

WADA/WSBA reception 2019

Enabling People to Be Their Best

Bios/Presentation materials

Enabling People to Be Their Best



Please Join Us for the 3rd Annual Washington Attorney with Disabilities Association and Washington State Bar Association Reception (CLE credit pending)

Thursday, October 24 at 5 PM

Register at: <https://forms.gle/CvsYnPcsbX6XrpAh6>

Opening Remarks: Jonathan Ko, President Washington Attorney with Disabilities Association and Washington State Bar Association Welcome (5:00 to 5:05)

Reasonable Accommodations:

Who is disabled and what accommodation is reasonable? (5:05 to 5:30)

CAROLYN LADD serves as Judge pro tem for Seattle Municipal Court and she is senior counsel at The Boeing Company. She obtained her Masters of Law from Georgetown University, focusing on Labor Law, after earning her JD from the University of Oregon. At Boeing, her practice focuses on compliance with equal employment opportunity laws. She serves as a vice president of Washington Women Lawyers, and she is a member of the Washington Attorneys with Disabilities Association and the Deaf & Hard of Hearing Bar Association. In her spare time, she follows #AppellateTwitter and watches Washington State Supreme Court oral arguments on TVW.

Enforcing the Law:

A Perspective from the Seattle Office for Civil Rights (5:30 to 5:50)

MICHAEL CHIN is the Civil Rights Enforcement Manager for the Seattle Office for Civil Rights responsible for enforcing local and federal Anti-Discrimination laws in employment, housing, public accommodations, and contracting. Under his leadership, Michael successfully launched four new civil rights protections which include the all-gender restroom access, ban on conversion therapy to minors, ban on the use of criminal records in housing, and the new

domestic worker protections. Michael oversees a team of civil rights investigators, an in-house civil rights testing program, and community outreach and trainings. Michael was instrumental in the early development and implementation of Seattle's labor standards ordinances until the creation of the new Office of Labor Standards in 2016. Prior to his role with SOCR, he worked as an investigator for the Washington State Human Rights Commission. Michael has presented trainings on civil rights protections, enforcement and equity. He is a certified mediator since 2006 and mediated for the Seattle Federal Executive Board, King County Dispute Resolution Program. He currently serves on the City of Seattle Alternative Dispute Resolution Advisory Board. Michael is a past member of the citywide Race and Social Justice Initiative Core Team and department Change Team which addresses racial equity in the City of Seattle. Michael received his Juris Doctorate from Gonzaga University School of Law and Masters Business Administration from Gonzaga in 2006.

Accommodations around the World! (5:50 to 6:10)

GENEVIEVE TIETJEN is a University of Washington alumni who has been with Microsoft for 13 years, the last 7 as a Senior Human Resources Benefits Business Partner. She has experience helping employees with accommodations due to disabilities or medical conditions. She is also working on a project team that is piloting central accommodations globally. In addition to her work, she has spent time volunteering at a woman and children's shelter at Seattle's Gospel Mission as well as the Washington State Department of Corrections.

Panel Question and Answer Session (6:10 to 6:30)

Reception (6:30 to 8:30)

Reasonable Accommodations in Employment

Carolyn Ladd
October 24, 2019

Disclaimers

- I speak only for myself
- This is not legal advice

What we'll cover today

- Reasonable accommodation under the Washington Law Against Discrimination
- Is obesity a disability? And if so, what reasonable accommodations might be required?
- New 2019 law re: guide dogs & mini horses
- Accommodating the side effects of medication
- Consequences of failing to accommodate

Disability

RCW 49.60.040(7)(a)

(7)(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.

RCW 49.60.040(7)(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.

Impairment

RCW 49.60.040(7)(c)

(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.

Qualifying for Reasonable Accommodation RCW 49.60.040(7)(d)

(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 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

*a limitation is not substantial if it has only a **trivial effect**.

RCW 49.60.040(7)(e)

Reasonable Accommodation

WAC 162-22-065

Reasonable accommodation means measures that:

- (a) Enable equal opportunity in the **application** process;
- (b) Enable the proper **performance** of the particular job held or desired;
- (c) Enable the enjoyment of **equal benefits, privileges,** or terms and conditions of employment.

