

No. 75024-6  
SUPREME COURT  
OF THE STATE OF WASHINGTON

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KENNETH McCLARTY

Respondent,

v.

TOTEM ELECTRIC

Petitioner.

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**WASHINGTON PROTECTION AND ADVOCACY SYSTEM'S  
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S  
PETITION FOR REVIEW**

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## **INTERESTS AND IDENTITY OF AMICI**

Proposed amici are organizations with experience and knowledge of people with disabilities, who rely on the protections of both federal and state laws relating to disability discrimination. Amici support Respondent's Motion for Reconsideration, and respectfully request that they be provided the opportunity to provide information to the Court on the extremely negative impact and unintended consequences that people with disabilities will suffer if the Americans with Disabilities Act ("ADA") definition of disability is adopted for the Washington Law Against Discrimination ("WLAD").

Amicus Washington Protection and Advocacy System ("WPAS") is the organization designated by federal law and the governor of Washington to provide protection and advocacy services for people in Washington with physical, sensory and mental disabilities. *See* Motion to Appear as Amicus Curiae and Declarations of Mark Stroh and David Carlson in support thereof. WPAS has a federally mandated duty to advocate for the rights of people with disabilities in Washington. *Id.*

Amicus Alliance of People with Disabilities ("Alliance") is an independent living center serving people with a broad spectrum of severe disabilities in King County. *See* Motion to Appear as Amicus Curiae and Declaration of Lonnie Davis in support thereof. The Disability Law

Project is the legal component of the Alliance; it has provided representation to hundreds of clients, and advice to many more. *Id.*

Amicus Jeanne A. Carpenter Epilepsy Legal Defense Fund Epilepsy Foundations (“Epilepsy Foundation”) is a national nonprofit corporation advancing the interests of the more than 2.7 million Americans with epilepsy and seizures. *See* Motion to Appear as Amicus Curiae and Declaration of Gary Gross in support thereof. The Epilepsy Foundation disseminates information about epilepsy and seizures; promotes public understanding of the disorders; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. *Id.*

Amicus National Alliance on Mental Illness Greater Seattle (“NAMI GS”) is a local affiliate of a national advocacy group for people with mental illness. *See* Motion to Appear as Amicus Curiae and the Declaration of Frank Jose in support thereof. NAMI GS has over 450 members and provides education, support groups, information and referral, as well as individual and policy advocacy services for thousands of people in King County. *Id.*

Tacoma Area Coalition of Individuals with Disabilities (“TACID”) is a Washington state non-profit corporation serving people with disabilities since 1980. *See* Motion to Appear as Amicus Curiae and the Declaration

of Christopher Ensor in support thereof. TACID provides support and advocacy services to thousands of people with disabilities each year. *Id.*

## I. STATEMENT OF THE CASE

Amici join in Respondent's Statement of the Case.

## II. ARGUMENT

### A. **Narrowing WLAD negatively affects many people with legitimate disabilities**

As set forth more fully in Respondent's Memorandum in Support of Reconsideration, the Court's sua sponte adoption of the ADA definition of disability for the Washington Law Against Discrimination ("WLAD") will dramatically limit the number of people with legitimate disabilities who are shielded from discrimination.<sup>1</sup> While the ADA provides protection from discrimination to some people with disabilities, it does not protect all individuals with disabilities. Michelle Parikh, *Burning the Candle at Both Ends, and There is Nothing Left for Proof*, 89 Cornell L. Rev. 721, 723 (2004). Individuals with disabilities that can be ameliorated with treatment or corrective devices, for example, may not be considered persons with disabilities covered by the ADA, although they would have been covered

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<sup>1</sup> As a result of *Sutton* and *Toyota* the ADA definition was narrowed considerably to only those individuals with permanent disabilities that could not be ameliorated through medication or treatment. See Respondent's Memorandum in Support of Reconsideration; *Toyota Motor Mfg. Kentucky Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) and *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 1991 S. Ct. 2139, 144 L. Ed. 2d 450 (1999).

by WLAD prior to the Court's July 6, 2006 ruling. People who have disabilities that are treated with medications, such as epilepsy, depression, and diabetes, among many others, for example, may no longer enjoy the protections of WLAD as a result of the newly adopted ADA definition of disability. Those with temporary disabilities will also no longer be protected from discrimination as they once were under WLAD.

As discussed more fully below, the adoption of the ADA definition of disability under WLAD will likely have a negative impact on people with disabilities in Washington.

