

NO. 96335-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CERTIFICATION FROM UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
IN

CASEY TAYLOR and ANGELINA TAYLOR, husband and wife and  
the marital community composed thereof,

Appellants,

v.

BURLINGTON NORTHERN RAILROAD HOLDINGS, INC., a  
Delaware Corporation licensed to do business in the State of  
Washington, and BNSF RAILWAY COMPANY, a Delaware  
Corporation licensed to do business in the State of Washington,

Respondents.

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**AMICUS CURIAE BRIEF OF  
THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION**

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## **I. INTRODUCTION AND IDENTITY OF AMICUS**

The Ninth Circuit certified to this Court the question of “[u]nder what circumstances, if any, does obesity qualify as an ‘impairment’ under the Washington Law against Discrimination (WLAD), Wash. Rev. Code § 49.60.040.” As set forth more fully below, every “sensory, mental, or physical condition” qualifies as an “impairment” under the WLAD, regardless of the cause of the condition or its commonness, as long as the condition is “medically cognizable or diagnosable.” Obesity is a “condition” within the meaning of the WLAD and is “medically cognizable or diagnosable.” This Court should answer the certified question by holding that obesity *always* qualifies as an “impairment” under the WLAD.

WELA consists of approximately 220 Washington lawyers and is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has a strong interest in establishing a broad interpretation of “disability” under Washington law.

## **II. SUMMARY OF ARGUMENT**

Under the WLAD an “impairment” includes any physical condition that is medically cognizable or diagnosable regardless of its cause or commonness. While weight *per se* is not a “condition,” obesity is a

commonly diagnosed medical condition.

The interpretative regulations of the Washington State Human Rights Commission (“HRC”) provide that a “condition” qualifies as a “disability” and an “impairment” under the WLAD when the condition is an “abnormality” and “a reason why the person...was discriminated against...” WAC 162-22-020(2). Obesity is, by definition, an “abnormal or excessive fat accumulation.” BNSF admits that plaintiff’s obesity was “a reason” Taylor “did not get or keep the job in question.” Furthermore, Taylor was perceived by BNSF as being obese.

WAC 162-22-020(2) and the remedial purposes of the WLAD preclude BNSF’s contention that it could deny Taylor employment simply because he suffered from an abnormal medical condition that is correlated with the future development of other disabilities. That contention violates both the letter and the spirit of the WLAD.

Both the Legislature and this Court have deliberately and repeatedly rejected the coverage limitations that exist under Americans with Disabilities Act (“ADA”) and the caselaw interpreting it. The relevant language of the ADA differs from the WLAD and, unlike the ADA, the WLAD requires a liberal interpretation to effectuate its broad remedial purposes. Federal discrimination law is irrelevant to the proper interpretation of RCW 49.60 where, as here, the text of the WLAD “is so

markedly different” from the analogous federal statute. *Martini v. Boeing Co.*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999).

This Court should hold that obesity is always an impairment within the meaning of the WLAD and, in the context of a disparate treatment case, always a disability.

### **III. ARGUMENT**

#### **A. The WLAD Provides Broader Coverage Than the ADA.**

The WLAD has prohibited disability discrimination in private sector employment since 1973. Until 2007 “the WLAD itself contained no definition of the term ‘disability.’” *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 500, 198 P.3d 1021 (2009). In 1975 the HRC defined “disability” in an interpretive regulation. WAC 162-22-020 (1975). The HRC definition stated: “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.” *Id.*<sup>1</sup>

In 1990 Congress enacted the Americans with Disabilities Act (“ADA”). The ADA contained a much more restrictive definition of “disability” than the HRC definition of “handicap.” In 1993, the Legislature changed all references to “handicap” in the WLAD to “disability.” *See SB*

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<sup>1</sup> At the time the statute and the regulation used the term “handicap.”

5474, Laws of 1993, ch. 510 (effective July 25, 1993). The House Committee on the Judiciary had heard testimony from witnesses who advocated incorporating the definition of “disability” under the ADA into the WLAD. *See* House Bill Report HB 1300 at 3 (Feb. 9, 1993). Despite this testimony, the Legislature decided not to adopt the ADA definition of “disability” as the WLAD definition of “disability”. *See* House Bill Report HB 1300 at pp.1-2; House Bill Report SB 5474 at p. 2 (Apr. 17, 1993).

