. Irons, *supra*, at 45.

¶15 The principle of separation of powers was incorporated into the Washington State Constitution in 1889. Consistent with the federal courts we have long held that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* (alteration in original) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)). We have also said that "[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976). In other words,

it is within this court's "appropriate sphere of activity" to determine what a particular statute means, and that determination relates back to the time of the statute's enactment.

[9-12] ¶16 The doctrine of [***16] separation of powers is reciprocal. "Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation [**1027] accrues directly to the branch invaded." *Carrick*, 125 Wn.2d at 136. The judicial branch violates the doctrine when it assumes "tasks that are more properly accomplished by [other] branches." *Id.* (alteration in original) (quoting *Mistretta v. United States*, 488 U.S. 361, 383, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (quoting *Morrison v. Olson*, 487 U.S. 654, 680-61, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988))). The legislature's role is to set policy and to draft and enact laws. "[T]he drafting of a statute is a legislative, not a judicial, function." *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quoting *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987))). Both the legislature and the judiciary intrude upon the other's authority cautiously so as not to violate the doctrine of separation of powers.

[*507] [13] ¶17 The separate branches must remain partially intertwined to maintain an effective system of checks and balances. *Carrick*, 125 Wn.2d at 135. [***17] The art of good government requires cooperation and flexibility among the branches. Each must act with a spirit of interdependence. *In re Juvenile Dir.*, 87 Wn.2d at 243. Washington State has enjoyed a rich history of cooperation and harmony among its three branches of government. Each branch has given deference to the others and all three have acted interdependently in exercising authority.

[14] ¶18 With this history in mind, we turn to the question before us: whether the legislature's retroactive amendment of a statute we have already construed violates separation of powers. To answer this question, we must determine "whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *Carrick*, 125 Wn.2d at 135 (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). Respondents argue that the retroactive application of the legislature's statutory definition of "disability" violates separation of powers by allowing the legislature to effectively overrule our decision in *McClarty* and act as a court of last resort. They claim that RCW 49.60.040(25) may only apply prospectively and that Hale's claim must therefore be governed by the definition [***18] we adopted in *McClarty*.

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[15] ¶19 As respondents correctly note, statutory amendments are generally presumed to be prospective only. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). The retroactive application of laws may violate the ex post facto doctrine, *State v. Schmidt*, 143 Wn.2d 658, 672-73, 23 P.3d 462 (2001), affect vested rights and violate due process, *State v. Varga*, 151 Wn.2d 179, 195, 86 P.3d 139 (2004), or affect other judicial functions. There are also many policy reasons that disfavor changing the law retroactively. Retroactive changes in the law alter the status quo and may disturb a party's reasonable reliance on what the law formerly said and may cause manifest injustices. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. [508] 1483, 128 L. Ed. 2d 229 (1994). However, where no constitutional prohibition applies, an amendment may act retroactively if the legislature so intended or if it is curative. *In re F.D. Processing*, 119 Wn.2d at 460 (citing *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990)); see also *1000 Va. Ltd. P'ship v. Vervecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006).

[16-18] ¶20 Although the Court of Appeals has [19] addressed the issue directly in *In re Personal Restraint of Stewart*, 115 Wn. App. 319, 335, 75 P.3d 521 (2003), this court has never specifically decided the question before us. We have hinted that a retroactive legislative amendment that rejects a judicial interpretation would give rise to separation of powers concerns. See *In re Det. of Brooks*, 145 Wn.2d 275, 285, 36 P.3d 1034 (2001); see also *In re F.D. Processing*, 119 Wn.2d at 461; *Johnson*, 87 Wn.2d at 926. However, with one exception, none of those cases involved express declarations by the legislature that the legislation was to apply retroactively. And in the one case, we confronted a clear statement by the legislature that the act was to apply retroactively; we "declin[e]" to reach the issue and decided [1028] the case on other grounds. *In re Det. of Brooks*, 145 Wn.2d at 286.