Reasonable Accommodation

WAC 162-22-065

Examples of reasonable accommodation may include, but are not limited to:

- (a) Adjustments in job duties, work schedules, or scope of work;
- (b) Changes in the job setting or conditions of work;
- (c) Informing the employee of vacant positions and considering the employee for those positions for which the employee is qualified.

Undue Hardship

WAC 162-22-075

An accommodation will be considered an undue hardship if the **cost** or **difficulty** is unreasonable in view of:

- (1) The **size** of and the **resources** available to the employer;
- (2) Whether the cost can be included in planned remodeling or maintenance; and
- (3) The requirements of other laws and contracts, and other appropriate considerations.

Gamble v. City of Seattle
6 Wn. App. 2d 883 (2018)

- Employers have an obligation to accommodate an employee's disability unless it would impose an undue hardship on the conduct of the employer's business
- This duty is limited to those steps reasonably necessary to enable the employee to perform his or her job

Gamble v. City of Seattle

- Employer must be aware of the disability and limitations
- Onus is on the employee to give the employer notice of the disability
- The employee has a duty to cooperate with the employer's efforts
- Envisions an exchange between employer and employee where each seeks and shares information to achieve the best possible results.

Gamble v. City of Seattle

“An employer must be able to ascertain whether its efforts at accommodation have been effective in order to determine whether more is required to discharge its duty. The employee therefore has a duty to communicate to the employer whether the accommodation was effective. This duty flows from the **mutual obligations of the interactive process.**”

Is obesity a disability?

- *Taylor v. Burlington NRR*, 193 Wn.2d 611 (2019)

“Because **obesity** is recognized by the medical community as a physiological disorder, or condition, and it affects the normal functions of several of the listed body systems, it **will always meet the WLAD’s statutory definition of ‘impairment.’**”

Possible Reasonable Accommodations for Obesity

Job Accommodation Network examples

<https://askjan.org/disabilities/Obesity.cfm>

- Large-rated harnesses
- Large-rated ladders
- Large-rated toilet
- Fall protection
- Seat belt extenders
- Modified workspace



Substitute House Bill 2822

- “There are an increasing number of occurrences where people intentionally or mistakenly represent their pet, therapy animal, or emotional support animal to be a service animal and attempt to bring the animal into a place that it would otherwise not be allowed.”
- Disservice to persons who rely on legitimate service animals

Service Animal

RCW 49.60.040(24)

Any **dog or miniature horse** that is **individually trained** to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.

Service Animals

Examples of Work or Tasks

- assisting individuals who are blind with navigation
- alerting individuals who are deaf to the presence of people or sounds
- pulling a wheelchair
- assisting an individual during a seizure
- retrieving items such as medicine or the telephone
- providing physical support and assistance with balance and stability to individuals with mobility disabilities
- helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors

Service Animal

RCW 49.60.040(24)

- “The crime deterrent effects of an animal's presence and **the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks.**”

Misrepresentation of Service Animal

RCW 49.60.214

(1) It shall be a civil infraction under chapter [7.80](#) RCW for any person to misrepresent an animal as a service animal. A violation of this section occurs when a person:

(a) Expressly or impliedly represents that an animal is a service animal as defined in RCW [49.60.040](#) for the purpose of securing the rights or privileges afforded disabled persons accompanied by service animals set forth in state or federal law; and

(b) Knew or should have known that the animal in question did not meet the definition of a service animal.

Misrepresentation of Service Animal

RCW 49.60.214

- An enforcement officer or place of public accommodation cannot ask about the nature or extent of a person's disability, but can ask:
 - Is the animal required because of a disability?
 - What work or tasks has the animal been trained to perform?
- Cannot ask for documentation

Guide Dogs & Service Animals

WAC 162-22-100

- It is an unfair practice for an employer. . .to request that a trained dog guide or service animal be removed from the workplace, UNLESS that employer. . .can show that the presence, behavior or actions of that dog guide or service animal constitutes an unreasonable risk to property or other persons.
- It is an unfair practice to remove a trained dog guide or service animal from the **entire** workplace because the animal presents a risk of injury or harm when in **part** of the workplace

Assessing Risk or Harm

WAC 162-22-100(2)

- Risk to property or other persons must be immediate or reasonably foreseeable, not remote or speculative.
- Risk to persons may be given more weight than risk to property.
- Risk of severe injury or harm may be given more weight than risk of slight injury or harm.