In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000), this Court concluded the HRC definition of “disability” was unworkable in reasonable accommodation cases. *Pulcino* modified the HRC definition of “disability” for reasonable accommodation cases only. *Id.* at 641. In such cases the employee had to prove (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 job.” *Id.* This Court further held that “[a]n employee can show that he has a sensory, mental or physical abnormality, by showing that he or she has a condition that is medically cognizable or diagnosable, or that exists as a record or history.” *Id.* “The HRC definition remained in force for any claims under the WLAD not based on an accommodation theory.” *Hale*, 165 Wn.2d at 501.

In *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), this Court by a 5-4 margin *sua sponte* (1) overruled *Pulcino*; (2) invalidated WAC 162-22-020; and (3) adopted the ADA definition of disability for all cases arising under the WLAD. The Legislature's response to *McClarty* was swift and definitive. By overwhelming bi-partisan majorities the Legislature enacted SB 5340, which "specifically rejected the definition of 'disability' adopted in *McClarty*...." *Hale*, 165 Wn.2d at 501.

The Legislature criticized this Court for failing

to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990 and that the law against discrimination provided such protections for many years prior to the passage of the federal act.

*Id.* at 501-02 (quoting Laws of 2007, ch. 37, § 1).

The Legislature enacted a new and broader definition of "disability" that "reinstates some of the language that was used in both the HRC definition and in *Pulcino*." *Id.* at 498, 502. Since 2007 "[d]isability' means the presence of a sensory, mental, or physical impairment that (i) is medically cognizable or diagnosable; (ii) exists as a record or history; or (iii) is perceived to exist whether or not it exists in fact." RCW 49.60.040(7)(a). The Legislature further provided that "[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.” RCW 49.60.040(7)(b).

“For the 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....” RCW 49.60.040(7)(c) (emphasis added). “Only for purposes of qualifying for reasonable accommodation in employment, an impairment must be known to exist in fact and...have a substantially limiting effect....” RCW 49.60.040(7)(d).

The current version of WAC 162-22-020 interprets the Legislature’s definition of “disability.” The HRC determined:

A condition is a “sensory, mental, or physical disability” if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes, 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). Insofar as a disability may be “common or uncommon,” whether a condition is an “abnormality” is unrelated to its statistical frequency. *See* RCW 49.60.040(7)(b).

**B. Obesity is Always an “Impairment” under the WLAD and Always a “Disability” in a Disparate Treatment Case.**

**1. Every Abnormal Sensory, Mental, or Physical Condition Qualifies as an “Impairment” and also as a “Disability” in a Disparate Treatment Case.**

The WLAD provides a disabled employee with a cause of action “for at least two different types of discrimination.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004).<sup>2</sup> In a disparate treatment case the employee claims the employer discriminated against him or her “because of the employee’s condition.” *Id.* In a reasonable accommodation case, the employee alleges the employer failed to take affirmative steps either to help the employee continue working in his/her current position or to attempt to find another position compatible with the employee’s limitations. *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 777, 249 P.3d 1044 (2011).

The WLAD effectively has two definitions of disability: one for disparate treatment/disparate impact cases and another one with additional elements for reasonable accommodation cases. Notably absent from the statute’s definition of “disability” outside the reasonable accommodation context is any requirement that a condition or impairment have a

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<sup>2</sup> The WLAD also recognizes a third type of claim, disparate impact. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 499-500, 325 P.3d 193 (2014). In a disparate impact case, the employee asserts a facially neutral employment policy has a disproportionate adverse effect on a protected class. *Id.*

substantially limiting effect in order to constitute a disability. “Requiring an employee to demonstrate that her disability substantially interfered with job performance in a reasonable accommodation case is logical because without the limitation there would be no need for accommodation....” *McClarty v. Totem Elec.*, 119 Wn. App. 453, 470, 81 P.3d 901 (2003), *rev’d*, 157 Wn.2d 214 (2006).

But an employee claiming disparate treatment is not asking the employer to take any remedial steps on his behalf. Rather, the employee asks only that the employer not terminate him for discriminatory reasons. Logically then, under a disparate treatment theory, the employee should not have to show that his condition substantially limited his ability to perform his job because he is not requesting special treatment based on any limitation. On the contrary, the employee is asking only to be treated like all other employees.

*Id.*; *McClarty*, 157 Wn.2d at 248 (Owens, J., dissenting); *accord Pulcino*, 141 Wn.2d at 641. The statutory text of the WLAD shows the Legislature accepted this persuasive rationale for confining the concept of “substantial limitation” to reasonable accommodation claims alone.

