CAUSE NO. 80771-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,

Appellants,

v.

WELLPINIT SCHOOL DISTRICT NO. 49,

Respondent

AMICUS CURIAE BRIEF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. Interest of Amicus

The Washington Employment Lawyers Association (WELA) has approximately 120 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association (NELA). WELA's members are Washington attorneys who primarily represent employees in employment law matters, including cases brought under the Washington Law Against Discrimination (WLAD), RCW 49.60. WELA members frequently represent disabled employees seeking either reasonable accommodation or asserting disparate treatment under both the WLAD and the American with Disabilities Act (ADA).

WELA has appeared as amicus curiae in numerous cases before the Washington Supreme Court, including *McClarty v. Totem Electric*,157 Wn.2d 215, 137 P.3d 844 (2006), which is central to the consideration of the issues now before this court. WELA was also active in drafting the subsequent remedial legislation which the Defendant argues violates the doctrine of separation of powers.[1]

II. Summary of Argument

On July 6, 2006 this court filed its opinion in *McClarty v. Totem Electric,* 157 Wn.2d 214, 137 P.3d 844 (2006). In *McClarty* the Court was

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[1] In *Moore* v. *King County Protection Fire District, No 26 et al*, Ninth Circuit No. 06-35948, the Court of Appeals is considering an appeal from the U.S. District Court in Seattle. The issue of whether the retroactivity provision of SB 5340 is constitutional is one issue pending before that Court. The case was submitted on July 9, 2008. The Ninth Circuit was made aware that the constitutionality of the retroactive application of the new definition of disability is to be decided by this court in this case. WELA appeared as amicus curiae in *Moore*, and argued in favor of retroactivity stressing the application of federal law.

asked to determine whether the definition of disability under a theory of reasonable accommodation also applied within the context of a disparate treatment claim. In relevant part, this Court found that neither the definition of disability for reasonable accommodation recited in *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 640, 9 P.3d 787 (2000) nor the definition of disability adopted by the Washington Human Rights Commission in WAC 162-22-020 applied. Instead, the Court overruled *Pulcino*, invalidated the Human Rights Commission definition of disability and adopted the federal statutory definition of disability contained within the American Disabilities Act. *McClarty,* 157 Wn.2d at 228, 137 P.3d at 851.

Immediately thereafter the Plaintiff brought a Motion for Reconsideration. The Washington Employment Lawyers Association (WELA) and the Washington State Human Rights Commission filed *amicus curiae* briefs in support of that motion. The motion was eventually denied.

The Washington State Legislature passed remedial legislation in the next legislative session. On or about May 4, 2007, the Governor of Washington State signed into law new legislation which created a new statutory definition of "disability" within the meaning of the Washington Law Against Discrimination (WLAD). In language that is clear and unequivocal, the new legislation provides that it 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." 2007 Wash. Laws Ch. 317,

§ 3.

Since the enactment of the new statutory definition, several federal district courts have considered challenges to the constitutionality of the retroactivity provision of the law, and have reached different conclusions.[2]

The Defendant in this case argues that the statute's retroactive provision is unconstitutional because it violates the Washington State constitutional doctrine of separation of powers. The Defendant is wrong. Moreover, the Washington Legislature has recognized that the state Supreme Court's majority decision in *McClarty* was the actual violation of separation of powers and a usurpation of its legislative functions. The irony of the Defendant's argument that the Legislature's attempt to counteract the usurpation of its authority violates the doctrine of separation of powers is inescapable.

The Plaintiff in this case argues that Washington State law supports the retroactive application of the new legislation. WELA agrees with this argument for reasons entirely different than those argued either by the Plaintiff

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[2] In *Varga v. Stanwood Camano School District,* WDW No. CV06-0178-MJP, Judge Marsha Pechman initially ruled that retroactive application of the statute was unconstitutional because it violated the separation of powers. However, Judge Pechman subsequently granted a motion for reconsideration of that decision to permit the Washington State Attorney General to intervene as required under Fed. Rule Civ. Pro. 5.1. The case was ultimately resolved and was dismissed without resolution of the issue of retroactivity. Two other federal district courts reached the opposite conclusion. In *Delaplaine v. United Airlines, Inc.*, WDW No. CV-06-0989Z, and in *Breeden v. Kaiser Alum. v. Chem. Corp.*, EDW No. 05-CV-363-LRS, Judge Zilly and Judge Lonny R. Suko respectively both ruled that the retroactive application of the new statute does not violate of the separation of powers doctrine.

or relied upon by the federal courts referenced above.