**B. Narrowing WLAD will have a particularly negative effect on people with mental disabilities**

After *McClarty*, employers will be permitted to discriminate against many people with a variety of disabilities who have been protected by WLAD for the past thirty years. People with mental disabilities, however, are likely to suffer particularly negative effects from *McClarty*.

**1. People with mental disabilities are targets of discrimination**

Due to society's irrational fear,<sup>2</sup> people with mental disabilities have been subjected to a long history of pervasive discrimination in all aspects

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<sup>2</sup> See Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63,\*\* (1991); see also Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMPLOYEE RTS & EMP. POL'Y J. 293, 312-13 (2005) (discussing the "distinct stereotypes and stigmas" associated with Bipolar Disorder that make co-workers feel disdain for employees with Bipolar Disorder).

of society, including but not limited to housing, education, and employment. Michael L. Perlin, *I Ain't Gonna Work on Maggie's Farm No More: Institutionalization, Segregation, Community Treatment, the ADA and the Promise of Olmstead*, 17 T.M. Cooley L. Rev. 53, 63 (2000); Michael L. Perlin, "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?", 8 J. L. & HEALTH 15, 28 (1993-94) (on persistent stereotypes and discrimination against individuals with mental disabilities)<sup>3</sup>; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985).<sup>4</sup> Surveys reveal that society perceives individuals with mental disabilities more negatively than people with any other type of disability. Perlin, 17 T.M. COOLEY at 63.

Given this pervasive discrimination and hatred, removing WLAD's protections will be devastating to people with mental disabilities who do not qualify for protection under the ADA's definition of disability.

Employers can now freely deny such individuals employment or fire them

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<sup>3</sup> Professor Perlin defines "sanism" as "an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry." See Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 28 (1993-94).

<sup>4</sup> Throughout history, people with mental disabilities have been forced into institutions where they are segregated from society and subjected to "unfair and often grotesque mistreatment." *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F. 2d 191, 197 (5th Cir. 1974). The "virulence and bigotry" of state-mandated segregation of the institutionalized mentally retarded "rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. 432, 454 (1985) at 461 (Marshall, J., concurring in part & dissenting in part).

from their existing jobs if they decide because the employees' mental illnesses make them "strange" or somehow undesirable as employees. This is precisely what has happened to individuals with mental disabilities who have brought Title I ADA claims, particularly since *Sutton* and *Toyota*. In *Steele v. Thiokol Corp.*, for example, the Tenth Circuit Court of Appeals held that a man with a mental illness who was called "Psycho Bob" and harassed by his co-workers for having a mental illness, and finally laid off, did not have a cause of action under the ADA because he did not meet the ADA definition of a disability. *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1256 (10<sup>th</sup> Cir. 2001). There are numerous other similar cases. *See* Appendix 1, attached hereto.

## **2. The ADA does not protect people with mental illness**

Although mental illness is a covered disability under the ADA, the federal case law narrowing the definition of disability under the ADA has had the perverse effect of excluding many individuals with mental disabilities. Consequently, these people have been unable to obtain the accommodations they need to be employed. Parikh, 723. While the ADA protects employees with obvious physical disabilities that can be easily accommodated, it "has been less successful in assisting individuals who suffer from more complicated illnesses that do not fit comfortably within the Act's narrow boundaries." *Id.* at 723-24; *see also Krocka v. City of*

*Chicago*, 203 F.3d 507, 513 (7<sup>th</sup> Cir. 2000)(man with severe depression, treated with psychiatric medications, not considered to have a condition that substantially limited a major life activity).

Particularly after *Sutton* and *Toyota*, WLAD had been the only means protection from employment discrimination for people with mental illness. By narrowing the definition of disability under WLAD, such individuals will likely not be afforded reasonable accommodations, and are therefore at serious risk of being unable to obtain or maintain employment.<sup>5</sup>

### **C. Narrowing WLAD will Result in Unintended Consequences**

*McClarty* also has far-reaching effects on the lives of people with disabilities, beyond their ability to obtain and maintain employment. The ability of individuals with disabilities to obtain health care, maintain their homes, and their family and social ties, could also be compromised if they are unable to be employed. As discussed below, the loss of or inability to obtain jobs will initiate a cascade of other serious negative consequences.<sup>6</sup>

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<sup>5</sup> See National Mental Health Association, *Recovery at Work: A Guide to Implementing Effective Employment Services for People with Psychiatric Disabilities*, 3; U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Center for Substance Abuse Prevention, *Work as a Priority: A Resource of Employing People Who Have Serious Mental Illnesses and are Homeless*, 17 (2003).