Federal discrimination law is irrelevant to the proper interpretation of RCW 49.60 where, as here, the text of the WLAD “is so markedly different” from the analogous federal statute. *Martini v. Boeing Co.*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999). The ADA contains a single definition of “disability” for all types of claims. A disability under the ADA means:

“a physical or mental impairment that substantially limits one or major life activities of such individual.” 42 U.S.C. § 12102(1)(A). An ADA disability also includes having “a record of such an impairment; or being regarded as having such an impairment....” 42 U.S.C. § 12102(1)(B)-(C). Except in “regarded as” cases an employee must prove a substantial limitation to have a “disability” under the ADA.<sup>3</sup> In other words, under the ADA some “impairments” do not qualify as “disabilities” even for the purposes of a disparate treatment claim. That is not true under the WLAD. In the disparate treatment context, the plaintiff’s proof of an “impairment” *ipso facto* establishes a covered “disability” under the WLAD.

The certified question here requires this Court to construe meaning of the term “impairment” in RCW 49.60.040(7)(c). “The court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). “Statutory interpretation begins with the statute’s plain meaning. Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, and the statutory scheme as a whole.” *Id.* (internal quotation omitted). A court “must not add words where the legislature has

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<sup>3</sup> In 2007 Congress amended the ADA. Thereafter, in order to prevail in a “regarded as” case an employee need only prove the existence of an impairment without regard to severity (so long as it is not both transitory or minor). *See* 42 U.S.C. 12102(3).

chosen not to include them....” *Id.*

BNSF and Taylor dispute whether an “impairment” under the WLAD must have a separate, underlying physiological cause. Relying on a doubtful reading federal law Taylor hotly contests, BNSF asserts that the WLAD incorporates such a requirement. BNSF is wrong. “Under the plain language of the statute, *any* mental or physical condition may be a disability.” *Clype v. Commercial Drivers Servs, Inc.*, 189 Wn. App. 776, 793, 358 P.3d 464 (2015) (emphasis supplied). “‘Impairment’ is defined as a nonexclusive list of terms including any ‘physiological disorder, or condition, cosmetic disfigurement or anatomical loss’ affecting the body’s systems....” *Id.* In other words, an impairment under the WLAD includes, but is not limited to, (1) any physiological disorder or (2)(a) any condition, cosmetic disfigurement, or anatomical loss (b) affecting one of more of the following body systems.<sup>4</sup>

As the Ninth Circuit recognized in its certification order, “from a purely textual standpoint...[the] WLAD appears to apply to conditions irrespective of physiological cause.” *Taylor v. BNSF Holdings, Inc.*, 904 F.3d 846, 850 (9<sup>th</sup> Cir. 2018). BNSF asks the Court to rewrite the text of RCW 49.60.020(7)(c)(i) to delete the comma after “disorder” thereby

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<sup>4</sup> While not free from doubt, the most natural reading of the statute is that the phrase “affecting one or more of the following body systems” applies to “condition” and “cosmetic disfigurement” as well as to “anatomical loss.”

adding “physiological” as a modifier of “condition.” A court should disregard the plain text of a statute only where the language the Legislature used leads to “unlikely, absurd, or strained results.” *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). BNSF does not, however, assert the actual syntax of RCW 49.60.020(7)(c)(i) leads to absurd results. Instead, the BNSF urges the Court to disregard the plain meaning of the legislative definition of “impairment” and adopt a narrower construction of that term to conform the WLAD to its questionable and contested reading of federal law.

The WLAD, however, mandates that the “provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020. This constitutes the Legislature’s “command that the *coverage* of [the] act be liberally construed and that its exceptions be narrowly confined.” *Seattle Housing Author. v. City of Seattle*, 3 Wash. App. 2d 532, 542, 416 P.3d 1280 (2018) (emphasis supplied).

RCW 49.60.020(7)(c) provides that an “impairment” “includes but is not limited to” physical conditions. The WLAD’s mandate of liberal construction requires that “impairment” be construed to provide for broad coverage of physical conditions regardless of whether they have a separate, underlying physiological cause. Although obesity is clearly a physical condition, BNSF wants this Court to rule that to qualify as an “impairment”

an individual must show a separate, independent, underlying cause of the condition. This interpretation would be inconsistent with the liberal interpretation of the text required by the WLAD. Nothing in the WLAD requires the existence of an “impairment” to be dependent upon its cause.