It is clear that a statutory provision is presumed to apply prospectively only. It may apply retroactively, however, where 1) the legislature intended retroactivity, or 2) if the provision is curative, or 3) if the provision is remedial. Even if the statutory provision falls within one of these three exceptions, it will not apply retroactively if it violates a constitutional prohibition. Whether a retroactive provision is unconstitutional because it violates separation of powers depends upon which of the three exceptions apply. In this case, the legislative intent is clear and unequivocal that the statutory provision apply retroactively.

This Court has ruled that where the statute is "remedial" or "curative" retroactive application of the statute violates separation of powers if it "contravenes" a prior judicial ruling. But this Court has explicitly left undecided whether a statutory provision clearly intended by the legislature to apply retroactively violates separation of powers where it "contravenes" a prior judicial determination. Where the legislature clearly expresses its intention that a statute apply retroactively, that provision does not "contravene" a prior judicial decision unless the retroactive application sets aside a final judgment of any Washington court.

Washington Courts look to federal law for guidance on the issue of separation of powers. Under federal law, the validity of a retroactive provision

principally turns upon whether the expression of the legislature's intent to make the provision retroactive "is so clear that it [can] sustain only one interpretation." When this exacting standard is satisfied, a retroactive statutory provision may apply to cases which predate the statute's effective date, including pending cases. Where legislative intent for retroactive application is clearly expressed a retroactive provision violates separation of powers only if it applies to sets aside a final judgment. No more should be required under the Washington Constitution.

Under federal law, whether a statute "clarifies" or "amends" a prior statute is only relevant as a means to determine if the legislature intended retroactive application. Where legislative intent is clearly and unequivocally expressed, however, federal courts are unconcerned about whether a statute amends or clarifies a prior statute.

In this case the legislature has clearly expressed its intention that the new definition of disability apply retroactively, except for cases which arose after July 6, 2006 and before the effective date of the statute. No final judgment is set aside by application of the new statute. The retroactive application of the new disability definition is therefore a valid exercise of legislative power.

III. Argument

A. In *McClarty* the Court Struck the State Definition of Disability and Adopted the Definition Under the Americans With Disabilities Act.

On or about July 6, 2007, the Washington State Supreme Court decided *McClarty v. Totem Electric*, 157 Wn.2d 215, 137 P.3d 844 (2006). In *McClarty,* an experienced electrician sued his employer for, among other things, disability discrimination under the Washington Law Against Discrimination, RCW 49.60. Mr. McClarty claimed both failure to accommodate and disparate treatment. *McClarty*, 157 Wn.2d at 217-218. The trial court granted summary judgment for Totem Electric. *Id.*

The Court of Appeals affirmed dismissal of Mr. McClarty's reasonable accommodation claim, but reversed on his disparate treatment claim. *McClarty v. Totem Elec.,* 119 Wn.App. 453, 81 P.3d 901 (2003). The Washington State Supreme Court granted review of *McClarty* purportedly to decide whether the *Pulcino* definition or the WAC definition of disability applied to claims alleging disparate treatment, and to resolve the split between Division II and Division III of the Court of Appeals with regard to this issue. *McClarty v. Totem Elec.,* 152 Wn.2d 1011, 99 P.3d 895 (2004)(*review granted*).

Although the sole issue pending before the Supreme Court was the applicable definition of "disability" in disparate treatment claims, without notice to the parties or to the Washington Human Rights Commission, the

Washington Supreme Court rejected the WAC definition as circular, rejected the *Pulcino* definition, and adopted the ADA definition of "disability" for both reasonable accommodation and disparate treatment claims. 152 Wn.2d at 228.[3] The Court's decision in *McClarty* effectively gutted long-standing state precedent and stripped countless individuals of the right to be reasonably accommodated in the workplace.[4] Numerous medical conditions previously recognized as disabilities under the WLAD are not protected under the ADA, *e.g.*, cerebral hemorrhaging, kidney obstructions, depression, bone spurs and ligament damage, broken bones, appendicitis, and flu.[5]