<sup>6</sup> Many studies have found that simply obtaining and then maintaining employment is difficult for people with mental illness. J.K. Burke-Miller, *et al.*, *Demographic Characteristics and Employment Among People with Severe Mental Illness in a Multi-state Study*, *Community Mental Health Journal*, April 2006, 143; D. Lerner, *et al.*, *Unemployment, Job Retention, and Productivity Loss Among Employees with Depression*, *Psychiatric Services*, Dec. 2004, 1371; A.F., Lehman, *Improving employment outcomes for persons with severe mental illnesses*, *Archives of General Psychiatry*, Feb. 2002, 165. As discussed above in Section B1, fear of stigma and

People with mental illness who are currently employed often get insurance through their employers, and effectively mitigate their disabilities through treatment. It is anticipated that increased access to mental health treatment as a result of the mental health parity (“Parity”) law in 2005, there will be a decrease in “social costs such as imprisonment, homelessness, hospitalization, and public assistance.” Washington Coalition for Insurance Parity, *Mental Health Parity Costs and Savings Summary*, 2 (2006).<sup>7</sup> The Parity law not only recognizes the importance of mental health treatment in avoiding homelessness, incarceration, and institutionalization, but further demonstrates the legislature’s continued commitment to broad protections for people with disabilities since the passage of WLAD over thirty years ago. While the legislature recently stressed the importance of mental health treatment by requiring its coverage by insurance comparable to other medical treatments, the *McClarty* Court’s interpretation of disability will allow an

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discrimination at work are major barriers for people with mental illness. National Mental Health Association, *Supported Employment for Persons with Psychiatric Disabilities: A Review of Effective Services*, 3.

<sup>7</sup> Due to recent passage of the mental health parity law, insurance companies are no longer allowed to cover mental health treatments in a different manner from other medical treatments. Washington Coalition for Insurance Parity, *Your Mental Health Insurance Coverage may be Improving Thanks to Washington State’s Mental Health Parity Law* (2006).

employer to fire an employee with a resultant loss of the employee's access to health coverage.<sup>8</sup>

Soon after losing insurance, the former employee will be at risk of falling into a vicious cycle involving homelessness, incarceration, and/or institutionalization. The cycle starts with unemployment and inadequate mental health services, both factors that increase the likelihood of homelessness. Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale L. & Pol'y Rev. 1, 8-9 (1996). In addition to the threat of homelessness, people with mental illness account for a disproportionate amount of the incarcerated population; there is a serious risk that untreated mental illness will lead to incarceration. Dale E. McNiel, et al., *Incarceration Associated with Homeless, Mental Disorder and Co-Occurring Substance Abuse*, *Psychiatric Services*, 840 (2005).<sup>9</sup> Homelessness and arrest history are also two main predictors of institutionalization in psychiatric hospitals. E.S. Casper, *Identifying Multiple Recidivists in a State Hospital Population*, *Psychiatric Services*,

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<sup>8</sup> Many such individuals will not be eligible for Medicaid or other government funded mental health care.

<sup>9</sup> Since jails and prisons are not mental health facilities, inmates are often released to the streets with unresolved mental health issues that lead to re-incarcerated. *Id.* at 845. Not only is the correction system not meeting the needs of people with mental illness, but in whole "[t]he state mental health system is in disarray." Randy Reville, *Issue Briefs: Inpatient Mental Health*, Washington State Hospital Association (2006), [www.wsha.org/page.cfm?ID=0096](http://www.wsha.org/page.cfm?ID=0096) (last visited July 25, 2006).

1074 (1995). *See also* Hopper, K., et al., *Homelessness, Severe Mental Illness and the Institutional Circuit*, *Psychiatric Services*, 659 (1997).

Employer-provided insurance leads to better access to treatment and treatment makes the employee more employable.<sup>10</sup> Unfortunately, however, it also makes the person ineligible for the protections of WLAD. Thus, the cruel ramification of *McClarty* is that an employee utilizing treatment to stay healthy enough to work is stripped of the protections of both the ADA and WLAD. Similarly, if an unemployed person with mental illness gets well enough to work, she will find the door to employment closed by discriminatory employers.

### III. CONCLUSION

For the foregoing reasons amici respectfully requests that the Court grant Respondent's Request for Reconsideration.

Dated this 31<sup>st</sup> day of July, 2006.

Respectfully submitted,

Washington Protection and Advocacy System,  
Applicant for Amicus Curiae

By \_\_\_\_\_  
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<sup>10</sup> Not surprisingly, the actual act of being employed and contributing to a job is itself considered therapeutic and promotes mental health, C.L. Bowden, *Bipolar Disorder and Work Loss*, *American Journal of Managed Care*, June 2005, 143.