While the definition of “impairment” the Legislature adopted in 2007 may have had textual similarities to the then-existing EEOC definition of that term under the ADA,<sup>5</sup> BNSF Br. at 12-13, the Legislature’s expressed intention was to restore the pre-*McClarty* HRC definition of “disability” for disparate treatment cases and broaden it. *Hale*, 165 Wn.2d at 498, 502. The pre-*McClarty* HRC definition of disability provided 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 (2006). This definition plainly did not include any requirement that a physical condition have a (separate, underlying) physiological cause to qualify as a disability under the WLAD. *McClarty*, 157 Wn.2d at 226 (HRC definition of disability “include[s] any medically cognizable abnormality.”) (emphasis in original).

BNSF’s assertion that the Legislature intended to incorporate federal law into the WLAD through its 2007 amendments, BNSF Br. at 22,

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<sup>5</sup> The very fact that the Legislature did not delete the comma following the word “disorder” after the EEOC did with respect to the federal regulation in 2009 shows the Legislature did *not* intend the definition of “impairment” to follow federal law.

could not be further from the historical truth. The 2007 amendments were a repudiation of this Court's decision in *McClarty* to reject existing WLAD authority and import federal ADA definitions, principles, and case law into RCW 49.60. The 2007 amendments were intended to reaffirm that the WLAD contains disability protections that "are wholly independent of those afforded by the federal law...." *Hale*, 165 Wn.2d at 501-02 (quoting Laws of 2007, ch. 37, § 1). In *Hale* this Court unanimously recognized that the new statutory definition of disability "reinstates some of the language that was used in both the HRC definition and in *Pulcino*" but is broader than prior law. *Id.* at 502. The last thing the Legislature intended to do was to adopt the restrictive interpretation of "disability" under then-existing federal law.

Even if the text and statutory history of the WLAD were not abundantly clear, WAC 162-22-020 disposes of the assertion that the WLAD covers physical conditions only where they have physiological causes. WAC 162-22-020(2) provides that a "condition is 'a sensory, mental, or physical disability' if it is an abnormality and is a reason why the person having the condition...was discriminated against." The HRC has determined that in a disparate treatment case a "condition" qualifies as a

“disability,” and therefore an “impairment,”<sup>6</sup> where two criteria are satisfied: the condition is (1) abnormal and (2) a reason the plaintiff was discriminated against. WAC 162-22-020(2) establishes that the HRC does not interpret the WLAD to include only physical conditions with physiological causes as “impairments” and “disabilities.”<sup>7</sup>

The Legislature has given the HRC the power to both “formulate policies to effectuate the purposes of the” WLAD and to adopt suitable regulations to carry out the provisions of the statute. RCW 49.60.110; RCW 49.60.120(3). The HRC’s interpretative regulations regarding the WLAD are “entitled to great weight” because the agency is “the administrative body whose duty it is to administer its terms.” *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). Courts defer to the HRC’s construction of the WLAD “absent a compelling indication that such interpretation conflicts with the legislative intent.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996).

RCW 49.60.020(7)(b) and WAC 162-22-020(2) make clear that whether a “condition” is an “abnormality” has nothing to do with how many

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<sup>6</sup> All “disabilities” are “impairments,” RCW 49.60.020(7)(a), so the regulation necessarily establishes when a “condition” qualifies as an “impairment.”

<sup>7</sup> WELA agrees with Taylor that medical conditions that are, in whole or in part, the result of the plaintiff’s voluntary behavior are “impairments” under the WLAD to the same extent as conditions beyond the plaintiff’s control. *See* Reply Br. at 13.

people suffer from that condition. The Legislature explicitly determined that a “disability exists whether...it is common or uncommon...” RCW 49.60.020(7)(b). In accordance with *Pulcino*, WAC 162-22-020(2) provides that a “a sensory, mental, or physical condition” will qualify as a “sensory, mental, physical disability” where it “[i]s medically cognizable or diagnosable.” 141 Wn.2d at 641. Under these provisions a condition is “abnormal” where it is “medically or cognizable or diagnosable,” regardless of how common the diagnosis might be.

In sum, the statutory text of the WLAD, its purposes and history, and the HRC regulations interpreting it all establish every “abnormal” “sensory, mental, or physical condition” is a covered “disability” in a disparate treatment case, regardless of the cause of the condition or its commonness. More generally, a “condition” need only be “medically cognizable or diagnosable” to qualify as an “impairment.”