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[3] As noted by Justice Owens in her dissent, by adopting the federal standard "the majority ... usurped the authority of the legislature and enacted a new law," in clear violation of the separation of powers. 157 Wn.2d at 235-36 (*internal citations omitted*)(Justice Owens dissenting). When courts confront wrongly decided, unworkable precedent, especially precedent that requires further attention from the Court following the original decision, courts can choose to overrule the erroneous precedent rather than "compounding the original error." See *Swift & Co., v. Wickham,* 382 U.S. 111, 116, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47-48, 97 S.Ct. 2549, 53 L.Ed.2d 568(1977); and *Patterson v. McLean Credit Union,* 491 U.S. 164, 173, 109 S.Ct. 2363, 2370-2371, L.Ed.2d 132 (1989). A court has the power to revisit its prior decisions when "the initial decision was 'clearly erroneous and would work a manifest injustice," *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). The majority decision in *McClarty* was wrongly decided.

[4] The United States Congress is on the verge of passing the ADA Restoration Act. This legislation would reverse recent United States Supreme Court rulings and require a liberal interpretation of the term "disability." The new legislation *inter alia* would extend coverage to people for whom corrective measures would permit normal life functions. *See* H.R. 3195, S. 1881.

[5] Some of the conditions previously recognized as a disability under the WLAD but not recognized under the ADA include, but are not limited to: **Arthritis** resulting in a severe limp, *Graver v. National Eng'g Co.*, 1995 WL 443944 (N.D. Ill. July 25, 1995); **carpal tunnel syndrome**, *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 373 (6th Cir. 1997); **chronic back pain**, *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998); **back and leg injuries**,; *Williams v. Channel Master Satellite Sys. Inc.*, 101 F.3d 346, 349 (4th Cir. 1996); d **shoulder, arm, and hand injuries**, *Marinelli v. City of Erie*, 216 F.3d 354 (3d Cir. 2000); **Diabetes**, *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002); **hemophilia**, *Bridges v. City of Bossier*, 92 F.3d 329, 334 (5th Cir.1996); **hypertension**, *Sheehan v. City of*

B. The Washington Legislature Passed Remedial Legislation With a Clearly Expressed Intention That It Apply Retroactively.

On April 22, 2007, the Washington legislature passed new legislation, S.B. 5340, that defines disability for the purpose of enforcing the Washington Law Against Discrimination (WLAD). The original preamble to the remedial legislation, as drafted by the state Judiciary Committee, provided as follows:

> The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214,137 7 P.3d 844 (2006), overstepped the court's constitutional role of deciding cases and controversies before it, and engaged in judicial activism by significantly rewriting the state law against discrimination. The legislature further finds that the law changed by the court is of significant importance to the citizens of the state, in that it determines the scope of application of the law against discrimination, and that the court's deviation from settled law was substantial in degree. The legislature reaffirms its intent that the law against discrimination affords to Washington residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and rejects the opinion stated in *McClarty v. Totem Electric*.

SB 5340(1). *See* Appendix A. The final legislation included the following language.

> The legislature finds that the supreme court, in its opinion in

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Gloucester, 321 F.3d 21 (1st Cir.2003); **heart conditions, including coronary artery disease**, *Epstein v. Kalvin-Miller Int'l, Inc.*, 100 F.Supp. 2d 222, 229 (D.N.Y. 2000) (holding that although the condition was not a disability under the ADA, it was a disability under New York law, which has a definition similar to Washington's former definition); **strokes**, *Sink v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 1085, 1095 (D.Kan. 2001); **cancer**, *Turner v. Sullivan Univ. Sys.*, 420 F.Supp. 2d 773, 784 (D. Ky. 2006); *Gordon v. E.L. Hamm&Assocs.*, 100 F.3d 907, 912 (11th Cir. 1996); **colitis**, *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593 (6thCir. 2002); **morbid obesity**, *Hazeldine v. BeverageMedia Ltd.*, 954 F.Supp. 697, 705 (S.D.N.Y. 1997); *Nedder v. Rivier College*, 908 F. Supp. 66, 77 (D.N.H. 1995); **vision impairments**, *Albertsons, Inc. v. Kirkingburg*,527 U.S. 555 (1999) (monocular vision); *Szmaj v. Ashcroft*, 284 F.3d 721 (7th Cir. 2002) (nystagmus).