Assessing Risk or Harm

WAC 162-22-100(2)

- Risk of injury or harm to the dog guide or service animal is **not** a reason for an employer to remove or exclude the animal. The decision whether to bring the animal to the worksite under such conditions most properly rests with the person with a disability using the dog guide or service animal.

Reasonable Accommodation

WAC 162-22-100(3)

- When risk justifies the removal of a dog guide or service animal from the workplace, efforts must be made to reasonably accommodate the person with the disability.

Liability for Guide Dog

WAC 162-22-100(4)

- “Generally, a person with a disability using a dog guide or service animal is responsible for the animal and may be held liable for the behavior and actions of the animal.”

Accommodating the Side Effects of Prescription Medications

- *Stewart v. Snohomish County PUD*, 262 F. Supp. 3d 1089 (W.D. of Wash. 2017)
 - “the PUD was not required to allow Stewart to work while under the influence of narcotics if those narcotics prevented her from doing her job properly”
 - The PUD “was not entitled to immediately discipline her for being impaired due to her disability”
 - “it could have treated her as an employee with a medical condition, rather than a drug abuser”

Troy Coachman v.
Seattle Auto Management
2:17-cv-00187

- W.D. of Wash. Jury Verdict Form

1 || If yes, what do you find to be the amount of damages sustained by Plaintiff?
2 ||
3 || Economic Damages: \$ 236,812
4 || Compensatory Damages: \$ 4,697,248
- ||

- On appeal to the 9th Circuit

Enforcing the Law: A Prospective from the Seattle Office for Civil Rights

- I. SOCR Overview
 - a. **Vision:** A city of liberated people where communities historically impacted by racism, oppression and colonization hold power and thrive.
 - b. **Mission:** To end structural racism and discrimination through accountable community relationships and anti-racist organizing, policy development and civil rights enforcement.
- II. Civil Rights Enforcement
 - a. Antidiscrimination laws (housing, employment, public places, contracting)
 - b. Civil rights protections (All-gender restroom, ban on conversation therapy, fair chance housing, closed captioning ordinance)
- III. disAbility Facts
 - a. Centers Disease Control and Prevention Report (2018)
 - i. 61 million U.S. adults – about 1 in 4 Americans – have a disAbility that impacts a major part of their life
 - ii. Most common disAbility type, mobility, affects 1 in 7 adults
 - iii. With age, disAbility becomes more common, affecting approximately 2 in 5 adults age 65 and older
 - iv. Most common type of disAbility in younger adults is cognitive disAbility
 - b. 2018 Enforcement Data
 - i. 26% charges filed in 2018 were disAbility related
 - ii. Over 50% of those complaints were based on failure to provide a reasonable accommodation
 - iii. Most of them were housing issues
 - iv. Service animals
- IV. Enforcement
 - a. Intake, Investigations, and Settlements Process
 - b. Outcomes
- V. Trends
 - a. Service Animals
 - i. ADA and WLAD 49.60.214 definition (2019) of Service Animals
 - a. Under the ADA, a service animal is defined as a dog or miniature horse that has been individually trained to do work or perform tasks for an individual with a disAbility. The task(s) performed by the dog must be directly related to the person's disAbility
 - b. Misrepresentation: \$500 penalty for the intentional misrepresentation of a service animal

- i. which delegitimizes the genuine need for the use of service animals and makes it harder for persons with disabilities to gain unquestioned acceptance for their legitimate, properly trained, and essential service animals
 - c. Applies to food establishments
 - d. Fair Housing Act includes emotional support and companion animals
 - ii. SMC 14.04/06.08 definition of Service Animals
 - a. "Service animal" means an animal that provides medically necessary support for the benefit of an individual with a disAbility
 - b. Seattle definition is more expansive in employment, housing, public places (except for food establishments)
 - iii. Inquiries allowed
 - 1. Is the animal required because of a disAbility (yes or no)
 - 2. Is the animal trained to do work, perform, or medically necessary? (yes or no)
- b. DisAbility Verification
 - i. Person provides information that they qualify as a person with a disAbility
 - 1. Third-party who can certify in their professional capacity that the person qualifies as a person with a disAbility
 - 2. Apparent disAbility, no documentation necessary
 - ii. Person with a disAbility has a disAbility-related need for an accommodation
- c. Engaging in the interactive process
 - i. Burden is on both parties to engage in the interactive process to address the persons disAbility related need for an accommodation
 - ii. Undue delay or initial denial of accommodation is failure to engage in the process
- d. Accommodation must be effective
 - i. Accommodation must effectively address the person's disAbility-related need
 - ii. May not be exactly what the person wants but the accommodation must be an effective solution
 - iii. Follow up with the accommodation
- e. Documentation