¶21 The parties offer us varied arguments regarding the acceptability of retroactive legislation based upon the character of the legislative amendment. In the absence of a clear declaration by the legislature regarding retroactivity of an amendment, it may be helpful to characterize changes to a statute as "clarifying" or "restorative" or [20] "curative" or "remedial" to assist in determining legislative intent. See *Vervecs Corp.*, 158 Wn.2d at 584. However, here the legislature was quite clear that S.S.B. 5340, amending RCW 49.60.040, was remedial and retroactive. The amendment was in direct response to our decision in *McClarty*, which the legislature believed "failed to recognize" that WLAD is independent from the federal ADA of 1990. The legislature has expressed its intent unequivocally, and we find the nature of the

amendment unhelpful in analyzing the separation of powers issue.

[509] ¶22 "[I]t is this court's obligation to determine and carry out the intent of the legislature." *City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 616, 70 P.3d 947 (2003) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). Determining the collective intent of the legislature is not always an easy task. *City of Everett v. Snohomish County*, 112 Wn.2d 433, 441, 772 P.2d 992 (1989). This is particularly true when we are called upon to interpret a law that was passed decades ago. Sometimes the legislative body was not as artful as it could have been in choosing the words for the text of the bill it has passed. Occasionally, try as the court [21] may, the legislature is disappointed with the court's interpretation. As recently expressed by a distinguished member of the legislature, sometimes the court must consider legislation passed by the legislature, shake its head and think, "what were they thinking?" And then of course there are times when the legislature reads an opinion of the court and says the same thing.⁵

5 See the remarks of State Senator Lisa Brown, who spoke at the induction ceremony of Justice Debra Stephens and commented on the relationship between the legislature and the judiciary. Induction and Administration of Oath of Office for Justice Debra Stephens (Wash. Sup. Ct. Jan. 7, 2008), audio recording by TVW, Washington State's Public Affairs Network, available at <http://www.tvw.org>.

¶23 In passing S.S.B. 5340, the legislature acted wholly within its sphere of authority to make policy, to pass laws, and to amend laws already in effect.⁶ As originally passed, the WLAD did not define "disability." In *McClarty*, this [510] court, in a five to four opinion, interpreted the act and concluded the definition of "disability" in the ADA was more consistent with the intent of the legislature. The legislature thereafter exercised its [22] authority to amend the act and change the definition of "disability" retroactively. The legislature was careful not to reverse our decision in *McClarty* nor did the legislature interfere with any judicial function. The legislature has not threatened the independence or integrity or invaded the prerogatives of the judicial branch. We hold that the adoption of S.S.B. 5340 did not violate the separation of powers doctrine. Indeed, the court's efforts to express the intent of the legislature in *Pulcino* and *McClarty* and the legislative response in S.S.B. 5340 should serve as a model of how two separate and independent [1029] branches of government can work together in harmony and in the spirit of reciprocal deference to the other's important role and function in the art of governing.

6 The Court of Appeals, in *Stewart*, held that the separation of powers doctrine prevented the legislature from amending the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, retroactively so as to overrule the holding in a separate Court of Appeals decision which had previously interpreted the act. *Stewart*, 115 Wn. App. at 342. We disagree with the reasoning of the Court of Appeals, but we are mindful of the problems [***23] created for the courts by the legislature's constant tinkering with the SRA. This court recently noted that the act had been amended over 181 times since its adoption in 1981. *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 7, 100 P.3d 805 (2004). Each time an offender is sentenced, the act requires the sentencing judge to calculate an offender score. To calculate an offender score requires the judge to examine the law and statutes in effect at the time each crime was committed. Calculation of offender scores has become a very difficult, complex, and time consuming process made more complex each time the SRA is amended. In addition to due process and ex post facto concerns, this task is

made even more difficult when some laws apply prospectively and some retroactively.

CONCLUSION

¶24 We hold that the application of S.S.B. 5340 retroactively did not violate the separation of powers doctrine.⁷ We reverse and remand to the trial court for further proceedings consistent with this opinion.

7 We decline to make a determination as to whether Hale was disabled under the amended definition of "disability" on this record.

Alexander, C.J.; [***24] C. Johnson, Sanders, Owens, Fairhurst, and J.M. Johnson, JJ.; and Thompson, J. Pro Tem., concur.

Madsen, J., concurs in result only.

Michael J. Killeen, *Employment in Washington: A Guide to Employment Laws, Regulations and Practices* (4th ed.)

Littler Mendelson, PC, *The Washington Employer*, 2008-09 ed.

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