> *McClarty v. Totem Electric,* 157 Wn.2d 214, 137 7 P.3d 844 (2006), was incorrect, in that it failed to recognize that the law against discrimination affords to Washington residents protections that are wholly independent of 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.

SSB 5340(1). *See* Appendix B.

Although the language is somewhat different, the new definition restores the scope of the pre-*McClarty* definition of disability. RCW 49.60.040(25).

As originally drafted, the legislation provided for complete retroactivity: "This act is remedial and retroactive, and applies to all claims that are not time barred, as well as all claims pending in any court or agency on the effective date of this act." SB 5340. A compromise was struck, however, on this provision of the legislation. The purpose of the compromise was to avoid the perceived inequity of enforcing the statute against employers who had relied upon the *McClarty* decision. The final legislation provides: "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." 2007 Wash. Laws Ch. 317, § 3.

C. Under Washington Law, A Statute Applies Retroactively Where the Legislature Expresses That Clear Intent. It Violates Separation of Powers Only Where the Retroactive Application Acts to Set Aside a Final Judgment.

Washington law presumes that statutory amendments apply only

prospectively. *In Re Stewart*, 115 Wn.App. 319, 332, 75 P.3d 521, 528 (2003); *American Discount Corp., v. Shepard,* 129 Wn.App. 345, 353 (2005). The presumption is overcome, however, in any of the following circumstances: 1) if the legislature intended retroactivity, 2) if the amendment is curative, or 3) if the amendment is remedial. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.,* 158 Wn.2d 566, 584, 146 P.3d 423, 432 (2006)("a statute or an amendment to a statute may be retroactively applied if the legislature so intended, if it is clearly curative, or if it is remedial"); *Steward,* 115 Wn.App. at 332. In this case there can be no dispute that the legislature intended the new legislation to apply retroactively, thereby overcoming the presumption against retroactivity.

Notwithstanding the explicit expression of legislative intent, a statutory amendment will not apply retroactively if it violates a constitutional prohibition. *Vertecs Corp.,* 158 Wn.2d at 584; *American Discount*, 129 Wn.App. at 335. The Defendant and lower courts appear to assume, incorrectly, that the constitutional doctrine of separation of powers is violated when the legislature passes retroactive legislation that "contravenes" a judicial decision that authoritatively construes statutory language - even where legislative intent for retroactive application is clear and explicit. While this Court has ruled that "curative" retroactive legislation is not constitutional where it "contravenes" a prior judicial decision, *State v. Dunaway,* 109 Wn.2d

207, 216 n6, 743 P.2d 1237 (1988), it has explicitly left undecided whether retroactive legislation is unconstitutional in the face of explicit legislative intent that a statute apply retroactively.

In *Detention of Brooks, In re*, 145 Wn.2d 275, 36 P.3d 1034 (2001), the Court considered whether a certain provision of the sexually violent offender statute applied retroactively. The Court first recited the familiar rule that a statute may be applied retroactively if the legislature clearly intended or if it was curative. *Id.* at 284-85. The Court acknowledged that the retroactive application of a "curative" statute was nevertheless unconstitutional if it "it contravenes a construction placed on the original statute by the judiciary." *Id.* at 285. Nevertheless, the Court specifically declined to decide whether retroactive application would be unconstitutional where the legislature clearly expressed its intention for retroactive application. *Brooks*, 145 Wn.2d at 285-86 ("We do not decide the issue of whether amendments to a statute may be applied retroactively where the Legislature expressly intends them to apply retrospectively and where the amendments contravene a judicial construction of the original statute").

In *Personal Restraint of Stewart, In re*, 115 Wn.App. 319, 75 P.3d 521 (2003), the Court of Appeals, without citation of authority, reached the issue that the Supreme Court declined to reach in *Brooks*. The Court ruled that a statute can not be applied retroactively if it "contravenes" a prior decision of

the *Court of Appeals* even where the legislature clearly expresses its intent in favor of retroactive application. *Id.* at 334. But the decision of the Court of Appeals is wrong and inconsistent with federal law.