- i. Request for an accommodation
- ii. Verification (if necessary)
- iii. Accommodations offered or provided
- iv. Follow-up
- v. Chronology of events (timely response)

VI. New Seattle Protections

a. Closed Captioning Ordinance (November 15, 2019)

- i. new requirement that closed captioning be turned on when televisions are in places of public accommodation
- ii. **Closed captioning** is made up of the words on a television screen that match the words being spoken on a television show. The words can only be seen when the closed captioning is turned on
- iii. **businesses that are open to the public** where people eat, drink, see a show, receive services, buy goods, or have fun
- iv. Exceptions
 1. No television sets in a public area
 2. Television cannot display closed captioning
 3. Selling different models of televisions that are available for viewing, at least one TV of each model must have the closed captioning on.

Microsoft Global Accommodations Pilot

Canada, Ireland, United Kingdom, Netherlands, Australia, China,
Brazil, Germany, India

US Accommodations

1. Specialized US HR Benefits Team to manage all US employee LOAs and medical accommodations
2. Employees reach out to askhr@Microsoft.com to request an accommodation; they are directed to our HR Benefits team
3. We work with employee and manager until we come to a decision as to whether a request is reasonable and we can accommodate

Central Pilot Overview – Other Countries

1. Managers/HR Line Solutions now have a central fund to use to pay for accommodations for employees with disabilities. Managers do not need to determine if they can afford it
2. Employees have a new central place (HRWeb) to request an accommodation that will be routed to HR Line Solutions Team
3. HR Line Solutions will be the facilitator of any accommodation ask and own the employee experience working thru their new and existing processes

Why we are doing this pilot

- To reduce barriers for employees to be as productive as possible
- Worldwide consistency for employees
- 44% of Microsoft employees live outside the US. The policy, process, and budget allocation varies by country. The one common theme outside the US is that there is no formal, centralized fund or process to support accommodation requests
- The managers must absorb the cost. Therefore, a manager's team budget is impacted by the cost of accommodation requests
- Our goal is to make all managers and all employees aware as to how to request an accommodation and help pay for and fund those requests thru one avenue

Where does an employee go to request an accommodation in your market? HR web- new page

Accommodations

Request Disability or Medical Accommodation

If you have a medical need or disability, you can request accommodations.

[Contact AskHR](#)

Related Benefits

[Ergonomic Assessments](#)

Plan Info

[How the Process Works](#)

[Get Help](#)

Top Tasks

[Request Accommodation](#)

[Get Sign Language or Captioning Assistance](#)

[Get Travel Assistance for My Disability](#)

Examples of what the Accommodation Budget (this Pilot) Can Cover

Accommodation Budget:

- Non-standard equipment such as braille displays, noise canceling headsets
- Voice recognition software- screen reading software. E.g. Jaws, Dolphin, Tobii
- Consulting services to help identify accommodations, e.g., employee going deaf or blind
- Captioning services or sign language services for the deaf or hard of hearing
- Hepa filters (for those with allergies)
- Disability Awareness training from a supplier for teams
- Standing mats
- Modified schedules
- Measures that might enable a person with a disability to perform their essential job functions, or enjoy the same conditions and benefits of employment as other employees, e.g. employee with allergies needs peanut-free food during a morale event.

Resources

To assist employers / employees with identifying accommodations that may be useful for employees with disabilities:

Job Accommodation Network (JAN)

JAN provides the following A to Z listings by disability, topic, and limitation. This information is designed to help employers and individuals determine effective accommodations and comply with Title I of the Americans with Disabilities Act (ADA). You will find ADA information, accommodation ideas, and resources for additional information.

<https://askjan.org/a-to-z.cfm>

Visible / Obvious Disabilities

Best Practice: If someone has an obvious disability; e.g., they are in a wheelchair, they have a seeing eye dog, etc., we do not require supporting medical documentation