**2. Obesity is an Abnormal, Medically Cognizable and Diagnosable, Physical Condition.**

When considered in light of WLAD’s text, purposes, history, and mandate of liberal construction, as well as the HRC’s interpretative regulations, the answer to the Ninth Circuit’s certified question is self-evident. Obesity is *always* impairment under the WLAD. Furthermore, in a disparate treatment case such as the present one, obesity is also *always* a

covered disability. As Taylor argues and BNSF does not dispute, obesity is a disease. Taylor Br. at 11-12; BNSF Br. at 41; Reply Br. at 3, 6, 12. That fact, in and of itself, establishes that obesity is a medically cognizable and diagnosable condition and, therefore, an impairment under the WLAD. Furthermore, BNSF's own physician diagnosed Taylor as suffering from obesity. Taylor Br. at 3.

Obesity is also an "abnormality" under WAC 162-22-020(2). The World Health Organization defines "obesity" as "an abnormal or excessive fat accumulation that presents a risk to health." Taylor Br. at 11. Obesity means weight that is "outside the statistically 'normal' range." BNSF Br. at 1. Taylor had a Body Mass Index of 41.3, far outside the normal range. *Taylor*, 904 F.3d at 848. It is undisputed that Taylor's obesity was "a reason" (and, indeed, *the* reason) that BNSF denied him employment as an electronic technician. *See id.*; see also Taylor Br. at 2-3. Accordingly, under WAC 162-22-020, Taylor's obesity was a both an impairment and a "sensory, mental, or physical disability."

BNSF admittedly excluded Taylor from employment because he suffers from obesity, that is statistically correlated with a higher risk than average of having or developing medical conditions that even BNSF recognizes are covered disabilities. BNSF argues that Taylor is not yet impaired enough to qualify for protection under the WLAD and that the

company can discriminate against him based on his obesity with impunity. BNSF's position in this case is fundamentally at odds with the letter and spirit of Washington law.

Contrary to what BNSF suggests, this case has nothing to do with whether "weight" is a condition, impairment, or disability under the WLAD. See Reply Br. at 4-5, 11. Weight is a physical characteristic; obesity is a disease. Blood sugar level and diabetes provide a useful analogy. Everyone has an average blood sugar level, just as everyone has an average weight. An individual's average blood sugar level is not per se a condition, impairment, or disability any more than a person's average weight is. Some people, however, have an average blood sugar level that is significantly higher than normal. Such individuals have the medically cognizable and diagnosable condition called "diabetes." Diabetes is correlated with a higher risk of developing other disabling medical conditions including cardiovascular disease, blindness, and nerve damage. But diabetes is also a disease, just like obesity.<sup>8</sup> Diabetes and obesity are both impairments under RCW 49.60 and WAC 122-22-020 even though blood sugar level and weight are not.

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<sup>8</sup> Diabetes sometimes has a physiological cause—insufficient insulin production due to a defect in pancreatic functioning—but sometimes it is caused by behaviors such as poor eating habits and a sedentary lifestyle. No matter what the cause, diabetes is a WLAD impairment. *E.g.*, *Cluff v. CMX Corporation*, 84 Wn. App. 634, 929 P.2d 1136 (1993).

In sum, obesity *always* constitutes an impairment under RCW 49.60, just like any other medically cognizable or diagnosable condition.<sup>9</sup>

#### IV. CONCLUSION

The Legislature has repeatedly rejected all efforts to restrict the broad meaning of the term “disability” under the WLAD to its narrower interpretation under federal law. In contrast to the ADA, every abnormal sensory, mental, or physical condition qualifies as an impairment under the WLAD and as a covered disability in a disparate treatment case, regardless of the cause of the condition or its commonness. This Court should answer the certified question by holding obesity is always an impairment under the WLAD.

Respectfully submitted this 14<sup>th</sup> day of January 2019.

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<sup>9</sup> The HRC’s Guide to Disability and Washington State Nondiscrimination Laws, Appendix C to BNSF Brief, refutes rather than supports the company’s position. The Guide does *not* “adopt[] in substance the EEOC’s original guidance on physical characteristics.” *Cf.* BNSF Br. at 2. Instead the Guide recognizes that the “Washington State definition [of disability] is broader and covers a greater number of impairments...” than the definition of “disability” under the ADA.