This Court has previously ruled that the evil in allowing the legislature to "contravene" a previous judicial ruling is that to do so would allow the legislature to become a "court of last resort." *State v. Dunaway,* 109 Wn.2d at 216 n6. But the legislature only becomes a court of last resort if it "overrules" a prior judicial determination. *State v. Posey,* 130 Wn.App. 262, 274 (2005) *affirmed and reversed in part* 158 Wn.2d 1009 (2006).[6] A judicial decision is overruled by a subsequent legislative enactment only where it sets aside a final judgment of any court. The legislature does not become a court of last resort by the enactment of legislation which repudiates or is entirely inconsistent with the *McClarty* decision. The legislature only becomes a court of last resort where a retroactivity provision acts to set aside a final judgment.[7]

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[6] Washington Courts appear to use the terms "contravenes" and "overrules" as if they were synonymous. *State v. Posey,* 130 Wn.App. 262, 274 (2005) reversed in part and affirmed in part 158 Wn.2d 1009 (2006)(using both terms synonymously). *Compare Overton v. Washington State Economic Assistance Authority*, 96 Wn.2d 552, 558, 637 P.2d 652 (1981)("In the past we have held that separation of powers problems are raised when a subsequent legislative enactment is viewed as a clarification and applied retroactively, if the subsequent enactment *contravenes* the construction placed on the original statute by this court")(emphasis added) *with Marine Power & Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal,* 39 Wn.App. 609, 615, 694 P.2d 697 (1985)(" The Legislature may not, under the guise of clarification, *overrule* by legislative enactment a prior authoritative Supreme Court opinion construing a statute")(emphasis added).

[7] Washington Courts appear to have ruled that within the context of separation of powers "contravenes" means inconsistent. *E.g., Washington State Farm Bureau Federation v. Gregoire,* 162 Wn.2d 284, 304, 174 P.3d 1142 (2007)("[S]eparation of powers problems are raised when a subsequent legislative enactment is viewed as a clarification and applied retroactively, if the subsequent enactment contravenes the construction placed on the original

If the Washington legislature attempted to apply a new definition of disability in reference to Mr. McClarty's case against Totem Electric, that legislation would have "contravened" or "overruled" the Court's decision in *McClarty* thereby transforming the legislature into a court of last resort in violation of the separation of powers. Indeed, a final judgment by any court based upon the *McClarty* decision can not be revived by a statutory provision no matter how clearly the legislature's retroactive intention is expressed.

In this case, the legislature clearly expressed that the new definition of disability does not apply to cases arising from the date *McClarty* was originally filed until the effective date of the new statute. The new statute created a "safe harbor" that was exempted from the reach of the statute. This safe harbor was determinative to Judge Zilly in ruling that the new statute did not "contravene" the *McClarty* decision. *See Delaplaine v. United Airlines, Inc,* WDW C06-00989TSZ at 5 (2007)("Senate Bill 5340 does not actually contravene *McClarty*")(Appendix H, Motion for Discretionary Review). Judge Pechman,

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statute by this court") *citing Overton v. Econ. Assistance Auth.*, 96 Wash.2d 552, 558, 637 P.2d 652 (1981); *Johnson v. Morris*, 87 Wash.2d 922, 557 P.2d 1299 (1976)). But federal law is to the contrary. In *ABKCO Music, Inc. v. LaVere,* 217 F.3d 684 (9th Cir. 2000), the Court considered whether a federal copyright amendment in 1997, which was inconsistent with a Ninth Circuit decision filed in 1995, applied retroactively. *Id.* at 689. In relevant part, the Court ruled that "[w]e have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment. . . . Normally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively." *Id.* In deciding that the amendment was intended to clarify, the Court acknowledged "[a]n amendment in the face of an ambiguous statute or a dispute among the courts as to its meaning indicates that Congress is clarifying, rather than changing, the law." *Id.* at 691. *See also Bedoni v. Navajo-Hopi Indian Relocation Com'n,* 878 F.2d 1119, 1120 (9th Cir. 1989)(Ruling that a clarifying amendment to the Tucker Act, which was inconsistent with a prior judicial interpretation, applied retroactively).

on the other hand, ruled that the retroactive provision violated separation of powers because it did "contravene" *McClarty*. *See Varga v. Stanwood-Camano School District,* WDW C06-178MJP at 8 (2007) ("Because S.B. 5340 contravenes *McClarty*, it violates the Washington separation of powers doctrine, and applies only prospectively")(Appendix I to Motion for Discretionary Review). But the reasoning of both jurists misconstrues the term "contravenes" in the constitutional context.

In this case, the legislature created a "safe harbor." But even without the safe harbor, a clearly expressed retroactivity provision would not have "contravened" a prior judicial decision unless it acted to set aside a final judgment of any court. The legislature had the legitimate authority to apply the new definition of disability to *all* cases which arose before the legislative enactment, even those cases pending on appeal, so long as the legislature clearly expressed that intention. This view is consistent with federal law, which Washington Courts look to for guidance on the issue of separation of powers.

D. A Retroactivity Provision is Valid Under Federal Law So Long As That Intention Is Clearly Expressed by The Legislature and It Doesn't Operate to Set Aside a Final Judgment.

Washington Court's look to federal law for guidance on the issue of separation of powers. *Carrick v. Locke,* 125 Wn.2d 129, 135 n1, 882 P.2d 173 (1994). *See also State v. Blilie,* 132 Wn.2d 484, 489, 939 P.2d 691

(1997)("However, this court relies on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine"); *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000(same). A different interpretation for state separation of powers requires careful justification.[8] If there exists any justification for an interpretation of state separation of powers different from the federal separation of powers, that difference favors greater state legislative authority not less. [9]

In *Rivers v. Roadway Express Inc.,* 511 U.S. 298 (1994), the Court analyzed the legislature's authority to enact retroactive legislation. In that case

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[8] Under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), "[t]he following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Id.* at 58. There is no apparent reason to believe that the separation of powers under the Washington Constitution is any different than the separation of powers under the United States Constitution. If there was a difference requiring a different interpretation, the party alleging the difference would be required to present a *Gunwall* analysis. *State v. Gunwall*, 106 Wn.2d 54, 58-63, 720 P.2d 808 (1986); *State v. Mason,* 127 Wn.App. 554, 26 P.3d 34, 43 (2005)("a party asserting an independent state basis for its constitutional argument must provide a *Gunwall* analysis unless the court has already analyzed the argument in that context"). In the absence of a *Gunwall* analysis, it is assumed that the same standards apply under the state and federal constitution. *Centimark Corp. v. Department of Labor and Industries of Washington,* 129 Wn.App. 368, 375, 119 P.3d 865 (2005)("In the absence of a *Gunwall* analysis for a specific legal issue, we cannot consider an argument that the Washington Constitution provides greater protection than its federal counterpart"). In this case, there has been no *Gunwall* analysis.

[9] It is well settled, that "a state constitution is not a grant, but a restriction upon the powers of the legislature, and, hence, an express enumeration of legislative powers is not an exclusion of others not named, unless accompanied by negative terms." *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203, 191 P.2d 241 (1948). The federal constitution by contrast is a grant of limited enumerated powers. *E.g. Alden v. Maine,* 527 U.S. 706, 713 (1999)("The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, § 8; Art. II, §§ 2-3; Art. III, § 2").

the Plaintiffs filed suit alleging they had been terminated from employment on the grounds of race and retaliation in violation of 42 U.S.C. Section 1981. *Id.* at 301. While that case was pending, the United States Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171. The district court dismissed the claim, relying upon *Patterson*, and the Plaintiffs appealed. While the appeal was pending, the Civil Rights Act of 1991 became law. *Rivers*, 511 U.S. at 302. Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations. *Id.* The Supreme Court granted certiorari to determine whether the Civil Rights Act of 1991 definition of "make and enforce contracts" applied to cases pending at the time of enactment. *Id.* at 300.

Although the Supreme Court ruled that the statute did not apply retroactively, it clearly established that Congress could have done so if it had clearly expressed its intent to do so. In relevant part the Court ruled that "[i]n the case before us today, however, we do not question the power of Congress to apply its definition of the term 'make and enforce contracts' to cases arising before the 1991 Act became effective, or, indeed, to those that were pending

on June 15, 1989, when *Patterson* was decided. The question is whether Congress has manifested such an intent." *Id.* at 311.

> *Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive, and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.* No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

Rivers, 511 U.S. at 313 (internal citations omitted)(emphasis added). *See also INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)(Where Congress clearly intends to do so, "it is beyond dispute that ... Congress has the power to enact laws with retrospective effect"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995)("It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: when a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly").[10] Under federal law, a statute applies retroactively

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[10] "Congress clearly has the power to amend a statute and to make that change applicable to pending cases." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993), *citing United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). "Further, the Supreme Court has consistently held that Congress may enact legislation with retroactive effect so long as it comports with Due Process by passing constitutional muster under rational basis scrutiny." *Id.*, *citing United States v. Sperry Corp.*, 493 U.S. 52, 64, 110 S.Ct. 387, 396, 107 L.Ed.2d 290 (1989).

where the statutory language is "so clear that it [can] sustain only one interpretation." *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001) *citing Lindh v. Murphy,* 521 U.S. 320, 328, n4 (1997).

Under federal law, courts apply a two-step test to determine whether legislation is impermissibly retroactive. The first step is to determine the clarity of Congressional intent. When Congressional intent is sufficiently clear to mandate retroactivity, no further inquiry is required. Where retroactive intent is not clearly expressed, courts determine whether the new legislation would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products, 511 U.S. 244, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). *See also U.S. v. Hovsepian,* 359 F.3d 1144, 1156 (9th Cir. 2004)("Only if the statute does not contain an "express command describing

its proper reach do we proceed to step two of the analysis, which is to determine whether application of the statute would have a retroactive effect within the meaning of *Landgraf*"); *U.S. v. Reynard*, 473 F.3d 1008, 1014 (9th Cir. 2007) ("If Congress's intent is sufficiently clear from the text and legislative history, then the statute may be applied retroactively, and the court need not address the second step") *quoting INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); *Kankamalage v. I.N.S.*, 335 F.3d 858, 862 (9th Cir. 2003)("However, if the statute or regulation does not contain an express command that it be applied retroactively, we must go to the second step which requires us to determine whether the statute or regulation would have a retroactive effect").

The only other impediment to the retroactive application of new legislation is that a legislature may not enact "retroactive legislation requiring an Article III court to set aside a final judgment." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 240.

> When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, p. 545 (J. Cooke ed. 1961). Our decisions . . . have uniformly provided fair warning that such an act exceeds the powers of Congress.

Id. at 225.[11]

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[11] *See also Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1988) ("When it so intends, [Congress'] ability to affect the content of a nonfinal judgment in a civil case, through retroactive legislation ceases only when a case's journey through the

In this case, the Washington State legislature has clearly and explicitly stated that the legislation giving a broader definition to the term "disability" is to be applied retroactively. The clarity of the legislation meets even the demanding federal standard that it be "so clear that it [can] sustain only one interpretation." *INS v. St. Cyr*, *supra.* In addition, so long as the legislation does not apply to Mr. McClarty or any other final judgment reached in reliance upon *McClarty*, it does not set aside a final judgment. Under these federal standards, it is very clear that the remedial legislation's retroactivity provision does not violate the constitutional doctrine of separation of powers.

IV. Conclusion

For the foregoing reasons, this Court should rule that the retroactive application of the new statutory definition of disability does not violate the constitutional doctrine of separation of powers.

Respectfully submitted this 22nd day of September, 2008.

Washington Employment Lawyers Association

By _____
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courts comes to an end."), *cert. denied*, 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989); *de Rodulfa v. United States,* 461 F.2d 1240, 1253 (D.C.Cir.) ("[T]he suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice.") (internal quotations omitted), *cert. denied,* 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972).

APPENDIX A

S-0543.2

SENATE BILL 5340

State of Washington 60th Legislature 2007 Regular Session

By Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser

Read first time 01/17/2007. Referred to Committee on Judiciary.

AN ACT Relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW; amending RCW 49.60.040; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), overstepped the court's constitutional role of deciding cases and controversies before it, and engaged in judicial activism by significantly rewriting the state law against discrimination. The legislature further finds that the law changed by the court is of significant importance to the citizens of the state, in that it determines the scope of application of the law against discrimination, and that the court's deviation from settled law was substantial in degree. The legislature reaffirms its intent that the law against discrimination affords to Washington residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and rejects the opinion stated in *McClarty v. Totem Electric*.

Sec. 2. RCW 49.60.040 and 2006 c 4 s 4 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof;

(2) "Commission" means the Washington state human rights commission;

(3) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

(4) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person;

(5) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment;

(6) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer;

(7) "Marital status" means the legal status of being married, single, separated, divorced, or widowed;

(8) "National origin" includes "ancestry";

(9) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory,

mental, or physical disability, or the use of a trained dog guide or service animal by a ((~~disabled~~)) person with a disability, to be treated as not welcome, accepted, desired, or solicited;

(10) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

(11) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

(12) "Real estate transaction" includes the sale, appraisal,

brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services;

(13) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof;

(14) "Sex" means gender;

(15) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth;

(16) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur;

(17) "Complainant" means the person who files a complaint in a real estate transaction;

(18) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction;

(19) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred;

(20) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a

parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years;

(21) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units;

(22) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building;

(23) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons;

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a ((~~disabled person's~~)) person with a disability's sensory, mental, or physical disability;

(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.

NEW SECTION. **Sec. 3.** This act is remedial and retroactive and shall apply to all claims which are not time barred, as well as all claims pending in any court or agency at the time of enactment.

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APPENDIX B

S-1761.3

SUBSTITUTE SENATE BILL 5340

State of Washington 60th Legislature 2007 Regular Session

By Senate Committee on Judiciary (originally sponsored by Senators Kline, Swecker, Fairley, Kohl-Welles, Shin, Pridemore, McAuliffe, Regala, Murray, Spanel, Franklin, Rockefeller, Kauffman and Keiser)

READ FIRST TIME 02/27/07.

AN ACT Relating to the definition of disability in the Washington law against discrimination, chapter 49.60 RCW; amending RCW 49.60.040; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric,* 157 Wn.2d 214, 137 P.3d 844 (2006), was incorrect, in that it failed to recognize that the law against discrimination affords to Washington residents protections that are wholly independent of 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.

Sec. 2. RCW 49.60.040 and 2006 c 4 s 4 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal

representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof;

(2) "Commission" means the Washington state human rights commission;

(3) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

(4) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person;

(5) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment;

(6) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer;

(7) "Marital status" means the legal status of being married, single, separated, divorced, or widowed;

(8) "National origin" includes "ancestry";

(9) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a ((~~disabled~~)) person <u>with a disability</u>, to be treated as not welcome, accepted, desired, or solicited;

(10) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or

facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

(11) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

(12) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services;

(13) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof;

(14) "Sex" means gender;

(15) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth;

(16) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur;

(17) "Complainant" means the person who files a complaint in a real estate transaction;

(18) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction;

(19) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred;

(20) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years;

(21) "Covered multifamily dwelling" means: (a) Buildings

consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units;

(22) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building;

(23) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons;

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a ((~~disabled person's~~)) sensory, mental, or physical disability of a person with a disability;

(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.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must have:

(i) 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 reasonable likelihood that job-related factors will aggravate it to the extent that it could create a substantially limiting effect if not accommodated.

(e) For purposes of (d) of this subsection, a limitation is substantial if it has more than a trivial effect.

NEW SECTION. **Sec. 3.** This act is remedial and retroactive, and applies to all claims that are not time barred, as well as all claims pending in any court or agency on the effective date of this act.

--- END ---

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN HALE and ROBBIN HALE, Appellants, v. WELLPINIT SCHOOL DISTRICT NO. 49, Respondent.	)	No. 80771-0 DECLARATION OF SERVICE

THE UNDERSIGNED, under penalty of perjury, under the laws of the State of Washington, does hereby declare as follows:

1. That the undersigned is now and, at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen and not a party to the above-entitled

action. .

2. That on the 22nd day of September, 2008, this declarant duly sent via fax, United States mail and/or electronic mail, a copy of the foregoing Brief of Amicus Curiae by the Washington Employment Lawyers Association, in the above referenced case, delivering a true and correct copy thereof to the following:

Paul J. Burns
Paulsen Center
421 West Riverside Suite 610
Spokane, WA 99201

Michael E. McFarland
Evans, Craven & Lackie
818 West Riverside, Suite 250
Spokane, WA 99201-0910

DATED in Seattle this 22nd day of September, 2008.

Kathleen Kindberg
Paralegal